SQUIRE PATTON BOGGS

Review With a View to Improve: Security of Payments in WA

Industry Advisory Group – Improving Security of Payment for Subcontractors

The McGowan government recently granted approval to review the security of payments to subcontractors in the WA building and construction industry. This approval will also see the establishment of an Industry Advisory Group (IAG), through which key industry representatives and public works agencies will be able to provide input so as to facilitate the process to implement these new laws.

The terms of reference include that the IAG is to assess:

a) Whether any amendments should be made to the Building Services (Registration) Act 2011

b) Whether there is a need for new or amended legislation in regards to providing fairer contracting practices

c) Whether improvements can be made to the adjudication process under the Construction Contracts Act 2004 (the Act)

d) Whether statutory trust arrangements should be introduced

e) Whether any alternative measures or reforms can be implemented that will improve security of payment for subcontractors and suppliers

The first meeting of the IAG with industry stakeholders will be held on 26 March 2018.

Total Eden v Charteris (WA Supreme Court)

The inquiry was announced one day after the decision of *Total Eden v Charteris* [2018] WASC 60 was handed down. Relevantly, that decision involved an application for judicial review of an adjudicator's decision under the Act in favour of a subcontractor, whereby the applicant contractor argued successfully that the adjudicator had failed to properly construe his obligations under the Act.

Key Findings and Implications

Justice Pritchard held that the adjudicator's decision was "infected by jurisdictional error" and, on this basis, the decision should be quashed.

Of the six grounds of review, three grounds were upheld on the basis that the adjudicator failed to take into account Total Eden's claim to an entitlement to set off a sum against the amount claimed by the subcontractor, ECA Systems. The adjudicator was also found to have acted unreasonably in requiring Total Eden to pay ECA Systems' preparation costs and share of the adjudicator's fee.

Essentially, Justice Pritchard held that the adjudicator had failed to perform his functions as required under s 31(2)(b) of the Act and misconstrued the relevant sections of the Act.

This decision provides a valuable example of what improvements could be implemented to the adjudication process to not only assist subcontractors, but to also improve the education of adjudicators and standards for registered adjudicators to follow.

Background

Total Eden was a contractor on an agriculture project (Project) engaged to supply and install irrigation equipment for the Project. Total Eden subcontracted the works to ECA Systems to install the electrical and process control works under the contract.

On 11 August 2016, upon completion of part of the works, ECA Systems submitted an invoice to Total Eden. By 6 October 2016, Total Eden had not paid the invoice and ECA Systems subsequently made an application for adjudication under the Act. Total Eden claimed that the principal would not pay certain invoices it had submitted for works completed by ECA Systems on account of loss and damage that the principal had suffered due to ECA System's faulty and defective work.

The adjudicator concluded that, pursuant to s 31(2)(b) of the Act, on the balance of probabilities, Total Eden was required to pay AU$92,853.74 (including interest, costs and GST) to ECA Systems. The costs included the sum of AU$1,681.82 for ECA Systems' preparation costs for the adjudication and AU$1,500, being ECA Systems' share of the adjudicator's fee.

Total Eden then applied to the WA Supreme Court for review of the decision.

Decision

Total Eden submitted that the adjudicator made six jurisdictional errors in coming to his decision, namely:

1. The adjudicator failed to consider the liability of Total Eden to ECA Systems as at the date of the determination, and not as at the date that Total Eden was required to respond with a notice of dispute

2. The adjudicator failed to have proper regard to Total Eden's entitlement to set off the sum in respect of the faulty and defective work

3. The adjudicator misconstrued the Act by excluding the rights of set off

4. The adjudicator determined the liability of Total Eden to ECA Systems on the basis of "basic contract administration procedures" and "fundamental, commonplace, fair and reasonable etiquette", rather than the law of WA
5. The adjudicator acted beyond his jurisdiction in requiring Total Eden to pay a sum which did not form part of the "costs of the adjudication"
6. The adjudicator acted unreasonably by requiring Total Eden to pay preparation costs and the adjudicator's fee for ECA Systems

Essentially, the adjudicator appeared to conclude that s.17 of the Act applied to the Project contract because of the absence of terms about when and how a payment claim was to be responded to, and that all of the provisions in Div 5 Sch 1 of the Act were to be implied into the contract. The adjudicator thereby determined that Total Eden had 14 days to raise an objection in regard to the payment claim under the implied term in cl 7(3), failing which it was deemed to have to pay the whole of the payment claim.

Justice Pritchard found the contract did not contain a provision about how or when a payment claim was to be responded to. Her Honour then followed the earlier reasoning of Justice Le Miere in *Cooper & Oxley Builders v Steensma* [2016] WASC 386 and held that only those parts of Div 5 Sch 1 of the Act that deal with when and how to respond to a payment claim were to be implied where such provisions were expressly absent in the subject contract. This meant that the deeming provision in clause 7(3) in Div 5 Sch 1 was not implied. The consequence of this finding was that the adjudicator had misconstrued the Act, and misunderstood the nature of his function under s 31(2)(b) of the Act.

The failure of the adjudicator to properly construe the Act meant that he did not consider Total Eden's set off claim at all. The adjudicator should have considered the set off claim on its merits but failed to do so.

The adjudicator had relied on the conduct of Total Eden in failing to respond with the 14 day period as grounds for his costs award, reasoning that Total Eden had been "frivolous or vexatious". As there was no proper basis for the adjudicator's primary determination, it was held that there was no proper basis for describing Total Eden's conduct as frivolous or vexatious and, therefore, this constituted a "manifestly unreasonable exercise" of the adjudicator's discretion under s 34(2) of the Act.

The review application was, therefore, upheld and the determination of the adjudicator set aside.

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