Article Information

Author: Megan Calder
Service: Projects, Infrastructure & Construction
Sector: Infrastructure

Security of Payment Update: Mediation clause found not to be a 'method of resolving disputes'

The Court of Appeal has today clarified that a contractual provision mandating attendance at mediation prior to litigation is not a 'method of resolving disputes' for the purpose of s10A(3)(d)(ii) of the Building and Construction Industry Security of Payment Act 2002 (Vic) (Act).

The Court of Appeal has today clarified that a contractual provision mandating attendance at mediation prior to litigation is not a 'method of resolving disputes' for the purpose of s10A(3)(d)(ii) of the *Building and Construction Industry Security of Payment Act* 2002 (Vic) (**Act**).

The Respondent under the Act, SSC Plenty Road Pty Ltd (**SSC**), applied for judicial review of an adjudication determination arising out of a construction contract pursuant to which Construction Engineering (Aust) Pty Ltd (**Construction Engineering**) was engaged to design and construct the Summerhill Shopping Centre in Reservoir.

One of the issues considered was whether the contract provides a method of resolving disputes.

Construction Engineering contended that its variation claims were 'second class' variations, being variations where the parties agree that the work has been done but do not agree that the doing of the work constitutes a variation or the value of the variation. SSC contended that the variations were 'excluded amounts' within the meaning of s10A(3) of the Act. Pursuant to s10A(3) of the Act, if the consideration payable under a contract exceeds $5 million and the contract ' provides a method of resolving disputes', then any 'second class' variations are not 'claimable variations' and are instead 'excluded amounts' which must not be taken into account by the adjudicator.

Clause 42, being the relevant dispute resolution clause of the contract between SSC and Construction Engineering, provides that if a dispute arises between the parties, the parties must meet to resolve the dispute following delivery of a notice of dispute. If the dispute is not resolved within 28 days, then it is referred to mediation according to the terms of the contract.

The trial judge held that clause 42 is not a method of resolving disputes under the contract within the meaning of s10A of the Act, having applied the criteria set out in the decision in *Branlin Pty Ltd v Totaro* [1].

The Court of Appeal upheld the decision of the trial judge, stating at [54] that 'the meaning of "method of resolving disputes" requires a method that will result in an actual resolution of the dispute, rather than just offering a forum for the discussion of the controversies between the parties, which may or may not lead to their resolution', and at [58] that it 'should be construed in such a way that it contemplates an alternative means of securing the certainty and finality of a binding amount'.

This construction is consistent with the stated purpose and objects of the Act; that is to provide a means of finally determining the parties' entitlements to progress payments.

The Court also confirmed that an adjudicator is not bound by any valuation made by the Superintendent under a building contract.

[1] [2014] VSC 492 (7 October 2014)