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Précis Paper

Security of Payments

In this edition of BenchTV, Dr Kylie Weston-Scheuber (Barrister, Victorian Bar, Victoria) and Julie Wright (Barrister, Greenway Chambers, NSW) discuss the security of payment regime across the States and Territories, with a focus on NSW and Victoria, and on the judicial review of adjudication determinations.

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Security of Payments

1. In this edition of BenchTV, Dr Kylie Weston-Scheuber (Barrister, Victorian Bar, Victoria) and Julie Wright (Barrister, Greenway Chambers, NSW) discuss the security of payment regime across the States and Territories, with a focus on NSW and Victoria, and on the judicial review of adjudication determinations.

Overview of the Security of Payments Regime

2. The security of payments regime exists in all Australian States and Territories in slightly different forms. There are two models of this regime:

   (i) the West Coast model – operational in Western Australia and the Northern Territory; and

   (ii) the East Coast model – operational in the rest of Australia.

3. The security of payments regime originated because contractors and sub-contractors were becoming insolvent as a result of not being paid for their construction work. The purpose underlying the regime is to provide an interim means of contractors and sub-contractors getting paid for their work.

4. In essence, the security of payments regime operates in the following way:

   (i) A builder, a contractor, or a sub-contractor issues a payment claim setting out the construction work they have carried out or the goods and services they have provided, and the amount claimed. The payment claim must comply with certain basic requirements under the applicable security of payments legislation in the relevant State or Territory.

   (ii) Within a certain designated timeframe, which differs from one jurisdiction to another, the respondent must reply to the claimant with a payment schedule, indicating how much of the claim they propose to pay, if anything, and setting out their reasons for that.

   (iii) If the respondent proposes to pay nothing, or less than the amount claimed, the claimant is then entitled to make an adjudication application

to an authorised nominating authority, after which the matter will proceed to adjudication before an adjudicator, usually someone with experience in the building and construction industry, who may also have legal expertise.

(iv) Within a certain timeframe, the adjudicator will make a determination as to how much, if anything, the claimant is to receive, based on the submissions that have been made to them.
(v) Once the adjudicator makes a determination, the claimant can go to court to have that determination enforced, and a certificate can be issued on the basis of that determination.

5. Equally, if the respondent fails to issue a payment schedule at all in response to the claimant's payment claim, the matter can proceed to adjudication, or the claimant can seek recovery of the amount claimed from the court by way of a debt.

6. In summary, the security of payments regime ensures a short form of recovery for builders and contractors. It is important to note, however, that the regime is without prejudice to the ultimate contractual rights of the parties. Therefore, even though a respondent may have been required to pay an amount under a security of payments regime, it is not barred from claiming, in the future, that building work done for them is defective, and taking its own measures to recover that money from the builder or contractor.

7. The nature of the security of payments regime is interim, rather than permanent, and this applies across all jurisdictions. The interim nature of the regime means that, if the matter ultimately proceeds to court, whatever is paid under it must be taken into account in the final calculation of the party's entitlements.

Judicial review of adjudication determinations

8. Although in some jurisdictions there is an internal review process of adjudication determinations, this is fairly limited, therefore, where a person is dissatisfied with an adjudicator's decision, their only available redress is to seek judicial review of the decision in the Supreme Court. Ordinarily, judicial review can be sought on the basis of jurisdictional error, that is, that the adjudicator has stepped outside the bounds of their jurisdiction, but it can also be sought on the basis of error of law on the face of the record.

9. In NSW, the position has traditionally been that judicial review of an adjudicator's determination is only available for jurisdictional error and not for error of law on the face of the record. The position is different in Victoria, however.

