SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland University of Technology v Project Constructions (Aust) P/L (In Liq) & Anor* [2002] QCA 224
PARTIES:	**QUEENSLAND UNIVERSITY OF TECHNOLOGY** (plaintiff/respondent) **v** **PROJECT CONSTRUCTIONS (AUST) PTY LTD (IN LIQUIDATION)** ACN 010 901 943 (first defendant/first appellant) **PROJECT CONSTRUCTIONS PTY LTD (IN LIQUIDATION)** ACN 092 704 884 (second defendant/second appellant)
FILE NO/S:	Appeal No 7943 of 2001 SC No 4810 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2002
JUDGES:	Davies JA, Mullins and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Allow the appeal.** **2. Set aside the orders made at first instance.** **3. Give judgment for the first and second appellants against the respondent.** **4. The respondent to pay the costs of the first and second appellants of this appeal and of the proceedings at first instance to be assessed on a standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT - breach of building contract – withholding of payment by plaintiff - appeal against dismissal of application for summary judgment and striking out of plaintiff's statement of claim, on the basis that no reasonable cause of action disclosed – whether plaintiff has a 'real prospect of succeeding on its claim'

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – DISCHARGE OF CONTRACT ON DEFAULT AND LIKE GROUNDS - whether cl 44.4(a), which provides for "the whole [or part] of the work remaining to be completed" referred to entire project

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – DISCHARGE OF CONTRACT ON DEFAULT AND LIKE GROUNDS - whether "no further payment" in last paragraph of cl 44.4 to be construed as operating to withhold past progress payments.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – DISCHARGE OF CONTRACT ON DEFAULT AND LIKE GROUNDS - whether upon termination of the contract, the principal may set off his claim for unliquidated damages for failure to complete against the payments to which the contractor has accrued a right – whether the contract has ousted right to set-off

Uniform Civil Procedure Rules 1999 (Qld), r 293(2)

Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd (1997) 14 BCL 215, considered
Alucraft Pty Ltd (In Liquidation) v Grocon Ltd (Supreme Court of Victoria Nos. 4683 and ors of 1990, 13 May 1994, Smith J, unreported), considered
Daysea Pty Ltd v Watpac Australia Pty Ltd [2001] QCA 49, (Appeal no 9325 of 2001, 23 February 2001), applied
Fancourt v Mercantile Credits Limited (1982) 15 CLR 87, considered
General Steel Industries v Commissioner for Railways (NSW) (1964) 112 CLR 125, applied
Galambos v McIntyre (1974) 5 ACTR 10, applied
Grocon Pty Ltd v Melco Celim Pty Ltd (Victorian Supreme Court No 10376 of 1991, 13 September 1993, Ashley J, unreported), considered
McCosker v Lovett (1995) 12 BCL 146, considered
McLachlan v Nourse [1928] SASR 230, considered
Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd [1995] 2 Qd R 521, applied
Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd (2000) 17 BCL 269, considered
Ownit Homes Pty Ltd v Batchelor [1983] 2 Qd R 124, considered

Re Concrete Constructions Group Pty Ltd [1997] 1 Qd R 6, considered
Swain v Hillman [2001] All ER 91, applied
Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513, applied

COUNSEL: R J Douglas SC, with R M Treston, for the appellants
P L O'Shea SC for the respondent

SOLICITORS: Bickford Lawyers for the appellants
Corrs Chambers Westgarth for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[2] **MULLINS J:** I agree with the reasons for judgment of and orders proposed by Holmes J.

[3] **HOLMES J:** The appellants are defendants to an action by the respondent for various forms of relief, including a declaration that they hold on trust for the respondent their interest in two sums paid to them under a building contract. They applied unsuccessfully for summary judgment, or alternatively the striking out of the plaintiff's statement of claim, on the basis that no reasonable cause of action was disclosed. Here they appeal against the dismissal of that application.

Background to the summary judgment application

[4] The statement of claim filed by the respondent reveals that the parties had entered a contract for the building of a bridge, under which the first appellant, as building contractor, was required to deliver monthly claims for payment, a certification procedure being laid down in the contract. The second appellant, we were informed, was the entity entitled to receive payment. On 19 December 2000 the respondent paid sums of $22,376 and $457,131 to the second appellant, in respect of two progress claims. When it made those payments, the respondent was unaware that the first appellant's licence under the *Queensland Building Services Authority Act* 1991 had been suspended on the previous day.

