The information contained in this publication is intended as an introduction only, and should not be relied upon in place of detailed legal advice. Some information has been obtained from external sources, and Corrs cannot guarantee the accuracy or currency of any such information.

The information contained in this publication was current as at March 2016.
WELCOME TO THE LATEST EDITION OF CORRS’ CONSTRUCTION LAW UPDATE MARCH 2016

This publication provides a concise review of, and commercially focussed commentary on, the major judicial and legislative developments affecting the construction and infrastructure industry in recent months.

It is a useful resource to help in-house practitioners and commercial managers keep up-to-date with recent legal developments and current legal thinking.

We hope that you find it interesting and stimulating.

OUR THINKING

Corrs regularly publishes thinking pieces which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Construction Law Update links to some of our recent thinking on issues affecting development in arbitral practice as well as the construction industry generally.
KEYWORDS: SECURITY OF PAYMENT

KEY TAKEAWAYS

The Senate Committee Report on Insolvency in the Australian Construction Industry acknowledged that the introduction of Security of Payment (SOP) legislation was a “positive development”, but identified several concerns, including:

- the speed of adjudication;
- the cost of enforcement;
- problems with insolvency; and
- cultural and practical barriers.

The Committee made recommendations addressing these problems, the most significant of which is that the Commonwealth should enact national, harmonised SOP legislation.
The report
The recommendations relating to SOP legislation are part of a broader report about the high rate of insolvency in the Australian construction industry. The Senate Standing Committee on Economics prepared this report after a year-long inquiry and associated public hearings and submissions.

Findings and recommendations
While the SOP legislation has been "successful in ensuring that money owed to subcontractors is paid"; it has been underused in practice, at least in some jurisdictions. The Report explores the reasons for this in Chapter 9. The following recommendations for addressing the problem are the most significant.

National, harmonised SOP legislation
One of the key recommendations was that many of the problems with SOP legislation could be resolved by a "harmonised, national security of payment Act". This could reduce costs and increase use of the legislation, as businesses operating in more than one jurisdiction would no longer need to familiarise themselves with up to eight separate legislative regimes. The Committee heard that the difference between jurisdictions (eg, adjudication timelines) is a central point of confusion in the industry. The Committee also stated that harmonisation would reduce "wasteful litigation in which parallel points of law are raised in different jurisdictions".

Education
Lack of knowledge about SOP legislation and confusion about how it operates are barriers to the legislation’s effectiveness. The Committee recommended that agencies responsible for the relevant Acts provide education, awareness and support for industry participants who might benefit from the legislation.

Potential criminal offences and enforcement
Intimidation and retribution regarding use of the legislation were identified as serious problems in the industry. The Committee recommended that it be made a statutory offence "to intimidate, coerce or threaten a participant in the building industry in relation to the participant’s access to remedies available to it under security of payment legislation." Further, to combat the use of false statutory declarations, the Committee recommended action to promote greater transparency and enforcement. This included recommending that the Australian Securities and Investments Commission and the Australian Taxation Office develop programs to "monitor the integrity of the payment system, with the aim of referring relevant matters to law enforcement" and that responsible agencies "publish publicly available, de-identified information concerning the outcome of payment disputes."

The full Report can be found at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction
On 20 October 2015, the Commonwealth Parliament passed the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015. This Bill will extend to small businesses unfair contract term protections currently afforded to consumers only. The Bill will amend the Australian Securities and Investments Commission Act 2001 and Competition and Consumer Act 2010; and will come into effect on 12 November 2016 (which is 12 months after it received Royal Assent).

Businesses that deal with “small businesses” should review their standard form contracts to ensure that no terms may be deemed unfair: and therefore void.
Practical implications

Small business contracts will be covered by the same protections from unfair contract terms that were previously only afforded to consumers. The protections will apply to "small business contracts". Small businesses, or those that contract with small businesses, will be affected.

A contract will be a "small business contract" if:

1. at the time the contract was entered into, at least one party is a business that employs fewer than 20 people, on a head count approach; and
2. for contracts with a term of 12 months or less, the contract price does not exceed $300,000; or
3. for contracts with a term of more than 12 months, the contract price does not exceed $1 million.

It is important to note that these protections only extend to standard form contracts. Terms in such contracts which are judged "unfair" will be void and so cannot be enforced. The existing jurisprudence regarding unfair contract terms in consumer contracts\(^\text{10}\) will continue to be relevant after the protections are extended.

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\(^\text{10}\) See, for example, ACCC v Chrisco Hampers Australia Ltd [2015] FCA 1204 at 37ff (Edelman J)
HIGH COURT PERMITS FREEZING ORDERS TO PRESERVE ENFORCEMENT OF INTERNATIONAL AND DOMESTIC ARBITRAL AWARDS

KEYWORDS: FREEZING ORDERS; ARBITRATION

KEY TAKEAWAY

The recent High Court decision in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*\(^1\) considered the doctrinal basis for freezing orders (also known as asset preservation orders, and, inaptly\(^2\), “Mareva injunctions”). In that decision, the High Court confirmed the potential breadth of such an order, in a way that assists parties to arbitrations.

The High Court’s reasons expressly confirm that freezing orders are available in relation to an anticipated award in a domestic arbitration, and make clear that freezing orders are available for anticipated awards in international arbitrations as well, regardless of the seat of the arbitration or underlying law of the dispute.

The decision puts another arrow in the quiver of parties who have agreed to resolve disputes by arbitration, and is a further demonstration of the Australian judiciary’s support for arbitrations international and domestic.\(^3\)
The decision in Bayan v BCBC

The fundamental issue in Bayan v BCBC was a short one: did the Supreme Court of Western Australia have the power to make a freezing order in anticipation of an enforceable money judgment in foreign proceedings?14

Bayan and BCBC were both shareholders in a company incorporated in Indonesia, PT Kaltim Supacoal. Their rights and obligations as shareholders were the subject of a joint venture agreement governed by the law of Singapore. BCBC commenced litigation in the High Court of Singapore claiming [among other things] damages for breach of the joint venture agreement.

Soon after commencing the Singapore proceeding,15 BCBC applied to the Supreme Court of Western Australia for a freezing order over shares owned by Bayan in an Australian company (Kangaroo Resources Ltd). There were no other proceedings on foot in Western Australia and there was no prospect of any before judgment in the Singapore litigation.

In the High Court, Bayan accepted that there was a factual foundation for the freezing order under the relevant Western Australian Court rules:16

(a) BCBC had a good arguable case in its Singapore proceeding;
(b) this gave rise to a sufficient prospect of obtaining a judgment in its favour;
(c) this judgment could be registered in, or enforced by, the Supreme Court of Western Australia; and
(d) there was a danger that, before satisfaction of that judgment, Bayan may dispose of its Australian assets.

However, Bayan contended that the Supreme Court did not (and does not) have the power to make a freezing order in relation to a prospective judgment of a foreign court.

The High Court disagreed. It held that the Supreme Court has the power to make the freezing order in the exercise of its inherent power. A money judgment in the Singapore proceeding can be registered under the Foreign Judgments Act 1991 (Cth) and enforced as a judgment of the Supreme Court of Western Australia, and is therefore a prospective judgment of the Supreme Court. The freezing order is made to prevent frustration of that judgment. 18 It is relief appurtenant to a prospective judgment; there does not need to be an underlying cause of action appurtenant to the freezing order before the Supreme Court.

In summary, the High Court concluded that the process which a freezing order is designed to protect is a prospective enforcement process so it does not matter that the freezing order is in anticipation of a foreign judgment coming into existence. This is so even if there are other conditions or contingencies [in addition to the outcome of the foreign proceeding] that need to be satisfied before the order can come into existence. 19

Application to arbitral awards

Like foreign judgments, subject to certain exceptions, domestic and international arbitral awards are enforceable by Australian courts. 20 So, the High Court’s reasoning should apply equally in relation to anticipated arbitral awards, both domestic and international, regardless of the seat of the arbitration or the underlying law of the dispute. Interim measures made by courts — such as freezing orders — are not incompatible with an arbitration agreement. In exceptional circumstances, a freezing order may be sought before an arbitration commences.

Indeed, all seven Justices specifically approved a “frequently applied” 1984 decision of the Supreme Court of New South Wales, 21 holding that a freezing order is available to support [domestic] arbitrations. 22 In that case, the Court said there is no reason to distinguish between arbitral proceedings and proceedings instituted in court in providing protection where a party is exposed to the risk that its opponent may dissipate its assets.

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15 The Singapore proceeding was commenced in December 2011: BCBC Singapore Pte Ltd v PT Bayan Resources TBK (2013) 276 FLR 273 at 278 [12]. A defence and counterclaim were filed in February 2012: BCBC Singapore Pte Ltd v PT Bayan Resources TBK (2013) 276 FLR 273 at 278 [12]. The freezing order was sought in April 2012: BCBC Singapore Pte Ltd v PT Bayan Resources TBK (2013) 276 FLR 273 at 275–276 [1].
16 Order 52A rule 5 of the Rules of the Supreme Court 1971 (WA).
17 The inherent power of the Supreme Court of a State includes the power to make orders "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction": Jackson v Stirling Industries Ltd [1987] 162 CLR 612 at 623 of which the freezing order is a paradigm example.
18 [2013] 9 ALJR 975 at 992-993 [47] (French CJ), Kiefel, Bell, Gageler and Gordon J.J.
19 [2013] 9 ALJR 975 at 993 [47] (French CJ), Kiefel, Bell, Gageler and Gordon J.J.
20 Foreign arbitral awards may be enforced in a court of a State of Territory or in the Federal Court as if they were a judgment of that court: International Arbitration Act 1974 (Cth) section 821, [3]. See also section 16 of the International Arbitration Act 1974, which picks up international arbitral awards made in Australia. Domestic arbitral awards may be enforced under section 35 of the uniform Commercial Arbitration Acts. See, eg, Andent Pty Ltd v Thornhill Machine Tools Australia Pty Ltd [2016] VSC 647 [orders to same effect as award made]; and Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd [2015] NSWSC 735 [award enforced as judgment of Supreme Court].
21 Article 9 of the Model Law, given effect by section 9 of the International Arbitration Act 1974 (Cth) and section 9 of the uniform Commercial Arbitration Acts.
22 Construction Engineering (Aust) Pty Ltd v Tambel (Australasial Pty Ltd) [1984] 1 NSWLR 274.
Practical issues

Although the High Court has confirmed that there is no inherent doctrinal or theoretical reason preventing freezing orders being made in connection with a domestic or international arbitration, there are still practical considerations to be aware of:

1 **Not a general security for judgment**

Freezing orders are not a general security for a potential judgment; they prevent the disposal of assets to frustrate the court’s processes by depriving the plaintiff of the fruits of any judgment.

2 **An exceptional order**

A freezing order is an exceptional order, which has been described as one of the law’s “nuclear weapons”. They are not granted lightly, and will be tailored to the specific circumstances of the case. They must generally be supported by an undertaking as to damages, which can be costly.

3 **Need to comply with relevant rules.** Freezing orders are now the subject of model rules prepared by a harmonisation committee of judges appointed by the Council of Chief Justices of Australia and New Zealand. These model rules have been adopted in all Australian States and Territories as well as in the Federal Court. They require cogent evidence that the applicant has “a good arguable case on an accrued or prospective cause of action” and that there is a “sufficient prospect” of obtaining an enforceable judgment, and for the court to be satisfied “that there is a danger that [the] judgment will be wholly or partly unsatisfied”. They may be made ex parte, which requires full disclosure of all relevant facts.

4 **The Federal Court has jurisdiction in relation to international arbitrations**

The High Court held in *Bayan v BCBC* that the connection with the Foreign Judgments Act 1991 (Cth) meant that federal jurisdiction arose. That reasoning also means that the Federal Court of Australia can hear applications for freezing orders connected with international arbitrations.

