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Construction Year in Review 2014

Introduction

Uncertainty is the watchword for the construction industry following a mixed year; uncertainty as to future demand for Australian commodities and uncertainty regarding energy prices as both iron ore and oil prices slip to their lowest levels for years. Demand for infrastructure projects has continued but has been hampered by political uncertainty as to the preferred structures for funding these projects, including an increase in recourse to Commonwealth funding. Governments are increasingly open to unsolicited proposals that were once the preserve of public tenders. The increasing size and urban impact of these kinds of projects has also seen their political significance grow, leaving them susceptible to changes in administrations.

Ongoing pressure on contractors to bid low in competitive tenders means that we may see an upsurge in variation claims over the coming 12 months. Significant changes to Security of Payment legislation in New South Wales and Queensland during the year will hopefully improve the efficacy, if not the consistency, of those regimes, though the full impact of these changes is yet to be seen.

2014 also saw the establishment of the Royal Commission into Trade Union Governance and Corruption, which published its interim report, including recommendations, on 15 December 2014. Led by High Court judge Dyson Heydon, the commission was established in March 2014 with a remit to investigate allegations of bribery, secret commissions and improper funding within Australia's most powerful trade unions. The report includes recommendations that cases involving a number of CFMEU and HSU officials be referred to the Director of Public Prosecutions and ASIC for potential criminal and Corporations Act proceedings. The impact of this report on the construction industry will become clear in the coming 12 months, but calls for legislation to re-establish the Australian Building and Construction Commission to regulate the industry may strengthen.

In our 2014 Construction Law Year in Review, we look at some of the key legal developments affecting construction industry participants and what these developments mean for you.

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Developments in Contract Law

This year has seen Australian courts provide further helpful guidance on contractual interpretation, including of construction contracts. In this review, we have focused on developments specifically in the construction context, albeit that some of these recent decisions are undoubtedly of broader application. In particular, courts have this year repeatedly affirmed the objective approach to be taken regarding contractual interpretation, as seen in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* the High Court, confirmed by *Mainteck Services Pty Ltd v Stein Heurty SA*.

Debate over the meaning of 'consequential loss' continues from the cases we have reported on in previous years, with the court in *Macmahon Mining Services v Cobar* emphasising that 'Consequential Loss' should be clearly defined within the terms of the contract. This case, which arose in the context of an exclusion clause, also confirmed the High Court's objective approach to construing contractual clauses as adopted in *Darlington Futures Ltd v Delco Australia Pty Limited Ltd* (1986) 161 CLR 500.

The limits on the imposition of a duty of care in construction projects have also been examined. In B*rookfield Multiplex Ltd v Owners Corporation Strata Plan*, the High Court overturned a NSW Court of Appeal decision stating that a building contractor owed a duty of care for pure economic loss arising from defective work to a successor in title to the developer of commercial premises. This narrowing of the duty of care will make it very difficult for subsequent building owners to claim against builders absent a direct contractual right, builders' liability likely being limited only to their agreement with the developer.

Chapter 1 provides a summary of the decisions that we consider most relevant and useful from the past 12 months, which emphasise the importance of ensuring clear and accurate drafting in construction contracts and an awareness of limits on liability for risk allocation purposes. For a more general round-up of developments in contractual interpretation outside the construction sphere, please see our *Contract Law Update 2014* publication, available at www.allens.com.au/pubs/ldr/contldr02feb15.htm.

Adjudication and Security of Payment Legislation

Security of payment regimes across the country continue to generate disputes and some useful court decisions have come out in the past 12 months.

Courts in Western Australia have considered the procedural aspects of determinations by way of statutory demand. In *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd*, the Western Australian Court of Appeal provided guidance as to the approach to be taken when challenging the enforcement of SOPA determinations by way of a statutory demand. In Western Australia at least, the mere assertion that a debt is not owed does not constitute a genuine dispute, and a statement of claim alone is not sufficient to establish a genuine offsetting claim. In *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd*, the Western Australian Supreme Court confirmed that leave to enforce an adjudication determination as a judgment must be obtained before the issue of a statutory demand, and that failing to do so will mean the statutory demand is liable to be set aside.

A suite of cases in the courts of Queensland, New South Wales and the Northern Territories have provided guidance on the meaning of 'natural justice' and, in particular, the meaning of a 'material' failure to provide natural justice in the context of security of payment determinations. These cases support the proposition that there will have been a denial of natural justice when an adjudicator decides a dispute on a basis for which neither party has contended, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.

The decisions outlined in Chapter 2 highlight the scope for uncertainty that still exists in security of payment legislation and the importance of having a detailed understanding of the security of payment regime in force in the relevant state/territory, both as to that regime's substance and its procedural requirements.

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Legislative and Policy Developments

2014 saw important changes being made to security of payment regimes in New South Wales and Queensland, though the impact of these changes is yet to be seen in full.

In Queensland, amendments to the *Building and Construction Industry Payments Act 2004* (Qld) came into force on 15 December 2014 and focused on four main areas: the timing of payment claim processes (including introduction of two new types of payment claims), the ability of respondents to raise new reasons for non-payment in adjudication responses, additional notice requirements before enforcement action, and the establishment of an adjudication registry to administer the act.

In New South Wales, amendments to the *Building and Construction Industry Security of Payment Act 1999* (NSW) came into force following the Collins review (on which we reported in our Construction Year in Review 2013). Despite the broad-ranging recommendations that came out of that review, the amendments are relatively narrow in scope. They focus just on applicable timeframes for payment claims, removal of the necessity of specific endorsement of payment claims, empowering the NSW government to regulate head contractor's retention of moneys on trust for sub-contractors to protect sub-contractors' interests, and enforcement procedures to ensure compliance with the security of payment regime.

In Western Australia, a review of the *Construction Contracts Act 2004* is underway, with submissions from stakeholders now being used to determine the scope of that review. A consultation discussion paper published at the outset of the review provided an interesting insight into use of the Act's adjudication procedure and revealed that the legislation is currently missing its mark. The likelihood is that calls for reform will come out of this process, including for increased harmonisation across states, though the Queensland and New South Wales experiences suggest that this may be over-ambitious.

Meanwhile, in Victoria, the Court of Appeal provided much-needed clarity on the issue of limitation periods for parties seeking to bring an action for loss or damage arising out of defective building work. In *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* the Victorian Court of Appeal has confirmed that the six-year statutory limitation period applicable in contract or tort claims does not apply and that parties will have 10 years from the date of issue of the occupancy permit.

In Chapter 3, we set out an overview of these latest changes, which have the potential to significantly affect the way in which security of payment claims are dealt with. Despite the legislative developments in Queensland and New South Wales, there remains significant scope for increased harmonisation of security of payment regimes as between the States/Territories. Harmonisation would serve to increase procedural consistency in security of payment claims to the benefit of project participants.

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Arbitration & dispute resolution

During the course of 2014, Australian courts reinforced their pro-arbitration stance, rendering decisions in a series of important cases which confirm a deep-seated respect for party autonomy and the arbitral process.

In *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd*, the Supreme Court of Western Australia confirmed that arbitration clauses will generally survive termination of the underlying agreement, and rejected arguments that the particular arbitration clause was void for uncertainty. Similarly, in *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited*, the Federal Court reinforced its pro-enforcement approach as regards arbitration awards and demonstrated the limited circumstances in which a court may set aside an arbitral award. And in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (the latest instalment in the long-running dispute between the same parties) the full Federal Court upheld an earlier decision rejecting an application to set aside or not enforce an international arbitral award on the basis of alleged breaches of natural justice.

Consistent with this approach, the Victorian Court of Appeal held in *Subway Systems v Ireland* that VCAT was a 'court' for the purposes of section 8 of the *Commercial Arbitration Act 2011* (Vic) such that a dispute brought to VCAT in breach of an arbitration clause was to be referred to arbitration in accordance with that clause. This decision reinforces the importance of contracting parties' autonomy, that parties who have agreed to arbitrate disputes will be held to their agreement, and also confirms an intention to give effect to the Model Law for domestic and international arbitration.

With an ever-increasing body of pro-arbitration court decisions, we hope to see international arbitration activity in Australia continue to grow as international recognition of what Australia can offer as a seat of arbitration increases.

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Chapter 1: Developments in contract law

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Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2014] HCA 7

In a case involving the supply of gas, the High Court held that a seller could act in its commercial interests and that, in doing so, it had not breached its contractual duty to use reasonable endeavours.

The facts

Verve (the ***buyer***) entered into a gas supply contract with Woodside and others (the ***sellers***). The sellers were obliged to have a certain amount of gas available for the buyer every day. This was called the maximum daily quantity (***MDQ***). The buyer could also seek an amount of gas in excess of the MDQ. This was known as a supplemental maximum daily quantity (***SMDQ***). The sellers had to use 'reasonable endeavours' to supply the SMDQ. The sellers were entitled to consider 'all relevant commercial, economic and operational matters' in determining whether to supply the SMDQ. [1]

The dispute

While the contract was on foot, there was an explosion at a third party supplier's plant. This caused the price of gas to increase considerably. The buyer then sought to obtain gas under the SMDQ provision. The sellers declined. Instead, they offered the buyer a short-term contract to supply gas at the increased market price. The buyer accepted. At the end of this contract, the sellers informed the buyer that it would have to enter a tender process to obtain additional gas. The buyer did so under protest. Once the market normalised, gas was supplied under the original agreement. The buyer sought relief for breach of contract, arguing that the sellers had not used reasonable endeavours to supply the buyer with gas under the original contract.

The decision

The High Court held that the reasonable endeavours clause did not impose an obligation on the sellers to supply the SMDQ to the buyers in the circumstances. In doing so, the High Court affirmed that contracts should be interpreted objectively. This approach involves considering:

- the language used by the parties;
- the surrounding circumstances; and
- the commercial purpose of the contract.

In applying this approach to the reasonable endeavours clause, the majority made three general observations:

- Reasonable endeavours clauses do not create an unconditional obligation.
- The nature of the obligation should be interpreted with regard to what is reasonable in the circumstances.[2]
- Contracts may contain an internal standard of what constitutes reasonableness.[3]

The court contrasted the qualified obligation in the SMDQ clause with the unconditional obligation in the MDQ clause. The SMDQ clause did not place an unconditional duty on the sellers to supply the gas to the buyer. The High Court held that, in circumstances where the sellers' obligations were conditional on what is reasonable in the circumstances, the buyer's interests could not be paramount in every case.[4]

1 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2014] HCA 7 at [17].
2 Ibid. at [41].
3 Ibid. at [43].
4 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at [92].

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Further, the standard of what was reasonable was expressly stated in the original contract. The SMDQ clause, which was at clause 3.3(a) of the contract, required that the sellers to act reasonably in supplying the SMDQ. The following clause, clause 3.3(b), expressly provided that the sellers were entitled to consider their own interests, being economic, commercial and operational interests, in considering whether they were able to supply the SMDQ. The High Court held that the explosion at the third party's plant significantly altered the market and determined that the reasonable endeavours clause would not require the sellers to 'forgo or sacrifice their business interests' to make the SMDQ available in the changed market conditions.[5]

The practical implications

This case confirms that reasonable endeavours clauses do not impose unqualified obligations on parties. Industry participants will need to be conscious of the impact that other provisions in the contract may have on the obligation to use 'reasonable endeavours'. Consistent with the High Court's decision, internal contractual provisions may trigger performance that is potentially less (or more) onerous than appears on the face of the clause containing the 'reasonable endeavours' obligation.

For the industry, if 'reasonable endeavours' is used, it may be prudent to clearly set out in the contract what is expected of the party the subject of the obligation (for example, setting out a list of steps that should be taken). It is also important to impose some parameters (time limits or a sunset clause, for example) on the obligation in order to avoid a never-ending obligation (a concern previously highlighted by the Supreme Court in New South Wales).

The industry should also not assume, at least in Australia, that alternative wording such as 'all reasonable endeavours' or 'best endeavours' will provide more protection. In Australia, the present judicial approach to 'best endeavours', 'all reasonable endeavours' and 'reasonable endeavours' is materially the same.

For now, in Australia, it appears that parties will need to carefully consider the effect of other provisions in the contract before simply inserting an obligation to use 'reasonable endeavours', 'all reasonable endeavours' or 'best endeavours'. Industry participants should ensure that their contracts are carefully drafted to avoid any ambiguity on the issue.

5 Ibid. at [47].

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Macmahon Mining Services v Cobar Management [2014] NSWSC 502

In two decisions in the recent proceedings of ***Macmahon Mining Services v Cobar***, Justice McDougall of the New South Wales Supreme Court considered the scope and effect of a clause excluding 'consequential loss'. The meaning of the term was interpreted with regard to the natural and ordinary meaning of the text, read in light of the contract as a whole.

The facts

Macmahon Mining Services and Cobar Management entered into a design and construct contract for a New South Wales copper mine development.[6] Less than two years later, Cobar issued a notice of termination under clause 22.3 of the contract. Clause 22.3 permitted Cobar to terminate the contract if, in its opinion, there had been material breaches that were incapable of remedy.[7] Macmahon disputed whether it was a valid termination and argued that Cobar had repudiated the contract.[8] Macmahon purportedly accepted the repudiation, discharged the contract and sued Cobar for damages.

The first decision

The dispute

In Macmahon Mining Services v Cobar Management, Cobar applied for summary dismissal of Macmahon's claim of more than $67 million for 'loss of opportunity to earn profit.'[9]

Cobar relied upon clause 18.5 of the contract in support of its application for summary dismissal. This provided that 'despite anything else in the contract, neither party will be liable to the other for any "consequential loss".' 'Consequential loss' was defined in cl 1.1 as:

> (a) any special or indirect loss or damage; and (b) any loss or [sic] profits, loss or [sic] production, loss or [sic] revenue, loss of use, loss of contract, loss of goodwill, loss of opportunity or wasted overheads, whatsoever, whether direct or indirect

The decision

In dismissing Macmahon's claim for 'loss of opportunity to earn profit' Justice McDougall considered whether clause 18.5 excluded Macmahon's claim for loss of profit. Justice McDougall applied the principles of contractual interpretation for exclusion clauses as set out in *Darlington Futures Ltd* v *Delco Australia Pty Limited*. The approach laid down by the High Court in Darlington was as follows:[10]

> the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole, thereby giving weight to the context in which the clause appears including the nature and object of the contract and, where appropriate, construing the clause contra proferentem in case of ambiguity

(i) The surrounding clauses

In considering the context in which clause 18.5 appeared, including the nature and object of the contract, his Honour considered that the following clauses favoured an interpretation that excluded the damages in McMahon's claim:

1 Clause 2.3, though it had no contractual effect, expressed the parties' intention that neither Macmahon or Cobar would be liable for consequential loss; and

2 Clause 18.4, which stated that the total aggregate liability of each party was limited to an amount equivalent to the contract sum (subject to certain exceptions, such as for wilful misconduct).

6 *Macmahon Mining Services v Cobar Management* [2014] NSWSC 502 at [1].
7 At [2].
8 At [3].
9 At [4].
10 *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

(ii) The wording of the exclusion clause

In relation to the wording of clause 18.5, the parties conceded that the word 'contract' was shorthand for 'benefit of the contract'. On this basis, his Honour held that one of the defined categories of excluded loss ('loss of contract') naturally covered both the direct loss of the benefit of the contract and third party loss (ie the benefit that might be lost to one party as a result of some breach by the other party's conduct).[11]

His Honour held that this provided powerful support to the argument that losses flowing from an alleged repudiation – ie the loss of opportunity to profit – fell within this excluded loss.

His Honour also noted that clause 18.5 included the phrase 'despite anything else in the contract'. His Honour held that this also suggested that an inclusive interpretation of consequential loss was intended by the parties.

(iii) Whether the interpretation deprived Macmahon of the benefit of the contract

Macmahon argued that interpreting the contract to exclude loss of opportunity to earn profit would have the consequence of depriving Macmahon of the benefit of the contract. Macmahon claimed that because clause 22.3 of the contract provided Cobar with the right to terminate for breach if, in its opinion, there had been a breach of contract, Cobar could seek to rely on a non-existent breach to terminate the contract without exposing themselves to liability for compensation. Macmahon argued that this interpretation deprived them of the benefit of the contract and was contrary to cl 22.1 (termination for convenience, which required compensation to be paid for termination). [12]

Justice McDougall disagreed with this submission. He stated that the probability of Cobar opportunistically terminating the contract was low, for the following reasons:[13]

1. accrued rights and liabilities would remain unaffected;[14] and
2. Cobar would be forced into a long and expensive process of locating another contractor.[15]

(iv) The drafting of the contract

Finally, Justice McDougall was influenced by the carefully bargained, clear wording of the clause limiting liability,[16] finding that the clause should not be read down so as to exclude this cause of consequential loss.

The second decision

The dispute

Macmahon pressed for summary dismissal in relation to Cobar's claim for relief for various alleged breaches of contract by Macmahon. Broadly, the alleged breaches were that Macmahon failed to use 'good industry practice', and that this failure lead to delays and increased costs.

Macmahon asserted that, on the proper construction of clause 18.5 and the definition of consequential loss in clause 1.1, the damages claimed by Cobar were excluded under the contract.[17]

11 At [27]-[29].
12 *Macmahon Mining Services v Cobar Management* [2014] NSWSC 502 at [19]-[20].
13 At [35].
14 At [33].
15 At [34].
16 At [30].
17 At [7].

The decision

His Honour concluded that it could not be said that the claimed damages so plainly fell within the definition of consequential loss to be defeated by the exclusion clause.[18]

Consequential loss was defined under clause 1.1 into two categories. The first being a loss of profits, the second being any 'special or indirect loss or damage'. His Honour described the second category as a 'catch-all'.[19] His Honour held that if the damages claimed fell under either of these heads, they would be excluded under the contract. [20]

In contention was whether the loss claimed by Cobar fell within the definition of 'special or indirect loss or damage'. Justice McDougall adopted the meaning of 'indirect loss or damage' in *Saint Line Ltd* v *Richardsons, Westgarth & Co Ltd*.

