SUPREME COURT OF QUEENSLAND

CITATION:	*S.H.A. Premier Constructions Pty Ltd v Lanskey Constructions & Ors* [2019] QSC 81
PARTIE:	**S.H.A PREMIER CONSTRUCTIONS PTY LTD** ACN 056 777 318 (applicant) **v** **LANSKEY CONSTRUCTIONS PTY LTD** ACN 010 636 512 (first respondent) **THE ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** (second respondent) **PAUL JASON HICK** (third respondent)
FILE NO/S:	No BS1485 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2019
JUDGE:	Boddice J
ORDER:	**1. The application is dismissed.** **2. I shall hear the parties as to any other orders and costs.**
CATCHWORDS:	BUILDING AND CONSTRUCTION – AUSTRALIA – BUILDING AND CONSTRUCTION CONTRACTS IN AUSTRALIA – VARIATIONS – GENERALLY – where the applicant seeks an order declaring void two adjudication decisions made by the third defendant and other ancillary or alternate relief – where adjudication decisions relate to two different projects but involve identical parties, and an identical ground to challenge each decision, namely, that each payment claim is invalid by reason of containing claims relating to more than one construction contract – whether the payment claims contained claims for work under different construction contracts or were variations *Building and Construction Industry Payments Act 2004* (Qld)

Building Industry Fairness (Security of Payment) Act 2017 (Qld)
Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85
Commonwealth of Australia v Verwayen (1990)107 CLR 394
Low v MCC Pty Ltd & Ors [2018] QSC 6
Matrix Projects (Qld) Pty Ltd . Luscombe [2013] QSC 4
Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6

COUNSEL: M Ambrose QC for the plaintiff
T Matthews QC, with S Whitten for the defendant

SOLICITORS: Thomson Geer for the plaintiff
CDI Lawyers for the defendant

[1] By originating application, filed 12 February 2019, the applicant seeks an order declaring void two adjudication decisions made by the third defendant and other ancillary or alternate relief. The adjudication decisions were issued at the request of the first respondent. The second respondent has responsibilities in relation to them.

[2] The adjudication decisions relate to two different projects but involve identical parties, and an identical ground to challenge each decision, namely, that each payment claim is invalid by reason of containing claims relating to more than one construction contract.

[3] The first respondent opposes the granting of relief in favour of the applicant. The first respondent contends the decisions related to claims in respect of a variation of a construction contract, not claims relating to more than one construction contract.

[4] The second and third respondents do not actively participate in the dispute. Each has indicated an intention to abide the order of the Court, save as to costs. The applicant has indicated no costs will be sought against either the second or third respondents.

Background

[5] The applicant is a national petroleum company. As part of its ongoing development it simultaneously engaged the first respondent, an experienced building contractor in commercial and infrastructure projects, in respect of the design and construction of petrol stations at various locations in Queensland and Victoria. Each project was the subject of a separate contract entered into between the parties.

[6] The adjudication decisions, the subject of the present application arise out of payment claims made in respect of construction contracts for petrol stations at Yeppoon and Carrara. Those payment claims received responses by way of a payment schedule, scheduling payment in the amount of Nil.

[7] Each adjudication decision was in favour of the first respondent. Those adjudication decisions have not been complied with, although subsequent to the giving of

undertakings, the applicant paid into court the full amount of each adjudication decision together with interest and the adjudicator's fees pending determination of the application.

Contract

[8] The general terms and conditions of each contract were essentially the same. Relevantly, those contracts included a clause in respect of variations in the following terms:

> "**36 Variations**
>
> **36.1 Directing Variations**
>
> The *Contractor* shall not vary *WUC*, except as directed in writing.
>
> The *Superintendent*, before the *date of practical completion*, may director the *Contractor* to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the *Contract* (including being within the warranties and subclause 2.2):
>
> (a) increase, decrease or omit any part;
>
> (b) change the character, quality, sequence of timing;
>
> (c) change the levels, lines, positions or dimensions;
>
> (d) carry out additional *work*;
>
> (e) demolish or remove material or *work* no longer required by the *Principal*;
>
> No variation shall invalidate the *Contract*.
>
> The items referred to above in the *Contract* as a variation do not constitute a *variation* if, in the reasonable opinion of the *Superintendent*, such items form part of the *WUC*."
>
> **36.2 Proposed Variations**
>
> The *Superintendent* may give the *Contractor* written notice of a proposed *variation*.
>
> The *Contractor* shall as soon as practicable after receiving such notice, notify the *Superintendent* whether the proposed *variation* can be effected, together with, if it can be effected, the *Contractor*'s estimate of the:
>
> (a) effect of the *program* (including the *date for practical completion*); and
>
> (b) cost (including all warranties and time-related costs, if any) of the proposed *variation*.
>
> The *Superintendent* may direct the *Contractor* to give a detailed quotation for the proposed *variation*, supported by measurements or other evidence of cost.
>
> The *Contractor* acknowledges and agrees that it is not entitled to claim any additional cost or expense, any adjustment to the *contract sum* or to claim an *EOT*

to the *date of practical completion* or to make a claim *otherwise at law*, arising out of or in connection with complying with this clause.

