SUPREME COURT OF QUEENSLAND

CITATION:	*Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd & Anor* [2018] QSC 310
PARTIES:	**MONADELPHOUS ENGINEERING PTY LTD** ABN 43 010 305 923 (applicant) **v** **ACCIONA AGUA AUSTRALIA PTY LTD** ABN 84 128 531 742 (first respondent) **MAX TONKIN** (Adjudicator No J1066620) (second respondent)
FILE NO/S:	BS No 10759 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2018
JUDGE:	Douglas J
ORDER:	**1. The claim is dismissed;** **2. The existing interlocutory injunction is dissolved; and** **3. The parties will be heard further as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant and first respondent entered into a contract for the construction of a project – where the first respondent served a monthly payment claim on the applicant – where that payment claim was disputed – where the first respondent commenced adjudication proceedings under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act") – where the applicant sought to have the adjudication proceedings restrained – whether the Act applied to the contract – whether the contract was an excluded contract

under s 3(2)(c) of the Act

Building and Construction Industry Payments Act 2004, s 3(2)(c), s 13, s 14,

APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd [2014] VSC 596, cited
Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd [2012] NSWCA 31, applied
Smith v Coastivity Pty Ltd [2008] NSWSC 313, distinguished

COUNSEL:	P Dunning QC and SB Whitten for the applicant M H Hindman QC and H Clift for the first respondent No appearance for the second respondent
SOLICITORS:	CDI Lawyers for the applicant Corrs Chambers Westgarth for the first respondent No appearance for the second respondent

[1] The question to be decided in this case is whether the building contract between the parties is "a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied."[1] If it is such a contract, the *Building and Construction Industry Payments Act* 2004 ("the Act") does not apply to it and the interlocutory injunction granted on 9 November 2018 should be made permanent. If not, then the injunction should be dissolved and the adjudication process under the Act should proceed.

[2] The resolution of the issue depends on the proper construction of an agreement between the applicant, Monadelphous Engineering Pty Ltd ("MEPL") as principal and Acciona Agua Australia Pty Ltd ("Acciona") as contractor for "the Kawana STP K150 Upgrade Project".

The relevant terms of the agreement

[3] There was a formal instrument of agreement between the parties which was described as "paramount" among a variety of contractual documents. There was also a collaboration deed and a subcontract described as "the amended AS4902-2000 general conditions of contract for design and construct between the Principal and the Contractor". The formal instrument of agreement in cl 1.1 ranked those other two documents in an order of precedence with the collaboration deed ahead of the subcontract. The formal instrument of agreement also contained a clause dealing with payment of the contract sum as follows:

> "**4. Contract Sum**
>
> (a) In consideration of the due performance and completion of the WUC by the Contractor, but subject to and without derogating from the

[1] See s 3(2)(c) of the *Building and Construction Industry Payments Act* 2004.

provisions of the Collaboration Deed, the Principal will pay to the Contractor, in accordance with the Contract, the lump sum of $18,353,131 (excl. GST) as set out in greater detail in the document titled 'Kawana Acciona Cost Basis' or such other sum as may become payable to the Contractor pursuant to the provisions of the Contract (**Contract Sum**).

(b) The Contract Sum:

(i) does not incorporate any indirect overheads or profit component, payment for which will be incorporated into the Surplus disbursement (if any) in accordance with the Collaboration Deed; and

(ii) is subject to adjustments only in accordance with the provisions of the Contract."

[4] MEPL was the contracting party with the Northern SEQ Distributor and Retail Authority, a statutory water supply authority created by the *South-East Queensland Water (Distribution and Retail Restructuring) Act* 2009 and the *Natural Resources Act* 2009, which trades as Unitywater and wants to upgrade an existing sewerage treatment plant at Kawana. Acciona is a subcontractor to MEPL but MEPL's submission was that the contractual relationship between them was more akin to that between joint venturers. That coloured the interpretation to be given to the relevant terms of the contract. The consequence was, it submitted, that its proper construction should be that the consideration payable by MEPL for Acciona's construction work was not calculated by reference to the value of the work carried out or the value of the goods and services supplied. In that context, the following clauses of the formal instrument of agreement, the collaboration deed and the subcontract were important.

Formal instrument of agreement

[5] Clause 1.1 of the formal instrument of agreement provided the following definitions:

"**1.1 Definitions**

The following documents will constitute the Contract between the parties:

(a) this Formal Instrument of Agreement;

(b) the collaboration deed between the Principal and the Contractor, dated 17 March 2017 ('**Collaboration Deed'**);

(c) the amended AS 4902-2000 general conditions of contract for design and construct between the Principal and the Contractor (**Subcontract**);

(d) the annexures to the Subcontract;

(e) the document titled 'Kawana Acciona Cost Basis';

(f) Principal's project requirements (as defined by the Subcontract); and

(g) any additional attachments to the Subcontract.