[5] That suspension was, the respondent contended, a substantial breach of contract entitling it, pursuant to the contract, to give the first appellant notice to show cause why the respondent should not terminate the contract or "take out of the hands of the [first appellant] the whole or part of the work remaining to be completed". On the giving of such a notice the respondent would have been entitled to suspend payments for a specified period. If the work were taken out of the first appellant's hands (as ultimately happened), the respondent would, on its argument, have been entitled to maintain the suspension of payment pending an adjustment, provided for by the contract,

to reflect the actual costs of completion. That adjustment would have resulted in no further amount being payable. In the circumstances, (so went the case for the respondent) the money had been paid under a mistake of fact leading to a *prima facie* obligation on the part of the appellants to make restitution.

[6] Before the learned judge at first instance, and here, the appellants advanced two arguments: firstly, that it was a complete defence to a restitution claim based on mistake that the payments were made for good consideration (in this case being owed for work already performed); and secondly, that the contractual provisions for suspension of payment and adjustment could apply only to work yet to be performed, and did not affect existing obligations to pay for past work. The learned judge at first instance, while expressing some partiality to these arguments, concluded that the respondent's case was not impossible of success, and, on the *General Steel*[1] and *Fancourt v Mercantile Credits Limited*[2] tests, should be allowed to proceed.

[7] Rule 293(2) of the *Uniform Civil Procedure Rules* enables summary judgment to be given for the defendant if the court is satisfied that the plaintiff has "no real prospect of succeeding" on its claim, and that there is no need for a trial of the claim. That level of satisfaction may not require the meeting of as high a test as that posited by Barwick CJ in *General Steel*: "that the case for the plaintiff is so clearly untenable that it cannot possibly succeed". The more appropriate inquiry is in terms of the Rule itself: that is whether there exists a real, as opposed to a fanciful, prospect of success[3]. However, it remains, without doubt, the case that

> "Great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case."[4]

[8] But the present case was one which turned in the first instance on whether the respondent had or might have had any entitlement to withhold payment of the two instalments. That in turn was a question of construction of the contract; and resolution of that question was capable of determining the proceedings. It was, therefore, possible by resolving the question of construction to achieve a result which was both expeditious and just.

The relevant provisions of the contract

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1 *General Steel Industries Inc. v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

2 *Fancourt v Mercantile Credits Limited* (1982) 15 CLR 87.

3 See *Swain v Hillman* [2001] 1 All ER 91 at 92 per Lord Woolf MR; *Three Rivers District Council v Bank of England (No. 3)* [2001] 2 All ER 513 at 541 for the adoption of such an approach in relation to r 24(4) of the *Civil Procedure Rules (UK)* which is in similar terms.

4 *General Steel* at page 130.

[9] The provisions of the contract dealing with the principal's rights on default by the contractor are as follows:

"**44.2 Default by the Contractor**

If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy, the Principal may give the Contractor a written notice to show cause.

Substantial breaches include but are not limited to-
…

(1) failing to maintain all necessary licences that are required for the Contractor to perform all of its obligations under the Contract.

44.4 Rights of the Principal

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4 the Principal may by notice in writing to the Contractor-
(a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or
(b) terminate the Contract.

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of-
(i) the date upon which the Contractor shows reasonable cause;
(ii) the date upon which the Principal takes action under Clause 44.4(a) or (b); or
(iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.

If the Principal exercises the rights under Clause 44.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6.

44.5 Procedure when the Principal Takes Over Work

If the Principal takes work out of the hands of the Contractor under clause 44.4(a) the Principal shall complete that work and the Principal may without payment of compensation take possession of such of the Constructional Plant and other things on or in the vicinity of the Site or on or in the vicinity of

the land in addition to the site procured by the Contractor pursuant to clause 27.6 as are owned by the Contractor and are reasonably required by the Principal to facilitate completion of the work.

If the Principal takes possession of the Constructional Plant or other things, the Principal shall maintain the Constructional Plant, and subject to clause 44.6, on completion of the work the Principal shall return to the Contractor the Constructional Plant and any things taken under this clause which are surplus.

