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Construction Matters

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Important Reminder for the Construction Industry

In less than four months' time, on 9 November 2023, the recent unfair contract term amendments will commence. From that time, potentially crushingly large civil penalties will apply to entry into contracts containing unfair contract terms, as well as attempts to rely on unfair contract terms (see our November 2022 issue). Now is the time to critically review standard terms or contract suites.

Please let us know if you would like assistance with that task or want to understand better how the changes may affect you.

Analysis of the Decision in *Downer Utilities Australia Pty Ltd v Alinta Energy Transmission (Chichester) Pty Ltd* (No 2) [2023] WASC 1

Greg Steinepreis and Blake Di Virgilio

The applicant, Downer Utilities Australia Pty Ltd (Downer), was the contractor under two engineer, procure and construct contracts (Contracts). The respondents, Alinta Energy Transmission (Chichester) Pty Ltd and another related entity (Alinta), engaged Downer under the Contracts for work on the Chichester Solar Gas Hybrid Project located in the Pilbara region.

The crux of the dispute between Downer and Alinta was that the superintendent appointed for the Contracts was an employee of Alinta, and Alinta improperly influenced the superintendent in the exercise of powers under the Contracts such that allegedly favourable treatment was given to Alinta.

Downer had pending claims against Alinta for extension of time and delay costs that were in dispute, and was exposed to a claim for liquidated damages for delay. It had potential causes of action relating to the alleged conduct of the superintendent.

Downer brought an application for pre-action discovery.

Downer submitted it had documentation that suggested Alinta and the superintendent had discussions about Downer's rights under the Contracts to which Downer was not privy, and that the metadata of certain documents sent by the superintendent to Downer in fact were authored by Alinta personnel.

Pre-action Discovery: Potential Causes of Action

Although Downer had some information about the potential causes of action, Archer J held that even if Downer believed it had a *prima facie* case and possessed some information about the alleged conduct, it may still seek pre-action discovery from Alinta to assess the risk and cost of litigation. Allowing Downer to obtain additional documents from pre-action discovery was judged to be in the interests of both justice and efficiency. In the words of Archer J:

"Believing something and having sufficient material to enable a decision to be made as to whether to commence proceedings are two different things. A person may firmly believe he or she has been wronged, yet not have sufficient information to decide whether he or she should litigate."

There were two potential causes of action on which Downer sought pre-action discovery from Alinta. The first concerned Alinta engaging in misleading and deceptive conduct at the time the Contracts were entered into, with Downer asserting that Alinta never intended the selected superintendent to act impartially, fairly, honestly and reasonably as required under the terms of the Contracts (Pre-contractual Claims). The second was that Alinta improperly interfered with the superintendent's functions during the administration of the Contracts (Interference Claims).

Pre-contractual Claims

Alinta disputed that Downer had established it may have a cause of action against Alinta for the Pre-contractual Claims. Evidence in the form of correspondence between Alinta and the superintendent was led by Downer regarding the relationship between Alinta and the superintendent, suggesting there may have been some sort of misleading and deceptive conduct engaged in before entering into the Contracts.

Archer J observed that some of the evidence gave rise to a suspicion that Alinta had interfered with the superintendent before entering into the Contracts, but she did not accept that there was enough objective evidence to suggest the Pre-contractual Claims were anything more than a suspicion. Accordingly, no orders were made regarding the Pre-contractual Claims.

Interference Claims

The sole issue in dispute regarding the Interference Claims was whether Downer already possessed enough information to enable it to decide to commence proceedings.

The court carefully examined the principles involved in an application for pre-action discovery and the issues that must be addressed in such an application.

Archer J agreed with Downer that pre-action discovery from Alinta would shed light on various issues regarding the Interference Claims and that Downer may have a cause of action against Alinta as a result of its interactions with the superintendent.

The result was that Alinta was ordered to provide pre-action discovery of several categories of documents to assist Downer's decision on whether to commence substantive proceedings.

Conclusion

This case highlights the requirement for superintendents, even if an employee of a principal under a construction contract, to act impartially and without influence from their employer.

Potential pitfalls may arise when a superintendent communicates privately with a principal on matters clearly notrelated to the employment relationship. The risk of abandonment of impartiality is raised where the superintendent has correspondence written by the principal and where the principal otherwise seeks to influence the superintendent in their role.

The case is an example of a (partially) successful application for pre-action discovery and highlights the hurdles an applicant must overcome for the application to succeed.

