



australian Construction

LAW BULLETIN

General Editor**Jim Ritchie**

*Special Counsel,
Allens Arthur Robinson, Brisbane*

Editorial Board**Paul Riethmuller**

*Partner, Blake Dawson
Waldron, Perth*

Andrew Robertson

*Partner, Piper
Alderman, Adelaide*

Shelley Maxwell-Smith

*General Counsel,
Plenary Group, Sydney*

Scott Laycock

Partner, Gadens Lawyers, Sydney

Contents

Exploring liability caps and limitations, exclusions of category of loss and management of process risks.....98

Clauses that exclude or limit liability are often used in construction contracts to manage risk. This article looks at some recent English and Australian decisions that are likely to impact upon the interpretation of these clauses.

Patrick Mead CARTER NEWELL LAWYERS

When is an expert determination process not an arbitration?100

This article discusses the Queensland Supreme Court's decision in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd*, where the court was asked to decide on the difference between an expert determination process and an arbitration.

Nick Rudge and Nicholas Gallina ALLENS ARTHUR ROBINSON

Traps for the private sector when bundling goods in response to a government tender102

The Federal Court's decision in *ACCC v Baxter Healthcare Pty Ltd* highlights the impact the structure of a tenderer's bid can have on the truly competitive nature of the tender process, ensuring a level playing field for tenderers and obtaining value for money by government. This article discusses the decision.

Scott Alden and Alyson Eather TRESSCOX LAWYERS

CASENOTES

- Indemnity clauses: construction and interpretation104
BI (Contracting) Pty Ltd v AW Boulderstone Holdings Pty Ltd

Shelley Maxwell-Smith PLENARY GROUP

- Election of remedies under the Payment Act106
Rojo Building Pty Ltd v Jillcris Pty Ltd

Jim Ritchie and Jesse Braid ALLENS ARTHUR ROBINSON



Exploring liability caps and limitations, exclusions of categories of loss and management of process risks

Patrick Mead

CARTER NEWELL LAWYERS

Exclusion clauses and liability caps

There is a distinction between an exclusion clause, the effect of which is to either absolve a party for the consequences of a breach of duty or to define substantively the limit of the duty by negating obligations that the law would otherwise impose,¹ and a liability cap, the purpose of which is to limit a party's exposure up to a predetermined amount or percentage of contract value.

Often, these legal mechanisms operate in tandem with provisions in relation to liquidated damages (which are not considered to be exclusory, operating in theory for the benefit of both parties) and insurance and indemnity provisions within a contract, to create a finely balanced risk regime.

Such clauses are construed:

... according to their natural and ordinary meaning, read in light of the contract as a whole, thereby giving due weight to the context in which the clause appears, including the nature and object of the contract, and where appropriate, construing the clause contra proferentum in case of ambiguity...²

Many contractors rely on such clauses to manage their risk of damages arising out of the performance of contracts they enter into — particularly in significant process engineering and mining contracts where exposure to unlimited damages will be often unacceptable. If the starting point is that a contractor

will not accept liability for unlimited damages, a number of different outcomes can be achieved by adoption of appropriate exclusions, limitations or caps. Accordingly, it is not uncommon to now see clauses drafted to ensure that liability for all damages is capped at a percentage of the contract sum or an annual amount in the case of a mining or services contract.

Other than in respect of a provision for liquidated damages (which itself is likely to be capped at a percentage of the contract sum) the contractor may insist upon a complete exclusion for damages for loss of profit, loss of use and business interruption, or alternatively seek to cap any such exposure to the limit of any applicable insurance.

Process engineering and process design risks are of real concern given the potential for loss to the client over life of plant, from shortfalls in production in the event that the plant is unable to meet prescribed performance criteria. Accordingly, a contractor will commonly seek to cap its total liability for a shortfall in production to the lesser of a percentage of the contract value or a fixed dollar amount.

Often the principal will insist upon exemptions of particular matters or losses when faced with a blanket exclusion. If the contractor agrees to this, it will often only do so, on the basis of a further cap on liability in respect of the matters not subject to the blanket exclusion.

Consequential loss exclusions in process engineering contracts

In a number of recent cases, a party who has contracted for the design and installation of plant and equipment, has sought to take the benefit of exclusion clauses in their contracts in defence to claims arising out of the performance of that plant or equipment.

Often these exclusions of liability seek to exclude any entitlement by the principal to pursue recovery in relation to what has been generically referred to as 'indirect' or 'consequential' loss. There have been some recent decisions by the English and Australian courts which are likely to impact upon the interpretation of these clauses and suggest avenues of recovery, notwithstanding their inclusion in contracts of this nature.