[This case note is based on a Thinking Piece by David Starkoff (Special Counsel, Sydney) and Lee Carroll (Special Counsel, Melbourne)]

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26 (2015) 89 ALJR 975 at 988 [77] (Keane and Nettle JJ)
25 *Jackson v Sterling Industries Ltd*(1987) 162 CLR 612 at 625 (Deane J)
24 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*(2001) 268 CLR 199 at 265 [156] (Kirby J), 312 [264] (Callinan J)
26 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*(2001) 268 CLR 199 at 265 [156] (Kirby J), 312 [264] (Callinan J)
28 See *Cardile v LED Builders Pty Ltd*(1999) 198 CLR 380 at 405 [6] (Gaudron, McHugh, Gummow, and Callinan JJ)
29 *Cardile v LED Builders Pty Ltd*(1999) 198 CLR 380 at 401 [2] (Gaudron, McHugh, Gummow, and Callinan JJ)
30 See, eg, *European Bank Ltd v Evans*(2010) 240 CLR 432
31 (2015) 89 ALJR 975 at 984–985 [51]–[55] (French CJ, Kiefel, Bell, Gageler and Gordon JJ)
32 The matter will arise under a Commonwealth law, namely the International Arbitration Act 1974 (Cth), and therefore section 39B(1A)(c) of the Judiciary Act 1903 (Cth) gives the Federal Court jurisdiction
In a decision at odds with at least three Queensland decisions, the New South Wales Court of Appeal has decided that the existence of a valid reference date is not a “jurisdictional fact” for adjudicators’ determinations under the Building and Construction Industry Security of Payment Act 1999 (NSW).

That is, in New South Wales now, an argument — even if correct — that a reference date supporting a claimed progress payment did not arise will not be sufficient to set aside an adjudicator’s determination.

This may seem a startling result. After all, the existence of a valid reference date is the lynchpin of the relevant definitions that give the claimant an entitlement to payment. Further, it will generally be a question without any disputed facts. But it is now the law in New South Wales (and may be followed elsewhere).
Facts
For the purpose of the main point of this case (whether a reference date is a jurisdictional fact) the facts can be stated shortly.

Southern Han engaged Lewence to construct an apartment tower. The contract was AS4000 1997 with amendments. Disputes arose between the principal and contractor, primarily about progress. Southern Han issued a notice to show cause, following which it took work out of Lewence’s hands and suspended payments to Lewence, purportedly in accordance with the contract. Lewence regarded this as wrongful repudiation.

Lewence then served a payment claim for about $3,200,000. A payment schedule was served. An adjudicator determined an amount payable of about $1,200,000. Southern Han sought to set aside the adjudicator’s determination for jurisdictional error.

At first instance, Southern Han prevailed: [2015] NSWSC 502 (Ball J). But Lewence appealed.

Decision
Each of the appeal judges [Ward and Emmett JJA and Sackville AJA] wrote separately, but each agreed the appeal should be allowed.

There were two issues of broader importance.

The reference date/jurisdictional fact issue
After considering relevant authorities, including to the contrary effect, Ward JA held [at [52], [61]]:

“What must be borne in mind is that the fundamental distinction between ss 8 and 13 of the Act is between the entitlement to a progress payment under the Act (dealt with in the former) and the right or entitlement to make a claim for a progress payment (dealt with in the latter). The consequence of making a valid payment claim is that it then falls to the adjudicator to determine the claim and, absent jurisdictional error, entitlement to such a payment on the particular facts of a particular case is not for the court to determine.

…

The claim of such a person to be entitled to a progress payment may be disputed (whether on the basis that a relevant reference date has not arisen or for other reasons) but what the words ‘or who claims to be entitled to a progress payment’ in s 13(1) make clear is that the existence of a dispute as to the entitlement does not preclude the making of a valid payment claim. Section 13(1) may be contrasted with s 13(5) in this regard, the latter being expressed as a prohibition on the making of a claim in the circumstances there specified.”

Emmett JA generally agreed with Ward JA [at [118]–[122]]. Sackville AJA generally agreed with Ward JA’s reasons [at [124]], but also wrote [at [140]]:

“In order to determine whether a respondent must make a progress payment, it may be necessary to decide whether the reference date has arrived. If so, an adjudicator has the authority to make that decision. If in making the determination, the adjudicator commits an error of law on the face of the record, the determination is subject to judicial review pursuant to s 69 of the Supreme Court Act 1970 (NSW). If the adjudicator’s determination is affected by a jurisdictional error, judicial review will also be available.”

This sits uneasily with his Honour’s view that Southern Han’s position was “not only difficult to reconcile with the statutory language, but adds a layer of uncertainty and complexity to a legislation intended to achieve certainty and to operate simply” [at [142]].

The reference dates after termination issue
As the Court held that a valid reference date was not a jurisdictional fact, there was no need to consider the substantive argument: whether a valid reference date arose [see Ward JA at [73]].

Ward JA [Sackville AJA agreeing and Emmett JA not deciding] held that, on the terms of that contract, reference dates would cease arising on termination [at [82]]. However, she would have accepted, contrary to two single Judge decisions in New South Wales [see at [81]], that one further reference date arises after termination for work performed prior to termination [at [82]].

https://www.caselaw.nsw.gov.au/decision/55ff8c4ee4b01392a2cd0f34
Sometimes parties get close to settlement but some complication arises and no document is executed, so there is doubt about whether there is a settlement.

At least in New South Wales, the court can determine whether parties have settled their proceedings, even where no document has been signed.

A similar process may be available in other jurisdictions, when the parties have got very close to settlement but have not signed a document.
Facts

The underlying facts of the dispute between Mr Gorczynski and his bank are not important. Mr Gorczynski was self-represented, but the Court made a pro bono referral and a barrister agreed to represent him (at [1]). With the barrister’s assistance, an offer to resolve the dispute was made (at [10]). The essence of the offer was accepted, “subject to [Mr Gorczynski] executing [an] attached deed of settlement and release” (at [10]). “The terms of the deed proved to be the sticking point” (at [10]).

Two terms were problematic. First, the release appeared to release a separate claim that was not the subject of the compromise (at [11]–[13]). And secondly, there was a non-disparagement clause (at [14]), which was a new term not previously discussed.

When the matter came before McCallum J for directions, she raised the issue of whether she should determine under section 73(1) of the Civil Procedure Act 2005 (NSW) whether, and if so on what terms, the matter had been settled (at [4]). That section provides:

“In any proceedings, the court:

(a) has and may exercise jurisdiction to determine any question in dispute between the parties to the proceedings as to whether, and on what terms, the proceedings have been compromised or settled between them, and

(b) may make such orders as it considers appropriate to give effect to any such determination.”

This course was not opposed by the parties (at [4]).

Decision

McCallum J held that section 56 of the Civil Procedure Act 2005 (NSW) — the now-common “just, quick, and cheap” provision — empowered the Court to determine such a question on its own motion (at [7]). She then proceeded to do so.

She held that:

“having regard to the content of the duty of each party under s 56, the Court should construe an exchange of offer and acceptance relating, as it did here, to the principal issues in dispute as being subject to an implied term that each party would act reasonably and in good faith, in accordance with the duty under s 56, in seeking to record the settlement on the premise that the settlement itself would be binding from that point.”

In relation to the release, she found that while it could have been too broad as initially drafted, it was subsequently amended in a way that addressed Mr Gorczynski’s genuine concerns (at [12]–[13]).

In relation to the non-disparagement clause, though she was sympathetic to why the bank would want it included, “the clause is not one which a bystander would think to have been necessarily or obviously a term of the settlement reached. I do not think it formed part of the agreement” (at [14]).

She therefore determined that the proceedings were settled on the terms of the bank’s draft deed, with the exception of the non-disparagement clause, and also a clause requiring Mr Gorczynski to warrant receiving independent legal advice (which he had not) (at [15]).

She then made orders ending the proceedings accordingly (at [17]–[21]).

https://www.caselaw.nsw.gov.au/decision/56bbb767e4b0e71e17f4f0dd

See also the case note on Pavlovic v Universal Music Australia Pty Ltd later in this edition.
KEYWORDS: EXPERT DETERMINATION

KEY TAKEAWAY

In assessing whether an expert’s determination is open to review, a court will consider the extent to which the expert’s decision was made in accordance with the contract between the parties.

The New South Wales Court of Appeal found here that the expert applied a contractual formula in a way the parties could not have contemplated when they entered into the contract. The Court of Appeal helpfully suggested several factors that will determine whether an expert’s decision is final and binding.
Facts
Australian Vintage Limited (AVL) and Belvino Investments (Belvino) entered into a lease for the development and operation of a vineyard. The lease provided that in the event of a natural disaster, either party could refer the matter to an expert to determine whether production or production capacity had been reduced by more than 50% of average production capacity.

In October 2013, a severe frost affected the vineyard, causing a substantial fall in grape production. An expert determination was accordingly sought. In October 2014, the expert determined that although a natural disaster had occurred, production and production capacity had fallen by less than the prescribed “50% of average production capacity”.

The lessee, AVL, disagreed with the expert’s determination, alleging that the expert had incorrectly applied the clause relevant to calculating the loss in production. Belvino argued that the determination should not be disturbed as the lease provided that the expert determination was final and binding.

The lessee brought proceedings in the NSW Supreme Court seeking to have the expert determination set aside, and also declarations as to the correct construction of the contractual formula.

The primary judge dismissed the summons on the basis that the expert determination was not reviewable and the expert’s determination was correct, although he reached his conclusion in a different fashion to the expert. The lessee appealed against both conclusions. The NSW Court of Appeal was thus required to consider when an expert determination will be reviewable.

Decision
Bathurst CJ (Beazley P and McCall JA agreeing) allowed the appeal, finding that the expert’s determination was not made in accordance with the contract and was therefore reviewable. Accordingly, the Court remitted the matter to the expert to make a subsequent determination.

While the judgment focuses on the construction of the relevant clause, Bathurst CJ identified five principles regarding the review of expert determinations:

1. Whether an expert’s determination is reviewable will depend on whether the expert carried out the tasks required by the contract.
2. If the expert carries out these tasks but makes errors or takes into account irrelevant matters, that will not expose their determination to a valid challenge. If, however, the expert carries out the task in a way not within the parties’ objective contemplation, then the determination will be challengeable.
3. Questions of mixed fact and law, and pure questions of law can be left for the determination of an expert.
4. That the contract states that the expert determination is to be final and binding has little bearing on whether it is reviewable. If the decision is made in accordance with the contract, it will be final and binding. To the extent that it is not, it will be subject to review.
5. The court will consider the scope of discretion that the parties intended the expert to have. The expert in this instance was required to determine how the clause operated, but the contract did not reveal an intention that the parties would be bound if the expert misapplied this formula.

https://www.caselaw.nsw.gov.au decisión/55ee60da6e4b2517a972807de
PAVLOVIC V UNIVERSAL MUSIC AUSTRALIA PTY LTD [2015] NSWCA 313

KEYWORDS: NEGOTIATION OF AGREEMENTS; SOLICITORS’ AUTHORITY

KEY TAKEAWAY

A negotiated and unexecuted settlement deed (or other agreement) will not be binding unless the parties have objectively expressed (by conduct or in words) an intention that they were to be immediately bound once the terms of the deed were agreed.

Solicitors do not have the same authority to bind their clients to an agreement in a non-litigious context as they do in a litigious one, absent actual express authority to do so.
Facts
This is a successful appeal from a first instance decision of the New South Wales Supreme Court.

In short, Mr Pavlovic and Universal were parties to a joint venture. In 2014, the parties agreed that their relationship was “untenable”. Exit and settlement negotiations resulted in a settlement deed that on 23 December 2014 was in final form for execution according to correspondence between the parties’ solicitors.

Mr Pavlovic’s solicitor, after seeking instructions from his client, informed Universal’s solicitor that Mr Pavlovic “will sign” the proposed settlement deed. But the settlement deed was never signed by Mr Pavlovic (or any of the Pavlovic entities, also defendants to the dispute). It was not signed by Universal until 23 February 2015, after Mr Pavlovic sought to terminate the agreement (if any).

At first instance, the trial judge, Sackar J, held that Mr Pavlovic’s solicitor’s email stating that his client would sign the settlement deed, combined with the rest of the communications and conduct, was enough to create a binding contract, and that only administrative steps (including execution and exchange of the documents) remained.

The issues on appeal were whether the primary judge erred:
- in his finding that Mr Pavlovic and Universal, acting through their solicitors, entered into a binding settlement deed; and
- in concluding that each party’s solicitors had actual or ostensible authority to enter into an agreement on behalf of the parties.

Decision
The appeal was allowed; the Court held that there was no binding agreement and that the parties’ solicitors did not have the requisite authority to bind their clients to the deed.