36.2A Directions constituting a variation

If the *Contractor* considers that any direction from the *Superintendent* constitutes a *variation*, it must give notice to the *Superintendent* within 5 *business days* of receiving that direction.

The *Contractor* acknowledges and agrees it will not be entitled to additional costs or expense, any adjustment to the *contract sum* or to claim an *EOT* to the *date for practical completion* or to make a claim *otherwise at law* arising out of or connection with any *direction* if it fails to comply with the requirements set out in this clause **36.2A**.

36.3 Variations for convenience of contractor

If the *Contractor* requests the *Superintendent* to direct a *variation* for the convenience of the *Contractor*, the *Superintendent* may do so. The *direction* shall be written and may be conditional. Unless the *direction* provides otherwise, the *Contractor* shall be entitled to neither extra time or extra money.

36.4 Pricing

The *Superintendent* shall, as soon as possible, price each *variation* using the following order of precedence:

(a) prior agreement;

(b) applicable rates or prices in the Contract;

(c) rates or prices in a *schedule of rates* or schedule of prices, even though not *Contract* documents, to the extent that it is reasonable to use them; and

(d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the *contract sum*."

[9] Clause 1 of each contract contained definitions, including:

- ***Direction***, "includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejections, request or requirement".

- ***Superintendent,*** "means the person stated in *Item 5* as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the *Contractor* by the *Principal* and, so far as concerns the functions exercisable by a *Superintendent's Representative*, includes the *Superintendent's Representative*."

- ***the Works***, "means the whole of the *work* to be carried out and completed in accordance with the *Contract*, including variations provided by the *Contract*, which by the *Contract* is to be handed over to the Principal".

- ***WUC (from "work under the Contract")***, "means the work which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, remedial *work, construction plant* and *temporary works* and all things necessary or incidental to the *Works* and the performance by the *Contractor* of its obligations under the *Contract* whether or not specifically referred to in the *Contract*."

  In the Contract:

  … (c) clause headings and subclause headings shall not form part of, not be used in the interpretation of the Contract.

[10] Other relevant provisions from each contract were clauses 2.1 and 20.

[11] Clause 2.1 related to performance and payment. It provided:

> "The *Contractor* shall carry out and complete the *WUC* in accordance with the *Contract* and *directions* authorised by the *Contract*.
>
> Subject to compliance by the *Contractor* with its obligations under the *Contract*, the *Principal* shall pay the *Contractor* the *contract sum* adjusted by any additions or deductions made pursuant to the *Contract*."

[12] Clause 20 provided:

> "The *Principal* shall ensure that at all times there is a *Superintendent* for the purpose of the *Contract*.
>
> The *Principal* shall endeavour to ensure that the *Superintendent* performs honestly and fairly its functions under clause 34.3 (assessment of *ETOs*), clause 34.6 (issue of the *certificate of practical completion*), clause 36.4 (pricing of *variation*), 37.2(a) (pricing of progress certificates), clause 37.4 (issue of *final certificate*) and in making cost assessments.
>
> The *Superintendent* may carry out its functions under the Contract (other than those referred to in the paragraph above:
>
> a) as agent and representative of the *Principal*; and
>
> b) in accordance with instructions given to it by the *Principal* (acting in its absolute discretion unless the *Contract* expressly requires otherwise).
>
> If, under the *Contract*, the *Superintendent* gives a direction, the *Contractor* shall comply with that *direction*.
>
> Except where the *Contract* otherwise provides, the *Superintendent* may give a *direction* orally but shall as soon as practicable confirm it in writing. If the *Contractor* in writing requests the *Superintendent* to confirm an *oral direction*, the *Contractor* shall not be bound to comply with the *direction* until the *Superintendent* does so."

Legislative regime

[13] Each adjudication decision was issued pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) (***"Payments Act"***). Its successor, the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) contains transitional provisions relating to claims commenced before its commencement. By those provisions, the *Payments Act* continues to apply with respect to the obtaining and enforcing of an adjudication decision, in relation to claims issued prior to the commencement of the new Act.