(hereinafter collectively called the **Contract**) with the documents ranking in the order of precedence set out within this clause (with the Formal Instrument of Agreement being paramount)." (emphasis in original)

[6] Clause 2 provided that the contractor will commence the performance of the "WUC" (Works Under Contract) in accordance with the contract. Clause 5 was an entire agreement clause in respect of the various contractual instruments that were described in cl 1.1.

Collaboration deed

[7] Recitals A, C and D provided:

"A. In June 2016, Acciona Agua Australia Pty Ltd ('Acciona') and Monadelphous Engineering Pty Ltd ('MEPL') associated themselves and worked together on the preparation and submission by MEPL of a tender for the Kawana K150 upgrade, design and construction project, being the provision of design, construction, commissioning and maintenance works.

…

C. The parties intend to work together on the Project on a collaborative basis to undertake the Works.

D. The parties have agreed to establish a collaborative relationship for that purpose and agree that their respective rights and obligations and other matters regarding the operation of the subcontract will be governed by this Deed and the Subcontract."

[8] There were several defined terms of significance including:

"**Collaboration** means the relationship created by this Deed.

…

Contribution means:

(a) in the case of Acciona, the payment of working capital pursuant to clause 15.2(a); and

(b) in the case of MEPL, the amount of working capital for which it is liable, pursuant to clause 15.2(a).

…

Corporate Fee means the amount of money to be retained by MEPL from the revenue received under the Head Contract in the amount of $1,000,000, provided that where the Head Contract is terminated prior to the date of practical completion under the Head Contract (other than by reason of Material Default by Acciona), the Corporate Fee will be reduced in accordance with the following formula:

Corporate Fee in event of termination = $1,000,000 x (Works completed under the Head Contract (as determined by the Steering Committee at the date of termination)/total Works under the Head Contract).

…

CP Cost means costs and expenses which are:

(a) reasonably and properly incurred (but, for the avoidance of doubt, other than a Material Default);

(b) directly and solely concerned with the execution of the Works; and

(c) approved by the Steering Committee, where required under this Deed,

or which are otherwise expressly described as such in this Deed or the Subcontract or approved by both parties in accordance with this Deed including those losses, costs and expenses arising out of any Claims made against either party (by a third party including the Client) relating to or arising in connection with the Head Contract, Subcontract, this Deed (including liabilities under any security, bond and indemnity agreements or otherwise to any third party), including under the Project Documents or otherwise in relation to its participation in the Project, but excluding any Claims, costs, losses or expenses identified in clause 8(a) of this Deed.

…

Participating Interests means the proportionate interest of each party in this Collaboration as set out in item 2 of Schedule 1, as adjusted in accordance with this Deed or otherwise by agreement between the parties.

…

Surplus means all revenue derived by the parties arising out of or in relation to the Head Contract and the Subcontract, (including, as applicable, proceeds recovered pursuant to insurances required to be taken out under the Head Contract or the Subcontract or amounts recovered through Claims or rebates from third parties) less the Corporate Fee and the CP Costs."

[9] The parties' proportionate interests as participating interests were 50:50.

[10] Clause 6 dealt with the relationship of the parties and provided in cl 6(c):

"(c) No party may:

(i) subject to clause 15.6, make an undisclosed profit from its position in relation to the Works; or

(ii) misuse its position in relation to the Works in order to obtain a personal benefit or profit."

[11] Clause 7 dealt with participating interests and general liability and provided:

"(a) The interests of the parties in Collaboration are the Participating Interests. The parties will share:

(i) all monies (excluding the Corporate Fee), rights and titles (excluding Intellectual Property Rights which will vest in accordance with the Subcontract) which may be derived from the execution and performance of the Works and the Project Documents;

…

(iii) all CP Costs,

…

in proportions equivalent to their respective Participating Interest."

[12] Clause 11.1(a) provided:

"**Constitution**

(a) The executive body of the Collaboration will be the Steering Committee, which committee will comprise up to two senior management representatives from each party who, at the date of this Deed, are the representatives identified in item 4 of Schedule 1."

[13] Clause 11.2 dealt with primary functions and read:

"In addition to any specific matters which are reserved for the jurisdiction of the Steering Committee under this Deed, the main functions of the Steering Committee are to:

…

(d) ensure proper oversight of the costs and financial arrangements of the Collaboration, including to approve expenditure by either of the parties and to review and approve the project and financial reports at its regular meetings under clause 11.3(a);

…"

[14] Clause 15.2 dealt with contributions in the following terms:

"(a) In the event that the costs in clauses 7(a)(iii) and 7(a)(iv) exceed the amount calculated by subtracting the Corporate Fee from the Contract Sum (as that term is defined in the Head Contract), the Steering Committee will determine the amount and timing of the Contribution required to be made by the parties, which will be in accordance with the parties' respective Participating Interests.