The relevant test was whether, objectively, the parties intended to bind themselves immediately to a contract or whether they would not be bound until all aspects of a formal agreement, in particular execution, had been finalised, having regard to the “outward manifestations” of the parties’ intentions [at [64] and [66]].

To arrive at its conclusion, the Court of Appeal examined the following issues.

The context of the parties’ dealings
The parties’ relationship had always been regulated through a series of complex and formal agreements. Reversing the primary judge’s findings at [132] of his judgment, the Court of Appeal held that if the parties had intended to be immediately bound, without execution of the documents, the parties’ sophisticated representatives would have said so. This position is supported by case law [at [84]].

The terms of the settlement deed
Universal’s contention that there was a binding agreement by exchange of emails was contrary to the terms of the proposed settlement deed, whose terms provided that the agreement was to take effect on execution [at [102]]. Further, the formality of a deed suggests that the existence of a binding agreement depends on execution and exchange.

Email exchange between parties’ solicitors
The language used in the emails between the parties was not the language of an immediately binding contract [at [110]]. Rather, it related to future arrangements for execution and exchange [at [112]]. Beazely P opined that something more than mere silence on whether parties were already bound would be needed to depart from the parties’ ordinary dealings and terms of the settlement deed. This position is supported by case law [at [114] and [116]].

The parties’ subsequent conduct
Universal did not comply with various aspects of the settlement deed. For example, it did not pay Mr Pavlovic his accrued leave entitlement, did not forward its counterpart of the settlement deed, and did not pay $100 for the transfer of Mr Pavlovic’s shares in the company. Similarly, Mr Pavlovic did not forward the signed settlement deed to Universal’s solicitors, nor did he forward an executed assignment of trade marks or share transfer as required by the deed.

A solicitor’s authority to bind their client
In relation to a solicitor’s authority, the Court of Appeal noted that a solicitor only has ostensible authority to bind a client to a contract in a litigious context [a principle stated in Lucke v Cleary (2011) 111 SASR 134], absent any express actual authority to bind clients to an agreement. In the present case, no litigation had been commenced by either party; rather, the commencement of litigation was viewed as an “alternative” to the process of negotiation they were undertaking [at [153]]. Further, the Court of Appeal noted that a potentially litigious context does not invoke such ostensible authority [at [154]].

See also the case note on Bendigo & Australia Bank Ltd v Gorczynski earlier in this edition.
GROCON CONSTRUCTORS (QLD) PTY LTD V JUNIPER DEVELOPER NO 2 PTY LTD (NO 2) [2015] QSC 173

KEYWORDS: CIVIL PROCEDURE; COSTS; JURISDICTION; PERSONS NOT PARTY TO PROCEEDINGS

KEY TAKEAWAY
Courts may issue orders against non-parties, but this will only occur where the interests of justice require a departure from the general rule. The court’s decision will turn on the conduct of relevant persons and the relationship between proceedings.
Facts

Background

Juniper Developer No 2 Pty Ltd (Juniper) engaged Grocon Constructions (Qld) Pty Ltd (Grocon) to design and build "Soul Project", a development in Surfers Paradise. Juniper’s solicitors, Norton Rose [NR], prepared the contract. It contained a liquidated damages provision (at clause 35.7) under which Grocon was to pay liquidated damages for failure to perform the contract within the times specified. When Grocon did not meet these timing requirements, Juniper purported to withhold money under clause 35.7.

The primary proceedings

Grocon instigated proceedings against Juniper claiming money owed under the contract and damages for breach of contract (Grocon Proceeding). Juniper filed a counterclaim alleging that it was entitled to liquidated damages under clause 35.7, or alternatively for general damages for delay. Grocon’s position was that clause 35.7 was void as a penalty. This argument accorded with a previous adjudication decision in Grocon’s favour under the Building and Construction Industry Payments Act (Qld) (2004).

In a separate action, Juniper sued NR in relation to its role in drafting the contract, claiming damages for misleading conduct, breach of contract and negligence on the basis that the drafting created an unnecessary risk that clause 35.7 might be unenforceable (NR Proceeding).

A question central to both proceedings was whether clause 35.7 was in fact void as a penalty. The trial judges in both proceedings referred the issue for a separate hearing in advance of the trials. At that separate hearing, Lyons J determined that clause 35.7 was not void and made a declaration to that effect. As a result of that determination, questions about costs arose. This was addressed in the present case.

The costs proceeding

The orders sought by the parties in relation to costs were as follows:

1. Juniper sought an order that Grocon pay its costs of the separate hearing. Grocon accepted it should pay Juniper’s costs except to the extent they were inflated by NR’s involvement. Grocon disputed any order making it liable for NR’s costs.

2. NR sought an order that Juniper pay its costs. Juniper argued there should be no order as to costs in the NR Proceeding, but that if one were made, Grocon should be liable.

Decision

Lyons J considered (at [76]) the power to award costs against a non-party and ultimately held that, notwithstanding NR’s success, the circumstances did not justify a costs order in NR’s favour. Lyons J found that, although Grocon’s conduct caused the clause 35.7 issue to be raised in the NR Proceeding, but that if one were made, Grocon should be liable.

Reasoning

Before considering the parties’ positions, Lyons J first had to determine whether the Supreme Court retains the power to make non-party orders. In 1992, the High Court had held in Knight v FP Special Assets34 that the Supreme Court did have that power, but the legislation underpinning that decision was subsequently repealed. Lyons J considered the scope of the current legislation35 and found that there was no material difference between the old and the new legislation. In particular, Rule 681[1] of the Uniform Civil Procedure Rules 1999 (Qld) states that:

"Costs of a proceeding, including an application in a proceeding, are in the discretion of the Court but follow the event, unless the Court orders otherwise."

Lyons J found there was no reason to distinguish between the costs incurred by NR and those that Juniper would have incurred if the litigation had only been between Juniper and Grocon. Consequently, his Honour held (at [77]) that while Juniper’s success against Grocon meant Juniper should have an order in its favour, it should be limited to two-thirds of Juniper’s costs of the separate hearing.

33 Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd [2015] QSC 102
34 (1992) 174 CLR 178
35 Section 15 of the Civil Proceedings Act 2011 (Qld) and Rule 681[1] of the Uniform Civil Procedure Rules 1999 (Qld)
Accordingly, his Honour concluded that the Court retains the power to make a non-party order. Martin J also reached this position in Beach Retreat v Mooloolaba Marina Ltd.36

Should Grocon be liable for NR’s costs?

In assessing whether Grocon should be liable for NR’s costs, the Court considered the factors and approach identified by Martin J in Beach Retreat and by Balcombe LJ in Symphony Group plc v Hodgson.37

Martin J held in Beach Retreat that the general rule is that only parties to proceedings are subject to costs orders and a non-party order will only be made if the interests of justice require a departure from this general rule. Applications for such orders should be treated with caution. The decision whether to grant a non-party order turns on the facts. The relevant considerations discussed in Symphony Group (and which Lyons J modified here) were:

- has the non-party had management of the action or maintained/financed the action?
- is the non-party a solicitor whose improper conduct led to the costs being incurred?
- has the non-party’s wrongful conduct caused the action?
- is the non-party a party to a closely related action heard at the same time but not consolidated?
- is it a group litigation where one action has been selected as a test case?

In the current case, the Court focused on two factors: firstly, did Grocon cause the action and secondly, how closely related were the actions?

Did Grocon cause the action?

Lyons J found that although Grocon’s position on clause 35.7 accounted for Juniper’s position in the NR Proceeding, it did not account for an early determination of that question in the NR Proceeding.

Lyons J held (at [32]) that the considerations described in Symphony Group were too broad and that the case “does not stand for the proposition that where any conduct whatsoever of a non-party is causally related to the bringing of litigation, then an order for costs can be made against that person.”

NR’s participation in the separate hearing gave Juniper an ally. There was no advantage to Grocon for NR to be part of the proceedings on the separate question. However, once it was clear the question should be determined early in the Grocon Proceeding, the efficient use of court resources supported the simultaneous determination of the question in the NR Proceeding. NR’s participation in the separate hearing was allowed for its own convenience and as a result, Grocon had two opponents instead of one. Accordingly, his Honour found that Grocon’s argument that clause 35.7 was void had, at best, a remote connection with NR’s participation in the separate hearing.

Closely related action?

The second point was that Juniper did not claim the same damage against Grocon and NR. Despite some similarities, the facts said to give rise to Grocon’s liability to Juniper were different from those alleged to give rise to NR’s liability. This was thus not a closely related action. Lyons J found that Grocon’s conduct did not make it fair or reasonable to impose on it costs associated with NR’s participation in the joint hearing. Even if Juniper had sued both Grocon and NR in the same proceedings, it seems it would be novel to make Grocon liable for NR’s costs.

The desirability of avoiding inconsistent findings was not a factor of any weight in determining whether Grocon should be liable for costs relating to NR’s participation in the separate determination.

Should Juniper be liable for NR’s costs?

NR ultimately succeeded at the hearing. However, other than its own success, NR did not identify any reason why another party should have to pay its costs.

Lyons J found that that outcome would be unusual since NR had ultimately benefitted from the outcome of the separate hearing. In particular, by having the question regarding clause 35.7 determined at the separate hearing, NR was able to limit damages that may otherwise have been claimed against it as a result of the expense that Juniper would have incurred in preparing the claim for general damages for delay.

Lyons J found that for this reason too, it would not be appropriate to award NR’s costs against a party (Juniper) that helped in securing it that benefit.


36 [2009] 2 Qd R 356
37 [1994] QB 179
KEYWORDS: BCIPA; PROGRESS PAYMENTS; CONCURRENT CONTRACTUAL AND STATUTORY PAYMENT REGIMES; RIGHT TO LITIGATE

KEY TAKEAWAY

The payment of an adjudicated amount under the BCIPA does not affect parties’ rights to commence proceedings to enforce rights and obligations under a construction contract. Nothing in the BCIPA prevents a party from commencing proceedings before completion of the construction contract.
Facts
Gambaro engaged Rohrig to build a hotel. The contract provided for progress payments. During the project, Rohrig made progress claims, which Gambaro paid. The project reached practical completion in late April 2014.

The contract provided that Rohrig could make its final payment claim within 28 days after the expiry of the last defects liability period, which was 12 months after practical completion. In May 2014, Rohrig made a claim under the Building and Construction Industry Payments Act 2004 (Qld) (BCIPA) for more than $2 million. Gambaro issued a payment schedule assessing the amount payable as $57,593. Gambaro paid that amount on 10 June 2014.

Rohrig applied for adjudication and the adjudicator determined that the amount to be paid by Gambaro was $956,788, which Gambaro paid. Gambaro then commenced proceedings claiming that it was not liable for $913,014 of the money paid and seeking summary judgment in its favour.

Rohrig argued that Gambaro’s claim had been brought pre-emptively while the statutory regime was still in operation and that it should be struck out. It argued that the entitlement to interim payments during the life of the contract under BCIPA ran concurrently with contractual mechanisms for interim payments. Rohrig further argued that where concurrent regimes come into conflict, section 99 of BCIPA means that the contractual regime yields to the statutory regime. Under this argument, the rights under the contract are suspended (but preserved under section 100 of BCIPA until completion of the contract).

Decision
Atkinson J held that once rights under Parts 2 and 3 of BCIPA have been exercised, the regime does not prevent the parties from enforcing their rights by litigation at [28]. Atkinson J cited Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd where Handley JA [in reference to the NSW equivalent of section 100] held:

“nothing done under, or for the purposes of Part 3, affects any civil proceedings arising under a construction contract ... a builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder’s right to the amount awarded by the adjudicator”.

Legislation is presumed not to oust the jurisdiction of courts except by clear words to that effect. Gambaro had complied with the BCIPA by paying the adjudicated amount and thus could litigate to determine the parties’ entitlements under the contract. Rohrig’s application was struck out. However, Atkinson J declined to grant summary judgment to Gambaro, finding that that several issues were the subject of factual and legal dispute and could only be decided at trial. Both applications were dismissed.


38 [2005] NSWCA 49 at [21]
39 Forster v Jododex Aust Pty Ltd (1972) 127 CLR 421 at 435–436
AGRIPOWER AUSTRALIA LTD V QUEENSLAND ENGINEERING & ELECTRICAL PTY LTD
[2015] QSC 268

KEYWORDS: BCIPA; PAYMENT CLAIMS; STATUTORY DECLARATIONS

KEY TAKEAWAYS

The Queensland Supreme Court has emphasised the need for contractors to have appropriate licences and to carry out only work that they are lawfully entitled to perform. Non-compliance may mean that the contractor has no right to payment under the Building and Construction Industry Payments Act 2004 (Qld) (BCIPA).

