SUPREME COURT OF QUEENSLAND

CITATION:	*Barclay Mowlem Constructions P/L v Ishikawajima-Harima Heavy Ind Co Ltd* [2003] QSC 010
PARTIES:	**BARCLAY MOWLEM CONSTRUCTION PTY LTD** (ACN 009 830 460) (plaintiff/first respondent) **v** **ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO LTD** (ACN 086 760 401) (first defendant/second respondent) **MITSUI & CO LTD** (ACN 001 855 465) (second defendant/first applicant) **PACIFIC POWER (INTERNATIONAL) PTY LTD** (ACN 003 424 691) (third defendant/second applicant) **TOSHIBA INTERNATIONAL CORPORATION PTY LTD** (ACN 001 555 068) (fourth defendant/third applicant) **IHI ENGINEERING AUSTRALIA PTY LTD** (ACN 000 945 504) (fifth defendant/fourth applicant) **TARONG ENERGY CORPORATION LIMITED** (ACN 078 848 736) (sixth defendant/third respondent)
FILE NO:	S9328 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	24 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2002
JUDGE:	Muir J
ORDER:	**1. The plaintiff's notice of claim of charge dated 13 September 2002 be cancelled.** **2. The moneys paid into court by the sixth defendant, together with accretions, if any, be paid out to the second to fifth defendants.** **3. The plaintiff pay the second to fifth defendants' costs, including reserved costs, if any, of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: BUILDING AND ENGINEERING CONTRACTS – SUBCONTRACTOR'S CHARGES – whether claim of charge under subcontract is invalid – construction of contract.

Subcontractors' Charges Act 1974

Frederick Leyland & Co Ltd [1947] AC 428
Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd [1985] 1 QdR 238
Hickman & Co v Roberts [1913] AC 229
New Zealand Shipping Co Ltd v Société des Ateliers [1919] AC 1
Panamena Europea Navigacion (Compania Limitada) v Qline Interiors Pty Ltd v Jezer Construction Group Pty Ltd [2002] QSC 088

COUNSEL: H B Fraser QC with D Logan for the applicants
EJ Lennon QC with D Kelly for the respondent

SOLICITORS: Minter Ellison for the applicants
Clayton Utz for the respondents

Introduction

[1] On 31 September 2002 the plaintiff Barclay Mowlem Construction Limited served on Tarong Energy Corporation Limited a notice of claim of charge purportedly pursuant to section 10(1) of the *Subcontractors' Charges Act* 1974 ("the Act") and on the first to fifth defendants inclusive a "notice to contractor of claim of charge being given". The amount claimed was $23,231,769 as particularised in attachments A, B and C to the notices.

[2] The first to fifth defendants inclusive are members of a consortium which contracted with the sixth defendant to construct a power generating plant at Tarong. Each consortium member was responsible for different aspects of the construction work and subcontracted parts of the work to others. The fifth defendant IHI Engineering Australia Pty Ltd ("IHI Australia") was responsible for provision of the design, manufacture, transportation to site, erection commissioning and testing of the generating plant's boiler. It contracted such work to its parent company Ishikawajima-Harima Heavy Industries Co Ltd ("IHI") which in turn subcontracted the work of erection, commissioning and testing the boiler to the plaintiff.

[3] The subcontract between the plaintiff and IHI is contained in a written agreement dated 17 July 2000 ("the subcontract") and in a document described as "Heads of Agreement" dated 19 June 2002 which varied the subcontract. There is another variation to the subcontract which is not relevant for present purposes. This application for orders cancelling or modifying the effect of the claim of charge is made under s 21 of the Act on the basis that the applicants are persons "prejudicially affected" by the claim of charge as payments on account of progress claims made by the applicants on Tarong totalling $3,966,475 have been paid into court by Tarong.

Another progress claim of $2,440,018 for November 2002 has been approved and is expected to be paid into court by Tarong also. A claim for December 2002 in the sum of $3,623,500 has been submitted but has not yet been approved.

The grounds supporting the application

[4] The applicants' principal contention is that the claim of charge is invalid as it does not secure "payment in accordance with the subcontract of all money that is payable or is to become payable to the subcontractor for work done by the subcontractor under the subcontract" within the meaning of s 5(2) of the Act. Rather, the respondents' claim is for damages for breach of contract or a quantum meruit, both of which are expressly excluded by s 5(6)(b).

[5] In the alternative, the applicants seek to have the claim or its effect modified or cancelled as –

(a) Three of the four consortium members have no connection with the subcontract;
(b) Having regard to the substance of IHI the respondent does not require the the charge to protect its interests;
(c) The charge was claimed after IHI had already been paid all monies due to it under its contract with IHI Australia.

In order to determine the merits of the argument it is necessary to first consider the contractual provisions governing the respondent's claim for payment.

