

Building & Construction Law Update

Spring 2011

Security for Payment Claims Made After Contract Termination

by Tony Mylne, Partner

On 3 June 2011 the Queensland Supreme Court considered:

1. Is a claim made following the termination of a contract valid and is any adjudication based on that claim valid?
2. Should an adjudicator decide a matter on a basis for which neither party contended? Has there been in those circumstances a denial of natural justice sufficient to justify voiding the decision?

The second question can easily be answered and is now well accepted in most jurisdictions, that in those circumstances the decision will be void so long as the point on which there was a denial was significant to the actual determination.

Contract termination

Of more interest is the first point concerning the validity of a claim following termination. In reaching a decision in this Queensland case, *Walton Construction (QLD) Pty Ltd v Corrosion Control Technology Pty Ltd*, the Court referred to various authorities from both New South Wales and Victoria. It was acknowledged that the leading authority from New South Wales, the case of *Brodyn Pty Ltd v Davenport*, was generally viewed as the authoritative approach in this area.

The Decision

The difference in the definition of Reference Date in the various jurisdictions was noted. The Queensland legislation, the *Building and Construction Industry Payments Act 2004*, provides for a Reference Date as "under a construction contract...". The Court concluded that this provision could only be interpreted to mean that the contract would need to be existing prior to any claim

being delivered. It was accepted by the parties that the contract had terminated prior to the fifth progress claim being served in the proceedings. The Court reviewed the contract provisions in detail and in particular those provisions of the contract that might operate following termination but still concluded that in the circumstances there was no right to make a progress claim under its terms following termination.

Different States

The Court drew attention to the difference in the New South Wales definition of *Reference Date* as it referred to *in relation to a construction contract*. The Court viewed that as markedly different from the Queensland definition and as a consequence found that termination meant no further claims could be delivered.

Reference was also made to a Victorian decision of *Gantley Pty Ltd v Phoenix International Group Pty Ltd* however it was considered that any statements made in that case were only consistent with the Court's view that *only if the contract expressly or impliedly provided for a payment claim to be made following termination could a claim proceed*.

Conclusion

Subject to the terms of the contract in question, in Queensland there is a problem with making a payment claim after a valid termination of the contract.

There may be appeals in respect of these matters given the disparity of decisions in New South Wales concerning this particular issue and the different approaches under each State's security for payment legislation.



Specific Performance of Contracts – Does Anyone Win?

by John Perry, Partner & David Thomas, Lawyer

As a general rule, equity will not grant an injunction or decree specific performance of a building contract as such an order would require the Courts to maintain constant supervision of the parties ongoing contractual relationship. This will often be in circumstances where there has been an absolute breakdown in the relationship between the builder and the owner. However, it is possible that in some cases a builder would seek that a building contract should be performed. This argument was recently brought before a Senior Member in the Victorian Civil and Administrative Tribunal at a hearing for an interlocutory injunction to remove the builder from a building site.

Background

By way of background, this matter concerned a construction project which had been significantly delayed due to a number of factors. The owner sought to terminate the contract with the builder on the ground of delay. The builder disputed the validity of the purported termination and maintained that at all times it was ready, willing and able to complete the contractual works upon further instruction from the owner. On that basis the builder was unwilling to give up possession of the building site.

The Position at Law

A standard building contract is not specifically enforceable and an aggrieved party is left to seek relief in damages.

This general rule is based upon both the Courts unwillingness to compel the building of houses and the view that a builder only holds a licence to be on the owner's land. This concept derives its origin from the decision in *Cowell v Rosehill Racecourse Co Ltd (1937) 56 CLR 605* where it was held that a contractual licence to be on land may be revoked at will by the owner and an aggrieved party is left to pursue a claim in damages. However, there have been some exceptions. For example, in *Robert Salzer Constructions Pty Ltd v Embee Pty Ltd* (unreported, VSC, 29 June 1990), an interlocutory injunction was granted to prevent the termination of a building contract.

The Salzer decision is perhaps best seen as an exception to the general rule based upon the specific facts of the case. It was subsequently distinguished in the Victorian Supreme Court in the case of *Nepean YKK Pty Ltd v Leighton Contractors Pty Ltd* (unreported, VSC, 12178 of 1991, JD Phillips J, 23 October 1991) where it was found that an injunction was inappropriate where damages would clearly be an appropriate remedy. It was also found that this would be the case even if the Owners conduct was ultimately found to be in breach of the contract.

If it is accepted that the leading reported decisions following *Cowell*, such as *Porter v Hannah Builders Pty Ltd [1969] VR 673* and *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd [1974] 1 NSWLR 93* remain good law in Australia, it is then important to turn to the test for injunctive relief.

The Test for Injunctive Relief

The test to be applied to an application for injunctive relief is two fold.

1. First, there must be a serious question to be tried. This requires a judgment to be made, from which the Court or tribunal will examine both the legal foundations of the claims made in the proceeding and evidence in support as exposed on the interlocutory application. The general rule is that unless



upon examination the Court concludes that the Applicants do not have any real prospect of success, then the Court will ordinarily be satisfied that there is a serious question to be tried.

