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Adjudicate Today Seminar – 26 Mar 2021

NSW Cases

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- *Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd* [2020] NSWSC 1702
- *Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd* [2020] NSWSC 1588
- *CPB Contractors Pty Limited v Heyday5 Pty* Limited [2020] NSWSC 1625
- *Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd* [2020] NSWSC 1251
- *Hanson Materials Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd [2020] NSWSC 1702

- Adjudication determination challenge based on the basis that the payment claim was not validly referrable to a reference date

- Clause 4.1

  "4.1 Claims submitted by the 20th day of the month will, if approved by Waco Kwikform, be paid by the end of the following month. If any part of a claim is not approved then such part will not be paid and the Subcontractor will be provided with the reasons for the non-payment."

- Parties agreed:

  whether there was a reference date turns on whether cl 4.1 is an "express provision" with respect to "the date on which a claim for a progress payment may be made"

Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd [2020] NSWSC 1702

Held – Stevenson J

- [10] “In my opinion [s 8(2)(a)] calls for a provision in the contract that, by its own terms, determines the date by which the payment claim can be made.”

- [17] “The clause contemplates that the date ‘on which a claim for a progress claim may be made’ is at CAS's discretion.”

- [18] “That day chosen by CAS would not be determined ‘by or in accordance' with the ‘terms of the contract’ and cl 4.1 in particular; but by CAS itself.”

- [25] “As s 8(2)(a) is not engaged, the question of reference date is to be determined in accordance with s 8(2)(b).”

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Cadia challenged determination on two grounds
  1. Construction work falls within section 5(2)(b) – Mining exception
  2. Payment claim not referrable to a reference date

- Challenge 1 - Mining exception:

  5(2)(b) “the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose”

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Contract involved [See [43]]:
  - “tunnelling or boring”; and
  - “constructing underground works”

- Questions [See [44]]:
  - On the proper construction of s 5(2)(b), was the “tunnelling or boring” or “constructing of underground works” for the “purpose of” extraction of minerals? [If “no”, s 5(2)(b) not engaged at all]

  - Did the Contract also require Downer to undertake “construction work” or “related goods and services” beyond “tunnelling or boring” or “constructing of underground works”? [If “yes”, Contract is a “construction contract” irrespective of whether s 5(b)(b) was otherwise engaged

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Mining operation is described in [49] to [59]
- Cadia's plan for new mining "Panel Cave" is described in [60] and [61]
- Development and production phases of the mining operation are described in [62] to [69]
- Work under the Downer contract is described in [70] to [80. It resulted in the ore body in the new mining Panel Cave (Panel Cave 2-3) being ready for mining however, other mining works are required before extraction of minerals can occur. See [82]
- Work done by Downer included extraction of 65,000 tonnes of "development ore" which was stockpiled. This was accepted by Cadia's GM as a by-product of work done by Downer. See [86]

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Work done by Downer did not take the development to a stage where mineral extraction could take place immediately. See [87]

- Tunnelling work to create the Under Cut and Extraction Levels was required. See [88]

- Downer constructed an access to the proposed Under Cut and Extraction Levels. This was work in the development phase. The production phase when minerals will be extracted has not commenced. See [92], [93]

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

5(2)(b) “the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose”

- Cadia’s construction – “it is sufficient if the tunnelling, boring or construction of underground work is for the “ultimate purpose” of extraction of minerals”

- Downer’s construction – “it is necessary that there be a ‘close and proximate’ connection between the tunnelling, boring and construction of underground works and the extraction of minerals; that is, that it is necessary that the tunnelling, boring and construction of underground works be for the ‘very process of extraction’”

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Held: Downer's construction preferred.
  - Mining exception to be construed beneficially to the subcontractor [102]
  - Extending the usual meaning of "extraction" by including tunnelling, boring or construction of underground works for that purpose suggest there needs to be a close proximity between the the works and the extraction [103]
  - As it has been held in other cases "extraction" does not include work that is "associated with", "preparatory to", it is hard to see why tunnelling, boring or construction of underground works which is in anticipation of ultimate extraction of minerals, should be held to be work "for the purpose of" such extraction. [104]

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Held
  - Mining exception does not specify tunnelling, boring or construction of underground works “preparatory to” extraction. This suggests a legislative intention that tunnelling, boring or construction of underground works referred to in the Mining exception must be for the actual purpose of extracting minerals
  - Even if the mining exception was engaged because the tunnelling, boring and underground construction work were for the purpose of extraction of minerals, the Contract is a construction contract because some of the work it called for was construction work. [148] - [150]

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

Challenge 2 - payment claim not referrable to a reference date

Clause 4.1(a)

[Downer] must render an Invoice to [Cadia] after fifteen (15) days following the end of each month during the period in which the Services are provided, in respect of the Services performed in that month, calculated by reference to the prices, fees, unit rates or other amounts specified in Schedule 3 (Price) …

(ii) [Downer] must prepare a monthly progress claim, including details of calculations and any evidence substantiating the amounts used, which is submitted to [Cadia] for review no later than eight (8) days following the end of the month;

(iii) … [Cadia] will assess and provide feedback to [Downer] by the fourteenth day following the end of month of receipt of the monthly progress claim.

