SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Building Insurance Services Pty Ltd v CGU Insurance Limited* [2020] QCA 121
PARTIES:	**AUSTRALIAN BUILDING INSURANCE SERVICES PTY LTD** ACN 162 498 599 (applicant) **v** **CGU INSURANCE LIMITED** ABN 27 004 478 371 (respondent)
FILE NO/S:	Appeal No 3110 of 2019 DC No 4368 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 18 (Koppenol DCJ)
DELIVERED ON:	5 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2019
JUDGES:	Fraser and Philippides JJA and Crow J
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. The orders of the District Court dismissing the appellant's claim and awarding judgment for the respondent be set aside and, in lieu thereof, judgment for the appellant in the amount of $242,032.14 be entered.** **4. Unless the parties file submissions as to costs within 14 days of the publication of these reasons, not to exceed four A4 pages in length, the respondents are to pay the appellant's costs of and incidental to the appeal and the proceeding below on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the District Court dismissed the applicant's claim as plaintiff against the respondent for interest at the statutory penalty rate pursuant to s 67P of the *Queensland Building Services Authority Act*

1991 (Qld) ("QBSA Act") – where the respondent did not advance any basis upon which to oppose leave to appeal and the hearing proceeded on the merits of the proposed appeal – whether the application concerns issues of statutory interpretation of general significance to those involved in contracting for building services and raises an arguable case – whether leave to appeal should be granted

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – NOVATION AND ASSIGNMENT – where the appellant purchased a building insurance claims repair work business from the seller, which was supplier of repair work services to the respondent pursuant to a supplier agreement – where there were various incomplete insurance repair jobs under the supplier agreement when the business was sold – where the seller consented in writing to the assignment of its interest in the supplier agreement to the appellant and the respondent also consented to the assignment – where the respondent accepted that the assignment of the seller's rights and obligations effected a novation of the supplier agreement – where the appellant, following novation, completed all incomplete repair jobs and subsequently issued invoices totalling $601,896 which were paid by the respondent, some of which were delayed – where the appellant, before the District Court, claimed statutory penalty interest consequent on the late payment of the invoices pursuant to s 67P of the QBSA Act, on the basis that the appellant was the "contracted party for a building contract" within the meaning of that section – where the primary judge held that the appellant was not a "contracted party" – whether the primary judge erred, as a matter of statutory construction, in failing to find that the appellant was a "contracted party" within the meaning of s 67P – whether, in the alternative, the primary judge erred in concluding that there was insufficient evidence to support an award of penalty interest in the quantity claimed by the appellant by distinguishing the value of the building work performed before and after the novation of the supplier agreement

Building and Construction Industry Payments Act 2004 (Qld), s 10, s 12, sch 2
Queensland Building Services Authority Act 1991 (Qld), s 67(1), s 67A, s 67AAA, s 67P, sch 2

Ball Construction Pty Ltd v Conart Pty Ltd [2014] QSC 124, distinguished
Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd [2009] NSWSC 320, cited
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In Liq) (2019) 99 NSWLR 317; [2019] NSWCA 11, cited
Younan v Queensland Building Services Authority [2011]

QCA 1, cited

COUNSEL: S Couper QC, with P Travis, for the applicant
A Morris QC, with A Harding, for the respondent

SOLICITORS: Axia Litigation Lawyers for the applicant
MCK Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

[2] **PHILIPPIDES JA:**

The application for leave

[3] This is an application for leave to appeal from a decision of the District Court, which dismissed the applicant's claim as plaintiff against the respondent for interest at the statutory penalty rate pursuant to s 67P of the *Queensland Building Services Authority Act* 1991 (Qld) (the Act)[1] in the amount of $242,032.14 on late progress payments.

[4] The issue raised concerns about whether the primary judge erred in holding the applicant was not a "contracted party" for "a building contract" within the meaning of s 67P(1)(a) of the Act in respect of building work performed prior to a novation of a building contract. A consequential issue as to quantification is raised if the applicant succeeds on the statutory construction issue.

