

# Security of payments legislation – recent cases

Dr Philip Bender, List A Barristers

# Agenda

- Some simple cases
- High Court in *Southern Han* (reference dates)
- *Shade Systems* (judicial review for non-jurisdictional error)
- *Maxcon* (pay when paid and jurisdictional error)
- *Maxcon* (undisclosed bankruptcy)
- Focus on discretionary trusts

# Unilateral claim withdrawal

- *Promax Building Developments Pty Ltd v 167 Lower Heidelberg Road Pty Ltd* [2016] VCC 1960
- Practice adopted
  - Monthly claim submitted
  - Works assessed by QS
  - Discussions between QS and claimant
  - Revised invoice issued based on QS
  - Sometimes developer made determination
  - Payment made

# Unilateral claim withdrawal

- This case
  - 15 Nov 2016 - initial invoice
  - Followed previous practice
  - Email 22 Nov 2016 after QS
  - Attached revised invoice dated 15 Nov 2016
  - Claim for \$310k
  - Payment schedule served
- *Was original claim withdrawn such that payment schedule to new claim served in time?*

# Unilateral claim withdrawal

- Claim can be withdrawn if consent
- Unilateral withdrawal if clear (*Kitchen Xchange*)
- This case - withdrawn
  - Revised invoice otherwise invalid
  - Intention to withdraw clear
  - Process previously followed

# Injunctions

- *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2016] NSWSC 1911
  - Restraint from applying or filing adjudication certificate
  - Adjudication – 9 Dec 2016 and hearing 22 Dec 2016
- Issue of date of service of application
  - Was response filed in time?
  - Procedural fairness
  - Serious question
  - Payment of funds into court & injunction

# Injunctions

- *Atlas Construction Group Pty Ltd v Fitz Jersey Pty Ltd* [2017] NSWSC 72
  - Last ref date arguably Oct 2015
  - Payment claim served Nov 2016
  - Positive adj decision on 6 Jan 2017
  - Adj certificate & judgment obtained
  - Garnishee order & judgment met
- Injunctive relief to repay or pay into court?
  - Too late
  - No evidence of inability to repay

# Failure in reasoning process

- *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 per Vickery J:

*An adjudication of a payment claim requires as a minimum a determination as to whether the construction work the subject of the claim has been performed and its value (or whether the goods and services have been supplied and their value). Failure to do so is a failure to comply with a basic and essential requirement of the Act...*



# Failure in reasoning process

- *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229
  - \$794,624 claim
  - Drawings, photographs, stat dec – not persuasive
  - \$338k for supplying & installing partition walls
    - Material in support far from establishes claim

# Failure in reasoning process

- *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229
  - Invoices
    - “well over” \$500k
    - Included replicated invoices
    - Others likely relate to variations
  - Indicate carried out significant work
  - Therefore entitled to \$768k

# Failure in reasoning process

- Did the adjudicator fail to carry out their function?
- Yes
  - Rejected main evidence for \$338k
  - No explanation of if and how invoices supported
  - Invoices of \$500k = <\$794k
  - Replicated invoices – no analysis
  - Variation invoices – no analysis

# Failure in reasoning process

- *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229
  - Can remit to adjudicator?
  - Unanswered – no cross claim
  - Not if lack of jurisdiction
  - Leaves open in other instances
  - Does it accord with the Act?
  - What if outside time limits for making a determination?

# Failure in reasoning process

- Compare: *Metacorp Australia Pty Ltd* (Vickery J)
  - If certiorari – matter open to be remitted
  - Remitted on procedural fairness for further submissions
  
- Compare: *Maxstra Constructions Pty Ltd* (Vickery J)
  - Remittal “is the usual form of relief when certiorari is granted”

*Southern Han Breakfast Point Pty Ltd (in liq) v  
Lewence Constructions Pty Ltd [2016] HCA 52  
(NSW Act)*

**8 Rights to progress payments**

- (1) On and from each reference date under a construction contract, a person:
  - (a) who has undertaken to carry out construction work under the contract, or
  - (b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment.