In *British Sugar PLC v NEI Power Product Ltd*,³ the defendant faced a claim for increased production costs and loss of profits due to the breakdown of power supply caused by allegedly poorly designed and badly installed electrical equipment. The court held that the increased production costs and loss of profits flowed directly and naturally from the alleged breach and were therefore not consequential.

Similarly, in *Deepak Fertilisers & Petro Chemical Corporation v Davy McKee (London) Ltd & ICI Chemicals and Polymers Ltd*,⁴ the English Court of Appeal decided that fixed costs and overheads claimed were not indirect or consequential — they were the direct and natural result of the destruction of the plant and had not been excluded elsewhere in the clause.

In *BHP Petroleum Ltd v British Steel & Dalmine*,⁵ the claim against British Steel alleged that losses had been caused because the inability to use the pipeline supplied until it was replaced had serious consequences for the way in which fuel operations were carried out, requiring significant expenditure on installing additional facilities and modifying existing equipment or necessitating flaring of gas which would otherwise have been re-injected. It was also claimed that the rate of extraction of both oil and gas was

lower than it would otherwise have been — leading to the postponement of the exploration of the field's potential.

British Steel relied upon an exclusion clause in the following terms:

Neither the supplier nor the purchaser shall bear any liability to the other ... for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages arising during and/or as a result of the performance or non-performance of this contract regardless of the clause thereof but not limited to the negligence of the parties seeking to rely on this provision.

The court found that most of the losses claimed were in fact a loss of production and therefore covered by the express wording of the exclusion. However, it went on to consider what the position would be if it was wrong in this conclusion and became necessary to decide whether the losses were indirect or consequential.

As drafted, the exclusion clause appeared to imply that 'the loss of production', 'loss of profits' and 'loss of business' were examples of indirect losses or consequential damages. This led to the argument on behalf of BHP that only indirect and consequential losses of profits, production or business were excluded. If this submission had been accepted, the effect of the exclusion would have been severely limited because the losses of profits, production or business were likely, in the light of previous authorities, to have been considered direct losses, not merely consequential, and therefore not excluded.

It has been suggested⁶ that the judge adopted a somewhat charitable approach to British Steel by deciding that the best solution was to construe the clause as though it read:

[F]or loss of production, loss of profits, loss of business or indirect losses or consequential damages of any other kind.

These cases accordingly suggest that fixed costs and overheads, increased production costs, and sometimes even 'loss of profits' claims will not be excluded by consequential loss exclusions commonly found in a number of the standard form contracts and upon which contractors have traditionally relied.

This would seem to be borne out by some further recent decisions (albeit in a slightly different context).

In *Hotel Services Ltd v Aitton International Hotels (UK) Ltd*,⁷ loss of profits resulting from defective products (and their removal and replacement) was held to be direct and natural consequence of the breach of contract.

Pegler Ltd v Wang (UK) Ltd (No 1),⁸ seemed to widen the scope of losses claimable as 'direct and natural losses'. Loss of sales, loss of opportunity to increase margins, loss of opportunity to make staff cost savings and wasted management time were all considered to flow directly from the breach and were recoverable.

The most recent leading Australian authority is *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*,⁹ in which losses to a third party such as the cost benefit of a head contract (lost future profits) and increased project costs were considered by Finn J of the Federal Court to fall within the first limb of *Hadley v Baxendale*,¹⁰ and thus were recoverable as directly resulting from the breach.

As a result of the characterisation of damages in this manner, and the interpretation and efficacy of a number of so called 'consequential loss' exclusions, a number of contractors are now no longer drawing a distinction between 'direct loss' and 'indirect or consequential loss' but are rather seeking to exclude specific types of damages. ●

*Patrick Mead, Partner,
Carter Newell Lawyers.*

Endnotes

1. *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353.

2. *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500.

3. (1997) 87 BLR 42.

4. (1991) 1 Lloyd's Rep 387.

5. (1999) 2 Lloyd's Rep 583.

6. Rowe & Mawe 'Consequential and Indirect Loss'.

7. [2000] BLC 235.

8. [2000] BLR 218.

9. [2003] FCA 50; BC200300200.

10. (1854) 9 Exch 341.

When is an expert determination process not an arbitration?

Nick Rudge and Nicholas Gallina
ALLENS ARTHUR ROBINSON

This article discusses the Queensland Supreme Court's decision in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206; BC200706324 in relation to issues arising from an expert determination process.

Introduction

Construction contracts often contain dispute resolution clauses that provide for expert determination as an alternative or precursor to litigation or arbitration. The purpose of these clauses is to allow parties to resolve disputes in ways that avoid the formality and cost of arbitration or litigation.