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

- Cadia contended the reference date was the fifteenth of the month
- Downer made payment claim on 8 May 2020
- Downer submitted that 15 April 2020 was was an available reference as no payment claim had been made
- Stevenson J saw substance in Downer's submission that on the proper construction of clause 4.1, a reference date arose on eighth of each month but there is no need to express a final view. [169], [170]

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

Stevenson J did express a view about the words in clause 4.1 purporting to prevent Downer from serving a payment claim for work done prior to the preceding month. His Honour said at [173]:

> "…That provision is inconsistent with s 13(4) and is thus one purporting to exclude or modify the operation of the Act. For that reason it is void by reason of s 34 of the Act."

CPB Contractors Pty Limited v Heyday5 Pty Limited [2020] NSWSC 1625

Challenge to adjudicator's determination on two grounds relating to one claim ["Spotters Claim"]. Challenge directed to a single paragraph:

- Two parts of the paragraph were unclear or poorly worded – the determination disclosed no evident or intelligible justification for upholding the Spotters Claim.

- Adjudicator denied the Plaintiff procedural fairness as he considered matters that were not submitted by the parties

CPB Contractors Pty Limited v Heyday5 Pty Limited [2020] NSWSC 1625

Hammerschlag rejected each point on the basis that they lacked merit and were artificial

His Honour noted this was a substantial matter:

- Payment claim $13m [15 lever arch folders]
- Payment schedule 60 pages
- Application 33 lever arch folders
- 13 requests for further information
- Adjudication period 10 weeks
- Determination 386 pages
- Adjudicated amount $13m

CPB Contractors Pty Limited v Heyday5 Pty Limited [2020] NSWSC 1625

At [35], Hammerschlag J made the following comments:

- An adjudicator's determination "is not a judgment of a court"
- Adjudicators are often "not lawyers"
- Adjudicators have "tight time limits"
- Adjudicators are required to determine "complex issue, factual and legal"
- Adjudication determinations "do not have the final effect of an arbitrator's award"
- Adjudication determinations "should not be scrutinised with an overcritical or pedantic eye but should be viewed with common sense and without undue legality"
- Adjudication determinations "are to be read as a whole and should not be viewed through the prism of legal concepts or examined with a fine-tooth comb"
- These points are especially to be borne in mind with a determination such as the present one where a significant burden was placed on the Adjudicator

CPB Contractors Pty Limited v Heyday5 Pty Limited [2020] NSWSC 1625

- Above points can be read in the context of his Honour's analysis of the Plaintiff's challenges which are directed to three parts of paragraph 372 of the Adjudicator's determination.

  - Challenge 1: A sentence was claimed to be unintelligible. However, this was found to be intelligible if an easily corrected typo is corrected. See [39] to [42].

  - Challenge 2: A passage reproduced at [43] was claimed to be unintelligible. This was found to be not unintelligible. See [44] and [45].

  - Challenge 3: It was claimed that neither party made a submission that it mattered that the "visual contact" statement did not appear in SWMS8 and the Plaintiff was denied procedural fairness. This challenge was found to be "artificial". See analysis in [52] to [64]

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd [2020] NSWSC 1251

Chronology

- 29 February 2020, Master served payment claim for $556,285.61
- No payment schedule issued
- 31 March 2020, Master conceded total amount payable for February payment claim was $202,066.81
- 31 March 2020, Master served payment claim for $266,570.81
- No payment schedule
- 21 April 2020, parties entered a Settlement Agreement - Reward agreed to pay Master $202,066.81 in full satisfaction of the March Payment Claim
- 22 April 2020, Reward Interiors paid Master $202,066.81

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd [2020] NSWSC 1251

Litigation

- Reward sued Master for damages
- Master cross claimed and sought summary judgment of March 2020 payment claim in the sum of $64,504.00 [$266,570.81 - $202,066.81]
- Master contended the Settlement Agreement is void under section 34
- Reward submitted Master accepted the $202,066.81 in full and final satisfaction of the March payment claim