[14] Relevantly, the *Payments Act* contained provisions in respect of payments under a "construction contract", which was defined in schedule 2 of the *Payments Act* as meaning "a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."

[15] Section 12 of the *Payments Act* provided a right to claim a progress payment. The process for progress claims was dealt with in s 17 of the Act. Relevantly, it provided:
"

> (1) A person mentioned in section 12, who is or claims to be entitled to a progress payment (the ***claimant***), may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).
>
> (2) A payment claim –
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and
>
> (c) must state that it is made under this Act.
>
> (3) The claimant may include any amount –
>
> (a) that the respondent is liable to pay the claimant under section 33(3); or
>
> (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
>
> (4) A claimant can not serve more than one payment claim for each reference date under the construction contract, but may include in any payment claim an amount that has been the subject of a previous claim."

[16] In *Matrix Projects (Qld) Pty Ltd . Luscombe,*[1] Douglas J upheld a submission that ss 12 and 17 of the *Payments Act* had the effect that a payment claim, to be valid, must relate only to one construction contract. In doing so, His Honour found the reasoning of McDougall J in *Rail Corporation of NSW v Nebax Constructions* persuasive and a conclusion with which His Honour agreed:

---

[1] [2013] QSC 4 at [17].

> "It seems to be that, because sections 13(5) [section 17(5) of the *Payments Act*] prevents (with a presently irrelevant exception for which subsection 6 provides), the service of more than one payment claim, per reference date, per construction contract, and because the right to adjudication of the "payment claim" is clearly referrable to a payment claim that complies with the various requirements of section 13 [section 17], there can only be only one adjudication claim for any particular payment claim for any particular contract."[2]

[17] Douglas J held, after finding as a matter of fact, that the payment claim in issue contained work undertaken pursuant to two different contracts, "accordingly the payment claim made cannot be described as one being made under a single construction contract, whether the relationship be described more generally as an arrangement or not. Therefore the variety of difference types of contract for construction work relied upon in the payment claim is fatal to its validity."[3]

Adjudicator's decision

Carrara contract

[18] The adjudicator found the works identified in the payment claim were carried out pursuant to work orders issued by the applicant. There was no expressed intention on the parties to enter into a multitude of separate agreements. The work performed was properly regarded to be variations under the contract. The payment claim was not invalid for claiming amounts payable under multiple construction contracts.

[19] Whilst those work orders did not strictly follow the procedures required for a variation of the contract, the conduct of the applicant in giving a verbal direction to carry out the additional works and, subsequently, issuing a work order in respect of those additional works, rendered the work analogous to a variation of the works under the contract.

Yeppoon contract

[20] The adjudicator found the contents of email communications between 23 February 2018 and 16 June 2018, supported a conclusion that the work, the subject of the payment progress claim, constituted a variation to the contract works. An email from the respondent of 20 March 2018 constituted a direction for a variation under clause 36.1, and the relevant works were carried out pursuant to that direction. The work in question was not a separate agreement. Accordingly, the payment claim was valid.

Submissions

[21] Both the applicant and the first respondent accept that the contracts involved construction work and that the reasoning of Douglas J in *Matrix Projects*, is apposite if, as a matter of fact, the payment claims in dispute contain work undertaken pursuant to several construction contracts.

[22] The applicant and the first respondent also accept that the adjudication process is properly the subject of judicial oversight.[4] The sole issue in dispute between the parties

---

[2] [2012] NSWSC 6 at [44].
[3] [2013] QSC 4 at [20].
[4] *Low v MCC Pty Ltd & Ors* [2018] QSC 6 at [8].

is whether the payment claims contained claims for work under different construction contracts.

[23] The applicant submits that each work order in respect of the Carrara contract constituted a separate and distinct contract. Each related to works, not the subject of the contracted works. None were specifically issued by the designated superintendent of the contract, as required for a variation under the contract. Each contained its own terms and conditions which significantly differed from the terms of the Carrara contract.

[24] The applicant submits the Yeppoon works also constituted a separate contract. It related to work specifically excluded from the contract works. There is no evidence it was ordered by the superintendent of that project. Accordingly, there is no basis upon which it can be said the Yeppoon work constituted variations in accordance with clause 36. That is the only basis upon which a variation can arise under either contract.

[25] The first respondent submits a proper interpretation of the work orders and of the email correspondence in respect of the Yeppoon contract, is that they represented variations within the provisions of clause 36 of those contracts. There is no evidence there was an intention to create legal relations in terms of each of the work orders, or the emails communication in respect of the Yeppoon project. Each related to works added on to the original contract. All works related to each respective project.