(b) The Steering Committee must provide each party with written notice of the amount of each Contribution the party is required to make and, in the case of Acciona, may specify a due date for payment (**Contribution Notice**).

(c) A party must pay each Contribution the subject of a Contribution Notice:

(i) in the case of Acciona, into the nominated MEPL Bank Account;

(ii) in the currency specified in item 8 of Schedule 1; and

(iii) by the due date for payment specified in the Contribution Notice or, if no due date is specified, within 10 Business Days of receipt of the Contribution Notice."

[15] The costs in cl 7(a)(iv) were left blank in the collaboration deed.

[16] Clause 15.4(b) then provided:

"…

(b) Subject to clause 15.4(c) Disbursements of Surplus will be made to the parties (in the case of Acciona, by way of payment from MEPL and in the case of MEPL by retention by MEPL of the relevant amount plus the Corporate Fee) ('**Surplus Disbursement'**) as approved by the Steering Committee in accordance with the following:

(i) The first Surplus Disbursement will be made within two weeks after receipt of the certificate of practical completion under the Head Contract, and the Surplus Disbursement must equal 90% of the party's Participating Interest multiplied by the Surplus (as forecast at the date of practical completion);

(ii) A further Surplus Disbursement will be made within two weeks after receipt of the final certificate under the Head Contract, and will be the party's Participating Interest multiplied by the Surplus (as calculated at final completion as part of the finalisation of the accounts under clause 19), if any, less any previous Surplus Disbursement.

(iii) For the avoidance of doubt, the balance of the Surplus (after payments in accordance with clause 15.4(b)(i)) will be retained by MEPL for the duration of the defects liability period under the Head Contract or until such time as it is required to paid [*sic*] in accordance with clause 15.4(b)(ii) or otherwise agreed by the Steering Committee."

[17] Clause 16 dealt with costs and expenses:

"**16.1 CP Costs**

(a) The parties agree the following are CP Costs where those costs are approved by the Steering Committee or approved by both parties in accordance with this Deed, and the Project Budget approved by the Steering Committee:

…

(vi) without limiting clause 7(a)(iii), where a party incurs a CP Cost, either in whole or in part, in excess of the proportion of the CP Cost equivalent to its Participating Interest, it will be entitled to reimbursement from the other party of the

amount incurred in excess of its proportion of the CP Cost equivalent to its Participating Interest.

(b) Without limiting clause 14.1 or 15, unless approved by the Steering Committee (including as part of costs to be reimbursed under clause 16.1), a party is not entitled to reimbursement from the other party for:

(i) corporate overhead or head office expenses;

(ii) income taxes or GST;

(iii) not used;

(iv) the salary and associated costs of members of the Steering Committee;

(v) travel, accommodation and administrative expenses of members of the Steering Committee;

or

(vi) time spent or expenses incurred by the Steering Committee in connection with the formation of policy for the Collaboration and the activities and meetings of the Steering Committee, and such costs must be borne by each party directly.

(c) For the avoidance of doubt, the parties acknowledge and agree that the Steering Committee can, at any time prior to the termination of this Deed, determine that a cost not previously approved is nevertheless a CP Cost."

Relevant subcontract terms

[18] The subcontract relevantly described Acciona as the contractor but it was clear in context that, for the purposes of that instrument, MEPL was the principal and Acciona was the contractor. Bearing that in mind, the following provisions were significant:

"**2.1A Acknowledgment by Contractor**

The parties agree that the contract sum and any rates to be applied in calculating the contract sum (together with any additions or deductions expressly provided for by the Contract) is an interim payment and is subject to the final reconciliation and adjustment to determine the Surplus Disbursements in accordance with the Collaboration Deed.

…

11D.1 Provisions subject to the BCIPA

(a) The rights and obligations of the parties under the Contract are subject to the provisions of the BCIPA to the extent that they apply and have not been contracted out of.

(b) Where there is any inconsistency between the Contract and the BCIPA, the BCIPA shall prevail to the extent necessary to avoid the inconsistency.

(c) Terms used in this clause 11D and defined in the BCIPA, shall have the meaning given to them by the BCIPA."

