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Samsung C&T Corporation v Duro Felguera Australia Pty Ltd: Hybrid Claims Under the Construction Contracts Act 2004 (WA)

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**SAMSUNG C&T CORPORATION V DURO
FELGUERA AUSTRALIA PTY LTD: HYBRID CLAIMS
UNDER THE CONSTRUCTION CONTRACTS ACT
2004 (WA)**

SEAN FOY *

ABSTRACT

*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*¹ was one of two matters considered jointly by the Court of Appeal (WA).² Both matters appealed against the outcome of judicial review proceedings brought following multiple adjudications given under the *Construction Contracts Act 2004* (WA).³ The issue for determination in *Samsung v Duro Felguera* was whether adjudicators performing functions under the *CCA* are acting within jurisdiction when determining ‘hybrid’ payment claims. The *CCA* defines the scope of a ‘construction contract’ by reference to the nature of any particular obligation in the contract. A hybrid claim is any payment claim which relates to contractual obligations which fall partly within and partly outside that definition. The majority determined that an adjudicator’s jurisdiction is limited to payment claims relating to obligations specifically listed

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¹*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, (*Samsung v Duro Felguera*).

²The other matter was *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation and Others* (2018) 52 WAR 323.

³Hereafter the *CCA*.

under the construction contract definition. Consequently, adjudicators must now determine the scope of their jurisdiction by careful application of the definition in the *CCA* to particular clauses in a contract. Given the time-sensitive nature of such determinations, this may prove a barrier to rapid adjudication of payment claims in similar circumstances.

I INTRODUCTION

The *CCA* provides for the adjudication of **payment disputes** between parties to **construction contracts**.⁴ Adjudication is intended to be a quick and relatively informal way of keeping ‘the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes’.⁵ *Samsung v Duro Felguera* however introduces an area of complexity for adjudicators and parties to construction disputes.

The central issue in *Samsung v Duro Felguera* was whether adjudicators awarding an amount for work performed under a **construction contract** were acting in excess of their jurisdiction by mistakenly including in their determination, payment for amounts that fall outside of the definition of construction **obligations** under the *CCA*. Martin CJ wrote a strong dissenting judgement. He and the original trial judge (Beech J) conclude that an adjudicator does not make a jurisdictional error if they mischaracterise something that isn’t a **construction work obligation** under the *CCA*. Instead the adjudication should stand. This is consistent with the *CCA*’s purpose. Because payments determined by adjudicators are payments on account, the final resolution of the **payment dispute** (outside of the *CCA*’s

⁴*Construction Contracts Act 2004* (WA) Pt 3.

⁵Western Australia, *Parliamentary Debates*, Legislative Council, 8 April 2004, 1934-5 (Nick Griffiths).

scheme of quick adjudication) can make adjustments for prior overpayments and underpayments.

The majority (Buss P and Murphy JA) disagreed. They conclude that because some *payment claims* fall outside of the CCA's definition of *construction work* they also fall outside of the definition of a contractual *obligation* and must be disregarded by adjudicators making payment *determinations*. To the extent that an adjudicator awards amounts for excluded construction work in a adjudication determination, they will have acted without jurisdiction. Their decision will be unenforceable unless the incorrectly decided amounts can be severed under common law. Following the majority decision in *Samsung v Duro Felguera* adjudicators must now take care to ensure their *construction payment dispute determinations* do not include payment for contractual *obligations* not countenanced by the CCA's definition of *construction contract*.⁶

The majority decision hinges on construction of Part 3 of the *CCA* and the definition of the terms *payment dispute*, *payment claim* and *obligations*. All members of the Appeal Court and the trial judge recognised the practical difficulties that might arise from so limiting an adjudicator's jurisdiction. These difficulties arguably are contrary to the *CCA*'s legislative purpose. Nevertheless, the majority determined that this interpretation is unavoidable, given the language of the statute.

Part II of this note explains the nature of adjudication under the *CCA*. Part III explains the background to the payment disputes in *Samsung v Duro Felguera*, the adjudication outcomes and the applications by Samsung for judicial review. Part IV explains the issues raised on appeal by Samsung, the appeal outcomes and the

⁶*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 320–1 [174].

different approaches taken by members of the Court of Appeal. Part V describes the practical difficulties that flow from the appeal judgement. Part VI introduces a number of implications for parties relying on the adjudication provisions of the *CCA*. Part VII provides concluding remarks.

II NATURE OF ADJUDICATION UNDER THE CONSTRUCTION CONTRACTS ACT

A *Adjudicating Hybrid Payment Disputes*

Part 3 of the *CCA* makes provision for the adjudication of *payment disputes* arising under *construction contracts*.⁷ *Payment dispute* and *construction contracts* are defined terms.⁸ A *payment dispute* includes situations where:

- a) *payment claims* arising under a *construction contract* are rejected or disputed (either wholly or partly);⁹
- b) amounts claimed as *payment claims* under the contract have not been paid in full by the due time for payment;¹⁰ and
- c) security or other money retained under a *construction contract* are due to be returned or paid and have not been.¹¹

Construction contracts are agreements (written or oral) to:

- a) perform construction work or supply goods related to construction work;¹²

⁷ *Construction Contracts Act 2004* (WA) s 25.

