
Index

Volume 21

Abandoned claims

- judgment on, principally concerned with costs, 12-13, 33-44
- whether cost reduction appropriate because of, 125

Access to the premises

- AS 4917-2003, 9-10

Acts Interpretation Act 1954 (Qld)

- s 32C, whether “detached dwelling” includes the plural, 207-212

Adjudication determinations

- basic and essential requirements of, 390-405
- bona fide attempts, 346-347
- certificates for, 289-311
- “denial of natural justice” due to lack of notice, 191, 199-203
- grounds on which purported determination void, 289-311
- judicial review of restricted after Brodyn, 328-352
- jurisdiction to value progress claims, 71-72, 79
- jurisdictional errors of law or breach of natural justice, 273-288
- leave to reargue Brodyn sought, 379, 400
- matters to be considered by adjudicator, 343-345
- policy shifts in applications for urgent relief and judicial review, 86-89
- statutory demands, when special circumstances or compelling reasons, 88-89
- “submissions” to an adjudicator, 200-202
- validity of process, regarding payment claims, 361-363
- whether attempt made in good faith to exercise powers given by the Act, 383-389
- whether determination in breach of the Act is unlawful, 390-405
- whether interim decisions, 266-272
- whether open to judicial review, 273-288

Administration, companies in

- interim nature of adjudication determinations and, 266-272
- proof of debt and, 443-453
- stay of proceedings and, 142-149

Appeals, see also Leave to appeal

- Commercial Arbitration Act 1985 (WA), 219-235
- prejudice and, 32-33

Arbitration, see also Referees; Statutory demands

- appointing authority, 263
- approaches for improvement of, 166-183
- arbitral seat, 263
- choosing an institution, 261
- conciliation before, 170-172
- costs for failed proceedings, 125-141

- decision made on a basis not put or pleaded by the parties, 150-159
- elements of an “agreement to arbitrate”, 260-265
- extension of certain times in arbitration clauses, 61-70
- international, 174
- language of, 264
- last offer arbitration, 181
- leave to appeal from arbitrator’s award, 213-218
- legal principles to be followed, 219-235
- manifest error on face of award, 213-218
- party to in administration, 142-149
- proceedings as “proceedings in court”, 142-149
- right to terminate, 106-124
- settlement with no figure, 181
- single issue arbitration, 180-181
- standard clauses, 173-174
- whether reasonable to determine that not in client’s best interests for arbitration to continue, 106-124

Arbitrators

- choosing them, 263
- claim for misconduct against, when decision made on a basis not put or pleaded by the parties, 150-159
- lay, approach to be taken on legal issues determined by, 219-235
- liability for costs of failed arbitration, 125-126, 133-136

AS 4000-1997

- liquidated damages clauses, 415
- Standard Suite of Contracts based on, 6-11

AS 4901-1998

- Standard Suite of Contracts based on AS 4000-1997 completed, 8

AS 4916-2002

- Standard Suite of Contracts based on AS 4000-1997 completed, 6-11

AS 4917-2003

- Standard Suite of Contracts based on AS 4000-1997 completed, 7-8

AS 4920-2003

- role of principal under, 11

AS 4921

- delay and performance provisions under, 11

Assets, *see also* Financing arrangements

- asset maintenance and services contracts standards suite, 6-11
- Mareva order due to limited assets of the defendant in Australia, 236-241

Builder’s side deeds (tripartite agreements)

- whether construction contract forms part of loan agreement, 71-79

Building and Construction Industry Security of Payment Act 1999 (NSW)

- adjudication determination, ability to seek judicial review of, 289-311
- adjudication determination, amount of progress payment not based on contract, 273-288

adjudication determination, policy shifts in, 86-89
 adjudication determination, whether interim decision, 266-272
 applications for urgent relief and judicial review by aggrieved parties, 86-89
 “basic and essential requirements”, 343-347, 351, 390-405
 concurrency of proceedings, 189-190, 437-442
 delay damages and, 364-382, 390-405
 “forms part of”, wording in s 7(2)(a), 71-79, 191, 196-199
 injunction for payment claim and adjudication application, 361-363
 injunctions and stays, 184-188
 interim nature of relief, 184-188
 judicial review of adjudication decisions restricted after Brodyn, 328-352
 Mareva orders, 236-241
 prohibition on defences and cross claims under s 15 of the, 425-427
 repudiation of contract, and debts under, 443-453
 s 13(4)(b), requirement that work be carried out in previous 12 months, 101-105
 s 22, 402-403
 shortcomings in, 327
 ss 9 and 10, valuation of construction work according to terms of contract, 71-72
 whether attempt made in good faith by adjudicator to exercise powers given by the Act, 383-389