[26] Alternatively, the first respondent submits that, to the extent the work orders create different contracts, the terms regarding payment offend the *Payments Act* provisions. Further, the claims of separate contracts have been made late in the proceedings in an effort to delay payment and deny the first respondent the benefit of the *Payments Act*. In those circumstances, the Court ought to decline, in the exercise of its discretion, to grant the relief sought by the applicant.

Evidence

[27] The payment claim in respect of the Carrara project related to six documents being:

(a) CV14 – Work order 187753;

(b) CV16 – Work order 188701;

(c) CV17 – Work order 188728;

(d) CV21 – Work order 188731;

(e) CV26 – Work order 189487; and

(f) CV30 – Work order 190375.

[28] Each work order related to different specified works. None of those works form part of the contracted scope of the Carrara project. Each work order dealt with works which has been the subject of various quotes by the first respondent. Each contained its own of terms and conditions.

[29] The work orders arising out of the Carrara project contained common elements. First, the work order was not designated as a variation to the contracted work. Second, neither the work order nor the relevant contract in respect of the work, designated that it was issued by the superintendent under the Carrara contract. Third, there was no written acceptance of the work order. Acceptance occurred by conduct in respect of each work order.

[30] The payment claim in respect of the Yeppoon project was not the subject of a specific work order. It arose out of the contents of email communications in respect of external roadworks that did not form part of the contracted scope of works.

[31] Those email communications included:

(a) An email from Alexey Davydov (on behalf of the first respondent) to Konrad Szczepaniak (on behalf of the applicant) on 23 February 2018 in which the applicant's approval was sought for the first respondent to proceed with a detailed survey in relation to particular roadworks, the subject of a development approval condition.

(b) A response email from Szczepaniak on 23 February 2018, advising that as the applicant was considering the layout of the site, the applicant requested the first respondent not proceed with the proposal;

(c) An email from Davydov on 26 February 2018, confirming the first respondent would not proceed any further at that stage, but noting the topic would have to be revisited;

(d) An email of 20 March 2018, sent by Konrad Szczepaniak to Alexey Davydov, and copied to Guy Butler and others, in the following terms:

> "Alexey, Guy
>
> In the meeting yesterday between United and Paul/Ross, it was agreed to proceed with the road survey at $1, 200. Paul and Ross also indicated that your consultant will assess the layout in light of the DA conditions pertaining to the road free of charge. Please proceed with the survey, I will issue a work order later this week. Please confirm the actual cost.
>
> With regards to meeting the DA conditions, the objective is to attempt to accommodate them within the existing road, if possible, as per my earlier advice."

(e) An email from the first respondent to the applicant on 1 June 2018, containing a revised cost estimate for the roadworks, the subject of the approval contained in the email of 20 March 2018.

(f) An email from the applicant to the first respondent on 16 June 2018 advising the applicant, having recently received the quotations, had decided not to proceed with the project at that time.

Discussion

Objections

[32] At the commencement of the hearing, I reserved the question of the admissibility of evidence sought to be led by the first respondent as to the conduct of the applicant in other projects. Having considered that material, I am satisfied it is not relevant to a determination of whether the works in dispute constituted variations to the contract works. I uphold the applicant's objection to the admission of that evidence.

Carrara contract

[33] Each of the work orders in dispute was addressed to the first respondent, identified the site address as Carrara and gave as a description of the works, a description referenced back to an earlier quotation submitted by the first respondent for that work. Each work order contained the words "Construction Quote Approved".

[34] Whilst none of the work orders identified as having been approved by the superintendent of the project, early in the Carrara project there was an exchange of communications by email between Manfred Bretterecker, on behalf of the applicant and Joanna Szweda, a project manager in the employ of the first respondent.

[35] Those email communications were in relation to markups to the drawings of the project. The first email, sent on 29 August 2017 from Bretterecker to Szweda, attached the markups. By email, dated 30 August 2017, Szweda responded:

> "Hi Manfred,
>
> We have noticed some changes like additional freezer room therefore are we to proceed on this basis or is this subject to variation approval".[5]

[36] Bretterecker sent an email dated 30 August 2017 to Szweda. The email, headed "Subject re: Carrara markups", was in the following terms:

> "Design should continue on the drawings marked up
>
> Should this result in a cost or time impost pls submit a variation which will be processed in the normal manner.
>
> Work orders will be raised on all approved variations.
>
> No work to proceed without work orders." [6]

[37] According to Graham Bell, the commercial manager of the first respondent, Bretterecker, was the applicant's superintendent for the Carrara project, until Simon Crow took over as superintendent in or about June 2018.

