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Editorial

Editor: Michael Christie SC

SIGNIFICANT CASES REPORTED IN VOLUME 37

The cases reported in the past year in Volume 37 of the Journal reflect the dynamic nature of construction law.

There have been many important decisions by State appellate courts, including several which have been the subject of applications for special leave to the High Court of Australia.[1] Volume 37 includes decisions on variations,[2] promissory estoppel,[3] expert determinations,[4] limitation periods,[5] the right of a contractor to rectify defects,[6] consequential loss for breach of contract,[7] concurrent wrongdoers and apportionable claims,[8] statutory demands pursuant to the *Corporations Act 2001* (Cth) in the context of construction disputes[9] and costs.[10]

Several decisions on the law of commercial arbitration,[11] including international commercial arbitration,[12] have been reported.

Two decisions of the Victorian Court of Appeal are of particular interest. The first, *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T*,[13] arising from the fire in the Lacrosse Apartment tower in Melbourne, is a landmark case in relation liability arising from the use of flammable cladding. The second, *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd*,[14] is an important case on the prevention principle.

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[1] In all those cases, special leave to appeal was refused. The cases are *Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd* (2022) 37 BCL 402; [2020] NSWCA 303 (on limitation periods). Special leave to appeal was refused by the High Court of Australia: *Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd* [2021] HCATrans 91; *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* (2022) 37 BCL 248; [2021] VSCA 69 (on the prevention principle). Special leave to appeal was refused by the High Court of Australia: *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd* [2021] HCATrans 185; *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* (2021) 37 BCL 169; [2021] VSCA 44 (on the excluded amounts provision of the *Building and Construction Industry Security of Payment Act 2002* (Vic)). Special leave to appeal was refused by the High Court of Australia: *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2021] HCATrans 169; *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* (2021) 37 BCL 47; [2020] NSWCA 223 (on liability for misleading and deceptive conduct by design professionals). Special leave to appeal was refused by the High Court of Australia: *Australian Consulting Engineers Pty Ltd v Mistrina Pty Ltd* [2021] HCASL 53.

[2] *Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)* (2022) 37 BCL 277; [2021] NSWCA 93; *Jabbcorp (NSW) Pty Ltd v Strathfield Golf Club* (2022) 37 BCL 477; [2021] NSWCA 154.

[3] *Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)* (2022) 37 BCL 277; [2021] NSWCA 93.

[4] *Lahey Constructions Pty Ltd v The State of New South Wales* (2022) 37 BCL 387; [2021] NSWCA 69.

[5] *Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd* (2022) 37 BCL 402; [2020] NSWCA 303. Special leave to appeal was refused by the High Court of Australia: *Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd* [2021] HCATrans 91.

[6] *Bedrock Construction and Development Pty Ltd v Crea* (2022) 37 BCL 422; [2021] SASCA 66.

[7] *Housman v Camuglia* (2022) 37 BCL 529; [2021] NSWCA 106.

[8] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T* (2021) 37 BCL 119; [2021] VSCA 72.

[9] *Ziegler v Cenric Group Pty Ltd* (2021) 37 BCL 219; [2020] NSWCA 85.

[10] *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* (2022) 37 BCL 302; [2021] QCA 8; *Oikos Constructions Pty Ltd v Ostin (No 2)* (2022) 37 BCL 424; [2021] NSWCA 98.

[11] *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd (No 2)* (2020) 56 WAR 169; (2021) 37 BCL 15; [2020] WASCA 201; *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* (2022) 37 BCL 522; [2021] QCA 212.

[12] *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2022) 37 BCL 363; [2021] FCAFC 110.

[13] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T* (2021) 37 BCL 119; [2021] VSCA 72.

[14] *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* (2022) 37 BCL 248; [2021] VSCA 69. Special leave to appeal was refused by the High Court of Australia: *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd* [2021] HCATrans 185.

There has been a number of significant cases on security of payment and statutory adjudication. Appellate Courts have considered jurisdictional error,[15] the validity of an adjudicator's determination made out of time,[16] stay of proceedings pending an appeal,[17] excluded amounts under the Victorian Act,[18] whether a superintendent's contractual payment schedule is a payment schedule for the purpose of the Act,[19] whether a payment claim can relate to more than one contract,[20] and requirements for a valid payment schedule.[21]

An important decision on orders for referral to a referee for inquiry and report in Queensland has also been reported.[22] That decision may reflect a trend in utilising the referral power in Queensland more often. The referral power is seldom exercised by state Supreme Courts apart from in New South Wales.[23]

Volume 37 includes two decisions of importance for design professionals. The first is a decision on liability for misleading and deceptive conduct in relation to structural design.[24] The second decision concerns the *Design and Building Practitioners Act 2020* (NSW), which will have a major impact on the liability of design professionals in New South Wales. That decision is of great practical importance in relation to pleading a claim under that Act.[25]

The Journal expresses its gratitude to the reporters for their outstanding contributions. The reporters are: Faheem Anwar of the New South Wales Bar; Dale Atkinson of Jones Day, Perth; Elizabeth Bateman of the Victorian Bar; Declan Byrne of the New South Wales Bar; Andrew Emmerson of the New South Wales Bar; James Gilronan, of Vincent Young, Sydney; Kenneth Hickman of Jones Day, Melbourne; David Hume of the New South Wales Bar; Bill Ilkovski of the New South Wales Bar; Thomas Law of CDI Lawyers, Brisbane; Andrew McNeill of Allens, Melbourne; Michael O'Callaghan, in house counsel at Seymour Whyte Constructions Pty Ltd; Raeesa Rawal of Debevoise & Plimpton LLP, London; Christopher Rowden of CDI Lawyers, Brisbane; Philip Santucci of the New South Wales Bar; Jason Schroeder of Baker McKenzie, Melbourne; Holly Scott of Baker McKenzie, Sydney; Professor John Sharkey, AM of Melbourne University Law School; Matt Sherman of the New South Wales Bar; Lucas Shipway of the New South Wales Bar; Diana Tang of the New South Wales Bar; Rhea Thrift of the New South Wales Bar and Ben Ye, Associate, High Court of Australia.

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[15] *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* (2021) 37 BCL 209; [2020] NSWCA 172.

[16] *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd* (2021) 37 BCL 66; [2021] QCA 10.

[17] *MTR Corp (Sydney) NRT Pty Ltd v Thales Australia Ltd* (2021) 37 BCL 83; [2020] NSWCA 226.

[18] *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* (2021) 37 BCL 169; [2021] VSCA 44 (*Building and Construction Industry Security of Payment Act 2002* (Vic)). Special leave to appeal was refused by the High Court of Australia: *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2021] HCATrans 169.

[19] *RHG Construction Fitout and Maintenance Pty Ltd v Kangaroo Point Developments MP Property Pty Ltd* (2022) 37 BCL 468; [2021] QCA 117.

[20] *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* (2022) 37 BCL 545; [2021] QCA 223. Compare *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* [2022] NSWCA 82 (to be reported).

[21] *Joye Group Pty Ltd v Cemco Projects Pty Ltd* (2022) 37 BCL 566; [2021] NSWCA 211.

[22] *Santos Ltd v Fluor Australia Pty Ltd (No 2)* (2022) 37 BCL 324; [2020] QSC 373.

[23] See M Christie, Editorial, "Creative Thinking and Innovation in the Resolution of Construction Disputes" (2020) 35 BCL 333.

[24] *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* (2021) 37 BCL 47; [2020] NSWCA 223. Special leave to appeal was refused by the High Court of Australia: *Australian Consulting Engineers Pty Ltd v Mistrina Pty Ltd (in liq)* [2021] HCASL 52.

[25] *Owners of Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* (2022) 37 BCL 495; [2021] NSWSC 1068. See generally L Chan, "Raising Consumer Confidence in Residential Apartment Buildings – The New South Wales Pillar 1 Reforms" (2021) 37 BCL 4; the Honourable Robert McDougall QC, "Design and Building Practitioners Act 2020 (NSW)" (2021) 37 BCL 13.

Book Review

RESIDENTIAL CONSTRUCTION LAW

Reviewed by Professor Paula Gerber*

Residential Construction Law, by Philip Britton and Matthew Bell, Hart Publishing, 2021, 599 pages: ISBN 9781509939244: Hardcover $198.00, eBook $158.40

Building a home is always a challenging undertaking. However, a convergence of recent events – the war in Ukraine, a global pandemic and floods, to name but a few – have made residential construction even more difficult and risky. Builders are going insolvent and home owners are despairing that they will ever get to live in their longed-for dwelling. Indeed, it has been observed that owners:

> may have hoped to build their dream home and live happily ever after, but there is a reason that tagline belongs only in fairy tales. Building a house may tum out to be a stress-free project; it is much more likely to be the stuff of urban legends – the cause of bankruptcy, marital dissolution, hypertension and fleeting fantasies ranging from homicide to suicide.[1]

Given this background, the publication of a book devoted exclusively to residential construction law, could not be more timely. The majority of scholarship around construction law tends to focus on large scale construction and infrastructure projects. It is a breath of fresh air to have a book devoted entirely to the oft neglected area of residential building.

Residential Construction Law was published at a time when defective work in domestic buildings is the subject of intense scrutiny. The 2017 fire in the high-rise Grenfell Tower in London, in which 72 people lost their lives, highlights the catastrophic consequences of defective building work and was clearly at the forefront of the authors' minds, as they worked on this manuscript. It was hoped that the Grenfell Tower disaster would be the catalyst for reform, but it has been observed by a United Kingdom developer that "we are doing things exactly the same way as we were doing them the day before Grenfell, and I think the industry is waiting to be told what to do".[2] This book provides the industry with the guidance they are looking for.

The book is a weighty tome, consisting of 599 pages (including a helpful glossary and index). It comprises 12 chapters written by two leading construction law academics – Philip Briton and Matthew Bell – with specialist contributions from Deidre Ní Flhoinn and Kim Vernau. This collaborative effort brings a wealth of expertise from multiple jurisdictions, and the comparative analysis across the United Kingdom, Ireland, Australia and New Zealand provides thought provoking and rich insights.

The foreword by her Honour Frances Kirkham CBE sets the tone for this collection. She calls out the problems of poor design, defective materials and bad workmanship commonly found in dwellings, identifies the paucity of protection afforded to residential occupiers and highlights the need for urgent regulatory reform.

Britton and Bell provide a roadmap for such reform. They do this in a most skilful manner; achieving a rare balance between being scholarly and being accessible. By comparing the efficacy of different protective measures in different jurisdictions they are able to identify "what works" when it comes to both preventing and curing defective work in residential buildings. Holistic reforms are required to better protect home owners and the authors seek to inspire such reform by demonstrating how different jurisdictions manage similar problems.

Chapter 3 illustrates this approach. It begins by defining regulation, before looking at obstacles to its success and how it fails. It contrasts the Building Codes in England and Wales with Australia, New Zealand, Ireland and Scotland, concluding that none of them are succeeding in entirely preventing

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[1] Philip L Bruner, "The Historical Emergence of Construction Law" (2007) 34(1) *William Mitchell Law Review* 1, 11 fn 50, referring to the observations of Yegan J in *Erlich v Menezes*, 981 P 2d 978, 987 (Cal, 1999).

[2] Colm Lacey, quote from Philip Britton et al, *Residential Construction Law* (Hart Publishing, 2021) 573.

defective and dangerous building works. The authors call for "radical re-approaches, including more intense and repurposed external statutory regulation of the industry, but also changes in 'culture', education and training".[3] They recognise that law reform alone cannot ensure the safety of dwellings; changes in the way the way different actors in the industry perform their roles and allocate responsibilities, is also required.

This book is a valuable resource for anyone involved in residential building work. As the authors note "no-one enters a construction project hoping (or even fearing) that it will result in poor outcomes".[4] Yet history shows us time and time again, that poor outcomes are not only possible, but probable. For this to change we must do things differently. But the construction industry has shown little willingness to fundamentally change its ways. It is therefore incumbent on policymakers and regulators to provide clear, precise and effective regulation that can give home owners confidence that they are living in a safe dwelling. Britton and Bell have made achieving that goal a whole lot easier by providing the data and analysis that is the bedrock of any evidence-based reforms.

[3] Philip Britton and Matthew Bell, *Residential Construction Law* (Hart Publishing, 2021) 139.

[4] Britton and Bell, n 3, 570.

Managing the Risk of Government Tender Disclosure under Freedom of Information Legislation

Duncan Anderson*

It is routine for construction contractors to tender for and then contract with government for the provision of public infrastructure. For construction contractors, public infrastructure tenders and contracts carry a potential risk in that commercially sensitive information then provided to the government may be amenable to public disclosure, under the freedom of information legislation operating in all Australian jurisdictions. Among other things, this article evaluates whether this perceived risk of public disclosure of commercially sensitive information is realistic, before going on to analyse and set out steps that construction contractors might take to manage this risk, so trade secrets and other valuable commercial information does not make their way into the public domain.

I. Introduction

In modern times, Australian governments and local authorities no longer maintain their own public works departments, as once was the case. Instead of maintaining fleets of construction equipment and extensive workforces at great taxpayer expense, Australian governments and local authorities nowadays look to the private sector to construct and maintain public infrastructure. It is commonplace for these to request tenders from, and then contract with, construction contractors in the private sector.

For construction contractors, government contracting has the potential to give rise to legal risks that would not eventuate from private sector contracting. One such legal risk associated with government contracting concerns the extent to which commercially-valuable information provided to government during the infrastructure tendering process may be publicly disclosed.

Government information is able to be disclosed to the public by way of freedom of information legislation, to which the Commonwealth and state and territory governments have been subject for many years. This freedom of information legislation is comprised in a series of Australian enactments collectively referred to in this article as "FOI legislation".[1]

The purpose of the FOI legislation is meritorious, in that it is to "promote and enhance the processes of democracy and representative government by increasing access to information held by the government".[2]

In a decision that concerned the confidentiality of information provided to the Commonwealth Civil Aviation Authority by a tenderer for a procurement contract, the Federal Court said:

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[1] The freedom of information legislation is comprised in the following Australian enactments; *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 2016* (ACT); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Government Information (Public Access) Act 2009* (NSW); *Information Act 2002* (NT); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

[2] Abigail Rath, "Freedom of Information and Open Government" (Parliament of New South Wales, Background Paper No 3, 2000 September 2000) Executive Summary <https://www.parliament.nsw.gov.au/researchpapers/Pages/freedom-of-information-and-open-government.aspx>.

> Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others.[3]

Accordingly, there is no obvious reason as to why commercially-valuable information provided by construction contractors to government during the infrastructure tendering process would not be subject to public disclosure under FOI legislation, in the same way as other information held by government.

There is the potential for construction contractors' trade secrets and other sensitive commercial information to be disclosed to the public by way of FOI legislation. Members of the public able to gain access to contractor information in this way may include a construction contractor's industry competitors.

With these considerations in mind and looking at things from the point of view of a private sector construction contractor, the objectives of this article are to:

(1) Set out and analyse the scope of government's public disclosure obligations under the FOI legislation;
(2). Evaluate whether the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process is real and substantial;
(3) Identify any safeguards in the FOI legislation that may serve to prevent public disclosure of commercially-valuable information provided to government during the infrastructure tendering process;
(4) Analyse the effectiveness of any such safeguards; and
(5) Provide an analysis as to steps that construction contractors can take, so as to reduce the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process.

Part II of this article analyses the scope of government's public disclosure obligations under the FOI legislation and addresses whether in light of this, the risk of FOI disclosure of information provided to government during infrastructure tendering is real and substantial.

Upon a conclusion that the risk of such FOI disclosure is indeed real and substantial, Part III of this article provides an analysis as to potential safeguards to disclosure in the FOI legislation and Part IV goes on to evaluate how effective these potential safeguards may be, to prevent public availability of contractor information provided to government during infrastructure tendering.

Following directly on from this evaluation, Part V of this article offers a series of conclusions as to how private sector construction contractors may reduce the risk of commercially-valuable information provided to government during infrastructure tendering from being disclosed to the public, under the FOI legislation.

II. The Scope of Government Disclosure Obligations under the FOI Legislation

The FOI legislation sets out a process whereby members of the public may obtain access to information held by government.

A member of the public first applies to the relevant government agency or local council for access to information he or she wants to see. The government agency or local council then makes a principled decision on the bases of the relevant FOI legislation as whether to grant or refuse access.

If access is refused, the member of the public can apply to the relevant Commonwealth, State, or Territory Information Commissioner or Ombudsman for a review. Any party that remains aggrieved upon such a review may then appeal to an external State or Territory tribunal.

On considering the FOI legislation it may be observed that:

(1) The FOI legislation requires that government information be disclosed to the public, unless the information to which access is sought is exempted from disclosure by the legislation itself;[4]

[3] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151, 246.

[4] *Freedom of Information Act 1982* (Cth) s 11A; *Freedom of Information Act 2016* (ACT) ss 6, 16 and Schs 1 and 2; *Freedom of Information Act 1991* (SA) ss 3, 12, 20; *Freedom of Information Act 1982* (Vic) s 3; *Freedom of Information Act 1992* (WA) ss 10,

(2) The FOI legislation defines government information to which the public is to have access in very broad terms;[5]
(3) The FOI legislation provides the public with a legally enforceable right to access to government information.[6]

These and other features of the FOI legislation serve to create a statutory presumption in favour of public disclosure of a very wide range of information in government's possession. On the face of things, the presumption of disclosure applies to information provided by construction contractors to government during the infrastructure tendering process. Accordingly, the potential exists for such information to be disclosed to the public under the FOI legislation.

It is important to consider whether the risk of public disclosure of commercially-valuable information provided to government during infrastructure tendering is real and substantial. If the risk of such disclosure is more apparent than real, then further analysis would largely be theoretical and potentially of little practical value.

Two examples of requests for access to government information under FOI legislation coming before State information commissioners and administrative tribunals are instructive, in this regard.

In *Adani Mining Pty Ltd v Office of the Information Commissioner* (*Adani*),[7] the appellant had controversially commenced development of a large coalmine, west of Townsville and Rockhampton in Central Queensland.

The appellant wanted to build an airport close by the mine and undertook discussions with the Townsville City Council and Rockhampton Regional Council, concerning financial assistance towards construction and operation of the airport.

In October 2017, the parties signed a "term sheet" that recorded the main terms on which they were prepared to contract, pending a formal written agreement.

The Australian Broadcasting Corporation requested access to the "term sheet" under the *Right to Information Act 2009* (Qld) but the Townsville City Council decided this was exempt from disclosure under that legislation.

The ABC appealed to the Queensland Information Commissioner who held it entitled to access the "term sheet". The appellant then appealed to the Queensland Civil and Administrative Tribunal (QCAT) to prevent public disclosure of the term sheet.

The appellant failed to persuade QCAT that the term sheet was necessarily exempt from disclosure under the Queensland FOI legislation and the Deputy President referred this aspect back to the Information Commissioner, for further consideration.[8]

In *Speno Rail Maintenance Australia Pty Ltd v Western Australian Government Railways Commission* (*Speno Rail*),[9] Speno Rail Maintenance Australia Pty Ltd (Speno Rail) and Rail Technology International

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23; *Government Information (Public Access) Act 2009* (NSW) ss 5,12,14; *Information Act 2002* (NT) s 3(2); *Right to Information Act 2009* (Qld) ss 3, 44, 47, 48; *Right to Information Act 2009* (Tas) s 7.

[5] *Freedom of Information Act 1982* (Cth) s 4 definition of "document of an agency"; *Freedom of Information Act 2016* (ACT) s 14 definition of "government information"; *Freedom of Information Act 1991* (SA) s 4 definition of "document"; *Freedom of Information Act 1992* (WA) s 9 and Glossary definition of "document"; *Freedom of Information Act 1982* (Vic) s 5 definitions of "document" and "document of an agency" etc; *Government Information (Public Access) Act 2009* (NSW) s 4 definition of "government information"; *Information Act 2002* (NT) s 4 definition of "government information"; *Right to Information Act 2009* (Qld) ss 12, 13; *Right to Information Act 2009* (Tas) s 5 definition of "information".

[6] *Freedom of Information Act 1982* (Cth) s 11; *Freedom of Information Act 2016* (ACT) s 7; *Freedom of Information Act 1991* (SA) s 12; *Freedom of Information Act 1982* (Vic) s 13; *Freedom of Information Act 1992* (WA) s 10; *Government Information (Public Access) Act 2009* (NSW) s 9; *Information Act 2002* (NT) s 15; *Right to Information Act 2009* (Qld) s 23; *Right to Information Act 2009* (Tas) s 7.

[7] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52.

[8] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [46]. There is no record of the Queensland Information Commissioner having reconsidered the ABC's request for access to the term sheet on the Austlii website.

[9] *Speno Rail Maintenance Australia Pty Ltd and Western Australian Government Railways Commission* [1997] WAICmr 29.

Pty Ltd (Rail Technology) had submitted tenders to the Railways Commission for provision of ultrasonic testing of rail.

Although Speno Rail's tender was successful, it applied to the Railways Commission under the *Freedom of Information Act 1992* (WA) for access to the tender that had been submitted by Rail Technology.

The Railways Commission refused access and Speno Rail lodged a complaint with the Information Commissioner for a review; Rail Technology objected to its tender being disclosed and was joined as a third party.

Through the conciliation process, Speno Rail agreed to pare down its access request to a small number of documents in Rail Technology's tender, referring to Speno Rail itself. In his decision, the Western Australia Information Commissioner required that Railways Commission give Speno Rail access to these documents, even though Rail Technology had copyright over these.

Following on from the analysis earlier in this article as to the scope of government disclosure obligations under the FOI legislation, it is submitted that the examples of the ABC's request for access to the commercially sensitive term sheet in *Adani* and Speno Rail's request for access to a competitor's tender in *Speno Rail* serve to show that the risk of FOI disclosure of commercially-valuable information provided to government during infrastructure tendering is real and substantial.

Members of the public (including industry competitors) can and do look to the FOI legislation to gain access to such information and it is desirable for private sector construction contractors to look to ways in which such disclosure may be prevented.

III. Safeguards in the FOI Legislation to Prevent Public Disclosure of Commercially-valuable Information Provided to Government during Infrastructure Tendering

As discussed in Part II of this article, the FOI legislation operates on the basis that members of the public must be allowed access to government information, unless the information to which access is sought is exempted from disclosure through the application of the legislation itself.

From the perspective of private sector construction contractors wanting to guard against public disclosure of information provided to government during infrastructure tendering, it is to be noted that six out of the nine enactments comprising the FOI legislation allow for exemptions to public disclosure, in circumstances where this would amount to an unlawful breach of confidence.

In theory, a construction contractor may reduce the risk of FOI disclosure of information provided to government during infrastructure tendering, by looking to have these unlawful breach of confidence exemptions apply.

The six enactments referred to above are the *Freedom of Information Act 1982* (Cth), the *Right to Information Act 2009* (Qld), the *Freedom of Information Act 1991* (SA), the *Freedom of Information Act 1992* (WA), the *Government Information (Public Access) Act 2009* (NSW) and the *Information Act 2002* (NT).

Of these six enactments, the *Freedom of Information Act 1982* (Cth), *Right to Information Act 2009* (Qld), *Freedom of Information Act 1991* (SA) and the *Freedom of Information Act 1992* (WA) all contain provisions whereby any prospective FOI disclosure of government information that is in breach of an obligation of confidence is exempt from disclosure, as a matter of course.[10] A prospective disclosure of government information need only amount to a breach of an obligation of confidence owed by government to the information provider, for the exemptions to apply.

[10] *Freedom of Information Act 1982* (Cth) s 45 and the Table to s 31A; *Freedom of Information Act 1991* (SA) s 39(12) and cl 13(1)(a) to Sch 1; *Freedom of Information Act 1992* (WA) ss 10, 23 and cl 8(1) to Sch 1 and *Right to Information Act 2009* (Qld) s 48 and cl 8(1) to Sch 3. For examples of decisions that confirm the effect of this legislation is to exempt prospective disclosure of government information in breach of an obligation of confidence from FOI disclosure as a matter of course, see *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [6], *Park v Moreton Bay Regional Council* [2020] QICmr 39, [11] and *Apache Northwest Pty Ltd v Department of Mines and Petroleum (No 2)* [2011] WASC 283, [22], [23] (Edelman J).

The *Government Information (Public Access) Act 2009* (NSW) and *Information Act 2002* (NT) also contain provisions whereby government information may be exempted from disclosure, if this would trigger a breach of an obligation of confidence. However, under both enactments, such information is not exempt unless it can also be shown that disclosure will not be in the public interest.[11]

This article focuses on the provisions of the *Freedom of Information Act 1982* (Cth), *Right to Information Act 2009* (Qld), *Freedom of Information Act 1991* (SA) and the *Freedom of Information Act 1992* (WA), whereby any prospective FOI disclosure of government information in breach of an obligation of confidence is automatically exempted from disclosure. Each of these provisions is in similar terms to the exemption in cl 8(1) to Sch 3 to the *Right to Information Act 2009* (Qld):

> Information is exempt information if its disclosure would found an action for breach of confidence.

Throughout the remainder of this article, these provisions are collectively referred to as "unlawful breach of confidence exemptions to FOI disclosure", with the inquiry generally being whether private sector construction contractors are able to take advantage of the provisions, so as to reduce the risk of FOI disclosure of commercially-valuable information provided to government during the infrastructure tendering process.

IV. How Effective Are the Unlawful Breach of Confidence Exemptions to FOI Disclosure to Prevent Public Disclosure of Information Provided to Government during the Infrastructure Tendering Process?

To assess the effectiveness of the unlawful breach of confidence exemptions to FOI disclosure, it is first necessary to consider how State and Commonwealth information commissioners, administrative tribunals and Courts have interpreted these.

