



Projects Disputes in Australia: Recent Cases

During the second half of 2016, a number of high-profile cases across Australia have offered significant insights to stakeholders in the construction and mining industries. Below we review several of the key ones.

New South Wales

Case: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 77

The scope for challenging an adjudicator's decision in New South Wales may have expanded.

Earlier this year, a single judge of the New South Wales (“NSW”) Supreme Court held that the Court has jurisdiction to review an adjudication for any error of law on the face of the record. This represented a significant expansion of the grounds on which a court can review an adjudication, which was previously limited to the confined notion of jurisdictional error (including non-compliance with the essential elements of the legislation, such as invalidity of the payment claim).

The decision concerned a contract between Shade Systems (“Shade”) and Probuild Constructions (“Probuild”) under which Shade agreed to supply and install external louvers to the facade of an apartment complex. Shade issued a payment claim for \$324,334

under the Building and Construction Industry Security of Payment Act 1999 (NSW), but Probuild rejected the claim in its payment schedule on the basis that it was entitled to liquidated damages of \$1,089,900 from Shade. An adjudicator awarded \$277,755 to Shade and rejected Probuild’s liquidated damages claim.

Probuild challenged the decision in the NSW Supreme Court, and was successful on its alternative argument that although there was no jurisdictional error, the decision should be quashed by the Court because the rejection of the liquidated damages claim involved an error of law on the face of the record. The Court held that the adjudicator had wrongly assumed that the onus was on Probuild to demonstrate that Shade was at fault for the failure to achieve practical completion on time.

The decision is significant because it potentially opens the door to greater judicial scrutiny of adjudication decisions, which may result in less certainty and more disputes for the industry.

However, it is important to note that the position is not yet settled—the decision is controversial given previous case law, and Shade has brought an appeal which is due to be heard in December 2016. In a decision staying the original costs order in favour of Probuild

pending the outcome of the appeal, the Court recognised the “public importance” of the issue and held that Shade has reasonable prospects of reversing the decision in its appeal, so a decision by the NSW Court of Appeal will bring welcome clarity to the industry.

High Court of Australia

Case: *Paciocco v ANZ* [2016] HCA 28

High Court clarification on the penalties doctrine, which has important implications for the enforcement of liquidated damages clauses.

By way of reminder, this dispute concerned the question of whether late payment fees charged by a bank (ANZ), constituted a penalty, but has been cause for wider interest given the impact on the penalties doctrine across a range of industries, including in the context of liquidated damages clauses in construction contracts and disputes.

The Federal Court had originally held that the late payment fees were impermissible as penalties, on the basis that they were extravagant and unconscionable when compared to the actual loss suffered by the bank. On appeal, the Full Federal Court overturned that decision, and the High Court has now agreed with the Full Federal Court.

The High Court decision confirms that a payment on default or breach of contract will only be a penalty if it is “out of all proportion to the interest of the party which the provision seeks to protect”. This is a high bar. More importantly, the High Court has clarified that this must take into account the totality of the party’s interests and is not confined to losses or expenses directly caused by the breach.

Within the construction industry, the decision will also make it harder to argue that a liquidated damages clause for delay on a project is a penalty. This is because, particularly on large projects, delay can have a large number of indirect impacts which principals can point to as part of the legitimate interests to be protected by a liquidated damages clause under the test confirmed by the High Court. This can be the case whether the assessment of that legitimate interest is one of the damages actually suffered upon a particular delay, or a

prospective estimate of the damages made prior to commencement of the project. However, it is perhaps even easier to do so on a prospective basis when there may be additional factors that represent realistic commercial risks even if many of them may not actually come to pass in the event of a particular delay.

Victoria

Case: *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119

Mediation is not a “method of resolving disputes” for the purpose of Security of Payment legislation.

The Victorian Court of Appeal was recently asked to consider the validity of a determination by an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* (“Victorian Act”).

In calculating a progress payment due under the construction contract (“the contract”), the adjudicator took into account “variations” to the contract pursuant to s10A of the Victorian Act. That section permits variations to be taken into account in certain circumstances, including: (i) where the contract sum does not exceed \$5.0 million; or (ii) where the contract sum exceeds \$5.0 million, but the contract “does not provide a method of resolving disputes under the contract”. The dispute resolution process under the contract required the parties’ representatives to meet to try to resolve the dispute, and, if unsuccessful, to attend mediation. If the mediation was unsuccessful, the parties were entitled to pursue their rights at law. The adjudicator considered that the contract did not provide for a dispute resolution method and thus took into account the variations in determining the amount of the progress payment.

The principal challenged the adjudicator’s determination in the Victorian Supreme Court, arguing that the contractual requirement of mediation constituted a “method of resolving disputes”. Such that the adjudicator was not entitled to consider variations pursuant to s10A of the Victorian Act.

At first instance and on appeal, the adjudicator’s decision was upheld. The Court of Appeal held that the purpose of s10A is to ensure that parties have available a means of finally

determining an entitlement to a progress payment, rather than a mere forum to address the controversies between them. Accordingly, mediation is not a “method of resolving disputes” for the purposes of s 10A(3)(d)(ii) of the Victorian Act because it does not *ensure* a final resolution.