[5] The respondent did not advance any basis upon which to oppose leave to appeal and the hearing proceeded on the substantive merits of the proposed appeal. The application concerns issues of interpretation of statutory provisions of general significance to those involved in the contracting for building services and raised an arguable case for the reasons that follow.[2] It is therefore appropriate that leave be granted.

Background

[6] The primary judge summarised the relevant factual background as follows:[3]

> "In mid-2013, the [appellant] purchased from IW & CA Price Constructions Pty Ltd (**Price Constructions**) its building insurance claims repair work business (**BIRS Queensland**). At that time, the business was the supplier to the [respondent] (under a preferred supplier agreement) of various insurance-related property assessment, reinstatement and repair services. Price Constructions consented in writing to the assignment to the [appellant] of the former's interest in the supplier agreement. The [appellant] delivered that consent to the [respondent] and requested its consent to the assignment. On 30 June 2013, the [respondent] informed the

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1 This Act has subsequently been renamed the *Queensland Building and Construction Commission Act* 1991 (Qld). The version of the Act that applied to the contractual relationships between the parties was the *Queensland Building Services Authority Act* 1991 (Qld).

2 See, for example: *Younan v Queensland Building Services Authority* [2011] QCA 1 at [7].

3 *Australian Building Insurance Services Pty Ltd v CGU Insurance Limited* [2019] QDC 18 ("Reasons") at [5]-[6].

> [appellant] that the [respondent] consented to the assignment to the [appellant] of Price Constructions' rights and obligations under the supplier agreement.
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> On 1 July 2013, settlement of the sale of the business from Price Constructions to the [appellant] was effected. At that time, there were various incomplete insurance repair jobs that Price Constructions had commenced but not completed. The [appellant] subsequently finished the incomplete jobs (and also started and finished various new jobs) and the [respondent] paid all of the issued invoices totalling $601,896.09. However, some payments were delayed until the Supreme Court declared (*IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Ors* [2017] QSC 39) that the party entitled to the payments for the work done by Price Constructions was the [appellant]."

[7] It was accepted[4] by the respondent that the assignment of Price Constructions' rights and obligations under the supplier agreement effected a novation of the supplier agreement.

[8] Pursuant to cl 2 of the supplier agreement, the novated supplier agreement operated as a "master agreement" between the appellant and the respondent, which appointed the appellant as a preferred supplier, constituted a standing offer from the appellant as "supplier" to provide "services" to the respondent and set out the overarching terms and conditions applying to the provision of such services. The primary judge set out the processes and procedures as to service orders being placed by the respondent:[5]

> "The [respondent] prepares a service order (2.2) which it enters into with the supplier (6.1(a)) and requests the supplier to supply services (6.2(a)). A service order is an agreement between the [respondent] and the supplier for the supplier to provide services (the insurance-related property assessment, reinstatement and repair services and any service order (1.1 'Services')) under the supplier agreement" (1.1 "Service Order"). If the supplier does not reject the request within 60 minutes (6.2(b)(i)), the services request is deemed to have been accepted and a binding service order formed (6.2(b)). The supplier then proceeds to carry out the services specified (6.3) and achieve or exceed prescribed service levels or standards (7.1, 17.1) and fix any defects (22). The parties agree that in consideration of the services, the [respondent] will pay the supplier the fees (9.1(a), 1.1 'Fees') for the services in respect of which the supplier will invoice the defendant within 7 days of the completion of the work (9.2(a)). The defendant must pay all invoices (except disputed invoices (9.3)) within 14 days of receipt of a valid tax invoice (9.2(e)). If the [respondent] disputes any fees on an invoice, it must advise the supplier within 21 days and each party must use its best endeavours to resolve the dispute (9.3)."

[9] The invoices issued under cl 9 of the novated supplier agreement for $601,896.09 were for payment of the total contractual value of the building work performed,

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4 Reasons at [18].