Building contracts, *see* Contracts

Certiorari

adjudication determination, Brodyn and, 328, 334-335, 340-341, 351
 adjudication determination, leave to reargue Brodyn sought, 379, 400
 sought after determination was not in accordance with contract, 273-288
 whether available to quash adjudicator’s determination, 289-311

Clerical errors, *see* Slip rules

Commencement contracts

whether limited terms contract included in, 12, 17-19, 30-31

Commercial Arbitration Act 1984 (NSW)

alternative dispute resolution and, 172-173
 leave to appeal from arbitrator’s award, 213-218
 s 42(1), 150-159
 s 48, 61-70

Commercial Arbitration Act 1984 (Vic)

s 36, costs of arbitration, 138-141
 s 42, 125-141
 s 51, 134-135, 140

Commercial Arbitration Act 1985 (WA)

S 38, 219-235

Commercial properties, *see also* Construction work

assignment of ongoing rights under building contracts, 248-259

Completion

liquidated damages clauses to maximise recovery, 412-424

whether had occurred by date of completion, 454-478

Conciliation, *see* Arbitration

Concurrency of proceedings

should statutory proceedings be completed before court proceedings are commenced, 189-190, 437-442

Construction contracts, *see* Contracts

Construction Management Trade Contract - General Conditions, *see* AS 4917-2003

Construction work

builder's suspension of works, 219-235

defects "not minor" so no practical completion of work, 213-218

requirement that work be carried out in previous 12 months for payment claims, 101-105

Standard Suite of Contracts based on AS 4000-1997, 6-11

valuation of, according to contract, 71-72

whether delay damages are "for" construction work or related goods and services, 364-382, 390-405

Contracts, *see also* Commencement contracts; Limited terms contracts; Liquidated damages

adjudication determination of amount of progress payment not based on contract, 273, 282-284

asset maintenance and services, 6-11

assignment of ongoing rights under, 248-259

Australian Standard, liquidated damages clause in, 422-423

commencement of work prior to formal contract, 12

construction of 10 houses as a "regulated contract", 207-212

dispute over existence of contract, following from letter of intent, 12-45

implied by conduct of parties, 430-436

incorporating ADR into, 169-170, 173-174

indivisible and not severable, progress payments and, 46-60

poor drafting of, 5

power balance from principals to contractors after Brodyn, 328-352

reconciliation with statutory progress payments, 327

repudiatory conduct, 46-47

time clauses in, 150, 152-154

unrealistic deadlines, 167

valuation of construction work according to terms of, 71-72

variations dealt with in, 385-387

whether concluded or not, 361-363

whether construction contract forms part of loan agreement, 71-79

whether wrongly repudiated, 430-436

Corporations

misleading and deceptive conduct, while acting honestly, 353-360

Corporations Act 2001 (Cth)

s 440D, arbitration proceedings as "proceedings in court", 142-149

set-off against judgment debt under s 553C of, 443-453

statutory demands, 349-350

Correspondence, *see* Documentation**Costs, *see also* Security for costs**

- abandoned claims and, 33-44
- amount of security for, 149
- delay costs as contractual compensation, 165
- leave to proceed with application for security of, 147-149
- liability for costs of failed arbitration, 125-141

Court, jurisdiction of

- judicial resistance to ADR, 172

Court, proceedings in

- no generally-applicable criteria for categorising a body as a “court”, 142-149

Credibility of witnesses

- conclusions based on findings about, 90

Damages, *see also* Delay damages; Liquidated damages

- general damages, when liquidated damages claims fail, 424
- partially completed dwellings, and entire contracts, 46, 53-55

