

Introduction

The Court of Appeal of Western Australia recently handed down two related decisions, *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27 (Samsung Appeal) and *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28 (Duro Appeal), in a dispute between Samsung and Duro arising out of the Roy Hill iron ore project.

The following points arise out of the decisions:

1. If a contract requires a contractor to perform one of the obligations in the definition of “construction work” under the Construction Contracts Act 2004 (Act), it will still be a “construction contract”, and an adjudicator is not bound to dismiss the adjudication application under section 31(2)(a) of the Act, even if the contract also requires the contractor to perform other duties (which may even fall within the exclusions in the Act) (from the Samsung Appeal).
2. An adjudicator has no jurisdiction to determine a dispute for payment which is not a “payment dispute” within the meaning of the Act. There is no power under section 31(2)(b) of the Act to consider the merits of a dispute involving a “non-payment claim” (from the Samsung Appeal).
3. An adjudicator’s jurisdiction is limited to the payment dispute arising from the non-satisfaction or disputation of the payment claim, but this can include considerations of entitlement to set off amounts paid on account against any liability and amounts due by way of liquidated damages and other matters, especially if relied upon by a party as a defence to the payment claim (from the Duro Appeal).
4. An adjudicator’s determination will be valid and enforceable to the extent that any aspect of it vitiated by jurisdictional error is capable of severance in accordance with common law principles (from the Duro Appeal).

The Samsung Appeal

Samsung appealed from the decision of Beech J of the Supreme Court of Western Australia in relation to issues arising out of two adjudication determinations.

The Court of Appeal determined the two relevant grounds of appeal as follows:

- **Ground 1** – Samsung alleged that an adjudicator is bound under section 31(2)(a) of the Act to dismiss any adjudication application which includes a claim in respect of work which included both “construction work” and work excluded from the definition of “construction work”.

The Court of Appeal dismissed this ground of appeal. The Court of Appeal held that if a party to an “umbrella contract”, having obligations to perform work described in the definition of “construction work”, as well as other contractual duties which may fall within the exclusions provided for in section 4(3) of the Act, applied for adjudication and its claim contained (correctly) an unpaid “payment claim”, as well as (incorrectly) a claim for payment with respect to other contractual duties, there will be no dismissal under section 31(2)(a)(i). This is because the umbrella contract is nevertheless a “construction contract” within the meaning of the Act. If the contract imposes on a contractor at least one of the specified obligations in paragraphs (a) to (d) of the definition of “construction contract”, it will be a construction contract even though it also deals with other matters. In those circumstances an adjudicator has no obligation to dismiss under section 31(2)(a) of the Act.

- **Ground 2** – Samsung alleged, as an alternative to Ground 1, that an adjudicator has no jurisdiction to determine amounts relating to work performed by the contractor which was not work of a kind described in the definition of construction contract, that is, that an adjudicator has no jurisdiction to determine such a “hybrid” dispute under section 31(2)(b) of the Act.

The Court of Appeal was not unanimous in this decision. Martin CJ confirmed the decision of the trial judge and dismissed this ground of appeal. Buss P and Murphy JA upheld this ground of appeal, and held that although there will be no dismissal of a hybrid claim for payment (being one including a “payment claim” as defined by the Act and a claim for payment in respect to its other contractual duties), the adjudicator has no jurisdiction to determine any dispute other than a “payment dispute” as defined by the Act. There is no power under section 31(2)(b) to determine the underlying “merits” of a dispute involving a “non-payment claim”. An adjudicator’s jurisdiction is limited to the determination of that part of the dispute which relates to a claim for payment for work described in the definition of construction contract.

Buss P and Murphy JA also held that an adjudicator’s determination would be valid to the extent that any aspect of it vitiated by jurisdictional error is capable of severance in accordance with common law principles.

The Duro Appeal

Duro appealed against both decisions of Beech J in the Supreme Court upholding Samsung’s application for judicial review and dismissing Duro’s application for leave to enforce determinations made by two adjudicators.

The Court of Appeal determined two grounds of appeal, in relation to set off and severance, as follows:

- **Ground 1** – In relation to set-off, the Court of Appeal had to consider whether the jurisdiction of an adjudicator is limited to the determination of the merits of the payment claim giving rise to the payment dispute.

The Court of Appeal held that an adjudicator's jurisdiction is limited to the payment dispute arising from the non-satisfaction or disputation of the payment claim, but this can include considerations of entitlement to set off amounts paid on account against any liability and amounts due by way of liquidated damages and other matters, especially if relied upon by a party as a defence to the payment claim. The Court of Appeal held that the trial judge erred in finding that the adjudicator exceeded his jurisdiction in finding that Samsung was not entitled to set off, as against the amounts claimed by Duro in the November claim, an amount in respect of an advance payment of AU\$6.66million. This was especially as it was relied upon by Samsung as a defence to the payment claim. The adjudicator did not exceed his jurisdiction by deciding that Samsung was not entitled to set off.

The Court of Appeal held that the decision of the trial judge should be set aside, Samsung's application for judicial review should be dismissed and Duro's application for leave to enforce the determination allowed.

- **Ground 2** – In relation to severance, Duro alleged that a court could sever invalid and valid portions of an adjudicator's determination and grant leave to enforce the valid portion.

The Court of Appeal was not unanimous in this decision. Martin CJ agreed with the trial judge that the court could not sever a determination affected by jurisdictional error. However, the majority, Buss P and Murphy JA, upheld this ground of appeal, and held that a court could sever invalid and valid portions of an adjudicator's determination and enforce the valid portion.

Buss P and Murphy JA construed the legislative intention of the Act and held that the Act does not manifest an intention that an adjudicator's determination is to operate as an "organic and indivisible whole", a determination of a payment dispute will typically involve the determination of "identifiable, divisible amounts claimed", and that a determination of a final amount to be paid "is no more than the mathematical result of the determination of divisible amounts".

Implications

Although the majority decision in the Court of Appeal will prevail in Western Australia, the fact that the Chief Justice agreed with the trial judge on two issues suggests that the Act would benefit from further amendments to clarify its legislative intention.

In the meantime, parties and adjudicators should ensure that they understand the effect of these decisions.

In particular, potential applicants should not be discouraged from making applications for adjudications arising out of contracts which may contain obligations to perform "mining work", as well as "construction work".

However, an adjudicator's jurisdiction will be limited to determining that part of the dispute which relates to a claim for payment with respect to 'construction work'.

If a party is of the view that part of a determination may be tainted by jurisdictional error, it can still seek leave to enforce any valid part of that determination.

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