CLAIMS FOR DAMAGES "UNDER A CONSTRUCTION CONTRACT" IN ADJUDICATION PROCEEDINGS – A CASE NOTE

GORDON SMITH

*Barrister & Solicitor**
Chartered Arbitrator, and Adjudicator

I. INTRODUCTION

The Western Australia State Administrative Tribunal ("Tribunal"), in its decision in *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* (*"Bocol and Keslake"*),[1] dismissed an application by Bocol Construction Pty Ltd, the applicant, for review of an adjudicator's decision to dismiss the applicant's application for adjudication of a payment dispute under s31(2)(a) of the *Construction Contracts Act* 2004 (WA) ("Act") without making a determination on its merits, on the basis that the application had not been prepared and served in accordance with s26 of the Act.

The Tribunal's decision involved three issues:

- whether the applicant's description of the respondent as the *"Trustee for Complete Road Services Trust"*, rather than the respondent's legal name, was sufficient to comply with the requirements of regs 4 and 5 of the *Construction Contracts Regulations 2004* (WA) ("Regulations");
- whether the applicant's claim for damages was a *"payment claim"*, defined in s3 of the Act in terms of a *"claim made under a construction contract"*; and
- whether the application was one that the adjudicator could be satisfied that it was not possible to fairly make a determination because of the complexity of the matter, pursuant to s31(2)(a)(iv) of the Act.

The Tribunal overturned the adjudicator's decision on the first issue, and upheld the adjudicator's decision on the second issue. The Tribunal also found that the adjudicator should have dismissed the application on complexity grounds.

The Tribunal's decision and reasoning, although not new, provide further helpful guidance to parties and adjudicators on technical aspects of an application for adjudication, the scope of claims falling within the definition of a *"payment claim"* in s3 of the Act, and the circumstances in which the Tribunal may consider the complexity ground to be satisfied.

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* Gordon Smith Legal, LLB (Hons), MBA, BE Civil, FCIArb, CArb, FSIArb, AIAMA, FIEAust, CPEng (Ret), IAMA Grade 1 Arbitrator.

[1] [2017] WASAT 15.

II. FACTS

On or around 22 July 2015, the applicant entered into a contract with the respondent, under which the respondent agreed to perform bituminous surfacing work on the Northam-Pithara Road in Western Australia ("Contract"). The respondent entered into the Contract as the *"Trustee for Complete Road Services Trust"*.

The respondent completed the work in July 2015, and on 22 March 2016, the applicant sent a letter to *"Bitumen Surfacing"*, the respondent's business name, alleging non-performance of its obligations under the Contract relating to the work. The respondent's solicitor responded by letter dated 19 April 2016, disputing the claim, and further disputing that it was a payment claim under the Act.

On 11 May 2016, the applicant served on both the respondent, and the Institute of Arbitrators & Mediators Australia, an application for adjudication under the Act, naming the *"Trustee for Complete Road Services Trust, trading as Bitumen Surfacing"*, as the respondent to the application.[2] The applicant claimed in its payment claim damages for breach by the respondent of an implied term of the Contract that the respondent would carry out the work with proper skill and care. On 25 May 2016, the respondent served its response to the application, and thereafter followed an exchange of submissions on the jurisdiction issue.

On 8 June 2016, the adjudicator dismissed the application, pursuant to s31(2)(a) of the Act, without making a determination on the merits, on the following grounds:

- the application had not been prepared and served in accordance with s26 of the Act because the party named in the application was the *"Trustee for Complete Road Services Trust"* and that the correct name of the respondent was Keslake Group Pty Ltd, as Trustee for the Complete Road Services Trust, of which the applicant was aware; and
- the applicant's claim was a claim for damages at common law and was therefore not a claim that related to the respondent's obligations under the Contract.