In that case, indirect damage meant damage that does not flow naturally from the breach without 'other intervening cause and independently of special circumstances.'[21] The approach adopted by his Honour also followed that of the court in *Regional Power Corporation* v *Pacific Hydro Group Two Pty Ltd* (No 2) [2013] WASC 356. In that case, the court held that 'consequential loss' is a loss at a step removed from the transaction and its immediate effects, or a loss which might be incurred by a reason of an inability to use plant or equipment for a purpose extraneous to the contract. His Honour also commented that this approach was consistent with both *Hadley* v *Baxendale* and *Environmental Systems Pty Ltd* v *Peerless Holdings Pty Ltd* (2008) 19 VR 358 (despite comments made by Justice Nettle in *Environmental Systems* suggesting that Australian law has diverged from the rule in *Hadley v Baxendale*).

His Honour noted that, on this construction of indirect damage, the question of what is direct or indirect necessarily required consideration of the purpose that is contemplated by the transaction documents. As such, Justice McDougall considered the case inappropriate for either summary judgment or strike out as an assessment of the claim would require a factual inquiry into the purpose contemplated by the contract.[22] It could not be said, with the necessary degree of confidence, that the damages claimed were so plainly within the definition of consequential loss that it must be defeated by the exclusion clause without any factual investigation. [23]

Practical implications

The meaning of 'consequential loss' should be defined clearly within the terms of a contract. Where exclusion clauses limit or exclude liability for consequential or indirect loss, courts will likely give effect to clear language that reflects the parties' commercial intention. A clear definition in the contract will prevent a court from interpreting the exclusion clause inconsistently with the parties' intentions. Parties should also seek legal advice before terminating a contract or accepting its repudiation as to the scope and extent of damages that can be sought.

18 At [25].
19 At [8].
20 At [21].
21 At [16]-[19]. *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99 at 103.
22 At [22]-[23].
23 At [25].

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Brookfield Multiplex Ltd v Owners — Strata Plan No 61288 [2014] HCA 36

The High Court has held that a building contractor does not owe the successive purchaser of a commercial building a duty of care to prevent pure economic loss.

The facts

In 1997, a developer contracted with Brookfield Australia Investments Ltd (then known as Multiplex Construction) (***Brookfield***) to construct a 22-storey building in Chatswood, Sydney. Part of the building was configured as serviced apartments and a hotel, which were sold by the developer to investors under a strata plan. In 1999, a certificate of final completion was issued and the strata plan for the serviced apartments was registered (Strata Plan No 61288).

In 2008, the owners of units in the strata plan (the ***Owners***) commenced proceedings against Brookfield alleging that Brookfield owed them a duty of care not to cause economic loss and, in breach of this duty, caused defects to be present in the building. The defects included issues with exterior rendering, inadequacy of metal coatings and steelwork.

The decision

The decisions below

At first instance, Justice McDougall held that Brookfield did not owe the Owners a duty of care. This was primarily due to the finding that Brookfield did not owe the developer a duty of care, due to the lack of vulnerability in these parties' arm's length contract. Accordingly, no duty of care was owed, by extension, to the Owners.

Appeal Justice Basten, with Appeal Justices Macfarlan and Leeming agreeing, overturned the first instance decision, finding that Brookfield owed the Owners a duty of care. The duty was cast in terms of the Owners' loss resulting from latent physical defects.

Appeal Justice Basten observed that the usual industry practice in execution of building works meant that, despite the presence of the superintendent, the developer did not have the ability to supervise the works to identify any defects in Brookfield's work. This vulnerability continued to successors in title, who were even more vulnerable than the developer due to their greater inability to supervise construction work or identify defects once the building was completed. The Court of Appeal considered that the developer was sufficiently vulnerable in relation to any defects by Brookfield to establish a duty of care. By extension, any successive purchaser, such as the Owners, would be even more vulnerable to any defects in the works completed by Brookfield, so that the Owners would benefit from such a duty of care.

The High Court's decision

In four judgments, the High Court unanimously held that Brookfield did not owe the Owners a duty of care. In each of the judgments, vulnerability was a common and central theme to the reasoning as a necessary element in establishing a duty of care to avoid economic loss. The High Court observed the factual and legal analogy of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 with the Owners' situation in relation to Brookfield. While most of the judges treated *Bryan v Maloney* (1995) 182 CLR 609 with some degree of caution, others sought to confine the principles in that case to domestic housing, with limited application following *Woolcock*.

The High Court applied the salient features approach to determine whether the factual matrix suggested that the Owners were sufficiently vulnerable, so as to extend the class of cases to which a duty of care should apply. While this process mirrored that of the Court of Appeal, the High Court gave considerably greater weight to the Owners' (and therefore the developer's) ability to protect itself from suffering economic loss due to Brookfield's defective work. The High Court reasoned that the Owners could have included provisions to protect themselves from defects in their unit sale contracts with the developer, including:

- warranties that the building was free from defects;
- rights to require the developer to make good any latent defects; or
- subrogation of any rights the developer may have against Brookfield in relation to defects.

Although the sale contracts under which the Owners purchased units from the developer contained some limited protections, the High Court held that the Owners' ability to bargain for greater protection meant that they were not vulnerable to economic loss caused by Brookfield's defective work. As such, no duty of care was found.

Practical implications

This case continues a line of common law authority (*Perre v Apand* and *Woolcock*) that suggests that a plaintiff building owner whose rights and relationship with a defendant builder is regulated by contract will not be sufficiently vulnerable to benefit from a duty of care to avoid pure economic loss and cannot therefore sue the builder in negligence.

Unless and until the High Court recategorises damages for defects as not being pure economic loss, defects claims in negligence have no foreseeable future.

The immediate implication from the High Court's decision is that it will be very difficult, if not impossible, for subsequent owners of buildings to bring actions against builders outside of any direct contractual right. This implies that the risks for builders, particularly where the construction is for strata complexes, will be limited in large part only to their agreement with the developer. The rights of subsequent owners will be limited to those under their contractual agreement with the previous owner. It should be noted, however, that the decision does not affect any statutory rights or obligations that may be available to plaintiffs.

More broadly, the High Court has stated clearly that, where two parties are free to contract with each other, it will be very difficult for one party to bring an action in negligence for pure economic loss as it will be unlikely to sustain a claim that they were in a position of vulnerability. As a consequence of this, parties should take great care to ensure that the relevant contract contains the entirety of the agreement with respect to any necessary warranties or indemnities, particularly in respect of defects.

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Unaoil Ltd v Leighton Offshore Pte Ltd [2014] EWHC 2965

The English High Court recently provided guidance as to the status of a liquidated damages clause when an agreement is modified in a way that could affect how liquidated damages are to be calculated.

The facts

Unaoil Ltd entered into a Memorandum of Agreement (***MOA***) with Leighton Offshore Pte Ltd, dated 10 December 2010, pursuant to which Leighton Offshore would appoint Unaoil as its sub-contractor for the onshore works component of the installation of an oil pipeline in Iraq (if it was awarded the main contract).

The MOA set an all-inclusive price of US$75 million. Article 8 of the MOA provided that if Leighton Offshore was awarded the contract for the project and breached the terms of the MOA, Leighton Offshore would pay Unaoil US$40 million liquidated damages, which was said to be a genuine pre-estimate of the loss that Unaoil would incur.

The MOA was then amended by agreement on 23 March 2011 (***Supplementary Agreement No 1***) and again on 15 April 2011 (***Supplementary Agreement No 2***) so that the price paid to Unaoil changed from a flat US$75 million to a lower amount that was contingent on how much money Leighton would receive for the project. No amendment was made to the liquidated damages clause.

The dispute

Unaoil asserted that Leighton did not appoint Unaoil as its subcontractor under the MOA. For the purposes of the judgment, Justice Eder was willing to accept that Leighton Offshore failed to adhere to the terms of the MOA, and that Leighton Offshore was prima facie liable to pay liquidated damages in the amount of US$40 million in accordance with Article 8 of the MOA.

A liquidated damages claim will fall foul of the doctrine against penalties if it is not a genuine pre-estimate of the loss suffered, determined at the time of contracting.

The issue that arose here was whether the genuine pre-estimate of loss was to be determined at the time of the initial MOA, or at the time of Supplementary Agreement No 2, and whether the US$40 million figure was a genuine pre-estimate of loss.

The decision

For a liquidated damages clause to be enforceable, the amount assessed at the time the contract is entered into must be a genuine pre-estimate of the loss. With some reservation, Justice Eder was willing to assume that the original US$40 million figure reflected a genuine pre-estimate of the loss at the time of the original MOA. However, his Honour stated that when a contract is amended in a relevant respect, the relevant date of assessing whether a liquidated damages clause reflects a genuine pre-estimate of loss is the date of such amendment.

The amendments in Supplementary Agreement No 2 reduced the contract price. In light of this new contract price, the US$40 million figure was 'manifestly one which could no longer be a genuine pre-estimate of likely loss by a very significant margin...'.

In the absence of evidence as to how the liquidated damages figure was calculated both in the original MOA and in Supplementary Agreement No 2, Justice Eder found that, once the original price was reduced, the liquidated damages clause was an unenforceable penalty 'on any objective view'.

The practical implications

While this decision has not been considered in Australia, contracting parties should consider revisiting liquidated damages clauses when contracts are amended, particularly if the contract price is affected. A failure to reconsider this may ultimately lead a court to find that the liquidated damages clause no longer reflects a genuine pre-estimate of loss.

Mainteck Services Pty Ltd v Stein Heurtey SA [2014] NSWCA 184

In this case, the NSW Court of Appeal considered the approach to construction of commercial contracts where there was ambiguous language and whether ambiguity was necessary to admit evidence of surrounding circumstances in the process of construction. The decision affirms the objective approach to contractual construction in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2014] HCA7 and provides guidance on the treatment of global claims made in construction disputes.

Facts

Stein Heurtey SA (***SHSA***) and Bluescope Steel (AIS) Pty Ltd contracted for the design, supply and installation of a furnace (the ***main contract***). SHSA then subcontracted some of its work under the main contract to Mainteck Services Pty Ltd under the second consortial agreement (the ***SCA***). Disputes arose between SHSA and Mainteck about whether Mainteck had supplied equipment and services in connection with the main contract beyond the scope it was required to provide under the SCA. The dispute was referred to a referee who produced a number of reports. The primary judge ordered that some paragraphs from these reports be adopted, whereas other paragraphs should be dismissed, including the referee's finding that the scope of work under the SCA was void for uncertainty.

Mainteck appealed against the primary judge's findings on a number of grounds, including the use of extrinsic materials in the construction of the contract and in relation to its global claims for delay and disruption.

The dispute

Contractual construction

The parties' dispute in relation to the scope of equipment and services provided turned on a clause in the SCA that purported to define Mainteck's contractual obligations by reference to the main contract:

> ARTICLE II. - PURPOSE OF THE AGREEMENT
>
> 1. The Parties shall jointly negotiate and carry out the Contact awarded by the Principal, their respective areas of responsibility being as laid down in technical specification of main Contract specifying the scope of supply and services to be performed by each Party, and the work program.
>
> Each Party shall assume the full responsibility for the fulfilment of its obligations under the Contract and shall bear the full technical and commercial risk associated with its own scope of supply and services. This applies also to the non-receipt or late receipt of payment(s) or instalments agreed upon or not with the Principal.

Although the main contract contained a definition for technical specification, the parties agreed that the reference to 'technical specification' in the clause above did not refer to this definition. However, the parties disagreed on the correct construction of this clause.

i) The parties' construction arguments

SHSA argued that Mainteck's scope of works was circumscribed by the main contract, which nominated Mainteck as an approved subcontractor, listed prices for what was referred to as the 'Mainteck Portion' in schedules to the main contract. SHSA contended that Mainteck's obligations arose from these schedules

Mainteck argued that the scope of its obligations were found in a bill of materials attached to the SCA.

ii) The correct approach to contractual construction

For the NSW Court of Appeal, Appeal Justice Leeming observed that parts of the SCA '[exhibited] considerable ambiguity, both on its own and in the context of the [Main Contract] to which it [referred].'

The ambiguity arose due to translation of the French text and attempts to incorporate civil law concepts that did not fit comfortably with established terms of the common law. For example, the court noted that the use of the term 'turnkey' was unproductive as it did not designate responsibility under the contract and the definition of the term was far from settled.

As a result of the ambiguity, Appeal Justice Leeming was required to consider the correct construction of the SCA and main contract and whether recourse to extrinsic material to aid construction was appropriate. Appeal Justice Leeming observed the divergence of High Court authority in relation to ambiguity between *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 and *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 and held:

> To the extent that what was said in Jireh supports a proposition that "ambiguity" can be evaluated without regard to surrounding circumstances and commercial purpose or objects, it is clear that it is inconsistent with what was said in Woodside at [35]. The judgment confirms that not only will the language used "require consideration" but so too will the surrounding circumstances and the commercial purpose or objects...It cannot be that the mandatory words "will require consideration" used by four Justices of the High Court were chosen lightly, or should be "understood as being some incautious or inaccurate use of language": cf *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [45].

Applying *Electricity Generation*, Appeal Justice Leeming held that the objective approach to contractual construction requires:

- determination of the terms of the contract by what a reasonable businessperson would have understood those terms to mean, and that inquiry is informed by consideration of:
  - the language used by the parties;
  - surrounding circumstances known to the parties; and
  - the commercial purpose or objects to be secured by the contract.
- Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'.[24]

In relation to the objective process of construction, Appeal Justice Leeming observed that whether certain legal text is 'clear' or has a 'plain meaning' reflects the outcome of interpretation, rather than the correct process of construction. That process requires determination of the meaning of text in the context of the agreement. His Honour observed that very often this process will produce a single, clear meaning. Where consideration of the context produces more than one meaning, it is necessary to consider the businesslike interpretation in light of the surrounding circumstances known to the parties.

Applying this reasoning, Appeal Justice Leeming dismissed Mainteck's appeal and held that although the court would have considered extrinsic materials, they were of no help to Mainteck. In this case, the scope of Mainteck's obligations were construed from the main contract, incorporated by reference into the SCA, rather than from the bill of materials as Mainteck contended.

Global claims

Mainteck claimed over $2.5million for disruption, under the headings of direct labour, loss of contingency (which was later abandoned), project management and craneage. As Mainteck did not identify any specific breach as the cause of each head of loss, its claim was a 'global claim.'

Mainteck argued that it was sufficient for it to establish a causal connection between some breaches by SHSA and disruption, as a result of which it said it was entitled to either the whole of its claim, or an apportionment.

Both the referee and the primary judge dismissed Mainteck's global claim for a want of evidence. Mainteck appeal the primary judge's decision.

24 *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7, [35].

Appeal Justice Leeming (for the court) rejected Mainteck's appeal in relation to its global claim for disruption, stating that Mainteck's approach was 'not the law'. His Honour referred to the leading Australian authority on global claims, *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 82 BLR 81, where Justice Byrne held that a global claim must fail if there is any material contribution to the cause of the global loss that was one for which the principal is not responsible. His Honour observed:

- 'In a global claim, a significant cause of loss not attributable to the defendant is fatal. Even Dr Haidar, whose book Global Claims in Construction (Springer 2011) is highly supportive of global claims, acknowledges at 163, by reference to the reasoning of Byrne J that:

  "It is accordingly clear that if a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the client."'[25]

- causation is inferred, rather than demonstrated in global claims, and as such 'the court should approach a total cost claim with a great deal of caution, even distrust...however, this suspicion [should not be elevated] to the level of concluding that such a claim should be treated as prima facie bad'[26]; and
- it was not possible to draw parallels between global claims and those in relation to contributory negligence, where such apportionment arises from legislation.[27]

Practical implications

This case shows the importance of clear drafting in commercial contracts. While it may be convenient to incorporate the terms of another agreement into a contract, this process may introduce risks by creating ambiguity as to what reference or incorporation is being made.

In relation to global claims, the Court of Appeal did not consider the English case of *Walter Lilly & Co Ltd v Mackay* [2012] All ER(D) 213 (Jul), which reached a different conclusion. In Walter Lilly, the court held that where a contractor caused one or more of the factors contributing to its global loss, the loss caused by the contractor is not necessarily fatal to its global claim; it will depend on what impact those events had. In the present case, while Walter Lilly may be persuasive authority, the Court of Appeal applied the Australian authority, to the effect that global claims will be treated strictly by the courts.

25 *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, [205].

26 *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, [192] citing *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 (Justice Byrne) at [23].

27 *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, [199] .

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Lend Lease Australia Pty Ltd v Sugar Australia Pty [2014] VSC 476

This decision of Justice Vickery in the Supreme Court of Victoria illustrates that a court will be willing to grant an injunction to prevent a beneficiary under a bank guarantee from calling on the performance of the guarantee where there is continual ambiguity or a breach of procedural requirements. The decision also provides guidance as to when a court will finally determine contractual construction at an interlocutory stage.

Facts

Lend Lease and Sugar Australia entered into a construction contract to upgrade a refined sugar facility at Yarraville in Victoria. Under the contract, Lend Lease was to provide two bank guarantees to Sugar Australia as security for its performance.

The contract also contained a clause requiring Sugar Australia to act reasonably when seeking recourse to the bank guarantees and set out a number of stipulations in relation to how recourse notices were to be issued.

As a result of Lend Lease's termination of the contract, Sugar Australia sought recourse to the bank guarantees, and Lend Lease sought an interlocutory injunction seeking to restrain Sugar Australia from doing so. Lend Lease asserted that Sugar Australia had not sought recourse to the bank guarantees in compliance with the terms of the contract.

The dispute

Lend Lease argued that an interlocutory injunction should be granted because there was a serious question to be tried as to whether Sugar Australia had sought recourse to the bank guarantees in accordance with the contract.

Lend Lease also argued that if an injunction were not granted, but that its claims were later upheld, it would suffer irreparable harm for which damages would not be an adequate remedy.

