

Construction Law

Article - The Supreme Court's new Technology, Engineering and Construction List

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and

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Article

The Supreme Court's new Technology, Engineering and Construction List

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The Building Cases List of the Supreme Court of Victoria was established in 1972. It was the first specialist list introduced into the Supreme Court and was the first managed list in Australia. The Honourable Justice Clifford Menhennitt was the founding judge of the list. The establishment of the Building Cases List was in its day considered “revolutionary”¹.

On 19 June 2009 the Building Cases List was abolished and replaced with the new Technology, Engineering and Construction List (‘the TEC List’). Order 3 of Chapter II of the *Supreme Court (Miscellaneous Proceedings) Rules 2008 (Building Cases)* has been replaced with a completely new order², in Order 3 Chapter II of the *Supreme Court (Miscellaneous Proceedings) Rules 2008 (Technology Engineering and Construction Cases)* (‘the TEC Rules’). The Supreme Court has also issued Practice Note No. 2 of 2009 (TEC List) for the list (‘the TEC Practice Note’).

The Judge in charge of the TEC List is the Honourable Justice Peter Vickery. The objective of the TEC List is to “provide for the just and efficient determination of TEC Cases, by the early identification of the substantial questions in controversy and the

¹ “Technology, Engineering & Construction List (TEC List), Practice Handbook”, the Honourable Justice Peter Vickery, 19 June 2009.

² *Supreme Court (Chapter II Amendment No. 1) Rules 2009*, S.R. No. 30/2009.

flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular case”³.

Cases to be Included in the TEC List

The lynchpin for entry to the Building Cases List was involvement in “building works”, whether that be the design, supervision or inspection of building works, the carrying out of building works or the manufacture or provision of any materials for inclusion in building works⁴. In this case “building works” was limited to building or engineering works “of any description whatever”⁵.

The most striking feature about the TEC List is the breadth of cases which will be included in the list. The TEC List will deal with cases involving “TEC works”, which are “technology, engineering or building construction works of any description whatsoever”.⁶ Technology is broadly defined to include: telecommunications equipment, systems and networks; computers, computer systems, modules, networks and software; electrical circuits and circuit boards; machinery; processing operations and facilities; and “any component, module, equipment, machine or system which is produced by the application of technology, mechanics or applied science”⁷.

A “technology, engineering and construction case” or “TEC case” will include any proceeding involving the design, supervision or inspection of TEC works, the carrying out of TEC works or the manufacture or provision of any materials for inclusion in TEC works. A TEC case will also involve any proceeding in relation to the performance, sale or supply of anything produced, manufactured or constructed as a result of TEC works, which involves or is likely to involve expert evidence of a technical nature. A TEC case however does not include any proceeding that includes a claim for personal injuries⁸.

A proceeding involving TEC works arising from an arbitration conducted under the *Commercial Arbitration Act 1984* or an arbitration in respect of which the Supreme Court otherwise has jurisdiction, may also be entered into the TEC List⁹.

Entry to the TEC List

All proceedings which have been entered into the Building Cases List as at 19 June 2009 will be entered into the TEC List without any further entry fee or order¹⁰. The procedure for entry into the TEC List otherwise remains generally the same as for the Building Cases List. The plaintiff can mark the originating process “TEC List” and it will be entered into the List upon the payment of the prescribed entry fee¹¹. Alternatively any party in a TEC case may within 14 days of appearance, apply to the Judge in charge of the TEC List for entry to the List¹². A proceeding may also be

³ Paragraph 5, TEC Practice Note,

⁴ Order 3.01, Chapter II *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Building Cases)*.

⁵ Order 3.01, Chapter II *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Building Cases)*.

⁶ Order 3.01, TEC Rules.

⁷ Order 3.01 TEC Rules.

⁸ Order 3.01 TEC Rules.

⁹ Paragraph 10, TEC Practice Note.

¹⁰ Order 3.03(4) TEC Rules, paragraph 12 TEC Practice Note.

¹¹ Order 3.03(1) TEC Rules and *Supreme Court (Fees) Regulations 2001, Schedule 2, Clauses 1.1 & 1.8 (as amended)*.

¹² Order 3.03(2) TEC Rules.

entered into the TEC List upon the referral of another Judge or Associate Judge, with the leave of the Judge in charge of the TEC List¹³.

As with the Building Cases List, a plaintiff in a proceeding in the TEC List is required to apply to the Judge in charge of the List for directions within seven days of the first appearance in the proceeding¹⁴. If the plaintiff does not do this, a defendant may then apply for directions within seven days of the plaintiff's failure to apply for directions¹⁵. Upon the hearing of a summons for directions the Judge in charge of the TEC List may give such directions as the Judge thinks "conducive to the effective, complete, prompt and economical determination of the proceeding"¹⁶. A case may be removed from the TEC List at any time upon the order of the Judge in charge of the TEC List¹⁷.

