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Benchmark

Friday, 11 October 2024

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

Drummond v Gordian Runoff Limited ACN 052 179 647 (NSWCA) - a refusal of an insurance claim on the basis of the period of insurance defined in s103 of the *Home Building Act 1989* (NSW) does not engage s54 of the *Insurance Contracts Act 1984* (Cth)

Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement) v Linx Constructions Pty Ltd (NSWCA) - leave to appeal refused as the case was not a suitable vehicle for determining the scope of the prohibition against raising a cross-claim under s15(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Fredon Infrastructure Pty Ltd v Hitachi Rail GTS Australia Pty Ltd (NSWSC) - payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had been validly served by email to officers who had actual and apparent authority to receive them

Paladin Projects Pty Ltd v Visie Three Pty Ltd & Ors (QSC) - adjudicator under the Building Industry Fairness (Security of Payment) Act 2017 (Qld) had fallen into jurisdictional error in one of the three ways alleged

Platform Constructions Pty Ltd v Fourth Dimension AU Pty Ltd ATF BD Hope Unit Trust & Ors (QSC) - s79(6) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) enlarges the ambit of what constitutes a copy of an adjudication application, rather than the ambit of a claimant's obligation to provide a copy of the adjudication application to the respondent

HABEAS CANEM

Before the puppy ears finally dropped

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Drummond v Gordian Runoff Limited ACN 052 179 647 [2024] NSWCA 239
Court of Appeal of New South Wales
White, Mitchelmore, & Stern JJA
Home building - the appellants engaged a builder to construct a house - the *Home Building Act 1989* (NSW) applied - the appellants entered into a home warranty insurance policy in respect of the builder's performance of the work, which provided cover for loss arising from a breach of the statutory warranties in the *Home Building Act* where compensation could not be recovered from the builder, or which the appellants could not have the builder rectify, because of the builder's insolvency - the builder failed to repair certain identified defects - the builder went into liquidation - the insurer denied the appellant's claim on the basis that period of insurance set out in s103BB of the *Home Building Act* had expired before the builder went bankrupt - the appellants sued in the Supreme Court, contending that s54 of the *Insurance Contracts Act 1984* (Cth) prevented the insurer from refusing the claim - the primary judge dismissed these proceedings - the appellants appealed - held (by majority, White JA dissenting): the policy did not incorporate relevant provisions of the *Home Building Act* or *Home Building Regulations 2004* (NSW), but provided that the coverage under the policy would be consistent with that legislation - the "loss insured by the Policy" was the loss or damage arising from the manifestation of a defect consequent upon breach of a statutory warranty - s54 of the *Insurance Contracts Act* is not engaged in any situation in which an insurer refuses to pay a claim by reason of an act of the type specified in that section, irrespective of whether that refusal was premised upon contract or statute - a refusal pursuant to s103BB of the *Home Building Act* did not engage s54 - s 103BB does not alter, impair, or detract from the operation of s54, so as to be inconsistent with s54 within the meaning of s109 of the Commonwealth Constitution - s103BB operates by way of supervening statutory regulation - the primary judge had been correct to order the appellants pay indemnity costs from a certain date due to the failure to accept an offer of compromise - an offer to forego any right to claim costs in circumstances in which proceedings have been ongoing for some time has the character of a genuine offer of compromise - appeal dismissed.
View Decision
[From Benchmark Monday, 7 October 2024]

Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement) v Linx Constructions Pty Ltd [2024] NSWCA 243
Court of Appeal of New South Wales
Bell CJ, Basten, & Griffiths AJJA
Security of payments - Linx engaged Kennedy to perform construction works - Kennedy served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - Linx did not serve a payment schedule - Kennedy commenced proceedings in the Local Court to recover the amount - the Magistrate reduced the claimed amount by the amount of a payment Linx had made to a third party supplier, which amount the third party had

previously invoiced to Kennedy, but then invoiced to Linx on Kennedy going into external administration - s14(4) of the Act provides that, where the respondent does not serve a payment claim, it becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates - s15(4) provides that, where the claimant sued in a court of competent jurisdiction to recover the unpaid amount of the debt, the respondent is not entitled to bring any cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract - the Magistrate found that Linx relying third party payment was not a form of cross-claim, but merely involved identifying the portion of the claim that remained unpaid - a Judge of the Supreme Court dismissed Kennedy's appeal - Kennedy sought leave to appeal to the Court of Appeal (leave was required because the amount in issue was less than $100.000) - held: the monetary sum at stake was approximately $30,000, which highlighted the heavy onus carried by Kennedy in demonstrating that its application satisfied the criteria for a grant of leave - the application did not raise an issue of principle or question of public importance regarding whether Linx's set-off was in substance a cross-claim which was caught by the prohibition in s15(4) - the proceeding involved somewhat unusual facts and circumstances, including the way in which the case was conducted - the case did not present a suitable vehicle for determining the scope of the prohibition in s15(4) - the primary judgment also did not produce a reasonably clear injustice which goes beyond something which is merely arguable - leave to appeal refused.
View Decision
[From Benchmark Friday, 11 October 2024]

