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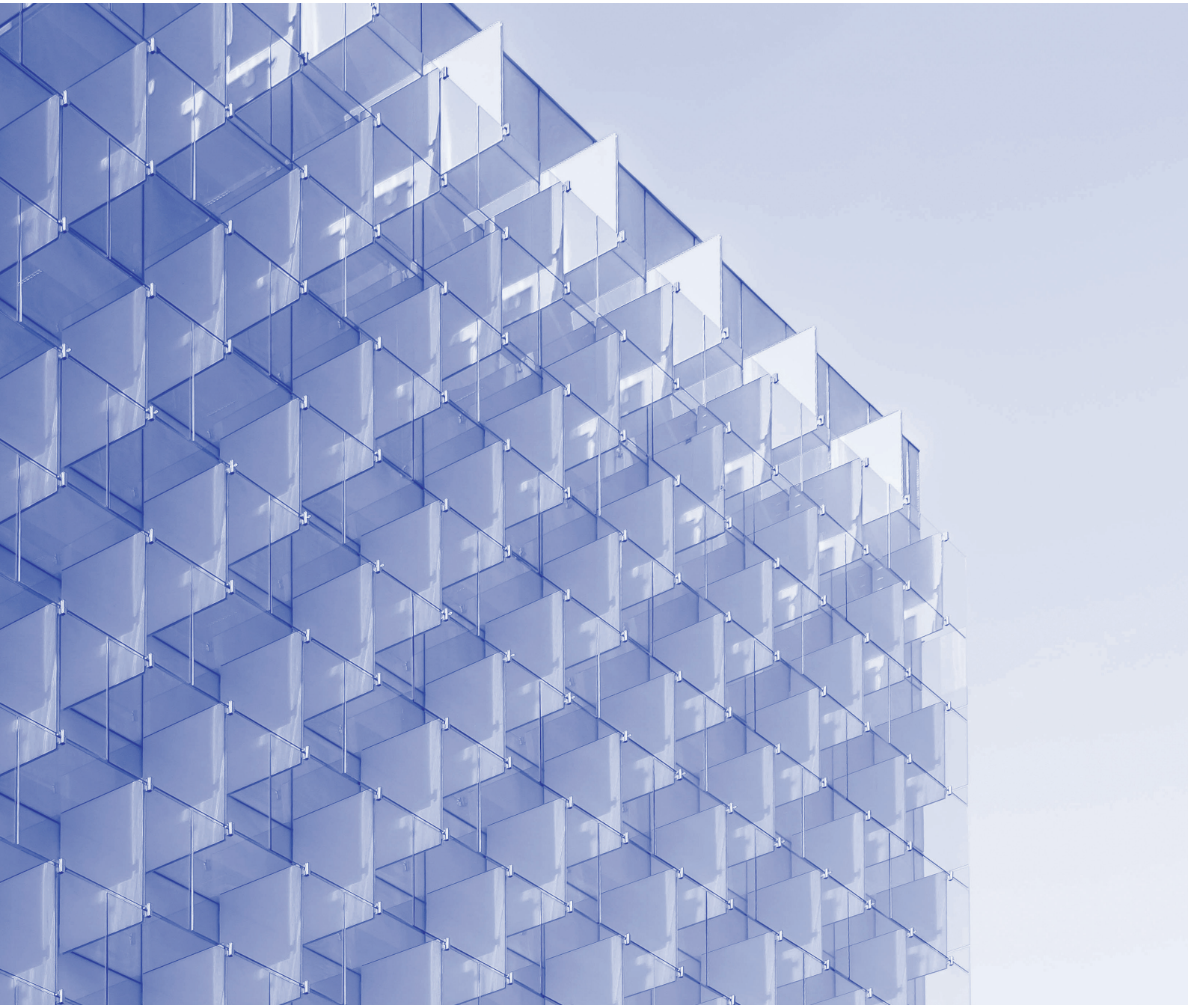

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The ACLN acknowledges the Australian Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which our company is located and where we conduct our business. We pay our respects to ancestors and Elders, past, present and emerging.

CONTENTS #201
ARTICLES

CONTENTS #201
ARTICLES

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EDITORIAL

Myra Nikolich

The Honourable the Chief Justice Sundaresh Menon touches on the role that international commercial courts might play in the management of complex disputes. His Honour outlines some concerns over the 'complexification' of commercial disputes, and especially, of construction disputes, and considers the consequences that this is likely to have for our approach to the resolution of such disputes. In this article, he focuses on the class of disputes which are so complex that they have become practically impossible to properly adjudicate. His Honour approaches this topic by providing an overview of the complexity problem and the challenges that it poses and suggests that we need to re–imagine the way we manage such disputes. His Honour concludes with some positive thoughts on the role that international commercial courts might play in the management of complex disputes.

Jonathan Newby and Jonathan Sumskas report on the recent Building Amendment (Registration and Other Matters) Bill 2021 (Vic) which introduces a number of amendments to the *Building Act 1993* (Vic). One of the key amendments is that the limitation period for 'cladding building actions' is now extended from 12 years to 15 years. According to the authors, construction industry professionals and their professional indemnity insurers should consider the impact of the extended limitation period for cladding claims.

Anna Scannell, Sefton Warner and Vujan Krunic consider new Commonwealth legislation which provides a framework for automatic mutual recognition of an individual's registration as a building practitioner in one state or territory, in other states and territories. Once this has been uniformly adopted around Australia and extended to building practitioners it will streamline the existing mutual recognition application process and make working as a building practitioner easier within Australia across state borders.

Joseph Xuereb and Harrison Frith discuss claims for retention moneys under the Victorian security of payment legislation. According to the authors, Victoria's position on claims for retention moneys is not only inconsistent, but it is contrary with other jurisdictions in Australia. The authors submit that the time is ripe for legislative reform to render Victoria's position uniform with the rest of the country; that the only way to correct the contentious position in Victoria, if the legislature saw fit to do so in order to reinforce the objects of the Act and provide for desirable uniformity with interstate legislation, is by passing an amendment that properly allows payment claims to include amounts for retention moneys.

David Solomon reports on the new Australian Standard AS 1576.7 (Int):2021—Scaffolding, Part 7: Safe use of encapsulation on scaffolding, that was published in September 2021. The objective of the Standard is to provide requirements and test methods for encapsulation and containment products for attachment to scaffolding to provide products that are suitable for the intended application, including fire hazard properties, strength properties ad fixing requirements.

Stephen Aroney and Cassandra McAlary discuss *Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888* [2021] NSWSC 1315, a long–awaited decision on biowood cladding. As noted by the authors, each combustible cladding case has to be taken on its own merits with some guidance being provided by this judgment.

Julian Bailey, Emma Knight and Therese Marie Rodgers discuss extensions of time in construction projects. Contractors' extension of time (EOT) entitlements and associated financial rights are always to be assessed pursuant to the applicable contract mechanism. A recurring question is whether EOT entitlements are to be determined prospectively, or with the benefit of hindsight. The authors consider two Australian cases that highlight the conflicting positions which may arise.

Corey Steel and Michael Robbins note that in Australia, resolving disputes through arbitration has been an attractive option for commercial parties. However, whilst arbitration has its benefits, flexibility has its limits, and strategic case management has its risks. The authors discuss *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323, in which the court was asked to consider the consequences of a deliberate procedural direction taken in an arbitration. In this case, the court set aside an interim arbitral award on the basis that the three–member tribunal was *functus officio*. The authors examine the risks to parties in arbitration that arose in this case.

Brett Vincent and James Gilronan discuss rise and fall clauses in construction contracts. Largely overlooked in the Australian construction industry for over two decades, interest has picked up in recent months due to rapid increases in materials prices. The authors suggest that legal practitioners and contractors should learn about or refresh their knowledge of rise and fall clauses and consider their inclusion in construction contracts.

Jay Hatten provides a summary on four construction companies and an officer from one of the companies who were convicted of work health and safety breaches. Each case related to serious work health and safety breaches which resulted in either the death or serious injury of a worker that could and should have been prevented.

Robert Riddell and Shaun Clifford discuss payment claims and supporting statements under sections 13(7) and (8) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Essentially, a head contractor must not serve a payment claim unless the claim is accompanied by a supporting statement in the form approved by the Secretary, and it must not be false or misleading. The authors highlight the consequences of not providing a supporting statement, or providing a false or misleading supporting statement.

Christine Jones, Marie–Louise Scarf and Rebecca Weakley consider the decision in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T [No 2]* [2021] VSCA 122, in which the issue regarding apportionment of liability between the building surveyor and the fire engineering consultant was revisited.

Andrew Hales, Claire Laverick and Tony Issa discuss who bears the cost when less work is undertaken than originally contemplated. Following the decision in *Day v Quince's Quality Building Services Pty Ltd* [2021] NSWCATAP 296, where a contract provides for a reduction in the contract sum for omitted or decreased works, the relevant consideration is a common sense analysis of whether works have been omitted or decreased. It is not whether work is done even if in a different manner to achieve the same or a similar result. This decision also confirms that contract rates are a ceiling for *quantum meruit* claims arising where parties do not document variations in writing.

Albert Monichino QC discusses the decision in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110. In this case, the Full Court of the Federal Court was asked to consider an application for enforcement of a foreign arbitral award in circumstances where the procedure for the appointment of the tribunal was not followed. This decision emphasises the need to ensure that the appointment of the tribunal is carried out in accordance with the procedure set out in the arbitration agreement. Failure to follow the appointment procedure can undermine the conduct of the arbitration.

Janine Stewart, Rebecca Cook and Irene Kim focus on adjudicators' jurisdiction across key Commonwealth jurisdictions (Australia, New Zealand and the United Kingdom) and whether the breadth of that jurisdiction means that adjudication is fit for purpose in the current construction environment. The authors also address the level of court intervention in the adjudication process across jurisdictions.

Season's Greetings: At the end of our second challenging year—and as we learn to live with COVID–19—we reflect on the difficulties experienced by so many in our communities. We hope that the challenges we faced over the last two years are behind us and we look forward to more optimistic times. We also take this time to appreciate those positive moments along the way that have kept our spirits up and given us strength.

As in previous years, we would like to express our sincere gratitude to our authors for their generosity, grace and goodwill in sharing their expertise, and to you, our readers, for your interest in and support of the ACLN. We very much look forward to our continuing association in 2022. We wish you and your families a very happy and safe festive season, and the very best for the coming new year.

THE ROLE OF COMMERCIAL COURTS IN THE MANAGEMENT OF COMPLEX DISPUTES

The Honourable the Chief Justice Sundaresh Menon

Chief Justice of the Supreme Court, Singapore

INTRODUCTION

In this article, I outline some concerns over the 'complexification' of commercial disputes, and especially, of construction disputes, and consider the consequences that this is likely to have for our approach to the resolution of such disputes. Construction lawyers are not strangers to complex disputes, nor to the challenges that complexity poses to our ability to do justice sensibly and effectively. The perennial complaints of excessive cost and delay are well–known, and I do not propose to repeat them. Instead, I would like to focus on the class of disputes which are so factually rich and complex that they have become practically impossible to properly adjudicate.

I propose to approach this in two parts: first, by providing an overview of the complexity problem and the challenges that it poses; and second, by suggesting that we need to re–imagine the way we manage and address such disputes. I will then briefly conclude with some thoughts on the role that international commercial courts might play in this endeavour.

THE COMPLEXITY PROBLEM

As our world becomes more complex, so have our disputes. Nowhere is this more keenly felt than in the field of international construction projects. Here, factual, technical and procedural complexity are often inescapable, if not definitional features.[1]

By all accounts, the complexification of construction disputes is gathering pace. This seems to be driven by at least three factors. First, there is the sheer size and scale of the projects themselves. In the words of Lord Justice Jackson, some project contracts are now 'so vast that no human being could possibly be expected to read them from beginning to end'.[2]

Indeed, as the number and size of mega–projects continues to grow, so too will the number and size of mega–disputes;[3] in 2019, one infrastructure consultancy reported handling a single dispute worth US$1.5 billion.[4] This leads to the second point, which is that the higher the stakes involved, the greater the tendency to adopt extremely adversarial approaches towards dispute resolution. This invariably complicates the task of managing and resolving the dispute at hand. It is not uncommon in such cases to hear of counsel taking a 'scorched earth' approach, leaving no stone unturned, and putting to the tribunal every argument, at times seemingly without regard to its legal merit.[5] In arbitration, this is sometimes done as part of a strategy of seeding the ground for a possible due process challenge of the award, in case of an unfavourable outcome. In these cases, losing the argument is simply not an option, despite the simple reality that every argument tends to produce at least one loser!

Finally, technology threatens to feed, even super–charge, the complexities inherent in construction disputes. The digital revolution has enabled the creation of massive quantities of documentation and data,[6] which hinders efforts to keep in check the costs and delays that attend the resolution of these disputes. In a striking illustration of the scale of the problem, one law firm on a tight deadline to submit the statement of claim in a dispute arising from the construction of an airport found itself presented with seven terabytes of data—that is, seven million million bytes of data—comprising some 15 million individual documents.[7]

Where does this leave us and how might this affect our approach to dispute resolution? While our existing processes may have worked well in earlier times when the factual questions involved were relatively narrow or straightforward, the world we live in today is infinitely more complex. Construction disputes involving numerous separate contracts and invoices spanning tens of thousands of pages are now par for the course.[8] In the literature on construction disputes, accounts of cases involving in excess of 10,000 pages of written submissions are not uncommon.[9]

To a point, complexity can be mitigated by careful and sensible case management. But the worry is that we may be past that point; that cases have gotten so complex and large that we have reached the limits of their litigability in a conventional way.

In a fascinating and thought–provoking article, Professor Jörg Risse speaks of what he refers to as the 'complexity problem'.[10] Take, for example, a case involving 10,000 pages of written submissions—which, is an actual instance recounted in the article.

Assume the arbitrator takes about six minutes to read a page, and therefore reads about 10 pages in an hour; she would need 1,000 hours just to read those submissions—about six months of concentrated reading, by Professor Risse's reckoning.[11] Of course, this does not include the time that she would need to refresh her mind of what had been read days, weeks or months earlier; to think about how it all comes together, or does not, as the case may be; or to verify what is written. And then there is the need to take that in conjunction with the equally weighty material on the opposite side; and finally, to evaluate all of that before making a decision.

This might be an extreme example, but the fact is that such disputes already exist, and I suggest that even those that fall well within these parameters would nonetheless be extremely difficult, if not practically impossible, to fairly adjudicate using conventional methods. This is not for incompetence or want of trying; the reality, rather, is that there are cognitive limits to our ability to absorb, retain and synthesise information.[12] While we might rely on aids and techniques to boost and stretch those limits, there comes a point when the human mind and will must yield to physical limits; logic lapses into mental shortcuts and heuristics, and the fair and proper adjudication of the dispute then becomes, in Professor Risse's words, 'a fiction'.[13]

A WAY FORWARD—RE–IMAGINING THE PATHWAYS TO JUSTICE

If this is not an unrealistic scenario, what can we do to address this? Two broad strategies have been developed to tackle the problem of managing such disputes—one prophylactic, the other reactive.

CONTAINING DISPUTES

The first of these involves trying to contain disputes before they get too complex to manage. This strategy is especially useful when applied to seemingly complex disputes which have become more than the sum of their numerous but individually far smaller parts. Such disputes become exacerbated not always because they involve interlocking issues which must necessarily be determined together; but rather because the resolution of their otherwise discrete parts had not been promptly pursued, and instead were postponed before later being consolidated.[14] There is, in this context, significant scope for the promotion of processes and procedures aimed at resolving small, discrete disputes quickly and cheaply, so that these are not left to fester and eventually snowballed into much larger issues. There are examples to validate such an approach.

Statutory adjudication, for example, has seen considerable success in various jurisdictions around the world, and prominently in the United Kingdom.[15] It offers the parties a quick and straightforward means of obtaining a decision in as little as 28 days with a much streamlined evidentiary process.[16] Although such decisions are only temporarily binding at law, anecdotal evidence suggests that in the majority of cases, the losing party is content to treat the decision as final and often will not challenge it subsequently in arbitration or litigation.[17]

Dispute boards are also gaining popularity, particularly in North America.[18] These come in different forms and structures, but share the objective of nipping incipient disputes in the bud quickly and informally, whether through the facilitation of party negotiations, or by the issuance of a non–binding or temporarily binding decision.[19]

There is also some statistical evidence to suggest that dispute boards are effective at preventing disputes from arising and escalating; various surveys indicate that upwards of 90 per cent of matters addressed by dispute board panels tend to be settled in the wake of the panel's recommendations,[20] and more than half the projects for which a dispute board is empanelled reported zero disputes crystallised.[21]

If the deployment of such processes have helped reduce the incidence of disputes that reach unmanageable levels of complexity, then surely, we should devote far more attention than we presently do to thinking about how to improve and strengthen those processes.

DOWNSIZING DISPUTES

The second strategy applies where a dispute has already become so complex as to be unmanageable. Faced with such disputes, drastic measures may be needed to downsize the dispute. This will require, first and foremost, active and robust case management. This could take the form of setting limits on the length of written submissions, the use of 'chess clock' time management at oral hearings, and strict adherence to procedural orders regarding the admissibility of fresh evidence or arguments. The making of such directions may draw cries of breach of due process, but I would argue that doing nothing—thus resulting in judges or arbitrators not being able properly to decide the dispute—is a far greater threat to the parties' right to be heard.

When we introduced strict page limits for appellate submissions in our court, this was met with howls of protest. My response at the time was that there was a far better chance that concise and manageable submissions

would actually be read, digested and engaged with, than would an unrestrained stream of consciousness.

A second, more radical means of downsizing the dispute might entail the use of representative sampling. In a dispute involving thousands of defects, it may be practically impossible to require proof of each and every defect in the assessment of damages. To deal with such cases, some courts[22] have endorsed an approach under which the result obtained in relation to a smaller, more manageable representative sample may be extrapolated to the wider set.

In *Amey LG Limited v Cumbria County Council*,[23] an employer claimed damages against a roadworks contractor for thousands of instances of allegedly defective patching and surfacing works. The claim was advanced on the basis of a sample set of the works revealing a certain rate of defects, which the employer argued could be extrapolated to the larger set, with the result that its claim for damages would balloon from some £22,000—based purely on the sample set—to £1.69 million—when extrapolated to the entire works.

Though the larger claim was ultimately dismissed on the basis that the sample evidence was insufficiently representative, the important point for our purposes is the court's endorsement of the employer's argument that the substantial quantities of patching and surfacing works made it 'completely impractical' for the employer to have inspected every item of work.[24] While it remains unclear whether such an approach will be accepted in cases where proof of each defect is theoretically possible, even if prohibitively expensive, we should surely be leaning in that direction.

Building on this, we might even consider the development of voluntary protocols under which parties might agree certain ground rules, such as carving out a set of 'excluded' low–value claims for which recovery is pegged to the percentage eventually recovered in respect of the main 'non–excluded' claims.

Some of these suggestions detract somewhat from the common wisdom that justice requires the fullest possible determination of all the facts. But whilst accuracy is undoubtedly important, it is surely an essential element of justice—in particular, access to justice—that the time and resources expended in that quest are contained within sensible and proportional limits.

What underlies all these suggestions is the need to forge a shift of mindset—one that moves away from a narrower view of justice as requiring an exhaustive search for the truth, to one which embraces processes and procedures which, whilst not as thorough, are nonetheless capable of producing sufficiently reliable decisions quicker and at less cost.

Indeed, if the popularity and success of adjudication and dispute board procedures are anything to go by, it seems fair to say that there is some readiness to forgo exhaustive due process in favour of speed, economy and a 'good enough' decision.[25] But beyond this, if we accept Professor Risse's argument, as I am inclined to, then in these cases the exhaustive search for the truth is, in truth, a chimera; a comforting illusion that helps us feel better about our quest for justice by allowing us to believe that we have at least tried our best. Do we really believe this is what the parties would want if they were presented with a brutally frank and honest assessment of the realities?

CONCLUSION—ROLE OF INTERNATIONAL COMMERCIAL COURTS

Let me conclude by touching on the role that international commercial courts, or ICCs, might play in the management of complex disputes.

I had earlier suggested that a change of mindset is required. I want to leave you with the thought that ICCs may be well placed to support this endeavour. Many of the suggestions I have outlined call for robust approaches to case management, which may give rise to due process concerns. Unfounded as these concerns tend to be,[26] the fact remains that arbitrators may find themselves somewhat constrained. International commercial courts, on the other hand, are less susceptible to what has been termed due process paranoia. The Singapore International Commercial Court ('SICC'), for instance, empowers its judges with wide and flexible powers of case management, and robust case management is a hallmark of our dispute resolution process.

In a recent case in which no less than 37 interlocutory applications were filed, procedural timelines were enforced through active, judge–led case management: deadlines were set for the filing of applications so that trial dates would not be derailed; page limits were imposed for written submissions; and time banks were used to keep the length of oral submissions in check.[27]

International commercial courts can offer other features that make them uniquely suited to the resolution of complex international construction disputes: these include flexibility of procedure, rights of audience for foreign counsel and the ability to join third parties, to name a few.

Of course, one must be satisfied as to the quality of the decision–makers.

In this regard, ICCs, including the SICC, tend to boast strong line–ups of internationally renowned judges. The SICC bench includes five fellows of the Academy, including Chief Justice McLachlin, Sir Vivian Ramsey, Professor Doug Jones and most recently, Judicial Commissioner Philip Jeyaretnam. One of the ways in which ICCs can leverage on such expertise is through the creation of specialised lists, and this is an initiative we are presently exploring.

All these features put ICCs in good stead to serve as a useful complement to international arbitration in the resolution of complex international construction disputes. This neatly dovetails with the crucial point that the courts and arbitration co–exist alongside one another in a relationship of complementarity rather than competition. International arbitration remains the most popular mechanism for the resolution of complex construction disputes. And national courts, including ICCs, continue to support arbitration by, amongst other things, enforcing agreements to arbitrate, making interim orders in support of arbitral proceedings, and applying sensible standards of due process when considering applications to set aside or enforce arbitral awards.[28] In addition, they can also contribute to the continuing dialogue on best practices for the management and resolution of these disputes by developing their own innovative responses.

I am confident that ICCs will, in these ways, not only play an increasingly significant role as one of the principal partners of arbitration, but also as one of the key pathways to justice for parties seeking sensible dispute resolution solutions in this age.

REFERENCES

1. According to the 2019 Queen Mary University of London International Arbitration Survey titled 'Driving Efficiency in International Construction Disputes' at p 10, 'factual and technical complexity', 'large amounts of evidence' and the presence of 'multiple claims and/or multiple parties' were selected by respondents as the most defining features of international construction arbitration.

2. *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] 1 WLR 3549 at [57]: 'Many people draft different sections of the contract and specification. The final contract is an amalgam of all these efforts. Sometimes, although not in this case, the contracts are so vast that no human being could possibly be expected to read them from beginning to end.'