This decision of the Queensland Supreme Court examines the circumstances in which an expert's conduct might cause an expert determination to become an arbitration, and indicates that the process of expert determination does not necessarily preclude experts from cross-examining witnesses. The case indicates that appropriate drafting of dispute resolution clauses can help preserve the benefits of expert determinations by helping to prevent these determinations being characterised as arbitrations.

Facts

Northbuild Construction Pty Ltd (Northbuild) and Discovery Beach Project Pty Ltd (Discovery) entered into a contract (the contract) under which Northbuild would carry out construction work. Under the contract, Northbuild referred several disputed matters, some of which involved questions of fact, law and quantum, for expert determination.

Section 13 of the contract provided that if a dispute was not resolved in a certain period of time, the dispute

would be referred to arbitration unless the party that lodged the notice of dispute elected to have the dispute determined by expert determination. Section 13 also provided that, except to the extent that the process for expert determination under the contract provided otherwise, 'the expert will not act as an arbitrator'.

Schedule 26 of the contract set out the 'Rules for Expert Determination'. Rule 2 of Sch 26 stated that '[t]he Expert ... may require from either party further information as the Expert sees fit'.

The contract stated that:

- '[t]he Expert is not bound by the Rules of Evidence and may make the Expert's determination on the basis of information received or the Expert's own expertise'; and
- '[u]nless otherwise stated this Process may be modified only by agreement of the parties and the Expert'.

The experts and the parties agreed that the experts should determine at least some of the matters that involved questions of fact, law and quantum. The experts and the parties also agreed that, insofar as the experts required oral evidence from witnesses on various matters involving questions of fact and law, the parties would accept the decision of the experts as to whether witnesses would be cross-examined by the opposing party.

The experts made a direction allowing cross-examination of witnesses by the opposing party (the cross-examination direction). Northbuild argued that, in making the cross-examination direction, the experts were acting as arbitrators as opposed to experts, or that, were the cross-examination direction to be implemented, the experts would be acting as arbitrators.

Decision of the Queensland Supreme Court

Justice Mullins examined the nature of arbitration and expert determination before answering the following two questions.

1. Did the experts have the power to direct that witnesses be cross-examined?
2. Did the cross-examination direction change the process from an expert determination to an arbitration?

The nature of arbitration and expert determination

Mullins J observed that it is easier to identify what is an arbitration than what is an expert determination because arbitrations are generally established by written agreements that satisfy the requirements of statutes that regulate arbitrations, whereas expert determinations, not being regulated by statute, are governed by the terms of the contract between the parties and the expert.

Her Honour found that the indicia of arbitrations are that:

- there is a dispute;
- the dispute has been remitted by the parties to a person for resolution in a manner that requires the exercise of a judicial function;
- where appropriate, the parties must have had the opportunity to present evidence and submissions; and
- the parties have agreed to accept the decision of the person to whom they have remitted the dispute.

Mullins J emphasised that arbitration requires that a decision maker act judicially. Her Honour noted that, while experts are not bound to act judicially, they may act judicially if doing so is not precluded by the terms of the agreement under which they are retained.

Her Honour also noted that:

- the existence of a dispute is not necessarily a decisive factor in determining whether an arbitration exists because it is ‘possible for parties to become involved in a dispute ... which they agree to submit for appraisal without intending that an arbitration should follow’ (at [61]);
- recent authority suggests that, where, in building and commercial contracts, an agreement between the parties and an expert does not make express provision for such matters as the procedures to be followed by the expert in reaching determinations, or the rights or obligations of the parties in relation to the expert’s determinations, courts will be slow to declare these agreements void with respect to these matters;
- the label which parties apply to a dispute resolution process does not necessarily determine whether the process is an arbitration or an expert determination; and
- there is no restriction on the nature of the disputes that parties can agree will be the subject of expert determination; for example, questions of law may be referred to an expert.

Did the experts have the power to direct that witnesses be cross-examined?

Mullins J found that the experts had the power to direct that witnesses be cross-examined.

Her Honour held that Rule 2 gave the experts power to question witnesses and that it was difficult to see why such questioning would not extend to questions put forward by the other party for the experts to consider asking the witnesses. Northbuild argued that the word ‘information’ in Rule 2 did not include evidence tested by cross-examination. Her Honour rejected this argument and construed the words of Rule 2 according to their natural meaning, which her Honour said were ‘about the requiring or receiving of information’.

Her Honour held that, apart from Rule 2, which gave the experts a power to test evidence to some extent, the

agreement of the parties to accept the decision of the experts as to whether witnesses would be cross-examined in respect of oral evidence, together with the subsequent cross-examination direction, meant that the parties had granted to the experts the power to cross examine witnesses.

Did the cross-examination direction change the process from an expert determination to an arbitration?

Mullins J found that the cross-examination direction did not change the reference to the experts from an expert determination to an arbitration. Her Honour based this finding on the construction of section 13 and a consideration of the powers granted to the experts under the contract.