5 Reasons at [10].

including work performed but not completed by Price Constructions prior to the 1 July 2013 novation date and works undertaken by the appellant.[6]

Relevant statutory provisions

[10] Before turning to the primary judge's approach, it is useful to set out the relevant provisions. Firstly, section 67P of the Act provides as follows:

> "**67P Late progress payments**
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> (1) This section applies if—
>
> (a) the contracting party for a building contract is required to pay an amount (the ***progress amount***) to the contracted party for the building contract; and
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> (b) the progress amount is payable as the whole or a part of a progress payment; and
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> (c) the time (the ***payment time***) by which the progress amount is required to be paid has passed, and the progress amount, or a part of the progress amount, has not been paid.
>
> (2) For the period for which the progress amount, or the part of the progress amount, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, for each day the amount is unpaid.
>
> (3) In this section—
>
> ***penalty rate*** means—
>
> (a) the rate made up of the sum of the following—
>
> (i) 10% a year;
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> (ii) the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills; or
>
> (b) if the building contract provides for a higher rate of interest than the rate worked out under paragraph (a)—the higher rate.

[11] Various terms in s 67P are defined in s 67A of the Act as follows:

> "***building contract*** see section 67AAA."
>
> "***contracting party*****,** for a building contract, means the party to the contract for whom the building work the subject of the contract is to be carried out."
>
> "***contracted party*****,** for a building contract, means the party to the contract who is to carry out the building work the subject of the contract."
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> "***progress payment*** see the *Building and Construction Industry Payments Act 2004*, schedule 2."

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6 Reasons at [6].

[12] The term "building contract" is relevantly defined by reference to s 67AAA of the Act to mean a contract or other arrangement for carrying out building work in Queensland but does not include a domestic building contract or a contract exclusively for construction work. "Construction work" is defined by reference to s 10 of the *Building and Construction Industry Payments Act* 2004 (Qld) (the BCIPA). The term "building work" is defined in sch 2 of the Act as meaning, amongst other things, the erection or construction of a building or the renovation, alteration, extension, improvement or repair of a building.

[13] For a building contract, the definitions of "contracting party" and "contracted party" refer respectively to the party for whom building work "is to be carried out" and who "is to carry out building work". The term "**carry out building work**" is defined by s 67A to mean:

> "(a) carry out building work personally; or
>
> (b) directly or indirectly, cause building work to be carried out; or
>
> (c) provide advisory, administrative, management or supervisory services for carrying out building work."

The primary judge's decision

[14] The primary judge rejected the respondent's contention that the supplier agreement was not a "contract for carrying out building work or other arrangement" within s 67AAA(1) of the Act.[7] The primary judge also rejected the respondent's argument that the payment time for the invoices provided by the appellant had not passed as required by s 67(1)(c) of the Act. The respondent failed to pay the appellant's invoices within 14 days of receipt, being the time within which the respondent was required to pay the appellant under cl 9.2(e) of the novated supplier agreement.[8]

[15] The primary judge accepted[9] that the assignment to the appellant effected a novation and held that as a result of the respondent's consent to the assignment (especially of the obligations of Price Constructions) Price Constructions was released or discharged from its obligations under the supplier agreement and the appellant and the respondent became parties to a novated supplier agreement. However, the primary judge dismissed the appellant's claim for penalty interest pursuant to s 67P of the Act on the basis that his Honour did not accept that the appellant was "the contracted party for a building contract" within the meaning of s 67P under the novated supply agreement.[10]

[16] Before the primary judge, the appellant had submitted that the focus of s 67P of the Act was on the identity of the contracting party at the point in time when a particular payment was required to be made thereunder. The respondent was required by cl 9.2(e) to pay on the invoice, and because of the novation of the supplier agreement, the party with the right to issue and deliver invoices after 1 July 2013 was the appellant, regardless of whether any of the invoiced work had been performed prior to that date by Price Constructions. It was argued that followed because, as a result of the novation of the supplier agreement, the appellant was the "contracted