44.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the contractor under Clause 44.4(a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying the amount of that cost.

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal. The Principal shall keep records of the cost in a similar manner to that prescribed in Clause 41.

If the Contractor is indebted to the Principal, the Principal may retain constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor."

The respondent's argument

[10] It was essential to the respondent's argument that the expression "the work taken out of the hands of the Contractor", be capable of referring to the building project as a whole, so that the last paragraph of cl 44.4 had the effect of suspending the contractor's entitlement to payment for work already performed until and unless it became entitled to an adjustment in its favour under cl 44.6.. More specifically, the effect of the argument was that cl 44.4 (a), in its reference to the taking of "the whole or part of the work remaining to be completed" out of the hands of the contractor, contemplated

alternatives: either the removal of the entire project, comprising work already performed and work remaining to be undertaken, or the removal of the project to date, together with part, but not all, of the work remaining to be done. And the last paragraph of cl 44.4 was equally to be taken as referring to the entire project, with the expression "the work taken out of the hands of the Contractor" used only to distinguish it from that part of the work, if any, remaining in the contractor's hands, for which he could expect to receive further payment. That construction was reinforced, it was submitted, by the use of the expression "further payment". It was meaningless, the respondent argued, to speak of further payment in respect of work the appellant would never do; it made sense only as a reference to payment for work already done.

[11] Thus the contractor would be disentitled to any further payment for work it had already done or work completed by the principal unless a payment were due to it under cl 44.6. Clause 44.6 required an ascertainment of the costs incurred by the principal in completing the work. If it were greater than what would have been paid to the contractor if it had completed the work, the difference was a debt due from the contractor to the principal. There would then be no payment due to the contractor, and no entitlement on its part to further payment under cl 44.4 in respect of the work taken out of its hands. In the circumstances of the present case the plaintiff estimated the cost of completing the work at $5,812,400 compared with the sum of $5,016,000 which would have been paid to the appellants had the first appellant completed the work. Accordingly, the appellants were not entitled under cl 44.4 to any further payment; that would have included the amounts paid on 19 December 2000 had the respondent exercised its entitlement to retain them.

Construction of Clause 44.4

[12] The reading of cl 44.4 contended for by the respondent seems to me to require an undue straining of the language contained in it. The expression "the whole" in sub-clause (a) must, in my view, be read with the words which follow, so that it is "the whole [or part] of the work remaining to be completed" which may be taken out of the hands of the contractor. There is no warrant for reading that expression as meaning the entirety of the work whether completed or remaining to be completed. Consistent with the clear meaning of sub-clause (a) as referring to work which remains to be completed, the reference in the last paragraph to "the work taken out of the hands of the contractor" must again relate to the work remaining to be completed, whether the whole or part of it, taken out of the hands of the contractor. It cannot sensibly be read as referring to the entire project.

Significance of disentitlement to 'further payment'

[13] More particularly, counsel for the appellants identified what seemed to me a significant objection to the respondent's construction of the last paragraph of

cl 44.4. If there were to be no further payment to the contractor for past work, short of a cl 44.6 result in his favour, a contractor who was left with part of the work remaining to be completed would be deprived of past progress payments, notwithstanding that he was still engaged on the project. That results seems at odds with rationale for cl 42.1, which sets up the progress payment regime, identified in *Daysea Pty Ltd v Watpac Australia Pty Ltd*[5]:

> "The significance of the clause… is that the progress payments are critical to the survival of the contractor and to completion of the project."

[14] Nor do I accept the respondent's argument that the expression "further payment" in the last paragraph of cl 44.4 is necessarily rendered meaningless by a construction which takes it as referring only to the work yet to be completed. It is arguable that the paragraph is designed to make it clear that the only payment which can be expected by the contractor for work which is taken out of his hands is one which becomes due under cl.44.6. Such a payment would become due because the contract price exceeded the actual cost of the work; so that it would arise in respect of work which was contracted to be done by the contractor but was in the event completed by another. It would be reasonable to describe such a payment as a "further payment in respect of the work taken out of the hands of the Contractor." Thus it may be argued that, for the purposes of that paragraph, the coming due of a payment under cl 44.6 is not the contingency which triggers entitlement to any outstanding payment, but the only circumstance which confers entitlement to payment in respect of that part of the contract work not performed by the contractor.