When drafting dispute resolution clauses, parties should carefully consider the powers they wish to grant an expert to ensure that these clauses are not found to be uncertain and to provide the expert with the powers the parties want the expert to have.

Mullins J indicated that nothing in section 13 precluded, from resolution by expert determination, disputes that raised questions about the credit of witnesses. Her Honour stated that section 13 contemplated that disputes arising under the contract may be suitable for both arbitration or expert determination, and that section 13 did not limit the nature of the disputes that could be determined by expert determination.

Mullins J noted that the process proposed by the experts, whereby they would determine several legal issues regarding the contract before they provided any expert determinations, resembled an arbitral process. Her Honour indicated that this resemblance did not mean that the experts would be acting as arbitrators because this proposed process came about as the

result of the implementation of the powers granted to the experts under the contract.

Her Honour indicated that the fact that the experts sought to cross-examine witnesses did not mean that the experts would be acting as arbitrators because the experts, while having the discretion to allow the cross-examination of witnesses, were not obliged to do so. Her Honour emphasised that the process of expert determination does not necessarily preclude experts from cross-examining witnesses.

Practical considerations

The implication of this decision is that, despite witness cross-examination being commonly associated with arbitration and litigation, the process

of expert determination can include witness cross-examination if the contract between the parties and the expert so allows.

Given that expert determinations are a creature of contract, parties that do not wish witnesses to be cross-examined as part of an expert determination should ensure that dispute resolution clauses are drafted accordingly.

When drafting dispute resolution clauses, parties should carefully consider the powers they wish to grant an expert to ensure that these clauses are not found to be uncertain and to provide the expert with the powers the parties want the expert to have. ●

*Nick Rudge, Partner, and
Nicholas Gallina, Lawyer,
Allens Arthur Robinson.*



Traps for the private sector when bundling goods in response to a government tender

Scott Alden and Alyson Eather
TRESSCOX LAWYERS

The tender process is meant to be a competitive process through which tenderers are able to compete fairly with each other to achieve, in a government context, an outcome that represents value for money. The recent case of *ACCC v Baxter Healthcare Pty Ltd*¹ highlights the impact the structure of a tenderer's bid can have on the

purchasing authorities in WA, SA, NSW, Queensland and the ACT for the supply of sterile fluids and PD products to public hospitals. Baxter was the preferred tenderer after offering substantial discounts on the supply of PD products if they were to be awarded the sole supplier contract for both sterile fluids and PD products. The

[This case] ... highlights the impact the structure of a tenderer's bid can have on the truly competitive nature of the tender process, ensuring a level playing field for tenderers and obtaining value for money by government.

truly competitive nature of the tender process, ensuring a level playing field for tenderers and obtaining value for money by government.

Summary of case

Baxter Healthcare Pty Ltd (Baxter) is a manufacturer of different types of sterile and other fluids commonly used in hospitals. Between 1998 and 2001, while Baxter was the only Australian manufacturer of sterile fluids, competition existed over peritoneal dialysis (PD) and other products.

After a period of tendering and negotiations, Baxter entered into long-term contracts with the relevant

degree of discounting of the PD products was such that the government would receive a financial benefit if the Baxter offer was selected.

At first instance, the court had to consider whether, in bundling the PD and sterile fluids products in its tender, Baxter had contravened ss 46 and 47 of the *Trade Practices Act 1974* (Cth) (the Act). Broadly, these sections deal with abuses of market power and exclusive dealing. On appeal, the issue was whether, upon the true construction of the Act, ss 46 and 47 applied to the conduct of a trading corporation in, or in connection with, negotiations for, entry into or

performance of, a contract with a state or territory government where the government's conduct is not in the course of carrying on a business. The question arose because in those cases the state/territory government enjoys an immunity from the Act which has been held in the past to provide a 'derivative immunity' to private sector entities dealing with government.

The court held that it would be wrong to conclude that ss 46 and 47 of the Act had no application to Baxter's conduct in relation to its dealings with government authorities. The court found that since the decision of *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*,² in which it was found that Crown immunity extended to a corporation that had contracted with a federal or state government or their authorities, many things had changed.

The High Court found by majority that *Bradken* no longer represented the current position in Australian law as it was too broad and 'as a result of changes to the Act since *Bradken*, state and territory governments no longer enjoy any general immunity from the Act' (at [64]). The court preferred the principle of construction where it was concluded that the inflexible rule in *Bradken* should give way to a more flexible approach taking into account the nature of the statutory provisions in question and the activities of government to which they might apply.