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7 Reasons at [12].
8 Reasons as [14]-[16].
9 Reasons at [18].
10 Reasons at [25].

party for a building contract", being the party which "(a) assumed the obligation and responsibility to complete the work, and (b) was then entitled to be paid for that work, it was also the party which (c) had the rights given by section 67P".[11]

[17] The respondent's position was that the focus of s 67P(1)(a) of the Act was on the identity of the parties to a particular building contract rather than the identity of the party with the right to issue invoices and:[12]

> "According to its terms, the section applies if the contracting party for a building contract (namely, the [respondent]) is required to pay an amount (the progress amount) to the contracted party for the building contract. Section 67A defines 'contracted party, for a building contract' as 'the party to the contract who is to carry out the building work the subject of the contract'. That party, the [respondent] submitted, was Price Constructions and not the [appellant] because the contract which subsisted prior to 1 July 2013 was a contract between the [respondent] and Price Constructions."

[18] The respondent thus contended that the amount claimed by the appellant was not for the building contract to which it was a party (the novated contract which came into existence on 1 July 2013) but for building work done by Price Constructions when it was the "contracted party" within the meaning of s 67P. The respondent only accepted that the appellant was entitled to payment in respect of the value of that work because the entitlement had been assigned to it by Price Constructions.[13] The primary judge agreed with this contention, having regard to the precise wording of the statute.

[19] His Honour also considered that that view was supported by *Ball Construction Pty Ltd v Conart Pty Ltd*,[14] the parties in that case being in an analogous position to the parties in the present case. His Honour relied on the following statements of Douglas J:[15]

> "The right to a progress payment under s 12 of the [BCIPA] arises if the person claiming the progress payment has undertaken to carry out construction work or to supply related services under the contract. Conart had not so undertaken in respect of any rights of That Builder to the extension of time claim for the period before the novation. It is difficult to see how it became entitled to a progress payment under the Act stemming from the period when That Builder was the contracting party, not Conart. It may be entitled to claim pursuant to the contract for the rights assigned to it, as Ball Construction conceded through its counsel, but the submission was that those claims were not covered by s 12."

[20] His Honour held:[16]

> "By parity of reasoning, just as Conart was not the contracting party under the construction contract prior to the novation, so too was the [appellant] in the present case not the contacted party for the building contract for the period before the novation. In each case, although the

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11 Reasons at [20].
12 Reasons at [21].
13 Reasons at [22].
14 [2014] QSC 124.
15 [2014] QSC 124 at [16].
16 Reasons at [24]-[25].

> novation resulted in a new contract coming into existence, it did not transmogrify that new party (Conart, or the [appellant]) into the 'contracting party' or the 'contracted party', respectively, for the pre-novation work. In my view, whilst the [appellant] became the 'contracted party' upon the novation's taking effect on 1 July 2013, there is no basis for concluding that the novation had some relevant retrospective operation with respect to the identity of the pre-1 July 2013 'contracted party'.
>
> Once it is concluded that the relevant contracted party for the pre-1 July 2013 building contract was Price Constructions, the [appellant's] argument based upon its entitlement to deliver invoices becomes irrelevant. That is because, as a matter of language and logic, the obligation in section 67P(2) is an obligation to pay interest at the penalty rate to the contracted party. That can only mean the contracted party referred to in section 67P(1)(a)—namely, as I concluded for the pre-1 July 2013 building contract, Price Constructions."

