



The Builders' Lawyer Weekly

Monday 23rd October 2006

The Builders' Lawyer Weekly is prepared by this law firm, The Builders Lawyer ('TBL') as a service to the building and construction industry. This newsletter is not a substitute for legal advice and you should not act on any information herein without checking it with us first: 1800 688 529 or with your own legal advisors. Please let us know if you do not wish to receive this bulletin.

Case Comment: Sydney Catchment Authority: How to count TPA damages

Down the runway again last Friday went the Sydney Airport Corporation as Justice Einstein refused the insurer Gordian Runoff's application to be joined into its dispute with *Boulderstone Hornibrook* stemming from the construction of the third runway at Mascot. Meanwhile the Sydney Catchment Authority found the NSW Court of Appeal had published its second decision stemming from the construction of an auxiliary spillway for the Warragamba Dam by Abigroup.

Given that construction contracts – the front end work – have thus come back into fashion these days, we often find sophisticated contract clauses which rule out some claims altogether, or which place conditions or time limits on others.

Once the trend toward tough

contracts becomes entrenched in the industry – as it has done in times past – much more reliance will again be placed upon rights under the Trade Practices Act by builders and contractors.

Sydney Catchment Authority is therefore a topical decision. It found that under the Trade Practices Act a claim for damages could be granted even though the loss sought for was limited to a loss on a specified portion of the works. In other words, a claimant does not have to prove loss over the whole of the contract, it need only establish that for example, in relation to that portion of the contract work it had been misled by the Principal and suffered loss in relation to it.

In this case, the loss was the “the cost of carrying out the additional work.”

The additional work arose as a result

of rock levels in the information made available at tender being discrepant with plans said not to exist [when in fact they did – a so-called ‘negative representation’ found to be misleading and deceptive in breach of TPA Sec.52.

While the Building and Construction Industry Security of Payment Act (‘the Building Payment Act’) was sold to players in the industry on the basis that it would protect contractors and sub-contractors from their head contractors’ insolvency, it has not done so. The declared purpose of the Act having been lost, the Act has had the effect of compelling all contracting parties to deal with each other on the basis that – on application of the contractor alone – a person will be appointed by a neutral third party to decide the

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The Week's Noted Judgments

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| COURT OF APPEAL: | Abigroup Contractors v Sydney Catchment Authority (No 3) | <i>TPA Sec.52 :whether loss in reliance damages must occur over whole of contract</i> |
| SUPREME COURT- TECHNOLOGY & CONSTRUCTION LIST | Sydney Airport Corporation v Boulderstone Hornibrook/ Connell Wagner Jem Developments v Hansen Yuncken | <i>Interest in joinder cannot be merely contingent</i> <i>Sec. 25(4) of B&CISOPA: set aside does not equal set-off</i> |
| DISTRICT COURT: Building Engineering Directions | Bellmarch Developments v Alcorns | <i>Untradesmanlike brick-cleaning with approval/ waiver of builder</i> |

TRADE PRACTICES ACT (COMMONWEALTH) / FAIR TRADING ACT (NSW)

If you feel that the contractual claim against you could not have been made without misleading and deceptive statements from your opponent you should contact us for advice on what you can do. You may be entitled to resist the contract claim.

Court Directions Hearings Last Week Sydney

SUPREME COURT TECHNOLOGY & CON- STRUCTION LIST

Friday, 20 October 2006
JUSTICE EINSTEIN; COURT 9A,
QUEENS SQUARE
HEARING 10:00am
1 055027/02 Sydney Airport Corporation Limited (Formerly Known As Sydney Airports Corporation Limited) v Boulderstone Hornibrook Engineering Pty Ltd & 5 Ors

JUSTICE BERGIN COURT 10C,
QUEENS SQUARE
MOTIONS TECHNOLOGY &
CONSTRUCTION LIST 9:15am
1 055085/04 Building Insurers' Guarantee Corporation v A & M Hanson Pty Ltd & 2 Ors
2 055092/05 Grocon Constructors Pty Limited v Selwan Property Holdings Pty Limited & 4 Ors
COURT 10C, QUEENS SQUARE
E
DIRECTIONS TECHNOLOGY &

CONSTRUCTION LIST 12:00pm
3 055013/04 Michael Davies Associates T/as Michael Davies Associates v Auburn Council & 1 Ors
4 055013/05 Owners Corporations Strata Plan 64324 v Vero Insurance Ltd
5 055038/05 Brookhollow Pty Limited (Formerly Grant Constructions Pty Limited) v R&R Consultants Pty Limited & 1 Ors
6 055091/05 Owners - SP 66601 v Majestic Constructions Pty Lim-

ited & 1 Ors
7 055006/06 The Owners - Strata Plan No 56587 v Vero Insurance Ltd & 1 Ors
8 055015/06 The Owners Strata Plan 64622 v Australand Constructions Pty Limited & 1 Ors
9 055018/06 Ching Sung Hoe v P & R International Developments Pty Ltd & 1 Ors
10 055020/06 Hon Tin Chu & 1 Ors v Ching Sung Hoe
11 055024/06 Tolsat Pty Limited T/as Everson's Food Processors