Sugar Australia argued that the interlocutory injunction should not be granted, and that, as the issues involved contractual construction, the court was obliged to finally determine the issue at the interlocutory stage of the proceeding.

The decision

The court did not have to finally determine the issue of contractual construction

Justice Vickery held that it was not necessary for the court to finally determine contractual construction at the interlocutory stage. Such determination was an exercise of discretion by the court after weighing relevant factors.

The factors here weighed against such an approach. These factors were:

- that the issues of contractual construction were difficult and there was no authority directly on point; and
- the limited amount of time to consider the issues, as well as the consequences to the parties of a final determination, might give rise to a degree of hardship due to the amount of the money sums involved.

The interlocutory injunction

Justice Vickery noted that the discretion to order an interlocutory injunction was guided by the following factors:

- there is a serious question to be tried;
- whether granting an injunction carries the lower risk of injustice; and
- whether granting an injunction is favoured on the balance of convenience.

His Honour noted that in cases such as this, where the final relief sought by a party is the same as that which would be granted at an interlocutory stage, a court should pay careful attention to the likelihood of success of the claim in deciding whether to grant an injunction. He also emphasised that clear words would be required to support a construction which inhibits a beneficiary from calling on a performance guarantee.

A serious question to be tried

(a) There was a serious question to be tried as to whether Sugar Australia had acted reasonably

As noted above, the construction contract contained a clause requiring Sugar Australia to act reasonably when seeking recourse to the bank guarantees. Justice Vickery noted that no attempt had been made in the contract to define what was meant by the requirement that Sugar Australia had to 'act reasonably'.

Justice Vickery held that Sugar Australia's ability to seek recourse to the bank guarantees depended on the proper construction of the words 'acting reasonably', and, in particular, whether those words were confined to a subjective or an objective assessment.

As the correct construction was not readily apparent, his Honour was satisfied that there was a serious issued to be tried in relation to the construction of the contract.

(b) There was a serious question to be tried as to whether Sugar Australia had issued a defective recourse notice

In relation to the recourse notice, Lend Lease made the following submissions:

- Sugar Australia made claims for reimbursement of monies which related to future claims rather than monies that were presently due. This was outside the framework of what was contemplated by the construction contract;
- Sugar Australia had addressed the notice to a non-existent Lend Lease entity instead of the contractor; and
- Sugar Australia sought to draw a sum greater than the liability cap contained in the contract.

Justice Vickery was satisfied that Lend Lease had a sufficiently strong case on the basis of its defective recourse notice that there was a serious issue to be tried.

Balance of convenience and risk of injustice

Justice Vickery was satisfied that if no injunction were granted, but the claims of Lend Lease were ultimately vindicated, Lend Lease would, in all likelihood, suffer irreparable harm for which damages would not be an adequate remedy. Justice Vickery was persuaded by the following factors:

- Sugar Australia had only paid up capital of $4, and neither of the two companies that owned its shares were guarantors to its obligations under the contract; and
- Lend Lease would also suffer reputational damage should the bank guarantee be called upon.

His Honour held that these factors represented a risk that Sugar Australia may dissipate the funds drawn from the bank guarantees (and would not be in a position to meet an order for payment of damages) or would lead to a reduced availability of bank guarantees or performance bond facilities to Lend Lease group and its subsidiaries.

In comparison, his Honour was not satisfied that there was likely to be more than a minimal inconvenience to Sugar Australia.

Practical implications

This case restates the established position under the common law that, ordinarily, clear words will be required for a court to support a construction of a bank guarantee clause that inhibits the beneficiary from calling on the performance guarantee.

This case also illustrates that bank guarantee clauses need to be drafted so that conditions precedent to their exercise leave no room for divergent interpretation. Here, the contract was a standard form contract and the bank guarantee clause was modified to include the term 'act reasonably'. Parties should carefully consider whether amendments to the standard form are necessary and whether they add ambiguity. As was illustrated in this case, even the minor amendment to 'act reasonably' created an ambiguity that prevented a principal from having immediate recourse to a bank guarantee.

The case also illustrates the need for the party that has recourse to the bank guarantee to comply with any requirements under a contract for recourse to that bank guarantee.

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Caratti Holdings Co Pty Ltd v Coventry Group Ltd [2014] WASC 403

Parties to a contract should be aware that express unilateral powers will not typically be subject to any restrictions on the exercise of that power. In a recent decision of the Supreme Court of Western Australia, a party argued for two pre-conditions to the exercise of a unilateral power in a commercial lease that were said to arise either from the construction of the contract or through implied terms of good faith and reasonableness.

The facts

After considerable negotiation, Caratti leased a commercial property in Western Australia to Coventry. The lease deed contained an express power for the benefit of Coventry to request that Caratti perform works to expand the existing premises in the future (the ***future development***).

Coventry occupied the commercial premises and sub-let part of the premises to another company. As Coventry's business expanded, six years into a 20-year lease, Coventry gave notice to Caratti requiring it to implement the future development under the lease. Caratti resisted, arguing that it should not have to bear the considerable expense of the future development when Coventry had already subleased some of the premises and Coventry would not be occupying all of the expanded premises once the proposed future development was completed.

The dispute

The question for the court was whether Coventry could exercise the right under the lease to the future development or whether there were any restrictions to the exercise of this power.

Caratti argued that, before Coventry could exercise the power relating to the future development, Coventry:

- must intend to occupy the whole of the future development for its own use; and
- must need the extra space that the future development would provide (as opposed to any sub-lessors requiring the extra space). (the ***preconditions***).

These preconditions were said to arise either from the construction of the future development clauses in the lease or through an implied term of good faith and reasonableness.

Coventry rejected Caratti's contentions, arguing that it was merely exercising a right that was expressly conferred by its agreement with Caratti.

Caratti's construction arguments

Caratti made four arguments in relation to the construction of the future development clause in the lease that was said to give rise to the preconditions. These were that:

- the new area created by the future development would not fall within the definition of premises. When this contention was combined the definitions of the future development and an express power in the lease that Coventry was permitted to sublet part of the premises, it was said to follow that the area created by the future development could not be sub-let to Coventry's tenant;
- aggregating the references to the future development in the lease resulted in a 'doubling up' of the phrase 'if required'. Caratti argued that this meant that Coventry must personally have a need for the additional area to be created by the future development, as opposed to a need of any sub-lessor;
- a reference in the future development clause to the tenant's 'absolute discretion' (in relation to the demolition of existing premises) meant that the omission of a similar absolute discretion on Coventry's power to request the future development was deliberate, and therefore Coventry did not have an absolute discretion to require the Future development; and
- if the future development clause was construed without the preconditions, it would place an unreasonable burden on Caratti. For example, it would allow Coventry to require the future development at the very end of the lease term, resulting in a significant outlay of funds with no certainty that the lease would be extended or renewed.

The decision: construction arguments

Justice Kenneth Martin affirmed the High Court's approach in *Woodside Energy Ltd v Electricity Generation Corporation* [2014] HCA7, as applied in *Mainteck Services Pty Ltd v Stein Heurty SA* [2014] NSWCA184, whereby the meaning of contractual terms are 'determined by what a reasonable business person would have understood those terms to mean', and that inquiry is informed by:

- the language used by the parties;
- the surrounding circumstances known to the parties; and
- the commercial purpose objects of the contract, as shown from the 'genesis of the transaction, the background, the context [and] the market in which the party is operating'.[28]

Applying Mainteck, his Honour confirmed that to the extent that the approach in Woodside is inconsistent with *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA45, the approach in *Woodside* is to be preferred.

Justice Kenneth Martin rejected each of Caratti's construction arguments, holding that:

- Caratti gave insufficient consideration to the text of the future development clause, resulting in a construction that would be surprising and uncommercial. The correct, businesslike interpretation of the defined terms and the future development clause meant that the lettable area created by the future development would form part of the premises;
- nothing turned on the repetition of the phrase 'if required';
- Caratti's argument that the omission of the phrase 'absolute discretion' was deliberate would cause commercial nonsense and failed to consider the context in which that phrase was located in the lease; and
- the hypothetical fact scenarios were 'straw men' designed to highlight implausible unreasonableness and were not established on the facts.

His Honour observed that it would have been 'dead easy' for a reasonable landlord to include the preconditions that Caratti argued for in the lease, and the fact that they were not present meant that Caratti was responsible for the consequences of including the unilateral power to request the future development.

Caratti's arguments for implied terms

In the alternative, Caratti argued that terms of good faith and reasonableness were either implied in law (either in all commercial contracts or commercial leases) or were implied in fact through either a process of instruction or on an ad hoc basis. Caratti contended that such implied terms would mean that Coventry was subject to the preconditions Caratti argued for, before Coventry could exercise the power to the future development.

Justice Kenneth Martin observed that there was a 'veritable cornucopia of case authority' in relation to the implication of terms of good faith and reasonableness but that this was still an unsettled area of law. Contrary to other authorities, his Honour held that the lease was not a class of contract that would typically be subject to terms of good faith and reasonableness implied at law.[29] Whether such terms were implied in fact was determined by the proper construction of the future development clause, in the context of the lease as a whole, reflecting the process of purposive construction discussed above.

Applying this reasoning, his Honour rejected that the terms of good faith and reasonableness were implied from the proper construction of the future development clause. In any case, such 'bland' and 'wholly porous' terms would not create the detailed preconditions that Caratti argued for.[30] Caratti had failed to provide sufficient evidence to create the detailed preconditions from the alleged implied terms, and had not established how the preconditions would fit within the scope of such implied terms. Accordingly, Caratti's arguments in relation to implied terms of good faith and reasonableness failed.

28 *Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7, [35] (Chief Justice French , Justices Hayne, Crennan and Kiefel).
29 Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, [350] (Justice Priestley).
30 Caratti Holdings Co Pty Ltd v Coventry Group Ltd [2014] WASC 403, [84], [188].

Practical implications

This case reaffirms the principles of purposive contractual construction by requiring consideration of the text of the contract, the terms in the context of the overall agreement and the party's commercial objectives. In addition, the case is a cautionary warning to parties proposing to plead an implied duty of good faith and reasonableness. Where a party proposes to plead this as a fall back position, it is necessary to:

- accurately identify the duty in each case;
- adduce specific evidence of the alleged breach of the implied term and consequences flowing from it;
- understand the content of the implied duty and limits of any such duty; and
- ensure that the pleaded for term is capable of standing independently of other arguments.

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Wright v Lend Lease Building Pty Ltd; Intercon Engineering Pty Ltd v Lend Lease Building Pty Ltd [2014] NSWCA 463

This decision serves as a reminder that courts will enforce agreements between commercial parties based on a literal reading of the relevant clauses and provisions, unless an absurdity results. In addition, this decision confirms that a subcontract can be construed by reference to the head contract where obligations are defined with certainty by reference to the head contract.

The facts

Lend Lease Building Pty Ltd was the head contractor for the Mulwala Redevelopment project. The project was governed by the terms and conditions of a contract between Lend Lease and the Commonwealth (the ***head contract***).

Relevantly, the head contract provided a definition of the 'Date for Final Acceptance' and the 'Date of Final Acceptance' .

Intercon Engineering Pty Ltd and Christopher and Cathy Wright (the ***appellants***) were engaged by Lend Lease, as subcontractors, to construct works under the head contract.

The subcontracts provided for the retention of monies by Lend Lease (by way of bank guarantee or cash). The appellants were entitled to the release of the monies upon the expiration of the 'Defects Liability Period'. Relevantly:

(a) the 'Defects Liability Period' expired '24 months after the Date of Final Acceptance'; and

(b) the 'Date of Final Acceptance' was defined by reference to the head contract.

The dispute

Twenty-four months after the completion of the work under the subcontracts, the appellants requested that the monies held by Lend Lease be released. Lend Lease refused this request on the basis that the 'Defects Liability Period' had not expired.

The appellants argued:

- that the subcontracts should be read so that the 'Defects Liability Period' expired 24 months after the completion of the subcontracts (as opposed to 24 months after the 'Date of Final Acceptance' in the head contract) because:
  - (i) the 'Date of Final Acceptance' was unknown, as it was contingent on many events occurring in the head contract; and
  - (ii) the literal reading of the subcontract created an 'absurdity' that was inconsistent with the 'commercial purpose' of subcontracts which required a 'finite Defects Liability Period' for the relevant work under the subcontract.
- that (in the alternative) the 'Date of Final Acceptance' and expiration of the 'Defects Liability Period' were objectively ascertainable and had, in fact, passed.

The decision

The court unanimously dismissed the appeal. President Beazley (who delivered the primary judgment) held:

- the definition of the 'Defects Liability Period' in the subcontracts was not absurd and could be determined by reference to the head contract. His Honour held that contractual parties have the 'freedom' to agree to a future date in a contract even if that date is unknown; and
- that the appellants failed to lead evidence that the 'Date of Final Acceptance' had occurred.

His Honour also noted that the version of the head contract that contained the relevant defined terms referred to in the subcontract is the one that existed at the date of entry into the subcontract, and not subsequently amended versions.

The practical implications

This decision serves as a reminder that courts will enforce contracts between commercial parties based on a literal reading of the relevant clauses and provisions, unless an absurdity would result.

In this case, the fact that the appellants did not appreciate the consequence of the subcontracts' 'Defect Liability Period' was not relevant to the construction of the contract. The court also held, as a general principle, that subcontracts should be construed by reference to the head contract in its form as at the date of entry into the respective subcontracts.

Saipem Australia Pty Ltd v GLNG Operations Pty Ltd [2014] QSC 310

This decision demonstrates the pro-enforcement approach taken by the courts in relation to unconditional performance guarantee clauses.

The facts

Saipem Australia Pty Ltd and GLNG Operations Pty Ltd were parties to a design and construction contract.

The contract operated (relevantly) as follows:

(c) 'Milestone Advance Payments' totalling $95 million would be paid by GLNG to Saipem (the ***advance payments***). The advance payments were secured by an unconditional bank guarantee in favour of GLNG. According to clause 5.5 of the contract:

  (i) GLNG was entitled to call upon the bank guarantee in its 'absolute discretion'; and

  (ii) Saipem was prevented from taking any steps to delay or avoid the issue of the bank guarantee to GLNG.

(d) Saipem would be entitled to two bonus payments (***bonus payment 1*** and ***bonus payment 2***), provided that Saipem completed construction on two separate projects between certain dates. Each bonus payment was worth $60 million (and would be reduced each day that construction of the two projects was delayed); and

(e) Bonus payments 1 and 2 would be set off against the advance payments (and if the advance payments exceeded the bonus payments, Saipem would have to pay back the advance payments to the extent they exceeded the bonus payments).

The dispute

On completion, GLNG determined that Saipem was entitled to $45 million in respect of bonus payment 1, and $0 in respect of bonus payment 2. According to the contract, GLNG required Saipem to repay to it $50 million (ie $95 million – $45 million) in respect of the advance payments. When Saipem did not repay the advance payments, GLNG sought recourse to rely on the bank guarantee.

Saipem sought an interlocutory injunction before the Supreme Court of Queensland. It argued that it was entitled to extensions of time for both bonus payments 1 and 2 and, because of this, it was entitled to set off the advance payments against the bonus payments either:

- by operation of the contract;
- by operation of section 67J of the *Queensland Building and Construction Commission Act 1991* (Qld) (the ***Act***); or
- in equity.

Saipem's primary goal was to preserve the 'status quo' between the parties pending trial and 'call into question' GLNG's attempt to rely upon the bank guarantee. The nature of Saipem's application required it to:

- demonstrate that it had a 'prima facie' case (ie it had a sufficient likelihood of success to justify the preservation of the 'status quo' pending trial); and
- that the 'balance of convenience' should fall in its favour.

Did Saipem have a 'prima facie' case?

To establish a 'prima facie' case, Saipem was required to:

- demonstrate that its claim in relation to the extensions of time for both bonus payments 1 and 2 was 'arguable'; and
- that it was entitled to set off the advance payments against the bonus payments either by operation of the contract, the Act or in equity.

GLNG conceded that Saipem had an 'arguable' case in relation to the extensions of time.[31] However, it did not concede that Saipem was entitled to set off the advance payments against the bonus payments by any of the avenues argued.

31 GLNG did not concede, however, that Saipem's 'arguable' case had any merit

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Justice Martin found that, given the nature of the relationship between Saipem and GLNG, and the preceding case law, that Saipem had demonstrated a 'prima facie' case, which, if accepted, would entitle it to a set off bonus payments 1 and 2 against the advance payments. In particular, his Honour found that:

- the contract 'mandated' the setting off of the advance payments against the bonus payments;
- s67J of the Act applied and this operated to preclude GLNG from relying upon the bank guarantee unless there was a 'debt due' (ie because Saipem had an 'arguable' case that would entitle it to set off bonus payments 1 and 2 against the advance payments, there would be no 'debt due' as the total of the bonus payments exceeded the amount owed for the advance payments); and
- Saipem had an arguable case which may, in the alternative, entitle it to an equitable set off.

As such, Saipem had established a 'prima facie' case.

Did the 'balance of convenience' fall in Saipem's favour?

Despite Saipem establishing a 'prima facie' case, Justice Martin held that the 'balance of convenience' did not fall in its favour.

The crucial factor in his Honour's decision was the 'unconditional' nature of clause 5.5 in the contract, which granted GLNG the right to call upon the bank guarantee. His Honour agreed with GLNG's submission that, in assessing the balance of convenience, the court should give considerable weight to clause 5.5.

In this case, clause 5.5 granted GLNG the unfettered right to call upon the bank guarantee and that right, as Justice Martin held, should not be disturbed. His Honour noted that where a party accepts the risk of an 'unconditional' clause, that party has a substantial hurdle to overcome when dealing with the balance of convenience.

The practical implications

This decision reinforces the pro-enforcement approach taken by the courts in relation to performance guarantee clauses. As this decision demonstrates, the primary focus of the courts in these types of hearings will always be the proper construction of the contract between the parties.