…

11D.3 Calculation or valuation of progress payments under the BCIPA

Despite any other provision of the Contract and notwithstanding subclause 37.1, in calculating any progress payment to which the Contractor is entitled to in relation to the Contract, and in respect of which the Contractor is entitled to claim in any progress claim:

(a) the following amounts shall not be included:

(i) any amount which the Contract provides cannot be claimed or is not payable because of the failure by the Contractor to take any action (including to give notice to the Principal);

(ii) any amount which represents unliquidated damages claimed against the Principal (whether for breach of contract, in tort or otherwise);

(iii) any amount which the Contract (including, but not limited to, subclauses 32(i) to 32(p)) provides is not payable until certain events have occurred or conditions have been satisfied, to the extent those events have not occurred or those conditions have not been satisfied;

(iv) any amount in respect of which the obligation of the Principal to make payment has been suspended under the Contract; or

(v) any amount that is not a CP Cost (as that term is defined in the Collaboration Deed).

(b) the following amounts shall be deducted:

(i) any amounts which:

(A) have become due from the Contractor to the Principal under the Contract (including provisional assessments pursuant to subclause 34.7;

(B) not used;

(C) the Principal is entitled under the Contract to set off against the progress payment; or

(D) not used;

(ii) any amounts to which the Principal is entitled under the Contract to withhold, deduct or retain from the progress payment (including pursuant to clause 5); and

(iii) any amounts stated in the statutory declaration provided by the Contractor in accordance with subclauses 37.lA(h) and 37.lA(i) as remaining payable to subcontractors or workers;

(c) in determining amounts to be excluded or deducted under paragraphs (a) and (b), regard shall be had to matters or circumstances occurring at any time before the date that the determination is being made arising out of or in relation to the Contract; and

(d) the value of any WUC relevant to the progress payment shall:

(i) not used;

(ii) not used;

(iii) exclude the value of any unfixed materials (unless the Contract expressly provides for payment for the unfixed materials and the Contractor has fully satisfied those requirements which the Contract provides are to be fulfilled before the Principal is required to pay for those items)."

[19] Clause 35 dealt with defects liability with cl 35.1(e) providing in particular:

"(e) Subject to subclause 35.2, the Contractor shall rectify all defects identified in the Principal's direction under paragraph (d) and re-test all rectified work (including, without limitation, proof of performance testing). If the Contractor fails to do so, the Principal may itself carry out the rectification or have the rectification carried out by others but without prejudice to any other rights and remedies the Principal may have. The costs thereby incurred shall be a CP Cost."

[20] Clause 37.1 then dealt with progress claims and provided:

"**37.1 Progress claims**

The Contractor shall claim payment progressively in accordance with Item 34.

An early progress claim shall be deemed to have been made on the date for making that claim.

The Principal shall be entitled to specify the format of the progress claims.

Each progress claim shall satisfy the requirements specified in Annexure Part S.

The Contractor's entitlement to claim in accordance with clause 37.1 of the Subcontract will be limited to the CP Costs incurred by Acciona during the relevant period for making a claim under this clause."

[21] Clause 37.1A then provided:

"**37.lA Further conditions for payments claims, certificates, calculations and time for payment**

In addition to the provisions of subclause 37.1:

(a) if the time for:

(i) delivery of any payment claim; or

(ii) payment of any claim,

under subclause 37.1 falls due on a day which which [sic] is not a business day, the claim may be delivered or the payment made on the next business day;

(b) the Contractor shall not be entitled to submit payment claims more frequently or at any time earlier than at the time specified in the Contract;

(c) if, at any time prior to the date on which the Contractor is otherwise entitled to make a claim for a progress payment, the Contract requires or the Principal has directed the Contractor to deliver certain material or information in support of its payment claim, then the Contractor submitting that material or information is a precondition to the date on which the claim for a progress payment may be made by the Contractor;

(d) the amount to be allowed by the Principal in any certificate under subclauses 37.2 or 37.4 as the amount due to the Contractor arising out of or in connection with the Contract shall:

(i) be calculated in accordance with the provisions of the Contract (including subclause 11D.3); and

(ii) only include liquidated amounts the subject of a judgment in favour of the Contractor (despite the Contractor having claimed any further amounts in the payment claim);

(e) the amount to be allowed by the Principal in any payment certificate under subclauses 37.2 or 37.4 as the amount due from the Contractor to the Principal may include the Principal's provisional assessment of amounts which may become due from the Contractor to the Principal under or in connection with the Contract arising from circumstances which have occurred prior to the date of the Principal's certificate (whether or not those amounts are unliquidated or contingent at that time);

(f) despite the amount certified by the Principal as payable under any progress certificate, the Principal shall not be obliged to pay any amount which relates to an unliquidated claim for damages by the Contractor;

(g) the Principal shall be entitled to not pay the amount certified in any progress certificate to the extent of any amount due from the Contractor to the Principal whether under or in connection with the Contract or otherwise;

(h) as a precondition to the date on which the claim for a progress payment may be made by the Contractor, the Contractor shall submit, one business day prior to the submission of the relevant progress claim, a completed statutory declaration in the form set out in Annexure Part F relating to that progress claim; and

(i) as a precondition to the date on which the final payment claim may be made, the Contractor shall submit, one business day prior to the submission of the final payment claim, a completed statutory declaration in the form set out in Annexure Part G relating to that final payment claim."