The appellant's submissions

[21] The appellant's submissions before this Court were that the primary judge erred in apparently accepting that the basis for the appellant's entitlement to be paid for the relevant building work was the assignment to it of that entitlement by Price Constructions, since the latter had no contractual entitlement to invoice for the relevant building work under the supply agreement prior to the novation.[17] Further, that the primary judge erred in identifying the relevant "building contract" for the purpose of the s 67P statutory interest claim as the supplier agreement as it stood before it was novated, when it was the novated supplier agreement that was the only relevant building contract.[18]

[22] The starting point for the appellant's submissions was that it was undisputed that the supplier agreement was novated and that, under the novated supplier agreement, the appellant promised to carry out the relevant building works on terms identical to Price Constructions' simultaneously discharged promise under the supplier agreement. Whatever tasks might or might not have been performed by Price Constructions while in the process of discharging its obligations under the supplier agreement, the appellant stepped into (and Price Constructions was discharged from) those obligations. The appellant's contention was that, under the novated supplier agreement, it was solely responsible for carrying out the relevant building works to the contractual standard, including for example, rectifying any defective work performed by Price Constructions. The corollary of being so obligated was that it alone had an entitlement to issue an invoice upon their being carried out. Price Constructions never acquired a right to issue an invoice for any part of the relevant building works under the supplier agreement. The appellant properly issued all invoices for the full amount of the building works under the novated supplier agreement. As the party solely obligated to carry out the relevant building works, the appellant was the "contracted party" under the novated supplier agreement, which was the relevant building contract to which the respondent was a "contracting party".

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17 Appeal Transcript at 1-2.

18 Appellant's amended outline at [17].

[23] The appellant further submitted that the amount invoiced by it satisfied the requirement in s 67P(1)(b) of the Act that the claimed "progress amount" was payable as a "progress payment" within the meaning of the Act as defined by reference to the definition in sch 2 of the BCIPA.

[24] The appellant also submitted that the primary judge's reliance on *Ball Construction* was misplaced as that case concerned the entitlement of a "post-novation builder" to assert a right for an extension of time claim, in circumstances where the post novation builder had not undertaken to perform the construction work and the accrued contractual entitlement lay with the original contractor (That Builder). By contrast, in this case, Price Constructions did not have accrued rights under the supplier agreement to payment for any part of the relevant building works such that it could not issue an invoice to the respondent and s 67P could not apply. A claim for statutory penalty interest under s 67P arose for the first time when the invoice issued by reason of the appellant's contractual right to payment for carrying out the relevant building works under the novated supplier agreement was not paid.

The respondent's submissions

[25] It was accepted on behalf of the respondent in oral submissions, that, upon novation of the supply agreement, the appellant undertook an obligation to ensure that the relevant building work was completed, including an obligation to rectify work done by Price Constructions. It was also submitted[19] that the respondent's case did not rest on the premise that Price Constructions had a crystallised right to payment before novation, rather it was accepted that it had no such right. The respondent's case centred on the construction of the terms of s 67P of the Act which created and regulated the right to statutory interest. The key question for examination was thus the text of the section itself.[20]

[26] In submitting that the primary judge correctly construed s 67P, it was contended that, by its terms, the scope of s 67P is delimited by reference to a specific contract, being the "building contract" as defined in the Act, and the identities of the parties to that contract. Further, s 67P made it clear that building work not carried out under the "building contract" because it was carried out under a different contract was beyond the scope of the operation of s 67P.

[27] It was contended[21] that the Act was drafted to ensure that the right to receive a payment under s 67P was only conferred on the party who actually performed the building work under the building contract. In support of that contention, reliance was placed on the definition of "carry out building work" which confined the term to the person or entity which either performs the work personally or directly or indirectly causes the work to be performed. The "contracted party" in turn was defined as the party who "is to carry out" the building work the subject of the contract, which, it was said, was a prospective definition. Section 67P(1)(a) could not be applied retrospectively for the benefit of someone who did not carry out the work because it was already done by someone else under a different contract.[22] In the present case, the relevant building work was not carried out under the novated supplier agreement but under the original supplier agreement.

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19 Appeal Transcript 1-9.

20 Referring to *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46 [47] and *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at 107 [39].