⁸ *Ibid* ss 3, 6.

⁹ *Ibid* s 6(1)(aa).

¹⁰ *Ibid* s 6(1)(a).

¹¹ *Ibid* s 6(1)(b)-(c).

¹² *Ibid* s 3 construction contract definition paragraphs (a)-(b).

- b) provide professional services related to construction work;¹³ and
- c) provide other services on-site related to construction work being performed on that site.¹⁴

Construction work is defined broadly under the *CCA*¹⁵ but specifically excludes:

- a) drilling for the purpose of discovering or extracting oil, natural gas, mineral bearing and other substances;¹⁶ and
- b) fabricating or assembling plant used for extracting or processing oil, natural gas (and its derivatives), mineral bearing and other substances.¹⁷

For convenience both of these exclusions are referred to below as the ‘mining exclusion’. Accordingly, a contract may include some obligations that fall within the *CCA* definition of **construction contract** and other obligations that fall outside it. Duro Felguera’s contract with Samsung C&T Corporation is one such example.¹⁸ A contract containing ‘hybrid’ obligations is capable of providing a jurisdictional basis for adjudication under the *CCA*.¹⁹ However, the scope of that jurisdiction is limited by the terms of the *CCA*.

In *Samsung v Duro Felguera*, the Court of Appeal had to determine the extent of that jurisdiction. The key question was whether adjudicators made a jurisdictional error by awarding amounts related to non-construction work, or whether their errors were made within jurisdiction. If the error was within jurisdiction, the determination was not able to be set-aside under a process of judicial review.

¹³Ibid s 3 construction contract definition paragraph (c).

¹⁴Ibid s 3 construction contract definition paragraph (d).

¹⁵Ibid s 4.

¹⁶Ibid s 4(3)(a).

¹⁷Ibid s 4(3)(c).

¹⁸*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 284 [4], 286 [12], 305 [95], 320 [172].

¹⁹Ibid 308 [97] (Martin CJ); 320 [174] (Buss P and Murphy JA).

However, if the error was jurisdictional, it follows that it is able to be set aside under a process of judicial review.²⁰

B *Adjudicating Payment Disputes – Aims, Processes, Time-limits and Outcomes*

The aim of adjudication is to ‘determine a [payment] dispute fairly and as quickly, informally and inexpensively as possible’.²¹ To this end, adjudicators must act informally.²² They may determine applications on the papers²³ and are not bound by the rules of evidence, but may inform themselves in any way they think fit.²⁴ Adjudicators can request written submissions and other documentation from either or all parties,²⁵ request attendance at a conference,²⁶ conduct inspections,²⁷ arrange for testing of a thing the subject of a *payment dispute*,²⁸ and engage an expert to investigate and report on matters relevant to a *payment dispute*.²⁹

Adjudicators also have the power to extend the time for making an adjudication with the consent of the parties³⁰ but otherwise must conclude the matter within either:

- a) 10 business days after the respondent party has served their written response to the adjudication application on other parties and the appointed adjudic-

²⁰Ibid 284 [5], 306 [96]-[97].

²¹*Construction Contracts Act 2004* (WA) s 30.

²²Ibid s 32(1).

²³Ibid.

²⁴Ibid.

²⁵Ibid s 32(2).

²⁶Ibid.

²⁷Unless all parties object; Ibid s 32(2)(c).

²⁸Unless all parties object and provided the owner of the thing consents; Ibid.

²⁹Unless all parties object; Ibid.

³⁰Ibid s 32(3)(a).

ator;³¹ or

- b) 10 business days after the last date on which the respondent party was required to serve their written response.³²

Adjudicators have the following options to conclude a matter.

- a) Make a written **determination** that a party to the payment dispute is liable to make a payment (or return a security) and the amount to be paid or returned, plus any interest on that amount.³³
- b) Make a consent **determination**.³⁴
- c) Dismiss the matter by finding the contract concerned is not a **construction contract**.³⁵
- d) Dismiss the matter based on the matter being withdrawn.³⁶
- e) Dismiss the matter based on it not having been prepared and served in compliance with the *CCA*.³⁷
- f) Dismiss the matter based on an arbitrator, court or other body making an order, judgement or finding about the matters subject of the **payment dispute**.³⁸
- g) Dismiss the matter having formed a view that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed

³¹Ibid s 31.

³²Ibid.

³³Ibid s 31(2)(b).

³⁴Ibid s 31(2A).

³⁵Ibid s 31(2)(a).

³⁶Ibid s 31(2)(ia).

³⁷Ibid s 31(2)(ii) - 31(2)(iia).

