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Benchmark

Friday, 12 July 2024

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (NSWCA) - the *Building and Construction Industry Security of Payment Act 1999* (NSW) does not require that a payment claim be made only for "construction work"

Lahoud v Willoughby City Council (NSWCA) - Local Planning Panel had not erred in granting development consent for the adaptive reuse of an existing commercial building, and permitting the height restrictions in the LEP to be exceeded

AM Darlinghurst Investment Pty Ltd as trustee for AM Darlinghurst Investment Trust v Growthbuilt Pty Limited (NSWSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had not committed jurisdictional error

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The scent on the breeze

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Summaries With Link (Five Minute Read)

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd [2024] NSWCA 162
Court of Appeal of New South Wales
Meagher JA, Basten, & Griffiths AJJA
Security of Payments - EnerMech contracted with the respondents to supply electrical works for part of the WestConnex project - EnerMech issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for more than $10million - the respondents served a payments schedule stating that nothing was payable - an adjudicator found in favour of EnerMech - the respondents commenced judicial review proceedings - the primary judge quashed the adjudication - EnerMech appealed - held: in the 24 years since the Act commenced, there has been considerable judicial analysis, both of the specific issue as to the nature of a payment claim, and as to principles governing the construction of the Act - as a matter of construction, a payment claim must be for an amount of money, and the claim must assert that the amount is for work done, goods supplied or services rendered, under a construction contract - understanding the objects of the, its structure and its spare language, there was little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule - the Act therefore does not require that a payment claim be made only for "construction work" - under s25(4)(a)(ii) of the Act, the adjudicator's understanding of the construction contract, even if legally erroneous, cannot be challenged on a claim to enforce an adjudication certificate; nor, without more, can it be so challenged on judicial review. - whatever conditions on the entitlement of EnerMech arose from the correct reading of the contract and the Act were properly matters for the adjudicator - appeal allowed.
View Decision
[From Benchmark Friday, 12 July 2024]

Lahoud v Willoughby City Council [2024] NSWCA 163
Court of Appeal of New South Wales
Meagher & Leeming JJA, & Preston CJ of LEC
Planning law - Willoughby Local Planning Panel, on behalf of Willoughby City Council, granted development consent for the adaptive reuse of an existing commercial building at Northbridge - the development included erecting an additional level (Level 4) on the existing building to provide two 3-bedroom apartments, which increased the height of the building to 18.08m - under cl 4.3 of *Willoughby Local Environmental Plan 2012*, the maximum height of a building on the land was 14m - the Panel granted a written request under cl4.6 of the Plan that sought to justify the contravention of the height standard - Lahoud brought judicial review proceedings in the Land and Environment Court - the primary judge dismissed the proceedings - Lahoud appealed - held: the appellant misunderstood the height standards - once the incorrectness the appellant's assumptions about the height standards was appreciated, each of the height standard grounds of appeal could be seen to be unfounded - the Panel did not breach cl4.6(4) by granting development consent to the development for which consent was sought except for the specified parts of Level 4 of the building which were required by the conditions to be

redesigned, relocated or deleted - that development, except for the specified parts which were required to be redesigned, relocated or deleted, did contravene the height standard, but the Panel was satisfied that the applicant's written request had adequately addressed the matters required to be demonstrated - on a proper construction of the development consent, the development to which the Panel granted development consent was the development for which the consent was sought, except for the parts of Level 4 which were required by the conditions of consent to be redesigned, relocated or deleted, and after that redesign, relocation or deletion of those parts of Level 4 had been effected - the question of whether the building as proposed to be redeveloped will be a building that has an active street frontage within the statutory description in cl 6.7(5) was not a jurisdictional fact, but was rather a question for the Panel to decide - the Panel's finding that the building has an active street frontage did not involve any jurisdictional error - other errors not established - appeal dismissed.
View Decision
[From Benchmark Friday, 12 July 2024]

