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WHITE PAPER

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Projects Disputes in Australia: Recent Cases

The High Court of Australia and courts in other Australian States have recently ruled on matters of significant importance to the country's construction, mining and infrastructure industries. At least three rulings related to Security of Payment legislation, while other cases involved assignment of defect warranties and the interpretation of joint venture agreements. Some of the decisions bring a degree of clarity, but potential stakeholders should remain wary of additional developments, as some issues remain unsettled.

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Since late last year, there have been several major decisions from Australia's highest courts on important issues for stakeholders in the construction, mining and infrastructure industries. Below, we provide a summary. Some of the decisions bring welcome clarity, while others leave open important issues which stakeholders should be wary of.

HIGH COURT OF AUSTRALIA

Case: Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd [2016] HCA 52

In its first decision on Security of Payment legislation (in this case, on the "East Coast" model), the High Court has ruled that a payment claim (and consequent adjudication) can be set aside as invalid where there is no reference date for the payment claim.

Southern Han Breakfast Point Pty Ltd ("Southern Han") contracted with Lewence Construction Pty Ltd ("Lewence") to construct an apartment block. During construction, Southern Han gave a notice to show cause to Lewence, followed by a notice of intention to remove the work from Lewence and suspend payment. Lewence treated the second notice as a repudiation of the contract and purported to accept the repudiation and terminate the contract. Lewence then submitted a payment claim to Southern Han, which did not nominate a reference date. Southern Han served a payment schedule in response, indicating the amount to be paid was nil. Lewence then made an adjudication application, which was opposed by Southern Han on the basis that the adjudicator had no jurisdiction. The adjudicator determined the adjudication in favour of Lewence.

Southern Han sought a declaration that the adjudicator's order was void, arguing that no right to a progress payment could have arisen to enliven the adjudicator's jurisdiction because the payment claim submitted by Lewence did not include a reference date. The NSW Supreme Court held that the Building and Construction Industry Security of Payment Act 1999 (NSW) ("NSW Act") required a reference date under the relevant construction contract as a precondition to the making of a valid payment claim, and it granted the declaration sought by Southern Han on that basis. However, the NSW Court of Appeal overturned that decision.

Southern Han appealed to the High Court of Australia, where the Court upheld the appeal and confirmed that the existence of a reference date is a precondition to the making of a valid payment claim. The Court also held that in this case, no reference date could exist because the relevant reference date would have occurred only after the termination of the construction contract such that no right to payment under the NSW Act had accrued prior to that termination.

The High Court's first decision on Security of Payment legislation is a significant one for the industry. It underscores the importance of strict compliance with the statutory requirements to make a valid payment claim—in this case, the requirement for a reference date. It also explains that the existence of a right to make a payment claim under Security of Payment legislation is not an accrued right that survives termination of a contract unless the contract provides otherwise.

NEW SOUTH WALES

Case: Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) [2016] NSWCA 379

Notwithstanding this Court of Appeal decision, uncertainty remains as to the extent of the Court's power to review an adjudication under Security of Payment legislation for non-jurisdictional errors of law.

Earlier in 2016, the NSW Supreme Court created uncertainty as to the scope of the Court's jurisdiction to review an adjudication decision pursuant to Security of Payment legislation, having held that the Court's jurisdiction extended to any error of law on the face of the record and was not confined to jurisdictional error. The NSW Court of Appeal has now unanimously overturned that finding and confirmed that the Court's review power is confined to jurisdictional error.

The decisions concern 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 NSW Act, 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 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.

In the Court of Appeal, Shade argued that the Court had erred at first instance because its finding was contrary to binding authority in the decisions in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393. Probuild contended that those authorities were not binding on the point, and in the alternative sought to reopen them. While an appeal is typically heard by only three judges, given the importance of the issue in this case, the Court of Appeal was constituted by a special five-judge bench, which unanimously overturned the decision of the Court below.

While the unanimous decision from five judges of the Court of Appeal is a powerful indicator that the Court's power to review an adjudication decision is confined to jurisdictional errors, uncertainty remains because Probuild has been granted special leave to appeal to the High Court. Special leave also has been granted for the High Court to hear an appeal against a decision of the South Australian Court of Appeal (in *Maxcon Constructions Pty Ltd v Vadasz & Ors* [2017] SASCFC 2), which followed the NSW Court of Appeal's decision. While the South Australian Court of Appeal followed the NSW Court of Appeal decision on the basis that it was "not plainly wrong", his Honour Justice Blue expressed some doubt as to whether the decision was correct.