³⁸Ibid s 31(2)(iii).

time (including any agreed extension of time) or for any other reason.³⁹

- h) Not determine or dismiss the matter. In these cases, the matter is taken to have been dismissed at the end of the time allowed for the adjudicator to deal with the matter.⁴⁰

The adjudication process is not a final determination of a payment dispute. Rather, it is envisioned that disputes between parties about their rights and obligations arising under a construction contract will be authoritatively decided by arbitration or other civil proceedings.⁴¹ Any **determinations** made by an adjudicator must be accounted for in those proceedings.⁴² This might include making orders to restore amounts paid on the basis of an adjudication,⁴³ by reducing the amount awarded to one party to offset an amount determined by adjudication⁴⁴ or other orders that may be appropriate in the circumstances.⁴⁵ Where an application for adjudication is dismissed, a person aggrieved may apply to the State Administrative Tribunal for a review of the decision to dismiss the application.⁴⁶ For matters not dismissed initially but taken to be dismissed under section 31(3) because they were not able to be determined within the prescribed time, section 37(2) allows a party to then re-apply within 20 business days to have the **payment dispute** adjudicated.

Otherwise there are no rights to appeal a determination or dismissal of the **pay-**

³⁹Ibid s 31(2)(iv).

⁴⁰Ibid s 32(3).

⁴¹*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 287 [18] (Martin CJ), 312–3 [138] (Buss P and Murphy JA).

⁴²*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 287 [18] (Martin CJ), 312–3 [138] (Buss P and Murphy JA); *Construction Contracts Act 2004* (WA) s 45(4).

⁴³Ibid.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶*Construction Contracts Act 2004* (WA) s 46.

ment dispute.⁴⁷ Nevertheless, an aggrieved party may bring an application for judicial review asserting jurisdictional error⁴⁸ as Samsung C&T Corporation did in this case.

III THE CONSTRUCTION DISPUTES, ADJUDICATION OUTCOMES AND JUDICIAL REVIEW

Samsung C&T Corporation, along with Roy Hill Holdings Pty Ltd was the head contractor for construction of the Roy Hill Iron Ore Project (the Project).⁴⁹ The scope of works included construction of an open cut iron ore mine in the Pilbara, a mine process plant, heavy haul railway system connecting the mine to the port, and new port facilities.⁵⁰ Duro Felguera were engaged by Samsung to perform various works. Between November 2015 and February 2016, disputes arose between Duro Felguera and Samsung with respect to *payment claims* made by Duro Felguera.⁵¹ Samsung rejected some claims and assessed others as requiring it to make no payment. On this basis Duro Felguera sought adjudication under the *CCA*.⁵² On each adjudicated payment claim Duro Felguera was successful. The nett result was five *determinations* requiring Samsung to pay Duro Felguera amounts totalling more than \$60 million.⁵³

Duro Felguera sought orders enforcing the five *determinations*. Samsung sought

⁴⁷Ibid s 46(3).

⁴⁸*Supreme Court Act 1935* (WA) s 16(1)(a).

⁴⁹*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 283 [1]; *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [1].

⁵⁰*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 283 [1].

⁵¹*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 283–4 [2]; *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [1]–[2], [21]–[33].

⁵²Ibid.

⁵³*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 290 [30].

judicial review of the *determinations* made in Duro Felguera's favour. Both applications were heard jointly by the WA Supreme Court.⁵⁴ Samsung argued the adjudicator in each case made errors that were jurisdictional in nature.⁵⁵ The trial judge (Beech J) agreed with Samsung that two of the *determinations* were affected by jurisdictional error and each was set aside.⁵⁶

Duro Felguera was granted leave to enforce the remaining three live *determinations* totalling more than \$20 million.⁵⁷ With respect to each, Beech J concluded that each adjudicator had mistakenly determined payment was owed by Samsung for some works that were excluded from the definition of *construction work* under the *CCA*. In each case though there were also some works within the definition of *construction work*, for which payment was determined. In other words, the disputed payment claims were 'hybrid claims' involving elements of *construction work* and elements of work caught by the 'mining exclusion' at section 4(3) of the *CCA*.⁵⁸

Beech J concluded that each adjudicator's incorrect assessment of *construction works* within each of the three live *payment claims* were not jurisdictional errors⁵⁹ because the scheme of the *CCA* contemplates that *payment claims* can be made that are hybrid in nature.⁶⁰ Accordingly, Beech J declined the orders sought by Samsung to set aside the three live *determinations*.

Beech J then explained a number of principles relevant to when a party can seek judicial review of a *determination* made under part three of the *CCA*. These

⁵⁴ *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016).

⁵⁵ *Ibid* [2].

⁵⁶ *Ibid* [3].

⁵⁷ *Ibid*.

⁵⁸ *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 291 [32].

⁵⁹ *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [335]; *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 295 [47].