In this case, the balance of convenience tipped in favour of GLNG because of the unconditional nature of the contract between it and Saipem. Understanding its risk, Saipem agreed to the contract and granted GLNG the unfettered right to call upon the bank guarantee. In this case, Justice Martin was unwilling to disturb GLNG's contractual right to call upon the bank guarantee.

Chapter 2: Adjudication & Security of Payments Legislation

- *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 and *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd* [2014] WASC 206
- *Seabreeze Manly v Toposu* [2014] NSWSC 1097
- The current status of natural justice in adjudications
- *Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access* (Australia) Pty Ltd & Ors [2014] QSC 223
- *Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd* [2014] NSWSC 102
- *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors* [2014] QCA 232
- *Hall Contracting v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20
- *DM Drainage & Constructions Pty Ltd atf DM Unit Trust t/as DM Civil v Karara Mining Ltd* [2014] WASC 170
- *Conveyor & General Engineering Pty Ltd v Basetec services Pty Ltd* [2014] QSC 30

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91 and *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd* [2014] WASC 206

Two recent cases in the Supreme Court of Western Australia have indicated that:

- a mere assertion that a debt is not owed does not constitute a 'genuine dispute' capable of setting aside an adjudication determination entered as a judgment; and
- leave to enforce an adjudication determination as a judgment must be obtained before the issue of a statutory demand, and that failing to do so will mean the statutory demand is liable to be set aside.

Together, these decisions provide important clarification on the enforcement of adjudication determinations by the use of statutory demands under Western Australia's security of payment legislation.

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd

The facts

In November 2010, KPA Architects Pty Ltd entered into an agreement with Fabcot Pty Ltd whereby KPA provided architectural services for Fabcot, which was redeveloping a shopping centre. Diploma Construction took over the redevelopment work from Fabcot in 2012 and an agreement was entered into with KPA that was on the same terms and conditions as the agreement between KPA and Fabcot.

Two payment disputes arose and were adjudicated under the *Construction Contracts Act 2004* (WA) (the ***CCA***), requiring Diploma to pay KPA totals of $136,145 and $368,399. Diploma separately initiated proceedings against KPA claiming damages for negligence in the amount of $287,905.

KPA obtained leave of the District Court to enter the adjudications as judgments, and subsequently issued a statutory demand to Diploma under s459E of the *Corporations Act 2001* (Cth).

Diploma initiated proceedings to set aside the statutory demand under s459G of the *Corporations Act* and was unsuccessful at first instance. This is an appeal from that decision.

The dispute

The grounds to set aside the statutory demand were argued to be:

- the existence of a 'genuine dispute' – Diploma disputed the debt that was the subject of the adjudications;
- an 'offsetting claim' – Diploma had initiated separate proceedings against KPA and sought to offset these claims;
- defects in the statutory demand that would cause substantial injustice – which in reality was a $3 calculation error and the failure to quantify the interest claimed; and
- that there was an 'other reason' to set aside the demand – the failure of KPA to comply with a dispute resolution clause in the agreement.

The decision

Genuine dispute

The basis of Diploma's genuine dispute claim was that KPA 'was not entitled' to the total of the determinations, and that the amounts were not due and payable.

However, the court held that the source of the debt was the judgment made under the CCA. There was no dispute about the occurrence of the judgment; as such, there was no genuine dispute about the debt that would justify an order to set aside the demand.

Offsetting claim

In respect of the proceedings issued by Diploma against KPA, the court had to determine whether the offsetting claim was 'genuine'.

Here the production of a statement of claim alone, even with supporting affidavits, was insufficient to support an offsetting claim. The production of the statement of claim is 'no evidence of anything'.

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Justice Pullin indicated that to succeed in an offsetting claim the affidavits in support must contain material from which a court can make an estimate of the amount of an offsetting claim and, in this case, the affidavits went no further than revealing that there was a statement of claim claiming damages of $287,905. Therefore Diploma's proceeding against KPA was not a genuine offsetting claim.

Justice Pullin also held that a party cannot raise a genuine offsetting claim merely by contending that it is not 'in truth' indebted for the amount claimed despite a determination. His Honour held that:

> [the prior cases] are plainly wrong and should not be followed insofar as they stand for the proposition that the person who owes a debt which is due and payable by reason of an adjudicator's determination and subsequent judgement, can raise a genuine offsetting claim merely by contending that it is not 'in truth, indebted for the amount' determined as due and payable or that, despite the determination, the contractor was not 'contractually entitled' to the amount determined or certified to be due by the adjudicator.

Further, the cross-claim must be capable of being quantified in money terms before it could be considered a genuine offsetting claim. In this case, the claims for declarations were not quantified in money, rather it was simply stated that Diploma would 'suffer loss' if the amounts contained in the statutory demand were paid.

For the reasons above, Justice Pullin found that no genuine offsetting claim existed.

Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd

The facts

Doric Contractors Pty Ltd was contracted to construct several buildings on the Jimblebar iron ore project in the Pilbara region of Western Australia. Doric engaged Kellogg Brown & Root Pty Ltd to provide engineering services in relation to the construction of those buildings.

After construction of the buildings was completed, Doric issued Kellogg with two invoices under the contract relating to alleged sub-standard performance of the contract. Kellogg refused to pay the invoices, disputing any liability to make payment. As a result of Kellogg's failure to pay, Doric made two adjudication applications under the *Construction Contracts Act 2004* (WA) (the ***CCA***) for each invoice. The adjudicator ultimately issued determinations under each adjudication application in favour of Doric.

Kellogg filed an application for judicial review of the adjudicator's determinations in the WA Supreme Court, asserting that Doric's claim amounted to a claim for damages and not a 'payment claim' for the purpose of the CCA.

Aware of the application for judicial review, Doric issued a statutory demand for payment of the amounts owed under the determinations. It did not obtain leave of a court in accordance with s43(2) of the CCA to enforce the determinations before issuing the statutory demand. In doing so, Doric essentially sought to 'side step' the usual process, which would have given Kellogg the opportunity to have the court consider the impact of the judicial review proceedings on the application for leave to enforce as a judgment.

Kellogg applied to the Supreme Court of WA to set aside the statutory demand.

The decision

Acting Master Gething found that the statutory demand should be set aside because Doric had not first obtained leave of the court to enforce the determinations in accordance with s43(2) of the CCA. He relied primarily on an earlier decision of the WA Supreme Court of Appeal, *Diploma Constructions (WA) Pty Ltd v KPA Architects* [2014] WASCA 91.

In addition to this, the Acting Master found that:

- a failure to obtain leave to enforce a determination as a judgment prior to issuing a statutory demand constituted 'some other reason' for setting aside the statutory demand under s459J(1)(b) of the *Corporations Act 2001* (Cth); and
- the failure to comply with s43(2) of the CCA meant that the statutory demand procedure was being improperly used to compel a solvent company to pay a disputed debt. This constituted an abuse of process that would warrant the court exercising its inherent jurisdiction to prevent reliance on the statutory demand.

Interestingly, in the event the Acting Master was wrong in his finding that leave must be sought to enforce an adjudication determination as a judgment under s43(2) of the CCA before a statutory demand can be issued, he also considered the impact that the existence of judicial review proceedings had on the statutory demand. He considered that the existence of the judicial review proceedings meant that there was a 'genuine dispute' as to the existence of the debt for the purpose of s459H(1)(a) of the Corporations Act. He noted that, on this basis alone, he would have set aside Doric's statutory demand.

An issue that was left open by the Acting Master was whether, if leave is obtained to enforce a determination as a judgment (at which time any application for judicial review would be considered) and a statutory demand subsequently issued, the existence of arguable judicial review proceedings will still be a 'genuine dispute' requiring the statutory demand to be set aside.

The practical implications

These decisions provide important clarification on the enforcement of adjudication determinations by the use of statutory demands under Western Australia's security of payment legislation.

In particular, *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* provides useful guidance as to how the courts may approach an application to set aside a statutory demand when issued to enforce a determination under the CC Act. It establishes that a mere assertion that the debt is not owed does not constitute a genuine dispute, and that a statement of claim alone is not sufficient to establish a genuine offsetting claim.

Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd, on the other hand, demonstrates that a party seeking payment of an adjudicator's determination by way of a statutory demand should ensure that it first obtains a court's leave to enforce the determination in accordance with s43(2) of the CCA. Failing to do so will mean that the statutory demand can be set aside.

In each state and territory there is a legislative regime that requires a party to have their adjudication determination certified as a judgment debt before it can be relied on (eg by way of statutory demand). This process is generally subject to the oversight of the court.

Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd demonstrates that the courts will not allow the statutory demands to be used to 'side step' the existence of this process.

Seabreeze Manly v Toposu [2014] NSWSC 1097

This decision establishes that a multilateral 'arrangement' can arise under the NSW Security of Payments Act in circumstances where the arrangement itself is not a legally enforceable contract. In this case, an 'arrangement' was found to exist where the head contractor and subcontractor arranged for the principal to make direct payments for the subcontractor's work and the principal authorised such an arrangement (and acted consistently with it).

The facts

Seabreeze Manly Pty Ltd was responsible for developing land in Manly for residential purposes. It engaged Castle Projects Pty Limited as a builder under an amended form of AS4000-1997 General Conditions of Contract. Two of the amendments to the form of contract were material in the case. The first provided that Castle Projects could only retain subcontractors with the prior consent of Seabreeze. The second provided that, if subcontractors were retained by Castle Projects with Seabreeze's consent, Seabreeze would pay those subcontractors directly.

Castle Projects subcontracted the supply and installation of steel and aluminium for the development to Toposu Pty Ltd on the basis that Seabreeze would pay Toposu directly.

Although Toposu addressed invoices to Castle Projects rather than Seabreeze, Castle Projects prepared payment schedules in response to these invoices as if Toposu had submitted a payment claim directly to Seabreeze and submitted the payment claim to the superintendent. Seabreeze paid the amount of the payment schedule certified by the superintendent directly to Toposu. This occurred on at least four occasions.

The dispute

Seabreeze disputed one of Toposu's payment claims on the basis that the work the subject of the claim was defective, the scope of works had been changed other than as authorised by the development approval, and the original price for the works had been exceeded. The dispute was referred to adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the ***Act***).

Seabreeze applied to the New South Wales Supreme Court to restrain the adjudicator's subsequent determination in favour of Toposu on the basis that there was no 'construction contract' between Seabreeze and Toposu, as defined under the Act. A 'construction contract' is defined under the Act to mean 'a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party'.

The decision

The court held that while there was no contract between Seabreeze and Toposu, the evidence clearly demonstrated the existence of a trilateral arrangement between Seabreeze, Castle Projects and Toposu sufficient to amount to a 'construction contract' under the Act.

The court referred with approval to two earlier decisions that are authority for the proposition that the only limitation on the meaning of the word 'arrangement' in the definition of 'construction contract' under the Act is that it must be one in which one party to it undertakes to carry out construction work for another party to it. A person 'undertakes' to carry out construction work, or to supply related goods and services, if the first person agrees, or accepts an obligation, or promises, to do that work or supply those goods and services.

In this case, his Honour found that Toposu agreed to undertake to carry out construction work for Seabreeze. This was so because Seabreeze had instructed Castle Projects to put in place a system whereby subcontractors were to receive payment from Seabreeze directly; this system was communicated to Toposu; and Toposu took the job on that express and authorised basis. Seabreeze effectively acknowledged this arrangement by paying Toposu directly on four occasions.

The presence of a separate contract between Seabreeze and Castle Projects did not negate the parallel existence of this arrangement as the true nature of the contract was, in effect (among other things) a conduit or medium between Seabreeze and the various subcontractors who did the actual work of building the project.

The practical implications

This decision serves as a timely warning to principals and other parties responsible for payment on construction projects to be aware that security of payment legislation can potentially apply to informal arrangements for the direct payment of subcontractors in return for carrying out construction work or supplying related goods and services for the project. Even if no contract exists between the relevant parties, they may fall within the ambit of the Act.

The current status of natural justice in adjudications

Adjudicators are bound by the rules of natural justice when deciding adjudications under construction industry payment legislation. The 'cardinal rules' of natural justice include the rule against bias and the right to be heard. Both of these rules apply to determinations made by adjudicators, but must be applied so as to 'fit' within the relevant statutory scheme.[32] A failure to afford a party natural justice may result in the adjudication being held to be void and of no effect.

Where a party challenges an adjudication determination on natural justice grounds, that party usually alleges that it was deprived of an opportunity to address the adjudicator on matters that would have had a material effect upon the outcome of the adjudication. The party must show that the matter which it was deprived the opportunity of addressing was a matter that was 'material' to the adjudicator's determination.[33]

The past year has seen the courts provide continuing guidance on the meaning of natural justice and, in particular, the meaning of a 'material' failure to provide natural justice. The courts have also affirmed the position that a denial of natural justice will occur when an adjudicator decides a dispute on a basis not raised by either party, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result. Chief among these was the decision of the New South Wales Supreme Court in *Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd* [2014] NSWSC 102. In this case, the court considered the meaning of a 'material' failure to provide natural justice in circumstances where the adjudicator made his decision on grounds not contended for by the parties. The court held that there was no 'material' denial of natural justice because there were no further submissions or evidence that would have made a difference to the adjudicator's determination. In addition, the court held that 'materiality' requires that the matter to which the adjudicator did not provide an opportunity to be heard was significant to the actual determination and might have affected the outcome.

Other cases which affirmed the position that a denial of natural justice will occur when an adjudicator decides a dispute on a basis not raised by either party (unless it can be said that no submission could have been made to the adjudicator which might have produced a different result) included *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors* [2014] QCA 232 and *Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors* [2014] QSC 223.

In McNab Developments, McNab argued that the adjudicator did not give it an opportunity to respond to the construction of a subcontract adopted by the adjudicator before the adjudicator acted upon it. The appeal was, however, dismissed because the parties did in fact make submissions which reflected their respective arguments in relation to the subcontract. These arguments were implicit in the submissions of both parties and the court found that the adjudicator appreciated the difference in approaches by McNab and MAK.

However, in *Caltex Refineries*, a denial of natural justice was successfully argued on the basis that the adjudicator made his decision based on reasons that were not advanced by either party. The difference in this case, when compared to McNab Developments, was that neither party was afforded an opportunity by the adjudicator to make submissions on a finding made by him in relation to an express contractual term.

Finally, the Northern Territory Supreme Court has also considered the principles of natural justice in circumstances where an adjudicator failed to consider and seek further evidence critical to a determination. In *Hall Contracting v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, the central question was whether the adjudicator was required to notify the parties that he was unable to make a determination without further information, and to make a request for that information. The court quashed the adjudication on the basis of an absence of natural justice and because the adjudicator was under a misapprehension regarding the existence of certain evidence.

As a whole, these decisions support the principle that a denial of natural justice must be 'material'. A 'material' denial of natural justice may occur when an adjudicator decides a dispute on a basis for which neither party has contended, or on grounds for which there is no evidentiary basis, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.

32 *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, [69].
33 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at 40.

Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors [2014] QSC 223

In this case, the Queensland Supreme Court considered the principles of natural justice in circumstances where a party was denied the opportunity to argue a point that the adjudicator decided upon.

The facts

Allstate hired scaffolding equipment to Caltex for refineries located in Queensland and New South Wales.

In November 2013, Allstate made claims for progress payments against Caltex under the Qld Act (in relation to its Queensland refinery) and under the NSW Act (in relation to its New South Wales refinery). The claims were for a total of $3,278,524 and $4,004,850. In response, Caltex served payment schedules conceding that only relatively small amounts were owed.

The dispute

The claims proceeded to adjudication where, by separate decisions, the adjudicator determined that Caltex should pay to Allstate $1,784,299 in relation the Queensland refinery and $2,357,796 in relation to the New South Wales refinery.

Caltex challenged the adjudicator's decision upon several grounds, which applied to both decisions.

The natural justice ground argued by Caltex was that the adjudicator found that the contract between the parties expressly entitled Allstate to claim for damaged equipment in a progress payment, despite the fact that neither party argued that there was such an express term. It was submitted by Caltex that the adjudicator's decision was not only different from the submissions made by Allstate, but inconsistent with those submissions because Allstate alleged an implied term, whereas the adjudicator found that an express term existed in the contract.

Importantly, the submissions of Caltex in its adjudication responses appeared to anticipate that the adjudicator may reach a view that was favourable to Allstate, but different from Allstate's own argument. Caltex's submissions warned the adjudicator that such an approach may deny it natural justice.

The decision

In considering relevant case law, including *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205, Justice McMurdo held that there will not be a substantial denial of natural justice where an adjudicator decides a dispute on a basis for which neither party has contended, unless it can be said that there was 'something to be put that might well persuade the adjudicator to change his or her mind'.

Justice McMurdo found that Caltex should have been afforded the opportunity to prepare submissions on the express contractual term decided by the adjudicator. As Caltex was not given this opportunity, the adjudicator had denied Caltex natural justice. His Honour also held that it was unnecessary for Caltex to demonstrate that, if given the opportunity to address the adjudicator's reasoning, that they would have persuaded him otherwise. In this case, it was sufficient that there was 'something to be put that may well persuade the adjudicator to change his mind'.

It was also relevant that Caltex had warned the adjudicator of a potential denial of natural justice if the adjudicator reached a view that was favourable to Allstate, but different from Allstate's own argument. In these circumstances, it was incumbent on the adjudicator to seek Caltex's submissions on the express contractual term. By failing to do so, the adjudicator denied Caltex natural justice.

The practical implications

This decision affirms the position that a denial of natural justice will occur when an adjudicator decides a dispute on a basis for which neither party has contended. In this case, Justice McMurdo found that, if given the opportunity, Caltex may have been able to persuade the adjudicator differently on his finding in favour of Allstate. It was therefore incumbent on the adjudicator to seek out all relevant submissions from the parties on a critical issue.

Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd [2014] NSWSC 102

This decision of the New South Wales Supreme Court considers the meaning of a 'material' failure to provide natural justice in circumstances where a party was denied the opportunity to make submissions on a particular point.

The facts

On 15 November 2012, the defendant contractor (***JCM***) sent two payment claims endorsed under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the ***NSW Act***) to Anderson. The first was dated 5 November 2012 and the second was dated 15 November 2012. Anderson did not pay the second payment claim and failed to respond with a payment schedule within the required time. As a result, JCM served a notice of intention to suspend work under the NSW Act.

The dispute

Anderson argued that the two invoices concerned the same reference date and were therefore precluded from being served under the NSW Act. Despite this, JCM suspended its construction works and, in response, Anderson terminated the construction contract on the basis that JCM had repudiated it.

In his determination, the adjudicator found that the payment claims were valid and JCM had appropriately suspended work in accordance with the NSW Act. Having reached these conclusions, the adjudicator allowed the amount claimed by JCM.

However, Anderson challenged the adjudicator's determination on the basis that the adjudicator had determined the reference date issue (ie its submission that the two payment claims concerned the same reference date) on a basis not contended for by JCM and, in respect of which, Anderson was not afforded the opportunity to make submissions. This challenge was heard in the New South Wales Supreme Court.

The decision

Justice Ball held that the fact that Anderson was not given an opportunity to make submissions in relation to the reference date issue did not amount to a denial of natural justice. This was because there was adequate information before the adjudicator to reach his decision without submissions from Anderson. His Honour also held that the adjudicator was not required to give Anderson an opportunity to comment on his reasoning process when that reasoning process depended on the material that was already before him.

Justice Ball reaffirmed that 'any entitlement to natural justice must accommodate the scheme of the Act' (*Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [142]) and, for the court to grant relief in respect of a denial of natural justice, the denial must be 'material'. Materiality requires that the matter to which the adjudicator did not provide an opportunity to be heard was significant to the actual determination and might have affected the outcome.

His Honour held that even if there was a denial of natural justice, any denial was not 'material'. His Honour reached this decision because there were no further submissions or evidence that would have made a difference to the adjudicator's determination.

The practical implications

This decision illustrates that the right to be heard on a particular issue will not be enlivened where there is adequate information before the adjudicator to reach his decision without further submissions from the parties. In addition, a denial of natural justice will not be 'material' unless further submissions or evidence would make a difference to the adjudicator's determination.

McNab Developments (Qld) Pty Ltd v *MAK Construction Services Pty Ltd & Ors* [2014] QCA 232

This decision of the Queensland Court of Appeal considered the principles of natural justice in circumstances where a party did not have an opportunity to respond to the construction of a contract adopted by the adjudicator before the adjudicator acted upon it.

The facts

By subcontract made on 23 January 2012, McNab Developments engaged MAK Construction Services to carry out concreting and formwork services for a project at James Cook University. On 12 December 2012, McNab issued MAK a direction to rectify alleged defects related to the project. On 17 December 2012, McNab took responsibility for the defective work under the subcontract out of the hands of MAK. Subsequently, on 28 March 2013, MAK served a payment claim on McNab for a claim in relation to 'Concrete/ Formwork during the period 6 February 2012 to 19 December 2012'. The claims were endorsed under the *Building and Construction Industry Payments Act 2004* (Qld) (the ***Qld Act***).

The dispute

McNab challenged the validity of the payment claim as a whole and the claim was referred to adjudication. Central to McNab's argument was clause 28(j) of the subcontract which dealt with liquidated damages. McNab argued that:

- liability to pay liquidated damages arose as and from the date MAK failed to achieve practical completion, whether or not non-completion was caused by MAK.

MAK argued that:

- McNab was required to prove that MAK was responsible for non-completion for it to be liable to pay liquidated damages.

On 30 May 2013, the adjudicator found in favour of MAK.

McNab challenged the decision in the Supreme Court of Queensland, seeking a declaration that the adjudication decision was void or liable to be set aside on a range of grounds. The challenge was dismissed by the court.

McNab filed a notice of appeal and sought an order that the adjudicator's decision be reversed and that MAK pay its costs at first instance and on appeal.

The appeal was based on a number of grounds. The relevant 'natural justice' ground was that the adjudicator decided the claim for liquidated damages on a basis for which the parties had not contended.

The decision

Justice Gotterson delivered the leading judgment and the appeal was dismissed.

In considering relevant case law, including *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205, the court recognised that a denial of natural justice will occur when an adjudicator decides a dispute on a basis not raised by either party, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result. The court also considered *David & Gai Spankie & Northern Territory Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd* (No. 2) [2010] QSC 166, which held that an adjudication determination was void because the adjudicator interpreted a contractual provision relevant to liquidated damages without seeking submissions from the parties.

Here, however, Justice Gotterson held that both parties did in fact make submissions which reflected their respective arguments as to the construction of clause 28(j). After considering these submissions, the adjudicator found that clause 28(j) had not been triggered against MAK (ie the adjudicator preferred MAK's submission that McNab was required to prove that it was responsible for non-completion). This interpretation was available to the adjudicator based on the submissions of the parties.

As such, there was no denial of natural justice.

Allens › ‹ Linklaters

The practical implications

This decision affirms the position that a denial of natural justice will occur when an adjudicator decides a dispute on a basis not raised by either party, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.

In this case, the adjudicator rightly considered both parties' submissions as to the construction of clause 28(j) and ultimately preferred MAK's submissions. As Justice Gotterson held, the mere preference of one party's submissions over another party's will not be a denial of natural justice.

Allens › ‹ Linklaters

Hall Contracting v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20

In this decision, the Northern Territory Supreme Court considered principles of natural justice in circumstances where an adjudicator failed to consider and seek further evidence critical to the determination made.

The facts

Hall Contracting and Macmahon Contractors Pty Ltd were parties to a contract for dredging and the disposal of seabed materials on the Darwin Marine Supply Base. During the wet season, the dredging was suspended but was on standby at the instruction of Macmahon.

The dispute

Two separate claims were made by Hall Contracting under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the ***NT Act)*** relating to the standby costs incurred at the instruction of Macmahon. The claims proceeded separately to adjudication.

Hall Contracting was successful in its first claim. In relation to the second claim, Hall Contracting based its argument on the evidence produced for the first claim and submitted that, due to the similar nature of both claims, the adjudicator was bound by the first determination. Despite this submission, Hall Contracting was unsuccessful in its second claim due to a lack of 'any evidence' or 'any specific evidence' provided to the adjudicator.

The decision

The adjudicator's decision in relation to the second claim was challenged in the Northern Territory Supreme Court.

The central question was whether the adjudicator's obligation to accord the parties procedural fairness required him to notify them that he was unable to make a determination without further information, and to make a request for that further information (ie the court considered whether it was incumbent on the adjudicator to inform Hall Contracting that he required further information in order to determine the claim).

Justice Barr found that a purported determination would be void (or 'not a determination under the NT Act'), if there were 'a substantial denial of natural justice'. In doing so, his Honour found that a decision maker is generally not obliged to invite comment on his evaluation of an applicant's case. Nonetheless, that proposition may be subject to the qualification that a party to a potentially unfavourable decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them.

Justice Barr found that there was a substantial denial of natural justice because Hall Contracting was not given an opportunity to make submissions on a matter that was highly significant in the adjudicator's evaluation of the second claim and which was ultimately dispositive.

The practical implications

This decision demonstrates that natural justice requires an adjudicator to direct a party's mind to critical issues or facts on which the decision is likely to turn if the party has not dealt with the issue in its submissions.

While it generally appears that a higher threshold is required to establish a denial of natural justice in the Northern Territory (ie there must be a *substantial* denial of natural justice), this decision lends itself to the principle that an adjudicator must hear (and seek out from the parties) all submissions which, if made, could influence the decision of the adjudicator – a similar approach to that taken by the courts in Queensland and New South Wales.

DM Drainage & Constructions Pty Ltd atf DM Unit Trust t/as DM Civil v Karara Mining Ltd [2014] WASC 170

This case demonstrates that, despite the fact that courts generally do not encourage strike out applications in contemporary litigation, they will strike out global costs claims/total costs claims if the essential elements of such claims are not pleaded.

Justice Beech's decision in this case highlights that when a contractor pleads a total costs claim, it must expressly plead that the principal's breaches were the only cause of the difference between the expected and actual costs, and that there were no alternative causes of loss apart from matters that were the responsibility of the principal.

The facts

The plaintiff, DM Civil (***DM***), and the defendant Karara Mining Ltd (***Karara***) entered into a contract for DM to construct a water pipeline, for a contract sum comprised of a lump sum apportioned between seven sections (the ***contract***).

For a portion of the works, DM's actual costs had been $47,846,924. Under the original scope of work for that aspect of the contract, DM's entitlement was $21,196,079.

DM claimed that the additional costs had been incurred as a result of Karara resequencing and redesigning aspects of the works through various directions and variation orders.

Relevantly its statement of claim contained schedules setting out the factual events on which DM relied for its claims, being:

- Schedule A – alleged issues in the giving of access or approvals by Karara;
- Schedule B – alleged re-sequencing directions given by Karara; and
- Schedule F – alleged issues in the manner in which Karara issued drawings under the contract.

DM pleaded that it had incurred 'additional costs' by reason of Karara's resequencing and redesign. It alleged that the resequencing and redesign had resulted in consequential disruptions of works, and made the works more complex than originally contemplated by the contract.

Essentially, DM claimed that additional costs were incurred in respect of all aspects of works under the contract, with only a limited number of specified exceptions.

DM's statement of claim contained a Schedule C which set out the additional costs that were alleged to have been incurred by DM (allocated to specific aspects of the works). However the pleading did not set out how it was alleged that each of the events in Schedules A, B and F caused any of the damage pleaded.

Karara applied to strike out paragraphs of DM's statement of claim. It asserted that DM's claim was a global claim and a total costs claim or modified total costs claim, but did not satisfy essential requirements of such claims.

The decision

Ultimately, Justice Beech granted orders striking out the paragraphs of the statement of claim that contained the global claim/total costs claim.

His Honour did this on the basis that the pleading did not meet the minimum requirements for the pleading of such claims. His Honour also made certain orders about matters that would need to be expressly pleaded by DM in any amended pleading of the claim.

The claims

Justice Beech noted that:

- 'Global claims' are those in which a plaintiff claiming under a construction contract contends that there were multiple interacting events for which the defendant is responsible, and pursues a claim for the global loss which the plaintiff says was caused by these events.
- A 'total costs' claim is where a contractor alleges against a principal a number of breaches of contract, and quantifies its global loss as the actual cost of the works less that which was contractually expected.
- A modified 'total costs' claim is where the contractor divides up its additional costs, and claims that the whole of one or more parts of those costs is the result of events for which the principal is contractually responsible.

His Honour then went on to classify DM's claims as:

- *Global claims,* because nothing in DM's statement of claim attempted to draw causal links between Karara's alleged resequencing and redesign events (in Schedules A, B and F), and any particular consequence in relation to any particular part of work or the incurring of any particular cost (in Schedule C);[34] and
- *Modified total costs claims*, as the claims related to a portion of the works, and the alleged additional costs were calculated as the difference between what it had been paid for the affected works and its actual cost.[35]

Requirements for pleading total cost and modified total costs

His Honour said that a total costs claim involves essentially involves four propositions:[36]

- the contractor might reasonably have been expected to perform the work for a particular sum, usually the contract price;
- the principal committed breaches of contract;
- the actual reasonable cost of the work was a sum greater than the expected cost; and
- the principal's breaches are the only cause of any significance for the difference between the expected cost and the actual cost.

Justice Beech emphasised that, for a total costs claim to succeed, the contractor must establish that there were no alternative causes of its loss and expense, apart from matters that were the responsibility of the principal.[37]

His Honour also stated that the same requirement is true for a modified total costs claim, within the sphere(s) in which the contractor claims the whole of its actual costs less what it has been paid.[38]

His Honour noted that, unless alternative causes are excluded, the inference of causation of the total loss cannot be drawn; put another way, that excluding alternative causes of loss was necessary for a contractor to sustain an inference that the difference between actual costs and expected costs was caused by the principal's variations or breaches.[39]

DM's statement of claim did not plead that there were no alternative causes for its increased costs. His Honour found that this was sufficient basis to warrant a strike out of the relevant paragraphs.

34 *DM Drainage & Constructions Pty Ltd atf DM Unit Trust t/as DM Civil v Karara Mining Ltd* [2014] WASC 170, at [41].
35 Ibid., at [47].
36 Ibid., at [56].
37 Ibid., at [59].
38 Ibid., at [59].
39 Ibid., at [59].

Requirements for pleading global costs claims

In addition to granting orders striking out the relevant paragraphs of the statement of claim on the basis of failing to meet the pleading requirements for total cost claims, Justice Beech considered whether there were any further pleading requirements for global costs claims in general.

Justice Beech summarised the relevant authorities and stated that the position under Australian law is that a global costs claim is permissible where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and where that situation has not been brought about by delay or other conduct of the claimant.[40]

The paragraphs containing the claim were struck out for not meeting these requirements.

His Honour declined to follow the English High Court case of *Walter Lilly & Co Ltd v Mackay* [2012] All ER(D) 213 (Jul), where it was held that where a contractor caused one or more of the factors contributing to its global loss, the loss caused by the contractor is not necessarily fatal to its global claim; it will depend on what impact those events had. In line with Australian authority (as also applied by the NSW Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurty SA* [2014] NSWCA 184), his Honour held that where a global claim is made, it is essential that the claimant prove that the principal is liable for the whole of the loss and that there were no alternative causes of the loss.

His Honour went further to say that, in the circumstances of the case, it was appropriate to require DM (in any amended pleading) to expressly plead that it was impossible or impracticable to identify that part of the loss which is attributable to each head of claim or conduct on the part of the principal.[41] He made orders requiring DM to do so.

Practical implications

Global and total cost claims are commonly raised by contractors in correspondence and during the administration of a contract.

While these claims can be legitimately pleaded, this case demonstrates that the courts will require certain minimum requirements of pleadings to be met. Importantly, this will require contractors to do some work in relation to the issue of causation – which is often not done in relation to claims submitted under a contract.

This case highlights that:

(a) when pleading global claims, if a contractor does not plead how certain events led to a loss, in some circumstances, the contractor may be required to expressly plead that it is impossible or impracticable to identify that part of the loss that is attributable to each head of event; and

(b) when pleading total costs claims, a contractor must, as a minimum requirement, expressly plead that the principal's breaches are the only cause of any significance for the difference between the expected cost and the actual cost.

40 By reference to *John Holland Pty Ltd v Kvaerner R J Brown Pty Ltd* (1996) 8 VR 681; *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] SC 713; and *McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd* [2011] QSC 178.

41 *DM Drainage & Constructions Pty Ltd atf DM Unit Trust t/as DM Civil v Karara Mining Ltd* [2014] WASC 170, at [75].

Conveyor & General Engineering Pty Ltd v Basetec services Pty Ltd [2014] QSC 30

This decision of the Supreme Court of Queensland considers the implications of providing a Dropbox link as a purported mode of service.

The facts

In 2012 CGE subcontracted to Basetec the supply of pre-assembled pipe rack units for water treatment facilities located at Condabri and Reedy Creek. On 30 July 2013, Basetec delivered two payment claims which were disputed in their entirety by GCE on 12 August 2013.

On 23 August 2013, Basetec made adjudication applications for each payment claim. Basetec communicated the two adjudication applications to CGE's solicitors via email (the ***first email***). Attached to the first email were copies of the two adjudication applications and a copy of another email (the ***second email***) sent to the Institute of Arbitrators and Mediators Australia by Basetec earlier that day. The second email contained all the same documents attached to the first email, but also included two Dropbox hyperlinks (Dropbox is a correspondence management application). These two Dropbox hyperlinks contained *additional materials* for the adjudication applications that were not contained in the first email, or any of its attachments.

Section 103 of the ***Building and Construction Industry Payments Act 2004*** (Qld) (the BCIPA) allows for service by any means provided for by the relevant construction contract. The contract concerned, however, made no provision for the service of a document, and neither party had otherwise agreed to use Dropbox as a means of service.[42]

Although CGE and its solicitors received and read the relevant emails and their attachments, they did not access the documents to which the Dropbox hyperlinks referred. CGE did not become aware of the contents of the Dropbox files until Monday 2 September 2014, when it emailed its adjudication response.

By that time, the adjudicator had already concluded that the adjudication application had been served by the first email sent on 23 August 2013 and had accepted the adjudication application on 28 August 2013. The adjudicator found the deadline for an adjudication response to be 30 August 2013, under s24(1) of the BCIPA. As such, the adjudicator determined that he was precluded from considering any submission from CGE submitted after 30 August 2013, except on the issue of service.

The dispute

After the adjudicator rendered an award on 10 September 2013, GCE applied to the Supreme Court of Queensland to have the award set aside, on the basis that:

- the adjudicator was in error in holding that CGE's payment schedules were due on 30 August 2013, being five business days after Basetec sent the first email containing the Dropbox links;
- and that because of this error, CGE was denied the opportunity to provide an adjudication response.

The decision

The Queensland Supreme Court held that the adjudication application was not properly served on 23 August 2013, and therefore that the adjudicator had erred in not considering CGE's adjudication response in his decision. The adjudicator's decision was therefore void.[43]

At common law, actual service does not require the recipient to read the document. However, it does require 'something in the nature of a receipt of the document', such that the person being served becomes 'aware of the contents of the document'.[44]

Justice McMurdo considered the application and interpretation of several statutes, namely the BCIPA, the *Acts Interpretation Act 1954* (Qld) (the ***AIA***) and the *Electronic Transactions (Queensland) Act 2001* (Qld) (the ***ETA***).

42 [2014] QSC 30, [23].
43 [2014] QSC 30, [44].
44 [2014] QSC 30, [34] citing Capper v Thorpe (1998) 194 CLR 342, 352.