Submissions

The applicant's submissions

[22] The applicant's argument is that cl 7 of the collaboration deed results in an arrangement which is a species of joint venture, a conclusion reinforced by cl 6(c) of the deed. Although its counsel concede that the payment claim is one for payment of CP Costs, the submission is that the consideration for those costs is subject to the sharing machinery in cl 7 and not by reference to the value of the work carried out or the value of the goods and services supplied the subject of that claim. The submission goes on to argue that the only entitlement to those costs must, by that machinery, account for whether they exceed the requirement for a 50% share of all CP Costs incurred by both parties. That necessarily requires calculation of the costs incurred by the applicant and then adjustments based on the sharing formula. The respondent's argument to the contrary is that the relevant figure produced by the calculation includes an integer referrable to the value of the work carried out or the value of the goods and services supplied.

[23] The practical difference is that, on the applicant's approach, partly because of the existence of the corporate fee of $1 million defined in cl 1.1 of the deed as a retention amount, the surplus is to be distributed according to cl 15.4 in tranches post completion. Clause 15.4(d) also provides that surplus disbursements are on account only and subject to adjustments after receipt of the final certificate pursuant to cl 15.4(b)(ii).

[24] Although Acciona may make progress claims by cl 37.1 of the subcontract, MEPL argues that the calculation of the value of the work claimed is subject to cl 11D pursuant to cl 37.1A to the effect that the claim may only be the share of the CP Costs to that date in excess of the 50:50 share between the parties. MEPL submitted, through their counsel, that there is no temporal limit on when set-offs may occur other than in response to a progress claim nor is there any limitation on the set-off exceeding the claim. The submission also relies on cl 16.1(vi) of the deed which provides for a right to reimbursement by one party from the other for CP Costs incurred over the 50:50 share with no temporal limitation on that right. Accordingly, Mr Dunning QC submitted that the right to reimbursement forms an essential part of the calculation for the consideration for the construction work. That led MEPL to the argument that the arrangement was akin to a joint venture as an arrangement for the sharing of risk for the whole project. In that context, it relied on the recitals to the deed set out earlier.

[25] Consequently, the submission was that the consideration for the work under the contract or the value of the goods and services supplied was to be calculated by reference to the sharing machinery in the deed and not by reference to the value of the work or the value of the goods and services. The submission was that Acciona may claim progressively for CP Costs but only those in excess of their 50% participation interest, with any surplus of revenue to be calculated by reconciliation at the end of the project. The value of the claim, therefore, depended on the total CP Costs incurred by each party approved by the steering committee or which had been

agreed on. If neither of the latter two applied then, on the plain reading of the deed, the costs did not fall within the definition of a CP Cost.

[26] When dealing with the fact that the subcontract sets out a regime in which progress claims and payment claims under the Act are to be made, MEPL argued that those provisions gave way to the provisions of the deed because of the hierarchy of contractual instruments with the result that the calculation of the value of the CP Costs was subject to the 50% sharing adjustment in cl 7 and the determination of each party's contributions identified by the steering committee by cl 15.2 so that the provisions of the subcontract regarding payment were able to be enforced unaffected by the exclusion of the contract from the Act. In that context, they pointed out that cl 11D.1(a) of the subcontract anticipated that the provisions of the Act may not apply.

[27] The conclusion of that submission was that the commercial purpose of the contract was that Acciona would effectively step into the shoes of MEPL under its head contract with Unitywater and each party would share the costs, risks and, ultimately at the end of the project, any surplus profit.

[28] In that context, MEPL relied on a decision of McDougall J in the New South Wales Supreme Court in *Smith v Coastivity Pty Ltd*[2] where there was, more clearly perhaps, a joint venture between the owners of land and a property developer to build units on land at Tweed Heads. Clause 3 of the relevant agreement there provided for a distribution according to fixed interest proportions after payment of "all … costs associated with the Project". In interpreting the relevant section equivalent to s 3(2)(c) of the Queensland Act, his Honour observed that the words "by reference to" the value of the work were capable of indicating a broad relationship between the concepts or things they connected but concluded that:[3]

> "the notion of an entitlement to share in profit is fundamentally inconsistent with the concept of value, or valuation, as it is used in the relevant sections of the Act."