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd [2020] NSWSC 1251

Stevenson J's comments:

- But for purported agreement [21 April 2020 Agreement], Master could have moved for summary judgment for claimed amount of $266,570.81 because Reward did not serve a payment schedule in response to the 31 March 2020 payment claim, [22]
- The purported effect of Agreement was that upon payment of $202,066.81, Master could not exercise the right it would have had under the Act because it must be assumed for the purpose of the application, Master agreed not to [22], [23]
- It is hard to see how the Agreement purports to exclude, modify or restrict the operation of the Act for the purpose of s 34(2)(a)
- The Agreement acknowledges the operation of the Act but records the parties' agreement that their rights would be governed by the Agreement
- The Agreement is not an attempt to deter a person taking action under the Act for the purpose of s 34(2)(b) as Master took action by making payment claims
- It is at least arguable that the Agreement (assuming it was made) was not rendered void by s 34
- The matter is not a matter to be resolved on a final basis on a summary judgment application

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Background:

- Bolton applied for adjudication of a payment claim made on 28 August 2019
- Hanson challenged the adjudicator's determination
- Hanson accepted that 25 September 2018 was an available reference date for the payment claim

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Adjudicator:

- rejected Hanson's submission that no reference dates arose following termination of the Contract on 3 October 2018
- formed the view that a reference date occurred after termination on 23 October 2018 [17]
- rejected Hanson's submission that a claim for an EOT (made on 28 September 2018) had only been made after the reference date (25 September 2018)

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Hanson challenged the jurisdiction of the adjudication on two grounds:

1. No further reference dates could arise following termination of the Contract on 3 October 2018: *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52

2. Payment claim could not be supported by the reference date of 25 September 2018 because claimed amounts for work work done after that date [26]

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Brolton's position:

- conceded no reference date arose on 23 October 2018 (contrary to adjudicator's view)

- However:
  - Issue (a) - payment claim dated 29 August 2019 was supported by the 25 September 2018 reference date, consequently, the adjudicator had jurisdiction
  - Issue (b) - any errors made by the adjudicator were within jurisdiction

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Issue (a) – was payment claim made on 29 August 2019 referrable to the reference date of 25 September 2018

- Hanson:
  - No - because the payment claim included invoices for work done after the reference date. Hanson referred to *Southern Han*, and also, at [26] and [27], to:
    - *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd* [2019] NSWSC 286
    - *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413

- Held Ball J (obiter)
  - In this case the payment claim served on 29 August 2019 was capable of being supported by a reference date of 25 September [28] – [33]
  - At [32], Ball J said: ”… it is primarily a question for the Adjudicator what work may be made the subject of a progress claim in accordance with the contract by reference to [the reference] date. …”

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Issue (b) – Is Adjudicator's error in his view that payment claim is supported by a reference date that arose on 23 October 2018 (after termination) reviewable

- Brolton contended error is not reviewable
- Hanson challenged this on two grounds - relying on *The Trustee for Allway Unit Trust trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd* [2018] SASC 46
  - Ground 1: "… not open to Brolton to support the determination by reference to a different reference date from one relied on by the Adjudicator."
  - Ground 2: "… Adjudicator's decision involved a denial of natural justice. …"

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Ground 1 – Can Brolton rely on the determination by reference to a different reference date from one relied on by the Adjudicator?

- Held [36] – [40]
  - facts in *Allway* were similar to facts in present case
  - Conclusion of Doyle J at [130] was correct. Doyle J said:

    "… An adjudicator's determination in respect of a payment claim with a particular reference date can only be sustained by a payment claim with that reference date; it cannot be sustained by reference to a payment claim with a different reference date."
  - Ball J said at [40]

    "… the parties [in this case] agreed that the relevant reference date … was 25 September 2018. On that basis, what the Adjudicator was asked to adjudicate was a payment claim in respect of that reference date. It was not, therefore open to the Adjudicator to determine the claim as if it were a payment claim by reference to some other date. Conversely, if the parties had left it to the Adjudicator to determine the relevant reference date, it would not have been open to them to justify the determination on the basis that it was a determination of a payment claim by reference to some other reference date."

    [My underlining]

Hanson Construction Materials *Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Ground 2: "… Adjudicator's decision involved a denial of natural justice. …"

- Held – [41]– [43] - there was a substantial denial of natural justice as:
    - Adjudicator's choice of reference date "had a substantial effect on the outcome of the determination." It provided an answer to Hanson's submissions:
        - "… Brolton had made progress claims for work done after 25 September 2018, which were not permitted by the contract."
        - "… any claim for extensions of time and delay costs were only submitted after the reference date (on 28 September 2018)."