21 Appeal Transcript 1-12.

22 Appeal Transcript 1-13.

[28] In its written submissions, the respondent also drew support from s 67P(1)(b) of the Act and the requirement therein that "the progress amount is payable as the whole or part of a progress payment" and directed attention to the BCIPA, which defined the right to a progress payment in terms of construction work "carried out or undertaken to be carried out 'under the contract'".[23] It was submitted that the right to a progress payment did not exist for construction work not carried out "under the contract", including work that was carried out under a different contract and consequently outside the scope of operation of the BCIPA. That approach was said to be consistent with the authorities set out by Douglas J in *Ball Construction*.[24] The work that was carried out by Price Constructions under the original supplier agreement was not construction work that was carried out under the novated supplier agreement because it preceded the making of that contract. Accordingly, the primary judge correctly found that it was outside the scope of s 67P.

Consideration

[29] Section 67P(1)(a) of the Act focuses, as a precondition to a statutory entitlement to penalty interest under s 67P(2), on the contractual obligation under the "building contract" to pay an amount (the "progress amount" being an amount that qualifies for payment as a BCIPA "progress payment"). Section 67P(1)(a) is not directed to a person who physically undertakes contractual work but to the contractual obligation to pay the progress amount in question imposed under the building contract – that is the contractual obligation imposed on the party for whom the building work, the subject of the contract, is to be carried out (the contracting party) for the benefit of the party who is to carry out the work thereunder (the contracted party). By the novated supplier agreement, it was the appellant who undertook contractual obligations to carry out building work, including that which Price Constructions had performed but which was incomplete and rectification, if required, of that work, and thus became the contracted party for a building contract to which the respondent was the contracting party for whom the construction work was to be carried out thereunder.

[30] Nor did the requirement under s 67P(1)(b) for that the progress amount to qualify as a "progress payment" under the BCIPA provide any impediment to the appellant's claim for penalty interest. "Progress payment" is defined under BCIPA[25] to mean a payment to which a person is entitled under s 12 (and includes a final, single or one off payment for carrying out construction work under the construction contract). A "construction contract"[26] relevantly means one under which one party "undertakes to carry out" construction work for another party. By s 12 of the BCIPA, the right to progress payments relevantly arises from "each reference date under a construction contract" where a "person has undertaken to carry out construction work" "under the contract". "Reference date" under a construction contract is relevantly defined[27] to mean the date stated in or worked out under the contract as the date a progress payment may be made.

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23 Respondent's outline at [11].

24 *Walton Construction (Qld) Pty Ltd v Salce & Ors* [2008] QSC 235 at [22]; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at [42]-[45]; *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128 at [28] referred to in *Ball Construction Pty Ltd v Conart Pty Ltd* [2014] QSC 124 at [11]-[12].

25 See sch 2 of BCIPA.

26 See sch 2 of BCIPA.

27 See sch 2 of BCIPA.

[31] As was observed in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In Liq)*,[28] in relation to the New South Wales equivalent of s 12 of the BCIPA, the reference to a person who has undertaken to carry out construction work under the contract is to be understood as a reference to a contractual undertaking not the physical performance of the work.

[32] As the appellant submitted, nothing in the definition of "progress payment" for the purposes of the BCIPA precludes it from being a contracted party for a building contract (the novated supplier agreement) pursuant to which the respondent, as contracting party, was required to pay the invoiced progress amount as a progress payment for the purposes of the Act. This was evident by the terms of the novated supplier agreement. By cl 6, detailed provisions were made for "Service Orders", including the scope of the services, made by the respondent and carried out by the supplier. By cl 6.4, a "Service Order" incorporated, by reference, all the terms of the novated supplier agreement. The invoicing and payment of "Fees"[29] was addressed by cl 9, which required the respondent to pay the supplier the "Fees" in consideration of the "Services".[30] By cl 9.2(a), the supplier was required to provide an invoice within seven days of the completion of the "Services requested in a Service Order". As the appellant submitted, the payments claimed by the appellant pursuant to cl 9.2 came within the definition of progress payment, being either the final payment or a single or one off payment for all construction work to be carried out pursuant to extant Service Orders. As the contracted party, the appellant became entitled to render fees under the novated supplier agreement, which imposed on it all the contractual obligations and conferred to it all the contractual rights.