[29] His Honour went on to conclude that the contract there was excluded and said, when comparing it with the decision in *Biseja v NSJ Group*,[4] the following:[5]

> "[A]lthough the determination of the value of those services in that case would always depend on a prior determination of the value of the construction work carried out, that value could be determined from month to month (by looking at the value of construction work performed in the month in question) and would always be a positive figure. That is a long way removed from the facts of this case."

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2 [2008] NSWSC 313.

3 [2008] NSWSC 313 at [62].

4 [2006] NSWSC 835.

5 [2008] NSWSC 313 at [64].

[30] In seeking to apply those statements to this case, MEPL argued that s 7 of the collaboration deed set the premise not only for sharing of all revenue but also all CP Costs so that if the project was carried through to completion and returned a loss because the costs exceeded the revenue, in the same way as in *Coastivity's* case, Acciona would be obliged to bear a 50% proportion of that loss. In this way, it submitted, the facts in *Coastivity* are relevantly identical to the present facts insofar as the calculation of the value of the consideration for work under the contract was concerned.

[31] Counsel for MEPL also submitted that the decision in *Coastivity*, although distinguished by the New South Wales Court of Appeal in *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd*,[6] was the subject of comments by Bathurst CJ from which I should conclude that the decision by McDougall J was distinguished without disagreement.

[32] It is not clear to me what view the Court of Appeal took of the value of the *Coastivity* decision as a precedent, but it is significant that Bathurst CJ said:[7]

> "28 In *Coastivity* supra, McDougall J (at [34]) emphasised that the question of whether a contract is a construction contract requires attention to be focused on the obligations under the contract. A corollary of this is that little assistance will be derived from a consideration of authorities dealing with a different contract imposing different obligations."

[33] It is significant, however, that, in reaching his decision and bearing in mind that s 7(2)(c) of the New South Wales legislation is the equivalent of Queensland's 3(2)(c), Bathurst CJ also said the following:[8]

> "46 In my opinion s 7(2)(c) does not apply to the agreement. This is because the consideration is calculated by reference to the value of the services supplied.
>
> 47 Section 10(2) of the Act provides that related goods and services are to be valued in accordance with the terms of the contract or, if there is no express provision, in accordance with the mechanisms set out in s 10(2)(b). This provision appears in Pt 2 of the Act which deals with the rights to progress payments. Section 7(2)(c) applies to exclude contracts where that mechanism cannot have application; that is where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 10(2)(b).
>
> 48 In the present case the agreement provided for a fixed payment of $130,000. That payment was payable by six instalments of $21,666.67 at the time set out in steps 1, 5, 6, 9, 10 and 11. The relevant reference date for those payments are the events specified in each of those steps. The amount payable is the amount calculated in accordance with the terms of

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6 [2012] NSWCA 31.

7 [2012] NSWCA 31 at [28].

8 [2012] NSWCA 31 at [46]-[51], (emphasis added).

the contract (see s 9(a)). For the purpose of s 7(2)(c) these amounts are not calculated other than by reference to the value of the services supplied as they are calculated in accordance with the contract price consistent with s 10(2)(b)(i).

49 Step 12 of the agreement provides that the bonus payment is payable within seven days of an invoice after direct reconciliation following occupation and/or building completion. Thus, the reference date for the payment of the bonus can be ascertained in accordance with s 8(2)(a) of the Act.

50 Further, the bonus amount is calculated in accordance with the terms of the contract consistently with s 9(a). For the purposes of s 7(2)(c) and s 10(2)(a), the contract provides how the amount is to be valued, namely 50 percent of savings below at [sic] targeted budget.

51 Accordingly, s 7(2)(c) does not apply. As I have pointed out, the date of any payment due and its value can be determined in accordance with the contract as required by the Act. **It is immaterial in my view that the amount of the bonus payment cannot be calculated until completion of the contract. What is of importance is that the contract provided the mechanism for its calculation at the reference date provided for by s 8(2)(a). The fact that no bonus may be payable when the reconciliation is done is immaterial.** The contractor retains $130,000 which has been paid. It simply does not get a bonus."

[34] In this case MEPL submitted that s 3(2)(c) also focussed on the "consideration payable for construction work carried out under the contract", not what a party claimed in its progress claim where, here, the contractual hierarchy required consideration of the documents forming the contract by the order they appeared in cl 1.1 of the formal instrument of agreement. Its counsel submitted that there was always a risk in this case that the consideration payable for the construction work may be a negative amount, as in the *Coastivity* decision. The consequence they argued for was that, by the deed, each party agreed that the consideration for the construction work was first to share equally in the CP Costs throughout the project, then to share equally in any surplus to be determined at the end of the project. MEPL submitted that the manner of calculation did not deny Acciona the ability to claim progress payments under the contract but did exclude it from the rapid and often uncertain vagaries of the adjudication process under the Act.

