SQUIRE PATTON BOGGS

Construction Matters

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Amendment to *Construction Contracts Act 2004* (WA)

On 22 September 2016, the WA Small Business Minister Sean L'Estrange introduced the Construction Contracts Amendment Bill 2016 (WA) into the WA State Parliament, to amend the *Construction Contracts Act 2004* (WA). The Bill aims to reflect the government's response to Professor Philip Evans' recommendations to improve the operation of and the access to the rapid adjudication process for resolving payment disputes under construction contracts (**response**). Minister Sean L'Estrange stated the Bill comprised the first raft of amendments, with a second raft of reforms to follow at a later date. The Bill passed the Legislative Assembly on 20 October 2016, and will proceed to the Legislative Council.

The amended Act will be complemented by a Code of Conduct for contractors, the establishment of a compliance unit within the Department of Commerce to monitor compliance with the Code and expanding the Small Business Commissioner's power to review and mediate disputes. Furthermore, as at 30 September 2016, the government has mandated the use of project bank accounts on public projects valued between AU$1.5 million and AU$100 million to ensure payments to subcontractors when the government contractor becomes insolvent.

Key Amendments

The majority of the amendments to the Act reflect the proposed changes outlined in the response.

The key amendments to note are as follows.

1. Business Days

All time limits relating to adjudicating a payment dispute are to be amended from "days" to "business days". The definition of business days is to exclude weekends, public holidays and the period from 25 December – 7 January. This will be a welcome amendment for both principals and contractors.

2. Time Period to Make Application for Adjudication

A key amendment the Bill introduces is significantly increasing the time limit in the Act for lodging an application for adjudication from 28 days to 90 business days. This was not recommended by Professor Evans – it goes against the purpose of the Act, which is to enable the swift resolution of payment disputes. However, the government believes that this amendment will address a concern that the current time limit is acting as an impediment for some participants, particularly small subcontractors, from accessing the adjudication scheme. The increased time period provides the potential applicant with about 18 calendar weeks to lodge a claim.

3. Time Period to Respond

The Bill amends the time in which a response to an adjudication application can be made from 14 days to 10 business days.

4. Permitting Recycled Claims

A significant amendment to the Act is the change to the definition of "payment claim" to include matters covered by a previous payment claim, permitting recycling of claims. Permitting recycled claims will allow a party whose initial payment claims were rejected or disputed to be included in a subsequent payment claim. There appears to be no limit on how many times a claim can be recycled. The only limit is that a payment dispute will not arise in respect of matters included in a payment claim, that have been the subject of an application for adjudication that has been dismissed or determined.

Permitting recycled claims provides the applicant with increased flexibility to seek rapid adjudication of a payment dispute. However, it may go against the object of the Act where a claim can be made multiple times and then be the subject of an adjudication well after the relevant event occurred. This is exacerbated by the increased time period in which an adjudication application can be made. Essentially, there may not be an absolute time limit placed on when an adjudication application can commence.

5. Contract Payment Terms

The bill reduces the maximum contract payment term from 50 days to 42 days.

6. Substance Not Form

The Bill amends the Act to focus on substantial compliance rather than the form of an adjudication application. The amendments provide that the adjudicator must dismiss an application without determining its merits if the application has not been prepared in accordance with section 26(2)(a), unless satisfied that the application complies with the section sufficiently for the adjudicator to commence adjudicating the dispute. This will ensure the substance of an application will prevail over the form, to the extent to which the adjudicator is satisfied that the application sufficiently complies with section 26(2)(a).

7. Enforcement of Adjudication Determination

Currently, leave of the Court is required in order to enforce a determination as a judgment or order of the Court. The Bill amends the Act's current position by removing the requirement of leave of the Court and only requiring that, a party that is entitled to be paid an amount pursuant to a determination, file at Court a copy of the determination (certified by the Building Commission), and an affidavit verifying that payment is due and owing.

Potential Impact of the Amendments

Contractors

The amendments are overwhelmingly favourable to contractors. It is apparent that, by amending the Act, the government aims to improve payment protection for small contractors, therefore mitigating the issues of insolvency and security of payment faced by small contractors in the construction industry.[1]

Under the current Act contractors have to pay special attention to when payment claims arise, in order to comply with the deadline to make an adjudication application under the Act. When the amendments are implemented the flexibility will be two-fold, as the applicant will have an additional 14 calendar weeks or so to prepare an application and the applicant will have the ability to recycle claims.