v Precision Stainless Systems Pty Limited
 12 : 055027/06 The Owners Corporation Strata Scheme 56120 v Allianz Australia Insurance Limited & 1 Ors
 13 : 055044/06 The Owners - Strata Plan No 58146 v Multiplex Corporate Agency Pty Ltd (ACN 003 070 120) (Aka Multiplex Constructions (NSW) Pty Ltd & 1 Ors
 14 : 055062/06 Kell & Rigby Pty Limited v Campbelltown Investments Pty Limited

roughs & Suzanne -v- Anthony John Cook
 3. : 223/05 Paula Palmer -v- Narex Australia Pty Limited
 4. : 2779/05 Coastal Construction Group Pty -v- Tim Andrews
 5. : 3015/05 David Pacanowski And Maxine -v- Simon Wakerman & Associates
 6. : 3303/05 Phillip Conicella & Janice Ethel -v- Moweno Pty Limited
 7. : 3533/05 W Eggerking & Co Pty Limited -v- Leonard Kuo & Joanna Kuo
 8. : 3535/05 S & D Interior Plaster Co Linings -v- Hightrade Construction Pty
 9. : 3859/05 Mark Robert Cruden And Samantha -v- Danny Mark Wilson & Sharyn
 10. : 4337/05 Jeffrey Tozer -v- David Howells
 11. : 4402/05 All Terrain Commercial Contracting -v- Dalabam Pty Ltd T/as Belmore
 12. : 436/06 Building Insurers Guarantee -v- Polarco Pty

Limited
 13. : 442/06 SC Clifford Constructions Pty Ltd, -v- Guthrie Concrete
 14. : 640/06 Eight Architectural Joinery Pty -v- Angus & Coote Pty Limited
 15. :
 1022/06 The Trustees Of The Benedictine -v- Colbron Constructions Pty
 16. : 1278/06 Vero Insurance Limited -v- Perry Charles Potter
 17. : 2247/06 Building Insurers' Guarantee -v- Tallwoods Pastoral Company

18. : 5092/05 Blue - Architects And Designers -v- Coffs Pacific Property

DISTRICT COURT BUILDING/ENGINEERING LIST

Directions Hearing Date : 19/10/2006
 BEFORE JUDICIAL REGISTRAR MCDONALD Court 13B
 1. : 4966/03 Salvatore Cassaniti & Alfa -v- Zirilli & Co Pty Limited
 2. : 3129/04 Timothy Philip Bur-



The information in these lists is compiled from information issued by the court registries and should be checked for confirmation.

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contractual position between builder and principal. Thus every contract now has an AS – 2124 type “Superintendent” (“the adjudicator”). The statutory adjudicator’s decisions over-ride decisions made by any contractual superintendent where they conflict.

The Sydney Catchment Authority decision – focussed on the Trade Practices Act – came out in the same week that Justice Einstein confirmed in *Jem Developments* that there were clear limits to the enforceability of adjudication determinations where a set off was pleaded – particularly where the federal Trade Practices Act provided the basis of an application for a stay or for lodgement of a cross-claim. “Setting aside” a judgment the procedure targetted by Sec. 25(4) of the Building Payment Act did not mean applying for a stay, or defending or cross-claiming under the Trade Practices Act

Jem Developments raises the possibility that where the subject matter of the adjudication is already before the court as an ordinary claim at the time the adjudication certificate is filed in court, it is likely that both the adjudication proceedings and the final court proceedings will be determined at the one time, with a separate question as to whether the party who lost the

Coming Events

- CRC Construction Innovation <FM as a business enabler> John Utzon Room, Sydney Opera House 3.30 pm 16 November 2006 [free]
- Australasian Tunnelling Society < Tunnelling 2006> Dockside Conference Centre, Darling Harbour 27-28 November 2006
- 22nd ARRB Conference < Research into Practice> 29 October -2 November Canberra

adjudication liable to pay the funds awarded into Court – rather than pay them to the other side.

In other words, in strongly contested cases there is now a distinct likelihood that we will see the return of the pre-2003 situation where a guarantee had to be provided where funds were not paid to the winning adjudication claimant.

It also means that the industry-wide scheme of statutory superintendence which has been established under will allow the adjudication system overall to perform its functions more efficiently. The adjudication determinations which the losing principal party can wear will not be stayed, but otherwise payment on the adjudication award may not take place before the resolution under Sec. 32 of the Act of the final decision in court or in arbitration, on the matter.

But the prominence given to security of payment over the past three years has meant that Trade Practices Act claims have been forgotten as contractors could now rely on prompt payment of their progress payment claims under the contract. The old superintendent had only been able to administer the contract – as a contract. He could not award damages for breaches of the fair trading legislation, or compensation for negligence in

preparing contract damages. Neither can the modern day adjudicator.

The adjudicator is compelled to give effect to the contract between the parties in valuing the construction work progressively claimed by contractors under the Act. If the contract provides for other terms of payment than monthly, then a contractor or sub-contractor may find that while it is entitled to make a payment claim once per month, it may be that an adjudicator will find that there is no entitlement under the contract for a payment to the contractor/sub-contractor at that time. The Act does not give an adjudicator power to arrive at his own estimation of what is fair and reasonable outside the terms of the contract between the parties.

The Courts have interpreted the interim nature of the Act’s entitlements in such a way as they do not allow companies in administration or liquidation to benefit from adjudications decisions in their favour via prompt payments. The creditors of the failed companies receive no moneys as a result. Liquidators do not receive any direct benefit from the Act when seeking monies owed to their construction or developer clients. That said, in any event, administrators do not use the Act as they should: but *that* is a tale for another day.

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