In this regard, the initial step is to identify the legal causes of action to which the unlawful breach of confidence exemptions to FOI disclosure apply. In a decision as to proper construction of the predecessor to cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld), the Queensland Information Commissioner said in *B v Brisbane North Regional Health Authority* (*B and BNRHA*):

> However, on the basis of the material set out above, I consider that the better view is that the words "found an action for breach of confidence" in s.46(1)(a) of the Queensland FOI Act should be taken to refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:
>
> (a) a cause of action for breach of a contractual obligation of confidence;
> (b) a cause of action for breach of an equitable duty of confidence;
> (c) a cause of action for breach of a fiduciary… duty of confidence and fidelity.[12]

The Information Commissioner then said:

> Furthermore, I consider the terms of s. 46(1)(a) require the test of exemption to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application for access… to the information in issue.[13]

It follows from these extracts that the unlawful the breach of confidence exemptions to FOI disclosure may assist a construction contractor to prevent FOI disclosure of information provided to government during infrastructure tendering, where a prospective FOI disclosure would provide the contractor with

[11] *Government Information (Public Access) Act 2009* (NSW) s 14 and para 1(g) of the Table to that section; *Information Act 2002* (NT) ss 50, 55.

[12] *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [43]. See also *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [60] (President Daubney J) confirming an action for breach of confidence extends to both equitable and contractual obligations of confidence.

[13] *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [44]; *Palmer v Townsville City Council* [2019] QICmr 43, [43].

either an action for breach of a contractual obligation of confidence or an action for breach of an equitable duty of confidence, against government.

The effectiveness of the exemptions can only be gauged by identifying the various elements of both causes of action and then analysing how these elements may apply, with respect to contractor information provided to government during infrastructure tendering.

The first section of Part IV of this article identifies elements of a breach of a contractual obligation of confidence for the purposes of the unlawful breach of confidence exemptions and considers how these may apply, with respect to information provided to government during infrastructure tendering.

Contractual protection from FOI disclosure is likely to be the simplest means of protection from a construction contractor's point of view. However, contractors often undertake infrastructure tendering under strict time constraints and it is not always realistic to conclude a formal confidentiality agreement with government, prior to tender submission.

The second section of Part IV of this article accordingly goes on to consider and analyse elements of a breach of an equitable duty of confidence, upon which a contractor might ultimately need to rely.

The third cause of action referred to in *B and BNRHA* is discounted from further consideration, as government is unlikely to owe fiduciary duties to infrastructure contractors.

A. Cause of Action for Breach of a Contractual Obligation of Confidence

The elements of a cause of action for breach of a contractual obligation of confidence will depend upon on whether a contractual term as to confidence is either express or implied.

1. Express Contractual Terms as to Confidence

In its recent decision in *Crown Resorts Ltd v Zantran Pty Ltd*, the majority of the Full Federal Court said:

> It can be accepted that where there is an express term in a contract as to confidentiality it will be enforced by a court of equity subject to equitable defences, including any discretionary considerations, unclean hands and subject to identified public policy that makes void or unenforceable a contract or a contractual provision as to confidence.[14]

In the Queensland term-sheet access case of *Adani*, the Deputy President of QCAT summarised the Full Federal Court's statement regarding enforcement of an express contractual term as to confidentiality as follows:

> In effect, where there is a contractual obligation of confidence, it will be enforced in equity so long as the necessary discretionary consideration is present that damages will not be an adequate remedy (which will ordinarily be the case), unless some recognised defence on equitable grounds arises.[15]

The Deputy President was here referring to the Court's equitable jurisdiction to grant injunctive relief, so as to prevent a prospective breach of contract. The Deputy President signalled an injunction is the primary remedy on breach of a contractual obligation of confidence, as the usual contractual remedy of compensatory damages will not normally be adequate to protect the interests of the information provider.

Further on in *Adani*, the Deputy President referred to the position subsisting under the Queensland FOI legislation, whereby defences to an action for breach of confidence are discounted from an assessment whether an unlawful breach of confidence exemption to FOI disclosure may apply.[16] Consequently, a construction contractor need only establish a breach of a subsisting contractual obligation of confidence, so as to take advantage of the unlawful breach of confidence exemptions to FOI disclosure and prevent FOI disclosure of information provided during the infrastructure tendering process.

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[14] *Crown Resorts Ltd v Zantran Pty Ltd* [2020] FCAFA 1, [34] (Allsop P with whom White J agreed).

[15] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [16].

[16] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [39]. Defences are also irrelevant with respect to the unlawful breach of confidence exemption to FOI disclosure in the *Freedom of Information Act 1982* (Cth); *Lobo v Department of Immigration and Citizenship* (2011) 56 AAR 1, [407]; [2011] AATA 705.

In contrast to the position with respect to an action for breach of an equitable obligation of confidence, the Deputy President also found there was no "public interest exception" to a breach of a contractual obligation of confidence, in the context of the unlawful breach of confidence exemptions to FOI disclosure. The Deputy President based this finding on the following reasons:

(1) By the terms of the Queensland FOI legislation, the Queensland Parliament had deemed public disclosure of government information in breach of an obligation of confidence to be against the public interest and it was not for the judiciary to gainsay it;[17]
(2) There was high judicial authority against a "public interest exception" with respect to a contractual obligation of confidence owed by government to third party.[18]

Despite the Deputy President having found no "public interest exception" exists with respect to a breach of a contractual obligation of confidence, it is apparent there are sound counterarguments in favour of such an exception.

In his summary concerning enforcement of an express contractual term as to confidentiality set out above, the Deputy President made only passing reference to the judicial discretion to grant injunctive relief for this purpose. The only aspect of the discretion mentioned by the Deputy President was that damages should not be an adequate remedy.

In contrast, Australian courts traditionally look to apply the "good working rule" set out by the English Court of Appeal in *Shelfer v City of London Electric Lighting Company* (*Shelfer*), in exercising their discretion to grant injunctive relief to restrain an unlawful act.[19] The substance of the "good working rule" is that a Court may award damages in lieu of injunctive relief where the following apply:

(1) injury to the plaintiff's legal rights is small;
(2) that injury is capable of being estimated in money;
(3) that injury is one which can be adequately compensated by a small money payment; and
(4) the case is one in which it would be oppressive to the defendant to grant an injunction.

Over the years, Courts came to "slavishly" follow the "good working rule" in *Shelfer*, so that injunctions to restrain wrongful acts became the norm, in circumstances where awards of compensatory damages may have sufficed.[20]

Recently in *Coventry v Lawrence*,[21] the United Kingdom Supreme Court eschewed this approach and emphasised the Court's discretion to grant injunctive relief was unfettered:

> Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion".[22]

Relevantly, the Supreme Court further held that a Court might legitimately take account of the "public interest" in exercising its unfettered discretion to grant injunctive relief.[23] Similarly, in the recent High Court decision of *Smethurst v Commissioner of Police*, Edelman J said:

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[17] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [34].

[18] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [37]; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456.

[19] *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322–323 (AL Smith LJ) (*Shelfer*). For examples of Australian decisions considering the "good working rule" in *Shelfer* see *Break Fast Investments v PCH Melbourne* (2007) 20 VR 311, [36], [49]; [2007] VSCA 311 and *Coles Group Property Developments Ltd v Stankovic* [2016] NSWSC 852, [170].

[20] See *Coventry v Lawrence* [2014] UKSC 13, [161] (Lord Sumption) "In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly" and [171] (Lord Mance) "I entirely agree with Lord Sumption (at para 161) that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly".

[21] *Coventry v Lawrence* [2014] UKSC 13.

[22] *Coventry v Lawrence* [2014] UKSC 13, [123] and see also [120], [154], [162], [170], [239].

[23] *Coventry v Lawrence* [2014] UKSC 13, [124], [157], [161].

> A common instance where an injunction is refused due to considerations of general principle beyond the justice between the parties is where the injunction would interfere with the rights of third parties. *Another is where it would interfere with a clear and compelling interest of the general public*.[24]

Accordingly, there is authority in support of the Court's discretion to grant injunctive relief being completely unfettered, with Courts being able to take account of the "public interest" when deciding whether to grant an injunction, to restrain an unlawful act.

Despite that, it is submitted the Deputy President was correct to find there was no "public interest exception" to the breach of a contractual obligation of confidence, in the context of an unlawful breach of confidence exemption to FOI disclosure. Under the Queensland FOI legislation, the Queensland parliament has deemed public disclosure of government information in breach of an obligation of confidence to be against the public interest and outside the legislation's ambit. That being the case, the Information Commissioner and QCAT were prevented for entertaining considerations as to the "public interest".

Based on the Deputy President's analysis in *Adani*, it is submitted the elements of a breach of contractual obligation of confidence for the purposes of the unlawful breach of confidence exemptions to FOI disclosure comprise the following:

(1) A written contract between the information provider and the information recipient;
(2) A clause in the written contract obliging the information recipient to keep information received from the information provider confidential;
(3) Provision of information by the information provider to the recipient under the confidentiality clause;
(4) A threatened breach of the confidentiality clause through disclosure by the recipient.

In the context of information provided in an infrastructure tender, the first and second elements effectively require that there be a written contract as to confidentiality between the tendering entity and the government agency requesting the tender. Compliance with these elements should not be taken lightly, as a document comprising a simple promise to keep information confidential unsupported by consideration will not amount to an express contractual obligation of confidence and will not support an unlawful breach of confidence exemption to FOI disclosure.[25]

As to the third element, the tendering entity must provide the requesting government agency with information to which the confidentiality clause in the written contract applies, in order for a cause of action to arise on the prospective disclosure of that information and the relevant unlawful breach of confidence exemption to FOI disclosure to apply. The challenge for a tendering contractor is to ensure it enters a binding contract with the relevant government agency, containing a confidentiality clause broad enough in its terms to include all matters between them.

While a government request for tender may include a written assurance as to confidentiality, it does not necessarily follow that a separate, process contract including that assurance as a term will be concluded, on submission of the contractor's tender.[26] A formal written contract is required, so as to ensure information confidentiality.

As the QCAT Deputy President alluded to in *Adani*, a potential solution is for the tendering contractor to enter a prior contract with the government agency to keep all matters between them confidential.[27]

2. Implied Contractual Terms as to Confidence

Recent authority suggests there is little, if any, distinction between the task of ascertaining existence of a duty of confidence based on an implied contractual term and the task of ascertaining existence of a corresponding equitable duty of confidence.[28]

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[24] *Smethurst v Commissioner of Police (Cth)* (2020) 94 ALJR 502, [274] (Edelman J); [2020] HCA 14 (emphasis added).

[25] See, eg, *Palmer v Townsville City Council* [2019] QICmr 43, [50].

[26] *IPEX ITG Pty Ltd (in liq) v Victoria* [2010] VSC 480, [43].

[27] *Adani Mining Pty Ltd v Office of the Information Commissioner* [2020] QCATA 52, [24].

[28] *Mastec Australia Pty Ltd v Trident Plastics (SA) Pty Ltd (No 2)* [2017] FCA 1581, [143].

The elements as to breach of an equitable duty of confidence in the context of the unlawful breach of confidence exemptions to FOI disclosure are considered in the second section of Part IV to this article.

B. Cause of Action for Breach of an Equitable Duty of Confidence

From a construction contractor's point of view, a written confidentiality contract with government presents as the simplest and most convenient way of reducing the risk of tender information becoming subject to FOI disclosure.

However, contractors often undertake infrastructure tendering under strict time constraints and it is not always realistic to conclude a formal confidentiality agreement with government prior to tender submission. Without a written confidentiality agreement, a contractor may find it needs to rely on a breach of the equitable duty of confidence, in order to take advantage of the unlawful breach of confidence exemptions to FOI disclosure.

It is therefore necessary to identify the elements of a breach of the equitable duty of confidentiality and consider how these may apply with respect to contractor information provided to government, during infrastructure tendering.

In *Corrs Pavey Whiting & Byrne v Collector of Customs* (*Corrs Pavey*),[29] the solicitors for the Australian patent holder of a pharmaceutical drug made a request to the Collector of Customs under the Commonwealth FOI legislation, for access to information showing whether a competitor may have imported the drug in breach of the patent.

The Full Federal Court considered whether the requested information was exempt from disclosure, on the basis this would amount to a breach of an equitable duty of confidence. In his dissenting judgment, Gummow J set out four elements needing to be established to make out this cause of action:

> The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of the information.[30]

This formulation for a case in equity to protect alleged confidential information has been adopted by the Full Federal Court in *Optus Networks Pty Ltd v Telstra Corp Ltd* (*Optus Networks*)[31] and more recently applied by the President of the QCAT in *Ramsay Health Care Ltd v Information Commissioner* (*Ramsay Health Care*).[32] While *Optus Networks* was not an FOI case, the application of the unlawful breach of confidence exemption to disclosure in cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld) was directly at issue in *Ramsay Health Care*.

Before going on to evaluate the four elements comprising a breach of the equitable duty of confidence identified in *Corrs Pavey*, it may be noted this cause of action has previously been considered to include a fifth element. This was for the breach of confidence to inflict, or be likely to inflict, "detriment".

In *B and BNRHA*, the Queensland Information Commissioner considered that comments previously made in *Corrs Pavey*, together with comments by the Federal Court in *Smith Kleine & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (*Smith Kleine*)[33] and by the High Court in *Commonwealth of Australia v John Fairfax & Sons Ltd* (*John Fairfax*),[34] had supported the view that an original confider of information had to establish detriment in order to invoke the exemption from disclosure in the predecessor to cl 8(1) to Sch 3 of the *Right to Information Act 2009* (Qld).

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[29] *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434.

[30] *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434, 443.

[31] *Optus Networks Pty Ltd v Telstra Corp Ltd* (2010) 265 ALR 281, [39]; [2010] FCAFC 21.

[32] *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [94].

[33] *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 112 (Gummow J).

[34] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

After that, Queensland Information Commissioners regularly invoked this fifth element as to "confider detriment" in their decisions.[35] Advent of this fifth element may have heightened the risk of FOI disclosure of commercially-valuable information provided to government during infrastructure tendering, by increasing the burden on any contractor, seeking to have an unlawful breach of confidence exemption to FOI disclosure to apply.

The High Court's decision in *John Fairfax* had concerned an injunction application by the Commonwealth government, rather than by a third party providing information to government. Many subsequent decisions doubted the existence of a requirement to show detriment,[36] which can only to have been consistent with the philosophy underpinning the equitable jurisdiction to protect confidential information set out by Gummow J in *Smith Kleine*:

> The basis of the equitable jurisdiction to protect obligations of confidence lies,…, in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained: … The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss.[37]

It was not until the President of the QCAT gave his decision in *Ramsay Health Care* that the erroneous fifth element as to "confider detriment" was removed from the list of elements to establish a breach of an equitable duty of confidence, before the Information Commissioner.[38]

The unsatisfactory position as to the legally erroneous fifth element of "confider detriment" illustrates additional legal risks for those seeking to take advantage of exemptions to public disclosure in the FOI legislation.

On considering a number of decisions of the Queensland Information Commissioner as well as the QCAT decisions in *Adani* and *Ramsay Health Care*, it is observed that Information Commissioners are well capable of making mistakes in applying the unlawful breach of confidence exemptions to FOI disclosure.

In addition, the presumption or bias towards public disclosure of government information contained in the FOI legislation tends to permeate the analysis and decision-making by the Information Commissioner. The tenor of the decisions is for the Commissioner to hold in favour of information disclosure, rather than for an exemption from disclosure to apply.

Those seeking to take advantage of the exemptions to disclosure in the FOI legislation therefore face a discernible litigation risk.

Returning to the four elements of a breach of the equitable duty of confidence, the first element requires "a plaintiff to identify with specificity, and not merely in global terms that which is said to be the information in question".

It is submitted this first element is uncontroversial and may readily be made out in the context of a contractor's formal tender to government during the infrastructure tendering process. The element does not figure prominently in decisions by State and Territory Information Commissioners and tribunals, in which the unlawful breach of confidence exemptions to FOI disclosure have been considered.

The second element as to breach of the equitable duty of confidence requires information to have "the necessary quality of confidentiality (and is not, for example, common or public knowledge)".

It is submitted that the distinction between contractor information satisfying this requirement and contractor information which does not lies in the extent to which the information provided to government is commercially innovative or sensitive on the one hand, and the extent to which that information is commonly known, on the other.

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[35] *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [91].

[36] *Ammon v Consolidated Minerals Ltd (No 3)* [2007] WASC 232, [310].

[37] *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, 112.

[38] *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [95], *Department of Energy and Public Works and Queensland Health; Cairns Regional Council (Third Party)* [2021] QICmr 15, [29].

A building design and specification incorporating an innovation directly attributable to the skill of the information provider would likely carry a quality of confidentiality, while a largely conventional building design and specification would not.[39] In any event, the inquiry as to the second element is one of fact for determination on a case by case basis.

The third element as to a breach of equitable duty of confidence requires information to have been received by the defendant "in such circumstances as to import an obligation of confidence".

In the context of contractor information provided to government during the process of tendering for an infrastructure project, two decisions are instructive as to circumstances in which a government obligation of confidence will be imported.

Dockpride Pty Ltd v Subiaco Redevelopment Authority (*Dockpride*),[40] a judgment of Le Miere J in the Supreme Court of Western Australia, concerned a request by the defendant first for expressions of interest, and then for tenders, to purchase and develop part of 80 hectares of dormant land in Perth.

An entity associated with the plaintiff called Westpoint submitted an expression of interest to the defendant. Westpoint then received a letter from the defendant's agent enclosing the tender documents and stating inter alia:

> It is important to note that the selection process will be subject to a probity audit by an independent auditor selected from one of Perth's major accounting firms.[41]

The plaintiff's tender was shortlisted with one other tender by Blackburne. The defendant accepted Blackburne's tender, despite this not having complied with a number of aspects of the formal design guidelines, set out in the defendant's initial information package.

The plaintiff sued the defendant, claiming damages for breach of a tender process contract that had included a term obliging the defendant to conduct the tender process fairly and according to defined criteria.

Together with the letter above, Le Miere J of Western Australia, made reference in its judgment to a process the defendant had adopted in dealing with the tenderers.

Part of that process had included a meeting between representatives of the defendant and Westpoint "to receive feedback on Westpoint's expression of interest submission and to understand the tender decision-making and selection process".[42] The Court accepted that at this meeting, a representative of the defendant had said words to the effect that:

> [T]he answer to any generic question relevant to all tenderers would be provided as advice to all tenderers whereas unique questions specific to an individual proposal would be answered only to the proponent.[43]

The Court further accepted that at the same meeting, the defendant's representative had gone on to repeat the statement in the agent's letter advising "a probity auditor would be appointed to ensure the equity and transparency of the selection process".[44]

The Court concluded the defendant's process in dealing with the tenderers had effectively given rise to an equitable duty of confidentiality and said:

> During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information is provided in circumstances where it is obvious that it is being provided in confidence. This may arise by implication.[45]

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[39] See, eg, *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [214]; [2012] ACTSC 126, where the Court doubted the confidentiality of information in the plaintiff's tender concerning (1) stockpickers of the same brand as all shortlisted tenderers and (2) shelving that was readily available on the market.

[40] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

[41] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [34].

[42] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [62].

[43] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [243].

[44] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [243].

[45] *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, [244].

It follows that where a principal conducts itself in such a way so as to give rise to a duty of confidentiality by implication during a tendering process, the third element as to a breach of the equitable duty of confidence may be satisfied with respect to contractor information then provided.

As with the second element of the cause of action, the question whether a principal's duty of confidentiality may arise by implication is one of fact for assessment on a case by case basis. However, a principal's duty as to confidentiality is more likely to arise by implication, if it adopts a formal and prescriptive tendering process including for example representations to the tenderers as to the probity and transparency of the selection process.

In *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (*Wagdy Hanna*),[46] Refshauge ACJ in the Supreme Court of the Australian Capital Territory considered a claim arising from tenders for construction of a storage facility at the National Library of Australia in Canberra.

In 1996, the defendant invited tenders for construction of an additional repository to store materials held by it. The plaintiff submitted a tender, as did a company called Decoin Engineering Pty Ltd (Decoin). Decoin's tender was successful and it constructed a repository, which the plaintiff considered incorporated a number of design features in its own proposal. The plaintiff believed the defendant had disclosed these features to Decoin, before deciding to accept Decoin's tender.

The plaintiff sued the defendant, claiming damages primarily based on the defendant having breached a contractual obligation of confidence, but also on the basis it had breached an equitable duty of confidence.

On finding the defendant did not disclose the plaintiff's design to Decoin, the Court went on to consider inter alia whether the defendant had breached an equitable duty of confidence to the plaintiff.[47] In so doing, the Court set out an extract as to the law of confidentiality in tender documents appearing in N Seddon's 2009 text *Government Contracts* part of which read:

> During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information, such as trade secrets or sensitive government or commercial information, as provided in circumstances where it is obvious that it is being provided in confidence. *This may arise expressly* or by implication. … . The existence of a duty of confidentiality may indirectly control one practice sometimes resorted to in negotiated tenders by the body seeking tenders, namely, disclosing to one tenderer an innovative feature of another tenderer's bid. So long as the innovative feature was *in the form of information provided in confidence*, the disclosure would be in breach of confidence.[48]

The extract from *Government Contracts* identifies two additional circumstances to that in *Dockpride*, in which contractor information provided to government during a tendering process will import an obligation of confidence by the government recipient.

The first of these is where government *expressly* states the tendering process will be confidential and the second is where contractor information is in the form of information provided in confidence; the Court in *Wagdy Hanna* provided an illustration of this second category, when it indicated a duty of confidentiality would be imported into the tendering process by a "statement by the tenderer marking his or her tender as confidential".[49]

Putting aside the circumstances in which an infrastructure tendering process may give rise to a government obligation of confidence, equity has previously recognised that the public interest in obtaining access to government information is one of the factors to be considered, in deciding whether government information should be the subject of an obligation of confidence.[50]

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[46] *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70; [2012] ACTSC 126.

[47] *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [210]–[215]; [2012] ACTSC 126.

[48] *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [212]; [2012] ACTSC 126 (emphasis added); the full extract of N Seddon's 2009 text *Government Contracts* as to the law of confidentiality in the tender documents set out by the ACT Supreme Court closely mirrors the content of the full extract from the Supreme Court of Western Australian's decision in *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211, part of which is reproduced on page 23 of this article.

[49] *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2012) 7 ACTLR 70, [213]; [2012] ACTSC 126.

[50] *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [82] (*Ramsay Health Care*); consideration of public interest as a factor in deciding whether government information should be subject to an obligation of confidence has been

However, the High Court has not articulated the circumstances where a "public interest exception" may apply to relieve government of an obligation of confidence and the scope of any "public interest exception" remains unclear.[51]

In addition, some but not all of the FOI legislation contains blanket exemptions to public disclosure of information that is subject to a government obligation as to confidence.[52] It is opined that Courts may act contrary to these blanket exemptions, if they were to allow public disclosure of otherwise confidential government information, based on their own judgment as to the public interest in preference to that of Parliament as expressed in the FOI legislation itself.

It is therefore submitted that any "public interest exception" existing as part of the third element of a breach of an equitable duty of confidence is unlikely to impact upon the application of the unlawful breach of confidence exemptions to FOI disclosure.

The fourth element as to a breach of equitable duty of confidence requires that there be an actual or threatened misuse of the information concerned.

In *B and BNRHA*, the Queensland Information Commissioner confirmed the inquiry as to this element concerned whether "disclosure would involve a misuse of the confidential information, (i.e. a use which is not permitted having regard to the scope of the obligation of confidence)".[53]

As to the scope of an obligation of confidence, the majority of the Full Federal Court said in *Joint Coal Board v Cameron*:

> The question is essentially one of fact. Whether, and if so, to what extent, the information in question was provided under an express or implied pledge of confidentiality, and if so, *the scope and extent of that confidentiality, will depend upon an analysis of all the relevant circumstances*.[54]

On one view, these statements of principle may be viewed as requiring Information Commissioners and administrative tribunals to make a value judgment, as to the scope of a government's obligation as to confidence arising on provision of contractor information when tendering for an infrastructure project.

The advent of the necessity for a value judgment by a decision-maker would tend to increase uncertainty around application of the unlawful breach of confidence exemptions to FOI disclosure and increase the risk to contractors of such disclosure.

However, it is not always appropriate to view the elements of a cumulative legal test as requiring entirely separate and distinct enquiries. Regarding application of the fourth element of a breach of the equitable duty of confidence generally, it is submitted the scope of any government obligation of confidence will be informed at least in part by the outcome of the inquiry as to the third element as circumstances importing an obligation of confidence. If a contractor provides an innovative building design to government as part of an infrastructure tender, it should look to ensure the scope of any government obligation of confidence is in the widest possible terms, by marking the tender documents "confidential".

That aside, equity provides guidance as to the scope of an obligation as to confidence concerning information provided during infrastructure tendering; where confidential information is conveyed, equity will intervene to restrain further use or disclosure, for a purpose other than that for which it was given in the first place.[55]

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categorised as part of the third element as to whether information was received in such circumstances as to import an obligation of confidence; *Ramsay Health Care*, [71].

[51] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31 (Mason CJ); *Ramsay Health Care Ltd v Information Commissioner* [2019] QCATA 66, [83].

[52] *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (WA); *Right to Information Act 2009* (Qld).

[53] *B v Brisbane North Regional Health Authority* [1994] QICmr 1, [103].

[54] *Joint Coal Board v Cameron* (1989) 24 FCR 204; 19 ALD 329, 339 (emphasis added). The Full Federal Court considered the application of the unlawful breach of confidence exemption to FOI disclosure in *Freedom of Information Act 1982* (Cth) s 45 as this provision then stood.

[55] *Mastec Australia Pty Ltd v Trident Plastics (SA) Pty Ltd (No 2)* [2017] FCA 1581, [185].

V. Conclusion

The FOI legislation in Australia provides members of the public with a legally enforceable right of access to a very wide range of information in government's possession. The legislation requires this be disclosed to the public, unless information to which access is sought is exempt from disclosure under the legislation itself.

In tendering for government infrastructure projects, private sector construction contractors may provide commercially-valuable and commercially sensitive information directly to government agencies that are subject to the FOI legislation.

Members of the public (including industry competitors) can and do make use of the FOI legislation to gain access to construction contractor information provided to government agencies, in and around the infrastructure tendering process. Accordingly, there is a risk to construction contractors that commercially-valuable and commercially sensitive information provided during infrastructure tendering will be disclosed to the public, through the freedom of information process.