Principals

The key amendments are conversely unfavourable to principals. The principal's disadvantage under the Act is exacerbated as there will now be a large imbalance in the time allowed to prepare a response to adjudication. As the applicant will have increased time to prepare an adjudication application there is the potential that the principal will have to reply to very detailed, voluminous claims in a similar amount of time as allowed under the current Act. This could cause injustice, especially in complex and large matters where expert reports are included in the application.

Furthermore, under the current Act, the principal has some level of certainty that once the 28 days for making an adjudication application have expired, they would not be subject to an adjudication application. This will no longer be the case with the contractors' ability to recycle claims.

Commencement and Transitional Provisions

All the amendments will commence operation on 15 December 2016, other than the reduction in maximum payment terms.

The new 42 day maximum payment term will commence operation on 3 April 2017.

If the time period to apply for adjudication expires before 15 December 2016, but, as extended by the new timeframe for applications of 90 business days, expires on or after 15 December 2016, the application may be made within the extended time period. In effect, therefore, potential applicants with payment disputes that arise on or after 11 August 2016 will have the extended time period of 90 business days to apply for adjudication under the act.

SIAC Rules 2016 and International Arbitration

Flexibility, efficiency, and cost-effectiveness … The advantages of international arbitration over traditional litigation have been well espoused and are well known to most, if the increasing growth of international arbitration is anything to go by. However, the extent to which these advantages can survive the tactics of disputing parties and be realised in practice has increasingly been called into question. For proponents of international arbitration, this is concerning. The perception that arbitration is less timely, no cheaper and indeed potentially more expensive than commercial litigation is sufficient to render parties reluctant to undertake arbitration.

The Singapore International Arbitration Centre (**SIAC**) has sought to alleviate this concern by introducing progressive new provisions in the sixth edition of the Arbitration Rules of the Singapore Arbitration Centre (**SIAC Rules 2016**), which came into effect on 1 August 2016.[2] The changes introduced under these new provisions will significantly re-inforce the traditional advantages associated with international arbitration, including efficiency and cost effectiveness, particularly in respect of complex disputes involving multiple parties or contracts.

Multiple Contracts and Consolidation (Rule 6 & 8)

In recognition of the increasingly complex nature of international commercial disputes, the SIAC Rules 2016 incorporate a new procedure that provides two routes by which a claimant in a multi-contract dispute can commence proceedings:

1. Filing a Notice of Arbitration in respect of each contract, whilst concurrently submitting an application for consolidation
2. Filing a single Notice of Arbitration for all the contracts, with the Notice of Arbitration serving as the application for consolidation

The SIAC Rules 2016 also allow for a party to make an application for consolidation after proceedings have been commenced to either SIAC or the Tribunal.

This rule change will significantly improve the efficiency and cost-effectiveness of arbitrating multi-contract disputes, particularly when compared to the previous position where arbitrations could only be consolidated by consent, creating the risk of additional costs and time, should either party elect to adopt an obstructionist approach.

Early Dismissal of Claims and Defences (Rule 29)

SIAC is the first major commercial arbitration centre to introduce a procedure for the early dismissal of a claim or a defence. The procedure allows parties to apply for the dismissal of a claim or defence where the relevant claim or defence is either:

1. Manifestly without legal merit
2. Manifestly outside the jurisdiction of the tribunal

This new provision is analogous to seeking summary judgment, and has the potential to provide parties with significant savings of time and costs.

1 Government of Western Australia, 'Construction Contracts Act amendments introduced', *Media Statements*

2 The SIAC Rules 2016 are available for download – http://www.siac.org.sg/our-rules/rules/siac-rules-2016

Delocalising the Seat of the Arbitration (Rule 21)

Another significant change introduced under the SIAC Rules 2016 is the removal of the notion of a default seat of arbitration. This change acknowledges the fact that most disputes are of an international character. Instead of Singapore being the default seat under the SIAC Rules 2016, the tribunal will determine the seat once constituted unless the parties have agreed otherwise.