⁶⁰ *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [326].

are briefly summarised as follows.⁶¹

- a) Section 46 of the *CCA* provides for circumstances when an adjudication may be reviewed on its merits. Otherwise adjudications are not subject to merits review.⁶²
- b) An adjudication **determination** is not susceptible to judicial review for non-jurisdictional error.⁶³
- c) **Determinations** of **payment disputes** (made under sections 31(2)(a) and 31(2)(b) of the *CCA*) may be challenged by bringing judicial review proceedings asserting jurisdictional error.⁶⁴
- d) An adjudicator makes a jurisdictional error if they determine a matter under section 31(2)(b) of the *CCA* when they should have dismissed the matter under section 31(2)(a).⁶⁵
- e) The power to determine a **payment dispute** under section 31(2)(b) is enlivened once it is established an adjudicator is not required to dismiss the application for any of the reasons given at sections 31(2)(a)(i)-(iv)⁶⁶ – that is, when the adjudicator is not required to dismiss the application because:
 - i the contract concerned is not a **construction contract**;
 - ii the application is withdrawn;
 - iii the application has been incorrectly prepared or served;

⁶¹Ibid [103]–[114].

⁶²Ibid [103]; Section 46 provides a limited right of merits review for parties aggrieved by an adjudicator’s determination to dismiss an application under s 31(2)(a) of the *CCA*.

⁶³Ibid [104].

⁶⁴Ibid [103]–[104].

⁶⁵Ibid [105].

⁶⁶Ibid [106].

- iv an order, judgement or finding has been made about the dispute by an arbitrator, court or other body; or
 - v the adjudicator is satisfied they can not fairly make a **determination** within the prescribed time because of the matter's complexity or other reason.
- f) Jurisdiction to determine an application under section 31(2)(b) is also contingent on whether there is a **payment dispute** within the meaning of the *CCA*.⁶⁷
- g) The categories of jurisdictional error are not closed.⁶⁸ They include an adjudicator:
- i mistakenly asserting or denying the existence of jurisdiction;⁶⁹
 - ii misapprehending or disregarding the nature or limits of their functions or powers;⁷⁰
 - iii purporting to act in circumstances where a jurisdictional fact is not established;⁷¹
 - iv disregarding a matter the statute says must be considered, or considering a matter the statute says must be disregarded;⁷²
 - v misconstruing the nature of their statutory function or the extent of their statutory powers in each case;⁷³ and

⁶⁷Ibid [107].

⁶⁸Ibid [108].

⁶⁹Ibid [109].

⁷⁰Ibid.

⁷¹Ibid.

⁷²Ibid.

⁷³Ibid.

vi breaching procedural fairness requirements when making a determination.⁷⁴

h) It is anticipated adjudicators will make some non-jurisdictional errors.⁷⁵ These include simple misconstruction a **construction contract**, making an error applying the contract terms to the facts or mistaking the facts themselves.⁷⁶ These errors are anticipated because the scheme of the *CCA* is aimed at making **payment dispute determinations** quickly and informally and because **determinations** are payments on account able to be reconciled in a final arbitration or civil proceeding.

In the reasons for decision given on Samsung's Appeal, Martin CJ takes no issue with Beech J's assessment of principles applying to whether an adjudicator has made a jurisdictional error. The majority (Buss P and Murphy JA) also conclude that an adjudicator's decision can be reviewed by the Supreme Court of WA in respect of jurisdictional error⁷⁷ and agree broadly with the principles described by Beech J.⁷⁸

IV ISSUES RAISED ON APPEAL AND THE APPEAL OUTCOME

A Arguments Raised on Appeal

Samsung appealed the decision of Beech J on three grounds.⁷⁹ All members of the Court of Appeal thought it necessary to deal only with Samsung's first and

⁷⁴Ibid [110].

⁷⁵Ibid [112]–[113].

⁷⁶Ibid.

⁷⁷*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 313 [139].

⁷⁸Ibid 313–4 [140]–[144].

⁷⁹Ibid 305 [92].

second grounds to decide the appeal.⁸⁰ Samsung's first ground asserted that on a proper construction of the *CCA* an adjudicator must dismiss any application for adjudication that includes a hybrid *payment claim* for *construction work* and work captured within the 'mining work' exclusion at section 4(3).⁸¹ Samsung's second appeal ground was an alternative to their first ground. It asserts that if an adjudicator does not dismiss a hybrid *payment claim* involving *construction* and mining work, the adjudicator has no jurisdiction to determine that part of the *payment claim* for obligations falling outside of the *CCA* definition of a *construction contract*.⁸² That is, an adjudicator has no jurisdiction to determine that part of the *payment claim* for work caught by the mining work exclusion at section 4(3) of the *CCA*.

Samsung argued with respect to its first ground of appeal the whole of the *CCA* shows a legislative intent that Part 3 adjudication should not proceed with respect to *payment disputes* that include any aspect of claims for payment for work not meeting the obligations described in the definition of *construction contract* under the *CCA*.⁸³ The core propositions underpinning Samsung's argument were:

- a) Part 3 adjudication is aimed at *payment disputes*,⁸⁴
- b) *Payment dispute* is a defined term and (relevant to the facts in *Samsung v Duro Felguera*) has its genesis in the non-payment of a *payment claim*,⁸⁵
- c) A *payment claim* is founded in the *obligations* performed (or not per-

⁸⁰Ibid 289–90 [27]–[28], 296 [50], 305 [92].