[38] Bretterecker's email of 30 August 2017, is significant for three reasons. The words "work orders will be raised on approved variations" and "no works to proceed without work orders", are consistent with a general direction in relation to variations on the Carrara project. Second, that general direction was given by the superintendent of that

---

[5] Affidavit of G Bell, filed 1 March 2019, p 150.
[6] Affidavit of G Bell, filed 1 March 2019, p 150.

project. Third, the project was conducted thereafter in accordance with that direction. That practice was entirely consistent with the direction given by the superintendent at the commencement of the project. There is no suggestion that direction was ever revoked when the superintendent changed in June 2018.

[39] In those circumstances, each work order is properly seen as confirmation of an approved variation pursuant to a direction given by the superintendent of the project, namely, that all approved variations would be the subject of work orders and that no work was to proceed without work orders.

[40] There is no basis for the applicant's contention that each work order represented a separate contract. Each work order was an approved variation. There was no error on the part of the adjudicator in determining the adjudication decision on the basis that each of the work orders constituted an approved variation of the Carrara contract.

[41] Even if I be wrong in my conclusion that the email from Bretterecker dated 30 August 2017 constituted a general direction from the superintendent of the Carrara project, the conduct of the parties, in respect of the undertaking of additional work for the Carrara contracts is consistent with a conclusion that the additional works undertaken pursuant to each work order, properly constituted variations to the contract, as the applicant, by its conduct, waived the requirement for strict compliance with the variation provisions in clause 36 of the contract.

[42] Waiver has been considered recently by Flanagan J in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd.*[7] Flanagan J adopted the following observations of Hammerschlag J in *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd*:

> "A party may expressly or impliedly give up its right to insist on a contractual condition: see the *Commonwealth of Australia v Verwayen*. On the evidence the referee found that that is what the plaintiff had done. By its conduct throughout it had waived a right to insist on strict performance of the conditions of the Contract with respect to the making of claims generally, which included waiving its right to insist on performance of the particular formal requirements in respect of the delay claim [citations omitted]."[8]

[43] The reference to *Commonwealth of Australia v Verwayen*, was to the judgment of Mason CJ, stating:

> "According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a matter inconsistent with that right. However, the better view is that, apart from estoppel and new agreement, abandonment of a right occurs only where the person waiving the right is entitled to alternative rights inconsistent with one another, such as the right to insist on performance of a contract and the right to rescind for essential breach [citations omitted]."[9]

---

[7] [2017] QSC 85 at [789].
[8] [2008] NSWSC 1163 [110].
[9] (1990) 107 CLR 394 at [406]-[407].

[44] The conduct of the applicant throughout the course of the Carrara project was to adopt the practice directed at the commencement of the project by its superintendent, namely, to issue work orders in respect of approved variations. Against that background the applicant waived its entitlement to subsequently insist on strict performance of the terms of clause 36 in respect of variations to the contractual work.

Yeppoon contract

[45] Having considered the email trail between the parties, between 23 February 2018 and 16 June 2018, in the context of other surrounding material, the adjudicator correctly determined the email of 20 March 2018 constituted a direction for a variation under the contract.

[46] The applicant's email of 23 February 2018 did not direct the first respondent to cease all work. The applicant intended the first respondent to continue to make enquiries with respect to the requirements for the roadworks. No additional costs were to be incurred until confirmation and further direction was received from the applicant. That further direction was given by email of 20 March 2018. The relevant works, the subject of the payment claim, were carried out pursuant to that direction. The works performed were a variation to the contract and properly the subject of a valid payment claim.

[47] The applicant's conduct in respect of the approval of the additional work on the Yeppoon contract constituted a waiver of its right to subsequently insist on strict performance of the terms of clause 36 of that contract.

Conclusion

[48] None of the work orders, the subject of the Carrara project, constituted separate contracts. Each was an approved variation. The adjudication decision did not involve multiple claims for work under separate contracts. The adjudicator did not lack jurisdiction. The adjudication decision was not invalid.

[49] The work, the subject of the adjudication decision in respect of the Yeppoon project, constituted a variation of the contract works. The adjudication decision did not involve a progress claim in respect of a separate contract. The adjudication did not lack jurisdiction. That adjudication decision is not invalid.

Orders

[50] The application is dismissed.

[51] I shall hear the parties as to any other orders and costs.