Fredon Infrastructure Pty Ltd v Hitachi Rail GTS Australia Pty Ltd [2024] NSWSC 1244
Supreme Court of New South Wales
Stevenson J
Agency - Fredon and Hitachi were parties to two construction contracts in the same terms for carrying out of work by Fredon in respect of the Victoria Cross and Crows Nest Metro Station - Fredon sent to officers of Hitachi two payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - Hitachi said the payment claims were not validly served, as the contracts req required Fredon to serve the payment claims on a particular nominated representative, and, if they were validly served, they were served the following day (which would mean that Hitachi's payment schedule was served within time) - held: under the terms of her contract of employment, the Hitachi officer who was one of the recipients of the payment claims had actual authority to receive payment claims generally, and did, with that actual authority, receive on behalf of Hitachi the payment claims in question - as to apparent authority, if a principal represents to a contractor that the principal's agent has authority to receive a document, and the contractor serves a document on that agent in reliance on that representation, the agent will be taken to have apparent authority to receive the document - Hitachi's predecessor had made such a representation regarding the officers who received the payment claims - delivery to these officers had been delivery to Hitachi - the correct inference on the evidence was that both of these officers had received the payment claims by email while they were at work - the payment claims had been effectively served on the day Fredon sent

them, and Hitachi's payment schedule was served out of time - Hitachi was therefore liable to Fredon for the amount of the payment claims.
View Decision
[From Benchmark Wednesday, 9 October 2024]

Paladin Projects Pty Ltd v Visie Three Pty Ltd & Ors [2024] QSC 230
Supreme Court of Queensland
Williams J
Security of payments - the applicant as contractor entered into a contract with the respondent as principal for the design and construction of 36 townhouses, together with certain civil works - an adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) determined that the respondent was liable to pay an amount in respect of a payment claim the applicant had served - the applicant sought judicial review of the adjudicator's decision, on the basis that the parts of the adjudication decision deciding liquidated damages and two variations were affected by jurisdictional error and were void - held: as to the first variation, the adjudicator did fall into jurisdictional error by allegedly improperly considering new material - as to the second variation, the adjudicator had placed reliance on the *Building and Construction Industry (Portable Long Service Leave) Act 1991* (Qld) and the *Queensland Building and Construction Commission Act 1991* (Qld) which was impermissible on the basis that the relevant provisions form no part of the Payment Schedule and therefore the dispute - the adjudicator had fallen into jurisdictional error in this respect - as to liquidated damages, the adjudicator did not deny procedural fairness - the adjudicator had not fallen into jurisdictional error in determining the date of practical completion - the adjudicator had not fallen into jurisdictional error by finding that the applicant had conceded there was an issue with a stormwater pipe - this finding was open on the evidence and was not a finding for which neither party had contended - the adjudicator had not fallen into jurisdictional error by his finding on responsibility under the Development Approval Matrix - the adjudicator had not fallen into jurisdictional error by his finding as to the meaning of "practical completion" - the adjudicator had not fallen into jurisdictional error by his findings related to extension of time claims - the adjudicator had not fallen into jurisdictional error by finding that the civil engineering consultant contract had been novated - whether or not in error, this finding was within jurisdiction - this finding was also not determinative of the relevant part of the claim - parties to agree on form of orders reflecting the Court's reasons.
Paladin Projects Pty Ltd
[From Benchmark Monday, 7 October 2024]

Platform Constructions Pty Ltd v Fourth Dimension AU Pty Ltd ATF BD Hope Unit Trust & Ors [2024] QSC 235
Supreme Court of Queensland
Copley J
Security of payment - the applicant and the first respondent entered into a written contract in relation to a building project at Southport, under which the first respondent agreed to supply and install vinyl planks - an adjudicator under the *Building Industry Fairness (Security of Payment)*

Act 2017 (Qld) made two adjudication decisions finding adjudicated amounts of nil and about $135,000 respectively - the plaintiff sought judicial review - held: the first adjudicator's registration as an adjudicator had lapsed two days before he made the adjudication decision - this adjudication decision was void because the adjudicator had not been a registered adjudicator at the date of the decision - as for the second adjudication, in requiring that a copy of an adjudication application be given to a respondent, s79(4)(a), if considered on its own, might require a respondent be given a duplicate or an exact likeness of the adjudication application made - however, s79(6) defines 'copy' of an adjudication application as including a document containing details of the application given to the claimant by the registrar after application - the applicant's submission that this meant that a claimant for adjudication has to serve both the full application and the document provided by the registrar after application should be rejected - on its proper construction, s79(6) enlarges the ambit of what constitutes a copy of an adjudication application - the applicant had failed to show that the first respondent failed to comply with its obligation to provide a copy of the adjudication application as required by s79(4) - judicial review application in respect of the second adjudication dismissed.
Platform Constructions Pty Ltd
[From Benchmark Wednesday, 9 October 2024]

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130
Supreme Court of New Zealand
Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ
Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.
Paki Nikora

Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anais Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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