III. TRIBUNAL'S REASONING

The Name Issue

With respect to the name issue, the respondent accepted that the applicant's naming of the party to the Contract as the *"Trustee for Complete Road Services Trust"* was an accurate description of the party

[2] Ibid, [17].

that entered into the Contract, but that it was not the correct name, since the applicant should have used the respondent's legal name, Keslake Group Pty Ltd, not its title or description.[3]

The Tribunal referred with approval to its earlier decision in *Match Projects Pty Ltd and Arccon (WA) Pty Ltd ("Match Projects")*,[4] in which it noted that s26 of the Act is clear that an application must be prepared in accordance with the Regulations, but that the information stipulated in the Regulations to be provided with the application is itself *"inexact"*.[5]

The Tribunal also noted that in *Match Projects* it was suggested that if it was apparent from the materials that the names and addresses of the respondent were known by the applicant, but not included in the application, the adjudicator would be required to dismiss the application. However, the Tribunal was of the view that the decision of the Supreme Court of Western Australia in *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* (*"Citygate"*)[6] placed some doubt on the decision in *Match Projects*, since the court was of the view that provided that the respondent's name can be found within the application considered as a whole, including attachments, that will suffice to correctly name the respondent.[7]

The Tribunal did not consider it necessary to apply the dicta in *Citygate*, because it considered the issue to be whether the expression *"Trustee for Complete Road Services Trust"* was a *"name"* in terms of regs 4 and 5 of the Regulations. The Tribunal was of the view that there could be no doubt as to the identity of *"Trustee for Complete Road Services Trust"*. The Tribunal noted the terms of reg 5 of the Regulations refer to the respondent's *"name"*, and does not require the *"name"* the party is known by, the party's full name, or in the case of a corporation, the name of its correct legal entity.[8] The Tribunal was of the view that it would not promote the purpose or object underlying the Act, as required by s18 of the *Interpretation Act 1984* (WA), by interpreting s26 of the Act and/or reg 5 of the Regulations, in terms that any error in the spelling of a name or the omission of a middle name would invalidate the application. The Tribunal concluded that the *"Trustee for Complete Road Services Trust"* is the party that entered into the Contract, and that it is not a misdescription of the respondent, since it is its correct name.[9]

The Tribunal also applied the terms of s74 of the *Interpretation Act 1984* (WA), which provides as follows:

> "[w]here a form is prescribed or specified under a written law, deviations therefrom not materially affecting the substance nor likely to mislead shall not invalidate the form used."

[3] Ibid, [54].
[4] [2009] WASAT 134.
[5] [2017] WASAT 15. [56].
[6] [2016] WASC 88, [134]-[140].
[7] [2017] WASAT 15, [42] and [58].
[8] Ibid, [62].
[9] Ibid, [63]-[64]

The Tribunal concluded that if it was wrong, and there was a misdescription of the respondent, there has been no material deviation affecting the substance of the application, nor was it likely to mislead the respondent, and therefore, in accordance with s74 of the *Interpretation Act 1984* (WA), the deviation would not invalidate the application for adjudication.[10]

Damages "Under the Construction Contract"

The parties agreed that it was an implied term of the Contract that the respondent must perform its work under the Contract with proper skill and care. The applicant sought to have the Tribunal imply a further term into the Contract that the applicant is entitled to make a claim for damages if the respondent does not carry out the work with proper skill and care.[11] The Tribunal was of the view that the criteria for an implied term established in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* were not satisfied,[12] in particular, in the absence of the Contract providing for a claim for liquidated damages, such a term is neither necessary nor *"goes without saying"*.[13]

With respect to the applicant's argument that a claim for damages for breach of an implied term is a claim *"under a construction contract"*, the Tribunal was of the view that the Supreme Court, in *Delmere Holdings Pty Ltd v Green* (*"Delmere")*,[14] and *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* (*"Laing O'Rourke"*),[15] supported the *"narrow"* view of the expression *"under a construction contract"* in terms of a payment claim made in compliance with contractual requirements. The applicant argued that these two cases did not consider a claim by a principal against a contractor, but the Tribunal relied upon the Supreme Court's decision in *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd* (*"Kellogg Brown & Root"*),[16] which involved a claim by a principal for damages for work not carried out with proper skill and care. The Tribunal referred to Master Gething's decision in that case that the principal's claim was for damages for defective performance of the contract, rather than a payment dispute under the Act.[17]

