SUPREME COURT OF QUEENSLAND

CITATION:	*CMC Cairns P/L v Isicob P/L* [2002] QCA 181
PARTIES:	**CMC CAIRNS PTY LTD** ACN 010 861 579 respondent/applicant **v** **ISICOB PTY LTD** ACN 010 398 044 appellant/respondent
FILE NO/S:	Appeal No 11034 of 2001 SC No 63 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	31 May 2002
DELIVERED AT:	Townsville
HEARING DATE:	28 May 2002
JUDGES:	McMurdo P, Williams JA, Cullinane J Separate reasons for judgment of each member of the Court; each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - OTHER MATTERS - where claim by sub-contactor not made until six years after completion of works - whether arbitration proceedings should be terminated LIMITATION OF ACTIONS - CONTRACTS, TORTS AND PERSONAL ACTIONS - THE PERIOD OF LIMITATION - ACTIONS FOUNDED ON SIMPLE CONTRACT AND TORT (INCLUDING BREACH OF STATUTORY DUTY) - where subcontractor did not dispute the amount paid by the builder as the final payment under the contract until some 6 years later - whether communication to the other party is a necessary element of a dispute in order to establish when the dispute first arose ARBITRATION - CONDUCT OF THE ARBITRATION PROCEEDINGS - TERMINATION OR STAY OF ARBITRATION PROCEEDINGS - appeal from an order terminating arbitration proceedings pursuant to s 46 of *Commercial Arbitration Act* 1990 (Qld) - whether there was

an inordinate and inexcusable delay where claim pursued some 6 years after completion of works - whether the period of delay before the arbitration proceedings commenced is relevant in considering whether or not it was inordinate and inexcusable - when time commences to run pursuant to s 41(2) of *Limitation of Actions Act* 1974 (Qld)

Commercial Arbitration Act 1990 (Qld), s 46
Limitation of Actions Act 1974 (Qld), ss 10, 41

Birkett v James [1978] AC 297, distinguished
Clements v Simto Pty Ltd [2001] WASCA 183, considered
Concrete Developments Pty Ltd v Queensland Housing Commission [1961] QdR 356, applied
Ellerine Brothers Pty Ltd v Klinger [1982] 1 WLR 1375, applied
John Grant & Sons Ltd v Trocadero Building & Investment Co Ltd (1938) 60 CLR 1, applied
Rheem Australia Limited v Federal Airports Corporation, Ambrose J, No 967 of 1991, 20 February 1992, applied
Santos Ltd & Ors v Pipelines Authority of South Australia (1996) 66 SASR 38, applied
Tradax Internacional S.A. v Cerrahoqullari T.A.S. (The M Eregli) [1981] 3 All ER 344, applied

COUNSEL: M Morrissey for the appellant
A Philp for the respondent

SOLICITORS: Thompson & Royds for the appellant
Williams Graham & Carman for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Williams JA and with the order proposed.

[2] **WILLIAMS JA:** This is an appeal from a decision of Jones J ordering pursuant to s 46 of the *Commercial Arbitration Act* 1990 (Qld) ("the Act") that arbitration proceedings commenced by the appellant on 21 July 2000 be terminated.

[3] The respondent is a builder who in late 1993 had contracted to build a number of home units at Yorkey's Knob. On 17 December 1993 he prepared a subcontract in terms of which the appellant was to:

> "Provide all the necessary labour, formwork materials … plant and equipment as per attached schedule of rates to complete concrete works in accordance with architectural drawings … ."

The document indicated that, given the schedule of rates, the work in question would be valued at "approximately $200,000". The appellant was to commence work on 15 December 1993 and it had to be completed in accordance with an "agreed construction programme". There was a provision for payment of liquidated damages for delayed completion. The document as prepared also contained a number of printed "Terms and Conditions".

[4] A copy of that document, not signed by the respondent, was sent to the appellant. It was returned to the respondent, signed by the appellant, and dated 8 February 1994. The appellant had deleted many provisions in the printed "Terms and Conditions" and had also made some amendments thereto. All those changes were initialled.

[5] The respondent has never signed the document as amended and signed by the appellant, but the subcontract work was carried out as if it were governed by those provisions.