To manage and mitigate this risk, construction contractors can look to bring their infrastructure tendering information within certain unlawful breach of confidence exemptions to FOI disclosure, in the FOI legislation. The unlawful breach of confidence exemptions appear in some, but not all, of the FOI legislation; their effect is to prevent prospective disclosure of government information, where this would have government in breach a legal duty of confidence owed to the original information provider.

For the unlawful breach of confidence exemptions to apply with respect to a construction contractor, government must first owe the contractor either a contractual obligation of confidence or an equitable duty of confidence, with respect to the contractor's tender information.

As to a contractual obligation of confidence, the analysis in the first section to Part IV of this article indicates there are significant advantages to a construction contractor in having a written confidentiality agreement with a government agency requesting tenders, rather relying on any equitable duty of confidence on that agency's part.

As with contracts generally, a contractual obligation of confidence stands to provide a contractor with a comparatively high degree of control and certainty, in being able to manage FOI disclosure risk. A contractor is able to take the initiative by preparing its own confidentiality agreement, for consideration by the government agency seeking tenders.

A contractor is more likely to be successful in invoking one of the unlawful breach of confidence exemptions to FOI disclosure, by relying upon a contractual obligation of confidence in preference to a corresponding equitable obligation. There is measurably less litigation risk associated with an Information Commissioner or administrative tribunal interpreting and applying a straightforward confidentiality clause, than in applying the complex elements of a breach of an equitable duty of confidence.

However, there are several aspects around contractual obligations of confidence, about which contractors ought to be mindful.

First, a confidentiality contract with a government agency requesting tenders should be in the form of a deed to avoid issues as to adequate consideration.

Second, the scope of a confidentiality clause should be in the widest possible terms, to reduce the possibility of that the clause does not apply with respect to any of the tender information ultimately provided to government.

Contractors should also be aware they cannot rely on an express assurance as to confidentiality by a government agency in its request for tender documents, as the basis for a contractual obligation of confidence, arising upon submission of tender documents. While there are other means by which a binding agreement as to confidentiality may be concluded, the simplest and most effective FOI risk management tool available to a contractor is a broadly-drafted deed of confidentiality, concluded with the relevant government agency.

While a broadly-drafted confidentiality deed may be the best means by which contractors can reduce FOI disclosure risk, contractors are often required to prepare and submit infrastructure tenders under strict time constraints and it is not always realistic for them to conclude a formal confidentiality agreement, prior to tender submission.

A contractor may find that it has to look to breach of an equitable duty of confidence by government, in order to take advantage of the unlawful breach of confidence exemptions to FOI disclosure and prevent public access to information it has provided, during infrastructure tendering.

It is apparent from the analysis in the second section to Part IV of this article that application of the four elements of a cause of action for breach of an equitable duty of confidence is a significantly more complex exercise, than that associated with breach of a contractual obligation of confidence.

Assessment of each of the elements of a breach of an equitable duty of confidence is largely undertaken on a case by case basis, with there being significant risks around the quality of evidence and its presentation and assessments made as to the merits, by Information Commissioners in particular.

These considerations suggest that an equitable duty of confidence will be of little use as tool to manage the risk of FOI disclosure, in the context of an infrastructure tendering process.

However, contractors involved in government contracting should not discount an equitable duty of confidence on the part of government as a legitimate means of managing FOI disclosure risk.

The analysis in the second section to Part IV of this article indicates the first and fourth elements of a breach of equitable duty of confidence may readily be made out, by a contractor involved in government contracting. While satisfaction of the second and third elements may be largely down to the actions of the government agency requesting tenders, contractors are able to enhance their prospects in this regard, by emphasising with government that their dealings in tendering for an infrastructure project are confidential and by clearly marking tender documentation to that effect.

Whatever their approach to managing FOI disclosure risk, private sector construction contractors should seek to be proactive from the outset of the tendering process, as inaction is unlikely in their best interests.

Report

CHESHIRE CONTRACTORS PTY LTD v CIVIL MINING & CONSTRUCTION PTY LTD

Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QCA 212

Supreme Court of Queensland (Court of Appeal)

Morrison and Mullins JJA and Bowskill SJA

9 September, 1 October 2021

Arbitration – Arbitration agreement – Definitions and form of arbitration agreement – Generally – Where the respondent (as contractor) entered into a subcontract with the appellant (as subcontractor) to carry out roadworks – where a dispute arose between the parties, in relation to a claim for payment made by the subcontractor in connection with the subcontracted works – where the contractor contended that the matter was the subject of an arbitration agreement and applied for an order referring the parties to arbitration – whether, for the requirements of an arbitration agreement, the relevant clause was within the meaning of s 7(1) of the Commercial Arbitration Act 2013 (Qld) – whether, in order to be an arbitration agreement as defined, the agreement must itself define the legal relationship to which it is intended to apply.

The Queensland Department of Transport and Main Roads engaged the respondent ("CMC") to carry out a project for roadworks construction. CMC (as contractor) entered into a subcontract with the appellant ("Cheshire") as subcontractor to carry out part of the roadworks.

A dispute arose between CMC and Cheshire, in relation to a claim for payment made by Cheshire in connection with the subcontracted works. Cheshire claimed against CMC in the Supreme Court of Queensland, seeking relief based on estoppel by convention or statutory unconscionable conduct, as well as for the return of a bank guarantee.

The subcontract between CMC and Cheshire contained, within a broader clause dealing with disputes between the parties, a sub-clause which purported to be an arbitration agreement.

Cheshire contends there was no "arbitration agreement", within the meaning of s 7(1), because the clause relied upon as the purported arbitration agreement did not itself define the legal relationship to which the clause was intended to apply.

Section 7 of the *Commercial Arbitration Act 2013* (Qld) provides:

> **"7 Definition and form of arbitration agreement (cf Model Law Art 7)**
>
> (1) An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) The arbitration agreement must be in writing.
>
> (4) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract was concluded orally, by conduct or by other means.
>
> (5) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.
>
> (6) In this section—
>
> ***data message*** means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
>
> ***electronic communication*** means any communication that the parties make by means of data messages.
>
> (7) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(8) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

Section 8 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 not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

CMC applied to the court at first instance for orders referring the parties to arbitration pursuant to s 8(1) of the Act.

Cheshire submitted at first instance that the purported arbitration agreement failed to meet the definition of an arbitration agreement in s 7(1) of the Act, as it did not itself contain any description of the nature of the disputes to which it is intended to operate so as to indicate, consistently with s 7(1), that they are disputes arising between the parties in respect of their defined legal relationship as parties to the subcontract.

The court at first instance granted the orders sought by CMC, holding that Cheshire and CMC have a defined legal relationship in that they are parties to a subcontract, which is to be construed having consideration to the whole of the subcontract, not just the sub-clause containing the purported arbitration agreement, such that the definition of an arbitration agreement in s 7(1) of the Act was met, which obliged the court to refer the parties to arbitration pursuant to s 8(1) of the Act.

Cheshire appealed from the court's orders at first instance, on the basis that the primary judge had erroneously interpreted s 7(1) of the Act, in particular, the meaning of the words "in respect of a defined legal relationship".

Cheshire submitted on appeal that s 7(1) of the Act requires an arbitration agreement to "define" the legal relationship with respect to which it is intended to operate with a certain level of precision and specificity, and that the arbitration agreement in question did not satisfy this requirement.

Held, dismissing the appeal:

(1) The interpretation of s 7(1) of the Act contended for by Cheshire is not supported by the words which are used in the provision, nor by reference to the context and broader purpose of the provision. (Bowskill SJA at [17], [20], [21], Morrison JA at [1] and Mullins JA at [2], agreeing).

R v A2 (2019) 269 CLR 507; [2019] HCA 35; *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13, considered.

(2) The phrase "defined legal relationship" is to be given a broad interpretation. Section 7(1) of the Act requires there to be a defined legal relationship in the sense of an identifiable legal relationship giving rise to legal remedies. It is not a requirement of s 7(1) that the arbitration agreement must "define" the legal relationship with respect to which it is intended to operate. That is, the requisite "defined legal relationship" does not need to be recorded in the arbitration agreement itself. (Bowskill SJA at [20], [22], Morrison JA at [1] and Mullins JA at [2], agreeing).

Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (No 2) (1997) 75 FCR 583; *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95; *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454 (CA); [2004] NZCA 418; *Bidois v Leef* [2015] 3 NZLR 474; [2015] NZCA 176, considered.

(3) The existence of a defined legal relationship between Cheshire and CMC is clear and can be plainly construed, applying orthodox contractual construction principles, from the arbitration agreement falling within a clause (dealing with disputes) of a subcontract between CMC (as contractor) and Cheshire (as subcontractor) entered into on a particular date. (Bowskill SJA at [23], Morrison JA at [1] and Mullins JA at [2], agreeing).

Bond v Chief Executive, Department of Environment and Heritage Protection [2018] 2 Qd R 112; [2017] QCA 180, considered.

M Jonsson QC and *C Taylor* for the appellant.

MH Hindman QC and *AJ Schriiffer* for the respondent.

1 October 2021

JUDGMENT

[1] MORRISON JA: I have read the reasons of Bowskill SJA and agree with those reasons and the orders her Honour proposes.

[2] MULLINS JA: I agree with Bowskill SJA.

[3] BOWSKILL SJA: The respondent, Civil Mining & Construction Pty Ltd (CMC) was contracted by the Queensland Department of Transport and Main Roads to carry out a project for roadworks construction. CMC entered into a subcontract with the appellant, Cheshire Contractors Pty Ltd (Cheshire) to carry out part of the roadworks. A dispute arose between CMC and Cheshire, in relation to a claim for payment made by Cheshire in connection with the subcontracted works. Cheshire filed a claim against CMC in the Cairns Supreme Court seeking to recover the money said to be owing. CMC's claim was for relief based on estoppel by convention or statutory unconscionable conduct, as well as for the return of a bank guarantee. CMC contends that the matter is the subject of an arbitration agreement and applied for an order referring the parties to arbitration in accordance with s 8(1) of the *Commercial Arbitration Act 2013* (Qld).

[4] For the reasons given on 9 April 2021,[1] Henry J allowed CMC's application and made orders that:

1. the parties are referred to arbitration pursuant to s 8(1) of the *Commercial Arbitration Act*; and
2. the proceeding is stayed.

[5] Cheshire appeals from those orders, contending that the conclusion reached by the learned primary judge was incorrect, on the basis of an erroneous interpretation of s 7(1) of the *Commercial Arbitration Act*, in particular, as to the meaning of the words "in respect of a defined legal relationship" in s 7(1). Cheshire contends there was no "arbitration agreement", within the meaning of s 7(1), because the clause relied upon as the purported arbitration agreement did not itself define the legal relationship to which the clause was intended to apply.

[6] Section 7 of the *Commercial Arbitration Act* provides:

> "7 Definition and form of arbitration agreement (cf Model Law Art 7)
>
> (1) An ***arbitration agreement*** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (3) The arbitration agreement must be in writing.
> (4) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract was concluded orally, by conduct or by other means.
> (5) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.
> (6) In this section—
>
> ***data message*** means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

[1] *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75.

electronic communication means any communication that the parties make by means of data messages.

(7) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(8) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."[2]

[7] Section 8 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 not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

[8] Cheshire contends that, upon the proper construction of s 7(1) of the *Commercial Arbitration Act*, it was essential that, to be an "arbitration agreement" within the meaning and for the purposes of that Act (in particular, s 8(1)), a clause in a contract which otherwise satisfies s 7 must itself define the legal relationship to which the clause is intended to apply.

[9] In the present case, the purported arbitration agreement was contained in clause 12.3.3 of the subcontract. Clause 12 of the subcontract deals with disputes between the Parties, as follows:

"12. Disputes

12.1 Early resolution

It is mandatory that the Parties comply with this clause before a dispute or difference is referred to mediation. Disputes or differences arising between the Parties shall be negotiated between the Parties with the bona fide intention of resolution without unreasonable delay.

12.2 Continuation of the Subcontract Works

In the event of any unresolved disputes or differences between the Parties, the Subcontractor shall ensure that the progress of the Subcontract Works is continued without any effect on the Subcontractor's Program.

12.3 Settlement of Unresolved Disputes or Differences

12.3.1 If disputes or differences arising between the Parties cannot be resolved pursuant to clause 12.1 then either Party shall refer such disputes or differences to a CMC Director and in the case of the Subcontractor means a company director or partner of the Subcontractor of the respective Parties in writing. Within 7 days of receipt of the written referral of such disputes or differences to Company Directors, Directors shall meet or otherwise confer to hold good faith discussions in an effort to resolve the disputes or differences by amicable agreement.

12.3.2 Should the Parties fail to reach agreement in accordance with clause 12.3.1 the Parties agree that the disputes or differences shall within 14 days from the receipt of the written referral pursuant to clause 12.3.1 be referred to mediation. Either Party may refer the dispute or difference to ACDC in writing requesting the appointment of a mediator. The mediation shall be conducted in accordance with the Australian Commercial Disputes Centre ("ACDC") mediation Rules and Procedures, and the Chairperson of the ACDC or the Chairperson's nominee will select the mediator and determine the mediator's remuneration. The Parties agree that he costs of any mediator appointed shall be borne equally between the Parties.

12.3.3 If the disputes or differences have not been settled within six (6) weeks (or such other period as may be agreed to in writing between the Parties) after the appointment of the mediator, the disputes or differences shall be referred to arbitration by either Party in accordance with and subject to The Institute of Arbitrators and Mediators Australia (Queensland Chapter), Rules for the Conduct of Commercial Arbitrations. In any arbitration both Parties shall be entitled to be legally represented. The Parties shall appoint an arbitrator within 7 days of referral to arbitration. If the Parties fail to agree on the identity of the arbitrator, the Parties agree that the

[2] Underlining added.

> President, for the time being of the Institute of Arbitrators and Mediators Australia, is on written request from a Party to appoint an arbitrator to hear and determine the disputes or differences. The Parties agree that they will not be able to proceed to arbitration unless clause 12.3.2 has first been complied with."[3]

[10] At the beginning of the "formal instrument of subcontract", the following appears:

> "THIS SUBCONTRACT is made on the 3 day of September 2015 ("Subcontract")
>
> BETWEEN:
>
> CIVIL MINING & CONSTRUCTION PTY LTD … ("CMC");
>
> and
>
> Cheshire Contractors Pty Ltd trading as Cape JV … ("Subcontractor"),
>
> jointly referred to as the 'Parties'".

[11] Cheshire submits that one of the requirements appearing in s 7(1) of the Act is that the arbitration agreement must "define" the legal relationship with respect to which it is intended to operate. It further submits that the word "defined" where it appears in s 7(1) "requires – literally – a level of precision and specificity within the language of an otherwise compliant arbitration agreement that cannot be satisfied by mere implication or 'vague allusion'." Cheshire contends that clause 12.3.3 did not itself define the legal relationship to which that clause was intended to apply and therefore cannot be an "arbitration agreement" within the meaning of s 7(1) and for the purposes of s 8 of the Act.

[12] At first instance, in dealing with Cheshire's argument that the defined relationship must be ascertainable from the arbitration clause itself, effectively considered in isolation, Henry J said (at [29]):

> "Such a requirement would be contrary to orthodox principles of construction, particularly that the whole of the relevant instrument is to be considered in construing its meaning. Clause 12.3.3 falls for interpretation in the broader context of the document as a whole, which is that it is a clause within a contract. Clause 12.3.3's references to the 'The Parties' is to the parties to the contract, that is, CMC and Cheshire. They have a defined legal relationship in that they are parties to a contract."[4]

[13] CMC submits that Cheshire's construction is too narrow and artificial. CMC submits that Cheshire's construction changes the word "defined", where it appears in s 7(1), from an adjective – a word used to describe the type of legal relationship that is required – into a verb, requiring a *definition* of the relevant legal relationship to be included in the arbitration agreement itself. CMC submits that all s 7(1) requires is that there *be* a defined legal relationship between the parties in respect of which certain disputes are to be referred to arbitration. That exists here. It is the relationship of contractor and subcontractor, as Parties to the subcontract. Further, CMC submits that the proper construction of s 7(1) of the Act is that the words "in respect of a defined legal relationship" perform the work of identifying that to be an arbitration agreement for the purpose of the Act there must be an identifiable legal relationship between the parties that gives rise to legal remedies. That is, that the work the words do is to exclude disputes where no legal remedy can be granted.

[14] That construction is supported by authority. In *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (No 2)* (1997) 75 FCR 583 at 594 Tamberlin J considered whether a claim under s 51A and s 52 of the *Trade Practices Act 1974* (Cth) could be said to be a matter arising "in respect of a defined legal relationship", within the meaning of the definition of "arbitration agreement" in the *International Arbitration Act 1974* (Cth). The argument against this was that the claim arises from conduct in trade and commerce which describes "an activity not a legal relationship". Tamberlin J held that:

> "This line of reasoning in my view should not be accepted. It assigns too narrow a meaning to the expression 'defined legal relationship'. The expression 'defined legal relationship' is followed by the words 'whether contractual or not'. These words indicate that the expression reaches beyond a relationship established by an agreement. The extensive expression 'in respect of' also indicates that a broad approach should be taken to the nature and extent of the relationship The 'legal relationship' can, on this approach, be defined by statute."

[3] Underlining added.

[4] References omitted.

[15] That decision was referred to with approval in *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95. In that case, Fisher J, in construing the meaning of the phrase "a defined legal relationship" in the almost identical provision in the New Zealand *Arbitration Act 1996*[5], held that "defined legal relationship" is to be given a broad meaning, and is neither confined to relationships recorded in documents nor to formal relationships such as contracts, trusts or partnership agreements (at [83] and [84]). Observing that there must be some limitation imposed by the expression "defined legal relationship" if complete redundancy is to be avoided, Fisher J said that, as a bare minimum, "the expression would seem to indicate that the dispute must be of a legal nature as distinct from a merely religious, cultural, academic, or social one" (at [85]). That reasoning was affirmed on appeal.[6]

[16] Fisher J's reasoning was also endorsed by a later Court of Appeal, in *Bidois v Leef* [2015] 3 NZLR 474. In that case, the question was whether a dispute between two Maori groups as to who held the rights to manage a particular area of land was one legally capable of being the subject of an arbitration. The Court of Appeal at [48] held that a broad purposive approach is required to the interpretation of the phrase and at [49] observed that:

> "Despite the fact that this requirement of a 'defined legal relationship' appears in many international arbitration provisions, it has been noted that there are virtually no reported cases in which an arbitration agreement has been held to be invalid for failure to meet this requirement. That does not of course mean the element is of no effect, but it is indicative of a broad interpretation being required, given the Act's stated purpose of allowing parties to refer disputes to arbitration."[7]

[17] The construction of s 7(1) contended for by Cheshire is not supported on a textual analysis of s 7 of the Act, nor by reference to the context and purpose of the provision.[8]

[18] The *Commercial Arbitration Act* is adopted from, and intended to give effect to, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (as adopted in June 1985, and amended in July 2006) with some adaptations for application to domestic arbitrations in Queensland.[9] The paramount object of the Act is "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense" (s 1AC(1)). The Act aims to achieve that paramount object by, inter alia, "enabling parties to agree about how their commercial disputes are to be resolved" (s 1AC(2)). As explained in the "Model Law note" to s 1 of the Act, "[t]he term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not".

[19] Section 2A(1) of the Act provides that, in the interpretation of the Act, "regard is to be had to the need to promote, so far as practicable, uniformity between the application of this Act to domestic commercial arbitrations and the application of provisions of the Model Law …". Accordingly, decisions from other jurisdictions in relation to the interpretation of equivalent provisions are both relevant and persuasive.

[20] The interpretation of s 7(1) which is pressed by Cheshire does not find support in the words of the provision itself. Contrary to Cheshire's submission, it is not a requirement of s 7(1) that the arbitration agreement must "define" the legal relationship with respect to which it is intended to operate. That is not what s 7(1) says. The subject of the arbitration agreement is the *agreement by the parties to submit to arbitration* all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. As CMC submits, there must *be* a defined legal relationship – in the sense of an identifiable legal relationship giving rise to legal remedies – but it strains the language of s 7(1) to construe the words as requiring that the agreement itself must *define* that legal relationship. On Cheshire's argument, s 7(1) would need to be read as though it said "[a]n arbitration agreement is an

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[5] *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95 at [64].

[6] *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at [60].

[7] References omitted.

[8] *R v A2* (2019) 373 ALR 214 at [32]-[33], [35]-[37].

[9] As part of an integrated statutory framework for international and domestic arbitration in each State and Territory in Australia: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 267 CLR 514 at [13].

agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a ~~defined~~ legal relationship, which is expressly defined in the arbitration agreement itself, whether contractual or not". Questions that arise immediately include how the requisite "legal relationship" could be *defined* in the arbitration agreement, if it is not contractual? What if the arbitration agreement is constituted by the exchange of pleadings, as contemplated in s 7(7)? But even apart from those questions, the interpretation contended for by Cheshire is simply not supported by the words which are used in the provision.

[21] I am unable to discern anything from the purpose or broader context of s 7(1) which would support a strained interpretation of the words used, such as contended for by Cheshire.

[22] The authorities referred to above, which are persuasive given the international context in which the Act operates, support a broad interpretation of the phrase "defined legal relationship" in s 7(1) and, likewise, support the construction contended for by CMC and adopted and applied at first instance by Henry J, namely, that the requisite "defined legal relationship" does not need to be recorded in the arbitration agreement itself. That construction reflects the natural and ordinary meaning of the words used in the section.

[23] Here, the existence of a defined legal relationship could not be clearer. The arbitration agreement is contained in clause 12.3.3, which falls within clause 12 (dealing with disputes) of a subcontract between CMC (as contractor) and Cheshire (as subcontractor) entered into on a particular date. The disputes dealt with by clause 12 are "disputes or differences arising between the Parties". Reading the definition of Parties into that phrase, where it appears in clause 12,[10] makes it clear the relevant disputes are disputes or differences arising between CMC and Cheshire, as parties to the subcontract. The reference in clause 12.3.3 to "the disputes or differences" is plainly, on orthodox contractual construction principles, a reference to the disputes or differences arising between the Parties referred to elsewhere in clause 12. That is a "defined legal relationship" in the relevant sense.

[24] The conclusion reached by Henry J was, in my respectful view, plainly correct. I would dismiss the appeal, with costs.

Solicitors for the appellant: *O'Connor Law*.

Solicitors for the respondent: *Clayton Utz*.

Andrew McNeill

[10] *Bond v Chief Executive, Department of Environment and Heritage Protection* [2018] 2 Qd R 112 at [10]-[11] and the authorities there referred to.

HOUSMAN v CAMUGLIA

Housman v Camuglia [2021] NSWCA 106

Supreme Court of New South Wales (Court of Appeal)

Bell P, Leeming and White JJA

28 April, 26 May 2021

Contract – Damages – Claim for consequential loss (lost rent) where construction works caused damage to neighbour's land – Whether primary judge misused evidence.

Appeals – Whether leave to appeal was required to challenge first instance costs order – s 101(2)(c) of the Supreme Court Act 1970 or s 127(2)(b) of the District Court Act 1973.

Costs – Calderbank offer – Whether primary judge erred in finding that appellants had unreasonably rejected offer.

The first and second appellants owned a harbourside property that adjoined a property owned by the respondent. There was a block of six apartments on the respondent's land, four of which are only accessible down a staircase along the boundary with the first and second appellants' land. The respondent leased those units.

The third appellant was a builder who was retained by the other appellants to carry out substantial construction works on their land.

The respondent commenced proceedings against the appellants claiming that their building works caused damage to her property, including that the supporting foundations for the stairway had collapsed and that the stairway showed signs of cracking and settlement.

By the end of the trial, each of the appellants had accepted that their acts and omissions had caused damage to the stairway. One of the only unresolved issues was whether the respondent was entitled to recover from the appellants rent that was said to have been lost as a consequence of the damage to stairway.

The primary judge held that the respondent was entitled to such consequential loss and awarded an amount of $157,240.14 for that head of damage.

The primary judge also found that the appellants were to pay the respondent's costs on an ordinary basis up to 7 September 2019 and on an indemnity basis thereafter. The basis for the claim to indemnity costs was that that the respondent had achieved a better result than what she offered to accept in an offer made in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333. That offer included a note that the respondent's costs to date were $150,000 but that she would accept payment of $100,000 in respect of costs.

The appellants appealed. In that appeal, the appellants did not dispute the calculation of the consequential loss but submitted that the primary judge erred in finding that the damage caused by their construction and demolition works had caused the units to be unlettable.

In the appeal, the appellants placed particular reliance on a report of a consulting engineer, which had been commissioned by respondent. In that report, he opined that, in relation to the boundary stairs, "[t]emporary propping has been installed which in my opinion is adequate to ensure re-support until permanent re-support is reinstated". The consultant engineer was not cross-examined on the adequacy of the temporary propping.

The evidence before the primary judge also included evidence from the respondent that it was not possible to re-let the apartments and from the respondent's leasing agent that it was not feasible to even attempt to re-let the apartments owing to the damage. The evidence given by both of those witnesses was subject to rulings limiting their use.

The appellants also appealed the special costs order. The first challenge was brought on the basis that the primary judge incorrectly noted that an offer to accept $100,000 in lieu of the $150,000 said to have been

incurred was substantial because it was only one-third of the respondent's costs when it was actually two-thirds. The second challenge was based on the fact that a bill of costs that was produced subsequent to the trial showed that the respondent's costs were in fact $113,696.10 and not the $150,000 referred to in the offer. The third challenge alleged that it was reasonable for the appellants not to accept the offer in circumstances when the leasing agent's affidavit had not yet been served.

Held, dismissing the appeal:

In relation to ground 1 challenge to consequential loss:

(1) It is unnecessary to express a conclusion whether the primary judge's reasons were inadequate. Even if there were a deficiency in the reasons, this Court would not intervene unless it were persuaded that the finding could not stand. This appeal is by way of rehearing. It is appropriate for the Court to address the substance of the matter, for only if there were error which was productive of injustice would the appeal be allowed and the proceedings remitted for retrial. (Leeming JA at [33]–[35], Bell P at [1] and White JA at [95], agreeing).

Stephenson v Santos [2020] NSWCA 262; *Capilano Honey Ltd v Dowling (No 2)* [2018] NSWCA 217, applied.