Debt, *see also* Judgment debt

- bank guarantee as security for, 443-453
- how proof of is dealt with by administrator, 443-453

Deceptive conduct, *see* Misleading and deceptive conduct**Deed of Company Arrangements (DCA)**

- administration under, 443-453

Defective building work

- AS 4917-2003, 10
- defects “not minor” so no practical completion of work, 213-218
- multiple minor defects, at date of completion, 454-478
- protection of purchasers where latent defects arise, 248-259

Defence

- prohibition under s 15 of the Security of Payment Act, 425-427
- refusal of referee to allow amendment to, 454-478

Delay damages

- AS 4917-2003, 9
- delay costs as contractual compensation, 165
- FIDIC’s conditions of contract, 415
- interest and, 390-405
- unreasonable application of liquidated damages, 167
- whether can be included in payment claim, 364-382, 390-405
- whether “for” construction work or related goods and services, 364-382, 390-405

Delinquent conduct

- arbitration costs and, 131-133

Denial of justice

- adjudication determination, failed to consider submission on defects, 289-311
- adjudication determination, of amount of progress payment not based on contract, 273-288

adjudication determination, review of, 328, 334, 342, 347

adjudicator's obligation to give notice of intention to rely upon a statutory declaration and, 191, 199-203

“Detached dwelling”

whether it includes the plural, 207-212

Determinations, *see* Adjudication determinations

Disclaimers

significance in provision of misleading information, 353-360

Discretion, exercise of

adjudication determinations and, 289-311

Dispute resolution, *see also* Arbitration; Mediation

approaches for improvement of, 166-183

evidence of relevance of claimed jurisdictional error to particular determination needed, 247

poor quality of, 5

“tiered” system of, 61-64

District Court

concurrency with statutory proceedings, 189-190, 437-442

referral to referee for report under 1973 Rules, 46

Documentation, *see also* Correspondence

ensuring completeness of, 167

evidence of relevance of claimed jurisdictional error to particular determination needed, 247

preparation and presentation of disputes, 411

Domestic Building Contracts Act 2000 (Qld)

regulated contracts and, 207-212

Domestic building work, *see also* Construction work

defined, 208-209

licences and, 289, 308-310

partially completed dwellings, and entire contracts, 46-60

whether “detached dwelling” includes the plural, 207-212

Dwellings, *see* Domestic building work

Enforcement, *see* Judgment debt

England

cases on protection of purchasers of commercial properties, 249-254

cases where the grant of stay would “prevent injustice”, 269-271

Entire contracts

partially completed dwellings and, 46-60

EOT clauses, *see* Time clauses in contracts

Equipment supply

Standard Suite of Contracts based on AS 4000-1997, 6

Equitable relief

whether unmeritorious conduct disentitles plaintiff to, 91

Error of law, *see also* Jurisdictional error

jurisdictional v non-jurisdictional, 329, 342

manifest error, defined, 219, 225

manifest error, regarding certification of drawings, 213-218

v wrong findings of facts, 219-235

Estoppel

prohibition on defences under s 15 of the Security of Payment Act, 425-427

promissory, in share sale agreement, 90-100

Expert testimony

in dispute resolution, 174, 178

when not cross-examined, 454-478

Extension of time clauses, *see* Time clauses in contracts

Fees

refunded due to misconduct by arbitrators, 125-126

Financing arrangements, *see also* Assets

financial problems of subcontractors, 168

secondary funding, 220-221, 226-227

whether construction contract forms part of loan agreement, 71-72, 77-79

Formal contracts, *see* Contracts

“Forms part of”, wording in builder’s side deeds

progress claim entitlements and, 71-79

serious question to be tried regarding, 191, 196-199

Fourth class contracts, *see* Limited terms contract

Freezing orders, *see* Mareva (freezing) orders

Global claims

reasonable cost of work, and apportionment of losses, 85

Good faith

whether attempt made in by adjudicator to exercise powers given by the Act, 383-389

Governing substantive law

arbitration and, 263-264

Hardship, *see* Undue hardship

Home Building Act 1989 (NSW)

licences under, 289, 308-310

Honest and reasonable conduct

whether can be judged as misleading and deceptive conduct, 353-360

Immoral conduct, *see* Unmeritorious or immoral conduct

Immunity, *see* Sovereign immunity

In kind payments

as part of contract payment, 430-436

Inclusion, *see* “Forms part of”