Accordingly, the scope of the Court's power to review adjudications remains uncertain until the High Court hears those appeals later this year, which is not likely to be before August.

Case: Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd [2017] NSWCA 27

The NSW Court of Appeal upheld a finding that the benefit of a defect warranty had been assigned to a third party notwithstanding that the relevant defect had arisen prior to the assignment.

Walker Group Constructions Pty Ltd ("WGC") performed a contract with P&O Trans Australia Holdings Limited ("P&O") for the design and construction of a container terminal at Port Botany in NSW. After the terminal was built, P&O assigned its leasehold interest to a subsidiary, which in turn assigned it to Tzaneros Investments Pty Ltd ("Tzaneros") through an assignment deed ("Assignment Deed").

In breach of certain "fitness for purpose" and design life warranties in the original contract, pavement in the terminal began to show cracking and spalling soon after it was laid by WGC, and before the assignment to Tzaneros. Tzaneros had known of the defective paving at the time of receiving the assignment and subsequently sued WGC for the cost of replacing it, on the basis of the fitness for purpose and design life warranties in the original contract. Tzaneros claimed the benefit of those warranties through a term in the Assignment Deed that granted it "absolutely all of the benefit of the Building Warranties" originally given by WGC.

The key question on appeal was whether the term assigning "absolutely all of the benefit of the Building Warranties" extended to the right to sue for the defective paving where the cause of action had accrued prior to the assignment. Both at first instance and on the appeal, the Court held that it did. In the course of the Court of Appeal's decision, it confirmed the fundamental importance of the "ordinary and natural" meaning of the words in interpreting the contract and provided guidance on limited circumstances in which prior negotiations will be relevant.

For the construction and projects sectors, the decision serves as a simple reminder of two points. First, it is important to consider carefully the scope of defect warranties and liability periods, and to make express in the contract any desired limitation

on them in respect of their assignment as well as their duration. Second, notwithstanding the technical complexity of the work typically dealt with in a construction contract, the decision highlights the power of using plain language in the contract—arguably, it is unsurprising that the phrase "absolutely all" was held to mean exactly that.

VICTORIA

Case: Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247

The Victorian Court of Appeal has determined that a contractor can no longer claim payment under the Victorian Security of Payment legislation once it is placed into liquidation.

Facade Treatment Engineering Pty Ltd ("Facade"), contracted to design, supply and install facade and curtain works for Brookfield Multiplex Constructions Pty Ltd ("Brookfield"). Facade submitted payment claims pursuant to the Building and Construction Industry Security of Payment Act 2002 (Vic) ("Victorian Act") in August and September 2012. The first of these was not paid in full and the second was not paid at all, and in both instances Brookfield did not serve a payment schedule in respect of the amounts not paid. Facade was then placed into liquidation, and the liquidator commenced proceedings in the Supreme Court of Victoria to recover the amounts due under the payment claims pursuant to section 16 of the Victorian Act. Section 16 allows a party to obtain summary judgment if a respondent has failed to pay an amount claimed by a payment claim under the Victorian Act after having failed to serve any payment schedule, and it does not permit a respondent to bring a cross-claim or make a defence. Brookfield counterclaimed, arguing that the subcontractor was liable for compensation costs and liquidated damages under the subcontract.

The Victorian Supreme Court dismissed the liquidator's application, holding that the subcontractor had no entitlement to payment pursuant to section 16 of the Victorian Act. On appeal, three judges of the Victorian Court of Appeal unanimously upheld most aspects of that decision. Most importantly, the Court held that once a winding-up order had been made in respect of Facade, it was no longer a "claimant" for the purposes of the Victorian Act because it continued to exist only for the purposes of the winding-up. In coming to this decision, the Court had regard to the purpose of the Victorian Act—namely, to provide cash flow to persons who carry out construction work—and concluded that the benefits of the section are thus available only to a person who continues to perform construction work (or supply related goods and services).

That finding was sufficient to determine the matter, but in *obiter*, the Court of Appeal also noted that there was inconsistency between section 16 of the Victorian Act and section 553C of the Corporations Act 2001 (Cth) because section 553C establishes a right to set off debts owed by a company in liquidation against amounts owed to the company in liquidation. On that basis, the Court remarked that section 16 of the Victorian Act would be invalid to the extent it would otherwise allow a company in liquidation to recover payments while avoiding any set-off or counterclaim.