(2) It was not unreasonable for any decision to let the premises to await the construction of a permanent solution to access the apartments, when one was reasonably expected in the short term. (Leeming JA at [36], Bell P at [1] and White JA at [95], agreeing).

(3) The opinion of the respondent's leasing manager that the property was incapable even of being advertised to let was inherently plausible. (Leeming JA at [37], Bell P at [1] and White JA at [95], agreeing).

(4) The primary judge's finding that it was reasonable for the respondent not to seek to re-let the apartment involved no misuse of the evidence of the respondent or her leasing agent because what was critical was those witnesses' perceptions of the position rather than the engineering opinion that notwithstanding superficial appearances, the temporary repairs to the stairway had made it safe. (Leeming JA at [39], Bell P at [1] and White JA at [95], agreeing).

(5) Obiter: While it was unnecessary to consider given the Court's earlier conclusions, the particulars provided by the appellants on their allegation that the respondent failed to mitigate her loss did not extend to a claim that she had failed to take reasonable steps to re-let the properties. This raised the disputed issue of whether mitigation was an aspect of the principle of causation. But nothing turns on it, because irrespective of whether the appellants are precluded from relying on this by their pleading of mitigation, they fail on the facts for the reasons already given, and it is unnecessary to consider the point further. (Leeming JA at [41], Bell P at [1] and White JA at [95], agreeing).

Bunge SA v Nidera BV [2015] 3 All ER 1082; UKSC 43, referred to.

In relation to ground 3 concerning the special costs order:

(6) Leave to appeal was not required. An appeal raising bona fide substantive grounds as well as costs is not an appeal as "costs only" within the meaning of s 101(2)(c) of the *Supreme Court Act 1970* (NSW) or s127(2)(b) of the *District Court Act 1973* (NSW), and that remains so even if the substantive grounds are rejected. (Leeming JA at [84], Bell P at [1] and White JA at [95], agreeing).

Dillon v Gosford City Council (2011) 184 LGERA 179; [2011] NSWCA 328; *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333; *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154, applied.

Road Chalets Pty Ltd v Thornton Motors Pty Ltd (in liq) (1986) 47 SASR 532, not followed.

(7) No basis to re-exercise the discretion as to costs was made out. (Leeming JA at [90], Bell P at [1] and White JA at [95], agreeing).

(8) The fact that the respondent's costs were ultimately shown to be $113,696 rather than the $150,000 that the respondent represented to the appellants was the sum of her costs at the time of the offer did not materially detract from the substantiality of the compromise when viewed as a whole. (Leeming JA at [14], [90], Bell P at [1] and White JA at [95], agreeing).

(9) The service by the respondent of her leasing agent's affidavits after the offer was material in circumstances where the respondent's affidavit (served two days prior to the offer being issued)

detailed the essential case advanced by the respondent. Namely, that the leasing agent told her that it was not possible to re-let the apartments by reason of the noise and vibration caused by the building works and the damage to the property. (Leeming JA at [92], Bell P at [1] and White JA at [95], agreeing).

J Turnbull SC and *A Ahmad* for the appellant.

G Sirtes SC and *G Rubagotti* for the respondent.

26 May 2021

JUDGMENT

[1] **BELL P**: I agree with Leeming JA.

[2] **LEEMING JA**: The issues in this appeal are very narrow. They are whether the plaintiff's claim for consequential loss should be set aside, whether there was error in a special costs order based on a *Calderbank* letter, and whether leave is required to advance the second point. The confined nature of the appeal warrants a highly abbreviated account of the background to a five day trial in the District Court.

[3] The first and second appellants, Mr Bardia Housman and Ms Beatriz Pena Alda, own harbourside land at Lavender Bay. The respondent, Ms Yolenda Camuglia, is the owner of neighbouring land. Both lots occupy steep slopes from the roadway to the harbour foreshore. On Ms Camuglia's land is constructed a building containing six apartments, two of which are accessible from the street, but the remaining four of which are only accessible down a staircase along the boundary between the two lots.

[4] The third appellant, Pacific Plus Constructions Pty Ltd, was retained by the first and second appellants to undertake substantial building works on their land. It subcontracted the demolition and bulk excavation works which commenced in around September 2017. Those works caused damage to Ms Camuglia's land. The primary judge found that, among other things, the supporting foundations for the stairway had collapsed and the stairway showed signs of cracking and settlement. Ms Camuglia sued her neighbours and Pacific Plus Constructions.

[5] By the conclusion of the trial, a large number of issues had been resolved. As between the three appellants, all had become represented by the same firm of solicitors, a cross-claim had been disposed of and it was accepted that any judgment should be entered against them all, reflecting a joint and several liability to Ms Camuglia. Further, the defendants/appellants accepted that their acts and omissions had caused damage to the stairway. Many aspects of the quantum of damage referrable to rectifying the damage were also agreed.

[6] After a five day trial, the primary judge promptly produced a judgment, reflecting the limited issues for resolution: *Camuglia v Housman* [2020] NSWDC 446. His Honour noted that after the concessions (some concessions had only been made on the last day of the hearing), there were only three outstanding issues.

[7] One issue was whether damage had been caused to a balcony. His Honour found that the damage was not causally linked to the defendants' breaches and dismissed that aspect of the claim. There is no cross-appeal from that part of the judgment.

[8] Secondly, the primary judge noted that it was not agreed that the defendants were liable for the (agreed) costs of rectifying the damage, on the basis that the cost of rectification was not an appropriate measure of damages, and that the plaintiff had failed to mitigate her loss. The primary judge found in Ms Camuglia's favour in relation to rectification. This was challenged by ground 2 of the appeal, but in the appellants' written submissions in reply, that ground was abandoned.

[9] That left only a contest concerning a claim for consequential loss. That issue was summarised by the primary judge as follows (at [13]):

> "As I have indicated, the plaintiff was leasing the units contained within the building. She says that as a consequence of the damage to the stairway it was no longer feasible to lease the premises, and that as a consequence they have laid vacant since various dates in 2018. The plaintiff claims lost rent by way of consequential loss. Her entitlement to this head of damages is disputed."

[10] The primary judge accepted that Ms Camuglia was entitled to consequential loss, calculated in the amount of $157,240.14. That amount was based upon evidence adduced by Mr Dominic D'Ettorre. The appellants pressed a ground of appeal based on inadequate reasons (although it was not the subject of separate oral submissions), and it is convenient to reproduce in full [32] which contains the reasons for allowing this head of damage:

> "The plaintiff adduced evidence from Mr Dominic D'Torre [sic], who has been the leasing manager of the property since 2015. Mr D'Torre [sic] expressed the view that following his inspection of the damage to the plaintiff's property it was no longer feasible to relet the units on the property owing to the safety issues relating to the damage to the stairway, its stringer, and the concrete paving slabs to the east of the building."

[11] The consequential loss claim was quantified in the following way:

(1) Ms Camuglia's rental ledgers indicated that five of the six units had been rented at weekly amounts ranging between $600 and $765, while the sixth unit, unit 2, had from time to time been occupied by Ms Camuglia's son rent-free. The weekly rental totalled $3,489.
(2) However, unit 6, unlike units 1, 3, 4 and 5, was capable of being continuously occupied, notwithstanding the damage to the stairway, as it appears to have had direct access to the street. Accordingly, $600 was deducted from the weekly return.
(3) From that amount, the primary judge applied a discount of 1/3, reflecting the loss of amenity of the units due to their proximity to the building works, that being a loss which Ms Camuglia accepted was not attributable to the defendants.
(4) Still further, the primary judge recorded an acceptance by Mr Sirtes SC, who appeared for Ms Camuglia at first instance and in this Court, that there should be a discount to reflect the vicissitudes of life as a landlord. The primary judge determined a discount of 20%.
(5) By reducing $2,889 (being $3,489 minus $600) by first 1/3, and then by 20%, the primary judge reached a consequential loss per week of $1,541.57.
(6) Ms Camuglia in her written submissions at trial had sought consequential loss only from October 2018, which was when Mr D'Ettorre told her that the premises were unlettable.
(7) The primary judge allowed a period from October 2018 until 1 month after judgment, ie 14 September 2020, amounting to a period of 102 weeks, and thus determined consequential loss as $157,240.14.

[12] No aspect of the appeal challenged any element of the calculation of consequential loss.

[13] Instead, the appellants maintained that no consequential loss should have been ordered, because the primary judge had erred in finding that the damage caused by their construction and demolition works had caused the units to be unlettable. This gave rise to the first ground of appeal.

[14] By a subsequent judgment as to costs, his Honour directed that the defendants pay the plaintiff's costs on an ordinary basis up to and including 7 September 2019 and thereafter on an indemnity basis: *Camuglia v Housman (No 2)* [2020] NSWDC 518. The judgment (as amended to correct an arithmetical mistake) was for $231,316.32. The special costs order arose from a letter dated 23 August 2019 stated to have been written in reliance on the principles in *Calderbank v Calderbank* [1975] 3 All ER 333 which proposed that the proceedings be discontinued on the basis that each party bear their own costs with the defendants paying lump sums of $100,000 in respect of the proceeding and a separate $100,000 in respect of costs. The letter referred to the evidence which, at that date, had been served, namely the evidence of Mr Herbertson, Mr Curtis, Mr Maynier and Ms Camuglia. The affidavits of Mr D'Ettorre had not at that stage been served. The letter also addressed the plaintiff's costs as follows:

> "In the event that our client is successful, we are instructed to seek costs should your clients unreasonably refuse to settle the Proceeding. Our client's costs of and incidental to the Proceeding to date are $150,000 inclusive of Counsel fees, expert fees and GST."

[15] The primary judge regarded the extent of the compromise contained in the letter as considerable. His Honour said:

> "[9] … The offer represented a 78% deduction on the plaintiff's consequential loss claim. It also represented an offer to meet one third of her legal costs, which at the time of the Calderbank offer amounted to a sum of $150,000.
>
> [10] More crucially, the judgment represented an award of more than $131,316 in excess of the Calderbank offer. This represented a substantial compromise, in my view."

[16] His Honour rejected submissions that the offer had not been supported by a bill of costs (on the basis that the defendants had sought no particulars of the costs) and that the 14 days for acceptance was insufficient time (on the basis that no request was made for any additional time to consider the offer). His Honour concluded that it was unreasonable for the defendants to have rejected the Calderbank offer, and accordingly made a special costs order in favour of Ms Camuglia.

[17] The challenge to the costs order was ground 3 of the appeal. Ms Camuglia belatedly (cf UCPR r 51.41) maintained that leave was necessary to bring that challenge, and, against the possibility that that was correct, the appellants sought leave.

Ground 1 – challenge to the claim for consequential loss

The evidence of Mr Herbertson

[18] The critical evidence on which the appellants relied in support of the first ground of appeal was a report dated 17 December 2018 by Mr Robert Herbertson, a consulting engineer retained by Ms Camuglia's solicitors. His report was principally directed to whether subsidence or withdrawal of support or vibration from the defendants' land had caused the damage to the site, and the appropriate rectification works to remedy the damage to Ms Camuglia's property. However, his report also addressed the temporary measures which had been put in place to restore access to the stairway. It stated the following:

> "9.5.4. The cracking and settlement of the stairs (Item 1 in Cantilever report) is unambiguously related to and a consequence of the collapse of the wall supporting the stair edge at the boundary with the adjoining property. This is reported as occurring during excavation on the adjoining site. (Damage shown on photograph 9 in the Cantilever report is not, in my opinion, related to construction on the adjoining site).
>
> (a) Temporary propping has been installed which in my opinion is adequate to ensure re-support until permanent re-support is reinstated. (Refer to section 10. of this report below)."

[19] The cross-reference to section 10 of the report was directed to additional steps which in Mr Herbertson's opinion should be undertaken in order to provide a permanent engineering solution for the stairway.

[20] Mr Herbertson was called in the plaintiff's case, and cross-examined. He was not asked questions about his opinion as to the adequacy of the temporary propping in place.

The submissions made at trial

[21] In final address, in both the defendants' written and oral submissions, the defendants relied on Mr Herbertson's evidence. At [6.6] of their written submissions they said:

> "Even still Mr Herbertson's evidence was quite clear that the temporary solution is structurally satisfactory. There is no evidence to suggest why the apartments are unsuitable to be rent. It is worth repeating that recovering compensatory losses in this sense must be reasonable and causative to the apparent loss. In this sense Ms Camuglia's assertion that it is a bandaid solution might be a way of characterising the solution as temporary but it does not qualify the habitability of the premise[s]."

[22] In oral submissions, Mr Ahmad (who appeared alone at trial, but was led in this Court by Mr Turnbull SC) put to the primary judge that:

> "[Mr Herbertson's] report of December 18 identifies that it's safe."

He also pointed to the fact that the majority of the tenants had left before any damage had been suffered. He contended that Ms Camuglia's decision had been to say "well, I'm never going to rent these units".

[23] One aspect of this ground of appeal was that neither this submission, nor the evidence on which it was based, was addressed by the primary judge.

The rulings restricting the use of Ms Camuglia's and Mr D'Ettorre's evidence

[24] The appellants also submitted that the evidence of Ms Camuglia and Mr D'Ettorre was misused by the primary judge.

[25] The portions of Ms Camuglia's affidavit which survived objection included the following:

> "[21] Upon the vacation of Units/Apartments 3, 6, 4, 5 & 1 of the Camuglia Property, I received advice from the leasing agent, D'Ettorre Properties Pty Limited t/as D'Ettorre Real Estate, that it was not possible to re-let those premises by reason of the noise and vibration caused by the Building Works upon the Housman & Alda Property and/or the damage caused to the Camuglia Property by reason of the Building Works.
>
> [22] I have been unable to re-let any of the apartments/units in the Camuglia Property since September 2018."

[26] The first paragraph of that passage was admitted on a limited basis, namely that "the paragraph not be used for the purposes of establishing the truth of the representation made to the deponent by Mr D'Ettorre".

[27] In cross-examination, the fact that Mr Herbertson had given advice that the temporary propping of the stairs was adequate was put to Ms Camuglia as follows:

> "Q. As at 6 July 2018, the stairs had been propped by PPC. Do you understand that proposition?
>
> A. Well, I, I see the, the props under the stairs, I see it now. I see it.
>
> Q. Have you understood that Herbertson described the propping of the stairs as structurally satisfactory?
>
> A. Can you repeat the question? I don't know, because even if I read the report, I don't understand what they mean, the engineer. I do not understand; I'm sorry, but I don't understand. That's what the engineer - I don't understand that. Maybe --
>
> Q. Do you understand that you're seeking compensation for lost rent?
>
> A. Well, but, you know--
>
> Q. Do you understand you're seeking--
>
> A. I'm, well, I'm not getting, I'm not getting any rental money. I'm, I'm not, because--
>
> Q. I'm not asking about what's happening; I'm asking about whether you understand you're seeking it?
>
> A. 'I'm seeking it. I'm seeking it.' I don't understand your question that and I, I don't know the question--
>
> Q. I withdraw the question."

[28] Subsequently, the cross-examination continued:

> "Q. I suggest to you that you have currently advertised for the letting of the premises and you're aware of it.
>
> A. No, that's not correct and it's not true.
>
> Q. Can I suggest to you that you have also deliberately chosen not to advertise unit 2 because your son lives in there.
>
> A. That's not correct and it's - it's not true because I'm not - we're advertising it. We're not advertising it because we can't lease it. It hasn't been leased until--
>
> Q. Can you just please confine your answer to the questions?
>
> A. I'm answering your question. I'm saying that I can't say yes or no because I have to - because the property has been empty since that damage happened because I'm not willing to put people at risk to climb down the stairs that have been damaged."

[29] Mr Dominic Bruno D'Ettorre had been the property's leasing manager since 2015. He observed the stairway at a site inspection in October 2018, and gave the following evidence, all of which was

subject to a ruling that "the evidence be limited to the witness' perception of the property's defects and his perception of the effect of those defects on a prospective tenant":

> "(d) Following the site inspection referred to in sub-paragraphs (a) and (b) above, I formed the opinion that it would not have been, or was not, feasible to attempt to re-let the apartments in the Camuglia Property owing to the conditions of the Stairway, the Concrete Path, the Eastern Pathway and the Fencing in that all were unsafe, dangerous and a trap to persons using the Camuglia Property, in particular the difficulties with gaining safe passage to and from the apartments, namely:-
>
> (i) there was not a safe means of access from the street to the Camuglia Property by reason of the Stairway, the Concrete Path, the Eastern Pathway and the Fencing;
> (ii) there was not a safe means of ingress and egress to and from the apartments in the Camuglia Property by reason of the Stairway, the Concrete Path, the Eastern Pathway and the Fencing; and
> (iii) there was not a safe means of access from the Camuglia Property to the harbour side foreshore by reason of the Stairway, the Concrete Path, the Eastern Pathway and the Fencing.
>
> …
>
> (f) Given the state of and/or damage to the Camuglia Property referred to in sub-paragraphs (a), (b) and (d) above, I do not consider that the apartments in the Camuglia Property are in a state or condition even capable of being advertised for lease, given the associated cost and the unlikelihood of a tenant wishing to live there.
>
> …
>
> (h) Annexed and marked 'G' are photographs of the Stairway, the Concrete Path and the Fencing provided to me on 1 November 2019 which I am advised, and verily believe, were recently taken by Marco Camuglia in October 2019. These photographs reinforce my opinion that it is not feasible to attempt to re-let the apartments in the Camuglia Property until such time as the Stairway, the Concrete Path and the Eastern Pathway are all made safe and/or replaced, and the Fencing is removed, for any incoming tenant to gain safe and secure passage to and from the apartments in, and common areas on, the Camuglia Property."

[30] It was also submitted on behalf of the appellants that Ms Camuglia could have let the units out on short term tenancies, via Airbnb. That led to the following exchange:

> "TURNBULL: Well, your Honour, short term rentals these days, and there was some evidence that she - although it was withdrawn by her on the second day of the hearing, was that she had attempted to rent them out by Airbnb. There was no difficulty in doing that.
>
> WHITE JA: Well, there is, isn't there?
>
> TURNBULL: Sorry?
>
> WHITE JA: I thought it was contrary to council requirements. That's what Mr D'Ettorre said.
>
> TURNBULL: She had tried to do that, though, your Honour. She gave evidence about that. Short term leases were certainly available to her, but, your Honours, that's not her reason for not letting them out. The reason she gave was because of the safety of the stairs."

[31] That exchange referred to correspondence from the local council, dated 30 September 2018, annexed to Mr D'Ettorre's affidavit. The council advised that the property could not permissibly be let short term under its zoning, and that a standard 3 month residential lease should be the minimum length of stay. That letter included a direction to:

> "[P]lease immediately cease advertising the Property on any short term tourist accommodation websites, including Airbnb and provide Council with a copy of your standard lease agreement for this property once tenants have been accepted".

Consideration

[32] I would accept, favourably to the appellants, that it would have been preferable for reference to the report from Mr Herbertson as to the adequacy of the stairway providing access to the lower four apartments and the cross-examination of Ms Camuglia dealing with that evidence to have been made in the reasons for judgment. However, although Mr Herbertson's opinion was prominent in the submissions on appeal, it was far less prominent in the closing submissions at trial. And, as will be seen below, there may have been good reason for it not to have been especially prominent at trial.

[33] In the foregoing I have refrained from expressing a conclusion whether the reasons were inadequate. That is because in an appeal such as the present, which is not confined to questions of law, and which proceeds by way of rehearing, and where there are no issues of credibility, the adequacy or inadequacy of reasons is usually not to the point. As was said by this Court in *Stephenson v Santos* [2020] NSWCA 262 at [24]:

> "[E]ven if there were a deficiency in the reasons, this Court would not intervene unless it were persuaded that the finding could not stand. This appeal is by way of rehearing, and there is no need for Ms Stephenson to establish error of law. For the reasons given under the heading 'Inadequacy of reasons as separate ground' in *Shellharbour City Council v Rhiannon Rigby* [2006] NSWCA 308, which have subsequently been followed in *NSW Police Force v Winter* [2011] NSWCA 330 at [89]-[90], these grounds were not of themselves sufficient to make out an appeal."

[34] The same point was made in *Capilano Honey Ltd v Dowling (No 2)* [2018] NSWCA 217 at [41]:

> "If the reasons provided addressed an issue, it is open to the unsuccessful party to challenge the reasoning on appeal. If they did not address an issue, it is open to the unsuccessful party to contend that the matter was not considered by the trial judge and, if materiality is established, the omission demonstrates error on that basis. The reasons given are the judge's actual reasons for deciding a point. Usually the appeal court can address the substance of the matter and will not remit because the reasons were 'inadequate'."

[35] I shall follow the usual course described in the passages above and address the substance of the matter, for only if there were error which was productive of injustice would the appeal be allowed and the proceedings remitted for retrial.

[36] First, it was unclear from Mr Herbertson's report how long precisely the "temporary" propping up of the stairway would be adequate. The impression I obtain from the material is that a permanent solution was sought to be put in place in the next weeks or months. That did not occur, in circumstances which need not be summarised in this judgment. It does not seem unreasonable for any decision to let the premises to await the construction of a permanent solution to access, when one was reasonably expected in the short term, especially bearing in mind the need for furniture and other possessions to be delivered to the premises. This may have accounted for the limited attention given at trial to this aspect of Mr Herbertson's report.

[37] Secondly, and more fundamentally, it is one thing for Ms Camuglia to have the benefit of an engineering report that the temporary solution was adequate in terms of safety. It was another thing entirely for Ms Camuglia to have the advice of her leasing manager that the property was incapable even of being advertised to let. That opinion was inherently plausible. If the properties were to be advertised, then the leasing manager had to make a decision to provide information concerning the temporary access or not. It is easy to see that a photograph, even if accompanied by a description of Mr Herbertson's opinion, would make the apartments unappealing to prospective tenants. On the other hand, if the access obstacles were *not* disclosed in the advertising, then it is easy to see the irritation which a prospective tenant who inspected the premises and found the hitherto undisclosed difficulties of access might display. In any event, Mr D'Ettorre was not cross-examined about this.

[38] In short, while the evidence of Mr Herbertson bore upon the finding made by the primary judge and it would have been preferable for it to have been referred to, even having regard to it, no sufficient case has been made out to impugn the finding.

[39] Thirdly, the finding that it was reasonable not to seek to re-let the apartments involved no misuse of the evidence of Ms Camuglia and Mr D'Ettorre having regard to the rulings which had been given. What was critical to the reasonableness of the decision was those witnesses' perceptions of the position, not the engineering opinion that, superficial appearances notwithstanding, the temporary repairs to the stairway had made it safe.

[40] Fourthly, the submissions concerning the possibility of renting the premises short term through Airbnb suffer from the same difficulty. Added to this is the correspondence from the local council mentioned above to the effect that doing so was unlawful, to which the appellants' submissions paid no regard.

[41] Separately from the above, a further obstacle on this issue faced by the appellants may arise having regard to the way the case was pleaded and particularised. At trial, the defendants were directed to particularise the ways in which they said Ms Camuglia had failed to mitigate her loss. They complied with that direction, and no part of those particulars (which were reproduced in full by the primary judge) extended to a claim that she had failed to take reasonable steps to re-let the properties. Insofar as this aspect of the case turns upon failure to mitigate, it is therefore outside the case advanced by the defendants at trial. But the relationship between causation and mitigation is contested. In the United Kingdom, mitigation has been said to be "an aspect of the principle of causation": *Bunge SA v Nidera BV* [2015] UKSC 43; 3 All ER 1082 at [81]. On the other hand, McGregor on Damages warns against the danger "of using causation as a sole touchstone to disguise … the real ground of a decision": J Edelman, *McGregor on Damages* (21st ed, Sweet & Maxwell, 2021), at [9.019]. In cases to which the *Civil Liability Act 2002* (NSW) applies, s 5D and, especially, s 5E will apply, and as presently advised I am unaware of analysis of the relationship between mitigation and the onus of proving "any fact relevant to the issue of causation" imposed by the latter. Proponents of the separatist and causal approaches, and examples of where the different approach may matter, are discussed in W Courtney, "Contract Damages and the Promisee's Role in its own Loss" (2019) 42(2) MULR 406 in section II(A) "The Controversy and Why it Matters". The pleading point raised in the present appeal is another example of when this aspect of taxonomy may matter. But nothing turns on it, because irrespective of whether the appellants are precluded from relying on this by their pleading of mitigation, they fail on the facts for the reasons already given, and it is unnecessary to consider the point further.

[42] Ground 1 is not made out.

Ground 3 – Challenge to the special costs order

Is there a requirement of leave?

[43] Ms Camuglia's written submissions maintained that the appellants required leave to challenge the exercise of discretion by the primary judge as to costs. She submitted that "if there be a separate item in a notice of appeal relating to costs only it can only be raised with the leave of the Court". There was said to be:

> "no sound reason to permit appeals as of right from discretionary orders going to costs only whether on their own (as proscribed by s 102(1)(c)) or as an adjunct to an appeal from another order as of right. To do so would be contrary to what was described in *Zhang v ROC Services (NSW) Pty Ltd*; *National Transport Insurance by its manager NTI Ltd v Zhang* [2016] NSWCA 370; 93 NSWLR 561 at [199] as the evident purpose of s 101(2)(c), namely, to discourage appellate review of such orders."

[44] On 13 April 2021, following receipt of Ms Camuglia's submissions, the appellants filed a notice of motion seeking leave to appeal as to costs against the possibility that leave was required (I pass over the fact that this should have been by way of summons in a separate proceeding). The appellants nonetheless relied on the reasoning of Lord Denning in *Wheeler v Somerfield* [1966] 2 QB 94 for the proposition that leave was not required. They noted, however, that the correctness of *Wheeler* had been left open by this Court in *Coffs Harbour City Council v Polglase* [2020] NSWCA 265 at [179] and *C G Maloney Pty Ltd v Noon* [2011] NSWCA 397 at [104]–[106]. In each of those cases, leave to appeal was granted to the extent such leave was necessary, in circumstances where it was not necessary to decide the issue. The same position was adopted in *Arena Management Pty Ltd (rec and mgr apptd) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652; [2011] NSWCA 128 at [129] and *AF Concrete Pumping Pty Ltd v Ryan* [2014] NSWCA 346 at [72]. In *Sahade v Bischoff* [2015] NSWCA 418 at [166] it was assumed, in the absence of argument, that leave was unnecessary. However, there are decisions in other jurisdictions disapproving *Wheeler*, many of which are summarised in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167 at [97]–[102] commencing with the sentence "That decision has received a mixed reception in Australia". The strongest disapprobation is found in *Road Chalets Pty Ltd v Thornton Motors Pty Ltd* (1986) 47 SASR 532 at 538 where Zelling ACJ said that this aspect of *Wheeler* was "unfortunately … against the whole course of reported cases for a century".