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4

10. *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 ("*Probuild v Shade Systems*") was the second decision coming before the High Court in the security of payments regime. In this case, the contractor, the claimant, obtained a determination in its favour that ProBuild was required to pay it a certain amount of money. ProBuild sought judicial review of this determination. At first instance, Emmett J went against the traditional position in NSW concerning judicial review of adjudication determinations, and found that error of law on the face of the record could be the basis of a successful judicial review. Emmett J held that the adjudicator had not made an error of law on the face of the record rather than a jurisdictional error, and so at first instance ProBuild was successful in its judicial review. As such, the matter was remitted to the adjudicator for re-determination.

11. Shade Systems then appealed to the Court of Appeal of NSW, which reverted to the traditional approach in NSW in relation to judicial review of an adjudicator's determination, holding that judicial review on the basis of error of law on the face of the record was impliedly ousted by the *Building and Construction Industry Security of Payment Act 1999* (NSW). Although there was nothing expressly in the Act that ousted judicial review on the basis of error of law on the face of the record, after looking at the purpose, text, and context of the Act as a whole, the Court held that there was an implied ouster of the court's power to conduct judicial review on this basis.

12. ProBuild appealed the matter to the High Court, which agreed with the Court of Appeal, holding that there is an implied ouster of the court's power to conduct judicial review on the basis of error of law on the face of the record. In reaching this decision, the High Court engaged in a similar exercise to that undertaken by the Court of Appeal, looking at the purpose of the *Building and Construction Industry Security of Payment Act 1999* (NSW), which is to ensure cash flow to contractors and sub-contractors, and the interim nature of the security of payment regime, that is, the fact that it is without prejudice to the final contractual rights of the parties. This means that if an adjudicator does make an error of law on the face of the record, this does not stop the wronged party from ultimately seeking redress in a court.

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5

13. *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 ("*Maxcon v Vadasz*") was an appeal from the Court of Appeal of South Australia to the High Court on a similar issue to that in *Probuild v Shade Systems*, namely: was there an implied ouster in the relevant security of payments legislation of the court's power to conduct judicial review of an adjudicator's determination

on the basis of error of law on the face of the record? Although it was not ultimately necessary for the High Court to decide this issue because it held that the adjudicator, who had been found by the trial judge and the Court of Appeal to have made an error in the determination, was actually not in error at all, the Court went on to consider the issue in any case.

14. The High Court, following its own reasoning in *Probuild v Shade Systems*, came to the same conclusion in relation to the *Building and Construction Industry Security of Payment Act 2009* (SA) as it had for the *Building and Construction Industry Security of Payment Act 1999* (NSW), which it said was relevantly similar, and held that, like the NSW Act, the South Australian Act contained an implied ouster of the court's power to review for error of law on the face of the record. As a result, in both NSW and South Australia, judicial review of an adjudicator's determination can only be sought on the basis of jurisdictional error and not for error of law on the face of the record.

The Victorian position

15. The position regarding security of payments in Victoria is slightly different to the rest of Australia (with the possible exception of the Australian Capital Territory, due to s 43 of the *Building and Construction Industry (Security of Payment) Act 2009* (ACT)). This is due to the fact that Victoria is unique in having s 85 of the *Constitution Act 1975* (Vic), which accords the Supreme Court of Victoria unlimited jurisdiction, and if the legislature intends to impair, vary, or alter this unlimited jurisdiction, it must expressly refer to that intention in the legislation that seeks to do so. Further, the minister introducing the legislation seeking to alter this unlimited jurisdiction is required to make a reference to this intention, and the reasons for doing so, in the First Reading Speech, or within a certain period of time of the legislation being introduced. This strict requirement therefore differentiates Victoria from other jurisdictions.

