Article Information

Authors: Daniel Fitzpatrick, Gareth Gillespie
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Reciprocity the key: the meaning of "other arrangement" in SoP Act (NSW) s 4 clarified in Crown Green Square v Transport for NSW

In December 2021, the Supreme Court of New South Wales per Henry J gave judgment in the matter of *Crown Green Square Pty Ltd v Transport for NSW* [2021] NSWSC 1557 (*Crown Green Square*).

The case concerns the meaning of "other arrangement" in the definition of "construction contract" in s 4 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoP Act**). The definition in s 4 reads as follows:

> "***construction contract*** means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party."

There is disagreement in the authorities as to whether an "arrangement" (which is necessarily something falling short of a contract) nonetheless requires a legally binding obligation to pay in order for it to come within the definition of s 4. Whether a relationship between parties falls within the definition of "construction contract" in s 4 is significant because, if it does not, then a payment claim served in reliance on that relationship will be invalid for purposes of the SoP Act.

The decision in *Crown Green Square* harmonises somewhat the competing lines of authority. It does not go so far as to require a legally binding obligation to pay, but does require at least "some element of reciprocity or acceptance of mutual rights and obligations relating to payment or price for the works (which may or may not be legally binding obligations)."[1]

Facts

The case relates to the construction of the "Infinity" complex near Green Square railway station in Sydney. The complex was developed and constructed by the plaintiffs, being entities of the Crown Group (together, **Crown Entities**). The defendants were Transport for NSW, Sydney Trains and Rail Corp (together, **Rail Entities**).

The dispute concerned the upgrade of a pedestrian tunnel linking the railway station with the Infinity complex (**Tunnel Works**). The development agreement entered into between the Crown Entities and the Rail Entities (**Development Agreement**) required the Crown Entities to carry out the Tunnel Works at no cost to the Rail Entities other than payment of $750,000.

The Crown Entities received the $750,000 for completing the Tunnel Works, but the construction entity within the Crown Entities purported to serve a payment claim on one of the Rail Entities claiming further payment of $866,530.06 in relation to the design and installation of certain electrical, mechanical and fire safety services in the tunnel (referred to by the Crown Entities as the **Link Works**). The relevant Rail Entity did not serve a payment schedule and the Crown Entities applied to the Court for judgment under s 15 of the SoP Act.

The Crown Entities submitted that their payment claim was based not on the Development Agreement and the work referrable to that agreement (being the Tunnel Works) but on a separate "arrangement" which they contend arose from later directions given to them by the Rail Entities to carry out the Link Works, in circumstances where the Development Agreement did not have a variation power and the Link Works were of a kind that would normally require a variation. The

Crown Entities argued that it was not necessary that this "arrangement" include a legally binding obligation to pay or any term as to payment.

The Rail Entities denied that the payment claim was valid, arguing that the Link Works were part of the Tunnel Works (as contemplated by the Development Agreement) and, hence, no separate "arrangement" existed and the Crown Entities were not entitled to any further payment.

Authorities on "other arrangement"

In *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 (***Okaroo***), Nicholas J adopted (at [41]) a broad interpretation of "other arrangement" so as to encompass "transactions or relationships which are not legally enforceable agreements".[2]

In *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 (***Machkevitch***), McDougall J cited *Okaroo* with approval at [24]-[26], holding at [27]-[28] that:

> "what is required is that there be something more than a mere undertaking; or something which can be said to give rise to an engagement, although not a legally enforceable engagement, between two parties… the court must look for a concluded state of affairs, which is bilateral at least, which can amount to an arrangement under which one party to it undertakes to perform construction work for another party to it. It is not necessary that the arrangement be legally enforceable."

A number of subsequent decisions of the Supreme Court endorsed the reasoning in *Okaroo* and *Machkevitch*.[3]

In 2019, in *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685 (***Timecon***), Ball J declined to follow the *Okaroo* and *Machkevitch* line of cases, holding that it was at odds with s 32 of the SoP Act[4] for claimants to be able to recover progress payments based on "arrangements" that are not otherwise legally enforceable, as the claimant would be required to give up whatever amount it had been awarded in final civil proceedings ([68]-[69]). In Ball J's view, to come within s 4 of the SoP Act, an "arrangement" need not be based in contract, but must nonetheless give rise to an enforceable legal right to payment, such as by reason of an estoppel ([87]). In Ball J's view at [68]-[69]: "the purpose of the SOP Act is not to create an obligation to pay where one does not otherwise exist".