[45] The issue, while it remains unresolved, will continue to engender debate in appeals in this Court. The exchange of submissions in the present appeal, and the review in a recent note in the Australian Law Journal by Mr Prince ("Recent Cases: *Coffs Harbour City Council v Polglase* [2020] NSWCA 265" (2021) 95 ALJ 181, to which White JA referred the parties), make it appropriate to consider this issue.

[46] Appeals are creatures of statute: see eg *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33 at [50] and *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124; [2008] HCA 13 at [2]. As was emphasised in *Perara-Cathcart v The Queen* (2017) 260 CLR 595; [2017] HCA 9 at [40], it is necessary to "look to the statute in order to determine what question or questions are required to be answered, rather than proceed on a priori assumptions". Indeed, it will be seen that the same approach was adopted in 19th century Full Court decisions on previous provisions governing the right of appeal. Thus in determining whether the challenge to the special costs order is available at all, or only with leave, or as of right, the starting point is the terms of the statute.

District Court – expansion in 1995 to permit appeals from costs orders

[47] Section 127 of the *District Court Act 1973* (NSW) relevantly provides:

> **127 Right of appeal to Supreme Court**
>
> (1) A party who is dissatisfied with a Judge's or a Judicial Registrar's judgment or order in an action may appeal to the Supreme Court.
>
> (2) The following appeals lie only by leave of the Supreme Court—
>
> …
>
> (b) an appeal from a judgment or order as to costs only, …".

[48] That wording was inserted in substantially the same form by the *Courts Legislation Further Amendment Act 1995* (NSW), Schedule 1 Item 1.3 [10]. The explanatory note stated, somewhat obliquely, that the amendment would simplify the provisions governing appeals.

[49] The new provision replaced an earlier regime which made provision for applications for new trials after a jury's verdict, and (simplifying slightly) otherwise conferred a right of appeal "from any ruling, order, direction or decision of the Judge in an action": see, respectively, ss 126 and 127, and s 128(2A), of the *District Court Act 1973* in the form those provisions took before 1995. Those words "ruling, order, direction or decision of the Judge" had previously been found in s 142 of the *District Courts Act 1912* (NSW) and s 107(1) of the *District Courts Act 1901* (NSW). Earlier still, the right of appeal was confined, relevantly, to "the determination or direction of the said Court in point of law": *District Courts Act 1858* (NSW) (22 Vic No 18), s 94. These provisions were held not to extend to appeals as to costs.

[50] A plaintiff who obtained an order for detinue in his favour but no order for costs brought an appeal under s 107 of the *District Courts Act 1901* in *Robinson v Sutton* (1909) 9 SR (NSW) 295. Cohen J wrote the leading judgment, with which Pring J and Sly J agreed. The Court followed *Dunn v Lowe* (1876) 14 SCR 371 which had held that an appeal from the District Court against a costs order did not lie. After dealing with English cases on the Judicature legislation, Cohen J addressed *Dight v Gordon* (1863) 3 SCR Eq 62, and said it was "sufficient to say that this was a case on the equity side of the Court, where, apparently, different rules prevail, and the decision was based on the words of the statute, and the Court followed the practice of the Courts of Equity in England": at 297. Cohen J then reproduced s 107 and said:

> "I think these words 'ruling,' 'order,' 'direction,' or 'decision,' refer to some question which has arisen in the course of the trial, that is to say, up to the time of judgment: some ruling of the Judge, some ruling of law, something going to the merits of the case, or upon the admission or rejection of evidence. These words point to something in the course of the trial, but preceding any question as to costs. In the words of Lord Campbell CJ in *Carr v Stringer* (EB & E 123), they refer to a determination on a decision of the cause. Here there is no appeal from the decision of the Court apart from the question of costs, which is not included in the words I have just quoted" (at 297-298).

[51] The re-enactment of the same language in the 1912 and 1973 statutes is some confirmation that the meaning given to the same words in *Robinson v Sutton* was endorsed: see for example *Vella v Commissioner of Police (NSW)* [2019] HCA 38; 93 ALJR 1236 at [19] and [52]; other authorities

are considered in *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847; [2020] NSWCCA 150 at [166]-[174].

[52] Thus s 127(1) and (2)(b) when introduced in 1995 represented an expansion of the scope of District Court appeals from the position which had obtained over the previous century. The new language followed the course taken in the *Supreme Court Act 1970* (NSW) which made provision for appeals to the Court of Appeal from the Supreme Court constituted by a single judge.

Supreme Court – imposition in 1972 of requirement of leave upon costs appeals

[53] Prior to the commencement of the *Supreme Court Act 1970* (NSW) on 1 July 1972, the position was markedly different in equity. Far from there being no appeal at all, appeals in equity lay *as of right* from decrees or orders as to costs.

[54] Section 21 of the *Administration of Justice Act 1840* (4 Vic No 22) had authorised the nomination of a judge to hear and determine matters in Equity. "[A]ny person feeling aggrieved by any such decree or order at any time within fourteen days next after the pronouncing or making of the same" was authorised to enter an appeal against such decree or order (originally to the other two judges of the Court, expanded to three judges by s 13 of the *Advancement of Justice Act 1841* (5 Vic No 9)). The circumstances in which this legislation was enacted are described in a note, "The Primary Judge in Equity" (2016) 90 ALJ 783.

[55] Two divided decisions of the Full Court had held that the words "any decree or order" bore their ordinary meaning, and extended to appeals where the only issue was costs, although that position was only reached with some expressions of dissatisfaction.

[56] In *Dight v Gordon*, Stephen CJ said that:

> "The Court here is in a different position from that of the Vice Chancellor in England. We are governed by the wording of the Statute under which appeals in Equity are brought (4 Vic No 22, s 21), which provides 'that it shall be lawful for any person feeling aggrieved by any such decree or order, at any time within fourteen days next after the pronouncing or making of the same, to enter an appeal in the office of the Court against such decree or order, &c.' This, in my opinion, obliges us to hear appeals of all sorts, and leaves us no discretion as to whether we ought or ought not to entertain an appeal for costs."

[57] Wise J agreed, regretting that there was no alternative in light of the statute, but noting:

> "It is plain that in England the Court would not allow any such appeal; and if it had not been for the express words in the statute, I should have had no doubt that we could not have allowed it."

[58] Milford J dissented, saying that "if the Courts of appeal in England can refuse to hear appeals upon costs, we can do so here". His Honour did not explain how that construction accorded with the statute upon which his colleagues had based their decision.

[59] The second Full Court decision was *Dixon v Williams* (1875) 13 SCR Eq 7. This was an appeal by the plaintiff from a decree by the primary judge in Equity (Hargrave J) that the defendant should have his taxed solicitor/client costs from the trust estate. The Full Court was constituted by Martin CJ, Hargrave J and Faucett J. Over Hargrave J's dissent, the appeal was allowed. Faucett J commenced his judgment:

> "This is an appeal solely on the question of costs, and I regret that the English practice, which does not allow an appeal for costs, is not followed here."

[60] Hargrave J, dissenting, considered that his own judgment was correct, on the basis that the Full Court's earlier decision in *Dight v Gordon* was:

> "quite contrary to the universal English practice (see the cases collected in *Daniel's* Practice, Vol III, pp 1347-50), and also contrary to our own practice in appeals from a Judge at Chambers".

[61] Once again, no attempt was made to address the language of the statute.

[62] Thereafter, s 70 of the *Equity Act 1880* (NSW) and s 81 of the *Equity Act 1901* (NSW) seemingly *expanded* the scope of appeals confined to costs, the latter providing that "[a]ny person aggrieved by any decree or order of the Judge, whether sitting in open Court or in chambers, may … enter an appeal". The re-enactment of the earlier statutory language, this time expanded to include orders made in chambers, was regarded as confirmatory of the construction reached under the 1840 statute. The notes on p 109 of

W Parker, *The Practice in Equity (New South Wales)* (Law Book Co of Australasia Ltd, 1930) identify a series of cases dealing with appeals for costs only. One is *Eberlein v Eberlein* (1887) 8 LR (NSW) Eq 1, where the only question was costs, and which proceeded on the basis that the appeal lay as of right.

[63] That was the position in equity until 1972.

The English position adopted in 1972 and extended in 1995 to District Court appeals

[64] The 1995 amendments introducing s 127(2)(b) of the *District Court Act 1973* aligned the position to that which applied to Supreme Court appeals (that, presumably, is the meaning of the "simplification" mentioned in the explanatory note). Section 101(2)(c) of the *Supreme Court Act 1970* (NSW) is in materially identical terms. As is pointed out in Mr Prince's note, s 101(2)(c) of the *Supreme Court Act 1970* (originally enacted as s 101(3)(a)) itself derives from English provisions. In England, a different approach had long been taken.

[65] Prior to the Judicature reforms which commenced in 1876, appeals in England lay (a) within the Court of Chancery (from the Vice Chancellors and the Master of the Rolls to the Lord Chancellor and, after its creation in 1851, to the Court of Appeal in Chancery); (b) from the civilian courts (including admiralty and ecclesiastical matters) and the colonial courts to the Privy Council, and (c) from a variety of courts to the House of Lords (Disraeli's success in preventing the abolition of most appeals to the House of Lords, effected by the *Appellate Jurisdiction Act 1876*, is described in D Steele, "The Judicial House of Lords: Abolition and Restoration 1873-6" in L Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009), pp 13-29).

[66] Absent from the foregoing is reference to the superior courts at common law at Westminster, and the multitude of local courts administering common law. That reflects Dixon J's observation that "[a]ppeal as distinguished from error was not a process of the common law": *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108; [1931] HCA 34, and see *Dwyer v Calco Timbers* at [2].

[67] The prevailing rule in all those areas was that an appeal could not be brought confined to a question of costs, at least unless there was some patent error or mistake in the order. However, if there was some other non-colourable ground of appeal, then the appellate court could revisit the issue of costs, even if the other ground failed.

[68] The English pre-Judicature position, which was evidently familiar in colonial New South Wales, was explained in a large number of decisions. First, in Chancery, in *Owen v Griffith* (1749) 1 Ves Sen 250; 27 ER 1012, the general rule that there could not be an appeal for costs only was insisted on. Lord Hardwicke LC said of the rule:

> "The foundation of it was to prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which as the reason of mankind might differ, it would create perpetual appeals; but this is no printed rule; and it seems somewhat strict and hard to adhere to it …".

[69] Similarly, Lord Lyndhurst LC said in *Attorney-General v Butcher* (1827) 4 Russ 180 at 181; 38 ER 773 at 773-4 that:

> "[t]he rule is, that you cannot appeal for costs alone. But if a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed on the substantial ground of appeal … A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the question of costs."

[70] In the Privy Council, appeals on costs alone were disfavoured. In *Mussumat Keemee Baee v Latchman-das Narrain-das* (1837) 1 Moo Ind App 470; 18 ER 188, it was said that "no appeal against a decree merely as to costs would be allowed" where costs were in the discretion of the court (the decisions altering the first instance order as to costs were, however, affirmed because there had been no discretion as to costs in the court below). In *Attenborough v Kemp* (1861) 14 Moo PC 351 at 352-3; 15 ER 338 at 339 (an appeal from the Court of Arches on a disputed church rate), Turner LJ for the Privy Council advised:

> "[Their Lordships] do not wish to lay it down as a general rule, that in no case would there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the Court below has proceeded upon mistake or misapprehension. Their Lordships do not think that any general rule can be laid down which must apply to cases of this description. Such cases their Lordships desire to leave untouched; but where there has been *bona fide* care and discretion exercised on the part of the Judge who has decided the case, their Lordships have no hesitation in stating their opinion to be, that in such a case no appeal will lie in respect of costs alone."

[71] That approach was applied in *Richards v Birley* (1864) 2 Moo PC (NS) 96; 15 ER 838 (on appeal from the Prerogative Court of York disputing another church rate) and in *Yeo v Tatem* (1871) 3 LR PC 696 at 702 (an admiralty appeal).

[72] In the House of Lords, dealing with a Scottish appeal, Lord Brougham wrote in *Inglis v Mansfield* (1835) 3 Cl & Fin 362 at 371; 6 ER 1472 at 1476:

> "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of Review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised."

[73] There were exceptions including where a question of principle was involved or where there was patent error. See for example *Yeo v Tatem* at 702, and see the cases cited in *The Annual Practice 1961* (Sweet & Maxwell Ltd, London, 1960), Vol 1 at p 1846 and Morgan and Wurtzburg, *A Treatise on the law of Costs in the Chancery Division of the High Court of Justice* (2nd ed, Stevens and Sons, London, 1882) at p 160.

The Judicature legislation

[74] The Judicature legislation extended the right of appeal to the (newly created) Court of Appeal from all Divisions of the (newly created) High Court of Justice. However, s 49 of the *Judicature Act 1873* provided:

> "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

[75] The language "as to costs only" will be noted. That is reflected in the current forms of s 101(2)(c) of the *Supreme Court Act 1970* and s 127(2)(b) of the *District Court Act 1973*. Broadly speaking, s 49 replicated the existing position. However, it will also be noted that s 49 of the *Judicature Act* made the grant of leave from the judge *at first instance* a condition of appellate jurisdiction in those appeals to which it applied. This was re-enacted in some Australian legislation (for example, s 27 of *The Judicature Act 1883* (Vic) (47 Vic No 761)) but was not repeated in New South Wales, where it was the Court of Appeal which could grant leave, if leave be needed. That distinction has made it possible to avoid resolving the point by granting leave to the extent necessary (see the decisions in [44] above).

[76] The effect of the prohibition upon appeals as to costs only was raised in the Court of Appeal in *Harris v Aaron* (1877) 4 Ch D 749. The plaintiff's bill had been dismissed, but without costs. The plaintiff appealed. The defendant sought, in the event the appeal was dismissed, to challenge the absence of a costs order at first instance. James LJ, with whom Mellish and Baggallay LJJ concurred, said:

> "[T]he Court had no power to alter the direction of the Vice-Chancellor as to costs, which were entirely within his discretion. The 49th section of the *Judicature Act,* 1873, was imperative."

[77] *Harpham v Shacklock* (1881) 19 Ch D 207 was similar. After the appeal had been dismissed, the successful respondent sought a variation to the Vice-Chancellor's order as to costs. Sir George Jessel MR said:

> "If we were to vary the order of the Court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs."

[78] Baggallay LJ said that "we must follow the rule that there shall be no appeal upon the question of costs only."

[79] In both those decisions, the Court of Appeal was dealing with an informal application which in substance amounted to a cross-appeal against the failure to make a costs order in favour of the respondent to the appeal.

[80] *Harris v Aaron* and *Harpham v Shacklock* are mentioned at p 1845 of the 1961 *Annual Practice* under the heading "Appeal as to Costs". The text reproduced the successor provision to s 49 of the *Judicature Act 1873*, namely, s 31 of the *Supreme Court of Judicature (Consolidation) Act 1925*, preventing appeals "as to costs only which by law are left to the discretion of the Court" without obtaining the leave of the Court or Judge making the order, and then stated:

> "Generally. – See *Harris v Aaron* (1877) 4 Ch D 749 (no power to vary as to costs only even where whole decree appealed against); *Harpham v Shacklock* (1881) 19 Ch D p 215 (same point)…"

Modern Australian decisions

[81] In *Road Chalets Pty Ltd v Thornton Motors Pty Ltd* (1986) 47 SASR 532, Zelling ACJ addressed a submission that leave was not required to challenge a costs order in circumstances where there were other substantive grounds of appeal which had failed. His Honour said that the proposition in *Wheeler v Somerfield* that the appeal extended to the ground concerning costs was quite wrong, and proceeded on the basis of a concession which ought not to have been made. He added:

> "If counsel had taken the care to look at the *Annual Practice* he would have found that there was ample authority for the proposition which he was asserting. I need only refer to the decision of the Court of Appeal in *Harris v Aaron* (1877) 4 Ch D 749 which is a clear authority for the long-standing practice of the Court and which would have bound the later Court of Appeal had they been referred to it in *Wheeler's* case, and I refer also to the discussion of the matter in the 1961 *Annual Practice*, vol 1, p 1845."

[82] As Mr Prince has explained, this is incorrect. *Harris v Aaron* was a challenge to a costs order by the *respondent* to an appeal. The respondent made no other challenges to the order. It is tolerably clear that a cross-appeal confined to costs is caught by the provision requiring leave to appeal "as to costs only". The report of *Harris v Aaron* is a little confusing, because the respondent's challenge was rejected peremptorily, before the judgment dealt with the failure of the appellant's appeal on substantive grounds, and the summary in the *Annual Practice* is also less than pellucidly clear. I would also note that the point was not fully argued in *Road Chalets* (as is recorded at 551) and was not addressed by Cox J or O'Loughlin J.

[83] This Court has held, relying upon *Wheeler v Somerfield*, that an appellant with a bona fide ground of appeal enjoyed as of right may also challenge a costs order without leave: see *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at [200] and *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154 at [61]. In light of the statement in *Road Chalets* that *Wheeler v Somerfield* should not be followed, there has been hesitation on the point, notably in *Arena Management Pty Ltd (recs & apptd) v Campbell Street Theatre Pty Ltd* at [129]. But the matters mentioned above persuade me that the statement in *Road Chalets* is incorrect and ought not to be followed. And indeed, the weight of authority in New South Wales thereafter, notably *Dillon v Gosford City Council* [2011] NSWCA 328; 284 ALR 619 at [53]-[57], supports the proposition already reached that where there is a substantive ground of appeal as of right, then even if that ground fails, the appellant may nonetheless challenge the costs order as of right. (Of course, if one or more of the substantive grounds succeeds, the costs discretion will have to be re-exercised and thus any ground of appeal as to costs will be otiose.) A discussion of the position in relation to other statutory provisions, many of which are slightly different, is found in *Muswellbrook Shire Council v Hunter Valley Energy Pty Ltd* [2019] NSWCA 216; 372 ALR 695 at [46]-[63].

[84] The upshot of the above is that an appeal raising bona fide substantive grounds as well as costs is not an appeal as to "costs only" within the meaning of s 101(2)(c) of the *Supreme Court Act 1970* or s 127(2)(b) of the *District Court Act 1973*, and that remains so even if the substantive grounds are rejected. There is no reason to depart from the construction which has hitherto been given to the provisions, which reflect an intermediate position from what had previously been the case in equity and

in District Court appeals, and one which aligned the position in New South Wales with that in the United Kingdom. While it was appropriate to adopt a cautious approach in light of the criticism in *Road Chalets*, a fuller examination enables the conclusion to be reached that ground 3 of the appellants' appeal is as of right. That construction respects the language of the provision, and aligns with the legislative history summarised above. It also accords with the practical consideration that there is little benefit in there being a separate requirement of leave, where three Judges of Appeal are already required to consider the substantive grounds in an appeal brought as of right.

Appellants' submissions on ground 3

[85] The substance of this ground, in contrast with whether it is available as of right, may be resolved much more concisely.

[86] The appellants accepted, correctly, that they needed to establish *House v The King* error in order to challenge the exercise of discretion as to costs, but said that such error was disclosed, in three ways.

[87] First, they said, that the offer was not one which would "meet one third of [Ms Camuglia's] legal costs" and the primary judge erred in saying that it was. Instead, the $100,000 was two thirds of the $150,000 which had been represented to be Ms Camuglia's costs at that time.

[88] Secondly, relying upon a bill of costs brought into existence in January of this year, they ultimately submitted that Ms Camuglia's costs had not been $150,000 as at 23 August 2019, but materially less, some $113,696.10.

[89] Thirdly, they submitted that the evidence which was ultimately dispositive, that of the leasing agent Mr D'Ettorre, had not been served at the time the offer was rejected.

Consideration

[90] I do not consider that any basis to re-exercise the discretion as to costs has been made out. The crucial consideration was that the offer was substantially more advantageous than the judgment Ms Camuglia ultimately obtained. The fact that her costs at that time are now shown to be some $113,696.10 rather than $150,000 does not materially detract from the substantiality of the compromise when viewed as a whole. The insignificance of the costs component was reflected in the failure on the part of the appellants to make any inquiries as to the basis of costs being $150,000, as the primary judge observed.

[91] The error concerning the compromise amount of $150,000 being two thirds, rather than the one third stated by the primary judge, is an obvious slip and immaterial.

[92] I do not regard the subsequent service of Mr D'Ettorre's affidavits as material. Two days prior to the offer, Ms Camuglia's affidavit of 21 August 2019 had been served, [21] and [22] of which have been reproduced above. The essential case advanced by Ms Camuglia, namely, that D'Ettorre Properties Pty Ltd had told her that it was not possible to re-let the properties by reason of the noise and vibration caused by the building works and the damage to the property was available to the defendants at the time they reviewed the offer.

[93] Ground 3 is not made out.

Orders

[94] For those reasons, although the appellants are correct to submit that their appeal is as of right, their appeal should be dismissed. There is no reason why costs should not follow the event. If either side seeks a special costs order, application may be made within the time specified by UCPR r 36.16.

[95] **WHITE JA**: I agree with Leeming JA.

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Amendments

11 October 2021 – Coversheet – "4 Russ 179" changed to "4 Russ 180", "8 SCR Eq 1" changed to "8 LR (NSW) Eq 1", "1 Ves Sen 249" changed to "1 Ves Sen 250" and "7 SASR 532" changed to "47 SASR 532" in list of cases cited
Headnote, holding 2 – "7 SASR 532" changed to "47 SASR 532"
[44] – "7 SASR 532" changed to "47 SASR 532"
[62] – "8 SCR Eq 1" changed to "8 LR (NSW) Eq 1"
[68] – "1 Ves Sen 249" changed to "1 Ves Sen 250"
[69] – "4 Russ 179" changed to "4 Russ 180"

Solicitors for the Appellant: *Holman Webb Lawyers*.

Solicitors for the Respondent: *Leslie Pozniak, Landerer & Co*.

Declan Byrne

AUSIPILE PTY LTD v BOTHAR BORING AND TUNNELLING (AUSTRALIA) PTY LTD

Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QCA 223

Supreme Court of Queensland (Court of Appeal)

Fraser and Morrison JJA and North J

19 August, 15 October 2021

Construction Contracts – Remuneration – Statutory regulation of entitlement to and recovery of progress payments – Payment claims – Where the appellant and respondent entered a subcontract agreement to design and construct a secant pile launch shaft – Where the respondent hired a crawler crane from the appellant to complete works under the head contract – Where the appellant applied for judgment pursuant to s 78(2)(a) of the Building Industry Fairness (Security of Payment) Act 2017 (Qld) to recover amounts owing under a payment claim but the application was dismissed – Whether the variation in relation to the hire of the crawler crane related to a contract other than the subcontract – Whether the payment claim contained claims in relation to two contracts – Whether the payment claim was void for the purpose of the Building Industry Fairness (Security of Payment) Act 2017 (Qld).

Consumer Protection – Misleading or deceptive conduct or false representations – Character or attributes of conduct or representation – Silence and non-disclosure – Where the respondent sent the appellant a letter stating that it would withhold further payment claims "as discussed" – Where the appellant did not respond to the letter – Whether the appellant's silence was misleading or deceptive or likely to mislead or deceive.

On 14 November 2018, Bothar Boring and Tunnelling (Australia) Pty Ltd ("the Contractor") engaged Ausipile Pty Ltd ("the Subcontractor") to design and construct a secant pile launch shaft with a subcontract price of $1,380,000 at a site in Biggera Waters, Queensland. The subcontract works were completed in late April 2019 and prior to demobilising from site, the Contractor agreed to hire the Subcontractor's crawler crane and an operator for other works on site required under the Contractor's head contract with John Holland. On 1 May 2019, the Subcontractor finished demobilising from the site except for the crawler crane and operator which remained onsite until 17 June 2019. After demobilising from site, the Subcontractor attended the site from time to time in May and June 2019 to rectify a number of defects in the secant pile wall.

Section 75 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ("the Act") creates a statutory right for a person who is or claims to be entitled to a progress payment to make a payment claim for each reference date under a construction contract. The subcontract provided for payment claims to be made on the 22nd day of the month.

The Subcontractor made three payment claims which were paid in full by the Contractor, without a payment schedule being issued. The Subcontractor made its fourth payment claim on 25 March 2019 for $463,936 which was partially paid in the amount of $25,000. No payment schedule was issued. On 26 April 2019, the Contractor orally notified the Subcontractor that it anticipated significant defects with the launch shaft once the excavation began and that it was holding claim (5) and any future payment claims pending the completion of the excavation. The Contractor confirmed this conversation with a letter on 1 May 2019. Despite this notice, the Subcontractor made payment claim (5) on 30 April 2019 for $268,972, but it was not paid. The Subcontractor made payment claim (6) on 24 May 2019 for $786,296.75 which included the unpaid amounts of payment claim (4) and (5) along with an additional amount of $21,500 for the hire of the Subcontractor's crawler crane. Subsequently, the Contractor paid an additional $25,000 towards payment claim (4). The total amount claimed by the Subcontractor that remained unpaid was $761,296.75.

The Contractor did not provide a payment schedule for any of the Subcontractor's payment claims. Section 77 of the Act provides that if a respondent does not respond to a payment claim with a payment schedule, then the respondent is liable to pay the amount claimed.

The Subcontractor applied for judgment pursuant to s 78(2)(a) of the Act for the total amount outstanding under payment claim (6). Section 100 of the Act provides that judgment under s 78(2)(a) is not to be given by a court unless the court is satisfied that the respondent did not (a) pay the amount to the claimant on or before the due date; and (b) did not give the claimant a payment schedule within the time required to do so under the Act.