Parties should carefully consider where they elect the seat of arbitration, as it will dictate the procedural laws by which the proceedings are conducted, including the availability of any appeal or review process.

More on Singapore

The SIAC Rules 2016 should be of particular interest to the infrastructure and projects industry in Australia. Singapore is renowned for its strong and sophisticated economy, and has been consistently ranked as one of the best locations globally for Ease of Doing Business.[3] Singapore also represents the middle ground between Australia and its key Asian trading partners in Japan, China, and South Korea.

These reasons, combined with the efficiency and cost-effectiveness that the latest SIAC Rules 2016 introduced, makes Singapore a seriously attractive place for the Australian infrastructure and projects industry to refer its disputes to.

With our office in Singapore being closely connected to our arbitration practices in Perth and Sydney, as well as our wider global practice group, our firm has both the local knowledge and global clout to assist clients in realising the benefits of resolving their disputes under the new SIAC Rules 2016.

Freedom of Contract Trumps Equity: Contractual Terms Excluding Set-offs and Encompassing Risk Allocation Given Broad Meaning

Ozton Pty Ltd v Cromwell Seven Hills Pty Ltd as trustee for the Cromwell Northpoint Trust[4] demonstrates the Court's reluctance to interfere with contractual arrangements freely entered into between commercial parties, holding that:

1. A contract providing an obligation to pay "without deduction" or "without set-off" excludes all set-offs, including equitable set-offs
2. Contractual clauses that encompass risk allocation between the parties should be given full effect
3. Damages are an adequate remedy for breach of express covenant and derogation from grant where the costs arise out of lost rent from and potential action by subtenants

Background

Ozton leases five commercial premises in Northpoint Tower, North Sydney, which is owned by Cromwell Seven Hills Pty Ltd as trustee for the Cromwell Northpoint Trust (**Northpoint**).

At the beginning of this year, Northpoint began a major redevelopment and renovation of Northpoint Tower. Ozton claims that the large scale of these works has breached the express covenant for quiet enjoyment in its leases, and therefore constitutes a derogation from grant.

As a result, from April 2016, Ozton stopped paying rent. Northpoint denies that Ozton has a right to withhold rent and has threatened to call on guarantees given by St George Bank. Ozton is therefore seeking an interlocutory injunction to restrain Northpoint from doing this.

What Was Argued in This Case – Key Issues

The key issues were:

1. In light of the relevant provisions of each lease:
   - Could Ozton claim an equitable set-off?
   - Could Ozton claim equitable relief more generally?
2. Are common law damages an adequate remedy for any derogation from grant by Northpoint, and if so, is it likely that Northpoint will be able to meet any damages reasonably likely to be awarded?

What Was Decided?

Can Ozton Claim an Equitable Set-off or Equitable Relief More Generally?

The relevant contractual provisions of the leases were clauses 5.1 and 21.1.

Clause 5.1 stated, among other things, that:

> "The Lessee must make payments due under this Lease:
>
> . . .
>
> (b) without set-off, counter claim, withholding or deduction".

3 http://www.doingbusiness.org/data/exploreeconomies/singapore

4 [2016] NSWSC 1339.

Clause 21.1 stated, among other things, that:

> "(d) The Lessee must not do anything which could prevent or delay payment by the bank to the Lessor under the Bank Guarantee"

The Effect of Clause 5.1

Citing *Norman*,[5] His Honour noted the general trend of authorities indicating that an obligation to pay "without deduction" will not exclude a right of equitable set-off, and considered *Oswal*[6] as indicating that the words "without set-off" will exclude all forms of set-off, including both equitable set-off and statutory set-off.

Considering the scheme of risk allocation that the leases evince, McDougall J held that "the better view" of clause 5.1(b) is that it operates to exclude the right to equitable set-off.

The Effect of Clause 21.1(d)

His Honour held that, except for limiting circumstances such as fraud, the contractual scheme evinces a clear intention that clause 21.1(b) be interpreted to ensure that Northpoint's income was guaranteed, even if there were disputes. Citing, with approval, Jackson's J statement in *Telvent* that:

> "even if an interlocutory injunction only delays the beneficiary's right to make the demand, that interferes with the very contractual right that was agreed if the injunction turns out to have been wrongly granted"[7]

McDougall J concluded that, "absent evidence of real and substantial harm to Ozton that is unlikely to be recouped if Ozton succeeds"[8] at trial, clause 21(d) should be given its full effect so as to protect the parties' contractual risk allocation (ensuring Northpoint's rental income is guaranteed).