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- (2) In this section,  
"reference date", in relation to a construction contract, means:
- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
  - (b) if the contract makes no express provision with respect to the matter-the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

*Southern Han Breakfast Point Pty Ltd (in liq) v  
Lewence Constructions Pty Ltd [2016] HCA 52*

**13 Payment claims**

- (1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "**claimant**" ) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
  
- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.



# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- Contract terms
  - Progress claim on 8<sup>th</sup> each month for work to 7<sup>th</sup>
  - Provision to give show cause
  - Then take remaining work from contractor
  - Suspend payment until superintended assess costs & certifies money due
  - Lewence (contractor) could also terminate for breach

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- Facts

- 10 October – Southern Han issues show cause
- 27 October – Southern Hand takes remaining work off
- 28 October – Lewence treats as accepted repudiation
  
- 4 Dec – Lewence services payment claim
  - No reference date
  - Claimed work to 27 Oct
  - Included work to 7 Oct subject of prior claim on 8 Oct

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- Supreme Court
  - Assume either suspension of work or repudiation
  - Only right to payment claim on 8 Oct 2014
  - Already exercised
- Court of Appeal
  - Existence of reference date
  - *Not* a precondition to making claim
  - Termination not prevent continuing reference to contract to determine right to make claim

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- High Court
  - What does a “person referred to in s 8(1)” mean?
  - Lewence
    - A person who has undertaken work etc.
  - Southern Han
    - A person “entitled to a progress payment”
    - Must be in respect of which a reference date has arisen
    - Vs Lewence – no specific mention of reference date

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- High Court
  - “entitled to a progress payment” on and from each reference date
  - Reference date precondition to claim under s 13(1)
  - Due to link between s 8 and s 13(1)
  - Consistent with s 13(5)

## *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- How is the reference date determined?
  - Contemplates claim for final payment
  - Claim may be made after contract expired
- BUT
- Not concerned with:
  - Damages for breach
  - Restitution for work carried out if contract repudiated

# *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd [2016] HCA 52*

- Suspension of payment
  - Suspended all rights/obligations
  - Including right to make progress claim for work to date
  - Repudiation = discharge of further performance
  - No intent that claim clause survive termination
  
- Right to make progress claim not accrued at 28 Oct
- No reference date
- Right changed to damages or restitution

# *Shade Systems Pty Ltd (Aust) v Probuild Constructions Pty Ltd (No 2) [2016] NSWCA 379*

- *Kirk v Industrial Court of NSW*
  - State legislative power cannot confer immunity from judicial review for jurisdictional error
- Error on face of record – construction of contract
- Can an adjudicator’s decision be reviewed for non-jurisdictional error (eg error of law on face of record)?
  - *Brodyn Pty Ltd v Davenport*
  - Primary judge - yes



# *Shade Systems Pty Ltd (Aust) v Probuild Constructions Pty Ltd (No 2) [2016] NSWCA 379*

- Tension between:
  - (1) No right of appeal in Act
  - (2) s 69, Supreme Court Act
- Basis to grant prerogative writs (judicial review)
- Subject to any legislative provision restricting power
- No explicit privative clause

# *Shade Systems Pty Ltd (Aust) v Probuild Constructions Pty Ltd (No 2) [2016] NSWCA 379*

- Followed *Brodyn*
- Inconsistent with objects of Act
  - Efficient mechanism for ensuring cashflow to builders
  - Would undermine expeditious process
- Developers not left without a remedy on final determination
  - s 32 – restitution of money already paid
  - Consistent with not allowing review of a decision within power

# *Shade Systems Pty Ltd (Aust) v Probuild Constructions Pty Ltd (No 2) [2016] NSWCA 379*

- Compare Victorian position
- Jurisdictional and non-jurisdictional error
- *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*
  - s 85 Constitution Act
  - Unlimited jurisdiction with provision for alteration
  - Were specific alterations
  - None to exclude certiorari

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Retention clause
- Release no. of days after Certificate of Occupancy
- *CFO shall mean the certificate of occupancy and any other approval(s) required under building legislation which are required to enable the works wilfully to be used for their respective purposes in accordance with the Principal's Project Requirements.*
- No effect as pay when paid? (s 12(1), SOP Act)

