SQUIRE PATTON BOGGS

Construction Matters

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Building and Construction Industry (Improving Productivity) Amendment Bill 2017

On 16 February 2017, federal Parliament passed the Building and Construction Industry (Improving Productivity) Amendment Act 2017 (Cth) (**Building Amendment Act**), implementing changes to the Building and Construction Industry (Improving Productivity) Act 2016 (Cth) (**Building Act**). Support for the bill came after an about-turn by cross-bench Senator Derryn Hinch, who had initially been a vocal supporter of the inclusion of a two-year grace period in relation to the Code for the Tendering and Performance of Building Work 2016 (2016 Code).

The Building Amendment Act will accelerate the introduction of the new national construction code, which clamps down on so-called "union friendly" provisions in enterprise agreements, such as limits on labour hire workers, contractors and visa workers.

Following a raft of last-minute amendments from the Nick Xenophon Team and Senator Hinch, the amendments to the 2016 Code establishes discrete exemptions to the general rule that if a company wishes to bid for and be awarded Commonwealth-funded building work, it (and all of its related entities) must not be covered by an enterprise agreements that contain any of the prohibited content in section 11 of the code.

Builders will now have to secure code-compliant agreements by the end of August this year if they want to win government contracts, with an estimated 1,500 deals previously struck (but which are thought not to comply with the previous code) will have to be renegotiated by August 2017.

The Turnbull government has also appointed John Murray AM to conduct a review of security of payments laws in the building and construction industry to address the significant differences in approach to security of payments laws throughout Australia, which impact on the level of protection afforded to subcontractors.

In order to identify best practice, John will undertake a wide-ranging review in consultation with business, governments, unions and other relevant interested parties and deliver a final report by 31 December 2017.

Common law claims for damages are not payment claims under the Construction Contracts Act 2004 (WA)

In *Bocol Constructions Pty Ltd v. Keslake Group Pty Ltd.*,[1] the Western Australia State Administrative Tribunal (**Tribunal**) dismissed an application for review of an adjudicator's decision to dismiss the applicant's application for adjudication of a payment dispute under s 31(2)(a) of the Construction Contracts Act 2004 (WA) (**Act**) on the basis that the application had not been prepared and served in accordance with s 26 of the Act.

The Tribunal's decision involved three issues, namely:

1. Whether the applicant's description of the respondent as "Trustee for Complete Road Services Trust, trading as Bitumen Surfacing" (which, whilst accurate, did not name Keslake Group Pty Ltd. as the trustee) was sufficient to comply with the requirements of regulations 4 and 5 of the Construction Contracts Regulations 2004 (WA) (**Regulations**)
2. Whether the applicant's claim for damages was a "payment claim", as defined in s 3 of the Act in terms of a "claim made under a construction contract"
3. Whether the application was one which the adjudicator could be satisfied was not possible to fairly make a determination because of the complexity of the matter, pursuant to s 31(2)(a)(iv) of the Act

1 [2017] WASAT 15.

Name Issue

The Tribunal was of the view that there could be no doubt as to the identity of the "Trustee for Complete Road Services Trust". There had not been a "misdescription" of the respondent, since it is its correct name.[2] Further, it was opined that interpreting s 26 of the Act and/or regulation 5 of the Regulations in terms that *any* error in the spelling of a name or the omission of a middle name would invalidate the application would not promote the purpose or object underlying the Act, as required by s 18 of the Interpretation Act 1984 (WA).

The Tribunal held that the respondent had not been "misdescribed" and that even if the description was wrong, there had been "no material deviation affecting the substance" of the application. In accordance with s 74 of the Interpretation Act 1984 (WA), the deviation would not have invalidated the application, which had been prepared and served in accordance with the CCA.

Damages "Under the Construction Contract"

The applicant sought to have the Tribunal imply that the applicant is entitled to make a claim for damages if the respondent does not carry out the work with proper skill and care.[3] The criteria for importing implied terms, as established in *BP Refinery (Westernport) Pty Ltd. v. Hastings Shire Council*, were not satisfied.[4] In particular, in the absence of the contract providing for a claim for liquidated damages, such a term is neither necessary nor "goes without saying".[5]

With respect to the applicant's argument that a claim for damages for breach of an implied term is a claim "under a construction contract", the Tribunal was of the view that the Supreme Court, in *Delmere Holdings Pty Ltd v. Green* (Delmere),[6] and *Laing O'Rourke Australia Construction Pty Ltd. v. Samsung C & T Corporation* (Laing O'Rourke),[7] supported the "narrow" view of the expression "under a construction contract" in terms of a payment claim made in compliance with contractual requirements. Although the applicant argued that these two cases did not consider a claim by a principal against a contractor, the Tribunal relied upon the Supreme Court's decision in *Kellogg Brown & Root Pty Ltd. v. Doric Contractors Pty Ltd.* (Kellogg Brown & Root),[8] which involved a claim by a principal for damages for work not carried out with proper skill and care.