The provisions of the subcontract relating to payment

[6] Under the subcontract, 85% of the subcontract price (A$35,300,000) is to be paid by IHI to BMC "on a monthly basis according to progress of the Subcontract Works *against the presentation of monthly statement* by the Subcontractor *duly certified* by the Contractors' Representative", with payment to be "made within fourteen (14) days *after approval of monthly statement* by the Contractor" (emphasis added).

[7] Pursuant to cl.1.0 (definitions and interpretation), cl.3.0 (subcontract price) of the Subcontract, and General Condition 1.1(1) (definition of "Subcontract Price"), the subcontract price is defined to mean the sum named in the subcontract agreement (being A$35,300,000) "subject to such additions thereto or deductions therefrom as may be made under the provisions of the subcontract".

[8] Clause 5.3 of the subcontract under the heading "5.0 ADJUSTMENT OF PRICE" provides –

> "5.3 Additional Works
> Additional work is defined as any work carried by the Subcontractor which is not the obligation of this Subcontract. For such work, the

contractor will place order additionally under separate quotation. [sic]".

[9] General Condition 29.1 relevantly provides:

> "29.1 The Subcontractor shall send to the Contractor, once in every month, an account giving particulars (as full and detailed as possible) of all claims for any additional expenses, for which the Subcontractor may consider himself entitled and of all extra or additional work ordered by the Contractor which he has executed during the proceeding month, and no claim for payment for any such work will be considered which has not been notified within a reasonable time".

[10] Special Conditions 4.1 and 4.4 provide for a procedure by which the respondent may be paid for additional work on a daywork basis.

[11] Clause 5 of the Heads of Agreement provides –

> "The parties agree to a process for the resolution of BMCL's claims (submitted and to be submitted) as follows:
> All claims received at site by IHI by end-June 2002 will have been reviewed and responded to by IHI in readiness for resolution on site mid-July 2002 (15th July 2002).
> Claims received by IHI in subsequent months will have been reviewed and responded to in readiness for resolution on site by middle of following month.
> If resolution cannot be reached on site within such period, claims may be referred for off site resolution between Chris Horner of BMCL and a senior executive of IHI to be nominated.
> If a resolution is not reached between off site representatives within 28 days, the claim is to be referred to a facilitation process; and
> If a resolution is not reached within 28 days, the matter may be referred to arbitration."

The claim of charge and status of the subcontract

[12] The claims comprehended within the claim of charge are –

(a) $2,800,000 on account of variation number 1;
(b) $5,663,719 on account of labour in excess of $122,000 hours pursuant to clause 2 of the heads of agreement;
(c) $269,145 on account of costs of additional plant pursuant to clause 6 of the heads of agreement;
(d) $18,014,859 pursuant to clause 5.3 of the subcontract and clauses 4.1, 6.1 and 6.2 of the Special Conditions of the subcontract.

[13] The last mentioned claim is further itemised in attachment B to the notice of claim of charge. It includes sums on account of materials supplied, a sum on account of delay and disruption (clause 6.1) and a sum for a *force majeure* claim. Attachment C provides a further break up of a $5,654,207 component of the sum of $18,014,859.

[14] All the above claims were included in a progress claim delivered by the respondent to IHI on 3 September 2002.

[15] In a letter to the respondent of 27 September 2002 IHI advised that it rejected all but one of the respondent's claims and stated inter alia –

> "The review process has reached the stage, with a number of site meetings held at which we strongly questioned the validity of all claims received, giving reasons that are not re-stated here. The next agreed stage were meetings held between your Mr Horner and our Mr Matsuzawa at which the only agreement was for claims to be categorised by type for further review. It was at these meetings that we foreshadowed issue of a taking over certificate, thereby allowing your site erection works to draw to a close in an orderly manner.
>
> Regrettably, when we issued the taking over certificate you chose to assert that we had repudiated the contract and unilaterally terminated the Subcontract. We have disputed your action and we consider the Subcontract to be still on foot.
>
> One effect of your disruptive action on site since then has been to suspend all consideration of claims categorising. The next stage, under the Heads of Agreement terms, is the appointment of a facilitator to attempt to progress resolution. In view of your purported termination of the Subcontract, we ask whether you agree that the claims be dealt with via the facilitation process of the Heads of Agreement terms or some other process."

[16] The reference in the above passage to unilateral termination of the subcontract is to the respondent's purporting to terminate the subcontract by letter dated 19 September 2002. IHI itself gave notice of termination of the subcontract by letter dated 14 October 2002 relying on the respondent's conduct which, according to IHI, manifested an intention on the respondent's part not to be bound by the subcontract.

Are the moneys the subject of the claim of charge moneys "payable in accordance with the subcontract"?

[17] The applicants contend that as the subject claims have not been certified and cannot be certified as a result of the termination of the subcontract and as the dispute resolution procedures contained in clause 5 of the Heads of Agreement are unable to be completed, there are no monies payable "in accordance with the subcontract". It is contended that any claims which the respondent may have are claims for damages for breach of contract or for a quantum meruit.

