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Benchmark

Friday, 15 March 2024

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

Neville's Bus Service Pty Ltd v Total Group Constructions Pty Ltd (NSWSC) - principal under construction contract was entitled to the amount required to rectify the building, not merely the difference in value between the building contracted for and the building constructed

Ingeteam Australia Pty Ltd v Susan River Solar Pty Limited & Ors (QSC) - adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) committed jurisdictional error in finding he did not have jurisdiction

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Summaries With Link (Five Minute Read)

Neville's Bus Service Pty Ltd v Total Group Constructions Pty Ltd [2024] NSWSC 215
Supreme Court of New South Wales
Ball J
Building and construction - Neville's Bus Services was the successful tenderer to provide public bus services to Transport for NSW in a region in southwest Sydney - in anticipation that it might be the successful tenderer, it entered into a call option to acquire a large parcel of land to be developed as a bus depot - it engaged Total Group Constructions to assist it in locating the land, preparing design specification for the depot, and applying for development consent - Total Group Constructions engaged MSL Consulting Engineers to prepare the structural design and documentation for the bus and carparking pavement slab which formed a major part of the development - following the success of the tender, Neville's exercised the option and entered into a construction contract with Total Group Constructions - Neville's alleged the construction was not constructed in accordance with the construction contract defective, particularly regarding the concrete slab - Neville's sued Total Group Constructions and MSL, and settled with MSL - held: having regard to admissions made and the conclusions of the experts there was no dispute on liability - essentially the whole pavement of the slab had to be replaced and Neville's damages must be assessed on that basis - Neville's was entitled to have a building erected in accordance with the contract, and its damage was the loss which it had sustained by Total Group Constructions' failure to perform its obligations - the loss could not be measured by comparing the value of the building which had been erected with the value the building would have borne if erected in accordance with the contract - rather, the loss had to be measured by ascertaining the amount required to rectify the defects complained of, and so give Neville's the equivalent of a building substantially in accordance with the contract - the principal qualification to this general principle is that, not only must the work undertaken be necessary to produce conformity, but that must also be a reasonable course to adopt" - the test of "unreasonableness" is only to be satisfied "by fairly exceptional circumstances", such as where the proposed rectification is out of all proportion to the benefit to be obtained - the Court assessed various heads of damages.
View Decision
[From Benchmark Tuesday, 12 March 2024]

Ingeteam Australia Pty Ltd v Susan River Solar Pty Limited & Ors [2024] QSC 30
Supreme Court of Queensland
Applegarth J
Security of payments - an adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) concluded he did not have jurisdiction to decide a claim for about $2.4million plus GST because of a claim for about $300 for repairing a floor in a shed with some plywood - this claim was for the cost of a handsaw, a piece of plywood, a roll of tape and a small amount of time that a licensed electrician took to tape the piece of plywood to the floor, above a spot that needed repair - the adjudicator decided that the claimant required a licence to do that

work, and because it did not have the required licence, it could not enforce the Operating and Maintenance Contract, and he did not have jurisdiction - the claimant sought judicial review - held: the adjudicator did not give the claimant the chance to call evidence or make submissions on the jurisdictional point - if the adjudicator, in the interests of expedition or for some other reason, did not wish to give the claimant an opportunity to give evidence and make submissions about a new matter upon which the adjudicator intended to base his conclusion about jurisdiction, the adjudicator should not have relied upon the parts of the respondent's reply submissions that made new allegations of fact about unlicensed building work - the adjudicator erred in concluding that the claimant was carrying out "building work" and needed a licence to do so - the adjudicator also erred in concluding that the carrying out of unlicensed building work meant that he did not have jurisdiction to decide the payment claim - the adjudicator should not have made a finding that the claimant had intended to do unlicensed work, which was a serious finding which had the effect of rendering the contract unenforceable, and to deprive the claimant of any right to payment under the *Building Industry Fairness (Security of Payment) Act* - that Act did not authorise the adjudicator to make a legally unreasonable decision - the adjudicator's error was material - if the claimant had been given the opportunity to make submissions about the floor repairs and also what might be inferred, if anything, about its intention at the time of contract formation, it was distinctly possible that the adjudicator would not have led himself into error - adjudicator's decision declared void.

Ingeteam Australia Pty Ltd

[From Benchmark Wednesday, 13 March 2024]

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.
Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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