Features of the TEC List

Parties will be expected to have engaged in serious settlement discussions before the commencement of the proceeding. It is expected that a TEC case should be approached "like any technical, engineering or construction project, with time and cost budgeting". Legal practitioners will be expected to approach their cases co-operatively and with the object of using the resources of the Court and the parties in a manner which is in proportion to the matters in dispute. Legal practitioners will be encouraged to focus on the central issues in the case¹⁸.

Judges will keep directions hearings to a minimum and where possible interlocutory applications should be determined on the papers. Where costs of a directions hearing are ordered to be paid, they will be fixed where possible.

Control of Proceedings in the TEC List

The Judge in charge of the List may at any time, allocate the proceeding to a Judge to be the Trial Judge ('the TEC Trial Judge')¹⁹. The Judge in charge of the List or the TEC Trial Judge will decide which matters in a proceeding may be determined by an Associate Judge²⁰. The matters which may be determined by an Associate Judge will generally be disputes concerning : discovery; particulars; security for costs; assessment of damages; subpoenas; and the applications referred to in Rule 77.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005*²¹. Any appeal from a decision of an Associate Judge shall be to the Judge in charge of the TEC List or to the TEC Trial Judge, unless required to be heard by the Court of Appeal.²²

The procedure of conducting a resources conference at an early stage after the close of pleadings has been retained. The conference will be chaired by an Associate Judge and will establish a "resources budget for the litigation"²³. The resources conferences are to be "relatively informal", however the parties should be represented

¹³ Order 3.03(3) TEC Rules.

¹⁴ Order 3.04(1) TEC Rules.

¹⁵ Order 3.04(2) TEC Rules.

¹⁶ Order 3.04(3) TEC Rules.

¹⁷ Order 3.06 TEC Rules.

¹⁸ Paragraph 16 TEC Practice Note.

¹⁹ Paragraph 18, TEC Practice Note.

²⁰ Paragraph 21, TEC Practice Note.

²¹ Paragraph 23, TEC Practice Note.

²² Paragraph 24, TEC Practice Note.

²³ Paragraph 25, TEC Practice Note.

by a legal practitioner who is sufficiently familiar with the matters to be considered at the resources conference²⁴.

TEC List Innovations

A number of innovations have been included in the practice of the TEC List “in order to give teeth to the objective” of the list²⁵. The Judge in charge of the List or the TEC Trial Judge may at any stage of the proceeding give directions limiting the time to be taken for examination, cross-examination or re-examination, or to limit the number of witnesses (including expert witnesses) that a party may call²⁶. The Judge may also limit the time to be taken by a trial, or by a party in presenting their case or the time to be taken in making oral submissions.²⁷

The discretion to limit time during a trial or the numbers of witnesses, must be exercised reasonably and not prejudice the right of each party to a fair trial²⁸. The discretion must also have regard to the importance of the proceeding as a whole or any question in the proceeding or the degree of complexity of the case²⁹.

In a TEC Case an assessor or assessors may be appointed pursuant to Section 77 of the *Supreme Court Act 1986* by the Judge in charge of the List or the TEC Trial Judge. The Practice Note sets out the procedure for the appointment of the assessor, participation by the assessor in the proceeding and the provision of any reports by the assessor.³⁰

The Practice Note also sets out a protocol for e-Disclosure. In any case in which the disclosure of documents in electronic format is likely, any party may make application to the Judge in charge of the List or the TEC List Trial Judge for an order for the preservation of electronically stored documents. Orders for e-disclosure can also be made at any time in a proceeding in addition to any other orders which may be made for discovery³¹.

The three strands of related disputes in the areas of technology, engineering and construction have been drawn together in to one list, “in order to accommodate the rapid advances of this century”. Practitioners will need to familiarise themselves with both the TEC Rules and the TEC Practice Note. The TEC Practice Note is stylishly presented with a cover in brick red to emphasis the building origins of the TEC List. The TEC List also has a logo, Pablo Picasso’s *Composition in Three Colours* (1947). In the words of the Honourable Justice Peter Vickery, the Picasso painting “draws together the three strands of human enterprise represented in the List – technology, engineering and construction, and embodies its theme – ‘New Perspectives in TEC Case Management’”³².

²⁴ Paragraphs 26 & 27 TEC Practice Note.

²⁵ “Technology, Engineering & Construction List (TEC List), Practice Handbook”, the Honourable Justice Peter Vickery, 19 June 2009.