The decision follows Cant Contracting v Casella, in which it was held that a building contractor who undertakes building work without an appropriate licence cannot pursue payment for its work and that an adjudication decision founded on an illegal contract is void.

Agripower extends this principle to a contractor undertaking “professional engineering services” and electrical work without the appropriate licences. Douglas J held that the contractor was not entitled to progress payments under the BCIPA given its breaches of the Electrical Safety Act 2002 and the Professional Engineering Act 2002.
Facts

In February 2013, Agripower Australia Ltd [Agripower] engaged Queensland Engineering & Electrical Pty Ltd [QEE] to perform electrical engineering works and design services on Agripower’s powder and granulation plants in Charters Towers.

A payment dispute arose, and on 11 November 2014, QEE served a payment claim under the BCIPA. On 18 December 2014, an adjudicator awarded the full amount of the payment claim ($60,000) to QEE [Adjudication Decision]. Agripower then applied in the Supreme Court of Queensland [QSC] for a declaration that the Adjudication Decision was void and should be set aside. Agripower alleged that QEE was not licensed to perform the electrical or engineering works and that therefore the adjudicator did not have jurisdiction to decide the BCIPA claim because the contract with QEE was illegal and unenforceable.

Decision

Douglas J held that QEE had contravened both section 56 of the Electrical Safety Act 2002 [Qld] [ESA] and section 115 of the Professional Engineers Act 2002 [Qld] [PSA]. Accordingly, the contract between Agripower and QEE was illegal and unenforceable, and the Adjudication Decision was void for jurisdictional error.

Douglas J held, following Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd, that one of the objects of the Act was the protection of the public. Therefore, he concluded that the breach of section 56(1) of the ESA rendered illegal a contract entered into by someone without a current electrical contractor licence.

Electrical works

Douglas J held that QEE had contravened section 56(1) of the ESA, which provides:

“A person must not conduct a business or undertaking that includes the performance of electrical work unless the person is the holder of an electrical contractor licence that is in force.”

Douglas J found that that QEE had conducted a business in contravention of section 51(1).

This was despite evidence that QEE had always intended to engage an appropriately licensed sub-contractor to perform the electrical works. Douglas J found that the contract was rendered illegal by implication, having regard to:

• the “emphatically” stated purpose of the Act itself, being to preserve public safety through proper licensing; and
• penalties for licence contraventions.

Professional engineering services

Douglas J held that QEE had contravened section 115 of the PSA, which provides:

“A person who is not a practising professional engineer must not carry out professional engineering services.”

The definitions exclude engineering services in accordance with a prescriptive standard, where its application does not require advanced, scientifically-based calculations.

QEE argued that the design and commissioning works of the granulation plant were undertaken in accordance with AS3000 [Wiring Rules] and AS3008 [Selection of Cables] and accordingly were undertaken under a prescriptive standard.

Douglas J found that QEE’s work constituted professional engineering services. This was because the works required either QEE or Milltech to make various design and installation decisions beyond what was provided for in AS3000 and AS3008.

A key factor in Douglas J’s finding was that engineering services will not be in accordance with a prescriptive standard where they require decisions to be made on the basis of professional judgement or experience. Douglas J indicated [at [52]] that it is unlikely that AS3000 could be considered a prescriptive standard. This is because AS3000 is divided into two parts, meaning that the use of the standard would require a professional judgment to be made on which part to apply in a particular situation.

The message of the case is simple: contractors must understand and comply with licensing requirements; where they do not strictly comply, they will suffer serious consequences.

KEYWORDS: SECURITY OF PAYMENT; DISPUTE RESOLUTION

KEY TAKEAWAY

A term of a construction contract which simply requires the parties to attend mediation is not a method of resolving disputes under the Building and Construction Industry Security of Payment Act because it will not result in a binding resolution unless agreement is achieved.

When assessing the value of work claimed under the Act, the absence of relevant material from the respondent does not entitle an adjudicator simply to award the amount of the claim.
Facts

SSC Plenty Road Pty Ltd (the Plaintiff) applied for judicial review of an adjudication determination made under the Building and Construction Industry Security of Payment Act 2002 (Vic) (the Act).

The adjudication determination related to a progress payment claim (the Payment Claim) made by Construction Engineering (Aust) Pty Ltd (the Defendant) dated 1 July 2015.

The Payment Claim included claims for progress payments for provisional sum items and variations under the construction contract between the parties (the Contract).

The disputed provisional sum payments included sub-categories such as “Feature Signage” and “Contamination” (Disputed Provisional Sums). There were also five Disputed Deduction Claims; however the dispute centred on 37 variation claims (Disputed Variations).

The Contract

Clause 42 of the Contract established a dispute resolution process culminating in referral to mediation.

In relation to pricing, the Contract provided that the superintendent was to assess amounts payable for variations and provisional sums.

The Plaintiff’s claim

The Plaintiff argued that there was jurisdictional error in the adjudicator’s determination because the adjudicator:

1. took into account variations which were not claimable variations, and which were therefore “excluded amounts” under the Act; and
2. failed to value the work in accordance with the Act because he merely adopted the Defendant’s assessment of the claims, rather than determining what work had been done and its value.

Decision

First ground: excluded amounts

The determination of an adjudicator under the Act will be void if the adjudicator takes into account any part of a payment claim that is an “excluded amount”.

An amount that relates to a variation that is not a claimable variation is an “excluded amount”.

The adjudicator determined that the Disputed Variations were claimable variations on the basis that clause 42 of the Contract was not a method of resolving disputes within the meaning of section 10A(3)(d)(ii).

The Plaintiff argued that mediation was a “method of resolving disputes” under section 10A(3)(d)(ii) because it was capable of resulting in a binding resolution of the dispute.

Vickery J applied the reasoning in Branlin Pty Ltd v Totaro (Branlin), which held that the basic requirements for a construction contract to provide a “method for resolving disputes” are:

1. a process which could be described as a “method” of dispute resolution;
2. a process which is capable of resulting in a binding resolution of the dispute; and
3. a process that the parties are contractually bound to enter upon and participate in.

Vickery J held that clause 42 of the Contract was not a method for resolving disputes because it “merely mandates attendance of the parties at mediation” and will not result in a binding resolution unless agreement is achieved. What is required is a process “which will result in the production of a binding decision by a third party appointed under the contract for the resolution of the dispute”.

The adjudicator therefore correctly classified the Disputed Variations as “claimable variations”.

Second ground: valuation of work

The second issue was how the adjudicator valued the work which was the subject of the Payment Claim. An adjudicator must determine the amount of a progress payment in accordance with the contract, or if the contract makes no express provision, based on the value of the work performed.

The Plaintiff argued that the adjudicator was compelled to act in accordance with the Contract, which meant adopting the superintendent’s decision.

Vickery J said that said that a contractual requirement to adopt a third party’s assessment does not provide a basis for the adjudicator to independently value the works. The Contract did not, therefore, provide for the valuation of progress claims for the purposes of section 11(1)(a).

The adjudicator’s valuations

The Plaintiff further argued that the adjudicator had erred in law because he had asked “an irrelevant question, namely whether the respondent had established a basis for withholding payment”.48

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43 At [122]
44 At [122]
45 At [64]–[66]
46 Sections 23(2A), (2B)
47 Section 10B(3)(a)
48 At [29]
49 [2014] VSC 492 (7 October 2014)
50 SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631 at [33], citing Branlin Pty Ltd v Totaro [2014] VSC 492 (7 October 2014) at (66)
Vickery J held:

"(t)he absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim."59

Any material relevant to the value of the claim provided (or not provided) by the parties may be taken into account in assessing the evidence overall; however, merely rejecting the respondent's contentions and adopting those of the claimant will not be a valid adjudication of a payment claim.60

Vickery J had regard to the strict time limitations that the Act places on adjudicators, as well as the qualifications required of an adjudicator under the Act and associated regulations,61 concluding:

"(t)he Act calls for a practical and robust approach to the assessment process on the part of the adjudicators and their expressed reasons."62

Vickery J found that in these circumstances, the standard of reasons required "falls toward the lower end of the scale".63

Vickery J held that there was no error in how the adjudicator assessed the value of the disputed Provisional Sums, because for these items, the adjudicator indicated in his reasons that he considered the material before him and assessed each item at the value he determined.64

However, in relation to 33 of the 37 Disputed Variation Claims, the adjudicator employed the following "formula":

"On the material before me, I conclude that the claimant performed the work the subject of the claim, that the work was outside the Contract, and that the Respondent fails to establish a sufficient basis to withhold payment for this item. I adopt the valuation provided by the claimant ..."65

The adjudicator followed a similar formula for three of the Disputed Deduction Claims.66

Vickery J said that this reasoning demonstrated the following errors:

(a) in effect, the adjudicator imposed an onus on the respondent to establish a sufficient basis to withhold payment in respect of each item;

(b) the adjudicator then proceeded to find in each case that the respondent failed to satisfy the onus; and

(c) having rejected the respondent's contentions, the adjudicator adopted the amount claimed in the payment claim.67

This approach did not demonstrate any process of assessing the value of the claim other than merely adopting the amount claimed by the claimant.

Result

Vickery J granted relief by way of certiorari on the ground of jurisdictional error in respect of the 33 Disputed Variation Claims and the three Disputed Deduction Claims.

Schedule of rates

Vickery J noted that he would also have found error in the adjudicator's determination relating to 19 of the Disputed Variation Claims because the adjudicator did not state in his reasons whether he adopted the schedule of rates annexed to the Contract in assessing the sum payable, and one or other party addressed the schedule of rates in relation to these 19 items.68

If the parties had not addressed the Schedule of Rates, the adjudicator would not have been remiss in failing to consider the value of the work done on the basis of those rates.69


See also the next note on a related proceeding.

59 At [81]
60 At [83]
61 At [91]-[96]
62 At [99]
63 At [107]
64 At [130]
65 At [131], quoting p 127 of the adjudication
66 At [140]
67 At [143]
68 At [151]. This was an additional ground for setting aside the determination, as each of these claims had already been determined to be the subject of jurisdictional error
69 Ibid [153]
**SSC PLENTY ROAD PTY LTD v CONSTRUCTION ENGINEERING (AUST) PTY LTD (NO 2) [2015] VSC 680**

**KEYWORDS:** SECURITY OF PAYMENT; REMISSION TO ANOTHER ADJUDICATOR

**KEY TAKEAWAY**
An adjudication determination under the Building and Construction Industry Security of Payment Act 2002 (Vic) will be remitted to a different adjudicator where some feature of the adjudicator’s conduct or reasons makes remittal to that adjudicator unfair or impracticable. Whether it is appropriate to remit the issues to a different decision maker (or a differently constituted decision making body) depends on the facts.
Facts

In the first proceeding, *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*,70 Vickery J held that the adjudicator fell into jurisdictional error in valuing claims under the Building and Construction Industry Security of Payment Act 2002 (Vic) ([the Act]).

In the present proceeding, having granted relief in the form of certiorari, Vickery J addressed whether the adjudication should be remitted, and if so, whether it should be remitted to the same adjudicator or a different one.

The Plaintiff’s claim

SSC Plenty Road Pty Ltd [the Plaintiff] argued the adjudication determination should be remitted to a different adjudicator because the errors identified in the adjudicator’s reasoning suggested that he might not bring an impartial mind to any issues remitted.

Decision

Vickery J found it appropriate to remit the claims for redetermination, because this is the form that an order for certiorari usually takes.71

Vickery J referred72 to *Davidson v Fish*, in which, when considering the previous authorities, Pagone J held:

"The relief that is appropriate in any particular case must ‘depend on all the circumstances of the case’ and I do not think it desirable for any fixed rule to be developed in substitution for a careful evaluation of all the facts of each case.” 73

His Honour further adopted Kyrou J’s reasoning in *Vegco Pty Ltd v Gibbons*:

"remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended bias or otherwise) if the matter were remitted to the same decision-maker or where it would be impracticable for the same primary decision-maker to redetermine the matter.” 74

Vickery J remitted the matter to the original adjudicator because the adjudicator’s determination:

• made no adverse findings or observations about the conduct of either party; and
• did not suggest that the adjudicator had formed a preconceived view of the materials or a general preference for the submissions of one party over the other.75

Vickery J considered that this order was consistent with the aims of the Act: to facilitate prompt recovery of progress payments and to avoid excessive legal formality.76

See also the previous note on a related proceeding.