[6] Clauses 5 and 14 of those conditions, as amended by the appellant, read as follows:

> "5. PROGRESS CLAIMS: (a) Unless stated on the front page of this Agreement Progress Claims shall be submitted on or before the 24th day of the month and payments shall be paid at the end of the month following the month in which the claim is received or within seven (7) days of receipt of payment by the Builder from the Principal whichever occurs earlier.
> (b) Claims must be made in writing in a format acceptable to and be delivered to the Builder's office. Claims received after the 27th day of the month will be deemed to be received in the following month.
> (c) The basis for claims shall be the Value of Work Completed (relative to the final value and the Cost to Complete) less any amounts owing to the Builder.
> …
> (e) As security for the performance of the Sub-Contractor's obligations the Builder shall withhold from each payment (Retention) an amount equal to the percentage stated to a maximum of the percentage stated of the sub-Contract Sum plus Variations and shall be held by the Builder until the Final Certificate has been issued by the Principal after the end of the Defects Liability Period. Any monies so withheld may be applied by the Builder to offset costs incurred as a result of any default by the Sub-Contractor.
> (f) A final payment will not be due until a final account (so noted) has been received by the Builder.
> (g) Before progress claims will be due, the Sub-Contractor shall:
> (1) have returned a signed copy of this agreement.
> (2) have submitted proof of insurance.
> (3) have rectified any clear breaches of these Terms and conditions of which he has been notified.
> (h) For overdue payments the Sub-Contractor shall be entitled to interest at the rate of 14% per annum for the overdue period.
>
> 14. ARBITRATION. Any dispute that may arise between the Sub-Contractor and the Builder that cannot be resolved by negotiation shall be determined by arbitration before a single Arbitrator in accordance with and subject to the Institute of Arbitrators Rules for the Conduct of Commercial Arbitration (or its successor). Neither party shall be represented before the Arbitrator by a member of the legal profession."

[7] The appellant completed its work under the contract on 9 June 1994, some 27 days late according to the respondent. On the respondent's case the work should have been completed on 13 May 1994.

[8] On 20 May 1994 the respondent sent to the appellant by fax a letter stating:

> "This is my calculation of your subcontract value which results from measurements on site. Please check it and let me know if there are errors."

With that letter were eight pages of calculations.

[9] That was followed by another fax from the respondent to the appellant on 25 July 1994; relevantly it provided:

> "Re: Final Contract Value
> (1) A set of drawings have been run off and are waiting to be collected from the office of Colefax Clayton Smith. …
> (2) The insurance company has approved the hours worked on the floor clean up …
> …
> Since your last claim, you've formed the upper ramp.
> …
> This will bring the Total subcontract value to $230,317.75.
> Once you've done quantities checks let me know."

[10] T Reddicliffe, a director of the appellant, admitted he obtained a copy of the plans from Colefax Clayton Smith on 26 July 1994.

[11] In his affidavit, W Odenthal, a director of the respondent, deposed:

> "On 28 July 1994 CMC paid Isicob the amount of $12,046.61 which is the amount that it had calculated as being the last payment due to Isicob in accordance with the calculations that it had communicated to Isicob by facsimile dated 25 July 1994."

That statement has been incorporated in the outline of submissions of the appellant as an accurate statement of fact, subject to the reservation that the appellant did not regard the payment as a "final payment" within cl 5(f).

[12] There was no response from the appellant to the communications of 20 May and 25 July (other than collecting the plans) nor was there any response to the receipt of the cheque for $12,046.61 (other than banking it). The next communication from the appellant was the letter of 9 June 2000, which was in these terms:

> "This letter is a reply to your facsimiles of 20 May 1994 and 25 July 1994 (copies enclosed) which set out your calculation of our subcontract value on the above project. The facsimiles ended by asking that I check the quantities and advise of any errors once the process was completed.
>
> This process is now complete and I enclose our priced Bill of Quantities for the project. I advise there are a number of errors and omissions in your quantities. To assist the process we commissioned a Chartered Quantity Surveyor to measure the formwork from the structural drawing from the Ground Floor up, he has prepared detailed take off sheets of which a copy is enclosed which should make it easier for you to verify his quantities.

> To further aid your verification process I have highlighted the items in your take off where we agree with your quantity and rate.
>
> We apologize for the length of time this process has taken.
>
> Once you have been through the quantities I suggest we meet to resolve any remaining differences.
>
> If you require anything further please advise."

The total value of the work then asserted by the appellant was $267,905.35.

[13] In his affidavit Reddicliffe detailed what he did (effectively what the appellant did) after receiving the plans on 26 July 1994:

> "6. It later became apparent to me that his take off had measured many of the extra items added to the original schedule of rates for the lower floors of the building, but not measured those same additional areas on the upper floors of the building.
>
> 7. I had intended to check the quantities myself, however as a result of my work commitments I was unable to complete this job. Therefore in 1995 I engaged George Tipping Charted Quantities Surveyor to prepare a bill of quantities for Isicob Pty Ltd so that I could check the correct price payable on the Golden Sands building project.
>
> 8. As a result of George Tipping moving from Cairns to Townsville and then to Rockhampton, George Tipping had some delay in completing the bill of quantities and we had difficulty communicating, particularly as I was required to spend extended periods of time in Brisbane. I was not provided with the bill of quantities until the middle of 1999.
>
> 9. After I received the bill of quantities I had to check the calculations and rates and also consider whether it was worthwhile for Isicob Pty Ltd to make a further claim for the remainder of money owing to Isicob Pty Ltd by CMC Cairns Pty Ltd."