²⁶ Order 3.05(1) (a) & (b) TEC Rules.

²⁷ Order 3.05(1)(c) to (e) TEC Rules.

²⁸ Order 3.05(3)(a) & (b) TEC Rules.

²⁹ Order 3.05(3)(c) & (g) TEC Rules.

³⁰ Paragraphs 44 to 52 TEC Practice Note.

³¹ Paragraphs 59 to 61, TEC Practice Note.

³² “Technology, Engineering & Construction List (TEC List), Practice Handbook”, the Honourable Justice Peter Vickery, 19 June 2009.

Case Notes

***Brown v Cardona & Ors (Domestic Building)* [2009] VCAT 910**

Author: Suzanne Kirton

This domestic building dispute was recently heard and decided at VCAT by Deputy President Macnamara. While the majority of the decision is not controversial, D.P. Macnamara made one significant ruling:

that in a domestic building contract governed by the *Domestic Building Contracts Act* 1995, a failure to attain one stage did not necessarily mean the following stage could not be achieved.

In this case, the owners (the Respondents) purported to terminate the contract when the builder claimed the lock-up stage progress payment was due. The owners argued that because the frame stage had not been reached, it necessarily followed that lock up stage could not have been attained.

Counsel for the owners made an analogy with birthdays. He said that a person could not celebrate one's 21st birthday if one had not yet turned 20.

D.P. Macnamara rejected the argument and held that each stage has its own separate definition in the Act. In the absence of a requirement in the definition that the preceding stage have been completed, he held that it was not a requirement.

***Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC**

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Author: David McAndrew

Adjudications under the *Building and Construction Industry Security of Payment Act 2002* (Vic)

Challenges to Adjudications

- *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; and
- *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156.

It is helpful to return firstly to *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394. In that case, the New South Wales Court of Appeal considered the circumstances in which an adjudication made under the provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the NSW Act**)³³ could be reviewed.

The Court examined the essential preconditions to the validity of an adjudication pursuant to s. 22 of the NSW Act (423 [1]; [2]; 441 [53]) failing which it would be void and not merely voidable.

It was further stated ([55]):

What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

The Court then went on to consider when non-compliance with the more detailed requirements of the NSW Act (i.e. the content of payment claims s. 17) would constitute a failure to satisfy an essential pre-condition and have the effect of rendering a purported determination void. The Court stated (441 [54]) that

“...it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination”.

It then stated (441 [55])

“the reasons given above for excluding judicial review on the basis of non jurisdictional error of law justifying the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination...”

The Court then held (at [56]) that compliance with the requirements of s 22(2) (Adjudicator’s Determination) of the NSW Act did not constitute pre conditions to the existence of authority to make the decision and stated that it would be sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be

³³ The payment claim was governed by the amendments that came into force on 3 March 2003 pursuant to the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW).

considered. To this extent, the Court of Appeal disagreed with the views expressed by Palmer J in *Multiplex Constructions Pty Ltd v Luikens*.

It was further held by Hodgson JA (with whom Mason P and Giles JA agreed) that relief in the nature of certiorari was not available in circumstances where the determination was not void by reason of errors of a “non essential” kind (423[1]; [2]; 443 [58], [59]) and that such relief was unnecessary in the case of a void determination, which can be dealt with by declaration of injunction (443 [61]).

Brodyn has continued to be followed in New South Wales. See: *Transgrid v Siemens Ltd* [2004] NSWCA 395 and leave to appeal refused on a number of occasions³⁴.

In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor.* [2009] VSC 156, the Supreme Court of Victoria has now had occasion to consider the *Brodyn* decision. The Plaintiff contended that an adjudication purportedly given under s.23³⁵ of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the Victorian Act**) was void by reason that it failed to meet various essential pre-conditions namely that the adjudication application was made out of time, and because the payment claim did not comply with the requirements of s. 14 of the Victorian Act.

His Honour’s decision constitutes a significant departure from the reasoning in the NSW Court of Appeal in *Brodyn* and the decisions that have followed it.

Certiorari available for non jurisdictional error

His Honour stated that relief in the nature of certiorari is available in the appropriate case and that such relief had not been excluded expressly or by implication under the Victorian Act ([74] – [90]). It should be noted however that His Honour’s observations in this regard are *obiter dicta*. No such relief was sought by the Plaintiff, and it was therefore unnecessary to consider whether there was any error on the face of the record in determining whether the statutory requirements had been satisfied, and if there was error, whether it was a jurisdictional or non jurisdictional error ([91]).

