Building & Construction Law Update

Spring 2009

Economic conditions affecting construction and development – issues for off the plan contracts

by Robin Lonergan, Partner and Vijay Maraj, Lawyer

Two recent decisions of the Queensland Supreme Court have had major repercussions for the construction and development industries. These decisions concern off-the-plan sales contracts for commercial and residential developments.

The First Case

On 8 October 2009, Justice Mullins handed down the decision of ***APN Property 3 Pty Ltd –v– Blondau & Ors. [2009] QSC 326***. She held that 12 contracts to buy commercial lots in a strata building could be terminated by the buyers.

The Building was being constructed on land which had been subdivided from a larger parcel. This land had been used for activities notifiable under the *Environmental Protection Act 1994 (Qld)* including a foundry and a service station which ceased operations many years ago. A site management plan had been recorded noting that contamination was present across the entire site in fill materials. The plan was directed at managing the contamination during site works and construction.

The developer entered into contracts with 12 different buyers. Each lot was one floor of the commercial building. The purchases had been structured by way of a Put and Call Option with the purchase agreement annexed. The buyers purported to rescind the agreements and the developer brought an application to the Supreme Court for a declaration that the purported rescission was ineffective.

There were a number of issues which were considered:-

1. The Option Agreement provided for an option fee of $100 plus a performance bond being 10% of the purchase price under the contract. The court found that the Option Agreement was an instalment contract for the purposes of Section 71 of the *Property Law Act 1974 (Qld)* because the total payment made under the Option Agreement was greater than 10% of the purchase price. Because the lot was mortgaged to a financier without the express consent of the buyers, the buyers could terminate the agreements under Section 73 (2)(a) of that Act.
2. The court considered whether appropriate disclosure statements had been given under the *Body Corporate and Community Management Act 1997 (Qld)* (**"BCCMA"**). The court agreed with the ruling in the 2006 case of ***Mark Bain Constructions Pty Ltd –v– Barling***, that the effect of a Put and Call Option is that there are obligations from which the parties cannot withdraw so that, consistent with the consumer protection aspect of the BCCMA, the disclosure statements must be given at the time of the parties signing the Put and Call Option.

   In the APN contract, the disclosure statement in the contract annexed to the Option Agreement was not signed by the seller so the buyer was entitled to cancel the agreement.
3. Finally, the court considered Section 421 of the *Environmental Protection Act 1994 (Qld)*. Under that section, if an owner proposes to dispose of the land particulars of which are recorded in the Environmental Management Register, the owner must, before agreeing to dispose of the land, give written notice to the buyer of the information on the register. If the owner fails to comply, the buyer may rescind the agreement by written notice before completion.

   The court found that the section applied even though the description of the land on the register was different from the description of the land being sold because the land on the register would be subdivided by way of a Community Management Statement to create the lot which is the subject of the contract.

   The court also found that an Option Agreement is an agreement to

(continued on page 3)

In this issue

- Economic conditions affecting construction and development – issues for off the plan contracts
- Repetitious payment claims: a new decision
- The consequences of amending Australian Standard Building Contracts
- Reviews and Appeals in the State Administrative Tribunal
- Industry alerts

macrossanslawyers

Repetitious payment claims: a new decision

by Tony Mylne, Partner

A decision delivered by the Supreme Court of New South Wales on 15 October 2009, ***Urban Traders –v– Michael*** (**"Urban Traders"**) clarifies other decisions in New South Wales in relation to claims involving estoppel and abuse of process against claimants where there are repetitious claims.

June 2008	Payment Claim 18 issued	$1,172,706
	Payment Schedule	NIL
	Adjudication	$357,925
July 2008	Payment Claim 19 issued	Included some amounts from Payment Claim 18 (was issued prior to adjudication)
	Resulted in suspension by Principal on questionable grounds	
January 2009	Payment Claim 20 issued	$1,389,796 Included some amounts from Claims 18 & 19
	Payment Schedule	NIL
August 2009	Payment Claim 21 issued	$9,258,726 Included some amounts from Claims 18, 19 & 20
	Payment Schedule	NIL
	Claimant sought to adjudicate Payment Claim 21 and Principal sought injunction restraining adjudicator from determining Payment Claim 21.	