The Tribunal rejected the applicant's submission that the Supreme Court's decision in *DPP Pty Ltd v McHenry*,[18] and the Tribunal's decision in *Georgiou Group Pty Ltd and MCC Mining (Western Australia) Pty Ltd*,[19] supported a *"broad"* approach to the interpretation of *"under a construction*

[10] Ibid, [65].
[11] Ibid, [97].
[12] (1977) 52 ALJR 20.
[13] [2009] WASAT 134, [99].
[14] [2015] WASC 148.
[15] [2015] WASC 237.
[16] [2014] WASC 206.
[17] [2017] WASAT 15, [103] and [104], and [2015] WASC 237, [66].
[18] [2012] WASC 140.
[19] [2011] WASAT 120.

contract", and noted, in any event, both cases were decided before the Supreme Court's decisions in *Delmere* and *Laing O'Rourke*.[20] The Tribunal concluded as follows:[21]

> "The right to claim for damages arises under the common law not under the Contract and therefore a claim for damages is not a payment claim because it is not 'a claim made under a construction contract … by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract'."

Although the Tribunal noted that it was not necessary to decide the issue, the Tribunal was also of the view that it was doubtful whether a claim of unliquidated damages can be said to be a claim for payment of *"an amount"*, in the definition of a *"payment claim"* in s3 of the Act.

Complexity

The final issue considered by the Tribunal was the application of s31(2)(a)(iv) of the Act, which provides that an adjudicator is obliged to dismiss the application if the adjudicator is satisfied it was not possible to fairly make a determination because of the complexity of the matter.

The Tribunal was of the view that the applicant's claim was neither factually nor legally clear, referring to a dispute as to the cause of the failure of the work, with competing expert evidence from the parties provided on different factual bases, and that weather on the day the seal was applied was relevant or may be relevant, but no conclusive evidence is available.[22] The Tribunal was also of the view that there would be problems in determining the quantum of damages, since two methods of remedying the work were advanced by the applicant's expert, but no reason was given for selecting one method over the other, or evidence as to differing costs of the two methods.[23]

The Tribunal therefore found that it was too complex a matter to enable the adjudicator to fairly make a determination under s31(2)(a)(iv) of the Act.

IV. DISCUSSION

The Name Issue

Applying the Tribunal's reasoning on the name issue, an applicant would comply with the terms of regs 4 and 5 of the Regulations by referring in its application for a payment dispute to be adjudicated to the respondent's name in a descriptive form, such as trustee, as in this case, or in a business name form, rather than its formal legal entity, providing the name is accurate and consistent with the terms of the relevant contract.

[20] [2017] WASAT 15, [107] and [108].
[21] Ibid, [115].
[22] Ibid, [32] to [35].
[23] Ibid, [136].

In cases where an applicant is seeking to supplement missing name information, rather than asserting that the name actually provided complies with regs 4 and 5 of the Regulations, the Supreme Court's decision in *Citygate* would assist, providing the correct information is found within the application, including any attachments.

The author submits parties should clearly take care to specify parties' respective correct legal entities in both the contract, and any subsequent application for adjudication under the Act, to avoid the uncertainty and unnecessary costs of a subsequent challenge to an adjudicator's decision.

The Tribunal's reference to s74 of the *Interpretation Act 1984* (WA) is the first occasion in which the author is aware that this provision has been relied upon in the context of the Act. The author submits that it is not clear that s74 is applicable in this case. If the Tribunal was of the view that the expression *"Trustee for Complete Road Services Trust"* was a misdescription of the respondent, it could only be because it is not a *"name"* under regs 4 and 5 of the Regulations. In light of the Tribunal's decision in *Match Projects* that s26 of the Act (and therefore regs 4 and 5) must be complied with, the author submits it is not clear that a different name entirely is a matter simply of form that can be remedied under s 74 of the *Interpretation Act 1984* (WA).