⁸¹Ibid 289 [27], 306 [95].

⁸²Ibid 290 [28], 306 [96].

⁸³Ibid 296 [51].

⁸⁴*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 296 [51]; *Construction Contracts Act 2004* (WA) s 30.

⁸⁵*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 296 [51].

- formed) by a party to a **construction contract**;⁸⁶
- d) The **obligations** giving rise to a **payment claim** refers to the definition of **obligations** under the *CCA* which in the case of a contractor's performance or non-performance is those **obligations** described in the definition of a **construction contract**;⁸⁷
- e) A **construction contract** is defined as having one or more of the **obligations** to carry out **construction work** as defined by the *CCA* (in particular noting the exclusion of mining work at section 4 (3) of the *CCA*)⁸⁸ and 'related obligations'⁸⁹ concerning the supply of goods,⁹⁰ professional services,⁹¹ and other site services (such as labour).⁹²
- f) Additionally, section 31(2)(a) supports the proposed jurisdictional limitation by requiring that only payment claims arising under **construction contracts** are adjudicated⁹³ and requiring compliance with section 26(2) so that an application for adjudication includes details of the **payment claim** giving rise to the **payment dispute** and adjudication application.⁹⁴ Samsung argued that the **payment dispute** must be restricted to disputed payments concerning work within the definition of **construction work**.⁹⁵

With respect to the second ground of appeal, Samsung argued that an adjudicator's

⁸⁶Ibid 296–297 [51]–[52].

⁸⁷Ibid.

⁸⁸Ibid 296 [51].

⁸⁹*Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [286]; *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 321–2 [177].

⁹⁰*Construction Contracts Act 2004* (WA) s 3 'construction work' definition paragraph (b).

⁹¹Ibid paragraph (c).

⁹²Ibid paragraph (d), s 5(3)(b).

⁹³*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 296–7 [52].

⁹⁴Ibid.

⁹⁵Ibid.

jurisdiction to determine a *payment dispute* was constrained by limits of a *payment claim* underpinning the dispute.⁹⁶ Samsung argued the *determinations* awarded to Duro Felguera, to the extent they included some amounts attributable to obligations falling outside the obligations listed within the *CCA* definition of a *construction contract* were in excess of the adjudicator's jurisdiction in each case.⁹⁷

B *Martin CJ's Dissenting Judgement*

Martin CJ dismissed Samsung's appeal on both grounds. Briefly summarised, Martin CJ's reasons for dismissing were as follows.

- a) Adjudication can occur if a *construction contract* is one where the contractor is required to perform *construction work*. Adjudication is still permitted if the contract imposes additional non-construction work obligations. That is if it is a contract where the contractor may be required to carry out *construction work* and non-construction work.⁹⁸
- b) Whereas Samsung argued that section 31(2)(a) and section 26 operate together to ensure adjudicators only deal with *payment claims* relating to *construction work*, this is not supported by a contextual reading of those sections. Read in the context of the *CCA* as a whole, section 31(2)(a)(ii) and section 26 merely impose obligations on an adjudicator to determine whether 'requirements of time, form and service' have been satisfied.⁹⁹ They do not go so far as to limit adjudication of *payment disputes* only relating to *obligations* referred to in the definition of *construction contract* under

⁹⁶Ibid 297 [57], 306 [97].

⁹⁷Ibid.

⁹⁸Ibid 287 [16].

⁹⁹Ibid 301 [74].

the *CCA*.¹⁰⁰

- c) Section 31(2)(a) of the *CCA* sets out the conditions that must be satisfied for an adjudicator to have jurisdiction to make a **determination**.¹⁰¹ These do not include a condition that the payment is limited solely to work described in the *CCA*'s definition of **construction contract** or that items of work falling outside the definition of **construction contract** are excluded from the **payment claim**.¹⁰²
- d) It is more practical (and therefore more likely to be correct) to construe the *CCA* as requiring adjudicators to determine whether elements of a contractor's claimed payments were **payment claims** as part of the adjudication process itself and not as a threshold jurisdictional issue.¹⁰³ Meaning that mistakes about these things by an adjudicator are not jurisdictional mistakes and can not be challenged using judicial review.

C *The Majority Judgement*

The majority (Buss P and Murphy JA) dismissed Samsung's first ground.¹⁰⁴ That is, Samsung's contention that any application for adjudication that includes a claim in respect of mining work must be dismissed because a contract that includes mining work obligations can not be a **construction contract** for the purposes of adjudication under the *CCA*.¹⁰⁵ They agreed with the trial judge and Martin CJ that a **construction contract** is one that includes **obligations** described in the definition given at section three

¹⁰⁰Ibid 300–1 [73]–[74].

¹⁰¹Ibid 303–4 [84].

¹⁰²Ibid.

¹⁰³Ibid 304–5 [89].

¹⁰⁴Ibid 308 [109].