It should be noted that His Honour did not deal with the question of whether an adjudication under the Victorian Act is a determination of a type that is susceptible to such relief.³⁶ In this respect, the Court of Appeal in *Brodyn* had stated (443 [58]):

“...it is by no means clear that an adjudicator is a tribunal exercising governmental powers to which the remedy in the nature of certiorari lies.”

What is an essential pre-condition to validity ?

The judgment also provides considerable support for the dissenting reasoning of Basten JA of the New South Wales Court of Appeal in relation to what constitutes an essential pre condition to the validity of an adjudication.

After Vickery J referred to the reasoning of Hodgson JA in *Brodyn* discussed above ([68]) His Honour referred to *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 in which Basten JA stated ([71] – [77]) that some of the reasoning in *Brodyn* may require some reconsideration.

³⁴ See the cases referred to at footnote 30 of His Honour’s decision.

³⁵ This is the corresponding provision to s. 25 of the NSW Act.

³⁶ An adjudication is probably most analogous to an expert determination. See: *Musico v Davenport* [2003] NSWSC 977 per McDougall J at [51].

His Honour referred to Basten JA's reasoning in *Coordinated* in the following terms:

Rather than approaching the matter by asking whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination, Basten JA approached the matter by asking whether the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. On this analysis, if the pre-condition is a matter for the objective determination of the court, a court may declare the determination to be void and order injunctive relief if the pre-condition is not satisfied. On the other hand, if the power to resolve questions said to be pre-conditions to the valid exercise of power by the adjudicator are, on a proper analysis, questions for the adjudicator, a subsequently made determination may still remain a valid determination. (emphasis added)

His Honour then noted ([71]) that Basten JA expressed similar views in his judgment in *John Holland Pty Ltd v Roads and Traffic Authority of NSW* [2007] NSWCA 19 at [71] - [72] in which Basten JA stated:

So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.

*As I sought to explain in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [43]-[48], in my view the power to resolve these questions has been conferred on the adjudicator.*

His Honour then decided the case on two bases. Firstly, on the basis that the alleged pre-condition to the valid exercise of power by the adjudicator is properly a question for the adjudicator (the Basten JA approach) and secondly, on the basis that it was a matter for the objective determination of the Court ([95]).

His Honour held that the adjudication was valid and dismissed the Plaintiff's claims.

Applications to Set Aside Judgments in respect of Adjudications under s. 28R(5) of the Building and Construction Industry Security of Payment Act 2002 (Vic) and Stay of Enforcement

Once an Adjudication is registered as a judgment by a Court of competent authority, a party seeking to challenge it must have regard to s. 28R(5) of the Victorian Act which provides:

- (5) *If a person commences proceedings to have the judgment set aside, that person-*
 - (a) *subject to subsection (6), is not, in those proceedings, entitled-*
 - (i) *to bring any cross-claim against the person who brought the proceedings under subsection (1); or*
 - (ii) *to raise any defence in relation to matters arising under the construction contract; or*
 - (iii) *to challenge an adjudication determination or a review determination; and,*
 - (b) *is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.*

Thus, subject to *Brodyn* and *Hickory*, the Victorian Act provides little if no scope for a successful challenge to an adjudication which has been registered as a judgment in a court of competent jurisdiction.

Both the NSW Act and the Victorian Act evince an intention to ensure speedy cash flow pending the final resolution of disputes which is essential to the commercial survival of builders and notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate.

In ***Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico and Ors*** [2004] NSWSC 344 the New South Wales Supreme Court considered when the Court may grant a stay of the execution or operation of orders or judgments arising from the filing of an adjudication certificate in circumstances where any monies paid would be practically irrecoverable due to the claimant's insolvency or liquidation. The Court granted a stay in circumstances where it found that there was certainty that the defendant's rights to recover the adjudicated amount will be otherwise rendered nugatory and that it would otherwise suffer irreparable prejudice. The Court also noted that the plaintiff's entitlement to the adjudicated amount was protected by an unconditional bank guarantee under the contract (at [32] – [33]).

On the other hand, in ***RJ Neller Building P/L v Ainsworth*** [2008] QCA 397 Keane J (with whom Fraser JA and Fryberg J agreed) stated:

[40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.

[41] The mere existence of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.

[42] While addressing considerations relevant to the exercise of the discretion to order a stay, one may also mention the consideration that the adjudication of Neller's claim resulted in a favourable outcome for Neller. While this adjudication is provisional, and, indeed, may ultimately be held to be devoid of legal effect, it is not irrelevant that an independent and expert arbiter has assessed the merits of the building dispute between the parties and concluded that the merits of that

dispute lie very much in Neller's favour. This is a consideration which tends to lessen the weight to be accorded to the concern that Ainsworth might be deprived of the fruits of ultimate vindication by the refusal of a stay.