3. See, for example, Boston's Central Artery/Tunnel Project, also known as the 'Big Dig', which was a 15–year, US$15 billion project: see Kurt L Dettman, Martin J Harty and Joel Lewin, 'Resolving Megaproject Claims: Lessons from Boston's 'Big Dig'' (2010) 30 *The Construction Lawyer*.

4. See the Arcadis 2020 Global Construction Disputes Report (Arcadis 2020) at p 10. In 2013, disputes values in the US tripled in value to $34.3 million and rose in the UK to their highest value since the Arcadis reports began at $27.9 million: Construction Global, 'Construction disputes rise in value to $32.1 million in 2013' (10 June 2013): <https://www.constructionglobal.com/construction–projects/construction–disputes–rise–in–value–to–dollar321million–in–2013>.

5. Klaus Peter Berger, 'The need for speed in international arbitration' (2008) 25 *Journal of Int Arbitration* 595 at pp 595–596.

6. Thomas J Stipanowich, 'Managing construction conflict: Unfinished revolution, continuing evolution' (2014) 34 *The Construction Lawyer* (Stipanowich) at p 24.

7. TLS London, A Transperfect World, 'Using Legal Technology to Navigate Complex Data in Construction Arbitration' (9 October 2020): <https://www.transperfect.com/blog/using–legal–technology–navigate–complex–data–construction–arbitration>.

8. See *China Machine New Energy Cop v Jaguar Energy Guatemala LLC & Anor* [2020] 1 SLR 695 at [39] and [141(b)].

9. Jörg Risse, 'An inconvenient truth: The complexity problem and limits to justice' (2019) *Arbitration International* 291 (Risse) at pp 292–293. This excludes exhibits annexed to the written submissions, which ran for additional thousands of pages.

10. Risse describes this 'complexity problem' as arbitration's 'inconvenient truth'—a truth we are loath to acknowledge, but which we ignore at our own peril: see Risse at pp 296–297.

11. Risse at p 293: this derives from the assumption that since many major law firms expect 150 billable hours per month per fee earner, 1,000 billable working hours in six months seems a fair assumption.

12. Risse at p 297.

13. Risse at p 293.

14. See Stipanowich at p 3: 'More emphasis was placed on lawyered, adversarial processes, with many disputes being postponed and eventually consolidated in massive arbitration or litigation proceedings.'

15. Adjudication is now the most common dispute resolution method in the United Kingdom: see Arcadis 2020 at p 18.

16. Thomson Reuters Practical Law, 'Adjudication: A quick guide': <https://uk.practicallaw.thomsonreuters.com/8–381–7429?transitionType=Default&contextData=(sc.Default)&firstPage–true>. Note that the 28 days can be extended by agreement.

17. Robert Gaitskell, Speech at the Society of Construction Arbitrators Annual Conference 2005, 'Current Trends in Dispute Resolution—Focus on ICC Dispute Resolution Boards' (14 May 2005) (Gaitskell) at para 7.2; Rashda Rana, 'Is adjudication killing arbitration?' (2009) 75 *The International Journal of Arbitration, Mediation and Dispute Management* 223 at p 226; John Uff, 'Dispute resolution in the 21st century: Barriers or bridges?' (2001) *The International Journal of Arbitration, Mediation and Dispute Management* 4 at p 15: 'The availability of an impartial 'first round' decision will usually be sufficient to deter further more costly disputes'; Jackson J, 'Address by Jackson J to TECBAR, TeCSA and SCL (2005) 21 *Construction Law Journal*' 265 (Jackson) at p 271.

18. Gaitskell at paras 8.5–8.6. See also Arcadis 2020 at pp 20 and 23.

19. Gaitskell at paras 8.1–8.3.

20. See Gaitskell at para 8.4, noting that '[e]xperience shows that dispute boards are successful, that is, they deal with and finally dispose of virtually all the disputes that come before them. Broadly, it seems that something in the order of 97 per cent of disputes referred to a DB will not go beyond that procedure into arbitration or litigation'. See also Ann McGough, Dispute Resolution Board Foundation, 'Growth of Dispute Boards Around the World: DRBF Database', stating that over 98 per cent of matters going to a dispute board do not go on to later arbitration or litigation.

21. See Stipanowich at fn 42, citing Carol Menassa and Feniosky Pena Mora, 'Analysis of dispute review boards application in US construction projects from 1975 to 2007' (2010) 26 *J Manage Eng* 65, stating that more than 90 per cent of cases heard by dispute review board panels settled in the wake of panel recommendation, and that no disputes were ever heard by the panel in 50 per cent of projects; see also Michael Patchett–Joyce, 'Specialist techniques for construction dispute resolution: How many ways can the cat be skinned?' (2017) 4 *BCDR International Arbitration Review* 73 at p 84, noting that one survey found that in 60 per cent of projects with a dispute board, no dispute was experienced.

22. Representative sampling has also been relied on in the US, such as in the context of the assessment of civil penalties in respect of fraudulent claims for government benefits, where individual prosecutions can involve tens of thousands of claims: see Joe D Hesch and Mia Yugo, 'Can statistical sampling be used to prove liability under the FCA or does each provision of the statute require individual proofs?' (2017) 41 *American Journal of Trial Advocacy* 335. In *Tyson Foods Inc v Bouaphakeo, et al*, No 14–1146 (22 March 2016), the Supreme Court of the US declined to establish general rules governing the use of statistical evidence in all class action cases, but observed that at times, 'a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability': see Paul Weiss, 'The US Supreme Court Issues Decision Allowing Use of Statistical Sampling and Representative Evidence by Class Action Plaintiffs in *Tyson Foods*' (25 March 2016): <https://www.paulweiss.com/media/3411480/25mar16flsaalert.pdf>.

23. *Amey LG Limited v Cumbria County Council* [2016] EWHC 2856 (TCC) (*Amey*).

24. *Amey* at para 1.23.

25. Richard Wilmot–Smith QC, 'Due process and issues which prey on the minds of arbitrators and clients alike' (2021) 40 *Civil Justice Quarterly* 98 at p 101; Jackson at p 271, stating, in relation to the popularity of adjudication, that '[t]he inference must be that the business community generally feel that rough and ready justice is a price worth paying, in order to avoid the delay, the expense and the sacrifice of management time which is inherent in full–blown arbitration or litigation.'

26. Sundaresh Menon CJ, Speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020, 'Dispelling due process paranoia: Fairness, efficiency and the rule of law' (13 October 2020) at paras 36–48.

27. See *Hai Jiao 1306 Limited v Yaw Chee Siew and other suits* [2020] 5 SLR 21 for the judgment of the SICC.

28. Sundaresh Menon CJ, Speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020, 'Dispelling due process paranoia: Fairness, efficiency and the rule of law' (13 October 2020) at para 24.

Chief Justice Sundaresh Menon's paper was previously presented at the 7th Annual Conference of the International Academy of Construction Lawyers on 9 April 2021. The paper was also published on the Supreme Court of Singapore web site. Published with permission.

VICTORIA EXTENDS LIMITATION PERIOD FOR CLADDING ACTIONS TO 15 YEARS

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IN BRIEF

Construction industry professionals and their professional indemnity insurers should consider the impact of the extended limitation period for cladding claims.

INTRODUCTION

The Building Amendment (Registration and Other Matters) Bill 2021 (Vic) commenced late last month, which had the effect of introducing a number of amendments to the *Building Act 1993* (Vic).

One of the key amendments is that the limitation period for 'cladding building actions' is now extended from 12 years to 15 years. A 'cladding building action' is a claim:

... in connection with, or otherwise related to, a product or material that is, or could be, a non–compliant or non–conforming external wall cladding product.

Notably, this definition is not limited to claims concerning combustible cladding, and ostensibly applies to claims relating to any type of non–conforming external wall cladding.

The *Building Act* ordinarily allows owners 10 years to bring claims for defective building work (commencing on the date of issue of the relevant occupancy permit or certificate of final inspection). However, amendments were introduced in December last year which extended this period to 12 years for cladding building actions, where the action became, or would have become statute–barred between 16 July 2019 and 1 December 2021 (that is, the occupancy permit or certificate of final inspection was issued between 16 July 2009 and 1 December 2011).

The current amendments now further extend the limitation period to 15 years, where the claim would otherwise have become barred between 16 July 2019 and 1 December 2023. Accordingly, Victorian property owners whose cladding claims would have been extinguished within his period now have additional time to commence proceedings against builders and other building professionals.

The extended limitation period also benefits the state government by allowing it further time to bring recovery claims where it has paid for cladding rectification works as part of the Cladding Safety Victoria program.

MAIN TAKEAWAYS FOR CONSTRUCTION PROFESSIONALS AND THEIR INSURERS

This is a troubling development for building professionals and their professional indemnity insurers, as building owners and the state government (where it is completing rectification works) now have a further three years in which to bring their claims.

In fact, certain claims that were previously technically out of time have now been resurrected by these legislative changes.

Most construction professional indemnity policies now exclude combustible cladding claims. However, before these exclusions were introduced many professionals submitted blanket or bulk notifications of projects with combustible cladding.

Unfortunately, if building professionals only notified projects that were completed within the previous 10–year limitation period, there is the potential they may not be covered for claims which now have the benefit of this extended limitation period.

Construction professionals whose insurance cover is in 'run–off' would also be wise to review their insurance arrangements.

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AUTOMATIC MUTUAL RECOGNITION ON THE HORIZON FOR BUILDING PRACTITIONERS

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INTRODUCTION

New Commonwealth legislation provides a framework for automatic mutual recognition of an individual's registration as a building practitioner in one state or territory, in other states and territories. Once this has been uniformly adopted around Australia and extended to building practitioners (which may be as early as later in 2021), it will streamline the existing mutual recognition application process and make working as a building practitioner easier within Australia across state borders.

We recommend that construction industry participants with registered building practitioners in multiple jurisdictions:

• take note of the new automatic mutual recognition framework (summarised below); and

• be aware of potential expansion of the scheme to building practitioners by the end of 2021.

The *Mutual Recognition Amendment Act 2021* (Cth) (*MR Amendment Act*) commenced on 1 July 2021. It amends the *Mutual Recognition Act 1992* (Cth) (MR Act) to, amongst other things, provide a new automatic mutual recognition (AMR) scheme.

On 28 June 2021, the *Mutual Recognition (Victoria) Amendment Act 2021* (Vic) received Royal Assent. That Act amends the *Mutual Recognition (Victoria) Act 1998* (Vic) effective from 1 July 2021, which adopts the MR Act (including the AMR scheme) as law in Victoria.

WHAT IS IT?

Before 1 July 2021, the MR Act only enabled an individual carrying on an occupation in one state to apply for a licence or registration to carry on an equivalent occupation in another state. That involves the submission of an application for mutual recognition, payment of application fees and demonstrating satisfaction with requirements applicable to each jurisdiction.

The AMR scheme now enables an individual who is registered for an occupation in their home state to carry on those activities in other states and territories without having to apply for, and pay fees for, a second licence.

Essentially, the AMR scheme makes it easier for workers to operate in multiple states and territories, whilst maintaining safeguards to protect work standards, consumers, workers and others.

As with the pre–existing mutual recognition scheme, the AMR scheme only applies to individuals, and not to other legal entities such as companies.

WHO IS IN?

Victoria, New South Wales, the Australian Capital Territory and Northern Territory have adopted the amendments to date. The other states have committed to joining the scheme, and we expect that they will do so in the coming months.

The AMR scheme only operates between participating jurisdictions. So until the remaining states opt in, AMR will only apply to relevant occupations between the states and territories that have so far adopted the AMR scheme.

The AMR scheme does not apply to New Zealand occupational registrations and licences. However, the existing processes under the Trans–Tasman mutual recognition arrangements continue to apply.

WHAT IS COVERED?

The Victorian Treasurer has temporarily exempted[1] a number of occupations and activities from the operation of the AMR scheme in Victoria. This includes building practitioners, architects, plumbers,

labour hire, professional engineers, environmental auditors and land surveyors.

It is expected that the AMR scheme will begin to apply to these occupations later this year (by 31 December 2021, or at the latest by 30 June 2022 when the Treasurer's declaration is repealed).

The exemptions in Victoria, however, do not prevent a person licensed or registered in Victoria from carrying on work in another participating jurisdiction under the AMR scheme, as long as it is not an exempt registration in that jurisdiction.

For example, a practitioner may be able to obtain AMR in another participating jurisdiction to carry out engineering work if engineering work has not been exempted by that other jurisdiction.

WHAT IMPACT WILL THIS HAVE ON THE INDUSTRY?

The AMR scheme is still subject to certain checks—a person will not necessarily be able to pick up tools in another state automatically, for example, there may be notification requirements[2] in the second state.

For example, an individual intending to carry on a class of prescribed electrical contracting work or a class of prescribed electrical work in Victoria in reliance on automatic mutual recognition must notify the local registration authority (Energy Safe Victoria) before beginning to carry on the activity.[3]

This includes:

• electrical installation work carried out on electricity generation systems;

• electrical installation work carried out on all or part of a battery energy storage system;

• certain electrical installation work required to carry out a primary work function relating to low voltage fixed electrical equipment; and

• certain electrical installation work required to carry out a primary work function relating to low voltage fixed electrical equipment.

Automatic deemed registration will also not apply to a person if:

• the person is the subject of certain criminal, civil or disciplinary proceedings in any state;

• any registration the person is required to have to carry on the activity, or an occupation that covers the activity, in any state is cancelled or currently suspended as a result of disciplinary action;

• the person is otherwise personally prohibited from carrying on the activity, or an occupation that covers the activity, or is subject to any conditions in carrying on the activity, as a result of criminal, civil or disciplinary proceedings in any state;

• the person is refused registration in any state for an occupation that covers the activity;

• the person is authorised otherwise than under Part 3A to carry on the activity in the second state. For example, the person is substantively registered in another state, has obtained mutual recognition rather than AMR, or is automatically licensed under another scheme; and

• if a person fails to satisfy a relevant requirement for automatic deemed registration.

EXISTING AUTOMATIC LICENSED OCCUPATIONS RECOGNITION

The *Mutual Recognition (Automatic Licensed Occupations Recognition) Act 2014* (NSW) has provided for automatic recognition of a limited list of occupations (such as electricians and electrical contractors)[4] long before the new AMR scheme commenced. Under that Act, recognised licence holders in another state to New South Wales are deemed to hold the licence in New South Wales in certain circumstances.

REFERENCES

1. https://www.legislation.gov.au/Details/F2021L00886

2. https://www.legislation.gov.au/Details/F2021L00889

3. Registration for carrying out a class of electrical contracting prescribed by regulations under the *Electricity Safety Act 1998* for the purposes of Division 1 of Part 3 of the *Electricity Safety Act 1998* and registration for carrying out a class of electrical work prescribed by regulations under the *Electricity Safety Act 1998* for the purposes of Division 2 of Part 3 of the *Electricity Safety Act 1998*.

4. Mutual Recognition (Automatic Licensed Occupations Recognition) Regulation 2021 (NSW).

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A FISTFUL OF DOLLARS—CLAIMS FOR RETENTION MONEYS UNDER VICTORIAN SECURITY OF PAYMENT LEGISLATION

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When a man's got money in his pocket, he begins to appreciate peace—Clint Eastwood[1]

The mindset is that 'the money is ours and you will have to get it off us or sue us if you want it—Witness to the Collins Inquiry[2]

INTRODUCTION

Although security of payment legislation is not uniform across all Australian states, the objective of the legislation remains the same. Namely to ensure that any person who undertakes to carry out construction (or to supply related goods and services) under a construction contract is entitled to receive (and is able to recover) progress payments.[3] Unfortunately for claimants in Victoria, the *Building and Construction Industry Security of Payment Act 2002* (Vic) (Victorian Act) is labyrinthine when compared with interstate legislation. The confounding nature of the Victorian Act is evident in the very low number of adjudications and low usage of the adjudication process.[4] It has been suggested that the low usage of the legislation is due to the highly complex language and technical nature of the Victorian Act and in particular the inclusion of a number of exclusionary claims.[5] Despite the complexity associated with the legislation, thousands of payment claims are made annually claiming in the aggregate hundreds of millions of dollars in progress payments.[6] The Victorian Act recognises the 'hardship which subcontractors suffer by reason of poor payment practices in the [construction] industry'.[7]

One such poor payment practice is the subcontractors' inability to recover from head contractors security proffered in support of the due and proper performance of the contract, namely retention moneys. Retention money is the fund withheld from payments due to a party lower in the contractual chain as security against their fulfilment of contractual obligations. For example, a subcontractor will submit a payment claim for the estimated value of work done and materials supplied during the relevant time period or stage of the works and the head contractor will pay it that sum less an amount retained by the head contractor as security for the ultimate completion.[8] Accordingly, subcontractors have reported problems associated with both the taking and release of retention moneys, including that:[9]

- some head contractors will often deliberately and unreasonably withhold or delay release of retention money to prop up their own cash flow;
- there is no standard percentage set for retention money;
- there is no standard release time for retention money; and
- the long periods in which retention money may be held by a head contractor increases the risk that the subcontractor will be unable to recoup the same.

A key question that arises for determination is whether payment claims that include claims for retention amounts can be made under the statutory regime. The Victorian Act makes no express provision for the manner in which retention moneys are to be claimed for by a claimant. In contrast, claims for retention are allowed in every other Australian state and territory. Victorian courts have taken the position that a claim for retention moneys is different in character and distinct from a claim for the value of construction work or related goods and services.[10] Therefore, any claim solely for the payment of retention moneys cannot ordinarily be the subject of a progress payment claim and fall within the operation of the Victorian Act. Victoria's position on this retention issue is inconsistent with every other state and territory in Australia. The divergent regimes

engender industry wide confusion about the subcontractors' rights to recover retention moneys, which can adversely impact parties' compliance with Victorian Act.[11]

This article begins by broadly dissecting the operation of retention moneys and the construction industry's reluctance to pay such amounts when they are properly due. Before advocating for legislative reform, an appreciation of the judicial treatment in Victoria and interstate of claims that include retention moneys is necessary.

The article concludes with a recommendation for legislative reform to the Victorian Act, that if adopted, will provide subcontractors with confidence that retention amounts will be released when they become due and payable.[12] The authors submit that the only way to correct the contentious position in Victoria, if the legislature saw fit to do so in order to reinforce the objects of the Act and provide for desirable uniformity with interstate legislation, is by passing an amendment that properly allows payment claims to include amounts for retention moneys.

RETENTION MONEYS IN THE CONSTRUCTION INDUSTRY

INTRODUCTION TO RETENTION MONEYS

Retention involves a principal or a head contractor (and so on down the contractual chain) retaining a proportion of an amount due to a contractor from a progress payment, as security for the performance by the contractor of its contractual obligations.[13]

Retention moneys are commonly accumulated by the head contractor from progress payments due and owing to the subcontractor.[14] The head contractor pays each progress claim to the subcontractor, it deducts a percentage against events which have not yet occurred and about which no determination has yet been made —similar to that of a 'rainy day' fund. The holding of retention moneys is an incentive for the subcontractor to complete the project in an expedited manner and as a safeguard against defects which the subcontractor may fail to remedy.[15]

The amount to be deducted and withheld from each progress payment is by agreement between the parties and is usually in the order of five per cent or 10 per cent of each progress payment until the total amount of moneys retained is equal to five per cent of the contract sum.[16]

Once the works are complete and a certificate of practical completion is issued, the contract will then usually provide that the retention moneys are to be returned, in part, to the subcontractor. Often, the agreed percentage of that which is returned to the subcontractor is 50 per cent.[17]

The remaining 50 per cent still held by the head contractor is commonly released to the subcontractor at the end of the defects liability period.[18] Typically such a period might be in the order of 12 months on a major construction contract, it could be as little as three months on a minor construction contract, or it could conceivably be for two years or more on a complex industrial project requiring lengthy commissioning periods for equipment.[19]

INDUSTRY EXPERIENCE

The practice of the subcontractor providing retention to the head contractor in the construction industry has been in existence for over 200 years.[20] The issue of recovering retention amounts has been thoroughly debated within industry, particularly over the past decade.

In 2012, Bruce Collins QC conducted an inquiry into insolvency in the New South Wales construction industry (Collins Report). The Collins Report contended that it:

... has been repeatedly made to this Inquiry that many subcontractors experience great difficulty in getting retained amounts released by head contractors. In circumstances where subcontractors find it both extremely costly and time consuming to recover cash retentions, the sad reality is that they are sometimes not recovered.[21]

The Collins Report found that retention sums have been subject to abuse by holding parties in a manner that placed considerable strain on the supply chain, predominately on subcontractors and their ability to maintain cash flow to their business.[22] It was suggested that retention funds are used to:[23]

- paying off the tail end of a previous project;
- investing in other business ventures;
- paying business overheads and head office wages;
- investing funds on the short–term money market;
- funding discretionary luxury expenditures; and
- funding speculative development activities.

The party to whom such money is owed is generally an unsecured creditor.[24] Therefore, if a party in the contractual chain becomes insolvent (in this case, the retention holder), a liquidator or a bankruptcy trustee can use it to discharge that party's debts and the party's contractual counterparts lower in the chain are unlikely to receive any of what is owed to them.[25] One witness to the inquiry went so far as to

state 'we have had experience in head contractors becoming insolvent and I think the most we have ever recovered after quite a long process is about $0.03c in the dollar of the debt owed, so basically nothing'.[26] The Report asserted that the true purpose of retention moneys has been corrupted and retention is instead treated as a fund available to the holding party for whatever purpose they like, regardless of the risk of being unable to pay it.[27]

In February 2018, John Murray AM published a Turnbull government commissioned report entitled, 'Review of Security of Payment Laws—Building Trust and Harmony' (Murray Report). Murray undertook a wide–ranging review of security of payment laws across Australia in consultation with business, governments, unions and other relevant interested parties. The report sought to explore further ways in which security of paymnent legislation can be strengthened in order to ensure the building industry is fair and productive for all participants. Murray elaborated on the Collins Report and found that subcontractors consider the costs associated with the recovery of retention moneys often mean it is not worth their while to pursue their recovery.[28] The report's finding was notwithstanding the fact that withheld retention moneys may represent the subcontractor's profit margin.[29] During consultations, the review heard many personal accounts of the direct impact of late payments on subcontractors. One of these is extracted below:[30]

We are in the construction industry and find that our suppliers dictate to us when payments will be made. As we are a small business and need the work we have to just go along with their terms if we want the job. The retentions are the worst, with some being delayed as long as five–six months and we have no control, even if there are no defects to our work. They also put clauses in the contracts which states that first retention is payable 'at practical completion of all works', not just of our works, which could be months from when we finished. It is difficult to push the issues as there is a fear that if you make waves you will not get any future work.