AM Darlinghurst Investment Pty Ltd as trustee for AM Darlinghurst Investment Trust v Growthbuilt Pty Limited [2024] NSWSC 825
Supreme Court of New South Wales
Ball J
Security of payments - AM Darlinghurst contracted Growthbuilt to design and construct the redevelopment of three adjacent buildings for a lump sum of $73.6 million - Growthbuilt served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for over $18million - AM Darlinghurst served a payment schedule stating a negative amount of over $6million, due to claims AM Darlinghurst made for liquidated damages arising from delays in completing the work under the construction contract - an adjudicator under the Act ruled that nearly $6million was payable to Growthbuilt - AM Darlinghurst sought judicial review of the arbitrator's decision - held: an adjudicator must comply with the timetable set out in s21 of the Act and is to consider only the matters set out in s22(2) - but this does not mean that the adjudicator must give any particular weight to any of these matters - the adjudicator is required to observe the rules of natural justice, which includes an obligation not to decide an application on a basis not raised by the parties, and which could not reasonably have been anticipated by the parties, without first inviting submissions on that basis - the adjudicator had not erred, when considering a particular report, in concluding that it was not practical in the time available to separate those parts of the report that depended on without prejudice communications from those that did not, and therefore deciding to give the report no weight - even assuming that the adjudicator's failure to refer to a particular person's evidence in relation to each variation was an oversight in drafting her report, that was not jurisdictional error, and the most that could be said is that the adjudicator did not specifically refer to evidence that she had largely rejected in a related context - the adjudicator had not relied on grounds not advanced by Growthbuilt in granting an extension of time - it had been within jurisdiction for the adjudicator to accept Growthbuilt's submission that AM Darlinghurst was not relevantly entitled to liquidated damages, even if that submission had no merit - application for judicial review dismissed.

View Decision
[From Benchmark Monday, 8 July 2024]

Executive Summary and (One Minute Read)

Moody v Netchoice (SCOTUS) - Lower court decisions upholding State statutes prohibiting social media companies from moderating content posted by third parties were reversed for failure to conduct proper First Amendment analysis

Summaries With Link (Five Minute Read)

Moody v Netchoice 603 US ___ (2024)
Supreme Court of the United States
The States of Florida and Texas enacted legislation that prohibited internet platforms from moderating third-party content based on content. The Supreme Court found serious First Amendment implications that the lower courts failed to properly consider. The cases were remanded to the courts below. The Court cited to *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974), where it was held that a Florida statute requiring newspapers to offer a right of reply violated the First Amendment because it consisted of compelled speech. Compelled speech can violate the First Amendment as much as suppression of speech. The Court said that government cannot meddle in speech by claiming that it is improving the marketplace of ideas. Here, the Court concluded that states were not likely to succeed in prohibiting the platforms from enforcing the platforms' own content moderation rules. The Court said that the States' attempt to better balance the mix of viewpoints on the internet by restricting content moderation amounted to an interference with speech decisions made by the private platforms. The Court added that a State cannot prohibit speech to rebalance the speech market. Inasmuch as the content moderation practices amounted to speech decisions by the platforms, the government was not free to enact laws that infringed those private speech rights.
Moody

Poem for Friday

Iceland

By Jonas Hallgrimsson (1807-1845)

Charming and fair is the land,
and snow-white the peaks of the jokuls [glaciers],
Cloudless and blue is the sky,
the ocean is shimmering bright,
But high on the lave fields, where
still Osar river is flowing
Down into Almanna gorge,
Althing no longer is held,
Now Snorri's booth serves as a sheepfold,
the ling upon Logberg the sacred
Is blue with berries every year,
for children's and ravens' delight.
Oh, ye juvenile host
and full-grown manhood of Iceland!
Thus is our forefathers' fame
forgotten and dormant withal.

Jonas Hallgrimsson was born in Iceland on 16 November, 1807. He is a revered figure in Icelandic literature, writing in the Romantic style. His love of the Icelandic people and country side and pride in the national identity comes through his poetry. He was a promoter of the Icelandic Independence Movement. He was employed for a time by the sheriff of Reykjavik as a clerk. He studied law at the University of Copenhagen. He also worked as a defence lawyer. He founded the Icelandic periodical Fjolnir first published in 1835. He died on 26 May 1845, after slipping on stairs and breaking his leg, the previous day. He died of blood poisoning aged 37 years. His birthday each year is recognised as the Day of the Icelandic Language.

Ég bið að heilsa, words by Jónas Hallgrímsson, composition by Ingi T. Lárusson
https://www.youtube.com/watch?v=6OqbfGSJDUc

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