Are Common Law Damages an Adequate Remedy for Any Derogation From Grant by Northpoint and Will Northpoint Be Able to Meet Any Award of Damages?

Accepting that the breaches that Ozton complains of are capable of being remedied by damages to compensate for loss of rent from, and further claims by, Ozton's subtenants, McDougall J therefore held that the second part of this question, whether Northpoint will be able to meet any award of damages, is the key question to be asked.

Considering Northpoint's net assets (totalling at least AU$56 million), along with its profitability and return of cash to investors, His Honour considered the risk of it not meeting any realistic estimate of damages suffered by Ozton to be minimal. His Honour therefore considered damages to be an adequate remedy for any damages that Ozton might sustain.

Conclusions

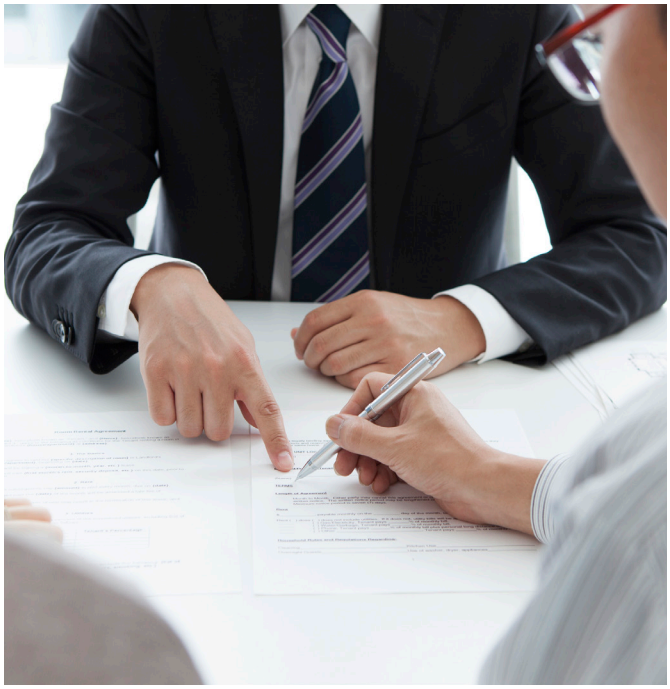
Justice McDougall therefore held that "there is no good reason for the court to interfere with Northpoint's exercise of…its contractual rights" and that the Court had no basis to interfere with the risk allocation scheme devised and implemented by the parties.

His Honour therefore dismissed Ozton's claim for interlocutory injunctive relief.

Key Takeaways – How Does This Case Affect You?

This case reinforces the reluctance of the Court to interfere with contractual arrangements entered into freely between two commercial parties. Specifically, this case solidifies the jurisprudential trends that:

1. Contracts providing an obligation to pay "without deduction" or "without set-off" exclude all set-offs, including equitable set-off
2. Contractual clauses providing risk allocation should be given full effect
3. Damages are an adequate remedy for breach of express covenant and derogation from grant where the costs arise out of lost rent from and potential action by subtenants



5 *Norman v FEA Plantations Ltd* (2011) 195 FCR 97.

6 *Oswal v Commonwealth Bank of Australia* [2013] WASCA 58, [54] (Pullin JA).

7 *Tevent Australia Pty Ltd v Acciona Infrastructure Australia Pty Ltd* [2016] QSC 201, [76] (Jackson J).

8 *Ozton Pty Ltd v Cromwell Seven Hills Pty Ltd as trustee for the Cromwell Northpoint Trust* [2016] NSWSC 1339, [35] (McDougal J).