Damages "Under the Construction Contract"

In light of the decisions by the Supreme Court in *Kellogg Brown & Root*, *Delmere*, and *Laing O'Rourke*, and the Tribunal's decision in *Bocol and Keslake*, there is now little scope for arguing that a damages claim, other than a claim for liquidated damages, is a *"payment claim"* under a construction contract, as defined in s3 of the Act, whether a claim by a contractor or a principal.

A different principle applies where the principal or contractor claims damages for breach of contract as a set-off under a contract, in response to a payment claim under the Act. The Supreme Court, in *Cooper & Oxley Builders Pty Ltd v Steensma* (*"Cooper & Oxley"*),[24] recently quashed an adjudicator's determination for jurisdictional error as a consequence of the adjudicator's failure to consider a claim for damages by Cooper & Oxley Builders Pty Ltd ("Cooper & Oxley"), as a set-off, in response to a payment claim by its subcontractor, AM Land Pty Ltd ("AM").

Clause 17.10 of the relevant contract in *Cooper & Oxley* provided that the contractor, Cooper & Oxley, may set off from any monies due, or reasonably anticipated by the contractor to become due, to the subcontractor any debt, amount, claim for damages or any other entitlement the contractor may have against the subcontractor. AM submitted progress claims 5 and 6 for payment, which Cooper & Oxley did not pay, asserting that it had a set off of damages for completing the works and liquidated damages for delay. The adjudicator incorrectly treated the two progress claims, and Cooper & Oxley's set-off claim, as three separate payment claims, and made a determination only on progress

[24] [2016] WASC 386.

claim 5. Applying the principles from the Supreme Court's decision in *Alliance Contracting Pty Ltd v James*,[25] the court found that any claim by Cooper & Oxley for payment of an amount would be a separate payment dispute, but that the adjudicator was required to take into account Cooper & Oxley's response, including the merits of any counterclaim or set-off, in reaching his determination.[26]

Complexity

The Tribunal has considered the application of the complexity test under s31(2)(a)(iv) of the Act in only a limited number of decisions. The Tribunal in this case based its reasoning on satisfaction of the complexity test by relying upon evidential matters of fact and opinion which the applicant had failed to establish. This is similar to an approach to the complexity test referred to by the Tribunal in *BGC Contracting Pty Ltd and Ralmana Pty Ltd*.[27]

However, the Tribunal, in its earlier decision in *Moroney and Murray River North Pty Ltd* (*"Moroney No 2"*),[28] in considering various factors in applying the complexity test, was of the view that if there is insufficient evidence for the adjudicator to make a determination, it does not make the claim too complex to determine, and that the appropriate course is for the adjudicator to make a decision on the *"balance of probabilities"*, as required by s31(2)(b) of the Act.[29] The Tribunal in *Moroney No 2* was of the view that the adjudicator in that case confused *"complexity"* with *"lack of information"*.[30]

The author submits that the Tribunal's approach in *Moroney No 2* is to be preferred to the reasoning in *Bocol and Keslake*, since simply a failure to provide sufficient evidence to prove a claim does not readily fall within the ordinary and natural meaning of a *"complex"* matter, particularly in circumstances where the complexity issue is the only substantive jurisdictional issue under s31(2)(a) of the Act.

30 January 2017

Gordon Smith
Barrister & Solicitor
LLB (Hons), MBA, BE (Civil), FCIArb, CArb, FSIArb, AIAMA, FIEAust, CPEng (Ret), Grade 1 Arbitrator

Gordon Smith Legal
Email: gordon.smithcharb@bigpond.com
http://www.gordonsmithlegal.com.au

[25] [2014] WASC 212.
[26] Ibid, [22].
[27] CC 800 of 2015, 8 January 2016, unreported transcript of the oral reasons delivered by Ms Owen-Conway.
[28] [2008] WASAT 111.
[29] Ibid, [133].
[30] Ibid, [134].