Section 39 of the AIA allows for service by means of 'telex, facsimile or similar facility'. While s39 makes no specific reference to service via email, Justice McMurdo acknowledged the existence of case authorities supporting the proposition that email was one such 'similar facility'.

This interpretation is facilitated by s11 of the ETA, which allows for service via electronic communication, provided the information would be readily accessible to the recipient, and the recipient has given consent to receiving the information via electronic communication.

On the facts, however, neither statute was applicable. First, CGE had not consented to being served via electronic communications. Second, because none of the data, text or images within the Dropbox was itself electronically communicated in the email, there was merely electronic communication of the *means* by which other information, in electronic form, could be found, read and downloaded from the Dropbox,[45] Justice McMurdo held the material contained within the Dropbox was not part of an electronic communication, as defined in the ETA.[46]

Justice McMurdo held that only the three documents attached to the first email were 'sent' in accordance with s 39 of the AIA. The additional materials in the Dropbox were not 'sent' to CGE; CGE was simply told where they were located.[47] Accordingly, Justice McMurdo concluded that the additional materials relating to the adjudication applications contained in the Dropbox were not served until 2 September 2013,[48] and that the adjudication application had not been 'served on the respondent', as required by s21(5) of the BCIPA.

Justice McMurdo observed, however, that if the entire adjudication application had been included in the email, service would have been validly effected when the email became capable of retrieval, under s24 of the ETA.[49]

The practical implications

If a correspondence management system (such as Dropbox or Aconex) is to be used on a project, parties should clearly identify whether documents may, or may not, be served using this method.

Unless provided for in the relevant construction contract, Dropbox links are not a permissible means of service for adjudication applications under the BCIPA.

Where drafting provisions in construction contracts relating to the service of documents, parties should think broadly about the various methods of service that are used presently and may be used in the future. In particular, parties should consider the means of electronic transfer for documents where email is unsuitable due to the size of the documents.

Where the relevant contract fails to make provisions for the communication, or service, of documents, parties can consent to receiving such documents via a mode of electronic communication. However, parties intending to serve documents via electronic communications should be aware that the communication of a mere link to a file hosted online, via a service such as Dropbox, will not be considered electronic communication for the purposes of the ETA.

45 [2014] QSC 30, [28]-[29].
46 [2014] QSC 30, [28].
47 [2014] QSC 30, [30].
48 [2014] QSC 30, [37].
49 [2014] QSC 30, [29]

Chapter 3: Legislative and policy developments

- Amendments to the Security of Payment Legislation in Queensland and New South Wales
- *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165
- WA reviews its security of payments regime

Amendments to the Security of Payments Legislation in Queensland and New South Wales

Amendments have recently been passed to both the Building and Construction Industry Payments Act 2004 (Qld) (the ***Qld Act***) and the *Building and Construction Industry Security of Payments Act 1999* (NSW) (the ***NSW Act***).

The amendments to the Qld Act focus broadly on the timing of payment claims and the adjudication process. The amendments to the NSW Act also relate to time frames for payment claims, in addition to protection for subcontractors. The amendments to the Qld Act commenced on 15 December 2014 while the amendments to the NSW Act commenced on 21 April 2014.

Amendments to the Qld Act

The Qld Act was amended by the *Building and Construction Industry Payments Amendment Act 2014* (Qld) (the ***Qld Amendment Act***), which itself was amended by the *Health and Other Legislation Amendment Act 2014* (Qld). These changes will apply to all contracts entered into after 1 October 2014, subject to some minor exceptions which are outlined below.

Timing of payment claim process

As always, a payment claim must be served in respect of a valid reference date. However, following the amendments:

- the time for serving a payment claim following the date upon which the construction work was last carried out, or the related goods or services were provided, will be reduced from 12 to six months (or such longer period as is provided for in the contract); and
- in respect of claims for final progress payments (which now includes the recovery of security or retentions), the claim will have to be served within 28 days after the expiry of the defects liability period, or such longer period as is provided for in the contract. If neither of those alternatives are applicable, the claim must be served within six months of the date work was last carried out.

However, the Qld Act contains transitional provisions which provide that if a payment claim is served on a respondent within six months after commencement of the Qld Amending Act, and relates to a construction contract entered into before the commencement, the claim can still relate to costs for work carried out, or goods or services provided, up to 12 months prior.

The amendments also introduce a dual system for classification of payment claims. There are now standard and complex payment claims, with a simple distinction between them: complex payment claims are those that exceed $750,000 exclusive of GST. Further, there are new timeframes for various steps to be taken under the Qld Act, which differ depending on the type of payment claim served. Following service on a respondent of a complex payment claim, respondents will have:

- 15 business days to provide a payment schedule; or
- if the claim is served more than 90 days after the reference date to which the claim relates, 30 business days to provide a payment schedule.

The position with respect to simple payment claims remains unchanged. Respondents will still have 10 business days following service of a simple payment claim to provide a payment schedule.

Similarly, the timeframes for a claimant serving an adjudication application under the Qld Act have not changed. However, following service of an adjudication application, a respondent will now have:

- in respect of simple payment claims – the later of 10 business days, increased from five, to provide an adjudication response, and seven business days after receiving notice of the adjudicator's acceptance of the adjudication application; and
- in respect of complex payment claims – the later of 15 business days to provide an adjudication response, and 12 business days after receiving notice of the adjudicator's acceptance of the adjudication application. A respondent may also apply to the adjudicator for an extension of time of up to 15 business days to serve an adjudication response.

Another important amendment is to the definition of 'business day'. To correspond with the shutdown of businesses in the industry during the festive period, none of the days between 22 December to 10 January (inclusive) will be counted as business days for the purpose of the Qld Act.

Importantly, the new definition of business day applies in respect of any outstanding steps still to be taken on a payment claim that was served prior to commencement. However, the simple/complex claim distinction (and the change to associated timeframes) does not.

Notwithstanding the statutory amendments, industry participants should still take care to consider the timing provisions in their respective contracts, including those that relate to certification of payment and payment of money. In certain circumstances, the contractual timeframes will take precedence over the provisions of the Qld Act, and may not be as generous.

New reasons in adjudication responses

Respondents will now be able to raise reasons for non-payment of complex payment claims in their adjudication responses where those reasons were not raised in the respondent's original payment schedule. Claimants will only have a right of reply if they notify the adjudicator of their intention to respond within five business days after receiving a copy of the adjudication response, unless the claimant gives the reply itself within the five business days. Otherwise, the claimant's reply must be served within 15 business days after receiving a copy of the respondent's adjudication response. A claimant may also apply for an extension of time within which to provide its reply where the new reasons given by the respondent are particularly complex or voluminous, such that extra time is needed to adequately respond.

Notice requirements before enforcement action

Under the amendments, a respondent will have a second opportunity to submit a payment schedule where it failed to do so following service of a payment claim. A claimant must now provide a respondent with a notice advising of the claimant's intention to take enforcement action, or otherwise refer the claim to adjudication. The notice must state that the respondent will have five business days from that notice to serve a payment schedule, regardless of whether the payment claim served was complex or simple by definition.

Adjudication proceedings

Under the amendments, the role of authorised nominating authorities (***ANAs***) has been abolished. ANAs will only administer applications already made to them prior to 15 December 2014.

The QBCC will maintain a registry to administer the adjudication process under the Qld Act. There will also be more stringent skills and qualifications requirements for adjudicators, including continuing professional development.

Claimants will also have an unqualified legal right to withdraw adjudication applications, which was not the case previously. Practically, this amendment should give principals some comfort that the adjudication process has been neatly discontinued under the Qld Act when they settle matters prior to an adjudication determination being reached.

Amendments to the NSW Act

In our 2013 *Construction Year in Review* we reported on the findings of the Independent Inquiry into Construction Industry Insolvency in NSW, chaired by Mr Bruce Collins QC. Despite the in principle support provided by the NSW Government to the recommendations of the Collins Report, the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) (the ***NSW Amendment Act***) ultimately contained few amendments.

Importantly, the NSW Amendment Act only affects ***contracts entered into*** after 21 April 2014 and does not apply to residential construction contracts, which deal with the carrying out of residential building work within the meaning of the H*ome Building Act 1989* (NSW). The key changes relate to:

- removal of endorsement of payment claims;
- timeframes for payment;
- information to accompany payment claims;
- creation of a trust account for retention money; and
- enforcement of compliance with the NSW Act.

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Removal of endorsement of payment claims

The Amendment Bill has removed the requirement that a payment claim be specifically endorsed as a claim being made under the Act. This will mean that payment claims will be identified in substance over form and no longer rendered invalid by a failure to comply with this technicality. As a consequence, parties must now assume that any claim for payment is one that can be pursued under the Act and must respond with payment schedules accordingly.

Timeframes for payment

Consistent with the underlying aims of the security for payments legislation, strict timeframes have been introduced for payment to head contractors and subcontractors. Payments owed by principals to head contractors must be made 15 business days after a payment claim is made and payments owed by head contractors to subcontractors must be made 30 business days after a payment claim is made.

Information to accompany payment claims

All payment claims served by a head contractor on a principal must now be accompanied by a supporting statement in the form set out in the *Building and Construction Industry Security of Payment Regulation 2008*. Broadly, the supporting statement is a one-page summary that identifies the parties, the contract, the schedule of payments to subcontractors and a declaration that the matters in the payment claim are true.

Creation of a trust account for retention money

Although current regulations do not provide for it, the legislation contains a future allowance for retention money held by head contractors to be held on trust for subcontractors. It is intended that the trust account would be regulated by the Small Business Commissioner.

Enforcement of compliance with the Act

The NSW Amendment Act has introduced enforcement procedures to ensure the observance of these requirements. Authorised officers will be appointed by the Director General of the Department of Finance and Services with the power to compel head contractors, by written notice, to produce relevant evidence of their compliance with the Act.

Failure to comply with a notice or the submission of false documents has a maximum penalty of $22,000 and/or imprisonment of three months.

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165

The Victorian Court of Appeal has clarified the time limit for a party seeking to bring an action for loss or damage arising from defective building work. For such claims, the six-year limitation period for actions in tort or contract does not apply. Parties will have 10 years from the date of issue of the occupancy permit or, if none exists, the date of issue of the certificate of final inspection.

The facts

Brirek Industries Pty Ltd sought to develop and sell a particular property. It contracted McKenzie Group Consulting (Vic) Pty Ltd to provide building surveying services. As part of this role, McKenzie issued a number of building permits to Brirek over the course of the development.

The dispute

Brirek claimed that in issuing some of the building permits, McKenzie had breached a number of its contractual duties, and that McKenzie had also breached its duty of care in tort to exercise due care, skill and diligence.

The key issue was whether Brirek would be statute-barred from bringing those claims. There was a dispute over which limitation period applied, the limitation under the *Limitation of Actions Act 1958* (Vic) or the limitation under the *Building Act 1993* (Vic).

In summary:

- Section 5(1)(a) of the Limitation of Actions Act states that a person cannot bring an action in tort or contract after six years from the date on which that cause of action accrued; and
- Section 134 of the Building Act states that in an action for loss or damage arising from defective building work cannot be brought more than 10 years after the date of issue of the occupancy permit. Brirek's claims were within this 10-year limit.

The parties disputed whether all actions for loss arising from defective building work would have a 10-year time limit, or whether the six-year limit in tort and contract applied instead. In the latter case, the 10-year limit in the Building Act acted as a 'long-stop', that is, the 10-year limitation period only applied to actions where the Limitations of Actions Act would otherwise permit the commencement of proceedings.

The decision

In a unanimous decision, the Court of Appeal rejected the 'long-stop' interpretation of the trial judge, and also held that s134 should not be confined to negligence. The court held that the trial judge had erroneously constructed the statute by considering extrinsic materials before exhausting the application of the ordinary rules of statutory construction.[50] The court also found that many authorities relied upon by the trial judge were unpersuasive.[51]

For these reasons, the court held that Brirek was not statute-barred as all actions for loss arising from defective building work have a 10-year time limit.

The practical implications

This decision is significant, as it brings much-needed clarity into this area of the law. Building owners can now be certain that they will have 10 years to bring a claim relating to defective building work in Victoria.

However, the decision also means that building owners could be more exposed to latent defects from defective building work. The time limit for bringing an action will start running when the occupancy permit or certificate of final inspection is issued, and there is the risk that this time limit might expire before any loss or damage becomes apparent. Contractors should ensure that they have adequate insurance coverage in respect of defective building work.

While the decision is important for proceedings brought within Victoria, due to the different legislation in each state and territory, this decision may not be relevant in other jurisdictions.

50 Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165 [108]-[112].
51 Ibid [129]-[133].

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WA reviews its security of payments regime

A review of the *Construction Contracts Act 2004* (WA) (the ***Act***) is currently being undertaken to assess its effectiveness and how it is interacting with Western Australia's other building laws. The review is in its early stages, with a Consultation Discussion Paper outlining the terms of reference released in October 2014, together with a request for submissions by stakeholders. These submissions, which were due in November 2014, will be published shortly and will dictate which issues will become the focus of the review.

The Act

The Act, which came into force in January 2005, contains Western Australia's mechanism for achieving security of payment in the construction industry. An efficient security of payments system is important for the construction industry as projects usually involve a complex 'chain' of contractual relationships and payment disputes are relatively common. Without a dedicated dispute resolution mechanism such disputes tend to be protracted, impacting the entire contractual chain.

All Australian states and territories have legislation directed at this objective, yet the laws vary considerably. Western Australia's model is unique (as least as compared with the Eastern states' laws) in that, rather than creating a statutory right to receive payments, it operates to modify or imply provisions into contracts (for example, where a contract is silent as to when payment is to be made, the Act stipulates this). As with all of the security of payment legislation across Australia, the Act seeks to provide access to a rapid adjudication process for disputed payment claims.

The review: key issues

To stimulate stakeholders' responses, the Consultation Discussion Paper published statistics on the usage of the Act's adjudication process. The number of applications has been increasing significantly since the Act was introduced. Most applications have been made in the commercial building sector. Interestingly, adjudications have mostly concerned high value claims – the Act does not seem to be operating at the lower end of the contracting chain. This is of some concern as a large impetus for introducing the legislation was to assist small contractors in claiming payment for work performed.

Key issues include:

- whether the timeline for the adjudication process should be tailored to the complexity of the dispute and amount in question (rather than being fixed for all disputes); and
- whether the scope of the Act should be altered (for example by excluding domestic building contracts, or by including the resources sector which is currently exempted).

At a broad level, the review will consider the desirability of having a uniform national model for security of payment claims in the construction industry and the practicalities involved in this. Based on previous attempts at uniformity, this seems an unlikely outcome of this review.

Watch this space for the next instalment of the review, incorporating stakeholders' views as to what they consider to be the most pressing issues.

1 [2013] VSCA 217.

Chapter 4: Arbitration & dispute resolution

- *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10
- *Siam Steel International Plc v Compass Group (Australia) Pty Ltd* [2014] WASC 415
- Natural justice in arbitration – *Emerald Grain* and *TCL* decisions
- *Subway Systems v Ireland* [2014] VSCA 142
- *Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd* [2014] VSCA 166
- Changes to arbitration and mediation rules
- *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636

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Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10

The Supreme Court of Western Australia rejected a wide-ranging attack by a party seeking to avoid an arbitration clause following the termination of a contract.

The facts

Pipeline Services WA Pty Ltd contracted with ATCO Gas Australia Pty Ltd for the installation of underground gas transmission pipelines in Western Australia. After Pipeline commenced work, it was told that 'unexploded ordnance' from previous armed services activities had been discovered and that this would substantially alter the scope of work. ATCO advised Pipeline that the contract was terminated and tenders for a new contract would be received. Pipeline's tender was unsuccessful and it stopped work. A dispute subsequently arose regarding the amount owing to Pipeline for the work that it had already completed.

Clause 25 of the contract contained the dispute resolution or arbitration clause, which provided:

> 25.1 General
>
> a. Any party may, by written notice, notify the other of a dispute.
>
> b. Unless a party has complied with this Clause 25 that party may not commence court proceedings relating to any dispute under this Agreement...
>
> ...
>
> 25.2 Escalation to Contract Manager
>
> a. Any outstanding dispute must initially be put forward to the Contract Manager for resolution.
>
> b. If a party considers that the matter is urgent a special meeting may be convened...
>
> 25.3 Escalation to Chief Executive Officers
>
> If resolution of the dispute... cannot be achieved at the special meeting required by Clause 25.2, the dispute will be escalated to the Chief Executive Officers... of the parties, who must endeavour to resolve the dispute.
>
> 25.4 Escalation to Arbitration
>
> (a) If the dispute is still to be resolved within two weeks of having to be referred to the Chief Executive Officers then either party may refer the dispute to arbitration.
>
> ...

The dispute

Pipeline sued ATCO in the Supreme Court of Western Australia for breach of contract. ATCO then applied for those proceedings to be stayed because Clause 25 required the dispute and for the matter to be referred to arbitration.

The court considered a range of arguments made by Pipeline, which, in effect, sought to prevent the dispute from being arbitrated. Relevantly, those arguments included that Clause 25:

- did not survive the termination of the contract;
- was void for uncertainty; and
- did not apply because ATCO had waived its entitlement to insist on compliance with it.

The decision

Survival of termination

The court rejected Pipeline's argument that Clause 25 did not survive the termination of the contract. While the contract did not expressly provide that Clause 25 would survive termination (whereas other terms were expressed to do so), the court attributed to the parties an intention that Clause 25 would do so, based on:

- the well-established principle that an arbitration agreement is a separate agreement to the principal contract, so is separable, and survives termination of the underlying contract, in the absence of evidence of a contrary intention by the parties;
- the general requirement in Australia and elsewhere that courts adopt 'a broad, liberal and flexible approach to the construction of [arbitration] agreements' and 'favour a construction which provides a single forum for the adjudication of all disputes arising from, or in connection with, that agreement';
- the manifest inconvenience that would result from disputing parties to a terminated contract being required to go to court to determine whether the termination is valid before proceeding to arbitration to resolve their dispute;
- Clause 26.14 providing that any clauses that 'need to survive in order to protect the presumed intention of the parties as expressed in this Agreement' are to survive termination, even where they are not expressed to do so; and
- the absence of any expressed intention that Clause 25 would not survive termination.

