

Construction Alert

On a road to nowhere: highway company fails to prevent enforcement of determination

RNR Contracting Pty Ltd v Highway Constructions Pty Ltd
[2013] WASC 423

WHAT YOU NEED TO KNOW

- The scheme and policy of the *Construction Contracts Act 2004* (WA) (CC Act) strongly supports the proposition that, prima facie, a party that has the benefit of a determination is entitled to enforce it.
- A party wishing to prevent the registration of a determination for reasons of jurisdictional error should bring an application for a prerogative writ to quash the determination, rather than merely seek to persuade a court not to grant leave to register the determination pursuant to the discretion conferred by s 43 of the CC Act.
- The existence of jurisdictional error in an adjudication determination may not be enough, on its own, to prevent the registration of a determination.

This article considers the decision of the Supreme Court of Western Australia in *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423.

Background

RNR Contracting Pty Ltd is a road construction contractor. Highway Constructions Pty Ltd is a civil engineering company that specialises in managing road and bridge construction contracts. RNR Contracting entered into a construction contract with Highway Constructions to provide bituminous sealing to a highway for the Dampier Highway Duplication Project.

Payment disputes arose with respect to three separate invoices issued by RNR Contracting to Highway Constructions under the contract.

The payment disputes were referred to adjudication under the CC Act. The adjudicator dealt with all three disputed invoices in the same adjudication, and a determination was made in favour of RNR Contracting.

RNR Contracting subsequently applied for leave to register the adjudication determination as a judgment

under s 43 of the CC Act. Highway Constructions opposed that application.

The parties' positions

Highway Constructions opposed the application on the grounds that:

- pursuant to s 32(2) and (3) of the CC Act, an adjudication can only deal with one payment dispute, unless the parties agree otherwise;
- the adjudicator had made a jurisdictional error by dealing with all three disputed invoices, as each constituted a separate payment dispute and Highway Constructions had not consented to the disputes being dealt with at a single adjudication; and
- pursuant to the decision of Murphy JA in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASC 217, the determination was tainted by jurisdictional error and should not be registered as a judgment.

The passage from *Perrinepod* that was relied on by Highway Constructions provided that an adjudicator's

determination can be challenged either by judicial review on the ground of jurisdictional error, or, at the point at which an application is made to enforce the determination under s 43 of the CC Act, on the basis that the determination exceeded the jurisdiction of the adjudicator and therefore was not a “determination” at all.

Highway Constructions submitted that it was clear from *Perrinepod* that, where a determination is tainted by jurisdictional error, it ought not be registered as a judgment.

Importantly, Highway Constructions only sought to oppose the *registration* of the determination pursuant to s 43 of the CC Act. It took no steps to challenge or quash the determination (by, for example, bringing an application for a prerogative writ).

RNR Contracting argued that where a defendant had not commenced proceedings to challenge or quash a determination, the court should not refuse to register the determination as a judgment. RNR Contracting relied on the decision of Corboy J in *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* (2011) 29 BCL 498; [2011] WASC 80, who, in dealing with s 43 of the CC Act, held that:

- the scheme and policy of the CC Act strongly reinforces the proposition derived from *Cockatoo Dockyard Pty Ltd v Commonwealth of Australia (No 3)* (1994) 35 NSWLR 689 that, *prima facie*, a party that has the benefit of a determination is entitled to enforce it. However, the court has a discretion in granting leave to enforce a determination under s 43; and

there must be a sufficient reason for the court to exercise its discretion to decline to grant leave, having regard to the scheme and policy of the CC Act, and what will be a sufficient reason will depend on the circumstances of the case.

Decision to grant leave

The court found that, for the reasons submitted by Highway Constructions, it was at least arguable that the adjudicator had made a jurisdictional error (by determining more than one payment dispute in the adjudication without the agreement of Highway Constructions).

However, the court found that this was not enough on its own to warrant an exercise of the discretion to refuse leave to register the determination, and ultimately granted leave to RNR Contracting.

In making the decision to grant leave, the court:

- stated that if Highway Constructions had taken some steps to overturn the adjudicator’s decision, the position may well have been different;
- referred with approval to the observation made by K Martin J in *Re Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35; [2011] WASC 172 that the importance of the CC Act as a swift circuit-breaking mechanism in a construction contract dispute is the fundamental governing criteria in the court’s assessment of whether it should exercise a discretion under the CC Act; and
- observed that the discretion conferred by s 43 of the CC Act is unfettered and each case will depend on its circumstances, but that the legislative scheme must be borne in mind and care must be taken not to undermine its purposes.

The court also noted that a strict application of *Perrinepod* could lead to anomalous outcomes. If a party in the position of Highway Constructions were to bring an application for prerogative relief and quash the determination, then the adjudication falls away and the party would no longer have any obligation to pay arising out of the adjudication. However, if the determination is not challenged, but a court declines to enforce the determination, then the adjudication remains on foot. The consequence of this is that the party in the position of Highway Constructions would continue to have an obligation to pay arising out of the adjudication and it may be open to the party seeking payment to enforce that obligation by issuing a statutory demand (even though the court had declined to enforce the determination under s 43 of the CC Act).

Key points

- The existence of jurisdictional error may not be enough on its own to prevent enforcement of a determination under the CC Act.
- A party wishing to prevent the enforcement of a determination for reasons of jurisdictional error should seek to quash the determination.
- The scheme and policy of the CC Act favours the enforcement of determinations, and a party seeking to resist enforcement must identify sufficient reasons for the court to exercise its discretion not to enforce. What will be a sufficient reason will depend on the circumstances of the case.
- The importance of the CC Act as a swift circuit-breaking mechanism in a construction contract

dispute is the fundamental governing criteria in the court's assessment of whether it should exercise a discretion under the CC Act.

- Even if a court declines to enforce a determination under s 43 of the CC Act, this may not prevent the party having the benefit of the determination

seeking to enforce it by other means such as a statutory demand.

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