16. In *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2) [2009] VSC 426*, Vickery J considered the position in Victoria with reference to s 85 of the *Constitution Act 1975* (Vic), and found that this provision set Victoria apart from NSW in particular, which was the jurisdiction it was being compared to in that case. His Honour noted that s 51 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) refers to the intention to alter or vary s 85 of the *Constitution Act 1975* (Vic) in relation to two particular provisions of the former Act: s 46 (which deals with the immunity of adjudicators) and s 28R (which deals with setting aside judgment that has been entered on the basis of a determination, and limits the court's powers of review in that particular situation). However, Vickery J noted that there was no reference to s 85 of the *Constitution Act 1975* (Vic) in relation to the court's power to review for error of

law on the face of the record, essentially contraindicating the argument that there was an implied ouster, because if there was, there would be a reference to s 85. Therefore, because of s 85, Victoria is in a different position to most of the rest of Australia in relation to judicial review of adjudication determinations.

What falls within the scope of judicial review of an adjudicator's determination on the basis of jurisdictional error?

17. Fundamentally, a jurisdictional error is an error that goes to the heart of an adjudicator's jurisdiction. In *Maxcon v Vadasz*, the South Australian Court of Appeal went through a list of things that would constitute jurisdictional error. If, for example, an adjudicator determines that a payment claim is valid when it is not, this would constitute a jurisdictional error, because there must be a valid payment claim for the adjudicator to have jurisdiction. There are certain other requirements of the adjudication process which would constitute jurisdictional error if not complied with: there must be an adjudication response provided within certain specified timeframes; the adjudicator must make a decision about the amount that is owed to the claimant, and must provide written reasons for that decision, which reasons must be adequate. The adjudicator also needs to accord the parties natural justice, a failure to provide which would also be a jurisdictional error for which the parties could seek judicial review.

18. While the above matters would quite clearly constitute jurisdictional error, there are other matters on which reasonable minds might differ as to whether they constitute jurisdictional error nor not. In *Maxcon v Vadasz*, for example, the error the adjudicator was said to have made was misconstruing a contractual provision, however, the High Court ultimately found the adjudicator to not have made an error at all. In this case, Maxcon sought to rely on a particular provision of the contract that allowed it to withhold sums by way of retention. The adjudicator found that that provision of the contract was invalid because it violated s 12 of the *Building and Construction Industry Security of Payment Act 2009* (SA), which prohibits "pay when paid" provisions, preventing a head contractor from saying, "we will only pay you when we are paid". As the adjudicator found that the relevant provision in the contract was a "pay when paid" provision, they determined that the provision was invalid.

19. At first instance and in the Court of Appeal, the adjudicator's determination was found to be in error, though the Court of Appeal was divided in terms of what sort of an error this was. Blue and Lovell JJ found that the adjudicator's determination was an error of law on the face of the record, that is to say, that although it was an error, it was something that still fell within the remit of the adjudicator to determine, and the adjudicator's error on that point did not

invalidate the determination. Hinton J, in dissent, found that the adjudicator's error was rather a jurisdictional error, because in making that error, the adjudicator was then going to take something into account in assessing the amount to be paid to the claimant which the adjudicator was not entitled to take into account, due to the error in the construction of the contract.

20. *Maxcon v Vadasz* therefore shows a good example of how reasonable minds might differ on whether something is an error of law or a jurisdictional error.

<u>*Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52</u>

21. The High Court's holding in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 ("*Southern Han*") that one of the pre-conditions for a valid payment claim is the existence of a reference date, has produced some interesting decisions in different jurisdictions. This is because it provides a means for those who wish to seek judicial review of an adjudication determination to argue that the payment claim on which the determination was based does not have a valid reference date.

22. This was the case in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289, where the contract in question provided that the reference date for a payment claim was the 20th of the month. However, there was a deeming provision in the contract, which stated that a payment claim that was served in advance of the reference date was deemed to have been served on the 20th of the month. In this particular case, the payment claim was issued on 12 July 2016. There had already been a payment claim served in respect of 20 June 2016, so this was not available as a reference date. Therefore, the only reference date that All Seasons could rely on was 20 July, and it argued that the deeming provision in the contract applied, such that although it had served its payment claim prematurely, the contract deemed the claim to have been related to the 20 July reference date.