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

"**pay when paid provision**" of a construction contract means a provision of the contract:

- (a) that makes the liability of one party (the "**first party**" ) to pay money owing to another party (the "**second party**" ) contingent on payment to the first party by a further party (the "**third party**" ) of the whole or any part of that money, or
- (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party, or
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

# Maxcon Constructions Pty Ltd v Vadasz – pay when paid

- Adjudicator

- *Reference to and reliance upon contingencies (namely CFO) based upon the principal's contractual project requirements under the head contract, certainly does make the liability to pay retention money owing under... the contract contingent and dependent on the operation of another contract. The retention provision makes the payment of retention monies subject to the respondent's performance under the head contract; specifically its procurement of a [CFO] upon its achievement of practical completion.....a third party even (the granting of CFO) must occur under the head contract...*

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Trial judge
  - No evidence of requirement to achieve CFO in head contract
  - Error based on absence of evidence
  - Not a matter of construction

# Maxcon Constructions Pty Ltd v Vadasz – pay when paid

- Court of Appeal adopts adjudication submission:

*The retention provisions do not refer to the need for satisfactory completion of any other contract or performance of particular conditions in another contract before payment is made, nor do the retention provisions even refer to any other contract. The retention provisions, instead of making payment contingent or dependent on the operation of another contract, require payment when a specified number of days have passed after a particular independent event has occurred (namely, after the certificate of occupancy is achieved).*

- Retention provisions made payment contingent on an independent event to head contract



# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Nature of the error
- Trial judge
  - Not jurisdictional error – not a misconstruction of Act
  - Error of law but not jurisdictional one
  - Matter of absence of evidence
  - Not error of face of record
  - Reasons are not record
  - Only application/submissions & determination

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Blue J (with Lovell J concurring)
  - Rejected submission that no jurisdiction to determine law
  - Not a jurisdictional error
  - Whether within s 12 just a substantive law issue
  - Correctly identified task
  - Just misconstrued definition of CFO
  - Within power
  - s 12 not a jurisdiction provision

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Hinton J (dissenting) – jurisdictional error
  - s 12 overrides contract
  - s 12 defines limits on rights/obligations to progress claim
  - Places limit on adjudicator’s power
  - If provision is not paid when paid
  - Adjudicator has no power to act contrary if retention
  - Erroneously applying s 12
  - Expands adjudicator’s jurisdiction
  - Award sum excluded by Act

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- If non-jurisdictional, an error on face of record?
  - Yes
  - s 22(3)(b), SOP Act
  - Adjudicator's determination must include reasons
  - Reasons did form part of the record

# *Maxcon Constructions Pty Ltd v Vadasz – pay when paid*

- Is judicial review available for non-jurisdictional error?
  - Did not find *Probuild* arguments about implied exclusion of judicial review persuasive
  - Felt *Probuild* not plainly wrong
  - Judicial comity

# *Maxcon Constructions Pty Ltd v Vadasz – bankruptcy*

- Maxcon discovered bankruptcy after adjudication
- s 269(1)(b), *Bankruptcy Act*:

*An undischarged bankrupt... shall not:*

*Carry on a business...under a firm name without disclosing to every person he.... deals, his or her true name and the fact that he or she is an undischarged bankrupt....*

# *Maxcon Constructions Pty Ltd v Vadasz – bankruptcy*

- Does section implicitly mean void contract?
  - Would be no construction contract
  - SOP Act would have no application
  - Adjudicator would have no jurisdiction
- Not implicitly void (or unenforceable)
  - If in individual name – okay – search register
  - Many cases – detrimental to counterparty
  - Also prevent funds for creditors / new creditors

# *Maxcon Constructions Pty Ltd v Vadasz – bankruptcy*

- Is it void at common law?
  - Public policy considerations
  - Practically – need to construe s 269(1)(b)
  - Not void (or unenforceable)





## Presenter contact details

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Dr Philip Bender

Owen Dixon Chambers West

[pbender@vicbar.com.au](mailto:pbender@vicbar.com.au)

03 9225 6941

*Dr Philip Bender is a barrister practising in bankruptcy & insolvency, taxation, and commercial and property law.*