Relying on the principles in *Bropho v Western Australia*,³ the court found it would be wrong to conclude that ss 46 and 47 had no application to any of Baxter's conduct in relation to its dealings with government authorities. The court emphasised that to find that Baxter was entitled to the derivative Crown immunity 'would go far beyond what is necessary to protect the legal rights of governments, or to prevent a divesting of proprietary, contractual and other legal rights and interests' (at [64]).

This case highlights a number of issues relating to both private sector and government, particularly in relation to procurement planning, the potential consequences of such planning and the potential for an anticompetitive result

or conduct in a process which is supposed to maximise competition and value for money.

Procurement planning

When embarking on a procurement, the government has a number of threshold questions. These include where there is a genuine need for the goods (that is, is it an appropriate spend), what is it that is being procured and how it can best be achieved, and, particularly relevant to this case, what goods and services should be called and how flexible the responses should be allowed to be.

This case highlights the issues relating to the combining of goods or goods and services in a request for tender either where responses can be for all of the tender requirements or where there is a discretion to provide some but not all of the goods or services. In such procurements, depending on how flexible the responses are allowed to be, as indicated by the government in the Conditions of Tendering and Schedules, there can be great flexibility for the private sector to structure their bids in what they consider to be very competitive ways but which in fact may be anticompetitive. Such structuring could include an entity providing reasonably high prices for the individual items but very large percentage discounts for a combination of products or services. Alternatively, the private sector may only offer certain items on particular terms if other goods or services are also selected.

This issue has always created difficulties in terms of fair and objective evaluation but now it seems that such offers, if taken, may lead to the entity being liable for a breach of the Act.

Does it matter if government not bound

This case confirms that government bodies are generally immune from liability under the Act by virtue of ss 2A and 2B, which provide an immunity to Commonwealth and state and territory Crown bodies respectively, where they are not carrying on a business. The application to government where it is carrying on a

business was recently found to apply in the case of *NT Power Generation Pty Ltd v Power and Water Authority*,⁴ which was referred to and confirmed in this decision.

However, government bodies should not rely on this immunity when conducting themselves generally and in relation to the tender process. While there may be no liability under the Act, liability under the state equivalent fair trading statutes may arise. In addition, in relation to misleading and deceptive conduct, while there may be an immunity from s 52 liability, other torts may arise such as misrepresentation or general negligence.

Further, while there is some uncertainty about the existence of the implied term of good faith in general commercial contracts, it has been generally accepted that it arises in relation to government contracts. Where the government engages in conduct which, but for an immunity, may breach the Act, it would be likely that a court would find against that government entity on the basis of a lack of good faith either as an implied term in the process (tender) contract or the substantive contract as the case may be.

Conclusion

Following the decision in *Baxter*, there are important lessons for the private sector in relation to responding to a government tender, particularly where there is the potential to be innovative or flexible in the response. Further, it would appear that the government itself may cause, or at least induce, such a breach in the method of procurement adopted, although in such circumstances would itself be immune from liability under the Act. ●

*Scott Alden, Partner, and
Alyson Eather, Solicitor,
TressCox Lawyers, Sydney.*

The authors would like to acknowledge the assistance of Lee Moore.

Endnotes

1. [2007] HCA 38; BC200707216.
2. (1979) 145 CLR 407.
3. (1990) 171 CLR 1.
4. (2004) 219 CLR 90 at 152 [170].



Casenotes



Indemnity clauses: construction and interpretation

BI (CONTRACTING) PTY LTD v AW BAULDERSTONE HOLDINGS PTY LTD

[2007] NSWCA 173; BC200705553

The oft-visited, yet relatively uncertain, realm of construction and interpretation of indemnity clauses in Australia was the central issue in this case. Although this issue has been examined in a number of cases over the last 40 years and more, there has not emerged a clear position on how the courts interpret an ambiguous or arguable indemnity clause. When the issue arose again in the present case, the NSW Court of Appeal took the opportunity to examine some of the case law on the subject.

Facts

In late 1963, Baulderstone Holdings Pty Ltd (Baulderstone) entered into a contract with the state of South Australia for the construction of buildings, including the kitchen and administration building at the Royal Adelaide Hospital. The contract required Baulderstone to apply asbestos insulation to steel framework as a fire protective finish. Baulderstone subcontracted, inter alia, the asbestos insulation works to BI (Contracting) Pty Ltd (BIC).

One of Baulderstone's employees, Mr Stutley, worked in the vicinity of the kitchen and administration building and subsequently developed mesothelioma as a result of inhaling asbestos which was released into the air during the spraying of the asbestos insulation.

Mr Stutley brought proceedings against Baulderstone for breach of its duty of care as an employer. These proceedings were settled by entry of a verdict in favour of Mr Stutley for \$500,000, with no admissions of liability by Baulderstone. Baulderstone, by way of cross-claim, brought

proceedings for contribution against BIC. The trial judge found the cross defendants liable as to 80 per cent of Baulderstone's liability to Mr Stutley. The finding of liability on the contribution claim and the amount of contribution assessed was not challenged in the appeal.

