CASE ALERT: REPETITIOUS CLAIMS IN ADJUDICATION

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Australia Construction and Infrastructure Alert

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EXECUTIVE SUMMARY

The South Australian Court of Appeal (Court of Appeal) in *Goyder Wind Farm 1 Pty Ltd v GE Renewable Energy Australia Pty Ltd & Ors* has delivered a landmark judgment.

The decision provides much needed clarity as to when, and in what circumstances, a contractor may (and may not) repeat claims made under the statutory security of payment (SoP) regime.

While this is a decision of the Court of Appeal and its direct impact will be limited to projects in South Australia (SA), the decision is likely to be applicable under the equivalent SoP regimes which exist in all other Australian states and territories (except the Northern Territory). The other interstate SoP regimes are drafted in similar, and often exactly the same, terms, albeit the various regimes also differ in other respects.

The Court of Appeal considered the following issues:

- Whether the principle of Anshun estoppel, whether described in that way or in terms of an abuse of process, applies to subsequent payment claims and adjudication applications under the SoP regime; and
- If so, whether that principle, howsoever described, applied to prevent the contractor from making and prosecuting the second payment claim for delay costs in respect of extension of time claims made by the Contractor.

The Court of Appeal held:

- There is no scope under the *Building and Construction Industry Security of Payment Act 2009* (SA) (SoP Act) for the common law doctrine of issue estoppel or, consequently, the extended doctrine of *Anshun* estoppel to operate against a payment claim or an application for an adjudication determination under that Act. This is a finding of some significance, given there was some uncertainty about this issue following earlier authorities.
- There, however, remains scope for the operation of a doctrine of preclusion under the SA SoP Act, in regard to conduct which may be characterised as an abuse of the processes of that Act. This is again a significant finding and provides useful clarification as to the limits which may be placed on the alleged repetition of claims.
- In this case, it was not an abuse of the processes of the SA SoP Act for the Contractor to have included different categories of delay costs in subsequent payment claims. That is, there was no repetition of

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claims as a matter of fact, despite that the claims arose out of the same delay events. This is also despite the earlier articulation of the delay costs claim in a Notice of Arbitration.

BACKGROUND

The case relates to a significant wind farm project in country SA. The joint venture Contractor claimed it was entitled to various extensions of time and delay costs attributable to Principal caused access delays. These access delays were alleged to have been caused by delays in obtaining environmental approvals.

The Contractor issued two separate payment claims (in February 2024 and April 2024) in respect of different reference dates. It subsequently made two separate applications for adjudication of those payment claims, both of which resulted in adjudication determinations. The Principal sought to quash the second adjudication determination by way of judicial review, on the basis that the second adjudication application was a reagitation of the first. Both the primary judge and the Court of Appeal found that there was no overlap between the first and second payment claims.

The judge at first instance dismissed the Principal's application for judicial review. Whilst the judge accepted that the two claims arose from a common cause of delay, it did not follow that delay costs arising from the same delay constituted a singular claim for delay. The Principal appealed the judge's decision.

COURT'S FINDINGS AND COMMENTARIES

The Court of Appeal dismissed the appeal. The Court of Appeal, having regard to the provisions of s32 of the SoP Act, did not consider the common law concept of issue estoppel to be applicable. It then followed that an extended doctrine of *Anshun* estoppel was similarly inapplicable. The Court of Appeal held that this was not to say that there is no scope for the operation of a doctrine of preclusion under the SoP Act; however, this would likely be made pursuant to an application for an abuse of process.

The Court of Appeal went on to consider whether the Contractor's submission of two payment claims for delay costs amounted to an abuse of process, however, it could not conceive of a situation where nonoverlapping claims for delay costs amounted to an abuse. That is, there would at least need to be factual repetition of claims for there to be an abuse of process, noting, however, that repetition alone may not be sufficient.

TAKEAWAYS

For the construction industry, the key takeaways are:

- The SoP Acts themselves set certain limits on the making of claims. In particular, under s13(5), only one payment claim may be made in respect of each reference date. Under s22(4), an adjudicator must value work the same as has been previously determined, unless the value has changed. These provisions provide for some amount of “finality” in the adjudication process. The SoP Act, however, concerns progress payments and expressly does not finally determine the parties' rights and obligations in respect of payment. The SoP Acts are therefore relevantly different to other sorts of proceedings, in which the doctrines of issue and *Anshun* estoppel apply. The Court of Appeal rejected the imposition of additional limitations on the making of nonoverlapping claims on the basis of these broader legal doctrines.

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- A contractor may therefore claim nonoverlapping components of a delay costs claim in separate payment claims (so long as the making of such claims is otherwise within the other limitations set by the SoP Act, such as the requirement for claims to be within the six-month period mandated by s13(4)(b)).

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