A second issue before the Court was whether the adjudicator was bound to adopt the value of work determined by the superintendent (under powers conferred by the contract). The Court held that the role of the adjudicator is entirely statutory, not contractual, so the adjudicator’s valuation was *not* constrained by the terms of the contract. Requiring the adjudicator to simply adopt the price of the superintendent would be inconsistent with the adjudicator’s statutory obligation to independently assess the value of the progress payment.

The case helpfully demonstrates that if contractors wish to avoid adjudicating disputed variations under the Victorian Act, they must ensure the contract includes a dispute resolution process capable of ensuring a final determination. While the process may include mediation (as many such provisions commonly do), there must be further steps that ensure a resolution (other than legal proceedings) in the event mediation is unsuccessful (for example, a binding third party determination).

Western Australia

Case: *Ralmana Pty Ltd v BGC Contracting Pty Ltd* [2016] WASC 131

When claiming an EOT or delay costs in legal proceedings, a party must plead and prove the satisfaction of any conditions precedent, including notice provisions.

The Western Australian Supreme Court considered an application to strike out claims in respect of an Extension of Time (“EOT”) and associated delay costs, on the ground that the claimant had not pleaded satisfaction of a notice requirement that applied to EOTs under the relevant contract.

BGC Contracting (“BGC”) subcontracted Ralmana Pty Ltd (“Ralmana”) to carry out excavation and filling of earthworks for rail embankments, roads and associated works for the purpose of building the roads and rail for the Roy Hill Project. The subcontract required that in order to claim an EOT,

Ralmana was required to request an EOT from BGC’s designated representative under the subcontract.

Ralmana commenced proceedings against BGC claiming \$33 million for delay costs (including due to access and site problems). Ralmana’s claim did not positively plead satisfaction of the requirement to first request an EOT from BGC’s designated representative. BGC sought to strike out the claim on that basis. In response, Ralmana argued that any non-satisfaction with the requirement was a matter to be raised and proved by BGC, and that in the absence of it doing so, the Court should assume satisfaction of the requirement. The Court rejected Ralmana’s argument and struck out the EOT claims accordingly. It held that satisfaction of a condition precedent for the claim for a liquidated sum (including an EOT), such as a notice provision, is a matter which must be positively pleaded and proved by a claimant. To do otherwise would in effect ignore the express provisions of the contract.

When claiming an EOT or delay costs in legal proceedings, a party will need to establish the satisfaction of any contractual conditions precedent to making the claim. This makes it important that contractors comply with any notice requirements or other preconditions for any time or money claims, and maintain records of doing so in order to support any subsequent proceedings should a dispute arise.

Queensland

Case: *Armour Energy Limited v AEGP Australia Pty Ltd* [2016] QSC 153

Interpretation of a condition precedent in an exploration farm-out agreement highlights the importance of clear drafting.

The Queensland Supreme Court considered the proper interpretation of a farm-out agreement (“Agreement”) in which Armour Energy Limited (“Armour”) agreed to sell a 75 per cent interest in petroleum exploration permits to AEGP Australia Pty Ltd (“AEGP”). Armour sought specific performance of the Agreement. In determining the application, the key question was whether a condition precedent had been satisfied. It required execution of a Deed of Assignment and Assumption (“DOAA”) by Armour, AEGP, the Northern Land

Council (“Council”) and the Native Title Parties, for the purpose of assigning the rights and obligations owed to the relevant Native Title Parties under the exploration permits.

Instead of the DOAA, the Council executed a Deed of Covenant (“Deed”) in respect of each existing Native Title Agreement. Armour argued that execution of the Deed satisfied the condition precedent because it had the effect of obtaining the consent of the Native Title Parties to a novation and assignment of the exploration permits to AEGP, by the Council acting on behalf of the Native Title Parties (as their legal representative). Conversely, AEGP argued that, for the condition precedent to be satisfied, each Native Title Party had to execute the DOAA in the form annexed to the Agreement.

There was clearly a degree of ambiguity in the drafting of the relevant clause. Further, the draft DOAA annexed to the Agreement failed to identify the names of the Native Title Parties. Nonetheless, the Court was able to resolve this by finding that the terms of each Native Title Agreement were incorporated by reference into the Agreement. The Court held that, viewed objectively, in the context of the Agreement as a whole, the clause did not require strict execution of the DOAA by each Native Title Party. Instead, the Deed simply had to be substantially in the form of the draft DOAA (which it was). As each Native Title Agreement had been novated, the execution of each Deed by the Council was sufficient to bind the assignee (AEGP) to the rights and obligations under the exploration permits. As the condition precedent was satisfied, the Court ordered that the Agreement be specifically performed.

As well as providing a timely reminder of the importance of clear and unambiguous drafting when setting conditions precedent in mining contracts, this case demonstrates that the native title consequences when assigning rights to rural land (in particular mining permits) are not mere formalities. The specific rights and obligations to the native title stakeholders should always

be clarified when buying and selling such interests. This will help ensure that the relevant conditions precedent can be easily satisfied so that there are no unintended consequences and no difficulties in enforcing the agreement in the future.

Lawyer Contact

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Steven W. Fleming

Sydney
+61.2.8272.0538
sfleming@jonesday.com

Simon Bellas

Perth
+61.8.6214.5711
sbellas@jonesday.com

John Cooper

Brisbane / Sydney
+61.7.3085.7010
+61.2.8272.0718
johncooper@jonesday.com

Stephen McComish

Perth
+61.8.6214.5710
smccomish@jonesday.com

James Ebert

Sydney
+61.2.8272.0588
jebert@jonesday.com