[14] Based on that evidence Jones J found:

> "It is not clear on the material exactly when Isicob formed an intention to check the measurements. …
>
> …
>
> Although there is no specific date given by Mr Reddicliffe as to when he became aware that the CMC measurements had not included additional areas on the upper floor, I infer that that was obvious to him a short time after he had obtained the plans on 26 July 1994. It seems to me that the dispute had arisen in the minds of those controlling Isicob at this time. However, as indicated, notification of that dispute was not made known to CMC until almost six years later."

[15] The respondent had not replied to the letter of 9 June 2000 when the appellant wrote the letter of 21 July 2000 referring the dispute as to the valuation of the subcontract

work to arbitration. The Institute of Arbitrators and Mediators appointed an arbitrator and notified the parties to that effect by letter dated 19 March 2001. The response of the respondent of 29 March 2001 asserted that it would not participate because the notifications were not "submitted in accordance with time limitations provided by the contract". That was relevantly followed by the respondent's application filed 31 May 2001 seeking an order terminating the arbitration pursuant to s 46 of the Act. That section provides:

> "**46. Delay in prosecuting claims.** (1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings.
>
> (2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders –
>
> (a) terminating the arbitration proceedings;
>
> (b) removing the dispute into Court; and
>
> (c) dealing with any incidental matters.
>
> (3) The Court shall not make an order under subsection (2) unless it is satisfied that the delay –
>
> (a) has been inordinate and inexcusable; and
>
> (b) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings."

[16] At first instance Jones J held that the necessary factual basis had been established for making an order under that section and exercised his discretion to so order. Three principal questions were addressed during argument on the hearing of the appeal:

1. When did the dispute arise;

2. Has there been inordinate and inexcusable delay on the appellant's part with respect to the arbitration;

3. Does the material establish that the delay gives rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration or that the delay is likely to cause serious prejudice to the respondent in the arbitration.

On the appellant's argument there were two subsidiary issues which had to be addressed:

(i) to what extent can the court have regard to delay before the reference to arbitration in considering whether there has been inordinate and inexcusable delay;

(ii) whether any delay can be classed as inordinate and inexcusable if within the applicable limitation period.

[17] The finding by Jones J that the dispute arose shortly after 26 July 1994 was open on the evidence, and in my view was the only reasonable conclusion which could be drawn from the evidence. Once Reddicliffe believed that extra items on the upper floors had not been included in the respondent's calculation and decided that the appellant should seek remuneration on that basis a dispute existed. Time and money would only have been expended by the appellant in obtaining a calculation contrary to that advanced by the respondent if that was seen as a way of resolving the dispute.

[18] Further, the appellant would have known that all subcontractual issues had to be resolved before the contractual issues between the owner of the units and the respondent could be finalised. Pursuant to cl 5(f) of the subcontract there was an onus on the appellant to submit a final account to the respondent and if that did not have to be submitted by the 24th day of the month following completion of the subcontract works, it would have had to be submitted within a reasonable time after the completion of those works. Because of that it was incumbent on the appellant if it was going to make a claim for an amount higher than that specified in the faxes of 20 May and 25 July 1994 to do so within a reasonable time after 9 June 1994. If it did not do so the only inference open would be that it accepted the respondent's calculations. It would not be open to the appellant to make a claim for additional payment once that reasonable time had elapsed. Certainly it could not make such a claim some six years after the work had been completed.

[19] If there was a viable dispute as to the entitlement of the appellant to payment for the subcontract works it had to arise at the latest within a reasonable time after the completion of the works. Jones J found that a dispute did arise during that period and that is the dispute which must be addressed when considering the application of s 46.

[20] Counsel for the appellant submitted that there could be no dispute until there was communication to the other side. If it is correct to say that a claim for additional payment must be made within a reasonable time of the work being completed, the communication here (on 9 June 2000) was well outside that time and there could be no relevant dispute thereby created.

[21] But in my view communication is not a necessary element of a dispute. A dispute may arise because of the fact that one party does nothing, that is, does not respond (for example) to a claim. Where a claim is made and ignored by the other party a dispute exists (*Ellerine Brothers Pty Ltd v Klinger* [1982] 1 WLR 1375 at 1383; *Tradax Internacional S.A. v Cerrahoqullari T.A.S (The M Eregli).* [1981] 3 All ER 344 at 350, *John Grant & Sons Ltd v Trocadero Building & Investment Co Ltd* (1938) 60 CLR 1 at 15; *Santos Ltd & Ors v Pipelines Authority of South Australia* (1996) 66 SASR 38, *Concrete Developments Pty Ltd v Queensland Housing Commission* [1961] QdR 356 at 360, 361, 374 and *Rheem Australia Limited v Federal Airports Corporation*, Ambrose J, No 967 of 1991, 20 February 1992).