[18] The respondents, in reply, contend that –

(a) The monies claimed are monies payable under the subcontract within the meaning of s 5(6) of the Act; and

(b) There is an arguable case that at the date of termination of the subcontract the respondent had an accrued right to have the amount

> payable determined by the court, which right required no further performance of any obligation of the respondent under the subcontract. That being the case the respondent's claim is not one for damages but one for "payment in accordance with the subcontract".

[19] In order to establish the latter proposition, the respondent relies on dicta of mine in *Qline Interiors Pty Ltd v Jezer Construction Group Pty Ltd.*[1]

[20] The principle on which reliance is placed is that which prevents a party insisting on fulfilment of a condition if non-fulfilment has resulted from that party's own fault.[2]

[21] In *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd*,[3] a case involving payment for works done after the issue of a survey certificate, the court concluded that as the certificate was not issued as a result of default on the part of one contracting party, the other was absolved from the necessity of obtaining it. The conclusion was arrived at by application of the principle which prevents a person from taking advantage of the non-fulfilment of a condition the performance of which has been hindered by himself and the related principle which "exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party".

[22] It is difficult, however, to apply such principles to the circumstances under consideration. Clause 5 of the Heads of Agreement provided for all claims received in any month after the end of June 2002 to be reviewed and responded to "in readiness for resolution on site by the middle of the following month". Failing agreement, the parties had the option of referring the claims for off site resolution. If no resolution was reached between off site representatives within a further period of 28 days, the claim was to be referred to a facilitation process. Then, failing resolution with a further 28 day period, each party had the option of referring the matter to arbitration.

[23] The evidence discloses that the clause 5 process was not advanced beyond off site resolution between Mr Horner and a senior executive of IHI when the respondent purported to terminate the subcontract. The evidence does not suggest or establish that IHI was in breach of any obligations under clause 5, but in its letter to IHI of 8 October the respondent asserted that it considered the Heads of Agreement to be no longer in force.

[24] In *Qline*, the first defendant contractor made it plain that it would not give effect to the provisions of the subcontract requiring it to assess relevant progress claims. In those circumstances, which included its wrongful purported termination of the subcontract, it was held that at the point of termination of the subcontract, the subcontractor had an accrued right to payment which required no further performance

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1 [2002] QSC 088.

2 C.f. *New Zealand Shipping Co Ltd v Société des Ateliers* [1919] AC 1, 6 per Lord Finlay LC; *Hickman & Co v Roberts* [1913] AC 229 and *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd* [1947] AC 428.

3 *(supra).*

of any obligations of the subcontractor under the subcontract. That may be contrasted with the position here in which the respondent's inability to avail itself of rights under clause 5 results from its wrongful conduct (if it was not entitled to terminate the subcontract) or its election to bring the subcontract to an end (if it was entitled to terminate the subcontract).

[25] S 5(6) of the Act relevantly provides –

> "Money that is or is to become payable to a subcontractor for work done by the subcontractor under a subcontract, and the payment of which is secured under subsection (2)--
>
> (a) includes money the payment of which is governed by a provision of the subcontract still to be complied with, including for example the following--
>
> (i) a provision establishing a procedure for the certification of the amount, quality or value of work that has been performed;
>
> (ii) a provision establishing a procedure for the resolution of a dispute about the amount, quality or value of work that has been performed; and
>
> (b) does not include the following--
>
> (i) damages for breach of contract or in tort;
>
> (ii) an amount payable on the basis of an extra-contractual remedy, including, for example, as reasonable compensation for work done;
>
> …".

[26] If subsection 5(6)(a) stood by itself it may have been possible to argue that it included claims such as the subject claim. The contrary argument is that once the subcontract is terminated the money claimed cannot be money "the payment of which is governed by a provision of the subcontract still to be complied with" unless the subcontractor's right to payment accrued prior to termination and the quantum, if not fixed by the relevant clause can be determined by the court pursuant to a principle such as that discussed in *Qline*. Whatever the true construction of the provision, it is apparent from subclause (6)(b) that it does not include "damages for breach of contract" or a "claim on a quantum meruit". The respondent's claim are of such a nature.

[27] As a long line of authority, inconsistent with a literal construction of subsection 5(2), establishes that for a charge to be valid, it must secure payment of money in accordance with the subcontract[4], the respondent has no valid charge.

[28] The above conclusions render unnecessary further consideration of the other grounds on which the application is based.

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[4] Eg, Groutco (Aust) Pty Ltd v Thiess Contractors Pty Ltd [1985] 1 QdR 238

Conclusion

[29] The orders will be –

1. The plaintiff's notice of claim of charge dated 13 September 2002 be cancelled.
2. The moneys paid into court by the sixth defendant, together with accretions, if any, be paid out to the second to fifth defendants.
3. The plaintiff pay the second to fifth defendants' costs (including reserved costs, if any) of and incidental to this application to be assessed on the standard basis.