¹⁰⁵Ibid.

of the *CCA* and the existence of additional obligations does not mean the contract ceases to be a **construction contract** for the purposes of adjudication under Part 3 of the *CCA*.¹⁰⁶

The majority upheld Samsung's second ground of appeal however.¹⁰⁷ They held the 'language, subject matter, context and purpose' of the *CCA* point to a construction that adjudicators may only make **determinations** settling **payment disputes** as defined.¹⁰⁸ In the majority's view, the scope of what an adjudicator may determine is limited by reference to the **payment claim** giving rise to a **payment dispute**.¹⁰⁹ A **payment claim** relates to **obligations** under the contract where **obligations** is a defined term. It means obligations for a contractor to:

- i perform **construction work** (as defined);¹¹⁰
- ii supply goods related to **construction work**; ¹¹¹
- iii provide professional services related to **construction work**; ¹¹² and to
- iv provide on-site services related to **construction work**. ¹¹³

In the case of a contractor claiming payment for work performed, jurisdiction is accordingly limited to **payment claims** relating to **construction work** performed and 'related obligations' as described by Beech J in *Samsung v Loots*.¹¹⁴ Related obligations was used as a compendious term by Beech J to

¹⁰⁶Ibid 320–1 [174].

¹⁰⁷Ibid.

¹⁰⁸Ibid 321 [175].

¹⁰⁹Ibid 322 [179].

¹¹⁰*Construction Contracts Act 2004* (WA) s 3 definitions of 'obligations' and 'construction contract'; *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [285].

¹¹¹Ibid.

¹¹²Ibid.

¹¹³Ibid.

¹¹⁴*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR

refer to matters listed in sub-paragraphs (b), (c) and (d) above.¹¹⁵

The majority found that Duro Felguera's claims related to some *obligations* to perform *construction work* or related obligations and some claims related to other contract obligations including obligations to perform work that is excluded from the definition of *construction work*. Because the adjudicators had no jurisdiction to award amounts to Duro Felguera for excluded obligations, to the extent they did so, they acted without jurisdiction.¹¹⁶ If those incorrect adjudication determinations could be severed from amounts correctly awarded, Duro Felguera would be able to enforce the validly made portion of the determinations.¹¹⁷ Severance was set aside to be dealt with in the settlement of final orders based on common law principles and the majority's decision in Duro Felguera's appeal (heard concurrently)¹¹⁸ – *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*.¹¹⁹

281, 321–2 [175-178].

¹¹⁵*Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [286]; *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 321–2 [177].

¹¹⁶*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 322 [179].

¹¹⁷*Duro Felguera Australia Pty Ltd v Samsung C&T Corporation and Others* (2018) 52 WAR 323, 349 [101]–[107].

¹¹⁸*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 322 [180].

¹¹⁹*Duro Felguera Australia Pty Ltd v Samsung C&T Corporation and Others* (2018) 52 WAR 323.

V PRACTICAL DIFFICULTIES PRESENTED BY THE
MAJORITY'S TREATMENT OF HYBRID (OR UMBRELLA)
CLAIMS

The nature of Duro Felguera's subcontract with Samsung and the progress claims arising under it highlight an obvious problem. When resources related construction work is performed there will commonly be contract obligations that fall within the *CCA*'s definitions of ***construction work*** and ***construction contract*** and other contract obligations that fall outside of those definitions.

Depending how a resources client or head contractor subcontract packages of work, there may be some contractors who are performing work that wholly meets the definition of ***construction work***. This might include contracts to construct or install roads, port infrastructure, accommodation or general use buildings and power, water and other services. There may be some contractors who perform ***construction work*** that is wholly covered by the 'mining exclusion'.¹²⁰ For example, installation of ore processing facilities or facilities for processing natural gas. And there may be some contractors (like Duro Felguera) who perform a mixture of included and excluded ***construction work***.

How to categorise a ***construction work obligation*** was an issue at the original trial.¹²¹ Duro Felguera submitted that whether a specific item being constructed was related to processing a mineral bearing substance (and therefore excluded from the definition of ***construction work*** by the min-

¹²⁰ *Construction Contracts Act 2004* (WA) s 4(3).

¹²¹ *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [351]–[356].

ing exclusion at section 4(3) of the *CCA*) was one of degree.¹²² The example Duro Felguera gave at trial was from *Re Anstee-Brook; Ex parte Karara Mining*¹²³ and considered whether a pipeline was part of plant used for the purposes of extracting or processing iron ore. Duro submitted the answer depends on whether the function performed by the pipeline is ‘so related to the extraction or processing of ore that it warranted being held to be [part of the extraction] plant’.¹²⁴

Duro Felguera’s ‘degree of connection to mineral processing’ argument was rejected by the original trial judge (Beech J) who favoured a more binary analysis.¹²⁵ The determination of whether the section 4(3) mining exclusion applies to a particular item of work involves determining whether or not the item involves constructing plant for the purpose of processing ore (or oil, natural gas or other substances identified at section 4(3)).¹²⁶ Assessing whether an item involves constructing plant covered by the mining exclusion should have regard to:

- the nature of the construction work and the item being constructed;¹²⁷
and
- the contractual context including the character and purpose of the overall package under which the work is being carried out.¹²⁸

If this analysis reveals that the character and purpose of the item is for processing ore or other relevant substances then the section 4(3) mining

¹²²Ibid [351].