Submissions for the respondent

[35] Acciona relied on s 13 and s 14 of the Act which provided for the amount of progress payments to which a person is entitled and for the valuation of construction work and related goods and services. Section 13 provides:

"**13 Amount of progress payment**

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

(a) the amount calculated under the contract; or

(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract."

[36] Section 14(1) also provides:

"**14 Valuation of construction work and related goods and services**

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) under the contract; or

(b) if the contract does not provide for the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect."

[37] Acciona's counsel also relied on the passage in *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd*[9] at [47], which I have set out earlier, that s 3(2)(c) applies to exclude contracts where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 14(2)(b) of the Queensland Act. As Ms Hindman QC pointed out, under this contract, the consideration payable for the construction work carried out under the contract and for the related goods and services supplied is calculated by reference to the value of the work carried out or the value of the goods and services supplied.

[38] In that context, she relied upon cl 2.1 of the subcontract which obliges Acciona to carry out and complete the work under the contract and obliges MEPL to pay Acciona the contract sum adjusted by any additions or deductions made pursuant to the contract. She submitted that it was not contentious that the work under the contract was construction work or related goods and services for the purposes of the Act where the contract sum was defined to mean the lump sum figure set out in the formal instrument of agreement including provisional sums but excluding any additions or deductions which may be required to be made under the contract.

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9 [2012] NSWCA 31 at [47].

[39] In that context, she referred to cl 4 of the formal instrument of agreement. The Kawana Acciona Costs Basis which formed part of the contract broke down the lump sum of $18,353,131 into various types of costs which were further broken down into items of work and associated costs. The consequence was that the lump sum was calculated by reference to the value of the work to be carried out and the value of the goods and services to be supplied. She then relied upon cl 37.1 of the subcontract permitting Acciona to claim payment progressively. Although the entitlement to the claim was limited to CP Costs incurred by Acciona during the relevant period for making a claim under cl 37.1, there were further restrictions on the entitlement to claim under cl 11D.3 of the subcontract. She relied, therefore, on those clauses to submit that Acciona was entitled to claim monthly for particular types of costs incurred in carrying out the work under the contract. She pointed out that each of the progress claims submitted by Acciona included a schedule identifying the value of work completed for each item of work in the relevant claim as against the total allowed for that item of work in the "Kawana Acciona Costs Basis" document.

[40] The respondent's submission went on to argue that, although the contract permitted MEPL to claim set-offs, that was a right regularly given in construction contracts to principals but did not mean that the consideration payable for the construction work was calculated other than by reference to the value of the work carried out. Ms Hindman submitted that, to suggest otherwise, would mean that any construction contract containing a liquidated damages clause or any set-off clause would fall foul of s 3(2)(c) and would mean that the consideration payable for the construction work was not calculated by reference to the value of the work carried out.

[41] In this contract, MEPL was prima facie entitled to set-off or deduct the principal's provisional assessment of amounts which may become due from the contract to the principal under or in connection with the contract arising from circumstances which have occurred before the date of the principal's certificate pursuant to cl 37.1A(e) of the subcontract. Nonetheless, retentions and debts and other moneys due from the contractor to the principal pursuant to cl 37.2 of the subcontract and other amounts set out in cl 37.2A did not require the conclusion that the consideration payable for the construction work was calculated other than by reference to the value of the work carried out.

[42] She submitted that the value of the work carried out was a necessary integer to the calculation of the consideration payable. She also submitted that MEPL's argument that the lump sum was consistently subject to change based on the amount of CP Costs that had been incurred was unsound on the basis that the lump sum could only be subject to change through the usual variation process.

[43] She also submitted that MEPL's argument that the claim that can be made is only for the share of the CP Costs to the date of the claim in excess of the 50:50 share was also unsound. The collaboration deed said nothing of what progress payments Acciona was entitled to receive under the subcontract or the Act. She submitted that the proper position was that the amount payable for construction work carried out is tied to the value of the construction work and not affected by the fact that MEPL has contractual set-off and deduction rights nor by the fact that the final financial position as between the two parties is affected by the terms of the collaboration deed. In that context, she submitted that the profit share arrangement does not determine the value of the construction work carried out under the contract. While the calculation of surplus is plainly needed to await the conclusion of the project, that was not the

position in respect of progress claims for the construction work with which the subcontract specifically dealt.

[44] Nor did she agree that the provisions of the subcontract gave way to the provisions of the collaboration deed because the contracts were readily able to be read together. She submitted that the lump sum was the consideration payable for the construction work the subject of the subcontract and the amount of a progress payment to be made might be affected by deductions and set-offs under the subcontract which arose as a consequence of the arrangements under the collaboration deed. Even if such deductions and set-offs were not made there would still need to be a final accounting between the parties to give effect to the collaboration deed.