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70 [2015] VSC 631
71 At [7]
72 At [20]
73 Davidson v Fish [2008] VSC 32 [14]–[21]
74 At [23], quoting Vegco Pty Ltd v Gibbons [2008] VSC 363 at [23]
75 At [26]
76 At [29]–[31]
NOVAWEST CONTRACTING PTY LTD V BRIMBANK CITY COUNCIL [2015] VSC 679

KEYWORDS: COMMERCIAL ARBITRATION ACT

KEY TAKEAWAYS

Section 8 of the Commercial Arbitration Act 2011 (Vic) is mandatory. Where it applies, however, a court may refuse to grant a stay of proceedings if the arbitration agreement is null, void, inoperable or incapable of being performed.

Difficulties either party might face in having to run an arbitration do not make an arbitration agreement incapable of being performed.
Facts

In 2005, Brimbank City Council (BCC) engaged Arcadis Australia Pacific Pty Ltd, formerly known as Hyder Consulting Pty Ltd (Hyder), for design, tender documentation and contract administration for the renewal of urban infrastructure in the North Sunshine Industrial Area (the Project). The agreement between BCC and Hyder provided for compulsory arbitration.77

In 2007 and 2008, BCC engaged Novawest Contracting Pty Ltd (Novawest) for the construction of road, drainage and other services on the Project.

In 2013, Novawest commenced proceedings against BCC, including for the costs of delays and variations. BCC counterclaimed liquidated damages for Novawest’s failure to reach practical completion, and costs for defects Novawest allegedly caused.

Novawest joined Hyder, claiming that Hyder’s designs were deficient and that Hyder was therefore a concurrent wrongdoer under Part IVAA of the Wrongs Act 1958 (Vic).

This proceeding concerned Hyder’s application to refer aspects of the further amended defence and amended counterclaim to arbitration, under section 8 of the Commercial Arbitration Act 2011 (Vic) (the Act).

BCC opposed the application and argued that until Novawest’s claims (some of which overlapped with claims against Hyder) were resolved, BCC would not know what loss it had suffered.78

Decision

Section 8 of the Act requires courts to stay proceedings commenced in contradiction to an arbitration agreement.79 A court may, however, refuse to grant a stay if the relevant arbitration agreement is found to be “null, void, inoperable or incapable of being performed”.80

Vickery J framed the issue in this case as “whether the arbitration agreement, in light of the circumstances relating to paragraphs [80] to [85] of the further amended defence and amended counterclaim, is incapable of being performed.”81

Vickery J considered a decision by the High Court of Singapore in Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd.82 In that decision, the High Court of Singapore said that “incapable of being performed” requires “some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement”.83

Vickery J concluded that the focus “is on the administration of the arbitration itself rather than the merits of what is to be referred to arbitration”.84 Any difficulty that BCC might face in conducting an arbitration was not a relevant consideration.85

Vickery J ordered that the relevant aspects of the further amended defence and amended counterclaim be stayed and referred to arbitration.86 His Honour acknowledged that as this order would result in different elements of the proceeding being split between two tribunals, it would not achieve the aims of the Civil Procedure Act 2010 (Vic) for the efficient, timely and cost-effective resolution of the issues in dispute.87

Costs

Hyder sought the costs of the application on an indemnity basis, based on two letters sent to BCC’s solicitors. Vickery J found that these letters were not Calderbank letters because they did not contain anything by way of a compromise.88 His Honour further stated that it was not unreasonable for BCC to maintain its position and bring its application before the Court, because the words “incapable of being performed” in section 8 of the Act had not previously been considered in Australia.89 However, his Honour did order BCC to pay Hyder’s costs of the application to stay the proceeding on a standard basis.90


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77 At [18]
78 At [23]
79 At [20]
80 At [20], quoting Lynaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2012] VSC 430 at [125]–[126]
81 Novawest Contracting v Brimbank City Council [2015] VSC 679 at [22]
82 [2008] SGHC 229
83 At [26], quoting Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd [2008] SGHC 229 at [42]
84 Novawest Contracting v Brimbank City Council [2015] VSC 679 at [27]
85 At [26]
86 At [30], [34]
87 At [30]
88 At [32], [33]
89 At [33]
90 At [34]
FRASER V SPERLING
[2015] VSC 698

KEYWORDS: DISCHARGE OF EARLIER BUILDING CONTRACTS

KEY TAKEAWAYS
A later commercial agreement will not necessarily discharge or subsume an earlier, related construction contract between similar parties.

The critical question is what legal obligations the parties owe, rather than who did the work.91
Facts
The case concerned a redevelopment of land at the Dinner Plain ski resort. Under the Building Contract, the developer and owner of part of the land, Snowy Corner Pty Ltd (Snowy), engaged Modern 1 Design Pty Ltd (Modern) and Alpine Woodpecker as the builders. The Frasers (the plaintiffs) owned part of the redevelopment land, and Snowy also entered into the Building Contract as their agent. Finally, Sperling and Kastner (the defendants) operated Alpine Woodpecker as a partnership.

After a falling out, Modern abandoned the project and Fingal Holdings Pty Ltd (Fingal) took Modern’s place. The new parties, Fingal, Alpine Woodpecker, and Snowy, entered into an agreement in April 2011 (April Agreement). The key terms are as follows.

- a) Fingal took on Modern’s obligations to complete the construction works, under the framework of the existing building contract.
- b) Fingal did not take on any obligations Modern owed its subcontractors before Fingal commenced on site.
- c) Snowy agreed to place $50,000 in a trust account before Fingal commenced, to help pay outstanding creditors.

Snowy did not make any payments into the trust account. The subcontractors remained unpaid. NAB, the project financier, refused to release funds for the plaintiffs to pay Fingal to complete the project. Snowy and the plaintiffs were not prepared to contribute more money, and works ceased in August 2011.

VCAT decision
In a VCAT hearing, the plaintiffs’ claim was dismissed on the basis that:

- the defendants did not cause the loss;
- Snowy and the plaintiffs’ failure to pay into the trust account, and direct payment to Fingal, was a significant factor in the collapse of the project;
- the defendants were only party to the Building Contract because Mr Sperling was a registered building practitioner, which was required for building permits and warranty insurance;
- Fingal, as the new builder, was responsible for carrying out the construction works, and consequently bore much responsibility; and
- the defendants did not breach any contractual responsibilities to the plaintiffs.

The decision on appeal
The plaintiffs appealed the VCAT decision on the grounds that the Tribunal erred:

- in holding the defendants were not responsible under the Building Contract, as builder;
- in holding that the April Agreement subsumed the Building Contract; and
- in failing to assess damages in the light of the defendants’ breaches of the Building Contract and April Agreement.

Was the Building Contract discharged by the April Agreement?
Daly AsJ held that the April Agreement varied, but did not of itself discharge or subsume the Building Contract. The defendants thus retained any obligations they owed under the Building Contract, including the obligation to carry out the works on the land, subject to exceptional circumstances of findings of estoppel or misrepresentation in respect of the defendants’ entry into the April Agreement.

Was Alpine Woodpecker responsible as builder under the Building Contract?
Daly AsJ held that Alpine Woodpecker assumed the obligations of the builder under the Building Contract.

This was because the VCAT decision failed to address the obligations and liabilities under the Building Contract. Daly AsJ applied Lumbers in assessing the legal obligations assumed by the parties rather than examining “who did the work.” The High Court reasoned in Lumbers that the end result of performance cannot obscure the legal relationships that brought about that end result.

Further, his Honour held that the VCAT decision impermissibly accepted parol evidence regarding Alpine Woodpecker’s actual role in the development project.

The outcome
Daly AsJ issued a declaration overturning the VCAT decision, but did not remit the proceedings to VCAT. Notwithstanding Alpine Woodpecker’s potential obligations under the Building Contract, the facts demonstrated a lack of causation and a failure to mitigate on the part of the plaintiffs. Accordingly, the appeal was dismissed.


91 Daly AsJ at [45] applied the High Court’s decision in Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635 (Lumbers).
92 At [46]–[47]
93 At [42] and [47]
94 At [45]
95 At [43], citing Lumbers at [187]
96 At [43]
MILBURN LAKE PTY LTD V ANDRITZ PTY LTD [2016] VSC 3

KEYWORDS: ADJUDICATION; JUDICIAL REVIEW; CERTIORARI

KEY TAKEAWAYS
This case highlights a risk contractors face before enforcing adjudicated decisions under the Building and Construction Industry Security of Payment Act 2002 (Vic) (the Act).
While the courts have limited when an adjudicated decision can be judicially reviewed, injunctions are now more likely to be granted before judgment is given if there is a potential error in an adjudicator’s decision.
Facts

Milburn Lake Pty Ltd [trading as Irwin Stockfeeds] [Irwin] and Andritz Pty Ltd [Andritz] were in a dispute over the construction of a stockfeed mill at Lang Lang.

After practical completion, Andritz submitted two payment claims which were then adjudicated under section 23 of the Act.

Irwan sought to enjoin Andritz from obtaining judgment under the Act in relation to one of the adjudicated decisions on the basis that it contained serious errors on the face of the record and, thus, there was a serious issue to be tried. The question for the Court was whether the balance of convenience favoured granting the injunction.

Object of the Act

The object of the Act is to ensure that contractors can recover progress payments for construction work.97 It is underpinned by the “pay now and argue later” philosophy, which seeks to preserve contractors’ cash flow.

Current law

In Victoria, the parties to an adjudication decision have traditionally been able to seek judicial review where there has been an error of law on the face of the record (using the writ of “certiorari”).

In 2015, the Supreme Court limited the scope of this rule when Vickery J decided in Amasaya Enterprises Pty Ltd v Asta Development [Aust] Pty Ltd that a plaintiff cannot seek certiorari once a contractor has entered judgment under section 28R of the Act.98 In effect, an aggrieved party can now only seek a judicial review in a limited window: being the time after the decision is made, and before judgment is entered.

While this might seem good for contractors, it has had an unusual (and potentially undesirable) effect.

Justice Forrest’s decision

The key issue for Forrest J was whether the balance of convenience favoured granting the injunction. On the one hand (and among other reasons), his Honour noted that Irwin would not be able to argue its case if the injunction were refused. On the other, Andritz would lose the immediate benefit of the adjudicated sum — $600,000.

Rather than seek to apply either of these alternatives, his Honour chose a half-way house by granting the injunction on the basis that Irwin pay the unpaid sum into the Court under section 28R of the Act, until the review of the adjudicator’s decision was decided.

One problem his Honour noted was that section 28R only applies where judgment has been given, which in this case had not happened. Notwithstanding this limitation, his Honour held that to “grant the injunction absolutely, without requiring payment into the Court, would frustrate the clear purpose of the Act”.99 His Honour relied on previous case law to bridge this obvious gap.100 The remaining question of course is whether a payment into the Court accords with the purpose of the Act.

Implications of the decision

While his Honour determined that his approach was consistent with the Act because the adjudicated sum would be safely held by the Court, there is an argument that decision undermines the principal object of the Act; that is, to ensure cash flow to contractors consistent with the “pay now, argue later” philosophy.

The likely consequence of the case is that where a party can point to a potential error of law on the face of the record in an adjudication determination (which would give rise to a serious question to be tried), the Court will likely grant injunctive relief to prevent the enforcement so long as the unpaid amount is paid into the Court. This will thus delay payment to contractors making claims under the Act.


97 Section 3
98 [2015] VSC 233
99 At [13]
THE PUBLIC POLICY GROUND FOR REFUSING ENFORCEMENT OF A FOREIGN ARBITRAL AWARD: INDIAN FARMERS FERTILISER COOPERATIVE LIMITED V GUTNICK [2015] VSC 724

KEYWORDS: FOREIGN ARBITRAL AWARDS

KEY TAKEAWAYS

1. The enforcing court must enforce a foreign award unless a circumstance set out in either section 8(5) or (7) of the IAA is made out.
2. “Public policy” under section 8(7)(b) is to be given a narrow meaning and is limited to fundamental principles of justice and morality.
3. The power conferred by section 8(7)(b) is a discretionary power but the discretion would only fall to be exercised in favour of enforcement in the most exceptional of cases.
4. Enforcement of an award which allows for double recovery would likely be contrary to public policy. This is because it is a universal and fundamental principle of justice and morality that a claimant cannot recover more than has been lost.
Facts
The parties were involved in an arbitration conducted under the SIAC rules. The jurisdictional seat of the arbitration was Singapore and the governing law was the law of England.