Substance Over Form, But Form Matters

Melissa Koo and Blake Di Virgilio

The recent decision from Rees J in *Rodrigues v customOz Services Pty Ltd* [2023] NSWSC 379 (*Rodrigues*) underscores the importance of understanding and complying with the security of payment legislation for both principals and contractors. It provides specific guidance about what can be a valid payment claim and payment schedule under the NSW legislation, which is similar to the legislation in Queensland, Victoria, Tasmania, South Australia, the ACT, and now Western Australia.

The plaintiff homeowners, Mr. and Mrs. Rodrigues, engaged the defendant builder, Mr. Ric Meijas, to perform renovation works on their home under two construction contracts (Contracts). The Contracts were for different aspects of the renovation works but were identical in their terms.

The issue in *Rodrigues* stems from, in short, a disagreement as to the proper remuneration for the works performed under the Contracts. The parties conferred by email to try to resolve the issues on a commercial basis. When it became evident that there was no resolution in sight, the defendant followed the dispute resolution clause in the Contracts and sought an adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA). As will be discussed, the plaintiffs would have benefitted from paying much closer attention to, and having a clear understanding of, the dispute resolution clause in the Contracts.

The reasons of *Rodrigues* serve as a reflection of the importance of understanding and complying with the SOPA, as well as emphasise some important principles of the SOPA in relation to payment claims and payment schedules.

The Adjudication

It was clear that the plaintiffs did not fully understand the application of the SOPA, as the efforts of the defendant to engage them in the adjudication process were met with a "nice try, Ric", and comments that they were "astounded by the lack of formal efforts towards meeting [the plaintiffs'] request for a mediation".

The defendant filed and served an adjudication application on 2 November 2022 and received a determination in his favour on 17 November 2022 (Determination). The reasons in *Rodrigues* deal with the plaintiffs' challenge of the Determination through judicial review.

Challenge 1: Invalid Payment Claim?

The plaintiffs claimed there was jurisdictional error, as the defendant's old invoices, which were subsequently revised and reissued, "used" all available "reference dates" available under the SOPA. In doing so, the plaintiffs cited an obsolete version of s 13 of the SOPA that referred to these reference dates. In dismissing this ground, Rees J referred to the current s 13 in the SOPA, which, in accordance with previous case law, allows for revised and reissued invoices to form a valid payment claim. Thus, Rees J held that the payment claim was valid.

The reasons for Rees J's decision reinforce previous judgments on this issue where courts have allowed a claimant to serve a payment claim for revised amounts despite it relating to work and payments claimed through previously issued invoices. Interestingly, Rees J noted that even if the SOPA had not been amended, the payment claim would still have been valid under the old s 13 and in accordance with previous judgments. As such, the plaintiffs' first challenge was wholly unsuccessful.

Challenge 2: Valid Payment Schedule?

The defendant commenced the adjudication process after giving notice to the plaintiffs, in accordance with s 17 of the SOPA, stating that the plaintiffs did not provide a payment schedule in response to the payment claim or the notice of intent to apply for adjudication. The consequence of not providing a payment schedule was that the plaintiffs could not respond to the defendant's adjudication application, which they perceived as unfair. This again shows the negative consequences of a lack of sufficient understanding of the SOPA in a construction dispute.

To address this perceived unfairness, the plaintiffs' second ground of judicial review saw them attempt to rely on a "without prejudice" email (Email), sent during their negotiations before the adjudication, as a payment schedule. The plaintiffs asserted that if the Email was, in fact, a payment schedule, the determination was invalid, as the application was out of time. Rees J considered that, on a proper construction of the SOPA, the defendant applied in time regardless of whether the Email was a payment schedule or not. However, in obiter, she still considered whether the Email could, in fact, be a payment schedule.

Rees J accepted that a payment schedule is a matter of substance over form, which is a long-standing principle from previous case law. Previous case law has also held that a payment schedule must "sufficiently describe the dispute" so the claimant can decide how to proceed.

The substantive requirements for a payment schedule are "relatively undemanding", only requiring in one form or another:

- The identification of the payment claim it responds to
- Statement of an amount proposed to be paid
- Reasons for the discrepancy between the claimed and scheduled amounts

Despite the "undemanding" requirements of a valid payment schedule, Rees J decided that the Email did not satisfy all the required conditions. The Email identified the payment claim in question, but it did not specify an amount to be paid, only stating that it will be a reduced amount compared to the payment claim. Further, the Email did not give any reasons why the plaintiffs were proposing to pay less than the claimed amount. On these bases alone, the payment schedule would have been found invalid. However, the form of the purported payment schedule also played a part in this context.