This decision brings further clarity to the position of insolvent contractors under the Victorian Act, but it also raises questions as to how the same issue will ultimately be treated in other States where a similar outcome has been reached but through a very different approach. Relatively recently, in *Hamersley Iron Pty Limited v James* [2015] WASC 10, the Western Australian Supreme Court considered the same issues in relation to the WA Security of Payment legislation (Construction Contracts Act 2004 (WA)). In that case, a similar practical outcome was achieved because the Court refused leave to an insolvent contractor that sought to enforce an adjudication determination against the principal. However, in that case, the Court recognised a discretion as to whether to enforce an adjudication determination, whereas the decision in the Victorian Court of Appeal suggests that as a matter of course, the right to rely on Security of Payment legislation is lost upon insolvency. If the question is one of discretion, this might allow courts to take into account whether or not a principal in fact prosecutes or proves any counterclaims it could have under s553C of the Corporations Act, whereas the approach in Victoria suggests that the actual merits of the counterclaim may not be relevant. The Victorian approach also appears to be more consistent with the approach adopted in NSW to date, including the decision in *Brodyn Pty Limited v Dasein Constructions* [2004] NSWSC 1230 (which the Victorian Court of Appeal considered in the course of its judgment), where the NSW Supreme Court held that the NSW Act ceased to apply once a contractor enters insolvency (though it should be noted that in that case,

the Court was satisfied that the principal had established the asserted counterclaims).

While some ambiguity may remain as to precise approach in other States, in practical terms, insolvent contractors are unlikely to be able to rely on Security of Payment legislation in a way that would avoid the set-off rights of s553C of the Corporations Act.

WESTERN AUSTRALIA

Case: Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd [2016] WASCA 213

The Western Australian Supreme Court has narrowly interpreted a joint venture agreement in order to minimise limits sought to be imposed on activities that could be undertaken by the joint venture operator.

The Western Australian Supreme Court of Appeal has narrowly interpreted an exclusive operation clause in a joint venture agreement so as to permit work undertaken by one party in preparation for the joint venture. The decision highlights the importance of specificity in joint venture agreements on large construction and infrastructure projects, and the importance of accurately planning for all activities that might need to be undertaken by the joint venture in such projects.

In 2010, Apache Oil and a number of related entities ("Apache Parties") entered into a joint venture agreement ("JVA") with Santos Offshore to develop oil reserves in Western Australia. The agreement included the purchase by the Apache parties of a 55 percent interest in a retention title and certain materials listed for use in joint operations.

Under the JVA, Apache Oil was the Operator of the Joint Venture. The JVA provided that if the Operator committed a material breach of the agreement, the Operations Committee could remove them as the Operator. It also provided that operations under the agreement could be conducted only as "Joint Operations" or "Exclusive Operations". "Joint Operations" were those which were chargeable to all the parties, and "Exclusive Operations" were those which were chargeable to fewer than all the parties. The JVA prohibited all Exclusive Operations except where the proposed conduct had been proposed as a Joint Operation to the Operations Committee but had not been approved.

Santos Offshore alleged that the Apache Parties breached the JVA by undertaking certain work in preparation for development of the oil reserves. They alleged that the work was an Exclusive Operation and was a material breach. The activity undertaken by the Apache Parties included: the completion of front-end design; evaluation and investigation into items of subsea infrastructure with long lead times between order and delivery for use in the proposed work; and the entering into contracts with certain suppliers for the procurement of certain long lead time items of equipment. The development to which this activity was directed was ultimately approved by the Operating Committee in 2013.

The WA Supreme Court held that the JVA extended to "activities and operations" directed to the development of the oil reserves and not merely to physical steps taken within the area of the retention title. His Honour also held that the breach was a material breach as "unauthorised development breaches" were material breaches of the object of the JVA, namely, that "the overall control of the development of the Operating Committee was fundamental to the operation of the JVA, and the unauthorised work breaches circumvented that overall supervision."

However, the WA Court of Appeal overturned the decision in favour of the Apache Parties. The Court determined that the activity undertaken was not a breach of the JVA because the agreement did not prohibit activities outside the purpose of the JVA. The purpose of the JVA was to establish the party's respective rights and obligations with regard to operations under the retention title, including the joint exploration for, and appraisal, development and production of, petroleum. The activities undertaken by the Apache Parties in this regard were not inconsistent with this purpose.

While the focus is typically on "getting the deal done" and assuming a cooperative spirit when a joint venture agreement is negotiated, the narrow interpretation of the JVA in this decision emphasises the importance for participants to carefully craft the scope of the joint venture (and to be wary of "standard forms"), particularly in large construction and infrastructure projects where the scope of potential activities is both immense and complex.

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