23. At first instance, the judge allowed the judicial review application, which was affirmed on appeal. The finding of the both the trial judge and the Court of Appeal was that there was no valid reference date for that payment claim. The deeming provision applied in relation to the contract, therefore, as a contractual claim, it was valid – although it was issued on the 12th, the provision deemed it to have been served on the 20th of the month. However, as the deeming provision made no reference to the security of payment legislation, it was found to be insufficient to deem a reference date of the 20th for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Importantly, the Court of Appeal made reference to the uncertainty that would result if the case were otherwise – namely, if the deeming provision operated for a security of payments claim, the respondent would not

know whether the claim was served on the 12th, or the 20th, creating uncertainty which is undesirable in a security of payments regime, where the respondent needs to know what date the claim has been served, given the strict timeframes in which it must serve its payment schedule.

24. As such, there was found not to be a valid reference date in this decision.

Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd [2018] VSC 386

25. This decision dealt with the issuing of a payment claim after termination of the contract. In this case, there was a contractual provision that set out an entitlement to issue a final payment claim after termination of the contract, which provision provided that the reference date for a final payment claim was the date the construction work was last carried out under the contract. There was a separate contractual provision which referred to the requirements for a final claim, namely, that all of the construction work had to be completed, and all of the defects had to be rectified. In this case, those things had not happened, as the contract was terminated while the work was still incomplete.

26. Vanguard therefore argued that there was no valid reference date for the payment claim because the contractual provision for what satisfied a final claim had not been complied with. The Court ultimately allowed the judicial review application, finding that there was no reference date. Kennedy J found that the reasonable business person would consider that the requirements for a final claim applied to the issuing of a final payment claim for the purposes of the legislation, so that these two provisions were effectively to be read together. Because the requirements of clause N11.1 in the contract were not satisfied, there was no valid payment claim for the purposes of the *Building and Construction Industry Security of Payment Act 2002* (Vic).

27. As an alternative, Promax also sought to argue that there was a reference date which arose under the legislation. In Victoria, reference dates are set out in s 9 of the Act, which provides that, firstly, the contract must be looked at for a reference date, and if there is no reference date provided in the contract, there is a series of default reference dates set out in the legislation. For a final payment claim, the default reference date is the date on which work was last carried out under the contract. Therefore, as an alternative, Promax sought to rely on the reference date under the legislation, which would not have the same requirements that had to be met under the contract. Her Honour, in dismissing that argument, held that because the contract itself provided for a reference date after termination, which for the reasons outlined above, did not apply here, Promax was not entitled to try to rely on a default reference date under the Act.

28. In conclusion, the payment claim was found to be invalid due to lack of a valid reference date.

Valeo Construction Pty Ltd v Pentas Property Investments Pty Ltd [2018] VSC 243

29. *Valeo Construction Pty Ltd v Pentas Property Investments Pty Ltd* [2018] VSC 243 ("*Valeo v Pentas*") illustrates that only one claim per reference date can be made.

30. Section 14 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) is the provision dealing with payment claims, s 14(8) providing that no more than one payment claim can be served for a particular reference date. In *Valeo v Pentas*, a payment claim (referred to as "Payment Claim No. 45") was served on 28 February, which, under the relevant contract, was the last day of the month that was the reference date for the purposes of the contract. On 1 March, Valeo issued another payment claim, also No. 45, which covered the same construction work as the earlier payment claim, but also some additional work, and also claimed a further $25,000 additional to the 28 February claim. The 1 March payment claim was referred to as "Revision 1", and also referred to as being an updated payment claim. Ultimately, no payment schedule was issued within the stipulated time by Pentas. On 6 March, five days after the second payment claim, Valeo sent an email to Pentas stating that the 28 February payment claim was withdrawn, and it was seeking to rely on the 1 March payment claim. No payment schedule was ultimately issued, and Valeo sought judgment to be entered on the basis of the payment claim because the amount had not been paid.