The applicants (Indian Farmers Fertiliser Cooperative Ltd) were successful in the arbitration and sought to enforce the SIAC arbitral award under section 8(2) of the International Arbitration Act 1974 (Cth) [IAA].

The respondents (Joseph Gutnick and Legend International Holdings) argued enforcement would be contrary to public policy because the arbitral award allowed for double recovery. Accordingly, the respondents argued enforcement must be refused under section 8(7)(b) of the IAA and Article 36(1)(lb)(ii) of the UNCITRAL Model Law (which has the force of law in Australia under s16(1) of the IAA).

Section 8(2) of the IAA provides that: “Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.”

The word “may” appears to confer a discretion on the Court. However, section 8(3A) provides that: “The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections [5] and [7].”

Croft J confirmed that the grounds in subsections [5] and [7] are exhaustive of the circumstances in which a court can refuse to enforce a foreign arbitral award under the IAA. Accordingly, unless a circumstance set out in either subsections [5] or [7] is made out, the court must enforce the foreign award.

The respondents relied on section 8(7)(b) of the IAA [and its analogue in Article 36(1)(lb)(ii) of the Model Law] and argued enforcement must be refused because a substantive element of the award — namely the assertion that it allows for double recovery — would be contrary to public policy under section 8(7)(b). Section 8(7A) provides that the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

Croft J confirmed that “public policy” is to be construed by reference to the international instruments on which the IAA is based (ie, the Model Law and the New York Convention) and in accordance with international jurisprudence. In summary, Croft J said public policy is to be given a narrow meaning and “it is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context.”

Croft J added that the power conferred by section 8(7)(b) is discretionary (such that even if it were found that enforcement would be contrary to public policy, the court retains a discretion whether to enforce the award). However, the discretion only falls to be exercised in favour of enforcement in the most exceptional of cases.

Is double recovery contrary to public policy?

In the arbitration, the respondents argued enforcement must be refused under section 8(7)(b) of the IAA and Article 36(1)(lb)(ii) of the Model Law) and argued enforcement must be refused because a substantive element of the award — namely the assertion that it allows for double recovery — would be contrary to public policy under section 8(7)(b). Section 8(7A) provides that the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

Croft J confirmed that "public policy" is to be construed by reference to the international instruments on which the IAA is based (ie, the Model Law and the New York Convention) and in accordance with international jurisprudence. In summary, Croft J said public policy is to be given a narrow meaning and "it is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context."
KEYWORDS: CONTAMINATION; TORTS; MEASURE OF DAMAGES

KEY TAKEAWAYS

- Where land is contaminated, the fall in value of that land is the usual measure of damages. This is because of the uncertainty about remediation and future opportunities for use or development.

- A party claiming damages for loss of opportunity must argue the necessary conceptual requirements of the claim clearly and must provide comprehensive evidence for the quantum of damages claimed.

- Plaintiffs who fail to provide a court with alternative measures of relief, and evidence to support those alternatives, will suffer serious consequences.
Facts

In December 2006, more than 486,000 litres of petroleum hydrocarbon leaked from a pipeline in Altona, Victoria. This contaminated groundwater underneath nearby land. This included vacant land owned by Winky Pop Pty Ltd and Or Australia Pty Ltd (Plaintiffs). The pipeline was owned and operated by the first defendant, Mobil Refining Australia Pty Ltd (Mobil).

The Plaintiffs were developers of residential and commercial properties. They were seeking to rezone the land at the time of the leak, and intended to construct a high density residential development on the land in the future.

The Plaintiffs claimed damages against Mobil in nuisance, negligence and under section 151 of the Pipelines Act 2005 (Vic). The Plaintiffs also made claims against the State of Victoria in negligence. Mobil accepted responsibility for the leak and ongoing remediation. In dispute was the appropriate form of damages.

The Plaintiffs argued that the contamination had robbed them of the opportunity to develop their land, and that damages should be calculated on the basis of this lost opportunity. The Plaintiffs calculated the lost opportunity as the value of their preferred residential development, less the cost of the development and the residual value of the land after contamination. This equated to a claim of more than $160 million (being around $274 million in revenue, less development costs of $106 million and $10 million for the land).

The defendants argued that the appropriate measurement of damages was the Plaintiffs’ reasonable costs of investigating the leak, plus the diminution in the land’s value.

Decision

Digby J held that damages should be based on the fall in the value of the land. In this case, the assessment of damages on a lost opportunity was “unacceptably uncertain” and more likely to lead to an unjust result.

In addition to being an inappropriate basis for calculating damages here, his Honour found that damages for lost opportunity were unavailable because:

- prior to the leak, it was unlikely the land would have been rezoned or permits granted to allow the construction of a residential development;
- the Plaintiffs failed to show that, but for the leak, they would have had the opportunity to develop the land;
- the Plaintiffs had not lost the opportunity to develop the land because of the leak;
- the opportunity to pursue the development had no real prospect of success and was therefore of negligible or no value;
- the Plaintiffs were unable to articulate clearly the development they had intended to pursue, instead offering three alternative scenarios; and
- the leak and contamination would not necessarily be permanent impediments to residential development of the land.

In other words, the Plaintiffs had failed to articulate in their pleadings, submissions and evidence essential conceptual elements relating to the lost opportunity, including the nature of the opportunity, its existence before the leak occurred and its certain loss in light of the contamination. The Plaintiffs also failed to adduce evidence on key amounts required to calculate the value of the claimed lost opportunity, such as the current value of the land and the cost to the Plaintiffs of financing the proposed residential development.

These conceptual shortcomings and evidentiary gaps meant that the Plaintiffs’ claim carried a high risk of overcompensation. His Honour noted [at [203]]:

“the plaintiffs’ claim for damages based on their asserted loss of opportunity is by its nature [at this point of time] hypothetical and pregnant with projections and uncertainties whereas the assessment of damages on the basis of the diminution in the value of the plaintiffs’ land as a result of the contamination injury caused by Mobil is, for the reasons I have explained, likely to be a more reliable and accurate basis upon which to assess damages.”

While the Court found diminution in value to be the appropriate measure of damages, the Plaintiffs had not advanced this claim in the alternative, nor led sufficient evidence as to the value of the land. Accordingly, while Digby J awarded the Plaintiffs $104,273.93 for the costs of investigating the leak, his Honour considered he had insufficient evidence on which to base an amount for diminution of the land’s value and did not award a sum in this regard.

SAKARI RESOURCES LTD V PURVIS
[2016] WASCA 240

KEYWORDS: STAYING IN THE APPROPRIATE JURISDICTION

KEY TAKEAWAYS

This recent decision highlights the benefits to international parties of agreeing the governing law and forum for their disputes when entering into their contract. Although this decision concerns an employment contract, the principles are equally important for construction contracts.

Once a party commences proceedings in one forum, the court will only stay those proceedings if their continuation is “vexatious or oppressive” having regard to the controversy as a whole. This procedural uncertainty may be avoided through a well drafted international arbitration agreement and a clearly defined governing law.
Facts

Sakari Resources Ltd (Sakari), a Singaporean company, employed Mr Purvis as a chief executive officer for an initial term of three and a half years (Initial Term). The contract would then continue indefinitely and Sakari could terminate the contract by giving six months’ notice or payment in lieu of that (Termination Payment). Mr Purvis alleged that Sakari terminated the agreement and thus triggered the Termination Payment. Sakari alleged the contract ended after the Initial Term and that was therefore not obliged to pay the Termination Payment.

Sakari paid Mr Purvis part of the Termination Payment while retaining a component in case it was required to pay additional tax. After paying that tax, Sakari withheld the balance of the Termination Payment, which was over $550,000.

Mr Purvis commenced proceedings in Western Australia to recover the balance of the Termination Payment. Two weeks later, Sakari commenced proceedings in Singapore and joined as co-defendants Mr Tivey (a Director of Sakari) and Mr Glare (Sakari’s General Manager - HR), who entered into the contract on Sakari’s behalf. Sakari alleged that Mr Tivey and Mr Glare did not obtain board or shareholder approval prior to entering into the contract. Sakari sought a permanent stay of the WA proceedings or, alternatively, a temporary stay while the Singapore proceedings were on foot.

Decision at the first instance

Master Sanderson dismissed Sakari’s application for an interim or permanent stay. Whilst the Master recognised that it was undesirable to have two concurrent proceedings in different jurisdictions, the WA proceedings were commenced first and when all of the matters raised by Mr Purvis were taken into account, Western Australia could not be considered a “clearly inappropriate forum”.

The decision on appeal

Despite finding that Master Sanderson had applied the wrong test, the Court of Appeal unanimously dismissed the appeal and upheld Master Sanderson’s decision not to grant the stay application.

The Court of Appeal found that instead of considering whether Western Australia is a “clearly inappropriate forum”, the test is whether, having regard to the controversy as a whole, the WA proceedings were vexatious or oppressive in such a way that they were “productive of serious and unjustified trouble and harassment” or “seriously and unfairly burdensome, prejudicial or damaging” to Sakari.

Newnes JA found that Master Sanderson incorrectly did not turn his mind to whether the continuation of the WA proceedings would be vexatious or oppressive in the Voth106 sense. Sakari in its written submissions argued that the overall dispute was centred in Singapore because Sakari was incorporated in Singapore, the alleged breaches occurred in Singapore, the dispute involved issues relevant to Singapore (including the impact of the Singapore Companies Act), and the location of witnesses (five witnesses were in Thailand and one was in Singapore).

In oral submissions, senior counsel for Sakari argued that the continuation of the WA proceedings would be vexatious or oppressive because:

1. Mr Tivey could pursue his counterclaim in Singapore, in which case Sakari would be involved in litigation in WA and Singapore on the same sub-stratum of facts; and
2. Sakari would be litigating corporate governance matters away from the centre of its operations and away from where the relevant events occurred.

Newnes JA found that those reasons individually and collectively fell well short of being vexatious or oppressive. There was no suggestion of any obstacle in Mr Tivey commencing proceedings in WA. Additionally, Mr Glare and Mr Tivey could be joined as parties to the counterclaim in the WA proceedings. Newnes JA found that Sakari did not suggest any difficulties in pursuing claims under Singaporean law in Western Australia. More importantly, Newnes JA found it was at least reasonably arguable that the proper law of the employment contract was that of Western Australia.

The Court of Appeal confirmed well known principles which stress the importance of considering disputes at the outset of the contract to avoid later disputes about jurisdiction. In light of this decision, parties may consider international arbitration as an alternative as a well drafted international arbitration agreement will, in most circumstances, allow a party to stay proceedings brought in another forum under section 7(2) of the International Arbitration Agreement 1974 (Cth). An arbitration agreement discourages parties from bringing actions in an alternative jurisdiction as costs are generally awarded on an indemnity basis for proceedings brought in breach of an arbitration agreement.107

106 Purvis v Sakari Resources Ltd (2015) WASC 63
107 Voth v Manila Flour Mills Pty Ltd (1998) 171 CLR 538
108 Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd (2014) WASC 10 (S)
AUSTRALIAN MARITIME SYSTEMS LTD v MCCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD [2016] WASC 52

KEYWORDS: DISPUTE RESOLUTION CLAUSES; RELATED AGREEMENTS

KEY TAKEAWAYS

When dealing with ancillary contracts, it is vital to review dispute resolution clauses. To treat them as uncontroversial boilerplate provisions is dangerous, especially where related contracts provide for different or ambiguous methods of dispute resolution.
Facts

McConnell Dowell (MD) engaged Australian Maritime Systems (AMS) under a Supply Agreement to supply navigation aids as part of its construction works for Rio Tinto Iron Ore’s Cape Lambert Tug Harbour. The Supply Agreement included a dispute resolution clause requiring parties to refer disputes to arbitration.

MD and AMS later entered into a “Supplemental Agreement”. This agreement did not contain a dispute resolution clause. The relationship between the Supply Agreement and the Supplemental Agreement was central to the case.