2. Second, the balance of convenience must favour the finding of an Injunction. In *Bradto Pty Ltd v Victoria [2006] VSCA 89* the Court of Appeal found that it is appropriate for a single test of the lower risk of injustice to be applied in all cases where an interlocutory injunction is sought whether it is prohibitory or mandatory in nature.

The Builder's Position

As outlined above, it is settled law that a builder holds a mere contractual licence to enter upon the owner's premises to undertake building works. In the recent VCAT decision the builder was unsuccessful.

This licence is revocable at will by the owner.

It is therefore difficult for a builder to establish on such an application for injunctive relief that there is a serious question to be tried due to the case law referred to above. However, even if a builder gets over this threshold, on the balance of convenience the builder must then show that there is a lower risk of injustice in finding that the builder should be allowed to continue on with the building work as opposed to the right to commence an action for damages if the builder is removed from the building site in breach of the contract.

Therefore, even if a builder brings an application seeking that a building contract should be performed, ultimately the current shape of the law reflects that a builder has no right to maintain possession of the building site and effectively becomes a common trespasser upon the owner's land irrespective of whether the revocation of the licence was lawful.

SA Still Waiting on Security on Payments to Take Effect

by John Kavanagh, Partner

The South Australian security for payments legislation which was passed in December 2009 by the South Australian Parliament. The legislation known as the Building and Construction Industry Security for Payments Act 2009 (SA) is still yet to come into force in South Australia.

It was initially proposed that the South Australian Act would be proclaimed in the second half of 2010.

The South Australian Act is modelled predominantly on the New South Wales version of the security for payments legislation. However, there are some differences between the two including the definition of "construction work" which is wider under the South Australian Act in that it includes fencing work.

Further, under the South Australian Act, a payment claim must be issued within 6 months after completion of the works to which the claim refers in the event that the construction contract makes no provision on the issue. In New South Wales, the relevant time period is 12 months.

In addition, unlike the New South Wales Act which provides for a period of 10 business days, the South Australian Act allows 15 business days for the issuing of a payment schedule after service of a payment claim or for the making of an adjudication application.

Once the South Australian Act does come into force, it will be of great interest as to how the South Australian Courts approach the legislation and the attempts by parties to seek judicial review of an adjudicator's determination.

If, as expected, the South Australian Courts follow the line of the New South Wales Court of Appeal decision in *Chase Oyster Bar v Hamo Industries (2010)* (New South Wales Court of Appeal 190), that overturned the *Brodyn Pty Ltd v Davenport (2002)* (New South Wales Supreme Court 254) decision which curtailed the rights of a party to challenge an adjudicator's determination, then the South Australian Act may provide an initial flurry of litigation, as parties seek to explore how far the South Australian Courts are willing to apply the principles espoused in the *Chase Oyster* decision.

New Workplace Health and Safety laws

by Rachel Drew, Partner, National Employment Law Group

On 26 May 2011 Queensland Parliament passed the Work Health and Safety Act 2011 (Qld), the first State to do so. The Act forms part of a national reform agenda that will result in harmonised workplace health and safety laws across Australia.

The WHS law will require that a duty holder ensure health and safety by eliminating risks, so far as is reasonably practicable. 'Reasonably practicable' means what is reasonably able to be done 'at a particular time' to ensure health and safety.

The new law includes new obligations which are not part of our current WHS law:

- Workers now include contractors and subcontractors;
- Employers' duties include more active monitoring of workers' health and conditions at the workplace;

- Company directors have a positive duty to ensure compliance with the WHS laws. Directors will be personally liable if they breach that duty.

The maximum penalty for breach of a health and safety duty has increased to \$3million.

There is also a range of specific duties imposed on designers and suppliers of buildings, building materials and machinery, as well as duties for anyone responsible for construction or installation of buildings and machinery.

The new Act will commence in January 2012.



Industry alerts

Queensland

On 25 August 2011 the Federal Court in Brisbane found that three Queensland based construction companies had engaged in price fixing and misleading conduct.

The issue was brought to the attention of the Australian Competition and Consumer Commission that the companies, T F Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd allegedly engaged in cover pricing in tendering for government projects between 2004 and 2007.

The matter has been adjourned in relation to penalties and other orders.

New South Wales Asbestos Taskforce

The New South Wales government will develop a statewide asbestos plan to improve the way government departments and agencies monitor and respond to asbestos.

Following threatened industrial action by New South Wales police requiring action over some 500 affected properties statewide and a report from the New South Wales Ombudsman that there was no coherent plan for dealing with asbestos a taskforce has been set up to develop the plan. The taskforce will be an interdepartmental group chaired by the chief executive of WorkCover.

South Australia Abolition of the First Home Bonus Grant

In the 2011 State Budget, the SA Government announced that the First Home Bonus Grant (FHBG) grant of \$8000 will reduce to \$4000 from 1 July 2012 and will be abolished altogether from 1 July 2013.

The FHBG is an additional payment made to first home buyers who are eligible for the First Home Owner Grant of \$7000, where the market value of the property is less than \$450,000.

The Government also announced that certain commencement and/or completion conditions will now apply to the building of a new home for eligible transactions entered into on or before 10 June 2011.

In the case of "off-the-plan" contracts executed on or after 10 June 2011 and before 1 July 2012, the contract must stipulate that the home will be completed by 31 December 2013.

(source Thompson)

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