Baulderstone also claimed a complete contractual indemnity against BIC on the basis of an indemnity clause included in the subcontract. The trial judge upheld that claim and awarded Baulderstone the full \$500,000 which had been awarded to Mr Stutley, plus interest.

Evidence was required that the subcontract was entered into as neither party could produce a copy of the original document; however, this was established to the trial judge's satisfaction. Clause 6 of the subcontract stated:

The Subcontractor shall take out and maintain workmen's compensation insurance and public risk insurance policies in respect of the subcontract works and shall pay all premiums thereon and all fees required by any public or local government authority in respect of the contract works and *shall indemnify the builder against all liability relating to the subcontract works.*

[Emphasis added.]

BIC appealed the judgment at first instance on the basis that the trial judge erred in accepting that clause 6 provided a complete indemnity to Baulderstone for its liability to Mr Stutley. BIC argued that their indemnity did not extend to cover Baulderstone's own negligence in failing to provide a safe place of work and such negligence did not fall into the category of issues 'relating to the subcontract works'. BIC also appealed the *Jones v Dunkel* (1959) 101 CLR 298 submission made at first instance, which will not be examined in this review.

It therefore fell to Beazley and Tobias JJA, and Bell J to determine whether the judge at first instance had interpreted the law in Australia correctly when he accepted Baulderstone's argument that clause 6

of the subcontract was sufficient to provide it with a full indemnity from BIC for its own breach of duty as an employer.

History of indemnity clause construction

There has been a long, and in parts confusing, history of case law relating to interpretation of widely drafted or ambiguous indemnity clauses. The 'strict construction' cases, starting with *Canada Steamship Lines Ltd v R* [1952] AC 192, were advanced by BIC as being the correct position in Australia, having been followed in the more recent decision of the High Court in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424.

In *Canada Steamship SS*, the House of Lords stated (at 208) that the construction of exclusion and indemnity provisions should be approached as follows:

- (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereinafter called 'the *proferens*') from the consequence of the negligence of his own servants, effect must be given to that provision. ...
- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. ...
- (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be "based on some ground other than that of negligence," ... The 'other ground' must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; ... the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are prima facie wide enough to cover negligence on the part of his servants.

BIC contended that the third principle stated above operated so as to require clause 6 of the subcontract to be read to exclude the negligence of the *proferens*, Baulderstone. BIC argued that the later

cases of *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 and *Andar* supported its contention that *Canada Steamship SS*'s three principles were currently good law in Australia. *Ankar* and *Andar* were cited to be of particular importance because these judgments came after the decision in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, where the High Court took a somewhat different view.

In *Darlington*, the court rejected the longstanding notion that exclusion clauses should be construed strictly, and instead (at 510) found that they should be:

... determined by construing the clause according to its natural and ordinary

... despite taking the more contextual approach seen in *Darlington*, the present decision represents a departure in the case of remaining ambiguity as *Darlington* found the clause would be construed *contra proferentem*.

meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

However, BIC contended that *Darlington* had been superseded by a return to the 'strict construction' in *Ankar* and *Andar*. In his judgment in this case, Beazley JA stated (at [25]) that:

... an examination of the joint judgment in *Andar* reveals that their Honours' approach to the construction of the indemnity clause was first to construe the clause strictly in the context of the contract as a whole and, to the extent that there remained any ambiguity, to construe the indemnity in favour of the *proferens*.

Indeed, Beazley JA goes on to reject that *Ankar* and *Andar* make any specific reference to *Canada Steamship SS*, and in particular, any reference to the relied upon third principle, which omission his Honour believed to be very significant (at [89]).

Further, Beazley JA stated (at [93]) that *Andar* went further and endorsed *Coghlan v S H Lock (Australia) Ltd* (1987) 8 NSWLR 88:

... that where the parties have deliberately chosen to adopt wording of the widest possible import, that wording is not to be ignored. Where wording is susceptible of more than one meaning, regard may be had to the circumstances surrounding the execution of the document as an aid to construction.

And later in his judgment (at [94]):

... I consider that there is nothing in *Ankar* or *Andar* which mandates the conclusion that the third 'principle' in *Canada Steamship SS* must be applied to the construction of an indemnity clause.

Consequently, Beazley JA (with whom

Tobias JA and Bell J agreed) rejected that *Canada Steamship SS*'s principles were still good law in Australia. This judgment also reversed the assumption in *Canada Steamship SS*'s third principle that if the indemnity remains ambiguous, the person seeking to rely on it, the *proferens*, should receive the benefit. However, despite taking the more contextual approach seen in *Darlington*, the present decision represents a departure in the case of remaining ambiguity as *Darlington* found the clause would be construed *contra proferentem*.