[45] She submitted that that was a sensible commercial construction of the arrangements because both parties incurred CP Costs and other costs but there needed to be a mechanism by which money coming in from Unitywater only to MEPL under the head contract flowed through to Acciona for the works the subject of this subcontract. She submitted that there would be no necessity for the provision of a lump sum amount at all if Acciona's entitlement to payment was calculated by reference to profit sharing arrangements only.

[46] She relied upon the Court of Appeal decision in New South Wales in *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* and submitted that the effect of MEPL's submissions was that Acciona had no right to payment for construction work undertaken by it until the conclusion of the project.

[47] She also submitted that there was extrinsic evidence illustrating the commercial context of the creation of the contract. The submission was:[10]

> "Part of the commercial context in which the Contract must be construed, then, is that MEPL, as the head contractor, would have the benefit of cash flowing from Unitywater during the course of the project and Acciona would not have the benefit of any cash flow, other than that which it receives from MEPL. That such cashflow would occur in a construction context is a notorious fact of the industry and, pursuant to s. 7, is the primary object of the Act."

[48] That evidence supported the view that the parties intended the regime created by the Act to apply to the project and that a final reconciliation would be performed at the end of that project.

Discussion

[49] The extrinsic evidence may be relevant in establishing the matrix of facts around the formation of the contract. It seems clear to me, however, that this is one of those cases where the proper construction of the contract leads, in any event, to the conclusion that the consideration payable for the construction work under it is to be calculated by reference to the value of the work carried out or the value of the goods and services supplied.

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[10] Outline of submissions for the first respondent at para 56.

[50] The subcontract does make provision for progress claims to be made and it is clear that the calculation of such claims requires the CP Costs to be calculated taking into account the value of the work carried out or the value of the goods and services supplied. They were an integer of the final figure to be paid after any set-offs arising out of the proportional sharing of the CP Costs pursuant to the agreement.

[51] The decision in *Coastivity* is distinguishable as it was based wholly on an entitlement to share in profit where the process of valuation could only be conducted once the project had been brought to completion and final accounts could be taken.[11] McDougall J expressed the view that the notion of an entitlement to share in profit was fundamentally inconsistent with the concept of value or valuation as used in the relevant sections of the New South Wales Act equivalent to s 3(2)(c).[12] That does not mean, however, that, in this case, the consideration payable for the progress claims contemplated was divorced from the calculation of the work carried out or the value of the goods and services supplied.[13]

[52] Counsel for Acciona submitted that the facts in *Coastivity* were very different from this case, a submission with which I agree. In particular, they pointed out the following distinctions:

> "(a) Here the GCC [the subcontract] contemplate expressly a process of valuation for the completed construction works, by reference to the lump sum representing the value of the construction works, during the project. That the Surplus, or any final adjustment between the parties, is not calculated until the conclusion of the project does not detract from that proposition. Acciona is entitled to payment of the construction works based on the value of those works (subject to any adjustments for set-offs or deductions which occurs in nearly all construction contracts).
>
> (b) Here the Contract does not contemplate an arrangement whereby the manner in which Acciona is to receive payment for the construction works is calculated only by reference to a profit share arrangement – there is a valuation exercise to be carried out by reference to the works completed. In fact the surplus (positive or negative) cannot be calculated without that valuation exercise having been undertaken.
>
> (c) Here the value of the construction work cannot be a negative amount. It will always be a positive amount. It may be subject to set-offs and ultimately (if there was a loss on the project) Acciona may be required to share in a project loss, but that does not mean that the consideration payable for the construction work is a negative amount – it is in fact the specified lump sum."[14]

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[11] [2008] NSWSC 313 at [60].

[12] [2008] NSWSC 313 at [62].

[13] [2008] NSWSC 313 at [63].

[14] Outline of submissions for the first respondent at para 64.

[53] Those distinctions are real with the result that this decision is one analogous to the decision of the New South Wales Court of Appeal in *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd*[15] in the passage set out earlier.[16] I agree with the submission, therefore, that the subcontract here identifies how the construction work is to be valued by reference to the lump sum which reflects the value of the construction work and related goods and services. Any surplus or other adjustment required between the parties can be calculated in accordance with the contract, particularly the collaboration deed, and may be reflected in set-offs made under the subcontract. It does not matter that the surplus or other adjustments required between the parties cannot be calculated on a final basis until the completion of the contract as it specifically and expressly contemplates that progress claims are to be made and paid by reference to the value of the work completed during the contract.

Orders

[54] Accordingly, the claim should be dismissed and the existing interlocutory injunction dissolved. I shall hear the parties further as to costs.

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[15] [2012] NSWCA 31.

[16] See also *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd* [2014] VSC 596 at [70]-[73].