Case Note: *Samsung C&T Corporation v Loots* [2016] WASC 330

Justice Beech of the Supreme Court of WA delivered a judgment, on 14 October 2016, in relation to an application by Samsung C&T Corporation (**Samsung**) to set aside five unfavourable adjudication determinations under the *Construction Contracts Act 2004 (WA)* (**CCA**) on the basis of jurisdictional error. The adjudication determinations had been made in favour of Samsung's subcontractor on the Roy Hill Iron Ore Project (**Project**), Duro Felguera Australia Pty Ltd (**Duro**) and totalled more than AU$60 million. His Honour set aside two of the five adjudication decisions. Samsung was unsuccessful in its application to set aside the other three determinations, with Duro obtaining leave to enforce them. As a consequence, Samsung was required to pay Duro a total of AU$12 million.

In summary, in relation to the two determinations that were set aside:

1. The first was set aside because the adjudicator's reasons for refusing to give credit to Samsung for a payment on account of more than AU$6.66 million revealed jurisdictional error.
2. The second was also set aside as jurisdictional error. The adjudicator's reasons were fatally flawed in a particular respect: a substantial element of Duro's claim, AU$32.4 million, was not referable to the payment claim.

First Determination to Be Set Aside

In the first determination to be set aside, the adjudicator found that Samsung had the right to set-off the payment on account of AU$6.6 million against amounts it owed to Duro. However, the adjudicator declined to bring that set-off to account on the ground that he found that, in an earlier progress certificate relating to a different progress claim, Samsung had wrongly set-off an amount of AU$13.1 million, which exceeded the payment on account.[9]

Justice Beech found that the adjudicator exceeded the limits of his statutory powers as they do not permit direct attention to the merits of competing claims, counterclaims or set-offs made in, or in response to, earlier or separate payment claims.[10] Justice Beech held it is not open to an adjudicator to find that the amount payable by a party in relation to the payment claim is to be increased (or decreased) on the ground that the adjudicator considers that a party wrongfully denied liability (or wrongfully made a claim) in relation to an earlier, different payment claim.[11]

9 *Samsung C&T Corporation v Loots* [2016] WASC 330 [2016] WASC 330 [273].

10 *Samsung C&T Corporation v Loots* [2016] WASC 330 [279], [283].

11 Ibid [281].

Second Determination to be set aside

The second determination to be set aside related to a progress claim for an amount of about AU$64 million, comprising four elements outlined in Duro's submissions to the adjudicator.[12] On the face of Duro's submissions to the adjudicator, nothing in Duro's progress claim was referrable to, or connected to any part of, the AU$32.4 million awarded.[13]

Justice Beech repeated what His Honour said in *Alliance Contracting Pty Ltd v James*,[14] regarding an adjudicator's powers and functions and came to the conclusion that as Duro had not made a payment claim in relation to the AU$32.4 million in its progress claim it followed that the adjudicator had no power to determine that Samsung was obliged to pay that sum to Duro. Therefore, His Honour held that the adjudicator exceeded his statutory authority.[15] Furthermore, in failing to respond at all to Samsung's primary submission about the AU$32.4 million, the adjudicator breached the requirements of procedural fairness.[16]

Reasons for Upholding Three of the Determinations

Samsung was unsuccessful in its application to set aside the other three adjudication determinations for the following reasons:

1. Justice Beech did not accept Samsung's submission that two adjudicators made a jurisdictional error in that they made their determination without regard to the subcontract, or because they adopted a construction of it that was outside reasonable bounds. His Honour held that an adjudicator has jurisdiction to err in the construction of a contract.[17] He was not persuaded that any error on the part of the adjudicators in determining whether milestones applied to the subcontract was anything more than an error in construing the subcontract.[18]
2. Justice Beech did not accept Samsung's submission that the progress claims in dispute were not payment claims as defined under the Act because the claim for payment was not confined to construction work. His Honour held this proposition involves a restrictive reading of the statutory language that finds no support in the text and, bearing in mind the evident object of the Act, gives rise to consequences that are unlikely to have been intended.[19]

12 Ibid [207].

13 Ibid [208], [212].

14 Ibid [217] citing *Alliance Contracting Pty Ltd v James* [2014] WASC 212 [60]; adopted by Mitchell J in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237 [186].

15 *Samsung C&T Corporation v Loots* [2016] WASC 330 [218].

16 Ibid [226].

17 Ibid [137].

18 Ibid [139].

19 Ibid [322].

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