The operation of Clause 44.6, on the respondent's construction

[15] A substantial consideration pointing to the implausibility of the construction contended for by the respondent is its potential for an arbitrary and unjust result. On its argument the contractor would be entitled to no further payment for work it had already done unless a payment were due to it under cl 44.6; that is to say unless there were a debt due to it from the principal because the cost incurred by the principal in completing the work was less than what would have been paid to the contractor if the work had been completed by it.

[16] Since, on the respondent's construction it is necessary to read the reference to "work taken out of the hands of the contractor" in cl. 44.6 as encompassing the entire project, it follows that "the cost incurred by the Principal in completing the work" and "the amount which would have been paid to the Contractor if the work had been completed by the Contractor" must refer respectively to the actual cost of the entire project and the contracted-for costs. Sums withheld by the principal would have no

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5 [2001] QCA 49.

independent significance in the equation, since they would be incorporated in the latter figure.

[17] Thus, on the respondent's argument, if the costs incurred in fact were $700,000 and the costs contracted for were $600,000 the difference of $100,000 would be a debt due from the contractor to the principal. There would, therefore, be no payment due to the contractor under cl 44.6, and no entitlement to any further payment regardless of whether past progress payments of twice that amount had been withheld by the principal. In any circumstance where the actual cost of completion was not less than the amount contracted for the contractor would have no entitlement to recover past payments due in respect of the work done.

Purpose of the suspension of payments under para 2 of Clause 44.2

[18] The best argument for the respondent was that there seemed little purpose in allowing suspension of payments to the contractor under cl 44.4 if, at the end of the prescribed period for suspension, his entitlement to payment for work done resumed. This led to an inquiry as to whether the purpose of the period of suspension lay in a distinction between the principal's rights on taking the work out of the hands of the contractor (cl 44.4(a)) and his rights on termination (cl 44.4(b)). A possible answer was that there would, in the event of termination (as opposed to the taking of the remaining work from the hands of the contractor), arise questions of set-off. Both parties furnished further submissions addressed to the question of set-off, both under cl 42.10 of the contract and under general equitable principles.

Set-off under Clause 42.10

[19] Clause 42.10 provides as follows:

> "**42.10 General Right of Set Off**
>
> Without limiting the Principal's rights under any other provision in the contract and notwithstanding the provisions of or the issue of a certificate by the Superintendent under clause 42.1 and 44.6, the Principal may deduct from any moneys due to the Contractor any sum which is payable by the Contractor to the Principal whether or not the Principal's right to payment arises by way of damages debt restitution or otherwise and whether or not the factual basis giving rise to the Principal's right to payment arises out of this contract, any other contract, or is independent of any contract. If the moneys payable to the Contractor are insufficient to discharge the liability of the Contractor to pay such sum to the Principal, the Principal may have resource to retention moneys (whether or not these are held by the Principal in alternative form pursuant to clause 42.3), and if they are insufficient, to security provided under clause 5.2 of the contract. Nothing in this clause shall affect

> the right of the Principal to recover from the Contractor the whole of such moneys or any balance that remains owing."

[20] It is clear enough that damages which might become due to the principal on termination of the contract would not constitute a "sum which is payable by the Contractor to the Principal" for the purposes of that clause, because such damages are no more than a "liability of which it cannot at present be predicated that there will in the future ever be any amount payable at all"[6]. Cl. 42.10 could not assist the respondent in this case, whichever course it took under Cl 44.4.

Equitable set-off

[21] There is some authority, advanced by both counsel, for the proposition that certified progress claims under a regime such as that provided in cl 42.1 give rise to accrued rights surviving termination of the contract.[7]. But that does not resolve the question of whether upon termination of the contract, the principal may set off his claim for unliquidated damages for failure to complete against the payments to which the contractor has accrued a right. Depending on the closeness of their connection, a claim for damages for breach of a contract may be set off against a claim for monies due under the same contract[8]. The question here is whether the contract has ousted any such right of set-off, and in what circumstances.