31. The question therefore was, was the 1 March payment claim (which was the second payment claim that had been served in respect of the reference date) a valid payment claim, or did it violate s 14(8) of the Act because it was the second payment claim issued in respect of the same reference date? Digby J found that the 1 March payment claim was not a valid payment claim because the 28 February payment claim had not been validly withdrawn. His Honour considered that it may be possible to withdraw an earlier payment claim and replace it with a later one, but the withdrawal must be clear and unequivocal. The references in the 1 March payment claim to "Revision 1" and to it being updated, and what appeared on the face of the document, were not sufficiently clear and unequivocal to indicate that the 28 February payment claim had been withdrawn.

32. Digby J referred to the fact that on 6 March, Valeo had sent an email to Pentas essentially clarifying the position and stating that its 28 February payment claim was withdrawn and the 1 March payment claim was being relied on. His Honour considered this to be further indication that, as at the time of the serving of the 1 March payment claim, the position was

not clear, which was why Valeo sought to clarify the position later, by which time it was too late. Therefore, the 1 March payment claim was held to be invalid, and could not form the basis of the judgment that Valeo was seeking before the Supreme Court.

Can an invalid part of an adjudicator's determination be severed from the rest of the determination?

33. This issue has been discussed in several recent cases, with some interesting differences between the jurisdictions. In particular, the issue has been considered by the South Australian Court of Appeal in *Maxcon v Vadasz*. Blue and Lovell JJ said that in the case of a determination that was infected in part by error, it was possible in some cases to sever that part out. In the case before them, which they found to be concerned with a non-jurisdictional error - that is an error of law on the face of the record - they found that the part of the determination containing the error could be severed out and remitted to the adjudicator, but the remainder of the adjudicator's determination would remain valid.

34. This issue has also been recently considered by a divided Western Australian Court of Appeal in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28. Buss P and Murphy JA both found that it was possible to sever part of a decision that was infected by jurisdictional error, so long as that part of the decision was divisible. In making this finding, their Honours considered whether or not the legislation indicated that it was intended for a determination to operate as an organic and divisible whole, saying that there was nothing in the legislation or any principle of the common law which meant that a determination had to operate that way. They referred to the fact that an adjudicator will often be adding up a certain number of divisible sums to come a final amount, namely, the amount of the determination, but that as long as each of those parts is divisible and the part infected by jurisdictional error does not affect those other parts, there is no reason why the infected part should not be separated out, allowing the other parts to continue to operate.

35. Martin CJ dissented on this point, finding that if the adjudicator's determination is infected by jurisdictional error, then it is void and of no effect, and it is not possible to sever the infected part from the other parts.

36. In NSW, in the recent decision of *Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd* [2018] NSWSC 264, Ball J reached a similar conclusion to Martin CJ, finding that it was not possible to sever out the invalid part of an adjudicator's determination infected by jurisdictional error.

37. In Victoria, the question of severance has been considered by Vickery J in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, although this case dealt with the very

specific issue of "excluded amounts", something unique to the Victorian regime. An "excluded amount" cannot be included in a payment claim, and can be a time-related cost, a claim for contractual damages, or a claim for a variation that is not one of the allowable or claimable variations under the legislation. Section 23(2B) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) provides that a determination is void to the extent that it takes into account one of these excluded amounts.

38. Vickery J considered s 23(2B) and found that the wording in this provision, "void to the extent", indicated that an adjudicator's determination that included one of these excluded amounts could be split up into a valid part and an invalid part, the latter of which could be severed. However, it must be noted that this wording is particular to Victoria.

39. Therefore, it does appear that there is a different position emerging in different jurisdictions. There have been some recent amendments proposed to the NSW security of payment regime which have been released for public consultation, one of these being to allow severance for the invalid part of a determination where that has been found by a court. The High Court has yet to consider this issue of severance.