Having decided upon the proper approach to be taken, the Court of Appeal then turned its mind to how clause 6 should be construed. Beazley JA found the language in clause 6 to be in the 'widest terms and as a matter of ordinary construction would encompass the injury, loss and damage for which Baulderstone was liable to Mr Stutley' (at [105]). Having regard to BIC's insurance obligations in clause 6, Beazley JA found (at [106]):

... the parties would have had it in contemplation that BIC should be liable



for its negligence, notwithstanding that Baulderstone was also negligent. In this regard I am of the opinion that there is no ambiguity in the provision so as to cause the clause to be construed in favour of BIC so as to make cl 6 inapplicable to the present circumstances.

Consequently, the court was unanimous in dismissing BIC's appeal and upholding Baulderstone's contention that the indemnity in clause 6 was sufficiently wide to cover its own negligence. Construction of such provisions, it appears on the basis of this case, is not to be strict any longer, but considered in the context of the contract as a whole. However, despite stating *Canada Steamship SS* was no longer good law and the proper approach is that in *Andar*, the Court of Appeal did not have to decide whether, if ambiguity still existed, the court would apply the approach in *Darlington*, *contra proferentem*, or in *Andar*, in favour of the *proferens*. ●

Shelley Maxwell-Smith,
General Counsel, Plenary Group, Sydney.

Election of remedies under the Payment Act

ROJO BUILDING PTY LTD v JILLCRIS PTY LTD [2007] NSWSC 880; BC200706613

This decision of McDougall J of the NSW Supreme Court considered whether a notice of intention to apply for adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) constituted an election that could not be withdrawn.

Background

The defendant, Jillcris Pty Ltd (Jillcris), engaged the plaintiff builder, Rojo Building Pty Ltd (Rojo), to construct a beach house. On 2 December 2005, Rojo's solicitors, acting on behalf of Rojo, signed and served a payment claim on Jillcris for the amount of \$251,537.09. Jillcris failed to provide a payment schedule by 16 December 2005, being the last date within the time limited by the Act. Pursuant to s 14(4), Jillcris thereby became liable to pay the full amount claimed. Section 15(2)(a) of the Act provides that in such circumstances the claimant has a choice in that the claimant may:

- recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
- make an adjudication application under s 17(1)(b) in relation to the payment claim.

Section 17(1)(b) provides that a claimant may apply for adjudication of a payment claim if the respondent fails to provide a payment schedule and fails to pay the whole or any part of the claimed amount by the due date for payment. Section 17(2) states that an adjudication application under s 17(1)(b) cannot be made unless:

- the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice.

subscriptions

subscribe to Australian Construction Law Bulletin

Subscriptions are available in electronic (PDF) format or hard copy and include 10 issues per year and binder.

To subscribe, simply call 1800 772 772

On 19 December 2005, Rojo's solicitor posted a letter to Jillcris giving notice that Rojo intended to apply for adjudication of the payment claim under s 17(1)(b) of the Act. Pursuant to s 17(2), the notice gave five days from the date of the letter for Jillcris to provide a payment schedule. The letter was received by Jillcris on 22 December 2005. No payment schedule was provided in response to Rojo's s 17(2)(a) notice.

On 23 December 2005, Rojo's solicitor, by facsimile, informed Jillcris' solicitor that Rojo did not propose to proceed with an application for adjudication and that Jillcris was no longer required to provide a payment schedule. Rojo then sought to recover the claimed amount as a debt due.

Issues

Jillcris contended that once Rojo had given notice of its intention to make an adjudication application, it was bound to proceed with that path and was unable to withdraw its notice. The primary issue was whether Rojo, by giving notice, had elected to proceed with one statutory alternative over another. If the court found that an election had been made it would then have to determine what the election was and whether it was open for Rojo to withdraw.

A preliminary issue relating to the authority of solicitors to sign and serve payment claims was also raised by Jillcris.

Decision

Solicitors' authority to sign and serve payment claims

McDougall J followed the Court of Appeal's decision in *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation* [2007] NSWCA 9; BC200700577, where it was held that a payment schedule could be signed by a solicitor. McDougall J agreed with Rojo's submission that 'there was no sensible distinction between the authority of a solicitor to sign a payment schedule and the authority of a solicitor to sign a payment claim, each being a question of fact' (at [26]). McDougall J found

that Rojo's solicitor was authorised to sign and deliver the payment claim and that these actions were to be taken as the actions of Rojo.

Was an election made?

