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EDITORIAL

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ARTICLES

Why the sound and fury? Enforcing security of payment adjudication determinations – *Brian Mason*

The security of payment legislation in each State and Territory permits the enforcement of unpaid adjudication determinations as a judgment debt. The Full Court of the Federal Court upheld the constitutional validity of this arrangement in *New South Wales legislation in Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25, finding that it did not engage the Kable principle because it was compatible with the institutional integrity and independence of that State's Supreme Court as a body vested with federal judicial power. This article argues that, despite that decision's authoritative nature, it is difficult to reconcile the Full Court's reasons with the High Court's Kable principle jurisprudence. It analyses three reasons for this, and each reason concerns the nature and exercise of judicial power. Construction lawyers should therefore retain lingering doubts about the constitutional validity of the arrangements in some States' legislation for recovering unpaid security of payment adjudication determinations as a judgment debt. 372

The availability of liquidated damages following determination of the construction contract – *Rohan Havelock*

Liquidated and ascertained damages provisions are commonplace in commercial construction contracts. Their purpose is to protect the employer in the event of delay in completion of the contract works, and to incentivise performance by the contractor. Liquidated damages ordinarily cease accruing upon the completion of the contract works. However, suppose the employer determines the contract as a result of prolonged delay by the contractor, and engages another contractor to complete the works. May the employer still claim liquidated damages against the contractor up until the time of completion? The case law and academic commentary on this issue are scarce. The purpose of this article is to analyse the practical and legal implications of this situation, and in particular to examine the legitimacy of the common law rule denying recovery in light of orthodox contractual principles. A comparative analysis of the way in which major standard form construction contracts address this issue is also undertaken. 385

An examination of the independent certification processes of a construction contract – Michelle Backstrom

Construction contracts often provide that the decision of an independent certifier is final and binding. The effect of a contractual term like this has been debated in the courts over time. This article considers the binding nature of certificates in the context of traditional construction contract arrangements and also considers the implications for more complex contracts like those entered into to facilitate public private partnerships. This article considers the response of the courts and the drafting implications, and argues that a different focus would be advantageous. 406

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