[22] In *Re Concrete Constructions Group Pty Ltd*[9] this court declined to imply into cl 42.1 of a contract in similar form a term to the effect that the principal was empowered to make a deduction for liquidated damages from a certified progress payment. Relying on that decision, Rolfe J in *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*[10] concluded that there existed no right of set-off against a claim under a progress certificate except as provided in the contract and, correspondingly, that a contract which did not so provide must be construed as denying any right to set-off.

[23] Citing each of these decisions, Byrne J, in the Victorian Supreme Court, in *Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd*[11] construed a similar

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6 *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521.

7 *McLachlan v Nourse* [1928] SASR 230; *McCosker v Lovett* (1995) 12 BCL 146; *Alucraft Pty Ltd (In Liquidation) v Grocon Ltd* (Supreme Court of Victoria Nos. 4683 and Ors of 1990, 13 May 1994, Smith J, unreported) cf *Ownit Homes Pty Ltd v Batchelor* [1983] 2 Qd R 124; *Grocon Pty Ltd v Melco Celim Pty Ltd* (Victorian Supreme Court No. 10376 of 1991, 13 September 1993, Ashley J, unreported).

8 *Galambos v McIntyre* (1974) 5 ACTR 10.

9 *Re Concrete Constructions Group Pty Ltd* [1997] 1 Qd R 6.

10 *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (1997) 14 BCL 215.

11 *Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd* (2000) 17 BCL 269.

standard-form contract as containing a provision (Cl. 42.1) which amounted to an agreement that no right of set-off against certified progress claims was available. Taking matters a step further, he rejected any right of set-off in that case although the contract in question had been terminated.

[24] It does not seem to me inevitably to follow that, where the contract evidences an agreement that progress claims will not be the subject of deduction or set-off, that preclusion must extend to the event of termination. Such a conclusion seems to me to move rather away from the rationale expressed in *Daysea* for discerning and preserving a right to progress payment without set-off; that is, the need of the contractor to remain viable in order to finish the contract. There seems no reason, either in general terms or on examination of the contract, that the parties' respective entitlements should not be the subject of set-off upon termination of the contract. The better view, I think, is that Cl 42.1 operates to defer any right of set-off during the life of the contract. If that be correct, and there exists a right of set-off on termination which is not available while the contract remains on foot, there would be some point in suspending payments to the contractor pending the showing of cause or the principal's decision as to whether to terminate or to take the work out of the hands of the contractor.

[25] Mr O'Shea SC, for the respondent, argued that the considerations which prevailed against set-off against progress payments while a contractor was still working on a project were equally inapplicable where the work was taken out of his hands. If set-off were available on termination, it should also be available where the principal exercised his option under cl 44.4(a). Thus, in the present case, the respondent was entitled on that event to exercise its right of set-off rather than having recourse to the last paragraph of cl 44.4. In my view, however, the regime set up by clauses 44.4, 44.5 and 44.6 provides a clear mechanism for determination of respective rights where recourse is had to cl 44.4(a); and the absence of any provision for further suspension of the right to progress payments militates against the conclusion that any set-off is permissible at that stage.

Conclusion

[26] Whether that is so or not, I do not think that any doubt as to the utility of the provision for suspension of payment comes close to outweighing the obvious potential for gross inequity attendant upon the construction contended for by the respondent. In my view, the contract is properly construed as providing for no more than a temporary suspension of the amounts which were due and which were in fact paid in December 2000. It follows that, since the respondent had no more than a passing entitlement to retention of those amounts, any mistake in their payment was not such as to give rise to an unjust enrichment of the appellants.

[27] The inevitable result of this construction of the contract is that the respondent had no real prospect of success on its claim, and there was

nothing to be achieved by a trial. The application for summary judgment should, therefore, have been granted.

[28] Because of this conclusion it becomes unnecessary to consider the appellants' alternative argument that they have a defence of the payments being made for good consideration which is such a complete answer to the respondent's case that it renders it without real prospect of success. For the reasons I have given relating to the construction of the contract I would allow the appeal, set aside the orders made at first instance and give judgment for the first and second appellants against the respondent. I would order that the respondent pay the costs of the appellants of this appeal and of the proceeding at first instance to be assessed on a standard basis.