The primary judge dismissed the Subcontractor's application and accepted the Contractor's defence that payment claim (6) was void since it made claims pursuant to more than one construction contract in contravention of the Act. The primary judge held that the crawler crane hire was a separate contract and was not a variation to the other works completed by the Subcontractor. Since payment claim (6) made claims associated with the Subcontract as well as a separate agreement for the crane hire, it was void for the purposes of the Act.

The primary judge rejected the Contractor's claim that the Subcontractor represented that the Contractor was not required to deliver a payment schedule, it was not required to assess or pay payment claim (5) or subsequent payment claims until the completion of the excavation and the Subcontractor would not enforce its rights in respect of payment claim (5) and subsequent claims. The basis of this claim was that the Subcontractor was silent with respect to any disagreement with the proposed approach discussed on 26 April 2019 and notified in the 1 May 2019 letter. The primary judge held that the circumstances did not give rise to a reasonable expectation that the Subcontractor should have disclosed that it disagreed with the Contractor's notice that it intended to withhold payment due to anticipated defects. The primary judge reasoned that prior to the letter, the Contractor did not provide any payment schedules and that the conversation on 26 April 2019, the letter on 1 May 2019 and the associated conversation on 1 May 2019 did not support the conclusion that an agreement was reached between the parties regarding the withholding of payment.

The primary judge also rejected the Contractor's defence that the Subcontractor did not give a valid warning notice since it was out of time. The primary judge held that the Contractor did not make out the threshold argument that the contractual time for payment was varied by the parties.

The Subcontractor appealed.

Held, allowing the appeal:

(1) The presumed intention of the parties was for the subcontract to be varied for the crawler crane hire and the primary judge erred in finding that the crane hire was under a separate contract. The parties were commercial contracting parties that entered into a formalised subcontract which detailed, among other things, provisions for payment claims, insurance, the manner of carrying out the work and indemnities. The exchange concerning the crane hire and operator did not include any of these relevant matters and it is unlikely that parties, with an existing subcontract still on foot containing all of these terms, intended to enter into a separate contractual relationship. This conclusion is strengthened by cl 3.1 of the subcontract entitling the Contractor to unilaterally vary the work and the inclusion of an operator with the crane hire, rather than just the crane itself, from the Subcontractor. (Morrison JA at [27] - [40], Fraser JA at [1] and North J at [125], agreeing).

(2) The Subcontractor did not engage in misleading or deceptive conduct. The Subcontractor's equivocal response was not an agreement to the Contractor's statement to withhold payment due to purported defects. The circumstances and correspondence taken as a whole did not create a reasonable expectation for a more detailed response from the Subcontractor and did not constitute misleading or deceptive conduct by silence. (Morrison JA at [58]–[62], [71]–[72] Fraser JA at [1] and North J at [125], agreeing).

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, applied.

(3) The proper construction of the Act must consider the objects and purposes of the legislation. The main purpose of the Act is to help participants in the building and construction industry to be paid for the work they complete. The Act provides a statutory entitlement for a person who claims to be entitled to a progress payment rather than requiring a person to actually be entitled to a progress payment. Therefore, a payment claim must comply with the requirements of the Act on its face.

Similarly, the Act provides giving the claim to someone who may be liable, rather than requiring a person actually to be liable. The person who receives a payment claim is obliged to respond to it with a payment schedule within the time frames given in the Act. (Morrison JA at [76], [80], [83]–[87], [92]–[97], Fraser JA at [1] and North J at [125], agreeing).

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41, applied.

(4) Payment claim (6) complies with s 75(1) of the Act and is a valid payment claim. On its face, it refers to the subcontract, does not refer to more than one contract and refers to the crane hire as a variation under the subcontract. Where a payment claim purports to be made under one contract, it is not rendered invalid simply because at a later time (either during the adjudication or otherwise) it is determined that part of the claim was, in fact, a claim under a different contract. Provided a payment claim is made in good faith and purports to comply with s 75(1) of the Act, the merits of that claim, including questions as to whether it complies with s 75(1), is a matter for adjudication after having been raised in a payment schedule. Given that, on its face, payment claim (6) complied with the Act and that the Contractor had not made out any valid defences, the appeal was allowed and judgment entered for the Subcontractor. (Morrison JA at [104]–[121], Fraser JA at [1] and North J at [125], agreeing).

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93, followed.

Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4; *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6; *Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330; *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239; *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363, distinguished.

MH Hindman QC and *MJ Steele* for the appellant.

TP Sullivan QC and *J Mitchenson* for the respondent.

15 October 2021

JUDGMENT

[1] FRASER JA: I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] MORRISON JA: On 9 September 2018 Bothar Boring and Tunnelling (Australia) Pty Ltd[1] was engaged to design and install a pipe from Biggera Waters on the Gold Coast to South Stradbroke Island.

[3] On 14 November 2018 Bothar engaged Ausipile Pty Ltd[2] as a subcontractor under a written subcontract agreement. Ausipile's work was to design and construct a secant pile launch shaft. Secant pile walls are a type of retaining wall used to retain water and soil so that a shaft may be excavated to enable tunnelling without the area inside the secant pile wall being flooded by water.

[4] The written subcontract agreement stipulated a subcontract price of $1,380,000 (plus GST) with 30 day terms, and that payment claims were to be submitted on the twenty-second day of each month to which the claim related.

[5] The usual process of issuing payment claims under the subcontract was to prepare a monthly payment tax invoice together with a payment claim report particularising the amount of each claim. That would be emailed to Mr O'Connor, Bothar's project manager, before the end of the month in which the relevant works were carried out by Ausipile. On occasion other representatives of each party would be copied in on the emails.

[1] To which I will refer as Bothar.

[2] To which I will refer as Ausipile.

[6] In breach of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld), Bothar did not respond to any payment claim by giving Ausipile a payment schedule.

[7] The payment claims made, and the payments under them were as follows:

(a) claim 1 was issued on 21 December 2018 in the sum of $61,380 (including GST); it was paid in full by Bothar on 1 February 2019;
(b) claim 2 was issued on 22 January 2019 in the sum of $32,620.50 (including GST); it was paid in full by Bothar on 1 March 2019;
(c) claim 3 was issued by Ausipile on 26 February 2019 for $663,344.50 (including GST); it was paid in full by Bothar, in two equal shares on 3 April 2019 and 17 April 2019;
(d) claim 4 was issued by Ausipile on 25 March 2019 in the sum of $463,936 (including GST); Bothar only paid $25,000 of that sum, on 17 May 2019;
(e) payment claim 5 was issued on 30 April 2019 in the sum of $268,972 (including GST); it was not paid;
(f) payment claim 6 included the unpaid component of payment claim 4 ($438,936), the unpaid amount of payment claim 5 ($268,972) as well as an amount for a hire by Bothar of Ausipile's crawler crane.

[8] Ausipile applied for judgment pursuant to s 78(2)(a) of the Act seeking to recover the total amount outstanding under payment claim 6. Bothar resisted that application on a number of grounds, the only one of which that is relevant to the present appeal was that payment claim 6 concerned two separate contracts and was therefore void. The learned primary judge accepted that argument, dismissing the application for judgment.[3]

[9] Ausipile has appealed that decision. The grounds advanced are:

(a) ground 1 – the learned primary judge erred in finding that a claim for a variation in relation to the wet hire of the crawler crane in payment claim 6 related to a contract other than the subcontract; put alternately, there was an error finding that payment claim 6 contained claims relating to two different construction contracts;
(b) ground 2 – as a consequence of that error, it was wrong to find that payment claim 6 was void for the purposes of the Act;
(c) ground 3 – alternatively, if it was right to find that payment claim 6 contained claims relating to two different construction contracts:
    (i) it was wrong to find that payment claim 6 was void for the purposes of the Act where, on the face of the payment claim, it related to one construction contract; and
    (ii) further or alternatively, it was an error to not sever the claim for the variation relating to the wet hire of the crawler crane ($21,500) from payment claim 6, and enter judgment for the balance of the payment claim.

[10] Bothar has filed the notice of contention contending that the learned primary judge was in error to find that there was no misleading or deceptive conduct by Ausipile, which caused Bothar to not submit a payment schedule in response to payment claim 6.

The legislative provisions

[11] There are a number of relevant provisions of the *Building Industry Fairness (Security of Payment) Act* which are relevant to the issue on this appeal.

[12] Section 68 of the Act sets out the meaning of the term "payment claim":

> "**68 Meaning of *payment claim***
>
> (1) A ***payment claim***, for a progress payment, is a written document that—
>
> (a) identifies the construction work or related goods and services to which the progress payment relates; and

[3] *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QSC 39.

(b) states the amount (the ***claimed amount***) of the progress payment that the claimant claims is payable by the respondent; and
(c) requests payment of the claimed amount; and
(d) includes the other information prescribed by regulation.

(2) The amount claimed in the payment claim may include an amount that—
(a) the respondent is liable to pay the claimant under section 98(3); or
(b) is held under the construction contract by the respondent and that the claimant claims is due for release.

(3) A written document bearing the word 'invoice' is taken to satisfy subsection (1)(c)."

[13] Of the total amount claimed in payment claim 6, issued on 24 May 2019, $761,296.75 remains unpaid. The recovery of that sum was sought under s 78 of the Act which relevantly provides:

"**78 Consequences of failing to pay claimant**

(1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.
(2) The claimant may either—
(a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or
…"

[14] Proceedings to recover an unpaid amount by way of a debt are governed by s 100 of the Act, which relevantly provides:

"**100 Proceedings to recover unpaid amount as debt**

(1) This section applies if a claimant starts proceedings in a court under section 78(2)(a) to recover an unpaid amount from a respondent as a debt owing to the claimant.
(2) Judgment in favour of the claimant is not to be given by a court unless the court is satisfied that—
(a) the respondent did not pay the amount to the claimant on or before the due date for the progress payment to which the payment claim relates; and
(b) if the respondent's liability to pay the amount arises because of a failure to give a payment schedule—the respondent did not give the claimant a payment schedule within the time required to do so under this Act.
(3) The respondent is not, in those proceedings, entitled—
(a) to bring any counterclaim against the claimant; or
(b) to raise any defence in relation to matters arising under the construction contract."

Background to the crane hire agreement

[15] Ausipile used a crawler crane to lift steel reinforcing cages off the piles, as well as to service other equipment.

[16] On 30 April 2019 Ausipile started to demobilise its onsite equipment as the principal work under the subcontract had been completed. Because the crawler crane had completed its task of lifting the steel reinforcing cages, and was no longer needed for the subcontract works, it was to be demobilised and removed from site.

[17] Bothar required a crawler crane for the excavation of the launch shaft. This was work which Bothar was required to perform under its head contract with John Holland.

[18] Mr O'Connor (from Bothar) contacted Mr Godden (of Ausipile) to see whether Ausipile would agree to hire the crawler crane to Bothar, as it was already onsite.

[19] Mr O'Connor gave evidence that some time prior to 30 April 2019 he called Mr Godden about the hire of the crane. He could not recall exactly what was said to Mr Godden, but the effect of the conversation was as follows:

(a) Mr O'Connor asked whether Bothar would be able to hire a crawler crane from Ausipile, to use for works they needed to do for John Holland;
(b) Mr Godden said that Ausipile would be able to do this; and
(c) Mr O'Connor asked if Mr Godden could send him the hire rates for the crawler crane.

[20] On 30 April 2019 Mr O'Connor received an email from Mr Godden providing hire rates for a "crawler crane". The email stated:

> "Kieran,
>
> Hire rate for the Crawler Crane as follows.
>
> $4800 pw Dry Hire.
>
> $2150 per day wet hire with Operator.
>
> Any queries please give me a call."

[21] Each party understood the reference to "dry hire" and "wet hire". The difference is that wet hire includes the cost of providing an operator for the crane.

[22] Mr O'Connor gave evidence that he did not send a reply email, but instead he assumed that he called Mr Godden. He could not recall what was said in the conversation, but believed it was most likely that he called and confirmed that Bothar agreed to hire the crawler crane at a wet hire rate.

[23] On 1 May 2019 Ausipile finished demobilising from the site. The crane and an operator remained onsite. Between 9 May 2019 and early June 2019, Bothar hired and utilised Ausipile's crawler crane and operator to perform its work under the head contract.

[24] On 17 June 2019 Mr O'Connor notified Mr Godden that the crawler crane needed repairs. They could not be carried out onsite, and Ausipile de-rigged the crawler crane and removed it.

[25] Mr Godden's evidence in cross-examination was that the crawler crane stayed onsite not just for the excavation of the launch shaft:[4]

> "It wasn't just – I don't think it was just particularly for the excavation for whatever purpose Bothar wished to use it to undergo their works, you know what I mean? It was – yes, it was no longer required by us, so it had been requested if we could just – if it could remain for the purpose of their concrete works, so."

[26] Mr O'Connor agreed that the price for the hire of the crane and operator had been agreed before Bothar's use of the crane commenced.[5] The following exchange occurred in cross-examination:[6]

> "No. Okay. Now, at the time that Bothar asked to hire the crawler crane and Ausipile agreed to that, there was no formal subcontract provided?---For the hire of the crane?
>
> Yes?---No.
>
> No indication that it would be a separate contract?---No.
>
> No indication that it would be subject to terms different from those in the subcontract?---No.
>
> No indication that it would be a different subcontractor at all?--- There was no different subcontract.
>
> And because there was no different subcontract, … Bothar didn't complain when it got payment claim 6 and saw that the claim for a variation for the crawler crane was included?---No."

Consideration – crawler crane hire a variation?

[27] Bothar's contention was that the crane hire was a separate contract, quite distinct from the subcontract between Bothar and Ausipile. For that reason it argued that payment claim 6 was not a valid payment claim because it related to two different contracts.

[28] In determining the nature of the agreement made between Ausipile and Bothar in respect of the crawler crane, the court seeks to determine in an objective way the presumed intention of the contracting parties. The court examines all the relevant indicia, including the communications and the context in which they occurred.

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[4] AB 570 lines 34-37.

[5] AB 596 lines 33-37.

[6] AB 598 lines 4-19.

[29] The context in which the exchange concerning the hire of the crawler crane can be summarised as follows. Ausipile and Bothar were commercial contracting parties in the construction industry. On 14 November 2018 they entered into a formalised subcontract agreement.[7] That subcontract contained detailed provisions governing matters relevant to the relationship between the two parties, including:

(a) a stipulation as to when payment claims would be made, and paid; payment claims had to be submitted on the twenty-second day of the month to which the claim related, to be paid within 30 days;[8]
(b) insurance was specified in respect of workers compensation, public liability, professional indemnity and subcontractors' plant and machinery;[9] for subcontractors' plant and machinery the limit of cover was $9,785,000 under an identified policy with an expiry date of 8 July 2019;
(c) all other expiry dates for insurance were 8 July or 30 September 2019;
(d) Ausipile was responsible for the provision of piling rig, plant and specialist crew for the drilling work;[10]
(e) by clause 1.1, Ausipile's work was to be carried out in accordance with the provisions of the subcontract agreement, and the provisions of Bothar's head contract, to the extent they were relevant to the performance of the subcontract work and were incorporated by reference;[11]
(f) by clause 3.1, Ausipile was required to vary the work as required by Bothar, but would not be entitled to claim extra payment for any variation not authorised in writing;[12] clause 5.2 obliged Ausipile to ensure that the persons engaged by it were to be "careful, skilled and experienced in their respective trades and calling";[13]
(g) clause 6 obliged Ausipile and its employees and subcontractors to be familiar with and comply with all rules and regulations in force at the worksite, and Ausipile had to provide equipment required in accordance with those rules and regulation;[14]
(h) clause 7 obliged Bothar to make payment in accordance with the terms of the subcontract, and required Ausipile to provide Bothar with evidence that wages owing to employees engaged in the work had been paid, and that all statutory and insurance obligations had been met;[15]
(i) clause 8.1 contained an indemnity by Ausipile in favour of Bothar, against all losses, liabilities, claims and expenses which might arise from the death of or injury to any person, and the loss or damage to the property of any person, arising out of or in connection with the performance of the work;[16]
(j) under clause 8.3, Ausipile had to maintain employer's indemnity and workers compensation insurance covering liability, including common law liability, to employees of Ausipile, as well as public liability insurance covering liability to any third party for death, bodily injury, loss of or damage to property arising out of any act or omission in the performance of the work;[17]
(k) clause 8.3(d) obliged Ausipile, at its own cost, to insure its plant and equipment;[18]
(l) clause 8.7 contained a separate indemnity from Ausipile to Bothar in respect of liability, loss or expense arising out of a failure on Ausipile's part to comply with its obligations under clause 8.[19]

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[7] AB 150.

[8] AB 151.

[9] AB 152.

[10] AB 160.

[11] AB 154.

[12] AB 154.

[13] AB 155.

[14] AB 156.

[15] AB 156.

[16] AB 156.

[17] AB 156-157.

[18] AB 157.

[19] AB 157.

[30] It was the case that at the time Ausipile's work onsite was coming to an end (late April) there were issues between Ausipile and Bothar in relation to the performance of the subcontract. By then Mr O'Connor had announced his intention to hold up progress claim 5 and future claims. Issues had also arisen with the design and construction of the secant pile wall launch shaft.

[31] In that context the exchange between Mr O'Connor and Mr Godden in relation to the crane hire took place.

[32] Bothar contended that it was a contract quite separate from the subcontract, standing on its own terms. In my respectful view, that is not a conclusion one would reach about the presumed intention of two commercial parties, already engaged in a relationship of some tension, given the matters set out below.

[33] First, the hire of the crane (assuming a five day working week) was $10,750. That is not an insignificant amount. Yet, on Bothar's contention, the contract did not have a start day or an end day, there was no date for invoices to be presented, nor any payment terms, particularly as to when the amount was to be paid, how and whether non-payment would attract interest or penalties. All of those are matters that were covered in the subcontract. Further, the contract contended by Bothar contained nothing in respect of insurance or workers compensation cover, or any of the indemnities that were plainly of interest to these two contracting parties when a subcontract was formed.

[34] The objective evidence was that matters such as the date for a progress claim, the date when claims had to be met, insurance, workers compensation and indemnities covering damage, were all matters of interest to each of these contracting parties. Detailed provision was made for them in the subcontract. In my view, it is most unlikely that two such contracting parties, with the existing umbrella of the subcontract and all its terms, intended to enter into a contractual relationship standing outside all of those provisions.

[35] It is notable that the contract was not just for the hire of the machine, but also of an operator supplied by Ausipile. A party in Bothar's position would plainly be concerned about issues such as the experience and qualifications of the operator, as well as workers compensation and insurance questions that would arise if that operator performed the work in a way that caused damage, either to the operator or other persons or property on the site.

[36] These considerations point inevitably, in my respectful view, to the conclusion that the presumed intention of the two parties was that this would be a variation to the existing subcontract. That they negotiated in the terse terms in which they did points to that conclusion, rather than concluding that this was a stand-alone contract for the wet hire of the crane, shorn of all other commercial terms.

[37] It must also be borne in mind that whilst Ausipile's work onsite had come to an end, the question of payments on the progress claims was yet to be resolved when the conversation occurred between Mr O'Connor and Mr Godden. In other words, the relationship of contractor and subcontractor was still on foot. In my view, that lends even more force to the conclusion that this was seen as a variation to the existing subcontract.

[38] The learned primary judge's analysis of this issue did not address many of the matters referred to above, but in particular the absence of any provision about matters of importance to each party, such as commencement, invoicing, payment, insurance, workers compensation and indemnities. Her Honour's conclusions were reached by the following process:

> "[T]he correct approach is to consider the nature of the work to be performed and whether the agreement constituted a separate agreement or a variation."[20]

[39] The nature of the work to be done had to be seen in light of the ability of Bothar to unilaterally vary the work under clause 3.1. Whether the agreement constituted a separate agreement or a variation merely states the question to be answered rather than providing the answer itself.

[40] In my respectful view, the parties contracted on the basis that the crane hire was a variation to the existing subcontract. The conclusion that it was a separate contract was, therefore, in error.

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[20] Reasons below [201].

Notice of contention – misleading or deceptive conduct

[41] Before the learned primary judge Bothar contended that Ausipile engaged in misleading or deceptive conduct causing Bothar to not submit its payment schedule in response to payment claim 6. That defence failed, and Bothar seeks to uphold the decision below on that ground, which is the subject of its notice of contention.

[42] The issue as framed below was whether Ausipile, by its conduct between 26 April 2019 and 14 June 2019, represented to Bothar that:

(a) Bothar was not required to deliver a payment schedule in response to payment claim 5 or payment claim 6 as required by s 76 of the Act; and
(b) Bothar was not required to assess or pay payment claim 5 or payment claim 6 until the completion of the excavation of the shaft; and
(c) Ausipile would not enforce its rights in respect of payment claim 5 or payment claim 6 under the Act.

[43] The second issue was that if that representation was made, did Bothar rely upon it in failing to deliver a payment schedule in response to payment claims 5 and 6.

[44] The background to this issue arises under s 75 and s 76 of the Act. Section 75 provides how a payment claim must be made and, relevantly, it must be given before the end of whichever of the following periods is longest, namely:

(a) the period worked out under the construction contract; and
(b) six months after the construction work to which the claim relates was last carried out.

[45] Section 76 of the Act makes provision in respect of a response to a payment claim, by the giving of a payment schedule:

> **"76 Responding to payment claim**
>
> (1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first—
> (a) the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;
> (b) 15 business days after the payment claim is given to the respondent.
> …
>
> (2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates."

[46] The consequences for failing to give a payment schedule are set out in s 77 of the Act:

> **"77 Consequences of failing to give payment schedule**
>
> (1) This section applies if a respondent given a payment claim does not respond to the claim by giving the claimant a payment schedule as required under section 76.
> (2) The respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates."

The relevant conduct

[47] On 26 April 2019 Mr Godden and Mr O'Connor had a conversation. At that point progress claim 5 had not been received, but both parties knew it shortly would be.

[48] Mr O'Connor gave evidence that Bothar had no confidence, at that point, that the secant pile wall would be able to retain soil and water once excavation began. According to him, Bothar expected that there would be significant defects in the secant pile launch shaft which would require rectification once excavation started.[21] Mr O'Connor said that because of the defective state of the launch shaft, Bothar formed the view that it should not have to undertake any further assessment or payment of the next

[21] AB 184 para 45.

progress claim (progress claim 5) or any future progress claims pending excavation of the launch shaft and resolution of the issues that were currently onsite.[22]

[49] On 26 April Mr O'Connor called Mr Godden. He could not recall the exact words of what was said, but only had a recollection of the substance and effect of what was said.[23] During the conversation Mr O'Connor said words to this effect:[24]

(a) that Bothar urgently required a defects response plan so that any defects encountered during the excavation could be rectified as swiftly as possible; and
(b) that Bothar would hold Ausipile's progress claim 5 and future progress claims pending completion of the excavation of the shaft.

[50] According to Mr O'Connor, he could recall telling Mr Godden (in words to this effect) that Bothar holding progress claim 5 and future progress claims "was due to our expectation that there would be significant and extensive defects in the secant pile launch shaft once excavation began and which would require significant remedial action". He told Mr Godden that Bothar would not assess any claims made by Ausipile, or pay any claims, until the issues had been resolved.[25]

[51] According to Mr O'Connor Mr Godden responded with words to this effect: "Ok I understand, I know where you are coming from".[26]

[52] Mr O'Connor said Mr Godden did not disagree with Bothar's position, and said that Ausipile agreed to provide a defects response plan. Mr O'Connor said he would be sending a letter to Mr Godden to confirm Bothar's position.[27]

[53] After that point Mr O'Connor did not speak to Mr Godden or anyone else from Ausipile in respect of any assessment or payment issues.[28]

[54] Mr O'Connor then sent a letter on 1 May 2019 in which he said:[29]

> "As discussed between Mr Kieran O'Connor and Mr Matt Godden, Bothar will hold Ausipile's Progress Claims 5 and 6 pending the satisfactory completion of the shaft excavation."

[55] Progress claim 5 was sent to Mr O'Connor on 30 April 2019.

[56] Mr Godden's response, in affidavit form contained these components:[30]

(a) Mr O'Connor did not mention any specific amount of money or make reference to any specific payment claim in the course of the telephone conversation;
(b) Mr O'Connor mentioned that Bothar felt they needed to withhold some money from upcoming progress claims for potential rectification works if required during the excavation process; however, at no time did Mr O'Connor mention any specific amounts of money to be withheld, nor was the withholding of the entire progress claim 5 ever referred to;
(c) at no time did he (Mr Godden) ever accept or agree or say anything to the effect of agreeing to the withholding of any payment, as he was not authorised to make such decisions;
(d) he could not recall the exact words he used to respond, but it was to the effect of: "Ok. I hear what you are saying".

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[22] AB 184 para 46.

[23] AB 185 para 47.

[24] AB 185 para 48.

[25] AB 185 para 51.

[26] AB 185 para 52.

[27] AB 186 para 55.

[28] AB 186 para 60.

[29] AB 186 para 62.

[30] AB 441-442 paras 6-14.

[57] In his next affidavit Mr O'Connor disagreed with Mr Godden's account,[31] and referred to his letter which, he said, "set out the position which in my view had been accepted during the conversation".[32]

Legal principles – misleading or deceptive conduct

[58] Bothar bore the onus of establishing the defence based on misleading or deceptive conduct, and the entitlement to relief under s 238 of the *Australian Consumer Law* in schedule 2 of the *Competition and Consumer Act 2010* (Cth). Section 18 of the ACL prohibits misleading or deceptive conduct:

> **"18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

[59] It is possible that silence can constitute misleading or deceptive conduct, when assessed in the context of other relevant circumstances. As was said in *Demagogue Pty Ltd v Ramensky*[33] where, having noted that if silence would be misleading or deceptive then s 18 obliged disclosure, Black CJ said:

> "To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such things as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

[60] In *Demagogue* similar comments were made by Gummow J[34] when his Honour referred to the limitation that:[35]

> "Unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist."

[61] In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*[36] the High Court observed that the language of a "reasonable expectation of disclosure" was not statutory but indicated an approach to the characterisation of conduct consisting of or including non-disclosure of information.[37] That characterisation of conduct, in commercial dealings, will be undertaken by reference to its circumstances and context:[38]

> "Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52."