¹²³Quoted in Ibid.

¹²⁴Ibid.

¹²⁵Ibid [352]–[354].

¹²⁶Ibid [354].

¹²⁷Ibid.

¹²⁸Ibid.

exclusion will apply so that the item work is not able to be relied upon to establish the existence of a *construction contract*.¹²⁹

In the case of parties like Duro Felguera who perform a mixture of included and excluded *construction work*, *payment claims* will arise for work performed in each particular period either as an express term of the contract or by implication under Part 2 of the *CCA*.¹³⁰ For reasons that include the following, it can not be assumed that all claims presented are able to conveniently separate *construction work* and non-construction work completed during a period.

- i *Payment claims* may include amounts for additional works, variations, delays, site instructions and other exigencies that arise during the construction of a resources project. Apportioning between *construction work* and excluded work in the circumstances may be practical or it may be very difficult depending upon the circumstances giving rise to those additional non-scoped works.
- ii *Payment claims* may include claims for ancillary costs such as mobilisation / demobilisation of additional staff, vehicles, fuel costs, site services like cleaning or waste removal and site accommodation. Such costs may be averaged across the whole of the works and apportionment between *construction work* and excluded work may be difficult or controversial.
- iii Some contracts and some contractors will be able to record and track the value or progress of works that are *construction works* and ex-

¹²⁹ *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 320–1 [174].

¹³⁰ *Construction Contracts Act 2004* (WA) s 15.

cluded works separately. This becomes a greater problem for smaller contractors though with simpler project control systems and fewer staff. Presumably the same small companies for whom adjudication is an attractive or necessary option.

- iv Apportioning *payment claims* to reflect the value of *construction work* and excluded work may be prone to error, or at least controversy where two parties to the contract disagree over how progress is to be measured.
- v The contract may not permit the contractor to submit two *payment claims* in one period.
- vi The contract may prescribe a process of measurement and reporting progress that does not easily allow for apportioning between work that is *construction work* and work that is excluded work.

Accordingly, there are a number of practical reasons for why parties in dispute over a hybrid *payment claim* might have difficulty presenting clear and uncontroversial evidence on how the *construction work* portion of each claim is to be valued. This presents an obstacle for adjudicators. If they are to perform their function under the *CCA* they must in a short time decide whether they can properly adjudicate the *payment dispute* and then determine payments in a way that avoids jurisdictional error.¹³¹ It is reasonable to predict that potentially complex and disputed evidential material impacting on jurisdiction may result in matters being dismissed for complexity.¹³²

Of course, if this occurs, it is also reasonable to predict some dismissed matters go-

¹³¹Ibid s 31(1).

¹³²Ibid s 31(2)(iv).

ing before the State Administrative Tribunal under section 46 of the *CCA*. Section 46 provides a right of review if an adjudicator dismisses a matter under section 31(2)(a). Section 31(2)(a) requires an adjudicator to dismiss a matter for multiple reasons including if the adjudicator is satisfied the matter is too complex to fairly make a *determination* within the prescribed period of 10 business days.

Whether those matters are then adjudicated will be based on whether the State Administrative Tribunal agrees with the adjudicator's appraisal of the matter's complexity. If the State Administrative Tribunal disagrees with the adjudicator's dismissal the matter is returned to the adjudicator to determine within 10 business days.¹³³ In between there may be opportunities for parties to seek judicial review of any decision made by the State Administrative Tribunal or an adjudicator who ultimately determines the *payment dispute*.¹³⁴ Predictably, at least some parties seeking to use adjudication could find themselves wondering whether the process is really is quick, informal and inexpensive.

The practical difficulties were acknowledged by both the trial judge and the minority appeal judgements.¹³⁵ The majority also acknowledge the inconvenience argument but were not able to determine it was significant enough or commonplace enough to affect their view of the proper construction of section 31(2)(b).¹³⁶

Respectfully though, the majority judgement arguably misapprehends the nature of the inconvenience argument. The argument is not directed so much to the scale or frequency of a particular problem with construction contracts generally but rather how to apply the *CCA*'s stated purpose to properly characterise an

¹³³Ibid s 46(2).

¹³⁴*Supreme Court Act 1935* (WA) s 16(1)(a).

¹³⁵*Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [326]–[338]; *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 294–5 [43]–[48].