Issues

There were three main issues:

1. Was there an abuse of process in bringing the Adjudication Application? Was the claimant estopped from initiating the adjudication as portions of a claim had been determined already by the adjudication of Claim 18?
2. Whether losses and expenses as a result of the suspension of works by the builder which included over-head profit could be claimed under the terms of the Act?
3. Did the non delivery of the payment schedule stop those claims being the subject of a further application for adjudication when contained in Claim 21?

Previous Decisions

Dualcorp involved four invoices where there had been an adjudication. A later Payment of Claim detailed the same four invoices plus two further invoices. No payment schedule was delivered. The Judge at first instance refused to proceed on the four invoices previously adjudicated and the Court of Appeal confirmed that decision and allowed only the two new claims to proceed, these not being repetitious. The Court of Appeal discussed issues concerning abuse of process and issue estoppel and Justice McDougall in Urban made various comments concerning whether or not certain circumstances would amount to an abuse of process.

In deciding the Urban matter, Justice McDougall reviewed the law in relation to abuse of process, issue estoppel and the principle of res judicata. There was no new material or circumstances (compared to the material available at adjudication) that might warrant consideration of any further claims.

The Urban Traders Decision

Justice McDougall considered that the initial adjudication created an estoppel which meant those same claims could not be presented in a subsequent adjudication. It was further decided that these claims amounted to an abuse of process if for no other reason than the builder had obtained Judgment for the amount determined by the first Adjudicator under Payment Claim 18 and it would seem now had sought to reconsider the basis on which it had obtained that Judgment.

Justice McDougall noted that many of the claims in Payment Claim 21 had not been the subject of an adjudication and were unrelated to those previous claims. He saw no reason why those claims couldn't proceed to an adjudication.

Justice McDougall granted the injunction on the claims that had been adjudicated.

Justice McDougall considered amounts that had been claimed in Payment Claim 21 associated with the costs of the suspension. Section 27 (2A) Building and Construction Industry Security of Payment Act 1999 provides that a builder has the right to recover losses or expenses incurred as a result of the removal of any work. Justice McDougall saw nothing in the Act that prevents those losses and expenses becoming the subject of a payment claim. In

Repetitious payment claims: a new decision (cont)

particular he said losses and expenses in this context should not be read down and should be subject to a liberal construction such that loss of profit on the work is not inconsistent with various provisions of the Act. In essence he let this issue be determined by the Adjudicator but pointed out that "the right to suspend work will lose much of its efficacy if the proprietor could, with impunity and without cost, react to the suspension by withdrawing the work from the builder."

The last point determined by the Court was whether the right to apply for Judgment in the absence of a payment schedule (claim 19) should be regarded as the statutory equivalent of an adjudicated determination. The court found that there was not the requisite level of determination as there hadn't been a reference to any decision-making body. In essence a requisite decision was missing to attract the principles of estoppel.

Summary

Justice McDougall's summary of the principal cases on the subject, clarifies what the rights of the parties are in repetitious claims. Unless there has been a determination by an Adjudicator the rehashing of claims and subsequent payment claims may continue. From a claimant's point of view it is important to initially select the best claim to proceed with by way of Default Judgment or by way of Adjudication Application.

Economic conditions affecting construction and development – issues for off the plan contracts (cont)

(continued from page 1)

> dispose of land for the purposes of the BCCMA and therefore the seller was required to comply with Section 421(2) of the *Environmental Protection Act* before entering into the Option Agreement. As the seller had failed to do so, the buyer had a right to rescind the Option Agreement and to be refunded all amounts paid under the agreement.

Effect of this case

This case highlights the effect of consumer legislation under the *Body Corporate Community Management Act 1997*, *Property Law Act 1974* and *Environmental Protection Act 1994* with respect to options and the need for developers to ensure that all appropriate notices are given under the various legislation.

The Second Case

A recent decision of the Supreme Court of Queensland led to the State Government enacting urgent changes to the *Body Corporate and Community Management Act 1997* (**"BCCMA"**). The decision in ***Bossichix Pty Ltd –v– Martinek Holdings Pty Ltd*** interpreted Section 212 of the BCCMA strictly giving the purchaser scope for terminating the contract of sale, based on the inadequate wording in the contract.