Some time after entering into the Supplemental Agreement, MD claimed payment from AMS for breach of the warranties under the Supply Agreement, and sought to enforce an indemnity under that agreement in respect of AMS’s defective works. In response, AMS commenced these proceedings seeking a declaration that the Supplemental Agreement released it from all obligations and liabilities to MD under the Supply Agreement. MD applied to stay the action on the basis that AMS had not adhered to the dispute resolution clause in the Supply Agreement.

This judgment concerned MD’s stay application. AMS defended the application, arguing that the Supply Agreement (and thus, the arbitration agreement in it) did not apply to the dispute, which it claimed was governed by the Supplemental Agreement.

Decision

Mitchell J rejected each of AMS’s arguments and allowed MD’s stay application. He found that although the Supplemental Agreement altered the parties’ substantive rights and obligations, the Supply Agreement continued to operate. Several factors suggested that, on its proper construction, the Supplemental Agreement did not end the operation of the Supply Agreement. Significantly:

(a) the Supplemental Agreement did not contain a dispute resolution clause, which strongly suggested the Supplemental Agreement did not end the arbitration agreement; and

(b) the Supplemental Agreement partly preserved the warranties and indemnities in the Supply Agreement, leading to the conclusion that the dispute resolution clause and the arbitration agreement in the Supply Agreement still had work to do for disputes arising from these warranties and indemnities.

In obiter, Mitchell J noted that the ordinary rules of construction of commercial contracts apply to the construction of arbitration agreements and cited Martin CJ in Pipeline Services WA Pty Ltd v Alco Gas Australia Pty Ltd for the proposition that courts should favour a construction which provides a single forum for all disputes arising in connection with a given agreement.

MARSH V BAXTER
[2015] WASCA 169

KEYWORDS: PURE ECONOMIC LOSS

KEY TAKEAWAY
After this decision, it may now be harder for plaintiffs to establish that they were vulnerable to a risk of pure economic loss where they had some means of protecting themselves.
Mr and Mrs Marsh (Appellants) carried on an organic farming business in Kojonup, Western Australia. Their farm was certified organic by NASAA Certified Organic Pty Ltd (NCO), a wholly owned subsidiary of National Association of Sustainable Agriculture (Australia) Ltd (NASAA). The organic certification was the subject of a written contract (NASAA Contract).

Mr Baxter (Respondent) farmed canola on an adjacent property. The Appellants’ property was separated from the Respondent’s property by a 20.5m road reserve lined with trees on either side. In May 2010, the Respondent sowed a strain of genetically modified canola (GM Canola) in the paddocks immediately adjacent to the road reserve. The GM Canola was harvested in November 2011 by a method known as “swathing”. Strong winds carried swaths of GM Canola onto the Appellant’s property. The Appellants’ farm was subsequently decertified as organic.

The Appellants brought a claim for pure economic loss in both negligence and nuisance for the income they would otherwise have earned selling their produce as organic. The Appellants contended that the Respondent had been negligent and unreasonable in choosing to swath the crop, rather than harvesting it by direct heading.

The trial judge dismissed the Appellants’ claims and the Appellants appealed to the Western Australian Court of Appeal. A majority of the Court of Appeal dismissed the appellant’s claims, finding the Respondent did not owe the Appellants a duty of care and that there had been no unreasonable interference with the Appellant’s use and enjoyment of their land. In respect of the Appellant’s vulnerability to the risk of harm, Newnes and Murphy JJA found that the Appellants were not vulnerable because:

- any question of vulnerability would need to be seen against the Appellant’s contractual obligations under NASAA Contract;108 and
- the Appellants could have minimised the risk of decertification, including planting more trees for natural screening, erecting physical barriers and carrying out inspections.109

In contrast, McClure P found the Appellants had taken the steps needed to protect themselves from the risk.

Both judgments cited with approval the decisions of the High Court in Perre v Apand (Perre)110 and Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (Brookfield),111 which considered questions of a plaintiff’s vulnerability to pure economic loss.

In Perre, the plaintiff was found to have suffered pure economic loss because they could no longer sell potatoes in Western Australia after the property had been quarantined following the negligent spread of bacterial wilt. McHugh J found that the plaintiffs were vulnerable to the defendant’s conduct, principally because they had no means of protecting themselves.112 These was an important point of distinction to Marsh v Baxter. Further, in Perre, the loss was the whole loss associated with not being able to sell at all, whereas in Marsh v Baxter, the loss claimed was a premium mark-up.

In Brookfield, the High Court held that the contractor under a design-and-construct contract did not owe a duty of care to an owners’ corporation to avoid pure economic loss occasioned by latent defects in the common areas of the property which the contractor had built. The Court found that the contracts between the parties offered a method of protection and remedies for any loss that might arise, which meant that the owners’ corporation was not vulnerable.

In the present case, the majority judgment’s focus on how the Appellants could protect themselves, despite the steps they did take to avoid the risk of contamination, appears to narrow the scope of vulnerability to instances where a plaintiff has no possible means of protecting itself against a potential risk. Furthermore, it appears that a plaintiff’s actions own actions in making itself vulnerable, by virtue of its contractual obligations or otherwise, will further limit its success in a claim for pure economic loss.


108 At [64]
109 At [64]
110 (1999) 198 CLR 180
111 (2014) 254 CLR 185
112 (1999) 198 CLR 180 at [149]
This case appears to be an example of the type of litigation Byrne J was at pains to ask construction litigants not to pursue.\textsuperscript{113} Toll Global Forwarding Pty Ltd (\textit{TGF}) made a several claims in contract and under other causes of action against the joint venture responsible for providing an array of services to Chevron on the Gorgon project. The joint venture parties were Thiess Pty Ltd (\textit{Thiess}), Decmil Australia Pty Ltd (\textit{Decmil}) and Kentz Pty Ltd (\textit{Kenz}) (together TKDJV).

Kenneth Martin J dismissed just about all of Toll’s claims. The case is a strong reminder to participants in the construction industry that clearly written contracts will be enforced even where one party claims that they are not fair or that they will make a loss on the deal.

Restitution, implied variations, promissory estoppel and statutory claims for misleading or deceptive conduct or unconscionable conduct are easy to allege: but much harder to make stick.

For lawyers, there is a further reminder to take care with details; “Theiss” appears to have been misspelt in the originating documents, and thus in the name of the case.
Facts
TGF sued TDKJV for fees beyond the levels stipulated in the services contract between TGF and TDKJV.

The contract contemplated a lump sum payment, by reference to a schedule of rates, for the sea carriage services TGF was to provide by shipping 11 tranches of up to 2012 accommodation modules manufactured and fabricated in Thailand to Port of Henderson, Western Australia. To meet its obligations, TGF subcontracted with an international shipping broker who in turn entered a direct charter party arrangement with the owner of the shipping vessels.

TGF’s performance suffered from product availability delays. These not only delayed the early tranches of the accommodation modules, but also resulted in waste because the carrying vessels were not loaded to capacity.

After just six sea voyages, TDKJV terminated the contract for convenience under an express right in the contract. The termination in itself was not an issue in dispute. What TGF claimed and TDKJV resisted was TGF’s entitlement to be compensated for arranging the sea carriage for what turned out to be only six voyages of transported accommodation modules.

TGF framed its claim on five alternative grounds: quantum meruit, contractual variation, promissory estoppel, misleading or deceptive conduct, and statutory unconscionable conduct.

Decision
Kenneth Martin J made some overarching remarks about of the arrangements between TGF and TDKJV. His Honour noted that the contract left open how TGF was to deliver the cargo. As noted above, TGF subcontracted with a broker. Although the details of that subcontract were not before the Court, the facts suggest TGF was essentially a contractual “middleman”. TGF was in consequence vulnerable to cost blowouts if its obligation to the broker was not limited to fixed fees, but was instead on a cost-plus basis.

Variation
After the contract was executed, TGF tried to change the lump sum payment to a “cost plus” arrangement. TGF alleged that this change had arisen by oral communications, implied conduct or custom. Documentary evidence suggesting this change was lacking. His Honour found these arguments baseless as they were inconsistent with the express prohibition on varying the contract except in writing as provided for in the general conditions of the contract.

Quantum meruit
TGF also sought to get round the contractual restrictions on remuneration by invoking a quantum meruit claim. TGF inevitably failed in this claim given the subsisting contract.

It is worth noting that TGF knew of the likely delay in cargo availability before the contract was signed. When the delay actually occurred and thus increased what TGF owed the broker, TGF’s staff wrongly assumed that TDKJV would reimburse TGF for what it paid the broker. As a result, TGF neglected the notification requirement under the contract with TDKJV. If TGF had followed those notification requirements, TGF could have claimed costs caused of delay caused by TDKJV. TGF similarly did not act to bring the contract to an end on the basis of TDKJV’s repudiation or for frustration.

Estoppe
His Honour rejected TGF’s estoppel claim on the basis that the pleading did not set out the elements required for the establishment of the claim. In any event, his Honour briefly pointed out some fundamental difficulties that the claim faced (these need not be noted here).

Misleading or deceptive conduct
TGF’s misleading or deceptive conduct claim also failed. TGF effectively claimed that TDKJV had misled it by silence. This was said to be because TGF had informed TDKJV of the broker’s shipping costs and TDKJV did not tell TGF that it did not agree with those costs. TDKJV responded that this assertion was untenable as TDKJV had repeatedly informed TGF that it did not agree to any proposed departure from the contractual pricing mechanism. Kenneth Martin J agreed with this submission and further said that this was a case of nothing more than a clash of position over the contractual remuneration provision.

Statutory unconscionable conduct
Finally, TGF claimed on the ground of statutory unconscionable conduct under section 51AA of the Trade Practices Act 1974 (Cth). His Honour found that the claim was devoid of merit. The relationship between TGF and TDKJV was plainly not one, as far as unconscionable conduct is concerned, where one party is at a special disadvantage in dealing with the other. His Honour found that there was no room at all in this commercially sophisticated environment for unconscionable conduct under statute to disrupt or to reorder the parties’ carefully negotiated commercial bargain.

The lessons are clear. Courts will enforce clearly written contracts and will give little ground where one party claims that the contract is not fair or that they will make a loss on the deal. Restitution, implied variations, promissory estoppel, misleading or deceptive conduct, unconscionable contract or whatever other excuses are argued will be difficult to sustain.

The United Kingdom Supreme Court has affirmed four principles of the law of penalties in England:

- The penalty doctrine remains but should not be extended.
- The penalty doctrine will only apply to secondary obligations arising from breaches of contract.
- The “true” test is whether the alleged penalty provision imposes a detriment on the breaching party which is out of all proportion to the protection of the innocent party’s legitimate business interests.

The “legitimate interest test” is the primary consideration when determining whether the relevant clause is “penal” and it will be protected unless that would result in an “out-of-proportion detriment”, or is “extravagant, exorbitant or unconscionable”.

Keywords: Penalties
Facts
On 4 November 2015, the United Kingdom Supreme Court, the highest court in England, handed down its joint judgment in Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Limited v Beavis [2015] UKSC 67 [Cavendish and ParkingEye].

Both cases involved a consideration of the contractual relationships between parties to determine whether the penalty doctrine would apply.

Cavendish involved an arm’s length commercial agreement between sophisticated, well-advised parties for the sale of a controlling stake in a marketing communications group in the Middle East.

ParkingEye involved a dispute as to whether an excess parking fee of £85 was a penalty.

Decision
The Supreme Court affirmed the following principles of English law:

1. The penalty doctrine is a long standing common law principle that should not be abolished or extended.
2. The penalty doctrine will only apply to secondary obligations arising as a result of breach of contract.
3. The “true” test is whether the alleged penalty provision imposes a detriment on the breaching party which is out of all proportion to the protection of the legitimate business interests of the innocent party.
4. The “legitimate interest test” is the primary consideration when determining whether the relevant clause is penal. The Courts are willing to protect the legitimate business interests of parties (which are often negotiated at length in pre-contract negotiations) unless the Courts determine that the purported protection of the legitimate interest will result in an “out-of-proportion detriment”, or is “extravagant, exorbitant or unconscionable”.

Though there were five separate judgments, there is a single set of principles with which a majority of the Court agreed. A detailed summary of the judgment [including a summary of the facts] is contained in the Supreme Court’s press summary.

Andrews decision not applied
Cavendish and ParkingEye considered fundamental aspects of the penalty doctrine, including the recent decision of the High Court of Australia in Andrews v Australia and New Zealand Banking Group Ltd [Andrews].