Rees J noted the Email was marked "without prejudice" and formed part of prior commercial negotiations. A "without prejudice" offer to settle a dispute was said to be a strong indication that the Email was not a payment schedule, because the purpose of the Email was to try to settle the dispute on a "confidential basis and without admission". Thus, the defendant would be required to accept payment on those terms, which is counter to the payment and adjudication procedure established under the SOPA. It would then be a logical step to suggest that even had the Email contained the required substance outlined above, in this case the form would have prevented it from being a valid payment schedule regardless. As such, this shows that the form of a payment schedule should not be ignored by those preparing payment schedules in response to a payment claim.

The Lessons

Although *Rodrigues* involved a relatively minor claim between a home renovator and a builder, the lesson of understanding and complying with the SOPA is one all project participants in the construction industry can take away from the decision.

As has been shown in *Rodrigues*, the ramifications of not understanding the SOPA are significant. Although the outcome may not have been altered in this case, had the plaintiffs understood the payment and adjudication procedures under the SOPA, they would at least have had the opportunity to present their position.

Although payment schedules are a product of substance over form, *Rodrigues* shows that form can also affect validity. As such, to avoid any unintended impacts of SOPA non-compliance in a payment schedule (or payment claim), it is recommended that all parties entering into construction contracts have appropriate templates, precedents and procedures in place to ensure strict compliance with SOPA requirements.

Case Note: Conditional and Retrospective Practical Completion Certificates and Damages for Defects

Greg Steinepreis

Summary

A recent decision of the Supreme Court of New South Wales has confirmed the legal difficulties where superintendents issue conditional practical completion certificates with retrospective dates, and that common law damages may not be available as a remedy for recovering the cost of rectification of defects identified during the term of the contract.

The Issues and Findings

The issues in *Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd* [2023] NSWSC 178 included whether conditional certificates of practical completion were of any contractual force and whether the contractual regime for notifying and remedying defects was a code.

The construction project in that case involved the construction of two buildings – Building A, which was to comprise a hotel and offices, and Building B, which was to be a multistorey car park. The contract was an amended form of AS 4902-2000 design and construct contract. The contract did not allow for separable portions.

The superintendent issued two practical completion certificates. A conditional notice of practical completion was first issued for Building A, specifying a retrospective date. The condition was that the contractor would complete and rectify certain works. The second (later) notice of practical completion for Building B was in similar form and stated a different retrospective date.

The contractor contended that the certificates could not be conditional under the contract and instead evidenced that practical completion must have occurred for both buildings. The contractor sought return of security. The principal submitted that the certificates were invalid and asserted practical completion had not occurred at all, so the contractor was not entitled to return of security or a final certificate, and the principal was entitled to liquidated damages.

On the issue of the conditional certificates, the court concluded that on the terms of the contract, the certificates were of no legal effect. It was held that the terms of the contract did not allow for conditional certificates and the content of the certificates could not be construed or aggregated such as to give rise to certification of one practical completion date for the works as contemplated by the contract.

Further, the court followed *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113 in holding that the retrospective dates stated in the notices were ineffective such that the date of practical completion would have been the date on which the notices were issued were it not for the problem of the conditional nature of the notices.

The court also construed the contractual terms (especially noting the defects rectification procedures, the defects liability provisions and the final certification process) as constituting a clear code for the rectification of defects apparent before final completion, leaving no room for a right to sue for damages at common law. In reaching this conclusion, the court followed *Turner Corporation Pty Ltd v Austotel Pty Ltd* (1994) 13 BCL 378.

Takeaway Messages

This case demonstrates the need to strictly follow the terms of the contract when dealing with practical completion certification and defect rectification.

Care should be taken in construing the contract, and in the drafting and timely issue of practical completion certificates.

When using the AS 4902-2000 general conditions, the principal should follow the defect rectification process in the contract, giving the contractor notice of the defects and an opportunity to rectify them, otherwise there may be no right to recover the costs of rectification.

Case Note: The Importance of Reasons Under SOPA (WA)

In *Insite Construction Services Pty Ltd v Daniels Civil Pty Ltd* [2023] QSC 33, the Supreme Court of Queensland has handed down a timely reminder to stakeholders under security of payment legislation as to the importance of giving reasons for non-payment of a claimed amount in a payment schedule.

Background

On 15 December 2021, Insite Construction Services Pty Ltd (Insite) engaged Daniels Civil Pty Ltd (Daniels) to undertake construction work at a school. On 6 June 2022, Daniels announced that it would cease trading and wind down its business. Three days later, on 9 June 2022, Daniels sent an email to Insite's project manager titled "Notification of Contract Termination". The email stated that Daniels had decided to terminate its current contracts and that it would only complete a portion of the earthworks with the balance to be done by a third party.