Under the interpretation in Bossichix, it was likely that many "off the plan" contracts would fail to comply with the former Section 212. In response to the decision, the Queensland Government took steps to amend Section 212 of the BCCMA.

Effect of this case

The new Section 212 deems a contract to contain a term that settlement must not take place earlier than 14 days after notice is given to the buyer that the scheme has been established or changed. The effect of this deeming provision removes the onus from the seller to include a compliant term in the contract.

A new Section 362A was also included to give retrospective effect to the new Section 212, so that it applies to contracts entered into both before and after the commencement date of the amending Section ie 5 June 2009. The amendments do not apply to contracts already terminated under the old provision or relevant legal proceedings which concluded before the commencement date.

Conclusion

Whilst the first case alerts the industry to the continued need for attention to detail, the second case demonstrates that in the prevailing economic climate the Queensland State Government is prepared to act quickly to step in and prevent widespread termination of contracts.

The consequences of amending Australian Standard Building Contracts

by Garth O'Rafferty, Lawyer

As government spending on infrastructure has increased many companies and contractors are bidding through tender processes and it is worth considering the implications of amendments made to Australian Standards General Conditions of Contract through tender or other documents.

Background

In the case of PRA Electrical Pty Ltd –v– Perseverance Exploration Pty Ltd [2007] VSCA 310, an invitation to tender for electrical and instrumentation work at a gold mine site was sent to tenderers. The contract price was a fixed lump sum and provided for works of over $3 million. A dispute arose over a minor amendment made to AS 4000-1997 through the tender request documentation.

The tender documents indicated that the contract would be based on General Conditions AS 4000-1997. Condition 6 of AS 4000 effectively provides that a written contract need not be signed as documents evidencing the parties' intentions constitute the Contract. However, the Principal's tender documents amended AS 4000 by stating that "*…condition 6, is deleted in its entirety*" and that the contract does not come into effect until it is signed by the parties.

Although the Principal, Perserverance, had during the tender process informed the successful tenderer, PRA, that a formal contract document would be issued to it for signing, no formal contract document was ever prepared for signing, and no contract was ever signed.

The Dispute

The parties had conducted themselves as if an agreement had been signed. PRA commenced work on site, provided the 10% security required by condition 5 of AS 4000, corresponded in writing with the Superintendent referring to specific conditions of AS 4000, issued a Show Cause Notice to Perseverance under condition 39.7 of AS 4000, and submitted four monthly progress claims seeking over $3 million for contract works and variations. A director of PRA later admitted in arbitration that he "presumed" that he was contractually bound by AS 4000.

PRA, carried out the works for several months. The principal, Perseverance, invoked Condition 39 in AS 4000 based on a substantial breach of contract by PRA and took the works and all PRA's materials and plant and equipment out of PRA's control.

PRA gave Perseverance a notice of dispute under condition 42.1 of AS 4000, stating that by taking the action it did, Perseverance had "*breached the Contract*".

PRA, in disputing the actions of Perseverance, attended several arbitration proceedings under condition 42 of AS 4000, significantly, PRA later argued that there was never any contract because, in accordance with Perseverance's amendment in the tender documents, no formal contract was ever signed. If there was no contract Perseverance would have no right to take control of PRA's materials and plant.

The Court Action

The Victorian Supreme Court was asked to determine whether or not there was ever any contract between PRA and Perseverance. The Court found that a contract did exist, and PRA appealed the decision to the Full Court of the Supreme Court.

The Appeal Court Ruling

PRA's appeal was dismissed by the Victorian Supreme Court of Appeal, which found that:

- PRA stood to benefit from the amendment to AS 4000 in the tender documents – the amendment effectively entitled PRA to suspend works while the contract remained unsigned. By having pressed on with the work in the way it did, PRA had waived its right to rely on that amendment.
- An "implied" contract also existed which contained AS 4000 but excluded the amendment requiring the contract to be signed by the parties, because, the Court ruled, the parties were commercial entities who had negotiated a detailed agreement over a six week period, the value of works running into the millions of dollars – an objective observer would readily infer that the parties had by their conduct, agreed to be bound by AS 4000 despite no formal contract being signed.
- PRA let Perseverance believe it had the contractual ability to take all materials and plant and equipment out of PRA's hands and give them to another contractor to complete the works, and PRA could not now deny that such an agreement existed.