In response to the Murray Report, the Western Australian Government appointed John Fiocco to chair consultations with the Industry Advisory Group, and to make recommendations to improve security of payment for subcontractors in the Western Australian construction industry. Fiocco published his report on 3 October 2018 entitled 'Security of Payment Reform in the WA Building and Construction Industry' (Fiocco Report). The Report noted that the overwhelming majority of stakeholders acknowledged that practices in the industry with respect to managing retention money are unfair for subcontractors.[31] It was acknowledged that parties should be free to contract upon the terms of their own choosing and individuals are the best judges of what is in their own interests.[32] On the other hand, it was contended that there is an inequality of bargaining power between subcontractors and parties higher in the contracting chain. If that proposition is accepted, it generally follows that subcontractors have no practical alternative but to accept the retention arrangements imposed upon them.[33] Admittedly, retention moneys are likely to be a small percentage of the value of any individual contract, but the duration for which it is held means that a party may have retention money held against all of its current projects as well as projects it has completed in the previous year or more.[34]

It is evident from the above reports that the abuse associated with the practice of retention moneys is endemic in the construction industry. Retention moneys are in every conceivable way the subcontractor's money until it is properly demonstrated that the head contractor has a right to resort to the fund.[35] The inability to recover retention money contributes to the attrition in cash flow experienced by subcontractors. It should follow that retention should have room to work within all security of payment regimes.

HOW HAVE VICTORIAN COURTS CONSIDERED CLAIMS FOR RETENTION AMOUNTS?

VICTORIAN SECURITY OF PAYMENT REGIME

Before considering the Victorian decisions in relation to claims for retention moneys, the appropriate starting point is the statutory regime itself. The overarching purpose of the legislation is to provide a statutory entitlement to progress payments for persons who carry out construction work or supply related goods and services.[36] The Victorian Act requires that a payment claim assert an entitlement to payment in relation to construction work undertaken, or related goods and services supplied, on or from a reference date in accordance with section 9(1). Such a payment claim must be served on a person who, under the construction contract concerned, is or may be liable to make the payment.[37]

Amongst other requirements, a payment claim must identify the construction work or related goods and services to which the claim relates.[38] Sections 5 and 6 of the Victorian Act provides broad definitions by way of both inclusions and exclusions of the phrases 'construction

work' and 'related goods and services' respectively. For example, construction work captures restoration, maintenance and demolition of buildings, the construction of major infrastructure, the installation of fittings in any buildings, cleaning works, prefabrication of structural components, painting or decorative works and more.[39]

Security of payment legislation primarily seeks to ensure prompt and timely payment to subcontractors under a 'pay now and argue later' scheme.[40] The legislation was introduced by state and territory governments across Australia in an attempt to 'stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment'.[41] The statute therefore aims to provide a preferred mechanism for recovering progress payments as opposed to rights under contract. In particular, the 'rough and ready' nature of preserving cash flow to a builder ensures that the lifeblood of the construction industry is maintained.[42] This element of the legislation is what fundamentally protects subcontractors at the bottom of the contractual chain.

The legislation places claimants in a privileged position by virtue of acquiring rights to payment in addition to what is stated in the contract.[43] Under the 2006 amendments to the Victorian Act, Mr Hulls stated in the Second Reading Speech that the legislation allows:

... subcontractors to use the adjudication process to access amounts clients or head contractors hold on trust ... until works are completed.[44]

However, these rights to recover moneys held on trust did not expressly extend to a claimant's entitlement to retention, but rather the setting up of a designated trust account as a precondition for an application of an adjudicator's determination.[45] The Victorian Act is silent as to whether claims for retention fall within the scope of the legislative regime. For instance, the statute does not make any express provision for retention moneys being a deemed form of construction work or a claimable amount in a payment claim made under section 14 of the Victorian Act. Similarly, it also does not exclude retention moneys in the excluded amounts regime pursuant to section 10B of the Victorian Act. The excluded amounts provision, which is unique to the Victorian Act, prevents, among other things, amounts claimed for damages for breach of contract or amounts relating to latent conditions from being taken into account in calculating the amount of a progress payment.[46]

Nevertheless, the ambiguity in relation to whether a claimant can claim for retention moneys alone does not mean that a claimant is ousted from doing so pursuant to their contractual rights. Sections 3(4) and 47 of the Victorian Act make clear that the statute does not limit any entitlement a claimant may have under a construction contract. The Victorian Act establishes a 'dual system for the payment of progress claims'—the statute and the construction contract.[47] Accordingly, a person's right to claim the return of security under contract remains unaffected by the legislative regime.

The lack of any express provision as to whether such amounts can be claimed in the Victorian Act has led to a number of decisions in the Victorian courts. This article therefore traverses the case law to demonstrate the state of play in Victoria concerning the recovery of retention moneys.[48]

THE POSITION PRE–*PUNTON'S SHOES*

Over the course of the past decade, Victorian courts have grappled to differing extents with the question of whether retention moneys fall within the ambit of the security of payment regime. Prior to the authoritative decision in *Punton's Shoes v Citi–Con* [2020] VSC 514 (*Punton's Shoes*), there was a general trajectory in the Victorian courts that payment claims may include claims for retention moneys.[49]

In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* (*Gantley*),[50] the first defendant submitted a payment claim that included, amongst other amounts, $100,000 for retention moneys under a bank guarantee. Vickery J made the following statement in obiter:[51]

Further, being a final payment claim, which has as its object the final balancing of the account between contracting parties, there is no reason why it cannot include at least some claims for payment in addition to payment directly for work done under the construction contract or for goods and materials supplied under it, provided such claims are not 'excluded amounts' under section 10B. Such claims may include, for example, payment of retention monies due under the security arrangements provided for under the contract ...

Vickery J's obiter left the door ajar for a claimant to claim retention moneys as part of a final payment claim under the Victorian Act.[52]

In *Cat Protection Society of Victoria v Arvio Pty Ltd* (*Cat Protection*),[53] the first defendant served a payment claim that included, amongst other amounts, $66,824.38 (excl. GST) for retention moneys. Digby J made two relevant observations in this case. First, that the claim for retention moneys were 'plainly not

what the parties contemplated and agreed would be included in [a progress payment claim]' which were limited to claims 'for the value of materials supplied and work done by the contractor'.[54] And second, in obiter, that a final payment claim that included 'one half of the [r]etention [f]und ... when able to be made' would be 'supported by section 9(2)(a)(ii) of the SOP Act'.[55] This second observation indicated his Honour was open to a claim including retention amounts, amongst a final balancing account.

After the decision in *Cat Protection*, two Victorian County Court decisions provided further guidance in relation to claims for retention moneys under the Victorian Act. Judge A Ryan in *Zulin Formwork Pty Ltd v Valeo Construction Pty Ltd* (*Zulin*),[56] granted judgment for a payment claim that included amounts for retention moneys, the balance of the contract sum and variations.[57] No payment schedule was served in that case and no submission was made by the defendant that the plaintiff was not entitled to the return of the retention fund.[58]

Subsequently, in *Cool Logic Pty Ltd v Citi–Con (Vic) Pty Ltd* (*Cool Logic*),[59] the plaintiff made a claim for retention moneys in the sum of $10,625 (INV–0619). Woodward J determined that the relevant claim for retention was valid because there existed a practice between the parties that the plaintiff would claim for the full amount owing, without allowing for retention and the defendant would issue a payment schedule deducting the amount of the retention.[60] This practice meant that the payment claims preceding claim INV–0619:

... are likely to have included claims in respect of the construction work represented by the retention amounts.[61]

Woodward J also made the following relevant observation:[62]

As a general observation, it seems to me surprising that a claim for retention moneys (providing that it meets the other statutory requirements) would not generally be treated as relating to construction work given that, almost by definition, it is retained from sums otherwise due for that work.

It is noted that in the 2020 case of *Foursquare Construction Management Pty Ltd v Chevron Corporation Pty Ltd* (*Foursquare*),[63] Burchell JR made three observations with respect to the Woodard J excerpt in *Cool Logic*:

- The general observation made by Woodward J was 'equivocal in its language'.
- Woodward J reached his findings 'without the benefit of the latter decision in *Punton's Shoes*'.
- Woodward J allowed the claim on alternative grounds, thereby rendering his general observation obiter dicta.

JUSTICE DIGBY IN *PUNTON'S SHOES*

The decision of *Punton's Shoes* currently stands as the determinative authority with respect to a claimant's ability to claim retention moneys under the Victorian Act.[64]

In this case, the first defendant served a payment claim for $222,750 (incl. GST) solely for the return of half of the retention moneys, without any claim in respect of the balance of the works.[65] Digby J ultimately held that no reference date arose under section 9 of the Victorian Act because the payment claim was not a claim in respect of construction work undertaken or the supply of related goods and services under the construction contract.[66] His Honour reached this conclusion by stating the following with respect to the creation of a 'separate and distinct security fund':[67]

Under the scheme of the contract the retention moneys progressively deducted formed a separate and distinct security fund to ensure performance by the contractor. The separate and distinct character of the contractual security fund created by the deduction of retention moneys is apparent from the terms and operation of cls 5.1, 5.2, 5.5, 5.6 and 42.8 of the contract which establish the purpose of that security fund, the contractual mechanism for its accumulation and reduction and the bases upon which recourse may be had to that security fund by the principal. The contract makes no provision for a claim in respect of, or for payment to the contractor in relation to the security fund. Accordingly, any implied right or entitlement there may be in the contractor to return of a portion of retention moneys is different in character and distinct from either a claim under the contract for the value of work carried out or an entitlement under the SOP Act for the value of construction work carried out and related goods and services.

In distinction to a payment claim entitlement, the contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is to be taken into account in the final certification process under cl 42.6 of the contract and thereby accounted for in the amount ultimately payable as between the contractor and the principal on the final reconciliation of each party's entitlements under the contract. The retention deduction, reduction, recourse and security related provisions of the contract do not contemplate or accommodate payment claims by the contractor for contract work undertaken or related goods and services supplied.

Therefore, any entitlement to the return of retention moneys upon achieving practical completion was held not to be 'in the nature of a payment claim under the [Victorian] Act for construction work or related goods and services undertaken and provided under the contract'.[68]

Digby J in this decision made clear his Honour's view that retention moneys are not amounts that are within the purview of the Victorian Act and that claims solely for such amounts are invalid.[69] Accordingly, claims solely for retention moneys are to be made pursuant to the contractual mechanisms agreed to between the parties.[70]

THE POSITION POST–*PUNTON'S SHOES*

Since the decision in *Punton's Shoes*, no court has overruled Digby J's reasoning with respect to retention moneys claimed under the Victorian Act. Digby J endorsed his own decision in *Punton's Shoes* in the case of *Watpac Construction Pty Ltd v Collins & Graham Mechanical Pty Ltd* (*Watpac*).[71] Similar to *Punton's Shoes*, the first defendant made a claim for retention moneys alone.[72] Digby J stated that the payment claim did 'not come within the scope of the [Victorian] Act' because they 'are not claims in relation to construction work or related supply of goods and services undertaken under the contract, but rather are claims in each case for reduction of security pursuant to cl 5.6 of the contract'.[73]

Later in 2020, Burchell JR handed down two decisions that considered the case of *Punton's Shoes* in circumstances where:

- a claim for retention moneys had been made together with other unpaid items; and
- a claim solely for retention moneys had been made.

First, in *Method Constructions Australia Pty Ltd v ABI Investment Holdings (Melbourne) Pty Ltd* (*Method*),[74] the plaintiff provided security by way of cash retention up to five per cent of the contract sum deducted progressively from progress payments.[75] In February and March 2020, $150,415.38 was claimed for return of the retention moneys, amongst other amounts relating to scaffolding, external works, electrical services and variations.[76] Burchell JR endorsed the decision of *Punton's Shoes*[77] and held that the 'relevant question in relation to retention is not whether the payment claim was issued in respect of a valid reference date, but whether the claim validly included the amount for retention at all, pursuant to the terms of the contract'.[78] In finding that the retention moneys could be so claimed under the contract, her Honour held 'it was permissible for the plaintiff to include the amount of retention money in the payment claim'.[79] The payment claim in this case is readily distinguishable to that in *Punton's Shoes* given that the claim was not solely for the return of retention moneys, but formed part of a mix that included unpaid construction work and related goods and services.

Second, in *Foursquare*, Burchell JR elaborated on her earlier judgment in *Method* and upheld the principle in *Punton's Shoes* that retention cannot be claimed alone. In *Foursquare*, the plaintiff served a final payment claim solely for the balance of retention moneys in the sum of $278,540.33.[80] Burchell JR determined that such a claim cannot be considered a payment claim under sections 5 or 14 of the Victorian Act and must fail.[81] In reaching this finding, her Honour endorsed *Punton's Shoes* for five reasons:[82]

First, it is binding authority on me. Secondly, unlike the obiter in Gantley, Cat Protection Society and Cool Logic, it is unequivocal. Thirdly, it is the most relevant authority, as it concerned retention moneys on a Victorian SOP application (cf John Goss, Vanella and EHome). Fourthly, unlike Cool Logic, it is ratio decidendi rather than obiter dicta. Fifthly, as noted above, Judge Woodward made his general observations in Cool Logic without the benefit of Punton's.

In applying the aforementioned authorities, Burchell JR affirmed that:[83]

... the purpose of retention moneys is to provide security for defective work; it is not to compensate a person for construction work. Therefore, a claim for retention moneys does not facilitate the purpose of the SOP regime, namely to compensate persons who have undertaken to carry out construction work under the contract or to supply related goods and services under the contract (section 9(1)).

…

In my view, seeking to recover the final portion of the retention monies via a payment claim solely for that purpose was not the appropriate forum.

Further to these findings, Burchell JR made the following observation:[84]

On a literal construction, retention moneys 'relate to the construction work', however Digby J in Punton's held that retention monies are a 'separate and distinct security fund' (at [110]), unrelated to the payment claim regime. His Honour relied upon the fact that 'the contract makes no provision for a claim in respect of, or for payment to the contractor in relation to the security fund' (also at [110]).

Of relevance, Burchell JR here admits that based upon a literal analysis retention moneys constitute construction work as defined in section 5 of the Victorian Act, but that such amounts are still nonetheless excluded pursuant to the decision in *Punton's Shoes*.

We will see that this literal analysis concerning the definition of retention moneys has been subsequently upheld by the Supreme Court of Queensland.

NON–VICTORIAN EXPERIENCE

In terms of making a claim for retention moneys alone under the security of payment statutory regime, the experience differs significantly in all other jurisdictions outside Victoria.

NEW SOUTH WALES

In New South Wales, the legislature made it expressly clear in the 2002 amendments to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW Act) that a claimant can claim retention moneys.[85] In section 13(3)(b), the NSW Act provides that:

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 27(2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

In the Second Reading Speech for the 2002 Bill,[86] Mr Iemma stated that:[87]

Minor changes have been made to remove possible ambiguities, for example, to ensure that progress payments include milestone payments, that progress claims under the Act can be made under construction contracts that have no provision for progress payments, and that progress claims can include the final amount claimed and retention moneys.

This amendment to the NSW Act was considered in the case of *Vanella Pty Ltd v TFM Epping Land Pty Ltd* (*Vanella*).[88] Henry J upheld a payment claim that sought 100 per cent of the contract sum which, in effect, included a claim for the release of retention moneys.[89] Her Honour found where a party claims 100 per cent of a construction contract sum, it must include retention moneys.[90] Upon a straightforward application of section 13(3)(b) of the NSW Act, the builder was entitled to the retention moneys.[91] It is worth noting that Burchell JR in *Foursquare* and Woodward J in *Cool Logic* observed that *Vanella* was distinguishable to the Victorian position because the Victorian Act materially differs to the NSW Act.[92]

QUEENSLAND

Similar to section 13(3)(b) of the NSW Act, the Queensland legislature also provides that a payment claim may include an amount held under the construction contract by the respondent that the claimant claims is due for release.[93] Such an amount includes a claim for retention moneys.

A claim for retention moneys arose in the case of *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* (*EHome*).[94] GCB Constructions issued a payment claim for $889,892.32 claiming all work carried out less amounts previously paid.[95] EHome argued that it was not a claim for construction work or related goods and services because it claimed, in effect, the return of retention moneys. Bond J did not accept this submission and held that:[96]

The claim expressed in the way that it was, as I have already described, was a claim for payment for construction work. Retention amounts were amounts that had been deducted from the value of construction work already completed. So a claim expressed as this one was simply cannot be characterised as other than a payment claim within the meaning of this Act.

These sentiments in *EHome* send a clear message that by its ordinary meaning, retention moneys constitute a claim for construction work within the meaning of the Queensland Act.[97] Relevantly, this analysis by Bond J echoes the same admission by Burchell JR in *Foursquare* at [56] where her Honour considered that a literal interpretation of retention money was consistent with the definition of construction work.

OTHER JURISDICTIONS

In all other jurisdictions including the Australian Capital Territory, Tasmania, South Australia, Western Australia and the Northern Territory, allowance has been made for the return of retention moneys under the guise of amounts held under the construction contract that are due for release.[98]

Of recent relevance, the Explanatory Memorandum for the 2021 Western Australian Bill provides that:[99]

Importantly, a payment claim can also seek the return of any performance security withheld under the construction contract (e.g. bank guarantee or retention money) that is due to be released, or the substitution of retention money for other performance security.

COMPARISON WITH VICTORIA

Despite the aforementioned legislative provisions, the Victorian legislature has not explicitly addressed whether retention moneys can or cannot be claimed under the statute.[100] It is evident that Victoria stands in isolation in relation to a claimant's ability to seek the return of retention moneys under its security of payment regime. All other jurisdictions, including Western Australia in 2021, have made clear provision for the recovery of retention moneys in their respective statutes, while Victoria lags behind on this important payment issue in the construction industry.

It is [the view of the authors] that legislative reform is essential to bring Victoria in line with the position in all other states and territories in Australia.

LEGISLATIVE REFORM

This article proposes to broaden the the ambit of a payment claim to include retention moneys, which if implemented would promote cash flow and properly safeguard a claimant's right to recover retention amounts.

ADDITION OF SECTION 14(3)(C)

It is essential that the scope of what can be claimed in a payment claim under the Victorian Act is widened to capture claims for retention moneys. This article proposes the following amendment to section 14(3) of the Victorian Act, which is inspired by an amalgamation of legislative provisions from non Victorian jurisdictions:[101]

14 Payment claims

...

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount; and

(c) that is held under the construction contract by the respondent and that the claimant claims is due for release.

Note: Section 10(3) provides that a progress payment must not include an excluded amount. Section 14(3)(c) can be used for the purpose of solely claiming retention moneys.

An amendment to section 14(3) of the Victorian Act, as outlined above, would grant a claimant the right to claim solely for retention moneys held by a respondent once they are due for release. Provided that the contractual pre–conditions for recovering the retention moneys are met, claimants will be able to now issue payment claims for such amounts pursuant to section 14(3)(c).[102] The additional note below subsection (3) provides further clarification that moneys 'held under the construction contract' include retention moneys.

With respect to the Victorian position, this amendment has a two fold effect. First, it brings Victoria in line with the rest of the states and territories in Australia. It is a matter of national importance that claims for retention moneys (and its application by the courts) be approached uniformly to ensure the purpose of the legislation is achieved. Second, it ensures claimants are not obstructed by the decision in Punton's Shoes, as was the case in Foursquare.

INTERACTION WITH VICTORIA'S EXCLUDED AMOUNTS REGIME

An important consequence of this amendment is the way in which section 14(3)(c) will interact with the excluded amounts regime in section 10B of the Victorian Act. As discussed in Part III, excluded amounts are unique to the Victorian regime and other states and territories have not had to consider such a provision in drafting sections relating to retention moneys.

It is a common industry practice for principals or head contractors to offset or deduct security (including retention moneys) in circumstances where a subcontractor is late in achieving practical completion leading to an accrual of liquidated damages, or alternatively a principal or head contractor incurring defect rectification costs due to poorly performed construction work.[103]

Relevantly, deductions in a payment schedule relating to liquidated damages are likely to fall afoul of section 10B of the Victorian Act.[104] Permitting a claimant to make a claim solely for retention moneys pursuant to the Victorian Act would have the likely consequence that a respondent in a payment schedule could not offset liquidated damages from claims for retention moneys. Conversely, an adjudicator will likely be able to have regard to rectification costs incurred or estimations as to defect rectification costs.[105]

It follows that if there is a dispute as to the subcontractor's entitlement to retention moneys, whether the claim is made for retention moneys alone or in conjunction with other claims, the parties will be bound by the adjudicator's decision. Accordingly, it is [the view of the authors] that the amendment to section 14(3)(c) of the Victorian Act does not alter the present legislative regime, except to the extent that it ensures the cash flow of claimants is not unduly obstructed by spurious arguments by respondents as to who has the right to the retention.

CONCLUSION

Victoria's position on claims for retention moneys is not only inconsistent, but it is contrary with other jurisdictions in Australia. The time is ripe for legislative reform to render Victoria's position uniform with the rest of the country. The case for national uniformity is clear: the differences in legislation between jurisdictions are undesirable in principle and a national approach will reduce the complexity and administrative burden associated with operating across multiple jurisdictions.[106] Many subcontractors operate in more than one state and the need to become familiar with the different positions on retention is undoubtedly cumbersome.[107] Victoria's current approach on retention is in significant tension with, the explicit policy and

purpose of the Act which is to promote recovery in the hands of a claimant of amounts identified in a payment claim.

In our view, the needs of the Victorian construction industry are no different to those in other jurisdictions. The inability to recover retention moneys is not a problem that is endemic to Victoria and should not be treated as such.

REFERENCES

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2. Bruce Collins QC, Independent Inquiry into Construction Industry Insolvency in NSW (Final Report, November 2015) 111 (Collins Report).

3. See, for example, *Building and Construction Industry Security of Payment Act 2002* (Vic) section 3(1) (Victorian Act).

4. Matthew Bell and Donna Vella, 'Motley patchwork to security blanket: The challenge of national uniformity in Australian 'security of payment' legislation' (2010) *Australian Law Journal* 565, 574.

5. John Murray, Review of Security of Payment Laws: Building Trust and Harmony (Final Report, December 2017) 71 (Murray Report).

6. See Victorian Building Authority, 'Adjudication Activity Statistics 2019–2020 Financial Year' (Final Report) <https://www.vba.vic.gov.au/plumbing/security–of–payment/adjudication–activity–statistics>.

7. Victoria, Parliamentary Debates, Legislative Assembly, 21 March 2002, 426–8 (Mary Delahunty MLA).

8. The authors will make reference throughout this article to subcontractors (as the payor) and head contractor (as the retention holder) but this can apply to other relationships down or up the contractual chain. For example, a head contractor (as the payor) may seek to recover retention from the principal (as the retention holder).

9. John Fiocco, Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry (Final Report, October 2018) (Fiocco Report) 93.

10. *Punton's Shoes Pty Ltd v City–Con Pty Ltd* [2020] VSC 514, [110]–[111] (Digby J) (*Punton's Shoes*).

11. Murray Report (2017) 5.

12. The authors note that the inclusion of a retention trust scheme pursuant to that in other states is outside the purview of this article. This issue is complex and if any action is to be undertaken, it needs to be done so carefully and proportionally. The authors submit that before the implementation of any retention trust scheme there is a need for a report from the Victorian Law Reform Commission or other similar research body before implementing the same.