Indemnity costs

arbitration proceedings, 125, 128-130

no entitlement where one defendant reasonably rejects compromise, 454-478

Indivisible contracts

progress payments and, 46-60

Injunctions

security of payment process, 184-188

Insolvency

statutory set-off for, 350

stays of judgment and, 266-272

Instalments, *see* Progress payments

Institute of Arbitrators & Mediators Australia

recommended dispute resolution clauses, 173-174

Instructions

prompt approvals of, 167

Insurance

AS 4917-2003, 10

Interest

delay damages and, 390-405

Interim awards

leave to appeal against, 219-235

security of payment process, 184-188

statutory right to progress payments, 330

whether adjudication determinations are interim decisions, 266-272

Judgment debt

adjudication certificates as, 289-311

principles applied on application for stay of, 266-272

relief to be sought from court that issued the judgment, 86, 88

set-off against, under s553C of Corporations Act, 443-453

staying enforcement of, if greater claims, 310-311

staying enforcement of, under Security of Payment Act, 187-188

Judgment on abandoned claims

costs and, 12-13, 33-44

Judicial review

adjudication determinations, grounds for, 301-306

adjudication determinations, restricted after Brodyn, 328-352

adjudication determinations, whether open to, 273-288

narrowing grounds for eligibility for, 86

Jurisdictional error

adjudication determination of amount of progress payment not based on contract, 273-288

adjudication determinations, review of, 328, 342

evidence of relevance to particular determination needed, 247

Justice, denial of, *see* Denial of justice

Leave

to continue arbitration, 142-149

to proceed with application for security costs, 142-149

Leave to appeal

from arbitrator's award, 213-218

what constitutes an error of law, 219-235

Letters of intent

dispute over existence of contract, and quantum meruit claim, 12, 15-18

Liability, *see* Limitation of liability

Licence

effect of absence of, 289, 308-310

Limitation of liability

AS 4917-2003, 10-11

Limited terms contracts (fourth class contracts)

whether come into existence, and whether included in commencement contract, 12-13, 20-33

Liquidated damages

AS 4917-2003, 9

calculation of, 421-422

drafting clauses, 419-424

enforcing clauses, 417

reasons for, 412

successful challenges to clauses, 424

v penalties, 413-419, 424

whether term part of contract, 430-436

Litigation

for dispute resolution, 168-169

Loan agreements

whether construction contract forms part of, 71-72, 77-79

Management

Standard Suite of Contracts based on AS 4000-1997, 6

Manifest error of law, *see* Error of law

Mareva (freezing) orders

limited to amount determined by adjudicator, 236-241

Mediation

approaches for improvement of, 166-183

conciliation before arbitration, 170-172

standard clauses, 174

streetwise parties and, 181-183

Misconduct of arbitrators

decision made on a basis not put or pleaded by the parties, 150-159

definition of, 154

refund of fees after, 125-126, 133-136

Misleading and deceptive conduct

Trade Practices Act 1974, relief granted according to, 90-91

Trade Practices Act 1974, while acting honestly, 353-360

Natural justice, *see* Denial of justice

Officer defendants

liability for costs, 141

Party and party basis for costs

arbitration proceedings, 125, 128-130

Payment claims, *see also* Progress payments

adjudication determination, and validity of, 289-311, 361-363

adjudication determination of amount of progress payment not based on contract, 273-288

AS 4917-2003, 10

interim nature of adjudication determinations, 266-272

reasons not raised in payment schedules can't be raised in adjudication response, 383-386