Lessons to be learned:

- Principals and Contractors should be conscious of the possible disputes arising from amendments to Australian Standard Building Contracts. While the judgment in PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd is one of common-sense, the seemingly minor amendment in the tender documents resulted in several arbitration proceedings, a no doubt costly Supreme Court action and an appeal to the Full Court of the Supreme Court.
- Principals and contractors should be aware that their legal position may be defined by both the written terms of a contract or by their oral agreement and the subsequent actions of the parties.

Reviews and Appeals in the State Administrative Tribunal

by Darren Miller, Partner

In August 2009 the Western Australia Supreme Court of Appeal (***Hartwig –v– Builders' Registration Board of Western Australia [2009] WASCA 138***) was required to consider a decision of the State Administrative Tribunal (**"SAT"**) in relation to disciplinary proceedings commenced by the Builders' Registration Board (**"the Board"**).

Background

The builder, Hartwig, carried out construction works for three different complainants. In each case a complaint was made to the Board for faulty or unsatisfactory building work. Subsequently the Building Disputes Tribunal (**"BDT"**) made orders pursuant to Section 12A(1) of the *Builders' Registration Act 1939 (WA)* requiring Hartwig to remedy the faulty building work within 28 days. In each case Hartwig failed to do so. Subsequently the orders of the Disputes Tribunal were revoked and substitution orders were made for Hartwig to compensate the complainants for the cost of repairing the work. Hartwig paid the compensation amounts to each of the complainants.

Some nine months later the Board commenced disciplinary proceedings against Hartwig in the SAT in its original jurisdiction, pursuant to Section 12D of the Act.

On 29 January 2008 a mediation conference was held which resulted in Hartwig raising two preliminary questions. The questions were in relation to the validity of the original orders made by the Disputes Tribunal, ie for rectification of the works.

The first of those questions was:

Is the Registrar an authorised person who, under the Builders' Registration Act in exercising "such jurisdiction of the Disputes Tribunal as is prescribed" required to comply with or give effect to the provisions of the Act (including section 36(1), 36(4) and 37(1)) in the course of making a decision or order in respect of a complaint under s12A(1) or s12A(1a) of the Act?

The original orders were made by the Acting Deputy Registrar under the jurisdiction conferred to him by s 33A (1) of the Act which provides that:

Such of the jurisdiction of the Disputes Tribunal as is prescribed may be exercised by —

(a) *the registrar, with the written approval of the Disputes Tribunal or the chairperson; or*

(b) *an authorised person, with the written approval of the chairperson,*

and for that purpose the Registrar or authorised person has all the powers of the Disputes Tribunal necessary to do so.

Sections 36(1), 36(4) and 37(1) of the Act relate to the procedure used at sittings of the Disputes Tribunal and provide that the Tribunal conduct a fair and equitable process in a timely manner without regard to legal technicalities. There is also a requirement to record the proceedings.

On 30 June 2008, the President of the SAT answered those questions and held that neither of the relevant sections applied to the registrar's exercise of a delegated jurisdiction. The President did however make note of the obligations on the Registrar to afford the parties a fair process by providing opportunity to attend and make comment on any subject of complaint.

Collateral Challenge

The preliminary questions in effect amounted to an attack of the decision of the Disputes Tribunal in imposing the original orders.

The Court of Appeal considered whether or not in proceedings in the SAT's original jurisdiction it was open to a party to make a collateral attack on the validity of the original decision of the Disputes Tribunal. If such an attack was open, was it then precluded if that person has not sought a review of the original decision under the Act?

The Court made the point that the SAT only has the jurisdiction conferred on it by the *SAT Act*, which divides the jurisdiction into ordinary and review jurisdiction.