The Tribunal concluded that:[9]

> "The right to claim for damages arises under the common law not under the Contract and therefore a claim for damages is not a payment claim because it is not 'a claim made under a construction contract … by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligation under the contract.'"

This decision suggests that there is limited scope for arguing that a damages claim, other than a claim for liquidated damages, is a "payment claim" under a construction contract, as defined in s 3 of the Act, whether a claim by a contractor or a principal.

Issue of Complexity

Pursuant to s 31(2)(a)(iv) of the Act, the adjudicator is obliged to dismiss the application if the adjudicator is satisfied that it was not possible to fairly make a determination because of the complexity of the matter.

The Tribunal was of the view that the applicant's claim was neither factually nor legally clear, referring to conflicting accounts as to the cause of the failure of the work, competing expert evidence and the fact that the weather on the day the seal was applied was relevant or may be relevant (for which there is no conclusive evidence available).[10] Additionally, the Tribunal was also of the view that there would be problems in determining the quantum of damages, since two methods of remedying the work were advanced by the applicant's expert, yet no reason was given for selecting one method over the other, nor was evidence provided as to different costs of the two methods.[11]

The Tribunal, therefore, found that it was too complex a matter to enable the adjudicator to fairly make a determination, a situation contemplated by s 31(2)(a)(iv) of the Act.

Serving Contractual Notices

A recent case highlights the courts' approach to notice provisions where a notice has been served, but not by the contractual means for doing so.

In *Torbey Investments Corporated Pty Ltd. V. Ferrara*,[12] the contract required notices to be "given by certified mail or personally". The relevant default notice requirements were:

> If a party is in substantial breach of this contract the other party may give the party in breach a written notice stating:
> (a) Details of the breach.
> (b) That, if the breach is not remedied within 10 working days, that party is entitled to end this contract.
> If 10 working days have passed since the notice of default is given and the breach is not remedied then the party giving the notice of default may end this contract by giving a further written notice to that effect.
> All notices to be given under this clause must be given by certified mail or personally.

2 [2017] WASAT 15, [63]-[64].

3 [2017] WASAT 15, [97].

4 (1977) 52 ALJR 20.

5 [2009] WASAT 134, [99].

6 [2015] WASC 148.

7 [2015] WASC 237.

8 [2014] WASC 206.

9 [2017] WASAT 15, [115].

10 [2017] WASAT 15, [32]-[35].

11 [2017] WASAT 15, [136].

12 [2017] NSWCA 9.

There was a termination notice clause also in what appeared to be mandatory terms. However, both the default notice and later termination notice were sent by letter by ordinary post. The contractor claimed that the notices were invalid because they did not comply with the requirements of the contract.

The court accepted that because each of the letters giving notice of default and termination were the subject of a response from the building contractor, the responses effectively acknowledged receipt and an understanding that what was being proposed was the termination of the contract.

While each contract must be construed according to its own terms, the purpose of the provisions was to provide a mandatory result if the requirements were followed, but not to invalidate a notice which was non-compliant. The result was that both notices were validly given for the purposes of the contract.

This decision suggests that it is possible to serve a valid notice by a method not expressly excluded in the contract if the purpose of the notice was achieved and the receiving party has acknowledged the notice and its effect.

It is not unusual in the administration of construction projects for communications to be by email. A similar result to that in *Torbey Investments* might apply if notices were sent by email. The sending of all communications by email over an extended period may also lead to a determination that a party would be prevented from later asserting service by email was invalid even if it was not allowed for in the contract.

Much depends on the words of the contract, the nature of the communication, the conduct of the parties and whether the communication was acknowledged. There may also be mandatory requirements imposed by statute. But the courts will generally take a purposive and commercial view of notice requirements where the contract and the law allow sufficient flexibility.

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