13. Julian Bailey, *Construction Law* (London Publishing Partnership, 3rd ed, 2020) [12.03].

14. Jeremy Coggins, Phil Evans and Tom Davie, *Understanding Construction Law* (LexisNexis, 2nd ed, 2020) [6.47].

15. Collins Report (2015) 106.

16. Collins Report (2015) 107.

17. Collins Report (2015) 197.

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19. John McMullan, *Construction Contract Administration Principles* (McMullan Solicitors, 2017) 65.

20. Charles O'Neil, *Global Construction Success* (Wiley Blackwell, 2019) 56.

21. Collins Report (2015) 109.

22. Collins Report (2015) 115.

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24. Deloitte Access Economics, Cost Benefit Analysis of Security of Payment Reform for the Building and Construction Industry (Final Report, July 2020) 10.

25. Deloitte Access Economics, Cost Benefit Analysis of Security of Payment Reform for the Building and Construction Industry (Final Report, July 2020) 10.

26. Collins Report (2015) 112.

27. Collins Report (2015) 116.

28. Murray Report (2017) 270.

29. Murray Report (2017) 270.

30. Murray Report (2017) 20.

31. Fiocco Report (2018) 97.

32. Fiocco Report (2018) 97.

33. Fiocco Report (2018) 98.

34. Fiocco Report (2018) 48.

35. Collins Report (2015) 110.

36. Victorian Act sections 1, 3(1).

37. Victorian Act section 14(1).

38. Victorian Act section 14(2)(c).

39. Santow JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462, 481 [68] dealing with a similar definition of 'construction work' in the *Building and Construction Industry Security of Payment Act 1999* (NSW) concluded that the phrase 'identifies a series of categories of construction work used in a very broad sense'. Subsequently cited by Lyons J in *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd* [2019] VSC 126, [77].

40. *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [96]; *Hickory Developments Pty Ltd v Shiavello (Vic) Pty Ltd* (2009) 26 VR 112, 121 [44] (Vickery J).

41. New South Wales, Parliamentary Debates, Legislative

Assembly, 12 November 2002, 6541 (Maurice Iemma), cited by *Hickory Developments Pty Ltd v Shiavello (Vic) Pty Ltd* (2009) 26 VR 112, 121 [42] (Vickery J).

42. *Saville v Hallmarc Constructions Pty Ltd* (2015) 47 VR 177, 207–8 [80] (Warren CJ and Tate JA (with whom Kaye JA agreed), cited by *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, [49]–[51] and *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd* [2019] VSC 126, [47] (Lyons J); see New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6542 (Maurice Iemma).

43. *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [7] (Finkelstein J).

44. Victoria, Parliamentary Debates, Legislative Assembly, 9 February 2006, 219 (Rob Hulls).

45. With respect to moneys held on trust, see for example sections 28B(6) and 28F of the Victorian Act.

46. See section 10B of the Victorian Act.

47. *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd (No 2)* (2010) 30 VR 141, 149 [18]–[22].

48. The authors would like to acknowledge their indebtedness to the following publications which were relied upon in this article on this point: Chris Harriss, 'Security of payment in Victoria moves one more step apart', *Adjudicate Today* (Article, 16 March 2021) < adjudicate.com.au/articles/security–of–payment–in–victoria–moves–one–more–step–apart>; Charlotte Sinclair and Tamara Gugger, 'Can a payment claim include a claim for retentions due under the contract?, Patrick & Associates (Article, 2020) < https://patrickassociates.com.au/can–a–payment–claim–include–a–claim–for–retentions–due–under–the–contract/>.

49. A similar view was expressed in the following article: Chris Harriss, 'Security of payment in Victoria moves one more step apart', *Adjudicate Today* (Article, 16 March 2021) < adjudicate.com.au/articles/security–of–payment–in–victoria–moves–one–more–step–apart>.

50. *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 (*Gantley*).

51. *Gantley* [2010] VSC 106, [187].

52. However, see *Foursquare Construction Management Pty Ltd v Chevron Corporation Pty Ltd* [2020] VCC 1928, [36] (*Foursquare*) whereby Burchell JR noted that Vickery J's dicta in *Gantley* was 'equivocal in its terms as it is premised by the word 'may''. This led her Honour to not endorse or apply *Gantley* in place of *Punton's Shoes*.

53. *Cat Protection Society of Victoria v Arvio Pty Ltd* [2018] VSC 757 (*Cat Protection*).

54. *Cat Protection* [2018] VSC 757, [47], [57]. This observation was made in relation to cl 25.1(a) of the contract.

55. *Cat Protection* [2018] VSC 757, [51]. This observation was made in relation to cl 25.1(c) of the contract, which provided that: 'Upon practical completion, the proprietor shall pay to the contractor the unpaid balance of the contract price—as that contract price may be adjusted pursuant to this contract'. Relevantly, see *Foursquare* at [38] whereby Burchell JR noted that Digby J's statement at [51] of *Cat Protection* was 'equivocal'.

56. *Zulin Formwork Pty Ltd v Valeo Construction Pty Ltd* [2019] VCC 936 (*Zulin*).

57. See *Foursquare* at [40] whereby Burchell JR reasoned that because the 'payment claim was not simply for retention' in *Zulin*, it is distinguishable to *Punton's Shoes*.

58. *Zulin* [2019] VCC 936, [63]–[65].

59. *Cool Logic Pty Ltd v Citi–Con (Vic) Pty Ltd* [2020] VCC 1261 (*Cool Logic*).

60. *Cool Logic* [2020] VCC 1261, [88]–[89].

61. *Cool Logic* [2020] VCC 1261, [89]; see also *Foursquare* at [41]–[42].

62. *Cool Logic* [2020] VCC 1261, [88].

63. *Foursquare* [2020] VSC 1928, [43]–[44].

64. *Foursquare* [2020] VSC 1928, [53]. Burchell JR stated it it is the 'most relevant authority' on the issue of retention moneys under the Victorian Act.

65. *Punton's Shoes* [2020] VSC 514, [4].

66. *Punton's Shoes* [2020] VSC 514, [114].

67. *Punton's Shoes* [2020] VSC 514, [110]–[111].

68. *Punton's Shoes* [2020] VSC 514, [113].

69. This conclusion was also reached on the basis that the contract in *Punton's Shoes* made no contractual provision for a claim to be made for the retention moneys by the first defendant.

70. *Punton's Shoes* [2020] VSC 514, [111].

71. *Watpac Construction Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 637 (Watpac).

72. *Watpac* [2020] VSC 637, [134].

73. *Watpac* [2020] VSC 637, [180], citing *Punton's Shoes* at [75]–[85], [94]–[114]; endorsed by Burchell JR in *Foursquare* at [56].

74. *Method Constructions Australia Pty Ltd v ABI Investment Holdings (Melbourne) Pty Ltd* [2020] VCC 1797 (*Method*).

75. *Method* [2020] VCC 1797, [10].

76. *Method* [2020] VCC 1797, [102].

77. *Method* [2020] VCC 1797, [79].

78. *Method* [2020] VCC 1797, [80]; see also *Foursquare* at [57].

79. *Method* [2020] VCC 1797, [82].

80. *Foursquare* [2020] VSC 1928, [16].

81. *Foursquare* [2020] VSC 1928, [65]. The judgment mistakenly refers to paragraph [65] as [23].

82. *Foursquare* [2020] VSC 1928, [53].

83. *Foursquare* [2020] VSC 1928, [54], [65]. The judgment mistakenly refers to paragraph [65] as [23].

84. *Foursquare* [2020] VSC 1928, [56].

85. See *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW) Sch 1 item 24.

86. Building and Construction Industry Security of Payment Amendment Bill 2002 (NSW).

87. New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6544 (Maurice Iemma).

88. *Vanella Pty Ltd v TFM Epping Land Pty Ltd* [2019] NSWSC 1379 (*Vanella*).

89. *Vanella* [2019] NSWSC 1379, [124]–[126].

90. *Vanella* [2019] NSWSC 1379, [125].

91. *Vanella* [2019] NSWSC 1379, [121]–[122], [126].

92. *Foursquare* at [45], [47]; *Cool Logic* at [86]; noting the absence of an equivalent of section 13(3)(b) of the NSW Act in the Victorian Act.

93. *Building Industry Fairness (Security of Payment) Act 2017* (Qld) section 68(2)(b).

94. *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* [2020] QSC 291 (*EHome*).

95. *EHome* [2020] QSC 291, 2.

96. *EHome* [2020] QSC 291, 6.

97. Referred to as the literal analysis that was made by Burchell JR in *Foursquare* at [56].

98. *Building and Construction Industry (Security of Payment) Act 2009* (ACT) section 15(3)(b); *Building and Construction Industry Security of Payment Act 2009* (Tas) section 17(3)(b); *Building and Construction Industry Security of Payment Act 2009* (SA) section 13(3)(b); *Building and Construction Industry (Security of Payment) Bill 2021* (WA) section 58 and note for section 23, stating that 'Division 6 extends the payment claim provisions of this Part to claims for the release of retention money…'; *Construction Contracts (Security of Payments) Act 2004* (NT) subsections 8(b)–(c).

99. Explanatory Memorandum, Building and Construction Industry (Security of Payment) Bill 2021 (WA) 3.

100. As discussed in the following sections in Part III of this article, Victorian case law has permitted retention moneys to be claimed in a payment claim provided it is claimed amongst other valid claimed amounts, including the balance of the contract sum: see *Method* where a claim for retention moneys was mixed in with other construction work and related goods and services.

101. See an identical provision in *Building and Construction Industry (Security of Payment) Act 2009* (ACT) section 15(3)(b); *Building and Construction Industry Security of Payment Act 1999* (NSW) section 13(3)(b); *Building Industry Fairness (Security of Payment) Act 2017* (Qld) section 68(2)(b); *Building and Construction Industry Security of Payment Act 2009* (SA) section 13(3)(b); see also a highly similar provision in *Building and Construction Industry Security of Payment Act 2009* (Tas) section 17(3)(b); see also a moderately similar provision in Building and Construction Industry (Security of Payment) Bill 2021 (WA) section 58(1); inspiration for the additional note is drawn from the note at the end of section 23 of Building and Construction Industry (Security of Payment) Bill 2021 (WA).

102. As noted above, retention amounts are generally released in two instances: first, when practical completion is achieved and second , upon the expiration of the defects liability period. Practical completion is defined in the contract and is generally reached when the project is reasonably fit for use or occupation by the proprietor. See, for example, cl 2 and 42.5 of AS 2124–1992. The defects liability period is also defined in the contract and usually of the order of 12 months.

103. Murray Report (2017) 270. Notwithstanding the right to deduct or withhold retention is governed by the terms of the contract.

104. Specifically, subsections 10B(2)(b)–(c) of the Victorian Act; see, for example, *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, [114]–[115].

105. Rectification costs have been found not to constitute an excluded amount: *Zulin* at [61]–[64]; *Maxstra Constructions Pty Ltd v Joseph Gilbert* [2013] VSC 243, [62]–[64]; Method at [115]–[120].

106. Murray Report (2017) 64.

107. Murray Report (2017) 64.

AUSTRALIAN STANDARD AS 1576.7 SCAFFOLDING PART 7—SAFE USE OF ENCAPSULATION ON SCAFFOLDING IS PUBLISHED!

David Solomon, Executive Officer Technical, Safety and Risk

Master Builders Association of NSW, Albury

In May 2018, the ACLN published an article I submitted on fire hazards and containment netting, after a serious fire developed on a building remediation site on Macquarie Street, Sydney opposite Parliament House. Containment netting fixed to multi–storey scaffolding ignited. The fire resulted in the deployment of emergency services and required the evacuation of personnel from the work site and building.

Containment netting may also be referred to as 'containment sheeting', 'screening' or 'scaffolding mesh'. The material is designed to contain demolition debris adjacent to public thoroughfares, suppress dust on construction sites and provide respite for site personnel from sun exposure when traversing from floor to floor.

Coincidently, the fire destroyed scaffolding that had been erected around the building to remove flammable cladding, which had been identified as a fire risk.

The cladding was removed the week prior to the fire which was limited to the scaffolding.

Shortly after the third shade cloth fire in the Sydney CBD, senior staff at the Master Builders Association of NSW identified a trend in shade cloth fires and approached the then Minister for Better Regulation, the Hon Matt Kean, advising that Australia did not have a National Standard to follow with any sort of flame index or fire–retardant rating regarding the encapsulation of scaffold. In fact, the building and construction industry had unofficially adopted sections from another Standard from the oil and gas sector, namely the British Standard BS 7955. The Minister supported the development of the Standard.

A meeting was held with Standards Australia shortly thereafter where a project proposal was approved in principle to commence drafting content for the Standard. That led to the development of a new standard for safety mesh, the dissemination of safety alerts a couple of times each month and engagement with industry and regulatory bodies on such safety matters.

I went on to say:

After the third shade cloth fire in the Sydney metro area, we felt compelled to do something proactive, cognisant that the building and construction industry were using a United Kingdom Standard from the oil and gas sector that was not relevant to our industry nor suited to the Australian environment, we set about meeting with the Minister, who supported the development of such a Standard, so long as there was no additional cost to builders.

On 3 September 2021, a new Australian Standard AS 1576.7 (Int):2021—Scaffolding, Part 7—Safe use of encapsulation on scaffolding was published.

The objective of the Standard is to provide requirements and test methods for encapsulation and containment products for attachment to scaffolding to provide products that are suitable for the intended application, including fire hazard properties, strength properties ad fixing requirements. The document also specifies installation procedure for various types of encapsulation. The control of risk of personnel falling from scaffolding is NOT the function of encapsulation or the Standard.

It should be noted that the Standard does not apply to encapsulation or containment attached to perimeter protection screens, to containment nets fixed below perimeter protection screens or to advertising banners attached to scaffold on the outside of encapsulation.

It should also be noted that the AS 1576.7 document is an interim Standard for a period of two years and should be regarded as a developmental Standard and liable to future alteration. The two–year expiry period concludes 3 September 2023, when it will be superseded by another Standard.

THE SUPREME COURT OF NEW SOUTH WALES DELIVERS ITS LONG–AWAITED DECISION ON BIOWOOD CLADDING

Stephen Aroney, Partner

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Mills Oakley, Sydney

INTRODUCTION

In *Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888* [2021] NSWSC 1315, Henry J found in favour of the owners corporation against the builder and the developer for total replacement of the biowood cladding. Whilst the owners corporation succeeded in their claim, each combustible cladding case has to be taken on its own merits with some guidance being provided by this judgment.

BACKGROUND

NCAT PROCEEDINGS

The Owners Corporation Strata Plan 92888 (the owners corporation) commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) against Taylor Construction Group Pty Ltd (the builder) and Fraser Putney Pty Ltd (the developer) in 2019 alleging that the 'biowood' cladding installed on the external walls of at the property was defective as it was combustible and created an undue risk of fire thereby failing to comply with the Building Code of Australia (BCA) amounting to a breach of the statutory warranty under the *Home Building Act 1989* (NSW) (the Act).

It is noted that biowood (wooden panelling) is commonly used on residential and commercial buildings in Australia as well as overseas.

The tribunal found that biowood cladding was not fit for purpose and that the builder and the developer were ordered to rectify the works at the property by removing the biowood attachments installed on the façade and replacing it with cladding that complied with the BCA and statutory warranties.

Additionally, the tribunal ordered that the builder and the developer pay the Owners Corporation's costs.

NCAT APPEAL PANEL

The builder and the developer appealed this decision to the NCAT Appeal Panel (Appeal Panel). The primary question for the Appeal Panel was whether the biowood material complied with the requirements of the BCA. On 4 August 2020, the Appeal Panel handed down their decision dismissing the appeal and affirming the orders made by the tribunal.

SUBJECT PROCEEDINGS

The builder and the developer then appealed to the Supreme Court of New South Wales (the subject proceedings) pursuant to section 83 of the *Civil and Administrative Tribunal Act 2013* (NSW). The subject proceedings were heard before Justice Henry on 16 October 2020. Her Honour was to ascertain whether NCAT and the Appeal Panel made any errors of law in their findings.

Her Honour provided her decision a year later on 18 October 2021.

THRESHOLD ISSUE

Prior to her Honour's consideration of the grounds of the appeal, she first considered the threshold issue raised by the owners corporation that leave to appeal should be refused as the appeal was 'futile or moot.' Her Honour disagreed with the owners corporation and was satisfied that the outcome of the appeal before the Supreme Court of New South Wales had the potential to change the decision of NCAT and the Appeal Panel and was therefore not futile and as such leave to appeal was granted to proceed.

GROUNDS FOR APPEAL

The submissions put forward by the builder and the developer included grounds for the appeal, namely that the Appeal Panel had:

(1) erred in its formulation of the test when determining whether biowood constituted an 'undue

risk' of fire spreading via the façade of the building;

(2) erred in its application of the proper test to the facts, giving rise to an erroneous conclusion;

(3) erred in its application of the BCA to the facts, giving rise to an erroneous conclusion;

(4) found the existence of 'undue risk' in the absence of evidence;

(5) erred in finding that the use of 'biowood' breached the statutory warranties in sections 18B(1)(b), (c) and (f) of the Act in the absence of evidence and/or by application of the errors identified in grounds 1 to 4 above; and

(6) failed to provide adequate reasons.

HER HONOUR'S DETERMINATION

Her Honour considered each ground of appeal brought by the builder and the developer, focussing on the phrase 'undue risk of fire spread'.

Her Honour's reasoning for her decision is set out below:

(1) Her Honour found that a multi–factorial approach is to be taken when considering the risk assessment of fire spread (such as the extent of the use of materials, their relationship to other parts of the building such as windows and balconies, as well as their combustibility, ignitability and rate of flame spread) and one cannot look at sole factors in isolation (or be too literal or narrow when construing the term).

(2) Even though the biowood had a Spread of Flame Index of 0, this meant it has a slower rate of fire spread (not zero rate). Further, it is not simply the risk of fire spread via the façade that has to be considered, it is also the possibility that the biowood, if ignited, would allow fire spread between levels of the building via the windows and balconies. The fact is that the biowood cladding was combustible and given the seriousness and consequences of potential injury, these factors need to be considered when weighing up the degree of fire spread allowed, what constitutes undue risk.

(3) Her Honour carefully dissects every argument put by the builder and the developer that the Appeal Panel did not provide proper reasons or jumped to conclusions (or did not have the expert evidence to support their findings of undue fire risk) and concludes that the builder and the developer failed to make out their grounds of appeal. Her Honour says the owners corporation was able to demonstrate that the Appeal Panel did have the factors, evidence and reasons to support their findings.

Therefore, her Honour concluded that the builder and the developer failed in establishing any grounds of appeal against the decisions in NCAT or the Appeal Panel (or any error of law). As such, the appeal was dismissed with the builder and the developer to pay the owners corporation's costs. It is unknown at this stage whether this decision will be further appealed by the builder and the developer.

IMPLICATIONS

Other owners corporations with cladding issues and actions, will view this judgment as a favourably and seek to rely on it against builders, developers, building professionals and insurers. However, we note that her Honour was not determining the case afresh as the appeal was focussed on the whether NCAT and the Appeal Panel had made any errors of law. Defendants in proceedings involving cladding need to be strategic and identify distinguishing factors when briefing experts, preparing evidence and defending these matters.

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EXTENSIONS OF TIME IN CONSTRUCTION PROJECTS—PROSPECTIVE OR RETROSPECTIVE DELAY ANALYSIS?

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INTRODUCTION

Contractors' extension of time (EOT) entitlements and associated financial rights are always to be assessed pursuant to the applicable contract mechanism. A recurring question is whether EOT entitlements are to be determined prospectively, or with the benefit of hindsight. Two recent Australian cases highlight the conflicting positions which may arise.

PROSPECTIVE V RETROSPECTIVE DELAY ANALYSIS—WHY DOES IT MATTER?

The method of delay analysis used for an EOT claim may be significant, because different results may ensue. For example, if varied work is instructed to a contractor which will clearly cause delay:

• using a prospective analysis with computer–based CPM modelling and time–impact analysis, the contractor may predict that the variation will cause 30 days of critical delay, and therefore a 30 day EOT will be claimed; however

• looking at delay retrospectively, once its impact has been felt in full, it may turn out that the contractor was only delayed by 20 days, as it was able to re–sequence certain activities and otherwise mitigate the possible delay.

Is the contractor entitled to a 20 day or a 30 day EOT? The difference can be significant, particularly if it means the difference between having to pay, and not having to pay, liquidated damages for delay.

The issue becomes more complicated and nuanced when it arises in an after–the–event forum, such as adjudication, arbitration or in court, when the effect of events is known. The argument then becomes: why consider a prediction of a period of delay when we know how long the works were actually delayed?

CASE 1

BUILT QLD PTY LTD V PRO–INVEST HOSPITALITY OPPORTUNITY (ST) PTY LTD [2021] QSC 224

The dispute arose out of a contract between the contractor, Built, and the employer, Pro–Invest, for the design and construction of a hotel in Spring Hill (the contract). In considering Built's claim for an EOT, the Supreme Court of Queensland was required to consider the appropriateness of the different methodologies adopted by the parties.

Clause 34.3 of the contract provided that:

The contractor shall be entitled to such EOT for carrying out WUC (including reaching practical completion) as the superintendent assesses, if:

(a) the contractor is or will be delayed in reaching practical completion by a qualifying cause of delay.

Built argued that the use of the words, 'is or will be delayed', refers to current or ongoing delay that required prospective analysis. It further relied upon clause 34.5 of the contract, which provided that the contract administrator was to assess the contractor's EOT claim within 14 days of receipt; otherwise there would be a deemed assessment of the EOT claimed.

On the basis that EOT claims were required to be made within 14 days of the contractor reasonably becoming aware of a qualifying delay, Built submitted that any delay longer than 28 days therefore required a prospective analysis, because there would be a future element to the EOT claim.

Pro–Invest submitted that it was open to the court to use either methodology, but that a retrospective methodology should be preferred. It further argued that the 'current exercise', i.e.

determining Built's EOT entitlement in court proceedings well after the expiration of both the alleged delay event and practical completion, was 'totally different' from the exercise contemplated by clause 34.5. On this basis, Pro–Invest submitted that clause 34.5 cannot operate to place the court in the 'shoes of the superintendent at the time of assessment' to now determine the EOT.

The court agreed with Pro–Invest, holding that the contract permitted the use of either a prospective or a retrospective methodology to determine an extension of time.

CASE 2

JOHN HOLLAND PTY LTD V THE MINISTER FOR WORKS [2021] WASC 312

In a dispute over the design and delivery of a new hospital in Perth, John Holland, the contractor, argued that its entitlement to an EOT should be considered prospectively. The state submitted that the 'particulars of the appropriate methodology or methodologies ... [would be determined] by way of exchange [of] expert evidence', but fell short of specifying whether prospective or retrospective analysis would be undertaken.

The Supreme Court of Western Australia concluded that the correct methodology is 'dictated by and depends on the proper construction of the contract', and is not a matter for expert evidence.