The Court of Appeal held that it was not open for the SAT in the course of a disciplinary proceeding in its original jurisdiction to determine a question which might have been, but was not the subject of review proceedings. Hartwig, therefore should have sought a review of the Disputes Tribunal decision in the SAT's review jurisdiction.

In conclusion, it is important that parties making an appeal to the SAT on a decision of the Disputes Tribunal, request a review by the SAT under its review jurisdiction and do not attempt to attack the findings or rulings of the BDT in subsequent disciplinary proceedings for failure to comply with orders made by the BDT.

Industry alerts

Commonwealth

2/10/09

The Housing Industry Association (**"HIA"**) revealed statistics showing that although housing loans for the construction of new homes had risen by 59per cent between November 2008 and July 2009 local government permits to build new houses had risen only 20per cent. HIA members have voiced concerns that applications are becoming bogged down in local government planning offices.

Queensland

28/09/09

The Australian Competition and Consumer Commission (**"ACCC"**) is pursuing three construction companies alleging price fixing and misleading and deceptive conduct in tendering procedures for Queensland Government construction projects. The ACCC alleges that TF Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd are alleged to be involved in 'cover pricing' practices.

Australian Capital Territory

15/10/09

The ACT government is considering the *Building and Construction Industry (Security for Payments) Bill 2009* which will establish an adjudication process as an alternative to the current lengthy and costly litigation process.

South Australia

15/10/09

Currently the South Australian Upper House is debating the *Building and Construction Security of Payment Bill 2009* which will amend the *Commercial Arbitration & Industrial Referral Agreements Act 1986* to establish an adjudication process for the industry in that State.

Tasmania

On 27 October the Tasmanian House of Assembly commenced the first reading of the *Building and Construction Industry Security of Payment Bill 2009*. The Bill seeks to provide timely progress payment provisions for the construction industry not provided for under the current *Contractors' Debts Act 1939*.

Western Australia

04/09/09

The Federal Government will establish a National Resource Sector Employment Taskforce to help secure the 70,000 skilled workers needed to build and operate projects over the next 10 years. A project co-ordinator will be appointed to work with the Western Australian Government and the Gorgon joint venture partners to establish the 6,000 strong workforce required for that project.

(source Thomson Reuters)

Contacts

If you would like to discuss any of the issues raised in this update or require further information, please contact

Brisbane

Tony Mylne, Partner
+61 7 3292 9715
amylne@macrossans.com.au

Robin Lonergan, Partner
+61 7 3292 9710
rlonergan@macrossans.com.au

Bill Hickey, Partner
+61 7 3292 9723
whickey@macrossans.com.au

Jeanenne Wilkinson, Senior Associate
+61 7 3292 9757
jwilkinson@macrossans.com.au

Vijay Maraj, Lawyer
+61 7 3292 9748
vmaraj@macrossans.com.au

Sydney (City)

Ned Boyce, Partner
+61 2 9391 3001
eboyce@hunthunt.com.au

Sydney (North West)

Ian Miller, Partner
+61 2 9804 5704
imiller@hunthunt.com.au

Melbourne

Andrew Barclay, Special Counsel
+61 3 8602 9219
abarclay@hunthunt.com.au

Adelaide

Rick Harley, Partner
+61 8 8414 3373
rharley@hunthunt.com.au

Perth

Marcus Easthope, Lawyer
Marks and Sands Lawyers
+61 8 9488 1300
Marcus.Easthope@marksandsands.com.au

Hobart

Guy Abel, Partner
+61 3 6210 6221
gabel@hunthunt.com.au

Darwin

Christine Osborne, Partner
+61 8 8924 2600
cosborne@huntnt.com.au

Newcastle

Susan Moran, Partner
+61 2 4925 5500
smoran@hunthunt.com.au

Disclaimer: The information contained in this newsletter is not advice and should not be relied upon as legal advice. Macrossans Lawyers recommend that if you have a matter that is legal, or has legal implications, that you consult with your legal adviser. If you no longer wish to receive this Update or any other publication from Macrossans Lawyers, please email us at ssadikaj@macrossans.com.au

This publication is printed on an FSC certified paper using 100% vegetable based inks. The printing method does not involve the use of isopropyl alcohol and meets the international environment standard ISO 14001.