[31] AB 458-459 paras 20-22.

[32] AB 459 para 24.

[33] (1992) 39 FCR 31, at 32.

[34] With whom Cooper J agreed.

[35] *Demagogue* at 41.

[36] (2010) 241 CLR 357.

[37] *Miller* at [19].

[38] *Miller* at [20]; internal citations omitted.

The conversation between O'Connor and Godden

[62] The learned trial judge found that even on Mr O'Connor's evidence the response by Mr Godden of, "Ok I understand, I know where you are coming from", could not be seen as an acceptance of Bothar's position.[39] Mr Sullivan QC, appearing with Mr Mitchenson for Bothar, contested that finding, submitting that this Court is in as good a position as the trial judge in assessing the findings as those findings "are not likely to have been affected by impressions about credibility or reliability".[40] He submitted that it was reasonable for Mr O'Connor to construe the response as agreeing with his position, and that the word "okay" had a natural meaning as an exclamation which communicates agreement.

[63] The two versions of what were said were accompanied by natural difficulties. Neither Mr O'Connor nor Mr Godden could remember the exact words that were said, and each describe the response "with words to the effect". Mr O'Connor had it as, "Ok I understand, I know where you are coming from". Mr Godden had it as, "Ok. I hear what you are saying".

[64] The context in which the response was made tells heavily against it being a communication of acceptance of Bothar's position or being understood by Mr O'Connor as a communication of acceptance of that position. According to Mr O'Connor he told Mr Godden that Bothar:

(a) would hold Ausipile's progress claim 5 and future progress claims pending completion of the excavation of the shaft, which was work that Bothar had to perform under its head contract;
(b) that was because of Bothar's expectation that there would be significant and extensive defects in the secant pile launch shaft once excavation began; and
(c) as a consequence Bothar would neither assess any claims or pay any claims made by Ausipile until the defects issues were resolved. In other words, according to Mr O'Connor Bothar was announcing that it would cut off all payments immediately, and no such payments would be made until an indeterminant time in the future when anticipated defects were resolved. Given that Bothar and Ausipile were commercially contracting parties, involved in a substantial construction contract in which there were issues between them, and there is no suggestion that Ausipile was acting other than in its own interests, it beggars belief that Mr Godden would signify acceptance of a proposition that no payments at all would be made until an indeterminant time in the future.

[65] In context, on either version of the conversation, the word "okay" could not have conveyed acceptance. The compelling finding is to the contrary, that all it signified was that Mr Godden understood what was being said even though he did not agree to it.

[66] The second finding challenged was her Honour's finding that Mr O'Connor's letter of 1 May 2019 did not convey that Bothar believed that the parties had agreed that Bothar was not required to serve a payments schedule.[41] In this respect several points were made. The first was that the letter reflected Mr O'Connor's subjective understanding that an agreement had been reached in the 29 April 2019 conversation.[42] This was said to be drawn from the ordinary text of the letter in context (a letter from one builder to another) as well as deriving some support from a conversation between Mr Yoon (Ausipile's commercial manager) and Mr Godden in the aftermath of having received the letter. Having received the letter Mr Yoon questioned Mr Godden who "denied that there was any such discussion or arrangement with Mr O'Connor".[43] It was submitted that Mr Godden (and Mr Yoon, if that mattered) substantially treated the letter as communicating that Mr O'Connor believed there was an agreement or arrangement for Bothar to hold the payment claims.

[67] An assessment of the letter and what it conveyed commences with the fact that Mr Godden's response to Mr O'Connor in the course of their conversation did not signify, nor could it be understood as signifying, an agreement or acceptance of Bothar's course of conduct. In those circumstances the letter

[39] Reasons below at [95].

[40] Respondent's outline para 57.

[41] Reasons below [107]-[112].

[42] Respondent's outline para 59.

[43] Affidavit of Mr Yoon, para 14, AB 450; affidavit of Mr Godden, para 18, AB 443.

relevantly commenced with the phrase "As discussed". As the learned trial judge found,[44] the use of that phrase reflects the conversation. In the circumstances it was not something that should have put Ausipile on notice that Bothar was acting under some misapprehension that there was an agreement that Bothar did not have to put in a payment schedule, or could withhold payment altogether.

[68] The balance of that sentence in the letter refers only to Bothar holding progress claims 5 and 6 pending completion of the shaft excavation. In terms it does not refer to Bothar not putting in a progress schedule or otherwise responding to the payment claim. All it reflects is that there had been a discussion that Bothar was not going to pay payment claims 5 and 6. That was said in a context where:

(a) no payment schedule had ever been put in by Bothar in response to any payment claim;
(b) Bothar had not paid payment claim 4 which was due on 30 April 2019 (the day before the letter); and
(c) there were allegations of defects in the work.

[69] In that context, the letter only conveyed that Mr O'Connor had said that Bothar would not be paying payment claims 5 and 6. As there had been no agreement or arrangement in the conversation between Mr O'Connor and Mr Godden, nor could Mr O'Connor have reasonably understood it to be so, this letter could not reasonably convey that Mr O'Connor did believe there was an agreement or arrangement, and was therefore labouring under a misapprehension.

[70] In my respectful view, the learned trial judge's findings on these matters were correct.

[71] That being so, Ausipile's silence after the letter of 1 May 2019 cannot constitute misleading or deceptive conduct. The two parties communicating with each other were construction companies engaged in commercial relations on a substantial construction site, in circumstances where work had been performed but there were disputes over the quality of that work. Whether by those disputes or otherwise Bothar had not made payment in respect of payment claim 4, and announced its intention not to pay payment claims 5 and 6 until some indeterminate time in the future. There were no circumstances giving rise to a "reasonable expectation" that Ausipile should break its silence. Each of Bothar and Ausipile were entitled to, and would be expected to, act in their own commercial interests, particularly when their relationship was one of dispute. There was no credible suggestion that Ausipile believed that Bothar was labouring under a misapprehension that its announced course of conduct was agreed or in some other way accepted. There was no occasion calling upon it to speak up.

[72] In my respectful view, the learned trial judge correctly rejected the ground based on misleading or deceptive conduct.

Was the payment claim invalid?

[73] I have earlier determined that the hire of the crane was under an arrangement that constituted a variation to the building contract. That being so, payment claim 6 was a claim, which on its face, included two distinct components, each made under the same contract. The first component was the amount of $596,777.73 contained in the first schedule to the payment claim.[45] The second component was the sum $81,500 claimed under the two schedules entitled "Variation Worksheet".[46]

[74] However, Bothar contended that if the crane hire was not, in fact, a variation to the construction contract, but a second contract between it and Ausipile, payment claim 6 was invalid because it related to more than one contract. The parties joined issue on this contention, both below and before this Court.

[75] Before turning to authority concerning this issue, it is necessary to consider the legislative provisions that are relevant.

[76] Section 70 of the Act provides for the right to a progress payment in these terms:

> "**70 Right to progress payments**
>
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract."

[44] Reasons below at [98].

[45] AB 168.

[46] AB 170-171.

[77] The term "reference date" is defined in s 67 of the Act, relevantly as follows:

> "**67 Meaning of *reference date***
>
> (1) A ***reference date***, for a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later month."

[78] In the present subcontract between Bothar and Ausipile, the reference date was the twenty-second day of the month to which the claim relates.[47]

[79] The Act also defines what a payment claim is, see paragraph [12] above.

[80] The Act contains provisions which define the amount of a progress payment (s 71) and the due date for payment (s 73). Section 75 then governs the making of a payment claim. It relevantly provides:

> **"75 Making payment claim**
>
> (1) A person (the ***claimant***) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the ***respondent***) who, under the relevant construction contract, is or may be liable to make the payment.
>
> …
>
> (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.
>
> (5) A payment claim may include an amount that was included in a previous payment claim."

[81] Bothar's contention starts by accepting that on its face payment claim 6 referred to one subcontract. That was a pragmatic acceptance because nothing in payment claim 6 suggests that the $81,500 claimed for crane hire was otherwise than under a variation to the subcontract. However, Bothar contended, both at first instance and before this Court, that if in reality the reference to a variation was wrong, and the crane hire was a separate contract, then payment claim 6 was invalid because it related to two contracts and not one.

[82] Implicit in Bothar's contention is the proposition that the parties on either side of a payment claim can litigate the issue of whether part of the payment claim is, as a matter of fact, under a different contract and do so before the matter reaches adjudication. On Bothar's contention, because the payment claim would be invalid, it does not matter that there is no response to it by way of a payment schedule under s 76, and no consequences under s 77 if no such response is given.

Construction of the provisions

[83] At the heart of the parties' contentions is the proper construction of s 68 and s 75(1) of the Act, which govern what a payment claim is and how a payment claim is made. Resolution of that issue impacted on the essential point of departure between the parties, namely whether the payment claim was invalid because it referred to more than one construction contract.

[84] The objects and purposes of the legislation must be considered when construing those provisions. The proper approach has been often reinforced by the High Court in cases such as *Project Blue Sky Inc v Australian Broadcasting Authority*.[48] It requires that consideration focus on the text of the provision, in context.

[47] AB 151.

[48] (1998) 194 CLR 355.

[85] It is well established by *Project Blue Sky* that:[49]

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'."

[86] Further, as was said in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:[50]

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

[87] The main purpose of the Act is to help people working in the building and construction industry in being paid for the work they do: s 3(1). That purpose is to be achieved by: (i) granting an entitlement to progress payments even if the contract does not do so, and (ii) establishing a procedure for making payment claims, responding to payment claims, adjudication of disputed claims, and recovery of the amounts claimed: s 3(b) and (c).

[88] Chapter 3 of the Act contains a set of provisions governing progress payments and their recovery. Within that Chapter Division 2 contains the suite of provisions relating to making and responding to a payment claim, and the consequences which follow if a response is not made under the Act.

[89] There are a number of matters to note about the provisions which I have set out above.

[90] Section 70 makes provision for the entitlement to a "progress payment" under a construction contract. It does not deal with payment claims as such. All it provides is that from each reference date (that being a date stated or worked out under the contract, or the last day of each month) someone who has done construction work under a construction contract is entitled to a progress payment.

[91] The term "payment claim" is relevantly defined in s 68 as being a written document which identifies the construction work to which the progress payment relates and states the amount of the progress payment "that the claimant claims is payable". Notable in those words is the fact that a payment claim merely sets out the amount that is **claimed** to be payable.

[92] The making of a payment claim is governed by s 75 of the Act. Notably, it provides that a person may give a payment claim not only if they are entitled to a progress payment, but also as if they claim to be entitled to a progress payment. Were that not self-evident on the face of its own terms, it is reinforced by the concluding words of s 75(1), which enable a payment claim to be given to somebody who, under the relevant construction contract, is liable to make to the payment or may be liable to make the payment.

[93] The terms of s 75(1) are inconsistent with absolute entitlements being established the moment the payment claim is given. It comprehends someone who claims to be entitled to a progress payment and who gives the payment claim to someone who may be liable to make the payment.

[94] Section 75(4) provides that claimant cannot make more than one payment claim for each reference date under the construction contract. But this says nothing about the validity of a payment claim which is actually made, except if the payment claim under consideration is not the first payment claim for that reference date.

[95] The Act requires that someone who receives a payment claim give a response to it in a particular way (see section 76 extracted above at paragraph [45]).

[96] The Act defines what a "payment schedule" means, in s 69:

> "**69 Meaning of *payment schedule***
>
> A ***payment schedule***, responding to a payment claim, is a written document that—
> (a) identifies the payment claim to which it responds; and
> (b) states the amount of the payment, if any, that the respondent proposes to make; and

[49] (1998) 194 CLR 355 at 381 [69]; internal citations omitted.

[50] (2009) 239 CLR 27 at 46-47 [47]; internal citations omitted.

(c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment; and
(d) includes the other information prescribed by regulation."

[97] When the definition of "payment schedule" is read into s 76(1)[51] it becomes evident that a person who receives a payment claim is obliged to respond to it, within the relevant time frames, by giving a document that identifies the payment claim, states what payment is proposed to be made, and why if it is less than the amount claimed.

[98] The mandatory obligation to respond to a payment claim identifying the basis upon which it is proposed to make a payment less than the amount claimed, tells against the proposition that the Act comprehends the resolution of issues such as Bothar would suggest, at a stage earlier than arbitration.

[99] The consequences of failing to give a payment schedule in response are set out in s 77(2). It makes the respondent "liable to pay the amount claimed under the payment claim". And, s 68 defines the "claimed amount" as the amount in the payment claim which "the claimant claims is payable". Further, if a payment schedule is not given and the amount is not paid,[52] the claimant can sue for the amount claimed under the payment claim and recover it as a debt: s 78(2) and (5)(a). Finally, in the proceedings to recover the claimed amount as a debt, the respondent is not entitled to bring a counterclaim or "raise any defence in relation to matters arising under the construction contract": s 100(3).

[100] Nothing in s 75(1) suggests that the respondent to a payment claim can simply ignore the payment claim or the statutory obligation to respond under s 76(1), by contending that issues such as whether the payment claim is truly under one contract should be first litigated to finality. The whole scheme of the Act is designed to enable compulsory and fast payment to subcontractors, with issues to be determined at a adjudication rather than by traditional litigation.[53]

[101] With those provisions in mind, one can direct attention again to payment claim.[54] On its face, it asserts that it is a payment claim in respect of the project entitled "1520-001 Quota Park Launch Shaft Secant Piling", and identifying the job number as "J18-39". It then lists the original contract sum plus approved variations, the amount claimed to date and the amount of "This Claim" which, in turn, itemises the two components of payment claim 6. The second of those components is claimed as "Variations as per Register (Attached)". The attached registers deal with two sets of variations, each claimed under the same project name and job number and described as "VA No 1" and "VA No 2". Variation 2 consists of the wet hire of the crawler crane. That schedule concludes with the description "Value of Variation Submitted" in the sum of $21,500.

[102] On its face, payment claim 6 refers to only one contract between Bothar and Ausipile. Thus, it is a document which fits s 75(1) of the Act, in that Ausipile claims to be entitled to a progress payment and therefore may give a payment claim to Bothar who may be liable to make the payment. In my view, even if it is the case that at some subsequent point it is determined that the variation was not a true variation and therefore not able to be made the subject of the payment claim, that does not render the payment claim invalid. Such an issue is something caught by s 69(c) of the Act, in that when Bothar obeys its statutory obligation to respond with a payment schedule, it might state that the amount proposed to be paid is less than that in the claim, and states why that is so, including the reason to withhold payment. The evident scheme of the Act is that if Bothar wished to raise a contention that a variation is not a true variation, or indeed the subject of a different contract, that is a matter that the statute obliges it to raise in

[51] *Bond v Chief Executive, Dept of Environment and Heritage Protection* [2018] 2 Qd R 112 at [11].

[52] The position of Bothar in this case.

[53] *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 at [20]-[23] per Basten JA, Meagher JA concurring; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462 at 474, 475 [34], [38] per Hodgson JA; *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178, at [17]; *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 at [36], [38].

[54] AB 167.

a payment schedule. In that way, the Act makes it plain that when the scheme under the Act operates by the giving of a payment claim, the entitlement to respond is by the statutory process and not otherwise.

[103] Do the authorities advanced on the appeal compel a different conclusion?

[104] Mr Sullivan QC, for Bothar, placed particular reliance on the decision in *Matrix Projects (Qld) Pty Ltd v Luscombe*.[55] That case involved a challenge to an adjudicator's decision made in respect of a challenged payment claim. The payment claim comprised three distinct claims based on three distinct contracts: (i) amounts owing in respect of nine properties which were all the subject of one contract (the "Period Subcontract"); (ii) amounts owing in respect of an additional five properties where work on them was not governed by the Period Subcontract, but had been verbally directed on a "do and charge" basis; and (iii) a claim for the payment of $550 sponsorship for a junior football team's training gear.

[105] The challenge to the adjudicator's decision based on the fact that the payment claim relied on three different contracts was accepted by Douglas J:[56]

> "Therefore she characterised the payment claim as comprising at least three distinct claims based on at least three different 'contracts' covering the work performed pursuant to the accepted work orders under the Period Subcontract, the 'do and charge' work and the claim for the soccer sponsorship. She submitted that the conjunction of s 12 and s 17 had the effect that a payment claim must relate to only one construction contract in reliance on a decision of McDougall J in *Rail Corporation of NSW v Nebax Constructions*. His Honour's conclusion is as follows:
>
> > 'It seems to me that, because s 13(5)6 prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract.'"

[106] Douglas J reached the conclusion that the payment claim could not be described as one being made under a single construction contract and adopted the passage in *Rail Corporation of NSW v Nebax Constructions*.[57] However, it must be noted that in doing so there was no examination of the proper construction of the then applicable section governing a payment claim.[58] Further, *Matrix Projects* involved a payment claim, which on its face, made claims under three distinct contracts. Because the payment claim covered more than one contract or arrangement it was held that it did not satisfy s 17, and as a consequence the adjudicator's decision was void on the basis that the payment claim itself was invalid.[59]

[107] It is of interest to note that in respect of the claim for the soccer sponsorship, Douglas J held that its inclusion in the payment claim did not deprive the adjudicator of jurisdiction. His Honour said:[60]

> "The argument for the first respondent was that all that was necessary was that the party undertake to carry out 'some' construction work and that the inclusion of the claim for the soccer sponsorship did not deprive the adjudicator of jurisdiction. I am inclined to accept that submission on the basis that it should be possible to treat the inclusion of such an obviously erroneous item in a payment claim as not depriving an adjudicator of jurisdiction. The jurisdiction is to determine the extent and value of the construction work under s 26 and the inclusion of a claim for an obviously irrelevant item for what is not construction work does not deprive the adjudicator of that jurisdiction."

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[55] [2013] QSC 4.

[56] *Matrix Projects* at [17]; internal citations omitted.

[57] [2012] NSWSC 6.

[58] At the time, that was s 17 of the *Building and Construction Industry Payments Act 2004* (Qld). The analogue under the current Act is s 75(1).

[59] *Matrix Projects* at [20] and [37].

[60] *Matrix Projects* at [24]; internal citation omitted.

[108] The construction adopted in *Matrix Projects* has been followed in NSW in a number of decisions,[61] and most recently in *Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd*.[62]

[109] In *Acciona*, an adjudicator's decision was challenged on a number of grounds, one of which was that the payment claim was invalid because it covered work under more than one contract. The parties had entered into a written goods supply agreement (**GSA**) for the supply and delivery of concrete. After the substantive works for which that concrete was required had been completed, Acciona continued to be engaged in the project, remedying defects, and continued to buy concrete from Holcim but in limited quantities. The GSA contained terms requiring the issue of purchase order for each order of concrete. Clause 2(c) of the GSA provided that "Upon the issue of a Purchase Order a separate contract will come into existence between the D&C Contractor and the Supplier on the terms set out in this Agreement". Over the life of the GSA, Acciona issued some 12,500 purchase orders and Holcim directed 36 payment claims to Acciona.

[110] The challenged payment claim contained two components. The first was just over $1m for newly claimed measured works over two separate periods, at least one of which had not been previously charged. The second was about $1.7m for works in five previous payment claims. A payment schedule was delivered in response and Holcim lodged its adjudication application. In its adjudication response, Acciona raised a jurisdictional issue, contending that the adjudicator did not have jurisdiction because the payment claim was for multiple purchase orders, which consisted of separate contracts. That contention was upheld by Hammerschlag J:[63]

> "The Adjudicator had no jurisdiction because the Payment Claim was invalid and ineffective to engage the operation of the Act. By the parties' express agreement in cl 2 of the Agreed Terms, each time a purchase order was issued, a separate contract came into existence between Acciona and Holcim on the terms set out in the GSA. Each such contract was governed by terms contained in the overarching GSA instrument, which terms became incorporate in every subsequent separate contract, but each time Acciona placed a purchase order, a separate contract for discrete work with a separate payment date came into existence."

[111] In *Acciona*, Hammerschlag J relied upon the conclusion in *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd*[64] where McDougall J dealt with a payment claim which relied upon a "variety of different types of contract for construction work", holding that it was invalid for that reason.[65]

[112] Two things should be noted about *Acciona*. The first is that there was no contention in that case that *Nebax*, *Matrix* or *Trinco* were wrongly decided. The second is that *Acciona* involved a payment claim which, on its face, identified more than one contract as the basis for the claim.

[113] In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*,[66] the NSW Court of Appeal recently considered questions arising about a payment claim, where claims within it were not claims under the construction contract, but *quantum meruit* claims. The payment claim stated that it was a claim for "works completed in the Project performed in accordance with the building and construction contract".[67] The amount claimed was broken down in to a "Contract Sum" and an amount for "Variations", the latter being set out in a table to the payment claim.

[114] Basten JA[68] held that a payment claim in those terms was "a claim for works completed under the contract".[69] His Honour continued:[70]

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[61] *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 at [6]-[7]; *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239 at [55]-[60].

[62] [2020] NSWSC 1330 at [35]-[37].

[63] *Acciona* at [40].

[64] [2018] NSWSC 239 at [55]-[61].

[65] *Acciona* at [36]; see also *SHA Premier Constructions Pty Ltd v Lanskey Constructions* [2019] QSC 81 at [16]-[17], [21].

[66] [2020] NSWCA 93.

[67] *TFM* at [19].

[68] With whom Meagher JA agreed.

[69] *TFM* at [19].

[70] *TFM* at [20]-[21]; internal citations omitted.

> "[20] It is possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue would involve raising a defence in relation to matters arising under the construction contract, a course prohibited by s 15(4) of the Security of Payment Act. Had the principals wished to challenge the claim on that basis, they could have done so by way of a payment schedule provided pursuant to s 14, indicating the claimed items intended to be paid and the reason for non-payment of any item not accepted. Such an issue would then have been addressed by the adjudicator appointed to determine any dispute thus arising. However, that course was not taken.
>
> [21] As the primary judge noted, this has long been the accepted understanding of the operation of the Security of Payment Act. In addressing an issue as to the sufficiency of the description of 'the construction work … to which the progress payment relates' under to s 13(2)(a), Hodgson JA stated in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In liq)*:
>
> > '[35] It is true that, if a payment claim does not identify the work in a way comprehensible to the respondent to the claim, the respondent will be in difficulty in formulating a payment schedule, and this may give rise to further difficulty in any adjudication proceedings …. But in my opinion, if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work, and because for that reason it disputes that the work was done or done to a standard justifying payment, or was within the contract or within any variation of it, and that any pre-condition to payment was satisfied. If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work; and if the adjudicator determined that it was identified, the adjudicator could address matters put in issue in that general way by the respondent.
> >
> > [36] That is, I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.'"

[115] Basten JA also noted that in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In liq)*[71] a similar conclusion was reached by Ipp JA who stated:[72]

> "… Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication."

[116] In a separate judgment in *TFM*, Emmett AJA noted that the payment claim included a breakdown of the amount claimed between the "contract sum" and "variations", each with a different figure. His Honour also noted that the payment claim "stated that it was made for works completed in the Project performed in accordance with the Contract".[73] Then, having noted the contention that the word "variation" could be understood as referring to a *quantum meruit* claim, which is not recoverable under the *Payment Act*, his Honour continued:[74]

> "There is nothing in the Progress Claim to suggest that the claim for variations was made otherwise than under the Contract. Indeed, the Progress Claim states specifically that they are made under the Contract. Had the Principal filed a payment schedule, which it failed to do, it would have been a matter for an adjudicator to determine whether the amounts claimed were payable under the Contract. There is no evidence to suggest that the claims for 'variations' were in respect of work done otherwise than pursuant to the Contract."

[117] The decision in *Nebax* is, in my view, of no assistance in the present case. *Nebax* concerned a construction contract where a progress claim was made in the form of attached invoices, each of which

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[71] (2005) 64 NSWLR 462.

[72] *Neapean Engineering* at [76].

[73] *TFM* at [90].

[74] *TFM* at [92].

said that it was "a payment claim made under the [Act]". In response Rail Corporation served a separate payment schedule in respect of each of the invoices. Then, Nebax made five adjudications applications, one in respect of each tax invoice and its appropriate payment schedule. An issue arose as to whether there was a jurisdictional issue because there were five separate payment claims and five adjudications applications. McDougall J considered that the structure of the Act made it clear that there should only one application for adjudication of any one payment claim.[75] The question addressed in that case is therefore well removed from the issue in the present case.

[118] Equally, the decision in *Trinco* is of no utility. At issue in that case, was whether an underlying payment claim was made on or from a reference date under a construction contract. McDougall J determined that issue, which he observed, was "sufficient to dispose of the matter".[76] It was only in that context that his Honour then dealt with an alternative argument, namely that the Act did not authorise for a payment claim to be made for work performed under more than one construction contract. However, the payment claim in that case, on its face, made claims under separate subcontracts.[77] *Trinco* therefore did not address the issue in the present case, where the payment claim is, on its face, referable to just the one contract.

[119] *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd*[78] is also of no assistance. The issue there was whether there was one contract the subject of the payment claim or a multitude of contracts, it being accepted that if there were more than one that was fatal. And, no issue was taken as to whether *Matrix Projects* was correctly decided.[79]

[120] In my respectful view, the reasoning in *TFM* is correct and should be followed. A payment claim should not be treated as a nullity for failure to comply with s 75(1) of the Act, unless that failure is patent on its face. Where a payment claim purports to be made under one contract, it is not rendered invalid simply because at a later time (either during the adjudication or otherwise) it is determined that part of the claim was, in fact, a claim under a different contract. Provided a payment claim is made in good faith and purports to comply with s 75(1) of the Act, the merits of that claim, including questions as to whether it complies with s 75(1), is a matter for adjudication after having been raised in a payment schedule. A recipient of a payment claim cannot simply sit by and raise that point later, if it is not put in a payment schedule in response.

[121] Therefore, in my view, even if the claim in respect of the crawler crane in this case truly fell under a different contract, nonetheless the payment claim complied with s 75(1) because it made a claim, on its face, for amounts due under the one contract.

Other contentions

[122] In the course of the appeal, there were competing contentions as to whether severance might be available in respect of that part of the payment claim which related to the crawler crane component. In light of the findings made above, it is unnecessary to deal with this issue.