The Supreme Court noted that in Andrews, the High Court of Australia “concluded that there subsisted, independently of the common law rule, an equitable jurisdiction to relieve against any sufficiently onerous provisions which was conditional upon a failure to observe some other provision, whether or not that failure was a breach of contract.”

The extension of the penalty doctrine in Andrews (that breach is not an essential aspect of the doctrine) was not considered favourably (or adopted) by the Supreme Court. Rather it was viewed as a “radical departure” from the existing law, and a “controversial decision”.

Four Justices sharply disagreed with the High Court decision in Andrews:

• disagreeing with the historical reasoning and analysis of the penalty doctrine in Andrews;

• holding that there had been no separate equitable jurisdiction for penalties since 1873; and

• noting that the High Court’s definition of a penalty is difficult to apply.

The other three Justices considered that any abolition or amendment to the penalty doctrine should be the responsibility of the Law Commission or Parliament.

What it means for Australia
Cavendish and ParkingEye dealt with two separate, but related, issues:

1. when the law of penalties applies
2. when a provision is considered penal (if the law of penalties applies)

It authoritatively resolves both of those issues under English (and Scottish) law. In Australia, only the first of those issues was resolved in Andrews.

The second issue — when a provision is penal if the law of penalties applies — is live.

The High Court recently heard argument in an appeal from Paciocco v Australia and New Zealand Banking Group Ltd, like Andrews, a bank fee case.

In the Full Court of the Federal Court, the lead judgment of Allsop CJ took a similar approach to the UK Supreme Court in Cavendish and ParkingEye.

Similarly, a recent Supreme Court of Queensland case held the obligation to pay 18% interest on outstanding amounts did not amount to a penalty as it was reasonably required to protect the plaintiff’s interests.

It remains to be seen how the High Court will resolve the second issue in the Paciocco case in light of the stance taken by [and commentary from] the UK Supreme Court.

https://www.supremecourt.uk/cases/uksc-2013-0280.html

Keywords: security of payment

Key takeaways
This article, by a Visiting Professor at King’s College, London, gives a useful and interesting comparison of the original English adjudication model and the Australian one. It also discusses the United Kingdom Supreme Court’s recent decision on the English legislation — interesting because the High Court of Australia has so far refused all opportunities to consider the legislation.


Keywords: privy council

Key takeaways
Simon Hughes QC, from Keating Chambers in London (the chambers of many of the leading building and construction barristers in London), gives a recap of a number of construction-related cases decided by the Privy Council on appeal from the Caribbean, including cases relating to (1) tendering procedure, (2) use of frozen funds after termination, and (3) termination under a FIDIC contract.


Keywords: contract law

Key takeaways
This is a paper delivered by Edelman J, one of the leading academic judges in Australia, to the Supreme and Federal Court Judges’ Conference in January 2016. As usual for him, it is learned and well-written. It provides a useful outline of three contractual issues which frequently arise in our construction practice: (1) implied terms, (2) rectification, and (3) the permissible use of post-contractual conduct. In relation to each, Edelman J gives a lucid explanation of the current position in Australia and some thoughts about the merits of the position (including, for the first two issues, by comparison with the current position in England).


Keywords: implied terms in contracts

Key takeaways

This article, by several leading contract scholars at Sydney Law School, draws out some of the potential implications of the High Court’s decision in Commonwealth Bank of Australia v Barker (2014) 253 CLR 169 — which was an employment case — for commercial contracts.

Abstract

In Commonwealth Bank of Australia v Barker the High Court of Australia considered whether an implied term of ‘mutual trust and confidence’ was to be recognised as an incident of contracts of employment. Such a term is well established under English law; its existence in Australian law had been inconclusively discussed in intermediate appellate decisions for some time (prior to the Full Federal Court’s decision in Barker). The High Court unanimously declined to adopt the term. In our view this is a surprising and undesirable development for Australian employment law. The reasoning in the joint judgment of French CJ, Bell and Keane JJ carries broader significance for contract law. They approached the question at the level of general principle, by reference to the rules governing the implication of terms in contracts. The joint judgment makes several contributions to the law. It sets out a taxonomy for implied terms, which includes a new category of terms implied by law in ‘all classes of contract’. It discusses the relationship between contract construction and implication, including in relation to matters such as cooperation in performance, and the test to be applied for novel implications in law. While there is much food for thought, the court’s contributions in these areas are not wholly convincing. Although not directly in issue in the case, the analysis also has consequences for the possible recognition of an implied term of ‘good faith’ in contracts.


Keywords: entire agreement clauses

Key takeaways

Entire agreement clauses are commonly included in construction contracts. In this article, based on a paper presented as a CPD seminar, Ian Jackman SC collects several useful cases about the effect of entire agreement clauses.

Abstract

The common inclusion in commercial contracts of an “entire agreement” clause presents a number of challenges to the current judicial trend for broad contextual approaches to the law of contract, particularly in the significance now attached to pre-contractual negotiations. In principle, there should not be any tension between the parties’ clearly expressed intentions and the judicial interpretation of their contract. That there is such a tension, however, is starkly illustrated in the reasoning of Australian intermediate appellate courts as to the extent to which entire agreement clauses: (a) do more than merely re-state the parol evidence rule; (b) negate the existence of collateral contracts; (c) preclude estoppels arising from pre-contractual negotiations; and (d) affect questions of construction generally. On all four of these issues, Australian appellate courts have tended to undermine the clarity and certainty that the parties plainly intend to achieve in their bargain by their express adoption of an entire agreement clause.


**Keywords:** good faith

**Key takeaways**

This article provides a useful summary of the current state of the law, and the complications it causes, relating to the vexed issue of good faith in contract law. Professor Gray’s “reading of the judicial tea leaves” is that when the High Court expressly decides the issue, it will recognise an implicit good faith obligation. The relevance of this topic to construction lawyers is underscored by footnote 1 to this article being a reference to the current draft of AS11000 including an express obligation of parties to act in good faith (contrary to the silence of AS2124 and AS4000).

**Abstract**

In a 2014 High Court employment law decision, the possibility that Australian law should embrace the doctrine of good faith in relation to contracting was again countenanced, but dismissed by the court on the basis that it had not been argued by the parties and so should not be considered further. The doctrine of good faith has been recognised by lower courts, but has never been the basis, at least expressly, of any High Court decision. Worse, the lower court authorities are in conflict regarding key aspects of the doctrine of good faith, such that the need for High Court clarification on the existence and precise contours of the doctrine in Australian law is pressing. This has occurred in other common law systems recently. In 2014, the Supreme Court of Canada accepted good faith as an organising principle, and the Supreme Court of the United Kingdom accepted that contractual discretion would ordinarily be conditioned upon good faith principles. This article attempts to answer three key questions: (a) whether the High Court should accept the doctrine as part of Australian contract law, and if so, (b) whether the clause includes concepts of reasonableness, or is confined to honesty, and (c) whether it is best seen as an implied term, axiom of construction, or assumption or expectation underlying a contract.

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**Keywords:** time bars

**Key takeaways**

This article explores some of the key facets of the lengthy (907 paragraphs) decision of Allanson J, in which Corrs acted and which was reserved for over two years.

**Abstract**

The Western Australian Supreme Court upheld a strict time bar even in circumstances where the contractor would otherwise have been entitled to an extension of time. The case serves as a reminder that clearly drafted time bars will bite if parties do not put their notices in on time. The case also stands for the proposition that a clearly drafted extension of time regime may exclude the operation of the prevention principle, meaning that the contractor will take the risk of accelerating in circumstances where no extension of time is granted.

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Keywords: reminiscing about the olden days

Key takeaways
This article is an interesting reminiscence by one of the country’s senior construction lawyers, John Sharkey AM, about the development of construction law dispute resolution. It is focused on his experiences in Victoria, starting in 1972. Interestingly, one of the charts included his article shows a sharp decrease in adjudication applications in New South Wales from 2012: perhaps indicating that this is on the wane, at least in New South Wales.

Abstract
The methodology employed to resolve construction law disputes in Australia has undergone dramatic change in the last half century. From final determination by litigation or arbitration to a plethora of choices, constant change has been the theme of the repertoire. Central to the change has been the assertion by the client of its dominant role. The legal profession has seen the subordination of the search for justice to issues of cost and time in a manner it was unprepared for. There is a need on the part of the profession to examine its role and the contribution it makes to the industry if it is to stay relevant in a constantly changing game.


Keywords: unfair contracts

Key takeaways
This article explores an issue that is likely from 12 November 2016: whether terms in construction contracts (or, more likely, subcontracts) will be impugned as unfair. It is entertainingly written (there is an extended “Bob the Builder” riff), and is at a high level — especially useful for those not familiar with the details of this aspect of the Australian Consumer Law.

Abstract
The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) passed both Houses of Parliament on 20 October 2015 and will commence on 12 November 2016, 12 months from the date it received Royal Assent. The Bill extends to small businesses the Australian Consumer Law’s existing consumer protections from unfair contract terms in standard form contracts. This article reviews the impact the amendments will have on the construction industry, where both small businesses and standard forms are ubiquitous.


**Keywords:** disruption claim; measured mile

**Key takeaways**

We frequently encounter disruption claims. This article, by a manager at Aquenta Consulting, provides a useful collection of the principles relevant to the valuation of disruption claims, including the “measured mile” approach.

**Abstract**

This article examines the measured mile method to estimate loss caused by disruption to the progress of a construction project by providing an overview of the operation of the methodology, a literature and case law review, and provides guidance on how a measured mile analysis should be conducted.


NAWIC Journal 2015 launched

**Keywords:** women in construction

**Key takeaways**

The National Association of Women in Construction has launched the NAWIC Journal 2015. To quote the National President’s report, “This journal reflects upon the past 20 years and celebrates the contribution of women to the construction sector and related industries.”

The open-access online journal consists of short articles arranged into sections including research, culture, case studies, leadership, education and training, trades, environment and sustainability, and innovation.

Corrs Melbourne office Senior Associate wins national award

Jey Nandacumaran has won the 2015 Tom Yuncken Award. Jey is a Senior Associate in the Melbourne office specialising in construction disputes.

In addition, Jaclyn Smith, an Associate also in the Melbourne office was runner-up for the award.

Every two years, the Law Council of Australia issues the award, which recognises excellence in the field of construction law and practice. The award is only open to lawyers aged 36 or under and the winner is chosen on the basis of:

- demonstrated excellence in the provision of construction law services to clients;
- academic and practical abilities in construction law;
- contribution to the field of construction law and practice; and
- maturity, self-reliance and leadership.

ICC Court — new policies for transparency and greater efficiency

Keywords: ICC, international arbitration

Key takeaways

On 5 January 2016, the International Chamber of Commerce (ICC) International Court of Arbitration announced two major decisions aimed at increasing the efficiency and transparency of ICC arbitration proceedings.

1. From 1 January 2016, the Court will publish on its website the names of the arbitrators sitting in ICC cases as well as their nationality, whether their appointment was by the Court or the parties, and which arbitrator is the tribunal chairperson. This will remain on the website after the case is terminated, though for confidentiality the names of parties, case reference number and names of counsel will not be published. Parties have the option of opting out of this limited disclosure by mutual agreement.

2. The Court has set out clear information regarding the cost consequences flowing from unjustified delays in submitting draft arbitration award to the Court. ICC tribunals are now expected to submit draft awards within three months of the last substantive hearing concerning matters to be decided in an award, or if later, the filing of the final written submissions (excluding cost submissions). Where drafts are submitted outside this timeframe, the Court now uses a fee scale [based on a reduced percentage of fees that the Court would otherwise consider fixing] depending on whether the drafts are submitted up to seven months, up to ten months, or more than ten months after the last substantive hearing or written submission. This policy also allows the Court to increase the arbitrators’ fees above the amount it would otherwise have considered fixing in cases where the tribunal conducted the arbitration expeditiously.

Read the ICC announcement in full here: http://goo.gl/o38Hs6
“I just want to be paid” – Overcoming insolvency challenges in the construction industry – The Commonwealth approach (7 December 2015)

Creating a lasting bond: Utilising social benefit bonds to help combat family violence in Australia (19 February 2016)

The challenge of building Australia’s gateway to the Indo-Pacific (2 February 2016)

Smart cities: Making Australian precinct energy networks a reality (9 March 2016)
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