¹³⁶*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 321 [176].

adjudicator's jurisdiction to determine *payment disputes*. The undisputed purpose of the *CCA* must be considered when faced with a choice of how to construe an adjudicator's jurisdiction.¹³⁷ The inconvenience arguments acknowledged by Beech J and Martin CJ and adopted by Duro Felguera on appeal go to favouring a construction of an adjudicator's jurisdiction that avoids complex evidentiary and legal arguments during a process which is meant to be quick, informal and aimed at keeping the money flowing through the contracting chain. The inconvenience arguments support a construction that favours certainty for *determinations* by avoiding judicial review processes about potentially forensic evidentiary points relating to individual items and details within *payment claims* which may be disputedly characterised as *construction work*, an *obligation* related to *construction work* or neither. Lastly, the inconvenience arguments go to favouring adjudicators dealing with *payment disputes* under section 31(2)(b) instead of forcing adjudicators to a view that some matters must instead be dismissed due to complexity under section 31(2)(a)(iv).

Of course, the scope to apply the purposive principle depends on whether the terms of *CCA* permit an interpretive choice.¹³⁸ The majority determine there is no interpretive choice because the *CCA* text and context clearly favours a construction that adjudicators act outside of their jurisdiction if they make a *determination* for work not properly characterised as falling with the *CCA*'s definition of *construction contract*.¹³⁹ Conversely the trial judge and Martin CJ construe the act as clearly evidencing no intention to narrow the jurisdiction of an adjudicator in this way and any mistakes made in a *determination* are made within

¹³⁷ *Interpretation Act 1984* (WA) s 18.

¹³⁸ *Van Heerden v Hawkins* [2016] WASCA 42 (10 March 2016) [100] citing *Mills v Meeking* (1990) 169 CLR 214, 235.

¹³⁹ *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 321–2 [175]–[179].

jurisdiction.¹⁴⁰

On this basis, it would appear there may be scope for the purposive principle to influence a future view that the errors complained about by Samsung were not jurisdictional errors. It is far from certain that such an argument would be ultimately successful however. The plain definition of *obligations* at section three and its limiting effect on the meaning of payment claim (which Martin CJ correctly stated gave rise to the issues in Samsung's appeal)¹⁴¹ poses a difficulty for arguing against the majority's decision in future cases.¹⁴²

VI IMPLICATIONS FOR PARTIES TO CONSTRUCTION CONTRACTS

In light of the majority decision in *Samsung v Duro Felguera*, and some of the practical difficulties recognised by the original trial judge and minority judgement, parties to hybrid *construction contracts* involving included and excluded *construction work*, may need to take a number of practical steps if they wish to preserve an ability to seek adjudication under Part 3 of the *CCA*.

Firstly, when negotiating contracts, it will be preferable that a party wishing to preserve operation of the *CCA* adjudication protects their ability to make multiple *payment claims* in a period. That is, preserving an ability to bring a payment claim covering included *construction work* and a separate payment claim cov-

¹⁴⁰*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 300 [72]; *Samsung C&T Corporation v Loots* [2016] WASC 330 (14 October 2016) [335].

¹⁴¹*Samsung C&T Corporation v Duro Felguera Australia Pty Ltd and Others* (2018) 52 WAR 281, 289 [26].

¹⁴²At the time of writing the Western Australia Government has commissioned a review into the operation of the *CCA*. It is not known whether the review will recommend changes to the definition of 'obligations' at section 3. If changes are contemplated the issues of purposive construction could become a live issue unless a revised act clearly settles the questions of when an adjudicator is acting within or outside of their jurisdiction when dealing with hybrid claims.

ering excluded construction work. Secondly, parties should identify whether each contractual *obligation* relates to included or excluded *construction work* and then specifically record the compensation payable for meeting each included and excluded *obligation*. In some cases, it may be clearer to have separate contracts or separable contract portions covering each activity. Thirdly, consideration needs to be given to how contracts are administered so that evidence and records of included *construction work* can be presented clearly in support of disputed *payment claims*. Fourthly, applications for adjudication should be prepared so they present a straightforward path for adjudicators to determine the claim is within jurisdiction within the short time frame allowed for adjudication to be conducted. This may require a party to leave out disputed amounts relating to potentially excluded work or itemise the claim in such a way that an adjudicator is able to make findings about the value of excluded work and sever that portion of the payment claim from any award made. Payment amounts relating hybrid items such as mobilisation costs and overheads should also be considered to permit adjudication of an identifiable amount that does not relate to excluded work.

VII CONCLUSION

The decision of the Court of Appeal in *Samsung v Duro Felguera* has made adjudication of some construction *payment disputes* more complex. For the most part, complexity will arise with regard to evidentiary matters. That is, a party seeking adjudication will bear an onus to demonstrate how their *payment claim* relates to the definition of construction work under the CCA and whether items subject of the claim is included or excluded from the CCA's definition of *construction work*. Bearing in mind the short time frame in which an adjudicator must be able to make a fair decision, it will be important for parties to *construction con-*

tracts to give consideration to contract set-up, contract administration and claims processes in ways that support a straightforward determination of claims if those parties wish to preserve recourse to adjudication under Part 3 of the *CCA*. Matters that go before adjudicators with apparent uncertainty over jurisdictional matters may be dismissed at an early stage based on an adjudicator's view they will not be able to fairly determine the matter within the short time frame provided for by the *CCA*.