Disposition

[123] For the reasons which I expressed above, the appeal should be allowed, the decision below set aside, and judgment entered for the appellant, with interest and costs. There were no separate submissions made as to the question of interest and therefore the parties should be given an opportunity to agree that issue or make submissions on it.

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[75] *Nebax* at [43]-[44].

[76] *Trinco* at [54].

[77] *Trinco* at [48].

[78] [2013] NSWSC 363.

[79] [2013] NSWSC 363 at [6]-[7].

[124] I propose the following orders:

1. Appeal allowed.
2. Set aside the orders made on 5 March 2021.
3. Pursuant to s 78(2)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) judgment be entered for the appellant against the respondent in the amount of $761,296.75.
4. The parties have leave to make such submissions as they are advised on the question of interest as follows:
   a. by the appellant, within 14 days of the publication of these reasons;
   b. by the respondent, within 14 days thereafter; and
   c. in each case, limited to four pages.
5. The respondent pay the appellant's costs of and incidental to the appeal, and the costs of proceeding BS 8953 of 2019.

[125] **NORTH J:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

Solicitors for the Appellant: *McInnes Wilson Lawyers*.

Solicitors for the Respondent: *Thomson Geer Lawyers*.

Jason Schroeder

JOYE GROUP PTY LTD v CEMCO PROJECTS PTY LTD

Joye Group Pty Ltd v Cemco Projects Pty Ltd [2021] NSWCA 211

Supreme Court of New South Wales (Court of Appeal)

Basten JA, Macfarlan JA and Emmett AJA

3, 9 September 2021

Construction contract – Progress payment claim – Payment schedule – Email refusing payment until work completed – Failure to say why payment withheld – Other documents not incorporated – Use of contextual material – Building and Construction Industry Security of Payment Act 1999 (NSW)

On 30 July 2019, the appellant ("the subcontractor") and respondent ("the contractor") entered into two subcontracts relating to work to be carried out on a building site in Alexandria. One was for the supply and installation of timber flooring, the other was for the installation of tiling.

On 27 April 2020, the subcontractor made a payment claim under the timber flooring contract. On 28 April 2020, the subcontractor made a payment claim under the tiling contract. Both were payment claims for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"). Both were the seventh payment claims under the respective subcontracts.

On 8 May 2020, an employee of the contractor sent an email stating, "Please be advised that no payment for above Invoices, until all works been completed". Copies of the invoices sent in April were attached to the email and the subject of the email was "Claim 7 for Alexandria job".

The subcontractor did not receive any payment by the due dates for payment of both claims. The subcontractor commenced proceedings for payment of those amounts in the District Court on the basis that the failure of the contractor to provide a "payment schedule" within the meaning of the Act gave rise to a liability to pay the full amount of the claim on the due date.

The District Court dismissed the subcontractor's claims. The primary judge found that the email of 8 May 2020 satisfied the requirements for a payment schedule under s 14 of the Act. The primary judge held that the email was in clear enough terms, stating the amount proposed to be paid (namely no payment) and the reason for withholding payment (namely, that the payment was not then owed because the work was incomplete). The primary judge also considered the background of the communications and concluded that those communications demonstrated the clarity with which the issues between the parties had been identified.

The subcontractor appealed the decision.

The question for the Court was whether the email sent by the respondent on 8 May 2020 constituted a "payment schedule" within the meaning of s 14 of the Act.

Held, allowing the appeal:

(1) The adequacy of the 8 May 2020 email as a payment schedule turned on whether or not it indicated why the amount agreed to be paid was less than the amount claimed, as required by s 14(3) of the Act. The significance of the requirement for reasons in a payment schedule are two-fold. First, reasons given in the payment schedule impose a critical constraint upon the scope of adjudication and must be with precision and particularity to a degree reasonably sufficient to apprise the parties of the real issues in dispute. Second, it informs the claimant as to the metes and bounds of the dispute so the claimant can make an informed choice as to whether to engage the adjudication procedures under the Act. (Basten JA at [11]–[15], Macfarlan JA at [31] and Emmett AJA at [45], agreeing).

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140; *Style Timber Floor Pty Ltd v Krivosudsky* [2019] NSWCA 171, referred to.

(2) A statement to the effect, "we do not intend to pay your claim" does not provide a reason for non-payment. (Basten JA at [18], Macfarlan JA at [31] and Emmett AJA at [45], agreeing).

(3) A statement that "we will not pay your claim until…" is not a statement that part or all of the claim will not be paid, but merely a statement as to when some or all may be paid. It leaves open the possibility that there is no dispute between the parties that the work the subject of the claim has been carried out. (Basten JA at [18], Macfarlan JA at [31] and Emmett AJA at [45], agreeing).

(4) Other documentary material may be incorporated by reference into a payment schedule, but this is to be done in writing. Documents that are to be incorporated into a payment schedule need to be identified with sufficient particularity so that the recipient to the schedule knows what is being incorporated. (Basten JA at [22]–[23], Macfarlan JA at [31] and Emmett AJA at [45], agreeing).

Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171, applied.

(5) Surrounding communications and contextual evidence may be used to explain the meaning of statements in the payment schedule to allow an adjudicator or the Court to understand the scope of terms used in a payment schedule. However, that was not the case in the present proceedings. There was no term in the 8 May 2020 email which required interpretation. What was sought to be achieved by reference to extraneous documents was to create a sufficient degree of particularity in the absence of incorporation. That course was not available. A payment schedule is not to be reconstructed by reference to external materials so as to give it a degree of particularity which it simply did not enjoy. (Basten JA at [24], Macfarlan JA at [31] and Emmett AJA at [45], agreeing).

(6) An assertion that the claimant had no entitlement to progress payments until completion of the works would be in direct contradiction of s 8 of the Act which confers a right to progress payments irrespective of what the relevant contract provides. This is not a "reason" at all for the purposes of the Act. (Macfarlan JA at [32]).

N Simpson and *S Woodland* for the appellant.

R Thrift for the respondent.

9 September 2021

JUDGMENT

[1] BASTEN JA: On 30 July 2019 the appellant, Joye Group Pty Ltd, entered into two subcontracts with the respondent, Cemco Projects Pty Ltd. The first involved the supply and installation of timber flooring; the second involved the installation of tiling, both at a development in Alexandria.

[2] In the course of the construction work, seven payment claims were made under each contract. In particular, on 27 April 2020 payment claim 7 was made under the timber flooring contract in an amount of $112,043.11. The claim involved an amount of some $59,000 for completion of the original contract work, the balance being identified by reference to four items which were described as "variation work".

[3] The following day, 28 April 2020, payment claim number 7 was served under the tiling contract, in an amount of $54,517.65, identifying 10 separate items.

[4] Section 14(4)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("Security of Payment Act") requires that a person on whom a claim is served may provide a "payment schedule" to the claimant within 10 business days after the claim was served. Failure to provide a payment schedule in response to a payment claim gives rise to liability to pay the full amount of the claim on the due date for the progress payment, which in this case was 30 days from the date of the claim.

[5] On 8 May 2020, an employee of the respondent sent an email to the appellant in the following terms:

> "Dear Joye Group,
>
> Please be advised that no payment for above Invoices, until all works been completed."

The invoices were attached to the email and the subject was identified as "Claim 7 for Alexandria job".

[6] No payment having been received by the due dates, the appellant commenced proceedings in the District Court on 22 June 2020. The proceedings initially related to four payment claims. Liability for the earlier claims was conceded and judgment obtained by the appellant against the respondent with respect to those claims. With respect to the claims still in issue, identified as payment claims 7 under the respective contracts, the only question was whether the email of 8 May 2020 constituted a "payment schedule" for the purposes of the Security of Payment Act.

[7] In its defence, the respondent alleged that it had suffered significant losses for which it proposed to claim a setoff, but accepted that those losses could only be recovered pursuant to separate proceedings. Despite the limited nature of the issue in dispute, a large volume of evidential material was tendered in the District Court and admitted without objection. Much of that material was also before this Court on the appeal. Much of it was entirely irrelevant.

[8] The District Court dismissed Joye Group's claims in relation to the outstanding matters, namely payment claims 7.[1] The present appeal challenges order (2) dismissing the proceedings relating to those claims. For the reasons which follow, the appeal should be allowed and there should be a judgment in favour of the appellant.

Statutory scheme – payment schedules

[9] The determination of the appeal turns on the operation of s 14 of the Security of Payment Act, which provides as follows:

> **14 Payment schedules**
>
> (1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) A payment schedule—
>
> (a) must identify the payment claim to which it relates, and
>
> (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
>
> (4) If—
>
> (a) a claimant serves a payment claim on a respondent, and
>
> (b) the respondent does not provide a payment schedule to the claimant—
>
> (i) within the time required by the relevant construction contract, or
>
> (ii) within 10 business days after the payment claim is served,
>
> whichever time expires earlier,
>
> the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

[10] Although a payment schedule was required with respect to each payment claim, there was no contention in this Court that the single email did not adequately identify the payment claims to which it related (there being two), nor that it did not indicate the amount of the claim that the respondent intended to pay, being in each case no amount. Section 14(2) was therefore satisfied.

[11] The adequacy of the payment schedule turned on whether or not it indicated why the amount agreed to be paid was less than the amount claimed, as required by s 14(3). (Had the contract not provided for progress payments to be made by a date determined as the "reference date" the Security of Payment Act would have provided that the reference date was the last day of each month in which contract work was carried out: s 8(2).)

[12] The provision of a payment schedule indicating that part or all of the claim is disputed, engages the entitlement of the claimant to apply for an adjudication pursuant to s 17 of the Security of Payment Act. Importantly, if an adjudication application is made, the party against whom the claim is made is

[1] *Joye Group Pty Ltd v Cemco Projects Pty Ltd* [2021] NSWDC 151 (Strathdee DCJ).

entitled to file an adjudication response, but "cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant": s 20(2B). The reasons given in the payment schedule therefore impose a critical constraint upon the scope of the adjudication.

[13] The parties took the Court to a number of authorities, including *Style Timber Floor Pty Ltd v Krivosudsky*,[2] *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liq)*,[3] *Clarence Street Pty Ltd v Isis Projects Pty Ltd*[4] and *Facade Treatment Engineering Pty Ltd (In liq) v Brookfield Multiplex Constructions Pty Ltd*.[5] However, it is sufficient in order to identify the relevant principles to refer to two only. The first explanation, which has since been treated as authoritative, is that given by Palmer J in *Multiplex Constructions Pty Ltd v Luikens*[6] in the following terms:

> "[67] … The evident purpose of s 13(1) and (2), s 14(1), (2) and (3), and s 20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s 22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then 'ambush' the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s 14(3) and s 20(2B) are designed to prevent this from happening.
>
> …
>
> [76] A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute."

[14] Secondly, Leeming JA in *Style Timber Floor*, in identifying consequences of the statutory regime, stated:

> "[45] Fourthly, and perhaps most importantly for present purposes, the payment schedule serves two important functions under the Act. The first is to inform the claimant as to the metes and bounds of its dispute with the respondent, so that it can make an informed choice as to whether to engage the expedited *pro tem* adjudication procedures under Division 2. The second is to articulate the respondent's case which will then be determined by the adjudicator. It will also enable adjudicators to assess whether to accept appointment as an adjudicator to a dispute. At the time an adjudication application is made, *all* that the claimant and the prospective adjudicator will know of the nature of the respondent's side of the case is what is contained in its payment schedule."

[15] Further, in endorsing the reasoning in *Luikens*, Leeming JA continued:

> "[47] When dealing with the requirements of a payment claim, Palmer J's analysis was endorsed by this Court in *Clarence Street* … at [31]. While it is clear that an abbreviated description, falling short of a pleading, will suffice, the passages emphasised indicate that the payment schedule must sufficiently

[2] (2019) 100 NSWLR 133; [2019] NSWCA 171 (Bell P, Leeming JA and Simpson AJA).

[3] (2019) 99 NSWLR 317; [2019] NSWCA 11 (Leeming, Payne and White JJA, Sackville and Emmett AJJA).

[4] (2005) 64 NSWLR 448; [2005] NSWCA 391 (Mason P, Giles and Santow JJA).

[5] [2016] VSCA 247; 313 FLR 163 (Warrant CJ, Tate and McLeish JJA).

[6] [2003] NSWSC 1140.

> describe the dispute so as to enable the claimant to determine whether to proceed in the knowledge of the nature of the case it will have to meet.
>
> [48] It is established that even where a respondent proposes to pay no part of a payment claim, it is still required to indicate reasons in accordance with s 14(3).[7] That, with respect, must be so having regard to, inter alia, the limiting effect of s 20(2B). It was not suggested in this Court that s 14(3) did not apply to Style Timber Floor on the basis that it refused to pay the entirety of the claim."

[16] It was not suggested by the present respondent that its refusal to pay any amount did not engage the obligation in s 14(3) to "indicate why".

Application of principles

[17] The relevant general terms of each subcontract were the same. Each provided in clause 23.1 for "progress claims" which the subcontractor was entitled to make in accordance with item 14 in the contract schedule. Item 14 provided that progress claims could be made "on the 25th day of each month, and payments to be 30 days end of month" [sic].

[18] Self-evidently, a statement to the effect, "we do not intend to pay your claim" does not provide a reason for non-payment. Further, a statement that "we will not pay your claim until …" is not even a statement that part or all of the claim will not be paid, but merely a statement as to when some or all may be paid. It leaves open the possibility that there is no dispute between the parties that the work the subject of the claim has been carried out.

[19] Even if there were only one item the subject of the payment claim, a refusal to make a payment until the work had been completed would not address the possibility that some work had been carried out in the period preceding the claim, for which payment had not been made and for which there was an entitlement to payment, both under the contract and under the Security of Payment Act. In fact, both the payment claims in issue contained several separate items. The purported payment schedule did not suggest that no work had been undertaken under the contracts prior to the respective payment claims, nor whether it was accepted that some work had been done (the details of which were not specified), but still no payment would be made. It therefore did not satisfy the purposes the statutory scheme was designed to serve.

[20] In dealing with the requirement for reasons, the primary judge stated:

> "[25] In my view the defendant's email of 8 May 2020 satisfies these requirements and is sufficiently particularised to enable the plaintiff to understand the issues between the parties in broad terms. The email states: 'Please be advised that no payment for the above Invoices, until all works completed'. That is, in my mind, clear enough terms—it is a statement of the amount that the defendant proposed to be made, namely no payment, and the reason for the defendant withholding payment, namely that the payment was not then owed because the work was incomplete. In *Style Timber Flooring* … at [2], Bell P held that this is:
>
> > 'not a licence for informality or an excuse for vague, generalised objections to
> >
> > payment'.
>
> [26] However, whilst there may be circumstances in which a court would look at the wording encapsulating the reasons for withholding payment and may not understand it exactly because it may be cryptic or abbreviated, those persons within the building industry would understand, as I find that the plaintiff would have understood in these proceedings. The plaintiff's suggestion that it could not understand the issues between the parties is disingenuous in the least."

[21] To describe the appellant's conduct in court as "disingenuous" was inappropriate. There was substance to the appellant's contentions. Indeed, the judge then proceeded to consider the background of communications which were said to demonstrate the clarity with which the issues between the parties had been identified. However, the inferences drawn from that material were not properly open for the purposes for which it was relied upon.

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[7] *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232 at [15]-[16]; *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333 at [24].

[22] As counsel for the respondent correctly noted, surrounding communications may be relied upon for one of two purposes. First, other documentary material may be incorporated by reference into a payment schedule. In *Style Timber Floor* Leeming JA stated, as to both payment claims and payment schedules, that they must be in writing. He continued:

> "[76] … It may be accepted that the requirement under s 14(3) may be satisfied by incorporating another document by reference. It is perhaps arguable that a payment schedule could incorporate a conversation by reference. But in the present case, the submission lacks any evidentiary foundation."

[23] Whilst accepting the possibility of documents being incorporated by reference, Bell P said that "any document or documents to be so incorporated would need to be identified with sufficient particularity so that the recipient to the schedule knew what was being incorporated."[8] There was no attempt, either express or by necessary inference, in the email of 8 May 2020 to incorporate any other document into what purported to be a payment schedule.

[24] The second use which the respondent submitted could be made of surrounding communications was to explain the meaning of statements in the payment schedule. In principle, it may be accepted that not only communications but other contextual evidence may be necessary and relevant to allow an adjudicator (or the court) to understand the scope of terms used in a payment schedule (or in a payment claim). That is not this case: there was no term used in the 8 May 2020 email which required interpretation. Rather, what was sought to be achieved by reference to extraneous documents was to create a sufficient degree of particularly in the absence of incorporation. That course is not available. A payment schedule is not to be reconstructed by reference to external materials, so as to give it a degree of particularity which it simply did not enjoy.

[25] In any event, the exercise failed at a factual level. With respect to the timber flooring, only one email was relied upon. It was an email dated 30 March 2020 from the respondent's site foreman, being in effect a direction to the appellant. The email read:

> "As discussed late last week and this morning, all timber flooring and timber stairs will be completed before the easter break (COB Thursday 9/4/2020)
>
> Currently 1 man onsite installing timber treads, man power to increase from tomorrow."

This was the only exchange relating to the timber flooring contract. It pre-dated payment claim 7 by four weeks. It indicated that there was ongoing work at the time and more expected to be done. It provided no element of particularity as to the content of the payment schedule in relation to the timber flooring claim.

[26] The Court was taken to a number of emails relating to the tiling contract. The earliest was sent at 6:52pm on 6 May 2020. It referred to incomplete works and rectification work. It asked that all works be completed by COB Friday 8 May. The principal of the appellant replied two minutes later agreeing that everything would be done by that date. At 9:45am on 8 May, the respondent's site foreman sent an email noting that "[n]o tilers onsite works still not completed". A further email at midday on 8 May referred to a telephone conversation and an agreed completion date of 15 May.

[27] These emails demonstrated that there was work which remained to be done. What they did not demonstrate was which, if any, of the items identified in payment claim 7 had not been done prior to the reference date, which was 25 April 2020. The only email which identified any work to be done was the email of 6 May 2020. If that had been included in the payment schedule (which it was not) there would have been a live issue as to whether it referred to any of the items in the payment claim. That question may have been open to clarification by extraneous evidence; alternatively, it might itself have lacked the particularity to make it part of a valid payment schedule. However, as it did not purport to be part of a payment schedule, that issue need not be explored.

Conclusion

[28] The appellant was entitled to succeed with respect to its claim for payment of the two amounts identified in payment claim 7 under each contract. It claimed, and was entitled to, pre-judgment interest

[8] *Style Timber Floor* at [3] (Simpson AJA at [82] agreeing).

from the date of which those payments were due. In accordance with a note sent following the hearing of the appeal, the parties agree that, if successful, the appellant is entitled to judgment in an amount of $175,190.55.

[29] The appellant also claimed, in its notice of appeal, its costs of the trial. After the judgment was delivered in the District Court the parties agreed (no doubt because at that stage each had enjoyed a degree of success) that there should be no order as to costs. That was formalised in order (2) entered on 17 May 2021. (Order (1) on that date added a sum of interest to the amount for which the appellant had obtained judgment.) Having now proved entirely successful, the appellant is entitled to its costs, both of the trial and in this Court. Order (2) of 17 May 2021 will need to be set aside to give effect to that conclusion.

[30] The Court should make the following orders:

(1) Allow the appeal and set aside order (2) made in the District Court on 30 April 2021 and order (2) entered on 17 May 2021.
(2) Give judgment for the appellant in the sum of $175,190.55, being the sum of invoices JSA19293 and JS19794 and interest on those amounts.
(3) Order that the respondent pay the appellant's costs of the appeal and of the proceedings in the District Court.

[31] **MACFARLAN JA:** I agree with the orders proposed by Basten JA and with his Honour's reasons for judgment. I add the following observations.

[32] The email that the respondent in the present case relied upon as a "Payment Schedule" within the meaning of s 14 of the *Security of Payment Act* (see [5] above) in my view plainly did not conform with s 14 of that Act, which required it to give a reason for non-payment of the Payment Claim. Either the email is to be read as stating no reason at all for non-payment (and therefore not conforming with s 14) or as conveying the implicit assertion that the appellant had no entitlement to progress payments until completion of the works. This assertion would however have been in direct contradiction of s 8 of the Act which confers a right to progress payments irrespective of what the relevant contract provides (see also ss 3(2) and 34). In response, counsel for the respondent argued that the sufficiency of any reason given in the Payment Schedule was a matter for any adjudicator who might be appointed. That in my view is however not so when the purported reason flies in the face of the statute. Such a "reason" is not a reason at all for the purposes of the Act.

[33] **EMMETT AJA**: The question in this appeal is whether an email dated 8 May 2020 (**the May Email**) sent by the respondent, Cemco Projects Pty Limited (**Cemco**), to the appellant, Joye Group Pty Limited (**Joye**), constituted a "payment schedule" within the meaning of s 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Security of Payment Act**). On 30 April 2021, for reasons published on that day, a judge of the District Court (**the primary judge**) concluded that the May Email constituted a payment schedule and, accordingly, that Joye was not entitled to recover the amounts of two invoices, No JSA19293 in the sum of $112,043.11 and No JS19794 in the sum of $54,517.65 respectively. Joye has now appealed from that decision to this Court.

[34] Section 8 of the Security of Payment Act relevantly provides that, on and from each reference date under a construction contract, a person who has undertaken to carry out construction work under the construction contract is entitled to a progress payment. Under s 13, a person who is or who claims to be entitled to a progress payment (**the Claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment. Under s 14(1), a person on whom a payment claim is served (**the Respondent**) may reply to the claim by providing a payment schedule to the Claimant. A payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment, if any, that the Respondent proposes to make (**the Scheduled Amount**). Under s 14(3), if the Scheduled Amount is less than the claimed amount, the payment schedule must indicate why the Scheduled Amount is less and, if it is less because the Respondent is withholding payment for any work, the Respondent's reasons for withholding payment.

[35] On 30 July 2019, Joye and Cemco entered into two subcontracts relating to work to be carried out on a building site at Mitchell Road, Alexandria. One subcontract was for supplying and installing timber flooring (**the Timber Contract**) and the other subcontract was for installing tiles (**the Tiling Contract**). The subcontracts were in relevantly the same terms and comprised:

- a formal instrument of agreement;
- subcontract conditions;
- completed schedule to the subcontract conditions; and
- further subcontract documents identified in a schedule to the subcontract conditions.

[36] Recital "C" of the formal instrument stated that Joye had agreed to execute certain work under the subcontract. Clause 20.1 of the contract conditions provided that Joye was to ensure that subcontract works reached practical completion by the date for practical completion specified in the schedule. Clause 23.1 provided that Joye was to claim payment progressively in accordance with item 14 in the schedule. The amount of the subcontract sum to be paid by Cemco to Joye was specified in an item in the schedule.

Timber Subcontract

[37] On 30 March 2020, Cemco sent an email to Joye with respect to "Mitchell road". The email stated as follows:

> "As discussed late last week and this morning, all timber flooring and timber stairs will be completed before the easter break (COB Thursday 9/4/2020)
>
> Currently 1 man onsite installing timber treads, man power to increase from tomorrow."

[38] On 27 April 2020, Joye sent an email to Cemco with respect to "Claim 7 for Alexandria job Timber", attaching tax invoice No JSA19293 dated 27 April 2020 in the sum of $112,043.11. The invoice claimed the sum of $59,262.50 for the following item:

> "This claim for Alexandria timber flooring project by 27/04/20, 14.45% of total contract completed".

The invoice also claimed four other items totalling the balance in respect of "Variation Work".

Tiling Subcontract

[39] On 28 April 2020, Joye sent an email to Cemco "Claim 7 for Alexandria job Tiling", attaching tax invoice No JS19794 dated 28 April 2020 in the sum of $54,517.65. Invoice No JS19794 included eight items for "Tiling Installation Services, Labour Only" and two items for "Extra screeding for ground floor (300mm)".

[40] On 6 May 2020, Cemco sent an email to Joye under the subject "Incomplete works". The email relevantly said as follows:

> "As discussed today over the phone please ensure all incomplete works are completed by COB Friday 8/5/2020, this includes rectifying tiles on level 2, all grouting works, missing floor watses [sic], chipped tiles.
>
> Regarding the limestone tiles, please ensure ef-ex is applied in the correct procedure. This is not only for level 2 as level 1 and ground floor also have evident spots
>
> 1. All tile surfaces are cleaned of any dust and wiped down and dry
> 2. Floor tiles are protected and taped around the edges of the floor and wall junction to avoid any run-off from the ef-ex product, if this product is not applied properly and evenly applied it will stain the tile
> 3. Once the ef-ex is applied a re coat of the sealer is required.
>
> Please have someone experienced to undertake these works".

[41] On 6 May 2020, Joye responded as follows:

> "That's is [sic] fine I sent Alan and two other boys tomorrow I will make sure everything be done by the date"

[42] On 8 May 2020, Cemco sent a further email to Joye in reply saying:

> "No tilers onsite works still not completed".

The Purported Payment Schedule

[43] On 8 May 2020, Cemco sent the May Email to Joye with respect to "Claim 7 for Alexandria job". The May Email said as follows:

> "Please be advised that no payment for above Invoices, until all works been completed [sic]."

While no invoices were mentioned, copies of invoices No JS19794 and No JSA19293 were attached to the May Email. The question is whether the May Email constituted a payment schedule within the meaning of s 14 of the Security of Payment Act.

[44] Specifically, the question is whether the May Email indicated why the Scheduled Amount, being nil, is less than the amount claimed in the two invoices and stated Cemco's reasons for withholding payment of the invoices. The primary judge considered that, having regard to the earlier emails set out above, which could be incorporated into the May Email, the May Email constituted a payment schedule in respect of both of the payment claims constituted by the invoices.

[45] I have had the advantage of reading in draft form the reasons of Basten JA for concluding that the primary judge erred. I agree with his Honour that it is not possible to determine from the May Email or the other emails precisely what work Cemco was asserting had not been completed. I agree with his Honour's reasons and the orders proposed by him.

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Solicitors for the Appellant: *LM Legal*.

Solicitors for the Respondent: *Bradbury Legal*.

Diana Tang

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