Accordingly, the court held that the state was required to plead its position as to whether the contract requires a prospective analysis, a retrospective analysis or combination of the two. It considered that the state's failure to do so would pose a 'real risk' to John Holland's preparation for trial.

However, the court drew the line at requiring the state to provide particulars as to the methodology by which the extension is to be assessed: the methodology to be employed was considered to be properly an area for expert evidence.

COMMERCIAL IMPLICATIONS

Both of these cases indicate that:

- The law is not prescriptive as to the method of delay analysis used in making and reviewing an EOT claim (i.e. prospective, retrospective, or a combination of the two). The contract terms are paramount.
- Expert evidence on delay cannot be used to interpret, let alone override, the EOT provisions of a contract.

There is some variation between the approaches taken by construction contracts to EOT issues:

- Under the NEC form, the philosophy is for EOT claims to be made and addressed at the time, based upon known information and predictions as to the impact of events, and without later revising the EOT assessment based on the actual delay suffered. This suggests that a purely prospective approach should be taken, not only during the project, but in adjudication, arbitration or court. However, there is authority from Northern Ireland indicating that later–acquired information can be relied upon (i.e. a retrospective analysis could be used).[1]
- The JCT form takes a two–stage, hybrid approach under which an EOT is to be claimed and assessed based on actual and expected delay to completion, however at the end of the project the contract administrator may review its EOT assessments and increase them if it believes more time was fairly due to the contractor based on the events subsequently occurring on the project.
- The FIDIC form also takes a hybrid approach, in that it requires the engineer to grant an EOT for particular causes if completion 'is or will be delayed'—suggesting that a prognostication of delay may be needed. But the EOT clause also permits the engineer to review previous EOT assessments and to increase them, if appropriate, which contemplates the use of a retrospective analysis.

Where the tension between a prospective delay analysis and a retrospective delay analysis becomes acute, is in after–the–event dispute resolution forums, such as adjudication, arbitration or in court. A tribunal may, for illustrative purposes, find it artificial to conclude that a contractor was due a 30 day EOT (based on a prospective delay analysis) when it was actually delayed by only 20 days. Yet there may be circumstances in which such a conclusion is justified, i.e. where the contract calls for EOTs to be assessed on a prospective basis, and there is evidence of the contractor mitigating the delay, or even accelerating its works. Ultimately, the issue is contract and fact sensitive.

REFERENCE

1. *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited* [2017] NIQB 43.

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FINALITY AND FREEDOM—UNAPPRECIATED RISKS OF THE ARBITRAL PROCESS

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INTRODUCTION

In Australia, resolving disputes through arbitration is, and has been for some time now, an attractive option for commercial parties.

Two commonly identified benefits to arbitration are:

(1) flexibility as to how the dispute is run, with upsides including the potential to save time and costs, as well as potential strategic advantages arising from a more bespoke manner of case presentation; and

(2) the general acceptance in Australia that arbitral awards should be presumptively enforced subject only to limited, specified exceptions in the Model Law such as fraud or improper due process.

However, flexibility has its limits, and strategic case management has its risks. In the recent case of *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 (*Chevron v CKJV*), Justice Kenneth Martin of the Supreme Court of Western Australia was asked to consider the consequences of a deliberate procedural direction taken in an arbitration. His Honour determined that, having regard to the legal doctrine of '*functus officio*', the tribunal lacked jurisdiction to hear a substantial component of one party's case.

An award being set aside—for reasons which arise from the procedural pathway constructed within the arbitration process—is a cautionary tale worth remembering.

In this article we examine the risks to parties in arbitration that arose in *Chevron v CKJV*.

BACKGROUND

Chevron had engaged CKJV (a joint venture between CBI Constructors Pty Ltd and Kentz Pty Ltd) to perform construction and other services in relation Chevron's Gorgon oil and gas project. A dispute arose as to how CKJV was to be reimbursed for its labour; Chevron contended an 'actual costs' basis, whereas CJKV sought to rely on contract variations or principles of estoppel to assert it was entitled to be remunerated on a 'rates' basis.

Arbitration commenced in 2017. The procedural pathway the parties took, recorded in a procedural order (PO 14), was to bifurcate all issues of liability and quantum in the dispute. Bifurcation along such lines is not uncommon—it can save time and costs if resolving liability first will reduce what then needs to be addressed at the quantum stage. It is not always suitable or helpful, as the factual and legal line between liability on quantum may be blurred.

However, as in this case, it remains an often–considered option when strategising how to pursue a formal dispute.

The parties' case on liability was heard in November 2018 and a first interim award issued by the tribunal in December 2018 (first interim award). While complex, a relevant result of the award was the triumph of Chevron's 'actual costs' case over CKJV's 'rates' based argument.

With all liability issues resolved, the arbitration turned to the matter of quantum. In that context CKJV was offered an opportunity to replead its case on quantum, and it did so by filing what it called an 'Amended Case on Quantum'.

Chevron objected to the filing on the basis that:

- CKJV's amended case was an attempt to recast its case on liability under the banner of 'quantum' where all issues of liability had been conclusively determined in the first interim award;

• once so determined, the *functus officio* doctrine holds that the tribunal's official function and power to decide such matters then expires; and

• as a consequence the tribunal's authority and jurisdiction to render any further determinations on liability issues had been exhausted—even if those issues had not been previously raised.

By a two to one majority in a second interim award, Chevron's *functus officio* objection was rejected. The tribunal then proceeded to determine the merits of CKJV's 'Amended Case on Quantum' in favour of CKJV (second interim award).

Chevron applied to the Supreme Court to set aside the second interim award.

THE SUPREME COURT SETS ASIDE THE SECOND INTERIM AWARD

While arbitral awards are intended to be final and binding, there is limited and discretionary scope set out in section 34(2) of the *Commercial Arbitration Act 2012* (WA) (CAA) for a court to intervene and set them aside. Chevron's application was brought on the grounds that, by application of the *functus officio* doctrine, the second interim award addressed matters beyond the scope of what the parties could then submit to arbitration, in contravention of s 34(2)(a)(iii) of the CAA in particular.

Justice Kenneth Martin agreed. His Honour found that:

• a cardinal principle of arbitration is that an arbitral award finally resolves a dispute referred to the tribunal by the parties;

• consistent with that approach, reasonable commercial parties to an arbitral agreement would not have agreed to their chosen arbitral tribunal acting beyond the scope of its authority by varying or revisiting a final, published determination in an award;

• the condition of *functus officio* is capable of being engaged by the statutory criteria under section 34(2)(a)(iii) of the CAA. A decision taken by an arbitral tribunal may be viewed as beyond the terms of 'the parties' submission to arbitration' where, by application of the *functus officio* doctrine, the tribunal's jurisdiction to resolve the relevant aspect of the dispute (in this case liability), had come to an earlier end; and

• CKJV's Amended Case on Quantum was, in fact and substance, a new pleading on liability which was impermissible because the tribunal was *functus officio* as regards matters dealt with in the second interim award.

CONCLUSION AND TAKEAWAYS

Interim awards in arbitration are a common occurrence. While not the final outcome of the entire arbitration, they are still final and binding (and whether or not they contain errors of law) as to the matters which they consider and resolve. The finality of even an interim award must be properly understood before a party chooses that path.

His Honour noted that the jurisdictional issues that arose in this outcome could have been avoided if the parties had instead persuaded the tribunal to resolve only specifically isolated and identified issues (i.e., a preliminary issue). But the procedural pathway was chosen and, in this instance, the presentation of CKJV's case precluded it from then pursuing an alternative avenue to recovery.

The message then is one of caution and prudence. It is incumbent on the parties to an arbitration to contemplate all possible outcomes of a particular path before committing to an exercise from which there may be no going back.

As mentioned above, the finality of arbitral awards is one of its attractive features. It generally limits costly avenues of appeal, with the CAA and the Model Law promoting an approach of minimum curial intervention. With Australian courts being referred more cases in relation to the supervision and enforcement of arbitrations, it is clear that Australian courts' pro–enforcement attitude is tempered by refusing to allow awards in circumstances where a tribunal has acted in excess of their jurisdiction.

This decision presents as a cautionary tale of the risks of procedural freedom. However, it is in fact a story of reassurance; confirming that the Australian courts will seek to uphold the certainty of arbitral awards. It just pays to always keep in mind that interim awards are still binding.

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RISE AND FALL CLAUSES IN CONSTRUCTION CONTRACTS IN 2021

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INTRODUCTION

Rise and fall clauses have been largely overlooked in the Australian construction industry for over two decades. Interest has picked up in recent months due to rapid increases in materials prices. As we re–enter an inflationary environment, legal practitioners and contractors should learn about or refresh their knowledge of rise and fall clauses and consider their inclusion in construction contracts.

In this article we cover:

(a) rise and fall clauses, also known as 'fluctuation' or 'price adjustment' clauses;

(b) how rise and fall clauses can be used; and

(c) important considerations when incorporating rise and fall clauses into standard contracts.

WHAT ARE RISE AND FALL CLAUSES?

Rise and fall clauses allow the price of a fixed–price or lump sum construction contract to increase (or potentially decrease) in accordance with fluctuations in supply prices and wages growth, for specific materials and labour, in the geographical region where construction occurs.

Rise and fall clauses introduce a level of price variance to a fixed lump sum. Price adjustments under a rise and fall clause must follow a predetermined formula, typically in accordance with price indices published by institutions such as the Australian Bureau of Statistics (ABS).

WHO IS LIKELY TO USE RISE AND FALL CLAUSES?

Historically, any discussion about rise and fall clauses in Australia has largely centred around labour cost increases.[1] The most obvious contemporary application of a rise and fall clause is for construction contracts with a large portion of the contract sum relating to materials costs, as those contracts are more likely to be affected by building materials shortages that are currently being experienced worldwide.[2]

Other situations in which rise and fall clauses are likely to be desirable are on projects:

(a) where construction commences a year or more after the date of the contract; or take more than two years to complete; and/or

(b) where the contractor must preserve its profit margin in a high inflationary period.

In these situations, an unexpected increase in the cost of building materials or labour (also known as inputs) over the life of the building project may consume a builder's potential profit. The recent demise of Privium Group[3] has clearly illustrated the difficulties faced by Australian builders during the last quarter, many of whom are experiencing a period of 'profitless prosperity'.[4]

HISTORICAL DEVELOPMENT OF RISE AND FALL CLAUSES

There is nothing particularly new about rise and fall clauses—it's the kind of bread–and–butter construction law that falls out of the spotlight during stable market conditions, only to re–emerge when world events cause fluctuations in supply.

An example of this can be found in a now–historical edition of the '*Building*' magazine published 12 February 1935, which reports a Council of Branches of the Master Builders Association of NSW's decision to urge the re–inclusion of a rise and fall clause into the association's endorsed conditions of contract, which:

... was formerly included in the conditions, mainly because of the unstable nature of the market following the war period.[5]

Rise and fall clauses re–emerged in the 1970's in Australia as it experienced an extended period of high inflation.[6] During the 1980's, rise and fall clauses were included in contracts as businesses feared further price increases could occur at any time, whether due to foreign military conflict impacting supply chains, or radical domestic policy depreciating the value of the Australian dollar on the global marketplace.[7]

In 2021, following record low interest rates, economic commentators now forecast inflation to become a serious issue for Australians.[8]

Inflation in the prices of building materials specifically has become a talking point among the Australian construction industry, caused by COVID–related shipping delays, and demand for materials outstripping supply due to a 'global construction boom'.[9] Lendlease chairman Michael Ullmer recently warned of 'systemic and underlying' inflation affecting major economies around the world.[10]

Overall, the average cost of materials inputs to the Australian housing construction industry has already (by September) risen by 7.7 per cent in 2021 compared with overall increases of 1.8 per cent in 2020, 0.7 per cent in 2019, 3.1 per cent in 2018 and 2.6 per cent in 2017.[11]

RISE AND FALL CLAUSES TODAY

These days legal practitioners are likely to have come across rise and fall clauses while reviewing public works contracts.

A good example is in the GC21 Edition 2 which includes a standard schedule 7 'Costs Adjustment Formula'. The GC21 Edition 2 General Conditions of Contract provides a useful guide to structuring their own rise and fall clauses.[12]

Although rise and fall clauses are often considered contrary to the principal's interests, with inflationary pressures affecting building inputs many competent contractors may be factoring additional risk into their lump sum tenders. Counterintuitively, by including rise and fall clauses into construction contracts, principals may find that they receive more competitive tender prices.

RISE AND FALL CLAUSES IN ANNEXURES AND SPECIAL CONDITIONS

Due to the bespoke nature of rise and fall clauses, they are best dealt with by inclusion in the annexures, or special conditions of a construction contract. Care should be taken when introducing a rise and fall provision to an amended or bespoke construction contract, as many draftspersons are in the habit of including 'no rise and fall' provisions at various locations, which may cause uncertainty.

AS 2124–1992 and AS 4300–1995, two older standard form contracts, both were drafted during a time when rise and fall clauses were commonplace. These standard form construction contracts anticipate rise and fall clauses may be annexed to the general conditions of contract. Under both contracts, clause 41 relating to daywork provides in part:

Amounts payable for daywork shall not be subject to adjustment for rise and fall in costs notwithstanding that the contract may provide for adjustment for rise and fall in costs.

For many young lawyers and contract administrators, this may be the first and only time they have heard of the phrase 'rise and fall' in the context of construction contracts. Indeed, this obscure reference does not feature again in the subsequently released AS 4000–1997 and AS 4902–2000 standard form contracts. Nonetheless, all construction contracts can in principle be amended to include rise and fall clauses.[13]

RISE AND FALL FORMULAE

Rise and fall clauses utilise mathematical formulae to determine how much a contract sum will change over time.

Rise and fall formulae have four essential elements:

(a) affected price;

(b) applicable price index;

(c) risk buffer; and

(d) reference dates.

AFFECTED PRICE

Rise and fall clauses rarely apply to the whole contract sum. Usually, the clause applies to specific materials and labour components, each fluctuating separately in accordance with each respective input cost measure.

Typically the contract sum will be broken down with respect to each trade. The apportionment does not have to be accurate—it must merely be agreed by the parties. An example of apportionment would be, that 40 per cent of the contract sum relates to on–site labour, while 15 per cent of the contract sum relates to steel reinforcement products, 20 per cent concrete etc. More sophisticated tenders may specify the apportionment in more detail.

Where a rise and fall clause applies to a schedule of rates, the apportionment task is not necessary, but each item on a schedule of rates will need to be assigned to a particular class of materials, such as, 'concrete products', or 'timber products', which will determine which relevant price index is to apply.

APPLICABLE PRICE INDEX

Price indexes record overall changes in the value of a stated commodity/material. If the value on the index goes up, the price component for the relevant material forming part of the contract sum will also 'rise'. In order to determine if a contract sum will 'rise' or 'fall', a comparison is made between the value of the chosen price index on two particular dates.

Today in Australia, the predominant price indices tracking cost fluctuations of building materials are the producer price indexes (PPI) published quarterly by the ABS. One such index is the 'input to the house construction industry', which specifies overall trends in prices for various types of building materials in each of the capital cities.[14]

At present there is no index for commercial construction in Australia. However, for infrastructure contracts, indices such as the 'output of the construction industries' may be used.[15] The use of 'output' indices as opposed to 'input' indices is appropriate where the contractor subcontracts all work to independent subcontractors.

With respect to labour input portions of a contract sum, reference to national award rates may be used to accurately track changes in labour input costs.[16]

An important safeguard in drafting rise and fall clauses is to specify an alternative index if a particular index ceases to be published. A general measure of inflation like the consumer price index (CPI) may suffice.[17]

Rise and fall clauses can also use indexes published by industry groups, such as the Cordell Building Indices, which are published by CoreLogic.[18]

RISK BUFFER

Rarely will a principal agree to pass on the entire fluctuation in prices of material inputs or labour inputs to a contractor. Instead, the rise or fall in a price index will be 'buffered', or reduced, by applying only a portion of the overall change to the contract sum for which the principal is prepared to accept.

The buffer may be significant, such that a five per cent rise in the price index for steel, applied at 40 per cent (representing a 40 per cent risk of price fluctuations to be borne by the principal), will only result in a two per cent rise in the affected portion of the contract sum relating to steel.

In some instances, the principal may accept 100 per cent of the risk of price fluctuations. in those situations, the risk buffer will be absent from the formula. This is most commonly the case under public works contracts, where the government is perceived to be in a position of contributing to price fluctuations (either factually or allegedly) and may wish to avoid any arguments about the validity of the contract, by accepting 100 per cent of any input price movement.[19]

REFERENCE DATES

Not to be confused with reference dates under security of payment legislation, these dates determine the point/s in time from which the rise and fall of prices is to be calculated. The first reference date will typically be the date of the 'base index' or 'commencement' of the rise and fall regime.

Depending on the formula used, the first reference date may be:

(a) the date of tender;

(b) the date of the contract;

(c) a date some number of months after the date a contractor is given access to a site; or

(d) a floating date that is updated each time a new price index is published.

Getting the reference date wrong can result in unexpected inflation in the contract sum. An example is the case of *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland*[20] where the difference between the parties' positions based on a poorly drafted rise and fall clause was over $400,000.00. In that case, the formula was expressed in the following way:

The contract price shall be deemed to have been calculated on the building materials index as published in the Monthly Review of Business Statistics published by the Commonwealth Statistician for the month in which falls the date of the tender.

The variation between the index at date of tender and the new index will be expressed as a percentage of the former.

For every one per cent, or pro rata, variation in this index 85 per cent of the uncompleted value of the Material content of the contract amount at the date of the variation will be varied by one per cent.

The contractor argued that the 'variation' of each newly published price index (referred to in the third paragraph quoted above) was to be calculated by reference to the value of the index at the date of tender. The principal, on the other hand, submitted that the value of each month's index should be compared with the previous month's index, because the formula was adjusting the contract sum on a monthly basis.

Under the contractor's interpretation, the formula produced an unexpected result, increasing the value of uncompleted work every month, even in circumstances where the applicable price index decreased.

The majority held that the principal's interpretation applied, and noted that the contractor's interpretation of the formula would have inflated the contract sum by a factor that was far out of proportion to actual increases in the cost of completing the work.[21]

Gibbs J said:

... the language of the clause as a whole being open to two constructions, it is proper to construe it so as to avoid consequences which appear unreasonable and unlikely to have been intended, even when the more or less arbitrary nature of the provision is taken into account.[22]

A similar reference date issue arose in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[23] in which the formula provided in part:

(3) For each one cent increase or decrease in the average weekly wage (as hereinafter defined), or alteration in marginal rates of pay, or the equivalent variation due to alteration of standard working hours, there shall be charged against or allowed to the Department's account as the case may be a sum representing 0.008 per cent of the value of the uncompleted portion of the contract as at the date of any such variation ...

The parties disputed whether 'the value of the uncompleted portion of the contract' referred to the value of the uncompleted portion as it was, at the date of the contract, or the periodically adjusted value at the time immediately prior to, or following, each adjustment, having regard to successive rise and fall throughout the project.

In each of the above cases, the formula was ambiguous enough such that each party considered it had a reasonable prospect of success in disputing the construction of the clause all the way to the High Court. In both cases, however, the majority took what could be considered the 'common sense' view, and did not allow a party to exploit the rise and fall clause to obtain an unfair benefit.[24]

In constructing the contract, the court:

(a) considered whether there was any ambiguity in the terms of the contract;

(b) considered, in light of all the relevant circumstances, what was the intention of the parties; and

(c) resolved any ambiguity in the contract in such a way that the resulting construction was consistent with the parties' intentions.[25]

MODEL RISE AND FALL CLAUSE FOR MATERIALS

A basic rise and fall clause applicable to the cost of materials can be included into most lump sum construction contracts. A simple clause[26] can have complex implications. Conversely, a formula that is too complicated may be prone to errors in its application.

The following clause is given as an illustrative guide only (and does not constitute legal advice):

Price Adjustment Formula

If, after the parties enter the contract, there occur increases or decreases in the costs of performing the contract, arising from changes in the cost of an affected class of materials (as indicated by a change in the value of a relevant price index nominated in the contract), the value of the work completed by the contractor shall be adjusted in accordance with the following price adjustment formula:

$A = B% x C$ x D% x E% x ((F–G)/G)

Where, for each portion or stage of the works:

A = the increase or decrease in the value (payable by the principal to the contractor) of WUC in that portion or stage of the works completed by the contractor: after the date of a change in the applicable price index, and up to and including the next date (if any) that the price index changes;

B = the percentage of that portion or stage of the works completed during the relevant period, having regard to the materials supplied during the relevant period;

C = the nominated portion of the original contract sum representing the contractor's price to carry out that portion or stage of the works, as nominated by the parties in an annexed affected price schedule;

D = the nominated percentage of the contractor's price to carry out that portion or stage representing the cost to the contractor in supplying the affected class of materials, as nominated by the parties in an annexed affected price schedule;

E = the nominated percentage of risk accepted by the principal with respect to price changes;

F = the value of the relevant price index applicable to the date/s when the relevant WUC was carried out;

G = the value of the relevant price index applicable to the date of entering the contract;

The annexed price schedule must specify:

(i) the class/es of materials intended to be affected by the above price adjustment formula;

(ii) for each affected class of materials, the relevant price index, (and any alternative price index/ es to be used in the event that a relevant price index ceases to be published);

(iii) the percentage of risk accepted by the principal with respect to price changes for each affected class of materials;

(iv) for any defined portion or stage of WUC, a portion of the original contract sum that is to represent the contractor's price to carry out that portion/stage; and

(v) for any defined portion or stage of WUC, a percentage of the contractor's price for that portion or stage of WUC that is to represent the supply of an affected class of materials.

Note: The price adjustment formula can be applied at any time to determine an adjustment to the contract sum up to and including the date of the most recently published price index. The price adjustment formula will not apply for periods when an applicable price index has not been published.[27]

RISE AND FALL ADJUSTMENTS ARE CALCULATED RETROSPECTIVELY

Price indexes are published on the basis of industry data collected during the period that the index applies. Most Australian price indexes are published quarterly.

For progress claims issued prior to the relevant index being released, price adjustment will not be available, unless the contract provides for an interim measure (such as, allowing a previous published index to apply until an updated value is published).

Under most standard contracts, a contractor is not entitled to monthly progress payments after practical completion is achieved. The contract should therefore make an allowance for a progress claim to be made after practical completion, when the applicable price index is published.

Otherwise, the contractor may be waiting until the end of the defects liability period to make a claim for rise and fall.

MONTHLY V QUARTERLY INDEXES

During high inflationary periods, a quarterly price index might not capture monthly changes accurately. A rise and fall provision that adjusts the value of work on the basis of a quarterly index may require that work performed in the first month of the quarter is adjusted separately to work performed in the latter months.