Clarification of "other arrangement"

After considering the competing authorities, Henry J (at [165]-[170]), subject to an important qualification, chose to follow the *Okaroo* and *Machkevitch* line of authority rather than Ball J's reasoning in *Timecon*, observing that the *Machkevitch* approach was supported by the greater weight of authority and the use of the word "arrangement".

The qualification to the *Machkevitch* approach was that:

> "an arrangement constituted by a bilateral concluded state of affairs that amounts to an engagement for the purposes of the SoP Act will necessarily involve **some element of reciprocity or acceptance of mutual rights and obligations** (whether legally enforceable or not)… A factual element underpinning such an arrangement for the purposes of the SoP Act would, to my mind, involve some communication or dealing between the parties on the subject matter of payment for the works, most likely the final price, and **a recognition or acceptance of some ultimate right to be paid**."[5] [emphasis added]

Henry J considered that it was not necessary for there to be any certainty as to payment or specificity as to the price, nor any certainty as to the time for payment or the method of calculating the price.[6] In the Court's view, whether or not such an "arrangement" is legally enforceable (other than for purposes of the SoP Act) is a question to be determined in final civil proceedings.

Outcome of the case

The Court's conclusion on the facts[7] was that the Crown Entities had not established the existence of an "arrangement". The Link Works were found to be part of the Tunnel Works, having been contemplated by the Development Agreement and development approval conditions, and the later directions given to the Crown Entities regarding the Link Works were found not to have given rise to an "arrangement" separate from the Development Agreement.

The Crown Entities' payment claim was therefore invalid, as it was not based on a relevant "construction contract" within

the meaning of s 4 of the SoP Act, and their application for judgment under s 15 of the SoP Act failed.

The Court observed at [221] that, even had it been the case that some of the Link Works were beyond the scope of the Development Agreement, the dealings and communications between the parties would not have been sufficient to amount to an "arrangement", in part because the Rail Entities had always made it clear that no amount would be payable to the Crown Entities for the Link Works beyond the $750,000 provided by the Development Agreement for the Tunnel Works as a whole.[8] There was no "concluded state of affairs" or "meeting of minds" in relation to the Link Works that would support an "arrangement".[9]

Conclusion

The decision in *Crown Green Square* lends weight to the view expressed in *Okaroo* and *Machkevitch* that an "arrangement" need not involve a legally enforceable obligation to pay, which will be welcomed by claimants seeking an expansive operation of the SoP Act. However, the requirement for "some element of reciprocity or acceptance of mutual rights and obligations relating to payment or price for the works" appears to rule out claims based on "arrangements" where payment and pricing are not addressed at all, which will provide some comfort to respondents. The approach in *Crown Green Square* also appears to be of greater assistance to adjudicators than the decision in *Timecon* in dealing with complicated "arrangement" claims, in that adjudicators are not compelled to reach conclusions as to the existence of alleged estoppels or other legally enforceable rights in order to determine whether a valid "arrangement" exists.

With that said, given the competing lines of authority and the typically contentious nature of "other arrangement" claims, it seems inevitable that the Court of Appeal will at some stage be asked to decide between the harmonised approach taken in *Crown Green Square* and the stricter approach in *Timecon*, or to consider more closely the necessary degree of reciprocity or acceptance of mutual rights and obligations relating to payment required to establish an "arrangement".

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[1] At [170].

[2] Nicholas J reasoned that "the Act contemplates a dual system" whereby claimants have a statutory entitlement to a progress payment that is not strictly synonymous with an underlying contractual right, such that the statutory right to payment can exist even where there is no underlying enforceable right at law (at [46]-[55]).

[3] See, e.g., *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439 per Stevenson J at [25] and [41], *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 per McDougall J and *Seabreeze Manly v Toposu* [2014] NSWSC 1097 per McDougall J.

[4] Section 32 of the SoP Act provides that progress payments required to be paid under the SoP Act's processes are interim in nature and do not affect the parties' rights at law in final civil proceedings.

[5] In making this qualification, Henry J drew parallels with the decision of Rein J in *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [27] and [57].

[6] In this respect, Henry J referred to the SoP Act's default provisions governing what an adjudicator is to do in the absence of such terms in the contract: see, e.g., ss 8(2)(b), 9(b), 10(1)(b) and 11(1A)(a).

[7] At [220]-[221], [234] and [236]-[237].

[8] See, e.g., [234].

[9] At [236].