Uncertainty

Pipeline's argument that Clause 25 was void for uncertainty was based on propositions, among other things, that:

a. the requisite content of the 'written notice' of dispute was unclear;

b. what was required to enable a dispute to be 'put forward' to the contract manager was uncertain;

c. Clause 25.2 did not mandate the convening of a 'special meeting', but escalation of the dispute to the chief executive officer, and then to arbitration, was conditional upon a special meeting having been convened;

d. the requirement for chief executive officers to 'endeavour' to resolve the dispute was unclear; and

e. the reference in Clause 25.4 that either party 'may' refer the matter to arbitration did not require either party to do so.

In deciding these questions, the court referred to well-established authority that the courts should prefer a construction that renders a commercial agreement certain to one that does not; and that, more specifically, courts should seek to construe arbitration clauses in a way that provides them with enforceable content, provided that can be done without rewriting them.

Applying these principles, the court rejected Pipeline's arguments. Regarding (a), (b), (d) and (e), the court decided that the relevant words and phrases were sufficiently certain according to their ordinary and contextual meanings. Regarding (c), the court accepted that a literal reading of Clause 25.2 supported Pipeline's argument, but decided that there was no need to interpret the provision so literally in light of the text and structure of Clause 25 (which indicated that a special meeting was mandatory) and the general approach to construction of arbitration clauses.

Waiver

The court rejected Pipeline's argument that ATCO had, by its response to Pipeline's claims before the proceedings were commenced, waived its entitlement to insist on compliance with the arbitration clause. It examined the correspondence between the parties and concluded there was nothing in it that indicated ATCO would not rely on the contractual provisions. The court stated that '[a]s ATCO was not the claimant in the dispute, and had no intention of commencing legal proceedings to enforce any claims, its failure to invoke provisions of the clause cannot be relied upon as evidence of an election to abandon its rights under the clause, or to waive compliance by Pipeline with its requirements'.

The practical implications

When a dispute arises between contracting parties, they will be held to the dispute resolution processes provided for in their agreement. This decision is yet another example of courts' willingness to enforce arbitration agreements, a goal that is reflected in international and domestic arbitration legislation. Careful drafting of arbitration and dispute resolution clauses will limit the risk of costly and time-consuming satellite disputes about their operation.

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Siam Steel International Plc v Compass Group (Australia) Pty Ltd [2014] WASC 415

Where a dispute resolution clause requires parties to issue a notice of dispute before commencing arbitral proceedings, that notice must explicitly identify its character as a notice of dispute and accurately identify the matters in dispute.

The facts

Siam Steel International Plc (***SSI***) entered into an agreement with the defendant, Compass Group (Australia) Pty Ltd, by which SSI agreed to supply accommodation buildings.

Under the contract, SSI provided security by way of three unconditional bankers' undertakings to account for payments made by Compass in advance. Retention monies were also provided.

The contract also expressly provided that any arbitration under the contract was to be effected in accordance with the *Commercial Arbitration Act 1985* (WA).

The dispute

Upon installation of the buildings, Compass refused to issue a certificate of practical completion or release the retention monies, as it claimed SSI had not completed the work and the buildings were defective. SSI said that it had carried out the rectification works and that it had achieved practical completion.

Compass had written to SSI stating its intention to have recourse to the retention monies or cash security to cover the costs of rectifying the defective works. Further correspondence was sent by SSI to Compass, and from Compass to SSI, in which each party made claims against the other.

SSI filed a writ in the Supreme Court seeking, among other orders, a declaration that Compass was not entitled to call upon the bankers' undertakings. Compass issued a notice to SSI seeking to refer the matter to arbitration.

Compass sought orders that the matter be stayed and referred to arbitration under either section 8 of the *Commercial Arbitration Act 2012* (WA) (the ***CAA***) or, alternatively, s7(2) of the International Arbitration Act 1974 (Cth) (the ***IAA***). SSI opposed the application, submitting that on the express words of the contract the CAA applied (the *Commercial Arbitration Act 1985* (WA) being read to mean the CAA) and there was no contemplation of, or agreement to, application of the IAA.

The decision

Did the IAA apply?

Justice Le Miere held that s7(1) of the IAA applied to the arbitration agreement, as SSI was domiciled or ordinarily a resident in a convention country (namely Thailand). According to his Honour, once the requirements of s7 are satisfied, a party cannot rely on jurisdiction or choice of law clauses to resist the grant of a stay order.

What constitutes a notice of dispute?

The relevant arbitration agreement provided that a notice of referral had to be given within 90 days of the issue of a notice of dispute, otherwise the dispute could not be referred to arbitration.

SSI submitted that a notice of dispute had been issued 90 days or more before Compass gave its notice of referral and, accordingly, the dispute could not be referred to arbitration.

According to his Honour, the dispute resolution agreement in question required some measure of formality in the notice of dispute so that the recipient knew that the dispute resolution process had been triggered, relevant rights were being exercised and time had begun to run. The notice needed to adequately identify the matters the subject of the dispute.

His Honour set out a two-step process for determining whether an alleged notice satisfies the requirements for a notice of dispute. The first step is to determine whether a reasonable person in the position of the recipient of the notice would understand it to have been given for the purpose of giving notice of a dispute between the parties under the dispute resolution agreement. The relevant principle here is the 'perspective rule' under which the reasonable person is taken to stand in the shoes of the addressee of the words at issue. If this first step is satisfied, the next step is to determine whether the alleged notice adequately identifies the matters that are the subject of the dispute. Justice Le Miere noted that this second step may be satisfied by incorporating or expressly referring to another document which identifies the matters the subject of the dispute.

His Honour reviewed various correspondence that each of the parties alleged constituted a notice of dispute. SSI contended that a letter it sent to Compass's was a valid notice of dispute where it alleged Compass's work was defective and proposed a meeting to resolve the defects. Compass contended that a letter it sent SSI, with the subject: 'Breach of contract by Siam Steel International Plc', where it set out alleged breaches of contract and claimed an entitlement to security, constituted a notice of dispute.

However, none of the correspondence pointed to by the parties met his Honour's two step test. SSI's letter to Compass did not expressly identify that it was a notice of dispute under the agreement, did not sufficiently identify the matters in dispute, and, as such, would not be reasonably understood to be a notice of dispute. Similarly, Compass's letter to SSI was not a definite and direct statement of dispute under the agreement and a reasonable person would not have understood it to be a notice of dispute under the agreement. Accordingly, neither of the parties' correspondence constituted a valid notice of dispute.

In respect of SSI's argument that the writ constituted a notice of dispute, Justice Le Miere stated that taking a step in court proceedings, or informing the other party that the first party proposes to take that step or confer about it, is the antithesis of giving notice of dispute.

Justice Le Miere held that, as no notice of dispute had been given, Compass's purported notice of referral of the dispute to arbitration was of no force or effect. It was open to either party to give to the other party a notice of dispute and, if the dispute is not otherwise resolved, to refer the dispute to arbitration in accordance with the dispute resolution clause of the contract.

By rejecting the parties' agreed view that a notice of dispute had been given, Justice Le Miere placed the dispute back at the pre-notice stage. This meant that the parties could not immediately refer the dispute to arbitration and potentially delayed the resolution of their dispute.

Was the arbitration agreement inoperative?

Justice Le Miere rejected SSI's submission that the failure of either party to 'enliven' the arbitration agreement by giving a notice of dispute in accordance with the clause rendered the arbitration agreement inoperative.

His Honour stated that an arbitration agreement is not inoperative in relation to particular claims merely because an arbitrator has not been appointed or a step that must be taken before an arbitrator is appointed has not yet been taken. His Honour went on to state that the effect of the IAA is that the parties are to be held to their bargain to arbitrate, except where the arbitration agreement has ceased to have effect for the future.

Similarly, his Honour did not accept SSI's argument that, in the absence of an enlivened arbitration agreement, the court has no jurisdiction to make an order under the CAA or the IAA.

Referral to arbitration

It was submitted that the court could not refer the parties to arbitration because no valid notice of referral to arbitration had been given by the parties and no arbitrator had been validly appointed.

According to Justice Le Miere, when s7(2) of the IAA says 'refer the parties to arbitration' it does not mean 'refer the dispute to the arbitrators'. His Honour stated that, on its proper construction, the section simply means that, once the action is stayed by the court, the parties have no other remedy than going to arbitration (should they wish to pursue their dispute).

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Practical implications

This decision has four key implications:

- The IAA may apply to an agreement with an international party regardless of whether the agreement expressly provides for the application of another jurisdiction's commercial arbitration legislation.
- In order for a purported notice to be considered a notice of dispute, it must satisfy two requirements. First, a reasonable person in the shoes of the recipient must understand that it is a notice of dispute under the arbitration agreement. Second, the purported notice must adequately identify the matters the subject of the dispute.
- Where a valid arbitration agreement exists, the court may stay the proceedings and refer the parties to arbitration, regardless of what stage the parties have reached in the dispute resolution process.
- Even if the parties agree that notice of dispute has been given, the court may take the opposite view and require notice to be given before the dispute can be referred to arbitration. This risk of further delay highlights the need for care to be taken when drafting a notice of dispute.

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Natural justice in arbitration – *Emerald Grain and TCL* decisions

Parties dissatisfied with an arbitral award face considerable hurdles to set aside an award due to an alleged breach of natural justice.

Natural justice under the Model Law

The *International Arbitration Act 1974* (Cth) (the ***IA Act***) gives the UNCITRAL Model Law on International Commercial Arbitration (the ***Model Law***) the force of law in Australia, and, in doing so, provides very limited grounds for a party to have an arbitral award set aside. One of those grounds is that the award conflicts with public policy. Section 19 of the IA Act provides that an arbitral award will be in conflict with the public policy of Australia if:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred in connection with the making of the award.

Two recent decisions highlight the difficulties in resisting enforcement of an award due to an alleged breach of the rules of natural justice.

TCL Air Conditioner (Zhongshan) Co Ltd v *Castel Electronics Pty Ltd*

The facts

TCL and Castel have been engaged in a lengthy dispute relating to exclusive distribution rights for air conditioners in Australia. In late 2013, an arbitral tribunal rendered an award in favour of Castel. The most recent skirmish involved TCL's appeal to the Full Federal Court to set aside the trial judge's finding that the award was not in breach of the rules of natural justice and was not in conflict with the public policy of Australia.[52]

TCL argued that:

- there was no probative evidence for the three critical factual findings made by the arbitrators (broadly alleged under the 'no evidence rule'); and
- the arbitrators could not reasonably make findings as to loss other than in accordance with TCL's expert evidence, when the arbitrators accepted that Castel's expert witness lacked expertise (broadly alleged under the 'no hearing rule').

TCL submitted that the court must revisit the facts of the case afresh to assess whether the rules of natural justice were followed by the arbitrators.

The decision

The Full Federal Court unanimously rejected TCL's appeal and found that:

The application was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.

The court referred to the policy behind the enforcement of international commercial arbitral awards and highlighted the danger that could occur if judicial review of arbitral awards reduced the concepts of natural justice to an analysis of formulaic 'black letter rules'.

Their Honours found that, although it was not necessary for the trial judge to hear TCL's application, the first instance judgment plainly showed that the arbitrators did not engage in 'guesswork or speculation'; there was full cross-examination of lay and expert witnesses, and the arbitrators were entitled to take all of the evidence and make their own assessment of it. TCL received a 'scrupulously fair' hearing and no rule of natural justice was breached.

52 [2014] FCAFC 83.

The court made the following observations about the rules of natural justice:

- The essence of natural justice is fairness. There can be no breach of any rule of natural justice unless there is real unfairness and true practical injustice in how the dispute resolution was conducted.
- The content of the rules of natural justice varies according to the circumstances and in particular the context of the dispute resolution process in question. In this case, the relevant context is international commercial arbitration, where parties consent to a private arrangement under which errors of fact or law are not legitimate bases for court intervention.
- The natural justice provisions of the Model Law and IA Act deal with fundamental conceptions of justice and fairness and should not be invoked for, or in respect of, minor, technical breaches.
- In most, if not all cases, a party that claims to have suffered such unfairness or injustice should be able to show it with tolerable clarity and expedition, without a detailed re-examination of facts or factual evaluation as occurred in the first instance of this matter.
- There may be real unfairness or injustice if a party can readily demonstrate that it has been denied an opportunity to be heard on an important and material issue that could reasonably have made a real difference to the outcome of the arbitration.

Emerald Grain Australia Pty Ltd v *Agrocorp International Pte Ltd* [2014] FCA 414

The facts

Agrocorp commenced arbitration in Australia against Emerald Grain in relation to a contract for the sale, in bulk, of Australian canola. Agrocorp claimed that it had incurred costs and lost profits due to Emerald Grain's failure to load a full shipment, and due to delays relating to import permits. Emerald Grain cross claimed for breach of contract and alternatively in negligence.

The arbitral tribunal made an award that was substantially in Agrocorp's favour.

Similar to TCL's claims discussed above, Emerald Grain applied to the Federal Court to have the award set aside under s19 of the IA Act, on the basis that it was in conflict with the public policy of Australia as it breached the rules of natural justice. Emerald Grain alleged that:

- there was no probative evidence before the tribunal to permit it to make certain findings (the 'no evidence claim'); and
- the tribunal made findings based on its own opinions and ideas without providing Emerald Grain adequate notice (the 'no hearing claim').

The decision

Justice Pagone rejected Emerald Grain's arguments regarding the 'no evidence claim' and the 'no hearing claim', dismissing the application. His Honour provided guidance on the circumstances where an arbitral award is claimed to be in breach of the rules of natural justice:

- When determining whether to set aside an arbitral award, Australian courts should aim to give effect to the policy of the IA Act to uphold arbitral awards, and a decision that an award is in conflict with public policy requires clear evidence to this effect. With this overarching policy in mind, the reasons set out in an award should be read consistently with one another to overcome any potential ambiguity.
- A dissatisfied party to an arbitral award has no right of appeal to challenge a tribunal's findings of fact. The reasons of an arbitral tribunal are not to be construed as if they were the decision of a court, and a challenge to an arbitral award is not to be treated like an appeal challenging the facts found by a first instance court from which an appeal may lie. It is the courts' role to ensure that the facts found were open to the arbitral tribunal from the material that was before it rather than determining that the facts were found correctly.

- Whether an arbitral award breaches the rules of natural justice (and is therefore contrary to, or in conflict with, Australian public policy) depends on the content of the rule in the circumstances of the particular case. Provisions of the Model Law are typically applied with uniformity between countries that have given effect to it.
- Broadly, arbitral awards should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are remedied.

Practical implications

In both *TCL v Castel* and *Emerald Grain*, parties resisted enforcement of an award, alleging the award was in breach of the rules of natural justice. In both cases, the parties' applications were, to some degree, an attempt to reopen the factual findings made by the respective arbitral tribunals. As both decisions show, a breach of the rules of natural justice under the IA Act or Model Law will only be established where there is clear evidence of circumstances that caused substantial and material injustice to a party. Typically, courts will not reconsider factual findings that were reasonably found to exist by an arbitral tribunal, even if a court may reach a different view of the facts.

Both cases provide useful guidance on the court's supervisory role in enforcing arbitral awards and hearing applications to resist them. It is clear that the policy of the Model Law – consistent and fair recognition of awards – is central to courts' consideration of applications seeking to resist enforcement.

Parties that are considering including an arbitration agreement or electing to submit disputes to arbitration should be aware of the limited, and fundamentally different, options for recourse and appeal, as opposed to those available in litigation.

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Subway Systems v Ireland [2014] VSCA 142

Where a dispute that is covered by an arbitration agreement is referred to a state-based statutory tribunal, it will typically be stayed and referred to arbitration by operation of the arbitration acts in all Australian states.

The facts

A dispute arose between Mr and Mrs Ireland (the ***Irelands***) and Subway Systems in relation to a Subway sandwich business that the Irelands operated in a shopping centre. The relationship between the parties was governed by the *Retail Leases Act 2003* (Vic) and a franchise agreement. The franchise agreement between the parties contained a clause referring disputes to arbitration. The Irelands sought to have their dispute with Subway Systems heard in the Victorian Civil and Administrative Tribunal (***VCAT***), instead of commencing arbitration.

The dispute

The question was whether VCAT was a 'court' for the purposes of s8 of the *Commercial Arbitration Act 2011* (Vic) (the ***CA Act***), and, if so, whether the VCAT hearing should be stayed and the dispute referred to arbitration.

Section 8 of the CA Act provides:

> 8. Arbitration agreement and substantive claim before court (cf Model Law Art 8)
>
> (1) a court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests...refer the parties to arbitration...

However, the word 'court' in s8 of the CA Act is not defined.

The decision

A majority of the Victorian Court of Appeal held that VCAT was a court for the purposes of s8 of the CA Act so that the dispute would be referred to arbitration, although each member of the court approached the question differently.

In the majority, President Maxwell's decision focused on the policy behind the Victorian Legislatures' intention to enact the UNCITRAL Model Law on International Commercial Arbitration (the ***Model Law***) as domestic Victorian law in the CA Act. This policy is to promote uniformity and harmonisation in decisions under the Model Law and 'when parties have agreed to have disputes between them determined by private arbitration, neither party is at liberty to litigate the matter in dispute through the adjudicative mechanisms of the State.'

Appeal Justice Beach, also in the majority, considered the unsatisfactory outcome if VCAT was found not to be a court: that parties would have a choice of forums in which to have their disputes heard, either at VCAT or under arbitration.

Conversely, Acting Appeal Justice Kyrou's analysis focused on the text of the Act and other statutes where the word 'court' is applied and noted the intentional omission of VCAT in various definitions of court in legislation. This led his Honour to find that VCAT was not a 'court' for the purposes of s8 of the Act.