One method of doing this is called a 'linear interpolation', which produces a retrospective monthly index from quarterly values. This process progressively incorporates the total rise and fall recorded over three months, by deeming one third of the overall rise or fall to have occurred in the first month, and two thirds to have occurred by the second month. The full value of rise and fall is deemed to have accrued by the third month.[28]

UNCERTAINTY OR CAPRICIOUSNESS

A rise and fall clause must be consistent with other terms of a contract and produce a reliable mathematical result. The courts will be reluctant to strike out an entire contract on the basis of uncertainty of a simple clause,[29] and if possible will determine the operation of the contract in accordance with the ordinary rules of contractual construction.

When a rise and fall clause contains an ambiguity, the function of the court is to make the clause operate sensibly if possible, 'within the reasonable confines of its language'.[30]

Where the rise and fall clause is unsalvageable, questions may arise as to whether the clause is to be severed, or whether the entire contract is void.[31]

The usual questions of *quantum meruit* in respect of the entire contract sum will arise if the contract is held to be void—in that case the existence of a rise and fall clause in the void contract documents may be used by the court to assess the degree of compensation that a contractor may be entitled to.

Where a formal contract fails to include a valid rise and fall clause, but the parties clearly intended for such a clause to apply, the court may rectify the formal contract to include the rise and fall clause.[32] In some cases, the consequences of a contract being voided for uncertainty may be severe, such as where a poorly drafted arbitration clause fails with the rest of the contract, after the arbitration has already taken place.[33]

An important concept to consider when analysing the legal risk of uncertain rise and fall clauses is 'capriciousness', or arbitrariness. Courts will not apply a poorly drafted (or ambiguous) rise and fall clause if the result is clearly unfair or out of proportion to actual inflationary pressures. The court is likely to read the clause down, on the basis that the parties to a commercial arrangement would not intend for a rise and fall clause to provide such a windfall to the contractor.[34]

UNFAIR WINDFALLS AND UPPER LIMITS

A contractor may receive additional payments under a rise and fall clause, regardless of whether the contractor actually incurred increased costs due to inflation.[35] To avoid this possibility, some rise and fall clauses limit adjustments so that they do not exceed the amount of additional costs actually incurred.[36] Such an approach may require the contractor to maintain (and share) very detailed and transparent records of costs incurred at each stage of the project.

PROHIBITIONS ON RISE AND FALL CLAUSES (RESIDENTIAL BUILDING WORK)

In Western Australia, the *Home Building Contracts Act 1991* (WA) prohibits the inclusion of rise and fall clauses in home building work contracts where the original contract sum of the work is between $6,000.00 and $200,000.00.[37] This prohibition is qualified by exceptions, such as a 'rise' clause being permitted where the direct cause of the price increases is the imposition of a new law, tax or duty.

A rise and fall clause is also allowable if drafted to apply only to actual increases in the cost of carrying out the construction work where the work is delayed solely as a result of circumstances outside of the contractor's control (not constituting a breach of the contract by the contractor). If the price increases by more than five per cent of the original contract sum, the owner may terminate the contract and compensate the contractor for work performed up to the date of termination.[38]

In Victoria, the *Domestic Building Contracts Act 1995* (Vic) also prohibits the inclusion of rise and fall clauses (cost escalation clauses) in domestic building work contracts.[39] There are stated exceptions to this prohibition, such as where the original contract sum is above $500,000.00, however, the requirement that builders give owners a notice in an approved form effectively creates a blanket prohibition, where the Director of Consumer Affairs Victoria has not approved any form of notice.[40] Cost escalation clauses are allowed in relation to a domestic building work contract worth over $5,000.00 that is 'for public construction'.[41]

No prohibitions currently exist in New South Wales, Queensland, South Australia, Tasmania, or in the Northern Territory for rise and fall clauses in residential or commercial construction contracts.

PRICE INCREASES CAUSED BY NEW LAWS, TAXES OR DUTIES

Both the Western Australian and Victorian Acts that prohibit rise and fall clauses have exceptions for provisions according to which the increase in contract sum is the result of the introduction of a new law, tax or other government–imposed charge, introduced after the contract was entered into. A residential builder wishing to rely on such a clause must provide a clear warning next to the contract sum.[42]

Rise (and fall) clauses relating to government–imposed tax increases may become particularly relevant for GST–inclusive lump sum contracts in coming years, with the threat of an increased GST on the horizon. The OECD recently recommended that Australia increase its GST by 25 per cent.[43] Although previous sales tax regimes allowed for increases in sales tax to be automatically passed on to consumers,[44] that is unlikely to be the case for any future GST increases.

STATUTORY SECURITY OF PAYMENT

Having regard to the way that security of payment legislation works among Australian east coast states,[45] it may be prudent to ensure the rise and fall clause adjusts the value of works performed under the contract, rather than merely providing a mechanism for allowing a superintendent to grant or withhold additional payments.[46]

Rise and fall adjustments are made retrospectively; a contractor may find that the value of work performed in a previous month substantially increases when the relevant price index is published (even though no further construction work has been carried out). In those circumstances, jurisdictional issues with respect to the existence of a valid reference date may arise.[47]

Given the potential for rise and fall clauses to be interpreted in unexpected ways, contractors may be warned to pay close attention to the interplay between the rise and fall clause and security of payment legislation, if they intend to utilise statutory adjudication to recover progress payments. It is at the intersection of laws that we may expect to see new developments.

WHAT LEGAL ADVICE CAN BE GIVEN?

Legal practitioners can be of great assistance when proposing or responding to rise and fall clauses in construction contracts, specifically:

(a) drafting a valid rise and fall clause, having regard to certainty of the clause in the operation of the contract as a whole, and also having regard to applicable local laws and regulations;

(b) identifying or scrutinising rise and fall clauses in a contract for tender, proposing or negotiating amendments to those clauses, or calculating unexpected consequences of a particular rise and fall clause; and

(c) resolving disputes regarding rise and fall clauses, their proper construction, and a party's prospects of success should they wish to challenge a party's interpretation of such clauses or seek to enforce the relevant clause in the courts, or persuade an adjudicator as to the correct application of the clause.

Note: Annexure A to this article is available for download as a PDF at https://vincentyoung.com.au/wp–content/uploads/Annexure–A–Rise–and–Fall–Clauses–in–Construction–Contracts.pdf

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12. See Annexure A to this article, Example 2, available at https://vincentyoung.com.au/wp–content/uploads/Annexure–A–Rise–and–Fall–Clauses–in–Construction–Contracts.pdf (Retrieved 19 November 2021)

13. *Stanwell Park Hotel Co Ltd v Leslie* (1952) 85 CLR 189, see page 201.

14. Catalogue 6427.0, Table 18, available at https://www.abs.gov.au/statistics/economy/price–indexes–and–inflation/producer–price–indexes–australia/latest–release (Retrieved 15 November 2021).

15. See Annexure A to this article, Example 3, which uses Catalogue 6427.0, Table 17.

16. As in the case of *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337. See Annexure A to this article, Example 2.

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19. See Annexure A to this article, Example 2.

20. (1976) 50 ALJR 769.

21. Ibid, per Stephen and Murphy JJ at page 257.

22. Ibid, at page 254.

23. (1982) 149 CLR 337.

24. Ibid, per Aickin J at page 406, and per Brennan J at page 426 where he states: 'We were furnished with sample calculations by both parties which were intended to demonstrate the reasonableness of the contending views as to the meaning of the VUPC. Interesting though they were, the construction of clause G 28(3) in this respect is not so uncertain as to be aided by examples of its operation if one or other construction be adopted.'

25. For a helpful review of the caselaw applicable to contractual construction, see Mason J's judgment, Ibid, pages 369 to 376.

26. See Annexure A to this article, Example 5.

27. See Annexure A to this article, Example 1, for a work through of this rise and fall formula, including some calculations.

28. See Annexure A to this article, Example 3, clause 199.04(c).

29. See for example, Brooking J's comments in *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106, at page 130.

30. *Hely v Sterling* [1982] VR 246, per Lush J.

31. Consider *Denton v Ryde Municipal Council* (1953) 19 LGR (NSW) 152.

32. See for example, *M.R. Hornibrook (Pty) Ltd v Eric Newham (Wallerawang) Pty Ltd* (1971) 45 ALJR 523, per the court on page 376.

33. This occurred in *Bevelon Investments Pty Ltd v Kingsley Holdings Pty Ltd* [Unreported, 1971] Supreme Court of Victoria. In that case, *quantum meruit* was awarded to the builder in lieu of a valid written contract.

34. The court will not likely read down a clause unless it is drafted ambiguously. See (1976) 50 ALJR 769 per Gibbs J at page 251.

35. See *In the Matter of a Building Contract between Blandhurst Pty Ltd and Graham–Hall (Contractors) Pty Ltd* [1984] QSC 242, whereby a builder was entitled to an additional $206,451 despite actual costs to complete being $71,000 less than originally estimated.

36. See Annexure A to this article, Example 4.

37. *Home Building Contracts Act 1991* (WA) sections 3, 13.

38. Ibid, section13(4)(c), Schedule 1 clause 4.

39. *Domestic Building Contracts Act 1995* (Vic) sections 3, 5, 15.

40. Ibid, section 15(2)(b), Domestic Building Contracts Regulations 2017 (Vic).

41. Domestic Building Contracts Regulations 2017 (Vic) clauses 11(1), 12(1).

42. *Domestic Building Contracts Act 1995* (Vic) section 33

43. OECD Economic Surveys: Australia (September 2021), available at https://www.oecd.org/economy/surveys/Australia–2021–OECD–economic–survey–overview.pdf (Retrieved 15 November 2021).

44. Clayton Utz, 'Hidden rise and fall provision' (1996) *Australian Construction Law Newsletter* 51, at page 52.

45. And now Western Australia, for construction contracts entered into from 26 June 2021, with the introduction of the *Building and Construction Industry (Security of Payment) Act 2021* (WA).

46. See for example, *Transgrid v Siemens Ltd* [2004] NSWCA 395, *John Holland Pty Ltd v Roads and Traffic Authority of NSW* [2007] NSWCA 19, and *Plaza West Pty Limited v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWSC 753.

47. See for example, *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808. In that Victorian case, the adjudicator determined that it did not have jurisdiction to award any payment to the applicant, finding that no work had been performed in the relevant period, and therefore concluding that no new reference date had arisen. Digby J declined an application to quash the adjudicator's decision.

LARGE FINES AND CRIMINAL CONVICTIONS FOR CONSTRUCTION COMPANIES AND AN OFFICER FOLLOWING WH&S BREACHES

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INTRODUCTION

In the last month, four construction companies and an officer from one of the companies were convicted of work health and safety breaches. Two of the companies received hefty fines and the officer was sentenced to six months imprisonment, wholly suspended. The other two remaining companies are awaiting sentencing, which is expected to occur in the coming months.

Each case related to serious work health and safety breaches in the construction industry, which resulted in either the death or serious injury of a worker that could (and should) have been prevented. In addition to the fines and criminal convictions, each case attracted significant media attention with multiple mainstream media outlets publishing articles on the incidents and the convictions, likely causing further irreparable reputational damage.

This article provides a brief summary of those cases, together with our recommendations.

RAR CRANES PTY LTD (RAR CRANES) AND MULTIPLEX CONSTRUCTIONS PTY LTD (MULTIPLEX)

The first case related to the 2016 incident that occurred on the University of Canberra public hospital project where a worker employed by RAR Cranes was crushed to death after a pick and carry crane toppled over and landed on top of him.

The investigations identified what was described as 'significant and systematic' failures in safety regarding the operation of the crane, including allowing it to operate at 130 per cent capacity and failing to carry out an appropriate risk assessment before the lift.

As the crane began to shift the load (which was a ten–tonne generator) several workers including the deceased walked alongside the load to steady it, thereby exposing the workers to a risk of death or serious injury when the crane toppled over.

In October 2021, both RAR Cranes and Multiplex pleaded guilty and were convicted of category 2 offences under section 32 of the *Work Health and Safety Act 2011* (ACT) (ACT WH&S Act) regarding the incident—being a breach of a work health and safety duty that exposed an individual to a risk of death or serious injury.

The companies will be sentenced in the coming months where both Multiplex and RAR Cranes are expected to receive significant fines, noting that the maximum fine for such an offence is $1,500,000.

Separately, several charges were also laid against various 'workers' and 'officers' regarding the incident and its surrounding circumstances, including:

(1) The operator of the crane, who was charged with manslaughter under the *Crimes Act 1900* (ACT)—noting that, at the time of the incident, the offence of industrial manslaughter was yet to be enacted in the Australian Capital Territory. In April 2020, the crane operator was sentenced to 12 months imprisonment (wholly suspended) after pleading guilty to a downgraded category 1 offence of 'reckless conduct' under the ACT WH&S Act—being a breach of a work health and safety duty that exposed an individual to a risk of death or serious injury that was reckless and without reasonable excuse;

(2) The crane dogman and the managing director of RAR Cranes, who were both charged with category 1 reckless conduct offences;

(3) The site supervisor and site safety officer of Multiplex, who were both charged with category 1 reckless conduct offences; and

(4) The Chief Executive Officer of Multiplex, who was charged with a category 2 offence on the basis that they were an 'officer' of Multiplex and they failed to exercise 'due diligence' to ensure that Multiplex complied with its work health and safety duty, which exposed an individual to a risk of death or serious injury.

In relation to the charges, Greg Jones, the Work Safety Commissioner at the time, said:

All workers, employers, their directors and managers, both on site and in the office, must ensure that safety is the number one priority.

… the range of charges reflect the shared responsibilities under the Work Health and Safety Act, from the boardroom to the workers conducting the activity.

Whilst the charges against the CEO and the two other individuals employed by Multiplex have since been dismissed, the laying of the charges nonetheless attracted a significant amount of media attention likely causing irreparable reputational damage to the individuals and Multiplex.

GLOBAL RENEWABLE ENERGY SYSTEM PTY LTD (GLOBAL RENEWABLE ENERGY)

The second case related to the 2019 incident that occurred when a worker employed by Global Renewable Energy, a solar installation contractor, fell 4.5 metres through a skylight in the roof they were working on, fracturing his spine and pelvis.

The investigations identified there were no perimeter guardrails on the roof, none of the workers were using safety harnesses and the Safe Work Method Statement (SWMS) did not identify that there were skylights in the roof or the associated risks.

The court ultimately found Global Renewable Energy guilty on five charges of failing to ensure the health and safety of its workers, so far as is reasonably practicable, and fined Global Renewable Energy $500,000.

CORDWELL RESOURCES PTY LTD (CORDWELL RESOURCES) AND ITS OFFICER

Finally, a concreting contractor, Cordwell Resources and its director have both pleaded guilty and been convicted for breaching their respective work health and safety duties. The breaches related to an incident that occurred when workers, under the director's supervision, were using the bucket of a front–end loader as a makeshift elevated platform.

The court heard that the workers in the bucket, which was raised 4.5 metres above the ground, were not wearing safety harnesses and were carrying out the works by having one person hold on to the other person that was carrying out the work to prevent them from falling forward out of the bucket. When the bucket began to tilt, one worker fell and the other sustained significant lacerations to his head from hitting it on the top edge of the bucket.

Judge Long SC heavily criticised the failures in safety by both Cordwell Resources and its director, pointing out that the reckless conduct was not just without reasonable excuse (i.e. an element of a category 1 reckless conduct offence) but with a degree of planning and reflection.

Cordwell Resources was fined $500,000 and the director was sentenced six months imprisonment (wholly suspended).

TAKEAWAY

These cases further highlight the need for companies and their officers to ensure that they understand and comply with their work health and safety obligations and duties.

In addition to the possibility of individuals being injured or killed, breaching a work health and safety duty may also result in:

(1) costly and protracted criminal proceedings;

(2) large fines and criminal convictions;

(3) significant project delays and other associated site–based issues and complications; and

(4) serious and irreparable reputational damage.

Disclaimer: The content does not constitute legal advice and should not be relied upon as such. Appropriate legal advice should be obtained in actual situations. Feel free to contact us should you require any assistance in resolving a legal dispute.

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HEAD CONTRACTORS AND SUPPORTING STATEMENTS UNDER THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999* (NSW)

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WHAT DOES A HEAD CONTRACTOR HAVE TO DO?

Under sections 13(7) and (8) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act), a head contractor must not serve a payment claim unless the claim is accompanied by a supporting statement in the form approved by the Secretary and it must not be false or misleading.

As of 1 March 2021, there are two forms, one for owner occupier construction contracts (owner occupier construction contract form), and one for all other construction contracts (construction contract form).

WHO IS A 'HEAD CONTRACTOR'?

A 'head contractor' is someone who directly contracts with the principal (the person at the top of the contracting chain), but not when one has no subcontractors including where the principal has engaged all the subcontractors directly.

The definition of head contractor under the Act is broader than it is generally understood, so care needs to be taken.

A head contractor under the Act may not have the management or control of the building site but, if they are:

... the entity that has a contractual relationship with the principal and engages another party or parties, to perform part of the work on that project,

they are a head contractor under the Act.

This is intentional, so the Act:

... does not fashion a role for any participant, but rather sets obligations for parties when and where they exist in a construction contract.[1]

... not providing a statutory declaration, or providing a false or misleading declaration that a head contractor has paid its subcontractors, exposes head contractors to regulatory investigation and prosecution of its company, directors and managers, but the underlying payment claim will stand.

WHAT ARE CONSEQUENCES OF NOT PROVIDING A SUPPORTING STATEMENT, OR PROVIDING A FALSE OR MISLEADING SUPPORTING STATEMENT?

Section 13(7)—not serving the accompanying supporting statement	Section 13(8)—serving a false or misleading supporting statement
Section 13(7)—max 1,000 penalty units ($110K) in the case of a corporation	Section 13(8)—max 1,000 penalty units ($110K) in the case of a corporation
Section 13(7)—max 200 penalty units ($22K) in the case of an individual	Section 13(8)—max 200 penalty units ($22K) or three months imprisonment (or both) in the case of an individual
Section 34D—max 200 penalty units ($22K) for a director or a manager of the corporation if they are captured by the executive liability offence	Section 34D—max 200 penalty units ($22K) for a director or a manager of the corporation if they are captured by the executive liability offence

Supporting statements are intended to replace the usual contractual requirement for a statutory declaration that all subcontractors have been paid before the head contractor can secure a progress payment from the principal.

Statutory declarations were 'often false, not enforced and frequently amended to convey the appearance that what was due and owing to a subcontractor was no longer an amount owed by the head contractor'.[2]

Sections 13(7) and (8) allows the regulator (the Department of Finance, and Services and Innovation through Fair Trading) to investigate and prosecute head contractors who breached sections 13(7) and (8).[3]

False supporting statements also present exposure to civil claims for damages for misleading and deceptive conduct.

Section 34D allows government regulators to pierce the corporate veil and pursue individual directors or senior managers (where they were in a position to influence whether sections 13(7) or (8) were breached) who knew of the breach or were recklessly indifferent, and failed to take reasonable steps to prevent or stop the breach.

The Court of Appeal has found that a non–compliant section 13(7) supporting statement given by a head contractor will not invalidate the payment claim itself.[4] If a non–compliant supporting statement is served by a head contractor, the principal must still provide the payment schedule within the prescribed 10 business days and, unless there are other contractual options, must rely on the relevant regulators to prosecute the head contractor for the breach of section 13(7).

This means that not providing a statutory declaration, or providing a false or misleading declaration that a head contractor has paid its subcontractors, exposes head contractors to regulatory investigation and prosecution of its company, directors and managers, but the underlying payment claim will stand.

REFERENCES

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2. The Second Reading for the Building and Construction Industry Security of Payment Amendment Bill 2013 (NSW) in the Legislative Assembly by Mr Andrew Constance (Minister for Finance and Services) on 24 October 2013.

3. The Second Reading for the Building and Construction Industry Security of Payment Amendment Bill 2013 (NSW) in the Legislative Assembly by Mr Andrew Constance (Minister for Finance and Services) on 24 October 2013.

4. *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93.

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COURT OF APPEAL REALLOCATES LIABILITY IN LACROSSE CASE—HAS THE DUST FINALLY SETTLED?

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INTRODUCTION

In May 2021, the Victorian Court of Appeal handed down its decision regarding apportionment of liability between the building surveyor and the fire engineering consultant in the landmark cladding litigation arising from the 2014 Lacrosse Tower fire.

BACKGROUND

In 2014, a fire was ignited by a cigarette left by a backpacker on a balcony in a Docklands apartment building. The rapid spread of the fire up 14 storeys was linked to the aluminium composite panels (ACP) installed on the outside of the building, which comprised a 100 per cent polyethylene core.

In 2019, the Victorian Civil and Administrative Tribunal (VCAT) delivered a decision that apportioned $12 million in damages between the building surveyor (33 per cent), the architect (25 per cent), the fire engineering consultant (39 per cent) and the individual who caused the fire (three per cent). The builder was able to pass through its liability to the consultants, even though it had breached its warranties. See our previous discussion on the initial tribunal decision.[1]

THE APPEAL

An appeal was brought in the Victorian Court of Appeal by the three consultants.

MARCH 2021 DECISION

In *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T* [2021] VSCA 72, the Court of Appeal upheld the tribunal's decision and found that the builder was not negligent under the *Wrongs Act 1958* (Vic) (*Wrongs Act*), as the three consultants had argued it should be. This was notwithstanding that the court agreed that the builder had breached the implied warranty under the *Domestic Building Contracts Act 1995* (Vic) and also the *Building Act 1993* (Vic) by constructing a building that didn't comply with the Building Code of Australia (BCA).

The *Wrongs Act* governs apportionment in Victoria and provides that the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount that reflects the proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage.

The court held that there was no error in determining that the builder's breach of warranty claims were not apportionable as the builder was not found to have failed to take reasonable care.

The court agreed that the builder did not fail to take reasonable care. This was because the builder was not aware of the fire risks connected to ACPs, was not responsible for including ACP in the building design, and could rely on a consultant's understanding of items that were technical and outside of a builder's knowledge, as a builder cannot be expected to know the intricacies of the products. The fact that the panels did not meet the statutory warranties given by the builder, because they were not compliant or fit for purpose, did not of itself constitute a lack of reasonable care, the court held.

The court found that the builder was not required to ensure that the materials selected complied with the BCA, even though ACP was referenced in the specification and drawings prepared by the architect. This remained the responsibility of the architect, not the builder.

The court agreed with the VCAT decision that the 'peer professional opinion' defence did not apply,

as the relevant peer professional opinion relied upon was 'unreasonable'.

This affirmed the tribunal's first instance decision that although the builder was liable to the owners of the building, it was able to pass the liability on to the responsible consultants.

Leave to appeal was granted on the issue of the building surveyor's failure to identify and correct an omission in a fire engineering report. The building surveyor successfully argued that VCAT erred in finding that the building surveyor's failure to identify and remedy deficiencies in the fifth fire engineering report caused the loss, and the court set aside that finding. The court agreed with the building surveyor's position that as the fire engineer was already aware that ACPs were proposed for the cladding, the inaction by the building surveyor had no causal consequence.

In all, of the 11 appeal grounds raised, 10 were rejected. The revisiting of apportionment was not remitted to the tribunal, rather it was conducted by the court.