[33] The primary judge's reliance on the judgment of Douglas J in *Ball Construction* as broadly analogous to the present case was erroneous for the reasons submitted by the appellant. In *Ball Construction*, in rejecting the proposition that the post novation builder was entitled to payment claims under the BCIPA, his Honour adopted[31] the statement of Brereton J in *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd*[32] in relation to the equivalent New South Wales legislation and proceeded on the basis that the BCIPA did not create a right to remuneration for construction work, such a right being created by the construction contract, rather the BCIPA created and regulated a right to obtain a progress payment. His Honour referred to authority as to the meaning, for the purposes of the BCIPA, of construction work carried out "under the contract".[33] His Honour found that any rights to the extension of time claim for the period before the novation arose when the pre novation contractor was the contracting party, not the post novation contractor. His Honour recognised that those contractual rights that accrued prior to the novation of the contract might be

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28 (2019) 99 NSWLR 317 at [229].

29 As defined in cl 1.1 of the Novated Supplier Agreement as the fees for the Services specified in, *inter alia*, a Service Order.

30 As defined in cl 1.1 of the Novated Supplier Agreement as "the insurance related property assessment, reinstatement and repair services to be provided under this Agreement, as set out in Schedule 3 and any Service Order".

31 [2014] QSC 124 at [12].

32 [2009] NSWSC 320 at [43] adopted in *BM Alliance Coal Operations Pty Ltd v BCG Contracting Pty Ltd & Ors* [2012] QSC 346 at [56].

33 [2014] QSC 124 at [11]-[12], referring to *Walton Construction (Qld) Pty Ltd v Robert Salce* [2008] QSC 235 at [22]; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at [42]-[45]; and *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128 at [28].

assigned, but found that such an assignment would not engage the BCIPA because of the requirement for the party asserting the BCIPA right to also be the party who undertook to carry out construction work under the contract that gave rise to the underlying accrued rights. The post novation contractor had not undertaken to carry out any work in respect of any rights of the pre novation contractor to the extension of time claim for the period before novation.

[34] That, as the appellant submitted, may be contrasted with the position of the appellant. The appellant became entitled under the novated supplier agreement to issue an invoice for the relevant building work and other work it had thereunder undertaken contractual responsibility to carry out.

[35] The primary judge thus erred in failing to find that the appellant was a contracted party within s 67(1)(a) of the Act for the pre novation building work under the novated supplier agreement. The appellant also satisfied the requirement in s 67(1)(b) of the Act in that the invoiced amount qualified as a "progress payment" under the BCIPA and, as required by s 67(1)(c), the invoiced amount remained unpaid as at the payment time as specified by the novated supplier agreement.

Quantification

[36] Given that the appellant was the contracted party for the pre 1 July 2013 work, it follows that the appellant was not required, contrary to the primary judge's finding, to distinguish between the value of the building work pre and post July 2013. The primary judge erred in dismissing the appellant's claim to penalty interest on the basis that it had failed to prove the quantification of the late payments in respect of which it was entitled to such interest. There was no dispute as to the calculation of the claim for penalty interest of $242,032.14. The appellant is entitled to that amount as penalty interest.

Orders

[37] The orders I would make are:

1. Leave to appeal be granted.
2. The appeal be allowed.
3. The orders of the District Court dismissing the appellant's claim and awarding judgment for the respondent be set aside and, in lieu thereof, judgment for the appellant in the amount of $242,032.14 be entered.
4. Unless the parties file submissions as to costs within 14 days of the publication of these reasons, not to exceed four A4 pages in length, the respondents are to pay the appellant's costs of and incidental to the appeal and the proceeding below on the standard basis.

[38] **CROW J:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.