[22] It follows that the dispute in question arose shortly after 26 July 1994.

[23] The Full Court of Western Australia held in *Clements v Simto Pty Ltd* [2001] WASCA 183 at para [11] that, for purposes of their equivalent of s 46, delay predating the commencement of arbitration proceedings was relevant when

considering whether or not there was inordinate and inexcusable delay. That is logical and is a conclusion in conformity with the philosophy behind the section.

[24] In the present case the delay between July 1994 and July 2000 must be brought into account when determining whether the delay was inordinate and inexcusable.

[25] After referring to the "necessity for speedy settling of accounts for building projects" and the fact that it was not burdensome for the appellant to have taken the necessary steps in 1994 to appraise the respondent of the dispute and refer the matter to arbitration if necessary, Jones J concluded that the delay here was inordinate and inexcusable. Those findings were clearly correct.

[26] The subcontract work was completed on 9 June 1994 and it was on 9 June 2000 that the appellant first indicated it intended seeking more than the respondent had proposed paying in its fax of 25 July 1994. It is probably not without significance that 9 June 2000 was the last day of a six year period commencing 9 June 1994. But as already noted the arbitration proceedings were not commenced until 21 July 2000.

[27] Against that background reference was made to ss 10 and 41 of the *Limitations of Actions Act* 1974 (Qld). The former fixes a six year limitation period for an action founded on a contract, whilst the latter makes special provision for arbitration proceedings. Section 41(2) makes it clear that time commences to run from when the cause of action arose and not from the date on which the award was made.

[28] Counsel for the appellant submitted that no cause of action has yet accrued because it has not submitted a final account as required by cl 5(f). For the reasons given above, the appellant is in serious default in that regard and by 2000 had lost the right to submit such an account. It follows that if the appellant has any cause of action relevant for purposes of the limitation statute, it must be one which accrued at the same time as the dispute arose, that is within a reasonable time after 26 July 1994 at the latest.

[29] It was also submitted on behalf of the appellant, relying on reasoning in *Birkett v James* [1978] AC 297 at 320 and 322, that delay within the six year limitation period was not relevant when determining whether or not there was inordinate delay. But s 46 of the Act would be rendered almost meaningless if one had to ignore the six year limitation period in calculating the delay and assessing whether it was inordinate. The court is given a specific power by s 46 of the Act which may be exercised once the prescribed circumstances are established. Whether the delay is to be classed as inordinate is to be determined against the background of the relationship between the parties (primarily the subcontract) and the circumstances of the case; whilst regard may be had to the applicable limitation period, that is not necessarily a decisive factor.

[30] In all the circumstances of this case the limitation period does not carry such weight as to make unreasonable the finding that the delay was inordinate.

[31] That leaves for consideration the issue whether s 46(3) of the Act was satisfied. In that regard, Jones J held:

> "I am satisfied, also, that there is a substantial risk of it not being possible to have a fair trial of the issues which would potentially arise in the arbitration proceedings. There are uncertainties about

> arguments that might be raised about the applicability of limitation provisions. There is the prospect of a counterclaim for liquidated damages and there are the general disadvantages inherent in delays of this magnitude arising before proceedings are notified."

As was pointed out in *Clements v Simto Pty Ltd* at para [31], the question is not whether "a fair trial had become impossible or whether the respondent would in fact suffer serious prejudice" but rather "whether there was a substantial risk of an unfair trial or whether it was likely the respondent might suffer prejudice".

[32] There is a real question here as to whether the appellant's claim itself would be statute barred. Given that the work was completed on 9 June 1994, that the reference to arbitration was on 21 July 2001, and that no detailed claim was formulated prior to the order of 9 November 2001 terminating the arbitration, the respondent would have a strong argument that the appellant's claim as finally formulated was statute barred. Further, any counter-claim the respondent sought to make could well be met with a limitation defence. It is obvious the respondent might wish to claim liquidated damages for the late completion of the work. There may well be other issues or claims which would become relevant if the arbitration were to continue. Reddicliffe refers in para 6 of his affidavit to "extra items" and that at least suggests that the appellant's claim could well be based on variations to the original contract. The lapse of time would indicate there may well be difficulties in leading all evidence relevant to such an issue.

[33] Again, the findings by the learned judge at first instance were fully justified.

[34] It follows that the decision appealed from was correct and the appeal should be dismissed with costs.

[35] **CULLINANE J:** I have read the reasons for judgment of Williams JA and agree with them and the order proposed.