Recommendations of the 'Review of Security of Payment Laws: Building Trust and Harmony' (December 2017) ("the Murray Report")

40. The Murray Report was published after a very significant review of the security of payments regime across Australia, making a large number of recommendations for changes in this area.

41. One of the key recommendations made is that the Victorian approach to whether insolvent contractors can make claims under the security of payments legislation be followed, rather than the approach adopted in NSW. This would preclude contractors who have become insolvent from seeking to enforce their rights under the relevant security of payments legislation. The rationale behind this recommendation is that the purpose of the security of payments legislation is to ensure the interim protection of the rights of a contractor, and to ensure cash flow to that contractor in the interim, without prejudice to the final rights of the parties. Therefore, if a contractor has become insolvent and enforces its rights under the security of payments regime, there may ultimately be no recourse for the head contractor or principal who has paid that money in the interim, because once the contractor or sub-contractor becomes insolvent, all of that money goes into the pool for its creditors.

42. A second important recommendation of the Murray Report is the removal of reference dates, which have recently been providing much fodder for challenges to adjudicator's

determinations, and replacing them with a system whereby claimants can make one claim per month, or more, if that is provided for under the contract. This would remove many of the complications currently faced by claimants in terms of working out when reference dates fall, and therefore remove the scope for challenges to a lot of payment claims that currently exist.

43. Another important recommendation is that the regime be extended to include residential building contracts, which is a significant change from the current position. This recommendation, if implemented, would create two potential difficulties. The first is that residential building contracts were not the original aim of the security of payments legislation; its original aim was to ensure that the cash flowed down from the principal or contractor to the bottom of the chain of sub-contractors. Given the absence of this chain from the residential market, extension of the security of payments regime to residential building contracts will not really be dealing with a problem for which the legislation was created. The second potential difficulty is the uncertainty for home owners undertaking a renovation who receive a payment claim from a builder under the legislation. The home owners would likely have a lack of understanding as to what the payment claim means or how the legislation works, meaning that they may not be likely to respond to the payment claim in time.

44. Currently, it is only in Tasmania that the security of payments regime operates in relation to residential building contracts. Although the regime also operates in relation to residential building contracts in Victoria, it is only if the owner is in the business of building residences, a requirement which has albeit been slightly watered down recently so that it applies to single-purpose vehicles.

45. Perhaps the most important recommendation of the Murray Report is that the NSW legislation model be adopted in general terms.

<u>Final advice for practitioners</u>

46. There has been talk for a number of years of introducing a uniform regime of security of payments, because even though most States and Territories have the East Coast model, there are still a number of differences between the different regimes, even down to the number of days in which a payment schedule needs to be issued. Therefore, there is much potential benefit to the adoption of a nationally uniform scheme, although it remains to be seen whether the recommendations of the Murray Report are picked up in relation to this.

BIOGRAPHY

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Kylie has a range of commercial law experience, including in the areas of building and construction (particularly security of payments), banking and finance, contractual disputes, and corporations. She also advises and appears in administrative law matters, both judicial review and merits review, and in matters involving regulatory compliance. Kylie is listed in Doyles Guide as a Recommended Construction and Infrastructure Junior Counsel (for Victoria in 2018). She is also convenor of the Women Barristers Association.

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Julie is a former partner of King & Wood Mallesons, where she specialised in contract and construction dispute resolution. From 2007 to 2012 Julie lectured an undergraduate course in contract formation and management at the University of Sydney where she was an Adjunct Associate Professor. Julie is a practising Arbitrator with the Resolution Institute (formerly IAMA). In 2013 she was called to the Bar where she carries out a broad range of civil litigation, with a focus on complex commercial disputes, advocacy, advisory work, and both domestic and international arbitration. Julie has been recognised as a leading lawyer, both as a solicitor and a barrister, by publications such as Chambers & Partners, and the Australian Financial Review's Best Lawyers, and is recognized as a pre-eminent barrister in Doyle's Guide for both NSW and Australia.

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