requirement that work be carried out in previous 12 months, 101-105

requirements for valid, 345-346

whether delay damages can be included in, 364-382, 390-405

Payments

whether payment in kind should be worked out as a percentage, 430-436

Penalties

v liquidated damages, 413-419, 424

Performance

defined in AS 4917-2003, 9

Key Performance Indicators (KPIs) in liquidated damages clauses, 423

Premises, access to, *see* Access to the premises

Proceedings in court

arbitration proceedings as, 142-149

Progress payments

adjudication determination, and claimed defects, 289-311

adjudication determination, Brodyn and, 338, 351

adjudicators' jurisdiction to value, differently to terms of contract, 71-72, 79

non-payment of, 219-235

partially completed dwellings, and entire contracts, 46, 51-52, 57-59

reconciliation with contractual provisions, 327

statutory provisions, 102-104

whether delay damages can be included in, 390-405

Promissory estoppel, *see* Estoppel

Purchasers

assignment of ongoing contractual rights under building contracts, 248-259

reliance on misleading survey information, 356-357

Quantum meruit claims

dispute over existence of formal contract, following from letter of intent, 12-45

partially completed dwellings and, 46-60

whether can be made for work carried out by another, 430-436

Reasonable conduct, *see* Honest and reasonable conduct

Referees

whether compelled to accept evidence not subject to cross-examination, 454-478

Regulated contracts

construction of 10 houses as a "regulated contract", 207-212

Relief, *see* Equitable relief; Urgent relief

Repairs

AS 4917-2003, 10

Repudiatory conduct

progress payments and, 46-60

whether acceptance of repudiation existed, 91

Residential building work, *see* Domestic building work

Retention money, *see* Securities

Review, *see* Judicial review

Rights of purchasers, *see* Purchasers

Risk allocation

appropriate allocation of, 167

Securities (retention money)

return of, when no immediate threat to call upon the instrument, 428-429

Security for costs

amount of, for claim and cross-claim, 149

leave to proceed with application for, 147-149

Security of Payment Act, *see* Building and Construction Industry Security of Payment Act 1999 (NSW)

Services contracts

asset maintenance and services standards suite completed, 6-11

Severable contracts

progress payments and, 46-60

Side deeds, *see* Builder's side deeds (tripartite agreements)

Slip rules

applicability due to clerical error, 191, 193-196

Solicitor and client basis for costs

arbitration proceedings, 125, 128-130

Sovereign immunity

agreement to arbitrate and, 265

Standards Australia, *see* AS ...

Statutory demands

adjudication determinations, when special circumstances or compelling reasons, 88-89

challenging security of payment adjudications, 329-331

concurrency of proceedings, 189-190, 437-442

progress payments, 102-104

whether vexatious or oppressive, 189-190, 437-442

Stay of judgment debt

if greater claims, 310-311

principles applied on application for, 266-272

whether other relief available, 347-349

Stay of proceedings

company under administration, 144-147

security of payment process, 184-188

Subcontractors

- financial problems of, 168
- secondary funding and, 221-222, 226-227

Summary judgment

- return of security, when no immediate threat to call upon the instrument, 428-429

Tenders for construction works

- dispute over existence of contract, and quantum meruit claim, 12-45
- open competitive tendering, 166-167

Termination of contract

- construction of clauses in contract, and repudiation, 46-48, 58
- liquidated damages clauses to maximise recovery, 418-419

Time clauses in contracts

- arbitration decision made on basis of, although not put or pleaded, 150, 152-154
- extension of times in arbitration clauses, 61-70
- liquidated damages, and EOT clauses, 420-421
- Trade Contracts, *see* AS 4917-2003

Trade Practices Act 1974 (Cth)

- s 52, misleading and deceptive conduct, in promise to complete, 90-91
- s 52, misleading and deceptive conduct, while acting honestly, 353-360

Trial

- conduct which prolongs, 130-131

Tripartite agreements, *see* Builder's side deeds (tripartite agreements)

Undue hardship

- extension of times in arbitration clauses and, 66, 70

Unmeritorious or immoral conduct

- does not disentitle a plaintiff from equitable relief, 90

Urgent relief

- what is available, and when can it be sought, 86-88

Utility of appeal

- arbitration proceedings, 116-117

Valuation

- of construction work, according to contract, 71-72

Variations

- AS 4917-2003, 10
- dealt with in contract, 385-387
- liquidated damages and, 418

Vendors

- misrepresentations by, 355-356
- recovery under narrow or broad basis, 257
- warranties from, 248-249, 256-258

Warranties

- from vendors of commercial properties, 248-249, 256-258

Writ of certiorari, *see* Certiorari