Insite interpreted this email as a termination of the subcontract by Daniels and purported to accept the termination on the same day. However, Daniels believed that the email simply modified the subcontract, specifying that it would only be responsible for the earthworks identified in the notice, and that the actual termination date for the subcontract was 26 August 2022.

Dispute

In August 2022, Daniels submitted a payment claim of AU$138,387.16 to Insite for completed work, with a reference date of 28 July 2022. In response, Insite issued a payment schedule stating that no payment was owed to Daniels. However, it did not provide any reasons for withholding payment in the schedule, only mentioning the search it was conducting for a subcontractor to finish the remaining work left by Daniels. Separately, previous correspondence between the parties had discussed Insite's right to set off costs related to engaging a new subcontractor.

Daniels then sought adjudication of the payment claim under the Building Industry Fairness (Security of Payment) Act 2017 (Qld) (BIF Act). The adjudicator determined that Daniels was entitled to the full amount claimed. The adjudicator concluded that Insite's payment schedule was invalid under the BIF Act because it did not provide reasons for non-payment.

Insite appealed the adjudicator's decision to the Supreme Court of Queensland, arguing that the decision was void due to jurisdictional errors. It claimed that the adjudicator had misunderstood his role under the BIF Act by accepting the value of the payment claim.

Decision

The court dismissed the application, with Crowley J determining that the adjudicator fulfilled his obligations under the BIF Act based on the evidence and submissions provided. The court noted that the adjudicator had the discretion to accept Daniels' uncontested valuation because Insite's payment schedule did not dispute the completion of the work or the valuation. Therefore, as there were no reasons to withhold payment, the adjudicator concluded that the full amount was payable.

The court held that the adjudicator was not required to conduct their own valuation or inquire further. It was open to the adjudicator to infer from a failure to give a payment schedule with reasons that challenged the work done or the valuation of that work, that those matters were not disputed and impliedly admitted.

Additionally, pursuant to the BIF Act, unless a payment schedule included reasons for not paying the claimed amount, the payment schedule would be invalid and an adjudicator cannot consider any new reasons for withholding payment. Any reasons previously given by Insite that were not mentioned in the payment schedule were deemed insufficient and could not be applied to the current payment claim.

Takeaway Notes

Under the Queensland security of payment legislation, if a respondent fails to issue a payment schedule, they become liable for the claimed amount. Where a payment schedule is issued but does not include reasons for non-payment, reasons cannot be introduced in response to an adjudication and the absence of reasons will invalidate the payment schedule.

In the above case, the court emphasised that it is not enough for a valid payment schedule to provide reasons in response to previous payment claims or in separate correspondence. If a party intends to rely on reasons for non-payment, those reasons must be identified in the appropriate payment schedule.

There is similar security of payment legislation in other states and it is probable that a similar result will apply there as in this case in Queensland.

Toolbox Topics

You Can Run, But You Cannot Hide From an Adjudication

A recent decision of the Supreme Court of Western Australia on a review of a decision of an adjudicator under the Construction Contracts (Former Provisions) Act 2004 (WA) (Act) highlights the difficulties faced in an adjudication (and on review) where there is no formal signed contract, discusses the significance of an error by the adjudicator in determining the date of the payment dispute, and demonstrates the dim view a court will take where a party sought to avoid the operation of the Act at the adjudication stage.

Cladding and Fire-related Defects Claims in the UK: "Show Me the Money"

It is with no great surprise that the issues associated with cladding and building safety in the UK have been heavily reviewed and greatly commented on since the Grenfell Tower tragedy on 14 June 2017. While this article does not intend to provide a comprehensive review and regulatory analysis of the developments over the last nearly six years, it raises questions as to whether further claims in this area are likely to arise in relation to historic, defective projects and where funding will come from to meet the significant remedial costs.

Update – Register of Foreign Ownership of Australian Assets

The Australian Taxation Office (ATO) recently announced the introduction of a new Register of Foreign Ownership of Australian Assets (Register). It is expected that the Register will come into effect from 1 July 2023.

The Register is intended to consolidate the existing registers administered by the ATO by providing a streamlined process for foreign investors to manage their Australian investments and support compliance with Australia's foreign investment framework.

At the same time, the Register imposes a number of new reporting obligations for foreign investors in addition to those that are already required under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (Act), including the obligation to report interests in mining and agricultural land, as well as small-scale property transactions. These new reporting obligations are not retrospective and will apply only to events occurring on and from the date the Register becomes effective.

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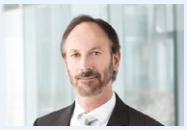

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