McDougall J found that the giving of notice under s 17(2)(a) was not of itself sufficient to constitute an election under s 15(2)(a). His Honour referred to *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554; BC200704188 and accepted that this case confirmed that the election under s 15(2) is one between bringing proceedings in a court and making an adjudication application.

McDougall J then considered what constituted the making of an adjudication application. While notice under s 17(2)(a) gives the respondent a further right to provide a payment schedule within five business days, it does not amount to the making of an adjudication application. Similarly, the provision of a payment schedule within the time limit does not mean that the claimant is bound to proceed to adjudication. As McDougall J stated, '[the claimant] may decide, for any number of reasons, not to press the dispute any further'. His Honour thus concluded (at [65]) that:

... a notice of intention to apply for adjudication does not amount to making an adjudication application. It is a procedural, although necessary, precondition to the making of such an application.

Accordingly, Rojo's letter of notice under s 17(2)(a) did not constitute or trigger any election for the purposes of s 15(2)(a). Having found for the plaintiff on this issue, McDougall J was not required to consider what would amount to an election and the consequences of such. Nonetheless, his Honour made several useful observations on these points.

When will an election be made and can it be withdrawn?

As obiter, McDougall J came to the tentative conclusion that once a s 17(2)(a) notice is given and a payment schedule provided in response, the claimant cannot seek the alternative

available now

Australian Environment Review

Australian Environment Review briefs legislators, policy makers, government officials, environment managers and engineers, water and power authorities, mining and oil companies, waste management companies and authorities, manufacturers and lawyers. It covers a broad range of environmental issues including new legislation and regulations relevant to industry and commerce, government initiatives to assist industry, and recent breakthroughs in research and technology.

Regular columns highlight water and waste management, important developments in the greenhouse debate, transport, energy and environmental law.

The newsletter includes book reviews, and a calendar of conferences and seminars to keep you in touch with the latest developments and current thinking on environmental issues.

Available in hard copy or PDF format, *Australian Environment Review* is a must-have reference for all legal practitioners and consultants involved in environmental law.

To subscribe to *Australian Environment Review*, simply call Customer Relations on **1800 772 772**.

LexisNexis®
Butterworths



course of action and have the claim enforced in a court. This was based on the explicit legislative intention expressed in s 3(3)(c) that any 'disputed claim' should be referred to an adjudicator rather than determined in court.

A disputed claim can only arise if there is a valid payment schedule to set the terms of the dispute. A valid payment schedule, in turn, may be provided within the time limit of s 14(4) or the further time limit of s 17(2)(b). Where a valid payment schedule is provided within five business days after a s 17(2)(a) notice, McDougall J considered (at [56]) that it would be 'quite extraordinary' if:

... the claimant could proceed to adjudication, lose before the adjudicator because of the issues raised in the s 17(2)(b) payment schedule, and then proceed to enforce the payment claim in a Court pursuant to s 15(2)(a)(i) on the basis that there remains a statutory liability pursuant to s 14(4).

McDougall J refrained from providing a concluded view on the question, but called on the legislature to clarify the consequences of a payment schedule being validly provided in response to a s 17(2)(a) notice.

McDougall J also briefly considered whether an election could be withdrawn before it is acted on. His Honour cited authority both in support and against this preposition.¹ However, those cases involved an election at law

between alternative and inconsistent rights whereas an election of either alternative for which s 15(2)(a) provides is an election between inconsistent statutory remedies, not rights:

The right is to be paid the progress payment, or the statutory liability created by s 14(4). Section 15(2)(a) provides alternative remedies whereby that right can be enforced.

His Honour cautioned that legal doctrines relating to election of legal rights might not be automatically analogous to election of statutory remedies and that the application of common law doctrine to the statutory scheme required careful consideration.

Conclusion

The Supreme Court found that no election had been made and Rojo was entitled to judgment for the amount claimed. This case represents yet another example of the court's insistence that rights and remedies be enforced swiftly under the Act in accordance with the legislature's intention. ●

*Jim Ritchie, General Editor, and
Jesse Braid, Paralegal,
Allens Arthur Robinson, Brisbane.*

Endnote

1. *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 and *Miller v Miller* (1945) 45 SR (NSW) 73.

PUBLISHING EDITOR: Darren Smith PUBLISHER: Susan Robinson PRODUCTION: Christian Harimanow

SUBSCRIPTIONS INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia

TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au darren.smith@lexisnexis.com.au

ISSN: 1035-1361 Print Post Approved PP 255003/07765 Cite as (2007) 19(9) ACLB

This newsletter is intended to keep readers abreast of current developments in the field of construction law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. This publication is copyright. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission. Inquiries should be addressed to the publishers.



Printed in Australia © 2007 Reed International Books Australia Pty Limited trading as LexisNexis ABN: 70 001 002 357