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Benchmark

Friday, 15 December 2023

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd (NSWCA) - an email from a principal to a contractor did not give sufficient reasons for refusal to pay to constitute a payment schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators Appointed) (NSWSC) - deed granted charge to secure payment of a development fee under that deed - development fee did not become payable due to Panorama's breach - charge did not secure obligation to pay damages - equitable maxims do not have a simple at large operation

Thallon Mole Group Pty Ltd v Morton; Morton v Thallon Mole Group Pty Ltd (QCA) - builder and contractor both failed in appeals against decision of primary judge regarding building contract

Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 4) (ACTSC) - builder was entitled to a quantum meruit where the building contracts had been discharged by agreement

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season

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)

Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd [2023] NSWCA 305
Court of Appeal of New South Wales
Leeming, Payne, & Kirk JJA
Security of payments - Witron Australia Pty Ltd contracted Turnkey Innovative Engineering Pty Ltd to carry out electrical installation works, being the installation of a series of group controls, at an automated distribution centre being constructed at Kemps Creek - the contract stipulated "a flat fixed price" of $11.4 million (excluding GST) for a defined scope of work, subject to "any increase or decrease arising from variations as mutually agreed by the parties" - the works were delayed, and the Witron sent Turnkey an email removing a number of areas from the scope of works under the contract - the contractor sought to re-price the works at about $14 million on the basis of additional works said to be outside the scope of the contract and not due to the fault of the contractor - there was an exchange of emails that appeared to constitute agreement to this variation - Turnkey served on Witron a number of variation claims - Turnkey then served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - in response, Witron sent an email to Turnkey stating that it would review the proposed variations after it saw progress in handing over certain areas, and stating that Turnkey should claim progress based on the original contract price, and asking that Turnkey adjust its claim accordingly - Turnkey contended that, as Witron provided no payment schedule, it was liable to pay the amount claimed in the payment claim - the principal contended that the email had constituted a payment schedule - the primary judge held the email was not a valid payment schedule, and Turnkey was entitled to judgment (see Benchmark 22 August 2023) - Witron appealed - held: under s14(2) and (3) of the Act, a payment schedule must identify the payment claim to which it relates, must indicate the amount of the payment (if any) that the respondent proposes to make, and, if the amount proposed to be paid is less than the claimed amount, must indicate why it is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment - if a response to a payment claim does not satisfy these requirements then it is not a payment schedule within the meaning of the Act and the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment - a payment schedule need not be a formal document and need not identify itself as a payment schedule - the requirement in s14(3) that a payment schedule contain reasons is not concerned with the adequacy or sufficiency of the reasons given, in the sense of making out a good answer to the claim, and that is a matter for the adjudicator if the dispute progresses that far - however, in general, a failure to provide any reason or reasons directed to a distinct and substantial component of a payment claim will constitute a failure sufficiently to indicate why the scheduled amount is less than the amount claimed - for Witron to say "we are not going to consider paying this until you do X" was, of itself, to refuse to grapple with the claim made - it was not saying that the claim was not payable, it was simply declining to consider whether or not that were so, and did not give reasons for rejecting the claim, and did not serve to apprise Turnkey of the real issues in dispute - appeal dismissed.

View Decision
[From Benchmark Thursday, 14 December 2023]

Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators Appointed) [2023] NSWSC 1492
Supreme Court of New South Wales
Robb J
Equity - PHG had options to acquire properties a residential and commercial development, and was negotiating for the purchase of another property - by a deed of assignment, PGH assigned the options and its position as prospective purchaser to Panorama, and Panorama was required to lodge a development application generally in accordance with a scheme prepared by ADS, pursue that application with Council, and pay a development fee to PHG - Panorama's development application varied significantly from the ADS scheme - Council refused consent - the development fee was not payable as Panorama had not lodged an application generally in accordance with the ADS scheme - PHG claiming that the deed granted it an equitable charge over the properties to secure an amount equal to the development fee - held: Panorama had breached the deed, because it failed to lodge and pursue a development application generally in accordance with the ADS scheme - if Panorama had complied with the deed, it would probably have gained development consent in the form of the an amended scheme substantially in accordance with the ADS scheme - PHG was entitled to damages to compensate it for the loss of opportunity to be paid the development fee - a clause in the deed explicitly created a charge pending payment of the development fee on options, contracts to purchase properties, and purchased properties - the obligation secured by the charge was the obligation to pay the development fee, and not the obligation to pay damages - the equitable maxim that equity regards as done that which ought to be done, and the common law principle, followed by equity, that a party to a contract will not be permitted to take advantage of its own wrong, do not operate at large - regarding the maxim that equity regards as done that which ought to be done, the actual doctrine in equity underpinning the validity of the charge was that an assignment for value of future property binds the property itself when it is acquired, automatically on the happening of the event, without any further act on the part of the assignor, and is not merely a right in contract - however RPG wanted to create a fiction that Panorama should be treated as if it had performed its contractual obligation to enliven the obligation to pay the development fee, that is, for the equitable doctrine to create both the charge and the debt - where a contract to assign or charge is supported by consideration, equity assumes that the assignment has been made or the charge created when the property vests in the assignor or chargor, where the only thing left to be done is the formal assignment or creation of the charge, and the performance of that obligation is not conditional on events that have not occurred - where the performance of that obligation is conditional on events that have not occurred, equity does not go further and assume that those events have occurred - as to the principle that a party to a contract will not be permitted to take advantage of its own wrong, there is no substantive principle that, in all cases where the effect of a breach of contract is that a state of affairs is not established that would entitle the innocent party to some benefit, that the innocent

party will be entitled to that benefit because the defaulting party's wrong disentitles it from relying on the absence of the necessary state of affairs - where the innocent party is entitled to a benefit that depends upon an event that the contract requires the defaulting party to achieve, the wrong of the defaulting party does not automatically entitle the innocent party to the benefit in specie, as opposed to damages for breach of the contract - PGH was entitled to damages, but not to enforce the charge to secure those damages.
View Decision
[From Benchmark Monday, 11 December 2023]

Thallon Mole Group Pty Ltd v Morton; Morton v Thallon Mole Group Pty Ltd [2023] QCA 250
Court of Appeal of Queensland
Bond & Boddice JJA, and Kelly J
Contracts - Morton and Thallon Mole Group Pty Ltd entered into a contract for Thallon Mole Group to construct a substantial residence for Morton at Holland Park - the contract price was in excess of $4.5million - a dispute arose regarding the unavailability of two large "Schucco" sliding glass doors that were to be installed at the house, and the relationship between the parties disintegrated - Morton refused to pay Thallon Mole Group's progress claims, and said she was concerned about an incorrect reduction of the contract price arising from the sliding doors and other defective work - Thallon Mole Group gave notice of anticipated achievement of practical completion and issued its final progress claim - Morton terminated the contract and engaged other builders to complete the work and to rectify defects - Thallon Mole Group commenced proceedings in the District Court, claiming about $640,000 as monies owing for unpaid works carried out pursuant to the contract, about $20,000 as a quantum meruit, and about $17,000 for delay and disruption costs - Morton counter-claimed for about $16,000 as liquidated damages and about $540,000 as damages for the costs of completing the defective and incomplete works - the primary judge found that the majority of alleged defects were minor and did not prevent practical completion, but there were a number of defects or omissions that were not minor, which made the house unsuitable for occupation on 8 April 2019, and that therefore Thallon Mole Group had not achieved practical completion, and Morton's termination of the contract had been valid - both Thallon Mole Group and Morton applied for leave to appeal, which was required because of the small quantum involved - held: the primary judge had not erred by allowing the amount for the reinstallation of the timber flooring in the upstairs area of the house - once it was accepted that the flooring was not laid in accordance with the contractual requirements, Morton was entitled to have the upstairs flooring replaced and installed in accordance with the contractual requirements - the primary judge had not erred in exercising her discretion to award interest - the primary judge had not erred in dismissing the claim for a quantum meruit in respect of a variation for the cabinetry - the evidence as a whole supports a conclusion that it was open to the primary judge not to be satisfied that Morton had given approval to that variation - the primary judge did not err in reducing the "notional unpaid balance of the contract price" by only about $140,000 on account of the Schucco doors and associated costs, rather than about $190,000 as Morton contended - the primary judge's

assessment of residual labour costs as 5% of the overall amount claimed was in accordance with the evidence and it could not be said the judgment formed by the primary judge produced a glaring improbable outcome, and so there was no basis for an appellate court to interfere with that finding - the primary judge did not err in dismissing Morton's claim for the costs of rectification of the pool balustrade, as reinstatement was not a reasonable course to adopt in the circumstances - other ground of appeal also failed - leave to appeal refused to both parties - parties to file written submissions on costs.
Thallon Mole Group Pty Ltd
[From Benchmark Tuesday, 12 December 2023]

Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 4) [2023] ACTSC 369
Supreme Court of the Australian Capital Territory
Mossop J
Restitution - Harlech claimed to be owed about $600,000 in unpaid invoices issued in accordance with an alleged agreement with Beno that Harlech would receive a share of Beno's gross profits on certain building projects - Beno denied the existence of the agreement and contended that Harlech had been paid for all services provided - Harlech obtained an adjudicated determination under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) directing Beno to pay Harlech about $600,000 - the determination was registered with the District Court, and Beno's bank account was garnished in an amount of about $200,000 - the Supreme Court later quashed the adjudicator's determination for jurisdictional error - Beno sought a declaration that Harlech was liable to account to Beno for the amount garnished from its bank account and claimed restitution in that amount - the Court ordered that Harlech pay Beno the claimed amount "by way of restitution" - the Court later set the restitution order set aside, as Harlech had been entitled to receive the payment under the *Building and Construction Industry (Security of Payment) Act*, and because the fact that Harlech had commenced civil proceedings to resolve the factual dispute was a relevant change of circumstances (see Benchmark 23 October 2023) - the Court now determined the claim by Beno for a quantum meruit - held: where there was a contract in place governing the rights of the parties to that contract, quantum meruit is only available in limited circumstances - any claim for restitution must respect the allocation of risk provided for by a contract and, to that extent, is subsidiary to a contractual claim - where a contract is still in existence, a claim for restitution of a benefit conferred assessed on a quantum meruit is not available - upon termination for repudiation of an uncompleted contract containing an entire obligation for work and labour done, the innocent party may sue either for damages for breach of contract or, at the innocent party's option, for restitution in respect of the value of services rendered under the contract - if a contract contains divisible stages of work where at the completion of each stage a contractual right to payment is accrued, there is no right to restitution in relation to any completed stage, as the entitlement to recovery is governed by the contract - the contracts here had been discharged by agreement - where a contract is discharged by agreement, the consequences of that discharge will usually be dealt with in the agreement - however, where the discharge of the contract is inferred from conduct, the inferred agreement may not address the consequences of

the discharge, and acceptance of a benefit by the defendant may provide a basis upon which a claim in quantum meruit may succeed - in this case, the contracts were not divided into stages, but there was entitlement to monthly payment if a claim was made during that month, dependent on an invoice being rendered - as no invoices had been rendered in the relevant periods, even though substantial work was done, there was no crystalised entitlement to part payment - the Court was not satisfied Nova had repudiated the contract, as its communications reflected an intention to honour its contractual obligations but an uncertainty as to how to do so - the availability of quantum meruit in circumstances where a partially completed contractual obligation is discharged by agreement but has conferred a benefit on the receiving party was consistent with High Court authority - the imposition of liability to make restitution in the current circumstances would not be such as to upset an allocation of risk reflected by the parties in their contracts - Beno was entitled to a quantum meruit.

Nova Builders Pty Ltd

[From Benchmark Wednesday, 13 December 2023]

Executive Summary and (One Minute Read)

Minnesota v Torgerson (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

Summaries With Link (Five Minute Read)

Minnesota v Torgerson 995 N.W.2d 164 (2023)
Supreme Court of Minnesota
Gildea CJ, Anderson, & McKeig JJ
A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.
Minnesota

Poem for Friday

In Memoriam, (Ring out, wild bells)

By: Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,

The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam,* written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells,* has been set to music including by Charles Gounod and Percy FletcherAlfred, Lord Tennyson died on 6 October 1892.

Ring Out, Wild Bells, Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

Ring Out, Wild Bells, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
https://www.youtube.com/watch?v=yPIqqvOM8Og

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
https://www.youtube.com/watch?v=KNMFvNZIsCM

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