The practical implications

The Court of Appeal's decision reinforces that parties who have previously agreed to arbitrate their disputes will be held to the terms of their agreement and proceedings commenced in statutory tribunals will be stayed in favour of arbitration.

Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd [2014] VSCA 166

Claiming 'through or under': companies may be subject to arbitration agreements that were entered into by other companies in the same corporate group.

The facts

Huhtamaki Australia Pty Ltd supplied flexible plastic packaging for yoghurt containers to another Australian company, Lion-Dairy & Drinks Pty Ltd. The plastic packaging supplied by Huhtamaki Australia contained ink products that were supplied by a company within the same corporate group, Huhtamaki New Zealand Limited, that was itself supplied by the manufacturer, Flint Ink NZ Limited. The supply contract between Huhtamaki NZ and Flint Ink NZ contained an arbitration agreement. Huhtamaki Australia was not a party to the arbitration agreement.

The dispute

When the plastic packaging degraded and failed, Lion Dairy brought proceedings against Huhtamaki Australia, which in turn, commenced a third party claim in court against Flint Ink NZ, claiming that the ink products it supplied were the cause of the defects. Huhtamaki Australia alleged that Flint Ink NZ owed it a duty of care due to the proximity between Huhtamaki Australia and Huhtamaki NZ, as both companies:

- were in the same corporate group;
- manufactured and supplied food packaging to their customers, including to Lion-Dairy; and
- were vulnerable to suffering economic loss if Flint Ink NZ recommended the use of unsuitable inks.

Flint Ink NZ submitted that it had no dealings with Huhtamaki Australia and that Huhtamaki Australia's claim was properly with Huhtamaki NZ. Accordingly, Flint Ink NZ applied for a stay of the third party court proceeding in reliance on s7 of the *International Arbitration Act 1974* (Cth) (the ***IA Act***). Section 7 of the IA Act provides that the IA Act applies where the arbitration agreement is governed by a convention country, such as New Zealand and Australia.

Further, s7(2) imposes a mandatory stay of court proceedings where:

> (a) proceedings instituted by a party to an arbitration agreement ... against another party to the agreement ... ; and
>
> (b) the proceedings involve the determination of a matter that ... is capable of settlement by arbitration;
>
> on application of a party to the agreement, the court shall .... stay the proceedings or so much of the proceedings as involves the determination of that matter...and refer the parties to arbitration in respect of that matter.

Huhtamaki Australia contended it was not a party to the arbitration agreement and therefore the third party proceeding was not instituted by a party to an arbitration agreement. Addressing this issue, Flint Ink NZ relied on s7(4) of the IA Act, which provides:

> (4) ... a reference to a party includes a reference to a person claiming through or under a party.

The Victorian Court of Appeal (Chief Justice Warren and Justices Nettle and Mandie) considered the overlapping questions of whether the Huhtamaki Australia's claim against Flint Ink NZ was 'through or under a party' so as to engage s7 of the IA Act, and, further, whether the claim was capable of settlement by arbitration.

The decision

The Court of Appeal held that Huhtamaki Australia's claim was 'through and under a party' and was capable of settlement by arbitration, and accordingly, stayed the third party claim and referred the parties to arbitration.

Through or under

In *Tanning Laboratories v O'Brien*,[54] the High Court held that whether a person is claiming through or under a party must be determined by identifying the subject matter of the controversy which falls for determination rather than by the formal nature of the proceedings or the precise legal character of the person initiating the proceedings.[55]

Applying this reasoning, the Court of Appeal considered whether the claim made by Huhtamaki Australia was derived from any right already vested in Huhtamaki NZ (a party to the arbitration agreement) and whether the parties were sufficiently proximate to support this mode of claim. Where a claim can be made independently of the relationship between potential parties to a dispute, it will not be 'through or under' the potential claimant or defendant. The Court of Appeal observed:

> The essence of Huhtamaki Australia's claim is that either under the ink supply agreement, or arising from it, Flint Ink NZ owed Huhtamaki Australia a duty of care which it breached by advising Huhtamaki NZ to use [the ink products supplied by Flint Ink NZ to Huhtamaki Australia's customer][56]

The Court of Appeal held that, as Flint Ink NZ had no dealings with Huhtamaki Australia and that every circumstance of Huhtamaki Australia's claim necessarily concerns and originates with Huhtamaki NZ, the duty of care pleaded by Huhtamaki Australia established the requisite degree of proximity. As such, Huhtamaki Australia was claiming through or under Huhtamaki NZ for Flint Ink NZ's breach of agreement with, or duty of care owed to, Huhtamaki NZ.

Capable of settlement by arbitration

Proper characterisation of the dispute was central to the Court of Appeal's finding that the dispute in question was capable of settlement by arbitration. The trial judge characterised the claim as being for indemnification, contribution or damages from a third party, but was not capable of settlement by arbitration, as there was no arbitration agreement applicable to Huhtamaki Australia, as a third party claimant. Adopting a different course, the Court of Appeal characterised the controversy between Huhtamaki Australia and Flint Ink NZ as whether Flint Ink NZ's breach of agreement with, or duty of care owed to, Huhtamaki NZ resulted in a breach of agreement with, or duty of care owed to, Huhtamaki Australia. The Court of Appeal held that the breach (in both cases) arose out of contract and was therefore capable of being settled by arbitration, and indeed was typical of the kind of disputes referred to arbitration.

By claiming through or under Huhtamaki NZ, Huhtamaki Australia fell within the ambit of s7(4) of the IAA and was deemed a party to the arbitration agreement for the purpose of its negligence claim against Flint Ink NZ. To that end, the Court of Appeal ordered that the third party proceeding be stayed and referred to arbitration under s7(2) of the IA Act.

The practical implications

- Where there is a dispute governed by an arbitration agreement to which the IA Act applies, an Australian court must stay the proceeding and refer the matter to arbitration.
- A company may be bound by an arbitration agreement entered into by another company in its corporate group if there is a claim that affects both companies and there is both a sufficient connection between the companies and the nature of the claim is one where the company can only establish its claim through the other.
- The implications of this decision may operate either as a benefit or detriment to companies within a corporate group that are subject to arbitration agreements.
- Parties can avoid unintended consequences from such arbitration agreements by performing regular audits on existing arbitration agreements entered into by companies within corporate groups.
- While it is unlikely that different drafting of an arbitration agreement would change this result, parties can proactively manage the possible consequences by determining which entity in a corporate group is best placed to enter into contracts for a particular project or supply chain and actively considering what dispute resolution mechanism is to apply to a project or series of transactions.

54 Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332.
55 Ibid 353.
56 Flint Ink NZ Limited v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd [2014] VSCA 166 (Chief Justice Warren, Justices Nettle and Mandie), [22].

Changes to arbitration and mediation rules

In 2014, a number of commonly used arbitration rules were revised, with a focus on modernisation and creating greater flexibility around arbitration procedures. The International Chamber of Commerce (ICC) also updated its mediation rules and guidance notes.

Summary of changes to major arbitration rules

The arbitration rules that were revised in 2014 included:

- The Institute of Arbitrators & Mediators Australia rules (***IAMA rules***) (effective 2 May 2014).
- The International Centre for Dispute Resolution (***ICDR rules***) (effective 1 June 2014).
- The London Court of International Arbitration rules (***LCIA rules***) (effective 1 October 2014).

The IAMA rules are generally used for domestic arbitration in Australia while the ICDR and LCIA rules are used for international arbitration. The International Centre for Dispute Resolution is the international arm of the American Arbitration Association (the ***AAA***).

Quicker, faster arbitration

In general, the IAMA, ICDR and LCIA rules have been modernised in order to:

- shorten time periods for filing documents or handing down awards;
- allow for electronic submission of certain documents; and
- prevent formal deficiencies delaying steps, such as the timely formation of an arbitral tribunal.

Consolidation and joinder

Under the ICDR and LCIA rules (but not the IAMA rules) tribunals now have the power to consolidate multiple arbitrations into a single arbitration in circumstances where the parties are the same, and the disputes arise under the same or compatible arbitration agreements.

The mechanisms used to consolidate proceedings differ in approach. Under the ICDR rules, a party can request the appointment of a 'consolidation arbitrator' to determine whether two or more pending arbitration proceedings under the ICDR rules or any other rules administered by the AAA or the IDCR can be consolidated. Unless the parties agree otherwise, the consolidation arbitrator shall not be appointed to the consolidated proceedings but, instead, may select one of the previously appointed tribunals to serve in the consolidated proceedings and the ICDR shall complete the appointment of the tribunal as necessary.

Under the LCIA rules, provided LCIA Court approval is granted, a tribunal may order consolidation:

- with the written consent of all parties; or
- where no arbitral tribunal has yet been formed in respect of the related arbitral proceedings; or
- if a tribunal has already been formed, if the arbitrators are the same across the tribunals.

The LCIA Court may also determine unilaterally, after allowing the parties' views to be heard, that proceedings should be consolidated. This can only occur in limited circumstances, where no arbitral tribunals have as yet been formed and the same parties have disputes under the same arbitration agreement.

Parties under the ICDR, LCIA and IAMA rules also have the option to join other parties to an arbitration. All the rules contemplate joinder by the consent of all parties (including, for the purpose of the LCIA and IAMA, by prior consent in the arbitration agreement), while the IAMA rules provide that joinder can also occur at the request of a party if the tribunal is satisfied, after giving parties the opportunity to be heard, that the party to be joined will not be prejudiced by the joinder.

Emergency relief

Under the LCIA and ICDR rules, parties can now apply for an emergency arbitrator prior to an arbitration tribunal being formed. This addition is designed to provide parties with an alternative to court injunctions or emergency hearings where the parties would prefer to maintain confidentiality instead of having the matter being heard in open court, or otherwise have concerns around international enforcement of court orders. The IAMA rules do not currently provide for the appointment of emergency arbitrators.

Code of conduct

While many of the changes to the LCIA rules are in line with those made by other institutions, the LCIA's reform is unique in that its arbitration rules are the first to provide a basic code of conduct regulating the legal representatives of the parties throughout the arbitration process.

These 'general guidelines' prevent legal representatives from:

- engaging in activities intended unfairly to obstruct the arbitration;
- jeopardising the finality of any award;
- knowingly making false statements to the tribunal or the LCIA Court;
- knowingly procuring false evidence;
- concealing documents ordered by the tribunal; or
- initiating unilateral contact with the tribunal without informing the other parties.

If a Tribunal finds that a party's legal representative has violated the guidelines, it may impose sanctions including, but not limited to, issuing a written reprimand or a written caution as to future conduct in the arbitration. Importantly, there may also be adverse cost implications.

In addition, Article 18 provides that any change or addition to a party's legal representation after the formation of the tribunal requires the approval of the tribunal which can be withheld where such change could compromise the composition of the tribunal or the finality of the award. This is intended to prevent parties from obstructing arbitral proceedings by repeatedly appointing new counsel.

Comment

Since the 2010 UNICTRAL Rules were issued, there have been a number of updates from arbitral institutions, including the 2011 ACICA rules (and the Exposure Draft for 2015 Rules), 2012 ICC Rules and the 2013 SIAC Rules. Although the raft of updated rules are not uniform in their changes, there is a general shift towards modernising procedures to reflect the needs of commercial parties to promote efficiency, particularly where multiple parties are involved.

International Chamber of Commerce updates mediation rules

The International Chamber of Commerce (***ICC***) also updated its mediation rules and guidance notes. The new mediation rules are short, succinct and clear. The rules provide for the fundamentals of mediation – in particular, providing for confidentiality and providing that documents and statements made as part of the mediation process are not to be produced as evidence – while retaining sufficient procedural flexibility. The appendix to the rules sets out the fees and costs associated with making a request for mediation under the ICC Mediation Rules. These cover both the filing fee and the administrative expenses of the ICC. In addition to the rules, the ICC has published guidance notes that are a very practical guide to both the rules and the general conduct of mediations.

Drafters should, however, take note of two issues. The first is that article 7(4) provides that the parties shall act in good faith throughout the mediation. However, good faith means different things in different countries. In Australia, the term is not precisely defined and has been the subject of many cases as to what is required by an obligation to act in good faith. Drafters may wish to consider whether they or their client wish to be bound by such an obligation. Secondly, article 10(2) provides that unless the parties have otherwise agreed, the parties may commence or continue any judicial, arbitral or similar proceeding, notwithstanding that the mediation is taking place under the ICC Mediation Rules. Express wording will therefore be required in the parties' arbitration agreement or dispute resolution clause if mediation is to be a precursor to judicial arbitral or similar proceedings.

When incorporating mediation into a tiered dispute resolution clause, it is important that the procedure is provided for with certainty, and yet with sufficient flexibility to deal with the specifics of any particular dispute. The ICC rules achieve that purpose.

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Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636

This decision reinforces the Federal Court's pro-arbitration approach to dispute resolution by rejecting a challenge to enforcement proceedings made under Australia's arbitration legislation by a judgment debtor.

The facts

Gujarat NRE Coke Limited and Armada (Singapore) Pte Ltd (Under Judicial Management) were parties to a contract under which Gujarat agreed to ship and Armada agreed to provide tonnage for the transportation of six cargoes of coking coal annually for each of the years 2008 to 2012 (the ***COA***).[57]

The dispute

Armada commenced arbitration against Gujarat for breach of contract arising from Gujarat's failure to nominate laycans under the COA for the six shipments in 2009, and the first three shipments in 2010. Armada also reserved its rights to allege further breaches in respect of future shipments.

The arbitration clause in the COA relevantly provided that each of the parties would appoint one arbitrator and those respective arbitrators would then jointly choose a third arbitrator. The clause also stipulated that the arbitrators must be 'commercial men who are members of the Institute of Arbitrators in London'.

The arbitral tribunal (the ***Tribunal***) made three partial awards in favour of Armada awarding damages for past and future losses incurred. The partial awards related to:

- the composition of the Tribunal and its jurisdiction to hear the dispute (the ***First Award***);
- the 'substantive' question of whether Gujarat breached the COA and Gujarat's main defences, as well as principles regarding the assessment of damages (the ***Second Award***); and
- Armada's entitlement to damages flowing from Gujarat's breach of the COA (the ***Third Award***).

Following the grant of the awards, Armada applied to the Federal Court of Australia for enforcement under section 9 of the *International Arbitration Act 1974* (Cth) (the ***Act***).

The decision

Justice Foster found that Armada had established that each of the First, Second and Third Awards were 'foreign awards' within the meaning of s8(1) of the Act and that Gujarat therefore had the onus of proof in relation to its challenge to the enforcement of the awards.

Gujarat challenged the enforcement of the awards on the following five grounds:

- the appointed arbitrators were not 'commercial men' as required by the COA. Gujarat argued that Armada had therefore not satisfied the threshold requirement in s9 of the Act, which requires the party seeking enforcement of an award to satisfy the court that the award was made by a tribunal which was operating under the arbitration agreement relied upon by it and produced to the court (***Ground 1***);
- as the appointed arbitrators were not 'commercial men', under s8(5)(e) of the Act, the awards were not made in accordance with the parties' agreement or, failing such agreement, it was not in accordance with the law of the country where the arbitration took place (***Ground 2***);
- relying on s8(5)(f) of the Act, insofar as the Second Award related to a declaration as to future loss, it had not yet become binding and should be set aside (the relevant declaration by the Tribunal provided that 'The Tribunal declares that Armada will be entitled to damages in respect of future shipments (if any) which Gujarat fails to perform..') (***Ground 3***);

57 Note: On 1 June 2009, Armada was placed under judicial management by the High Court of the Republic of Singapore. Judicial management under the laws of Singapore is not liquidation. A company under judicial management continues in business. The idea behind judicial management is that the court will assist corporate and debt restructuring with a view to the relevant corporation continuing in existence.

- further or alternatively, insofar as the Second Award related to a declaration as to future loss, it was contrary to the public policy of Australia (s8(7)(b) of the Act) (***Ground 4***); and
- the contract was a 'sea carriage document' within the meaning of s11 of the *Carriage of Goods by Sea Act 1991* (Cth) (the COGS Act), and therefore the Tribunal did not have jurisdiction to render Gujarat liable for damages (***Ground 5***).

In considering Grounds 1 and 2, Justice Foster held that, although Australian courts have the power to determine the jurisdiction of arbitral tribunals, they should only exercise that power where it is necessary to do so. His Honour also held that the appointed arbitrators, despite being lawyers, were 'commercial men' within the meaning of the arbitration clause due to their commercial arbitral experience. In any event, as Gujarat agreed to their appointment (and even appointed a lawyer as an arbitrator itself) it had waived its right to object to the appointment, or was otherwise estopped from doing so.

In considering Grounds 3 and 4, Justice Foster declined to give effect to the Second Award insofar as it related to future shipments. Instead, however, his Honour permitted Armada to amend its application if required, in relation to any awards that were made by the tribunal before his Honour's decision was handed down.

Gujarat's challenge on Ground 5 was submitted in reliance upon the judgment of Justice Foster in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) ALR 161 and on the basis that the COA was a 'sea carriage document' within the meaning of s11 of the COGS Act. If accepted by the court, this argument would result in the arbitration clause of the COA being of no effect (meaning that the awards could not be enforced in Australia). Justice Foster's decision in *Dampskibsselskabet* was, however, overturned by the Full Federal Court. His Honour therefore found that the Full Court's reasoning in that appeal was a complete answer to Ground 5 and rejected the challenge.

The practical implications

This decision reinforces the pro-enforcement approach of the Federal Court and demonstrates the limited circumstances in which a court may set aside an arbitral award under the Act. The judgment is also a cautionary warning to parties resisting enforcement that once the party seeking to enforce the award has satisfied the threshold criteria for enforcement under the Act, the party resisting enforcement has the burden of proof in respect of the challenge to the award. Any such challenge to enforcement may have cost consequences which, in this case, lead to an order that Gujarat must pay Armada's costs.

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