MAY 2021 DECISION

In May 2021, the Court of Appeal handed down its judgment in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T [No 2]* [2021] VSCA 122, reallocating the responsibility as follows: the fire engineer was apportioned 42 per cent (up three per cent), building surveyor was apportioned 30 per cent (down three per cent), while the backpacker who started the fire and the architect's apportionment percentages remained the same.

In reaching its decision, the court had regard to:

- the degree of departure by each wrongdoer from the standard of care reasonably expected of that wrongdoer; and
- the causal potency of each wrongdoer's negligent acts or omissions.

The court held that the fire engineer sat at the top of the hierarchy by a clear margin, but the building surveyor bore 'a not insignificantly greater responsibility than the architect'. The court agreed with the original findings that the fire engineer's failures had considerable causal potency, while also stating it had 'frontline responsibility'.

The court noted that while it might have appeared that it simply assigned the reduction in the building surveyor's share of the apportionment to the fire engineer without increasing the architect's share, the revised percentages reflected the court's view about each party's relative responsibility.

THE IMPACTS

The case has been the catalyst for exclusions in professional indemnity insurance cover, withdrawals of insurance cover and increased premiums for practitioners in the building and construction industry, including consultants such as those in this case (architects, building surveyors and fire engineers).

The appeal decision means that the issues plaguing the professional indemnity insurance industry are unlikely to cease any time soon.

REFERENCE

1. See at: https://www.holdingredlich.com/residential–focus–13–march–2019

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LESS WORK THAN ORIGINALLY CONTEMPLATED? WHO BEARS THE COST?

DAY V QUINCE'S QUALITY BUILDING SERVICES PTY LTD **[2021] NSWCATAP 296**

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KEY TAKEOUTS

Where a contract provides for a reduction in the contract sum for omitted or decreased works, the relevant consideration is a common sense analysis of whether works have been omitted or decreased. It is not whether work is done even if in a different manner to achieve the same or a similar result.

This decision also confirms that contract rates are a ceiling for *quantum meruit* claims arising where parties do not document variations in writing.

FACTS

On 17 May 2017, Mr and Mrs Day (owners) entered into a Residential Building BC4 contract with Quince's Quality Building Services Pty Ltd (builder) for the construction of duplex dwellings.

Originally, the builder had contracted to supply and place two underground rainwater tanks and two 'Atlantis Flo' detention systems under the decks. The builder had allowed $56,500 for the cost of these works. However, at the builder's suggestion and with approval from the owners, the builder installed an above–ground rainwater tank at the side of the building at a cost of $40,480. In a similar way, the supply and installation of hardwood timber cladding and painting services originally agreed was later substituted with a different product that in turn required less labour.

A dispute arose between the parties in respect of defects in the builder's work and adjustments to the contract sum.

On 18 October 2020, the owners commenced proceedings in the NSW Civil and Administrative Tribunal. The owners argued that in respect of the hydraulics, external cladding and painting, the 'works' were 'decreased' or there were 'omissions' from those works, and so the contract price ought to be reduced.

They relied on clause 14(f) of the contract which provided:

(f) Where the works are decreased or omissions from the works are made the cost of the work now not required is to be deducted from the contract price. Cost in this case means the actual cost of labour, subcontractors or materials save [sic] by the builder because the work is now not required to be done. No other deduction is required by reason of the work aspect of work being decreased or omitted.

The builder argued that the clause ought to be read as a whole. The only savings or credits that arose under the clause were those works, being a decrease or omission from the work, 'now not required to be done'.

The builder also noted that the clause makes clear that 'no other deduction is required by reason of the work or aspect of the work being decreased or omitted'.

At first instance, the tribunal found for the builder. It determined that the owners had contracted for the supply of a rainwater system, they were provided with a rainwater system, albeit a system that was materially different to the 'works', and the builder was entitled to retain the difference in the costs between what was contracted for and what was in fact provided.

The tribunal applied the same rationale for the external cladding and painting.

The tribunal's decision was reached on the basis that:

- clause 14(f) of the contract was enlivened where work was not done, not the situation where work was done but in a different manner to achieve the same or a similar result;
- ultimately, the work itself was still done and therefore could not fit into the stipulation in clause 14(f) that the work was 'not required to be done'; and
- In a lump sum contract, both parties are at risk where work done is more expensive or cheaper than the allowance in the contract.

The owners appealed the tribunal's decision on four grounds:

(1) Ground One: The tribunal misconstrued clause 14 and should have found that where the works are decreased or omissions from the works are made, the cost of the work not now required is to be deducted from the contract price.

(2) Ground Two: The tribunal failed to determine material issues raised by the owners, being a damages claim in respect of a 162 working day delay in completing the works.

(3) Ground Three: The tribunal erred in finding that the builder be remunerated on a *quantum meruit* basis and that was how it should be calculated. Separately, the owners also asserted that the tribunal did not turn its mind to the question of the reasonableness of the amounts claimed by the builder, and failed to determine that the contract rates provided the ceiling upon reasonable remuneration on a *quantum meruit* basis in circumstances where the parties did not sign written details of the variations as required by the contract.

(4) Ground Four: The tribunal did not afford procedural fairness or conduct proceedings in accordance with the rules of natural justice.

DECISION

The Appeal Panel allowed the appeal, set aside the tribunal's original decision and remitted the matter to the tribunal for redetermination.

GROUND ONE—CONSTRUING CL 14(F)

The Appeal Panel found for the owners. The tribunal had erred in its approach and construction, and it ought to have directed its attention to whether the works had decreased, or whether there were omissions from the works, such that there was 'work not now required' to be done. This construction made sense in the context of a building contract in which the parties have agreed that the scope of the 'works' may be varied. The owners were therefore entitled to a reduction in the contract sum.

The Panel said that when undergoing the exercise of construing commercial contracts, a court or tribunal will apply a presumption that the parties did not intend the contract's terms to operate unreasonably and a common sense approach must be taken.

On this basis, the Panel found that clause 14(f) of the contract had to be read in conjunction with clauses 14(g), (h) and (i) which provided:

(g) Where the work to be done is increased, the cost of the extra work is to be added to the contract price. The Builder can choose when and how often to claim payment for variation work and is not required to wait until the next stage claim.

(h) Where the price has not been previously agreed for variation work and the price to be paid for the work will be the cost as calculated in accordance with sub–clause (i) below, together with the allowance specified in item 1 of Schedule 2 for overhead and profit.

(i) The cost referred to in sub–clause (h) above, unless otherwise agreed, will be calculated as follows:

(i) for work by the builder's employees, the rates for such labour are those set out in item 2 of Schedule 2. If no rates are shown, then the rates to be used are the rates published by the Master Builders Association of NSW current at the time the variation is made; …

Considering this, the Appeal Panel found that if the builder's interpretation was correct:

- clauses 14(h) and (i) would never have any work to do; and
- no party would ever agree on a variation price, as there would be windfall gains to a builder if the costs of the works decreased, and windfall gains to the homeowner if the costs increased.

GROUND TWO—FAILURE TO DETERMINE DAMAGES CLAIM

The Appeal Panel found for the owners. The tribunal had identified the claim, but the Panel found it had failed to consider the issue.

GROUND THREE—REMUNERATION ON A *QUANTUM MERUIT* BASIS

The Appeal Panel found for the owners. The Panel applied *Paraiso v CBS Build Pty Ltd* [2020] NSWSC 190 (which itself had applied *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32), to find that contract rates are a ceiling for *quantum meruit* claims arising where parties do not document variations in writing. The Appeal Panel found that the tribunal did not have regard to the upper limit imposed by clauses 14(h) and (i).

GROUND FOUR—PROCEDURAL FAIRNESS

The Appeal Panel found for the builder. The owners' primary submission was that the tribunal failed to allow the owners to cross–examine the builder's witnesses. The Panel found that the owners were given the opportunity to cross–examine the builder's witnesses on several occasions, but failed to do so, and could not see what more the tribunal could have said on this issue.

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ENFORCEMENT OF ARBITRAL AWARDS IN LIGHT OF THE PRIMACY OF THE ARBITRATION AGREEMENT

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THE FACTS

Energy City Qatar ('ECQ'), a company incorporated in Qatar, sought to enforce in Australia an arbitral tribunal award made in Qatar against Hub Street Equipment (Hub), a company incorporated in Australia. The award was purportedly made pursuant to an arbitration clause in a contract between ECQ and Hub for the supply and installation of street lighting and furniture in Qatar (Agreement).

Energy City Qatar made an advance payment to Hub under the Agreement, which ECQ then sought to recover after deciding not to proceed with it. Following some email communications and meetings in which ECQ sought repayment of the money, Hub informed ECQ that it would identify its position after obtaining legal advice. However, Hub never communicated with ECQ again and continued to retain the advance payment.

Article 46 of the Agreement provided that any dispute not resolved amicably within 28 days would be referred to arbitration, to be conducted in accordance with the rules of arbitration in Qatar, before a three–member arbitral tribunal, with each party appointing an arbitrator and the party–appointed arbitrators appointing the chair.

Article 47 provided that the governing law of the Agreement was the law of Qatar, and Art 50 prescribed that any arbitration would be conducted in English.

Critically, ECQ did not send Hub a notice under Art 46 of the Agreement giving Hub the opportunity to appoint an arbitrator within 45 days of the commencement of the arbitration. Instead, ECQ applied directly to the Qatari Plenary Court of First Instance (Qatari Court) to appoint three arbitrators, including an arbitrator nominated by ECQ. Hub was given notice of the Qatari proceeding but did not appear.

The Qatari Court made orders appointing all three members of the arbitral tribunal (tribunal) pursuant to Art 195 of the Qatari Civil and Commercial Code of Procedure (Qatari law), which relevantly provided (as translated in English):

If a dispute arises between the parties prior to an agreement between them as to the arbitrators ... the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties.

All three appointed arbitrators were of Arabic descent, albeit ECQ's nominee was not appointed. It was apparent from the Qatari Court's published reasons that in exercising its power of appointment, it laboured under a misapprehension of fact that following the commencement of the Qatari proceeding ECQ had invited Hub to appoint an arbitrator which invitation Hub had declined.[1]

The tribunal sent six notices in English about the conduct of the arbitration to Hub, with the arbitration being adjourned on three occasions due to Hub's non–appearance. Hub did not appear at all in the arbitration (which was conducted in Arabic).[2] Following the arbitration proceedings, the tribunal issued an award in Arabic against Hub.[3]

Energy City Qatar applied to enforce the award in Australia.

DECISION AT FIRST INSTANCE

Hub sought to resist the enforcement of the award on several grounds under sections 8(5) and 8(7) of the *International Arbitration Act 1974* (Cth) ('IAA').

The principal ground was that the composition of the tribunal, as appointed by the Qatari Court, was not in accordance with the Agreement, enlivening section 8(5)(e) of the IAA.[4] A subsidiary ground was that the arbitration was not conducted in English as required by the Agreement.

At first instance, Jagot J enforced the award.[5] She rejected Hub's submission that the composition of the tribunal, as appointed by the Qatari Court, was not in accordance with the Agreement.

While her Honour accepted that the arbitration was not conducted in English as required by the Agreement, and that therefore a gateway for resisting enforcement had been established, she considered that as a matter of discretion the award should be enforced as the procedural irregularity[6] had not caused Hub any material prejudice.[7]

Hub appealed the decision to the Full Court.

APPEAL TO THE FULL COURT

There were two principal issues on appeal:

(1) Was the appointment of the tribunal in accordance with the parties' Agreement?

(2) Should the court exercise its discretion under section 8(5) of the IAA to enforce the award if the tribunal was appointed contrary to the Agreement (assuming an affirmative answer to the first question) or given that the arbitration was conducted in Arabic (and not in English) contrary to the Agreement?

The leading judgment was delivered by Stewart J, with whom Allsop CJ and Middleton J agreed.

FIRST QUESTION

WAS THE ARBITRAL TRIBUNAL COMPOSED IN ACCORDANCE WITH THE AGREEMENT?

At the crux of the first question was the scope of Art 195 of the Qatari law'; that is, whether the Qatari Court's power to appoint the tribunal had been validly invoked?

Justice Jagot at first instance was satisfied that a dispute had arisen between Hub and ECQ for the purposes of enlivening the Qatari Court's jurisdiction under Art 195 by virtue of the fact that Hub had refused to respond to ECQ's request for repayment.[8]

On appeal, the Full Court concluded, in reliance on the expert evidence adduced by Hub, that the Qatari Court did not have a jurisdictional basis to appoint the tribunal.[9]

The expert evidence on Qatari law was to the effect that in the absence of a notice of the kind contemplated by Art 46 of the Agreement, and the failure of the parties thereafter to agree on the appointment of the arbitral panel in accordance with the procedure laid down in Art 46, the Qatari Court's jurisdiction under Art 195 to appoint the arbitral tribunal was not enlivened.[10]

In circumstances where the procedure for appointment of the arbitral panel in Art 46 had been ignored, the Full Court held that ECQ had prematurely approached the Qatari Court, which in turn had acted on the misapprehension that the contractual procedure for the appointment of an arbitral tribunal had been followed but had failed.[11]

Hence, the appointment by the Qatari Court of the tribunal was not in compliance with the Agreement.[12] Accordingly, contrary to the trial judge's reasons, a proper basis for resisting

The Full Court's decision affirms the primacy of the parties' arbitration agreement. Where an arbitration agreement provides that each party is entitled to appoint an arbitrator, that right is a fundamental element of due process and is not to be discarded.

The Full Court drew a distinction between technical procedural defects which cause no material prejudice (on the one hand) and fundamental defects which affect the structural integrity of the arbitration (on the other hand).

enforcement under section 8(5)(e) of the IAA (equivalent to Art V(1)(d) of the New York Convention) had been established.[13]

SECOND QUESTION

THE NATURE AND EXERCISE OF THE RESIDUAL DISCRETION

The structure of Art V of the New York Convention (to which effect is given in section 8 of the IAA) is such that even if one of the limited grounds for resisting enforcement is made out, the enforcement court has a discretion to nevertheless enforce the foreign award. This discretion emanates from the word 'may' in Arts V(1) and (2) of the New York Convention. The Full Court noted that there was no authoritative statement in Australia of the nature of the discretion to enforce an award conferred in sections 8(5) and (7) of the IAA.[14]

As to the irregularity concerning the composition of the tribunal, the Full Court held that there was 'little if any scope' for the court to exercise the residual discretion under section 8(5) of the IAA to enforce the award.[15] This was because the defect was:

... fundamental to the structural integrity of the arbitration [and] it [struck] at the very heart of the [T] ribunal's jurisdiction.[16]

As to the irregularity constituted by the conduct of the arbitration in Arabic (as opposed to English), the Full Court held that Hub had not established that the trial judge's discretion had miscarried. The procedural defect had not caused material prejudice to Hub. Accordingly, the Full Court considered that it was appropriate for the residual discretion contained in section 8(5) of the IAA to be exercised so as to enforce the award.[17]

In the end result, the Full Court allowed the appeal and refused to enforce the foreign award.

COMMENT

PRIMACY OF THE ARBITRATION AGREEMENT

The Full Court's decision affirms the primacy of the parties' arbitration agreement. Where an arbitration agreement provides that each party is entitled to appoint an arbitrator, that right is a fundamental element of due process and is not to be discarded. Therefore, if the tribunal is constituted in a manner contrary to that agreed procedure,[18] the structural integrity of the tribunal is affected.

This will justify refusal of enforcement of an arbitral award on the basis that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, under the New York Convention,[19] or alternatively under the UNCITRAL Model Law on International Commercial Arbitration.[20]

The basic paradigm in international arbitration is for each party to appoint its arbitrator and the two arbitrators to then appoint a chairperson. The right of parties to nominate arbitrators of their own choice to determine their dispute is generally considered to be a fundamental right which promotes the concept of party autonomy.

Returning to the case at hand, Art 195 did not give the Qatari Court the right to override Hub's right to nominate an arbitrator of its choice. Instead, it merely provided for a default mechanism in the event of a dispute as to the appointment of an arbitrator (presumably, in the event that the respondent failed to appoint an arbitrator pursuant to its right to do so, or alternatively, in the event that there was disagreement as to the choice of the presiding arbitrator).

Clearly, therefore, the Qatari Court overstepped its jurisdiction in supervising the arbitration.

While the Qatari Court did not give effect to ECQ's choice of arbitrator and instead appointed all three arbitrators, it remains that Hub was deprived of its right to appoint an arbitrator of its choice, which the Full Court confirmed was a fundamental right. As it happened, all three appointed arbitrators were from a Qatari (or at least Middle Eastern) background. There is no mention of this fact in the judgment, but one may safely presume that if Hub, as the Australian party, was afforded the opportunity to appoint an arbitrator, it would have appointed an Australian (or English) arbitrator.

STANDARD OF PROOF

The Full Court clarified that although the grounds for resisting enforcement under the IAA are finite and narrow, that does not translate to the award debtor facing a standard of proof higher than the ordinary civil standard when seeking to resist enforcement of an award. The case therefore confirms that the standard to be applied in resisting enforcement of an arbitral award is the civil standard, being the balance of probabilities.

RESIDUAL DISCRETION

The Full Court's decision is also instructive in addressing the application of the residual discretion to enforce an award, notwithstanding that one of the limited grounds for resisting enforcement has been established. The Full Court drew a distinction between technical procedural defects which cause no material prejudice (on the one hand) and fundamental defects which affect the structural integrity of the arbitration (on the other hand).[21] The judgment confirms that the residual discretion has little or no application to the latter.[22]

This distinction should provide useful guidance for future cases.

COMITY

The decision is somewhat controversial in that it may be perceived to second guess the decision of the supervising court in the exercise of that court's power to support the arbitration in question. Based on the exceptional facts, however, it is submitted that the Full Court has not infringed the concept of comity in refusing to enforce the award.

While it is exceptional for an enforcement court to disregard a decision of the court of the seat, the implication of the Full Court's decision is that Australian courts exercising an enforcement role will not uncritically follow decisions of the court of the seat where the Australian court is persuaded that the court of the seat has made a fundamental error supervising the arbitration which materially affects the rights of the parties as set out in the arbitration agreement. In these circumstances, the Australian court will not blindly enforce a foreign award. That is not to derogate from Australia's reputation as an arbitration–friendly jurisdiction.

REFERENCES

1. *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Co* [2021] FCAFC 110, [52]–[53] (Stewart J) (Full Court Decision).

2. Ibid [103].

3. Ibid [30]–[31].

4. This ground for resisting enforcement in the New York Convention is expressed in Art V(1)(d).

5. *Energy City Qatar Holding Co v Hub Street Equipment Pty Ltd [No 2]* [2020] FCA 1116 (First Instance Decision).

6. Beyond these procedural irregularities, Hub also contended that it did not receive proper notice of the arbitration proceedings, that it was unable to present its case, and that the tribunal award involved a breach of procedural fairness: First Instance Decision, [27]. All of these other challenges were rejected at first instance.

7. First Instance Decision, [29]

8. First Instance Decision, [59]. With respect, this reasoning does not withstand scrutiny.

9. Full Court Decision, [82] (Stewart J).

10. Ibid [55]–[59].

11. Ibid [59]–[60].

12. Ibid [60].

13. Ibid [14], [59]–[60].

14. Ibid [92].

15. Ibid [82].

16. Ibid [104].

17. Ibid [103]–[104].

18. Whether laid out in the original arbitration agreement or a subsequent agreement that amends the original arbitration agreement as to the manner of constituting the arbitral tribunal.

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959), Art V(1)(d).

20. Art 34(2)(a)(iv).

21. Another example of a fundamental defect is an award made without jurisdiction.

22. Absent, perhaps, an estoppel arising in an exceptional case.

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ADJUDICATOR JURISDICTION ACROSS JURISDICTIONS

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INTRODUCTION

The construction industry underpins economies worldwide. In New Zealand, the construction sector contributes 6.2 per cent to gross domestic product (GDP) as of March 2020, with GDP increasing significantly by 52 per cent on a quarterly basis.[1] The report 'Global Construction 2030' forecasts that construction output will increase by 85 per cent to US$15.5 trillion by 2030. The leading countries are expected to be China, the United States and India. The report predicts an average global construction growth of 3.9 per cent per annum to 2030, outpacing global GDP by over one percentage point.[2]

However, despite best project intentions, with construction projects often come construction project disputes. These have the potential to derail projects, relationships, client budget and contractor margin. Given the significant potential impact of protracted disputes, the process of adjudication has been established in various jurisdictions for the fast track resolution of disputes arising under a construction contract.[3]

Adjudication is a process in which an independent third party (known as the adjudicator) determines a dispute put forward by opposing parties. In most jurisdictions, adjudication is a process whereby disputes are largely determined on the papers, with no hearings. It is conducted within very tight timeframes for both submissions and determinations, with most disputes being resolved within six weeks.[4]

In New Zealand, adjudication was first introduced by the *Construction Contracts Act 2002* (NZ) (CCA) in April 2003 as a speedy dispute determination mechanism to facilitate cash flow. Under the CCA, the adjudicator holds jurisdiction for certain disputes arising under the construction contract and must observe the principles of natural justice. Adjudication has become known as a 'short and sharp, rough and ready' process, undoubtedly the preferred dispute resolution forum for contractors or subcontractors.

Adjudication has gained even more momentum globally, arguably due to the significant growth in construction and the COVID–19 environment, increasing the volume of construction disputes requiring resolution. The COVID–19 pandemic has negatively affected construction projects through issues in global supply chains and difficulties in delivering projects on time. Unsurprisingly, the United Kingdom Construction Leadership Council has noted that the level of notifications and claims under construction contracts has increased due to COVID–19.[5] A recent Royal Institution of Chartered Surveyors survey also found that over 40 per cent of professionals reported an increase in disputes since the onset of the pandemic.[6]

However, while adjudication has been a useful tool in dispute determination, the increase in its use has highlighted constraints in the process and caused parties to question whether the scope of adjudicators' jurisdiction is broad enough to achieve its purpose.

This article focuses on adjudicators' jurisdiction across key commonwealth jurisdictions (including Australia, New Zealand and the United Kingdom) and whether the breadth of that jurisdiction means that adjudication is fit for purpose in the current construction environment. It also addresses the level of court intervention in the adjudication process across jurisdictions. The increase in alleged jurisdictional issues (perceived or actual) is

becoming increasingly common and—importantly—can result in delays to the otherwise short statutory timeframes, prevent parties from relying on otherwise legitimate legal arguments falling outside the strict realms of contract, and ultimately render any determination unenforceable and/or unfit for purpose (although the willingness of the courts to interfere at this juncture varies).

We explore these issues more specifically by discussing the following:

(1) how jurisdiction is determined;

(2) how jurisdiction can be challenged;

(3) what jurisdictional issues may arise;

(4) why jurisdiction matters; and

(5) whether the scope should be expanded.

HOW IS JURISDICTION DETERMINED?

We examine below the setting of jurisdiction in New Zealand, Australia and the United Kingdom. Overall, an adjudicator's jurisdiction is widest in the United Kingdom, allowing 'any' dispute arising under the construction contract to be adjudicated. New Zealand follows closely, allowing disputes regarding payment and rights/obligations to be adjudicated. In Australia, jurisdiction is limited to payment disputes only. Most jurisdictions, excluding the United Kingdom, provide that parties cannot contract out of the relevant legislation.

NEW ZEALAND

In New Zealand, the jurisdiction of an adjudicator is set by the *Construction Contracts Act 2002*. Adjudicators have jurisdiction to determine disputes regarding payment and the rights/obligations of a party under a construction contract.[7] Originally, New Zealand more closely followed Australia in that only disputes regarding payment were subject to adjudication. However, this was broadened to include rights and obligations by the *Construction Contracts Amendment Act 2015* (NZ). A construction contract is defined as a contract for carrying out construction work including any variations to the construction contract.[8] If the adjudicator determines that a party is liable to make payment, the adjudicator must also determine the amount of payment, date of payment and any other conditions. The parties may extend the adjudicator's jurisdiction by written agreement.[9]

AUSTRALIA

In Australia, the legislation governing adjudication differs between states. The legislation in New South Wales,[10] Victoria,[11] and Queensland[12] are largely similar. Unlike New Zealand, jurisdiction is limited in scope to disputes over payment claims (it does not extend to rights and obligations) and can only be invoked by a person who performs construction work and claims to be entitled to a progress payment.[13]

An adjudicator has jurisdiction to determine the amount of a progress payment, the date the amount becomes payable and the rate of interest payable. The legislation does not reference extending jurisdiction by agreement as in New Zealand.

In Western Australia[14] and the Northern Territory,[15] the adjudicator has jurisdiction to determine matters related to a construction contract regarding payment disputes.

UNITED KINGDOM

In the United Kingdom, the jurisdiction of an adjudicator is set by the *Housing Grants, Construction and Regeneration Act 1996* (UK) (HGCRA). An adjudicator's jurisdiction is largely determined by the contract. Unless otherwise stated, the adjudicator has jurisdiction to determine a dispute arising under the contract.[16] If a contract does not provide for adjudication, the Scheme for Construction Contracts (England and Wales) Regulations 1998 provides that an adjudicator shall decide the matters in dispute including payment disputes.

Unlike Australia, the United Kingdom legislation allows adjudication to be invoked by any party to a construction contract at any time to resolve any dispute arising under the contract.[17] The right to adjudication cannot be narrowed in scope or contracted out of.[18] This is a broader approach than both jurisdictions discussed previously, but most resembles the New Zealand jurisdiction.

OVERALL

All jurisdictions have similar themes underpinning adjudication—to facilitate timely payments and efficient cash flow between parties to a construction contract. The scope of jurisdiction in the United Kingdom appears to be the broadest, with New Zealand close behind. The New Zealand and Northern Territory of Australia jurisdictions further purport to provide speedy dispute resolution solutions.

The New Zealand and United Kingdom legislation allows the adjudicator jurisdiction over payment disputes and any other disputes arising from the construction contract. This is broader in scope than the Australian legislation, which only allows payment disputes in relation to progress payments. This is likely attributable to the fact that the Australian legislation specifically relates to security of payment while the New Zealand and United Kingdom legislation cover construction contracts in general.

HOW IS JURISDICTION CHALLENGED?

There are two key junctures at which parties may challenge the jurisdiction of an adjudicator: (1) at the outset of the adjudication; or (2) once the determination has been issued and is being enforced.

Jurisdictions differ in relation to the level of court intervention, but courts are generally reluctant to intervene in an adjudicator's determination.

Overall, New Zealand and the United Kingdom have similar approaches by allowing review of an adjudicator's decision only in the case of jurisdictional errors or an extreme breach of natural justice. Australia has specific review processes set out in the legislation, such as internal review. Most jurisdictions allow adjudicators to determine their own jurisdiction. The courts in all jurisdictions tend to be reluctant to intervene and overturn adjudicators' determinations.

NEW ZEALAND

In New Zealand, if the jurisdictional issue is raised prior to the adjudicator's determination or during the adjudication, the adjudicator may rule on their own jurisdictional matters. However, if the dispute has already been determined, a party who is required to pay as a result may apply for judicial review of the adjudicator's determination. This is only in the case of jurisdictional errors that breach natural justice.

The courts are vigilant to ensure that judicial review of adjudicators' determinations do not cut across the scheme of the legislation and undermine its objectives.[19] The Court of Appeal in New Zealand has warned against the courts allowing judicial review proceedings that interfere with the 'pay now, argue later' doctrine.[20] This is largely due to the nature of an adjudicator's determination being interim in nature,[21] and the parties' right to subsequently determine the dispute in arbitration or litigation.[22]

AUSTRALIA

In Australia, the procedure for review of the adjudicator's determination is clearly set out and is overall more limited. However, the legislation does not provide for situations of challenging jurisdiction prior to the determination of a dispute. After the determination of a dispute, Victorian legislation allows the respondent to apply for a review of the adjudicator's determination only if the respondent provided a payment schedule to the claimant within the time specified, and on the grounds that the adjudicated amount included an excluded amount. The respondent must identify the amount that is the excluded amount and have paid the claimant the adjudicated amount other than the alleged excluded amounts.[23] In Queensland, a review must first be applied as an internal review, and then a review of the original determination to the registrar.[24] The registrar may confirm, amend or substitute the original determination. In Western Australia, a person who is aggrieved by a determination may apply for a review. The determination may be set aside, and the adjudicator must make a determination on the issue.[25] Following the New Zealand and United Kingdom positions, the courts in Australia are also unlikely to intervene in an adjudicator's determination.

UNITED KINGDOM

In the United Kingdom, the Technology and Construction Court (TCC) determines disputes about buildings, engineering and surveying. Prior to the final decision, a party can challenge the jurisdiction of an adjudicator by: agreeing to widen the adjudicator's jurisdiction; referring the jurisdictional dispute to another adjudicator; referring the jurisdictional dispute to the courts; or refusing to participate.[26] After the determination, a party may challenge the adjudicator's decision by either opposing enforcement of the determination in court or arbitration proceedings, or by itself commencing court or arbitration proceedings to seek a declaration that the adjudicator's determination is unenforceable.[27]

Lack of jurisdiction is a ground for judicial review of an adjudicator's determination. Other grounds, such as errors of procedure, fact or law, are unlikely to be valid.[28] The courts will rarely interfere with the adjudicator's determination.[29] If a party doubts the jurisdiction of an adjudicator but wishes to proceed with the adjudication in the interim, it should proceed with the adjudication while reserving the right to challenge the adjudicator's determination on the grounds of jurisdiction in later proceedings.[30]

Unlike the United Kingdom, New Zealand and Australia do not have a designated construction court. This means that High Court judges may have less specialisation regarding construction matters than an adjudicator. The courts should rightly be reluctant to interfere in adjudication processes. If the purpose of adjudication is to provide a speedy resolution for construction disputes, with the further option of utilising arbitration or litigation, review of adjudicators' determinations goes directly against this purpose. The courts should only interfere in exceptional circumstances and this is more so in New Zealand and Australia since adjudicators are specialised in their area. A potential option is to have more vigilant appointment processes to ensure adjudicators have the expertise they require to make the determination.

WHAT JURISDICTIONAL ISSUES MAY ARISE?

At the two key junctures in which parties may challenge the adjudicator's jurisdiction, jurisdictional issues may arise as to whether the adjudicator has jurisdiction to determine the dispute at the outset and/or whether the adjudicator has remained within their jurisdiction in making their determination.

Some common examples of jurisdictional issues are briefly explored below for illustration purposes:[31]

NOTICE OF ADJUDICATION RELATES TO MATTERS NOT YET IN DISPUTE

Parties to a construction contract have the right to refer a 'dispute' to adjudication. New Zealand legislation defines dispute as 'a dispute or difference that arises under a construction contract';[32] United Kingdom legislation also refers to 'a dispute arising under the contract' and clarifies that dispute includes 'any difference';[33] and Australian legislation does not define 'dispute'. The construction contract may further define what constitutes a dispute.

Parties may seek to argue that there is no dispute (therefore no right to refer a matter to adjudication for which the adjudicator may determine) where the claim has not been rejected, where the claim cannot be admitted or rejected based on the information available, or because the contractual claims process has not been followed. This is commonly referred to as there being no 'crystallised' dispute, and is common across all commonwealth jurisdictions.

Whether there is a dispute will depend on the definition of dispute under the applicable legislation and contract. In *Amec Civil Engineering Ltd v The Secretary of State for Transport*,[34] the United Kingdom House of Lords set out seven propositions regarding what does and does not constitute a dispute: in essence, a dispute will not arise unless or until it emerges that the claim is not admitted, which may be established in a number of ways (expressly or by inference, with the duration of the action or inaction being informative), but not necessarily by reason only of a claim being submitted.[35]

In New Zealand, although the contractual claims and dispute resolution process may indicate whether a dispute has arisen, it is not a prerequisite given the wide definition of a dispute and the prohibition on contracting out of applicable legislation.[36]

NOTICE OF ADJUDICATION RELATES TO MULTIPLE DISPUTES

Again, parties to a construction contract have the right to refer 'a' dispute to adjudication (singular, not plural). Parties may seek to argue that multiple disputes have been referred to a single adjudication, and in the absence of consolidation and/or extension of the adjudicator's jurisdiction by agreement, the adjudicator does not have jurisdiction to determine more than one dispute.

Whether the dispute involves multiple disputes will depend on the wording of the applicable legislation and the relevant facts. The courts will generally take a broad approach. In the United Kingdom case *Fastrack Contractors Ltd v Morrison Construction Ltd*,[37] it was said that the question involves a careful characterisation of the dispute, which will not necessarily be determined solely by the wording of the notice of adjudication but must be construed against the underlying factual background from which it arose and which is known to both parties.

In Western Australia, the courts have gone further—in *Clough Projects Australia Pty Ltd v Floreani*,[38] it was held that an adjudicator may adjudicate more than one payment dispute, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect their ability to adjudicate fairly and as quickly, informally and inexpensively as possible.

NOTICE OF ADJUDICATION RELATES TO MATTER PREVIOUSLY DETERMINED BY ANOTHER ADJUDICATOR

A party to a construction contract may seek to refer a dispute that has already been determined in another adjudication. In New Zealand, estoppel may be raised as a defence to any claim where the same subject matter has already been determined so as to prevent a party from commencing multiple adjudications in relation to the same subject matter.[39]

The purpose of the relevant legislation in seeking to provide speedy resolution of disputes is a determining factor, as re–adjudicating the same subject matter goes against this purpose. In the United Kingdom, it has been held that the adjudicator is required to resign if a party attempts to re–adjudicate the same matter,[40] and it has also been suggested that a party may have an obligation to refer the adjudicator to a determination of a previous adjudicator of the same dispute.[41] In practice, if a party raises the issue, an adjudicator may seek submissions from the parties and determine their jurisdiction to avoid the issue undermining the determination.

The question of whether the subject matter is the same or substantially similar to the one previously determined may not be clear cut and will depend on the facts of the case.

In *Benfield Construction Ltd v Trudson (Hatton) Ltd*,[42] it was said that a dispute will generally be the same or substantially the same if there are no material differences in the facts or the same documents will be relied upon. If an adjudicator's determination is made on the same dispute, the later decision will not be enforceable, and the earlier decision will be binding until the dispute is finally resolved by arbitration, litigation, or agreement between the parties.[43]

DETERMINATION FALLS OUTSIDE SCOPE OF NOTICE OF ADJUDICATION

The jurisdiction of an adjudicator is defined by the terms of the dispute that has been referred.[44] New Zealand legislation requires an adjudication to be initiated by a notice of adjudication, which must state the nature and a brief description of the dispute and of the parties involved.[45] Once the adjudicator has been appointed, the claimant must refer the dispute in writing by an adjudication claim specifying the nature or the grounds of the dispute.[46]

In *Alaska Construction + Interiors Auckland Ltd v LaHatte and Lovich Floors Ltd*,[47] it was confirmed that the grounds of the dispute set out in the notice of adjudication may be superseded by the adjudication claim—with the notice of adjudication having no more relevance or significance than initiating the adjudication process.

Comparatively, in the United Kingdom, a notice of adjudication primarily defines the dispute,[48] although the respondent may enlarge the adjudicator's jurisdiction by introducing new matters not identified in the notice of adjudication.[49] The notice of adjudication cannot be used to limit the adjudicator's jurisdiction to consider valid defences.[50] It may be considered a breach of natural justice if the adjudicator disregards a potentially valid defence by taking a restrictive view on its jurisdiction.[51]

The New Zealand legislation is more procedurally prescriptive than the United Kingdom legislation as a result of the requirement to state 'the nature and a brief description of the dispute'[52] (as opposed to the 'notice of intention to refer a dispute to adjudication'[53]), as well as the requirement for the adjudication claim to set out the nature or grounds of the dispute.[54]

DETERMINATION RELATES TO CLAIMS, DEFENCES AND/OR RELIEF OUTSIDE THE CONSTRUCTION CONTRACT

As above, the parties have a right to refer a dispute arising under a construction contract to adjudication. The reference to 'arising under' arguably prevents the adjudicator from considering matters falling outside the scope of the construction contract itself—that is, beyond matters relating to contractual entitlement, such as statutory and equitable claims and/or relief.

In the United Kingdom case *Premium Nafta Products Ltd v Fili Shipping Co*,[55] the House of Lords considered the difference between 'arising under' and 'arising out of' the construction contract in the context of an arbitration clause, preferring a pragmatic and commercial approach to interpretation to allow a wide range of disputes to fall under the category of disputes able to be referred to arbitration for resolution.[56] The same principles are seen to apply to adjudication.

In *Haskell Construction Ltd v Ashcroft*,[57] the New Zealand High Court rejected the argument that the adjudicator could only determine amounts payable under the contract and therefore cannot award damages that exist separately and not under the contract. The court considered the purpose of the relevant legislation and held that the adjudicator's jurisdiction extends to include compensation for loss or damages under a relevant statutory remedy.

In an adjudication context, an adjudicator will ordinarily have jurisdiction to decide upon rectification of the contract,[58] but not matters regarding pre–contractual misrepresentations or settlement agreements.[59]

DISCUSSION—WHY DOES JURISDICTION MATTER?

The adjudicator's jurisdiction is of critical importance given that limitations can severely impact a party's ability to best present its case, and lead to allegations that the adjudicator has (or will) act outside their jurisdiction. This can undermine the purpose of the process to provide a cost–effective and efficient dispute resolution process.

JURISDICTION ISSUES IN PRACTICE

In practice, jurisdictional issues have become part of the 'lawyers toolbox'—used to: extend the statutory timeframes; leverage the inclusion of counterclaims with opposing counsel; prevent the opposition from raising otherwise valid claims/defences; limit the other party's efforts in reply/rejoinder by detracting resources elsewhere; and to set the foundation for later challenging any unfavourable determination.

As matters stand, it is therefore critical to understand when jurisdictional challenges are valid or simply strategic—or both—and how to deal with such issues when they arise. But, is it satisfactory to simply 'deal' with such issues when they arise, or is more fundamental change required to avoid jurisdictional issues interfering with the legislative purpose of adjudication?

EVOLUTION OF DISPUTES REFERRED TO ADJUDICATION

In the authors' opinion, the overall objective of adjudication remains the same globally: parties to construction contracts require speedy and cost–effective resolution of disputes as a means of facilitating cash flow in the sector, particularly as the sector experiences increasing growth and demand.

What has changed is the utility of adjudication (i.e., how it is being used by parties to a construction contract); the nature of the disputes now being referred to adjudication (increasing in complexity and significance, often requiring extensive expert and factual evidence); and the environment in which disputes are arising (increasing in pressure as a result of COVID–19 and sector demand/resource strain).

In some instances, what has also changed is the parties' objectives when engaging in the adjudication process—not always intended to resolve a single dispute for which a party believes it has a genuine entitlement in respect of, but rather used to seek an independent opinion on the dispute to then be used to guide commercial resolution and/or as a strategic tool, for example, to leverage a commercial project reset or settlement under threat of multiple time consuming and expensive adjudications detracting resources from project completion.

IMPACT OF JURISDICTIONAL ISSUES IN EVOLVING ENVIRONMENT

The impact of jurisdictional issues arising in this evolving environment can be significant and differs between jurisdictions, affecting the extent to which adjudication may be considered no longer fit for purpose across jurisdictions. By way of example:

(1) The efficiency of adjudication may be compromised because of timetable extensions granted—or agreed, under threat of jurisdictional issues being relied on to avoid any unfavourable determination—because of jurisdictional issues being raised at the outset. This is a greater issue in Australia and the United Kingdom, where there is no ability for the adjudicator to extend the applicable timeframes in the absence of agreement, unlike in New Zealand where the adjudicator has a wide discretion to grant an extension to the timeframe for the respondent's response.

(2) The cost of adjudication may significantly increase because of time spent by counsel and the adjudicator in raising or responding to jurisdictional challenges, enforcing or avoiding the enforcement of a determination that falls outside the scope of the adjudicator's jurisdiction, or any judicial review on grounds related to jurisdiction. Of course, the reluctance of the courts across all jurisdictions to intervene and overturn adjudicators' determinations does reduce the chances of jurisdictional issues being escalated and increasing costs, assuming the parties appreciate this prior to submitting any application for judicial review. The costs of resolving the dispute may be further exacerbated in the event either party refers the dispute to a substantive hearing (court or arbitration) for a final decision.

(3) The ability to obtain a sufficiently robust interim decision that the parties 'can live with' pending any final decision or commercial resolution may be threatened due to the restrictions on extending the statutory timeframes (affecting the parties' ability to put forward their best position); the inability to re–adjudicate matters already determined (increasing the importance of determinations given the 'precedent' value); and access to suitably qualified adjudicators. The latter is a particular issue in New Zealand for a variety of reasons (including population and litigation appetite compared with Australia and the United Kingdom) and can result in the inability to appoint the parties' preferred adjudicator and in some instances an adjudicator appointed to determine a dispute that is outside their experience or skillset.

CONCLUDING COMMENTS—SHOULD THE SCOPE BE EXPANDED?

In conclusion, there is a clear place and continued need for adjudication—if anything, the need is now greater as the construction sector grows and faces its own set of challenges because of COVID–19 and widespread constraints on resources and supplies. Unfortunately, the existence of jurisdictional issues (perceived or actual) is likely to continue to be used in practice as a method for slowing down the process or avoiding unfavourable determinations, particularly as the adjudication framework struggles to adapt to the evolving environment and utility of adjudication.

In the authors' opinion, there is scope to increase the breadth of adjudicator's jurisdiction across all jurisdictions to fully enable parties to put forward their best position and receive a robust determination that reflects a reasonable outcome. It is suggested that this may be achieved by increasing the ambit of matters able to be determined (for example, to all disputes arising out of or in relation to a construction contract, including statutory and equitable claims) and providing adjudicators in Australia and the

United Kingdom with the ability to extend the statutory timeframes where the circumstances permit (for example, where the dispute is particularly complex and involves voluminous materials).

However, there are downsides to this approach, which cannot all be canvassed within this article, for example, the fact that adjudication is meant to be an interim measure, and extending jurisdiction will potentially result in determinations becoming the final step for parties.

For adjudication to become/remain a credible dispute forum for parties, particularly where breadth of jurisdiction is more extensive (and may be increased), measures are necessary to increase scrutiny over the experience and expertise of adjudicators and the robustness with which adjudicators are appointed—this necessarily also requires an increased supply of suitability qualified adjudicators.

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10. *Building and Construction Industry Security of Payment Act 1999* (NSW).

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12. *Building and Construction Industry Payments Act 2004* (Qld).

13. Julian Bailey, *Construction Law*, 2nd ed, Informa Law from Routledge 2016) at [24.03].

14. *Construction Contracts Act 2004* (WA).

15. *Construction Contracts (Security of Payments) Act 2004* (NT).

16. *Housing Grants, Construction and Regeneration Act 1996* (UK), section 108.

17. See n 13, above, at [24.03].

18. Although this is not expressly stated in the legislation, section 108 has been interpreted as being unavoidable. See n 13, above, at [24.04].

19. *Haskell Construction Limited v Ashcroft* [2020] NZHC 772.

20. *Rees v Firth* [2011] NZCA 668.

21. *Carillion Construction Ltd v Devonport Royal Dockyard* [2006] BLR 15.

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27. See n 13, above, at [24.95].

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29. *Twintec Limited v Volkerfitzpatrick Limited* [2014] EWHC 10 (TCC).

30. *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] EWHC 177 (TCC).

31. Other examples include (without limitation) allegations that the adjudication relates to a contract that is not a construction contract; the adjudication notice not valid or validly served; the claim or response was served out of time; the adjudicator does not have jurisdiction to determine their

own jurisdiction; the determination is based on arguments not presented by either party; the claimant's reply is not strictly in reply; the respondent's rejoinder is not strictly in rejoinder, etc.

32. *Construction Contracts Act 2002* (NZ), section 5.

33. *Housing Grants, Construction and Regeneration Act 1996* (UK), section 108.

34. *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC). Subsequently approved by the Court of Appeal.

35. Similar conclusions were reached in *Fastrack Contractors Limited v Morrison Construction Limited* [2000] EWHC 177, where it was said that in order for a dispute to have crystallised, 'the subject matter of the claim, issue or other matter [must have] been brought to the attention of the opposing party and that party [must have had] an opportunity of considering and admitting, modifying or rejecting the claim or assertion'; and *Witney Town Council v Beam Construction (Cheltenham) Limited* [2011] EWHC 2332 (TCC), where it was said that a dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.

36. See *DHC Asserts v Toon* [2015] NZHC 140 and *Body Corporate 200012 v Keene QC* [2017] NZHC 2953.

37. *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168.

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41. *Arcadis UK Ltd v May and Baker Ltd* [2013] BLR 352.

42. *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC).

43. *Quietfield Ltd v Vascroft Construction Ltd* [2006] BLR 67.

44. *Horizon Investments v Parker Construction Management HC Wellington* CIV 2007–485–332.

45. *Construction Contracts Act 2002* (NZ), section 28.

46. *Construction Contracts Act 2002* (NZ), section 36.

47. *Alaska Construction + Interiors Auckland Ltd v LaHatte and Lovich Floors Ltd* [2002] NZHC 1056.

48. *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 Con LR 71.

49. *Pilon Ltd v Breyer Group Plc* [2010] BLR 631.

50. *Kitt v Laundry Building Ltd* [2015] BLR 170.

51. *Thermal Energy Construction Ltd v AE&E Lentjes UK Ltd* [2009] EWHC 408 (TCC).

52. *Construction Contracts Act 2002* (NZ),section 28(2)(b).

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54.*Construction Contracts Act 2002* (NZ), section 36(2)(a).

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57. See n 39, above; see also *M Van Der Wal Builders & Contractors Ltd v Walker HC Auckland* CIV–2011–004–83, 26 August 2011, which confirmed that liability to pay damages for breach of contract was a determination of rights and obligations.

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