# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Abigroup Contractors P/L v Multiplex Constructions P/L & Ors* [2003] QCA 501 |
| PARTIES: | **ABIGROUP CONTRACTORS PTY LIMITED** ABN 40 000 201 516<br>(plaintiff/first respondent/appellant)<br>**v**<br>**MULTIPLEX CONSTRUCTIONS PTY LTD** ABN 96 008 687 063<br>(first defendant/first applicant/first respondent)<br>**WATPAC AUSTRALIA PTY LTD** ABN 71 010 462 816<br>(second defendant/second applicant/second respondent)<br>**THE CROWN IN RIGHT OF THE STATE OF QLD – THROUGH THE DIRECTOR GENERAL OF PUBLIC WORKS** ABN 46 752 917<br>(third defendant/second respondent) |
| FILE NO/S: | Appeal No 5641 of 2003<br>SC No 3723 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 14 November 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 22 October 2003 |
| JUDGES: | Davies and McPherson JJA and Wilson J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal allowed with costs**<br>**2. The orders made on 5 June 2003 cancelling the claims of charge dated 1 April 2003 and 2 May 2003 are set aside**<br>**3. The application dated 14 May 2003 is dismissed**<br>**4. Costs of and incidental to the proceedings at first instance, including the costs incidental to the application to stay the enforcement of the orders for cancellation, are to be paid by the respondents to this appeal** |
| CATCHWORDS: | CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND |

IMPLIED CONDITIONS – whether subcontract contains provision for resolution of dispute about value of work performed – whether complied with

ACTS OF PARLIAMENT – INTERPRETATION – ACTS AND CLAUSES – PARTICULAR ACTS – QLD – whether amendments to s 5 *Subcontractors Charges Act* 1974 changes the definition of 'charge'

*Subcontractors' Amendment Act* 2002 (Qld)
*Subcontractors' Charges Act* 1974 (Qld), s 5, s 5(1)(a), s 5(2), s 5(6), s 10, s 10(1B), s 10A, s 10C, s 11, s 21, s 22

*Australian Broadcasting Commission v Australian Performing Rights Association Ltd* (1973) 129 CLR 99, cited
*Community Development Pty Ltd v Engwirda Construction Company* (1969) 120 CLR 455, referred to
*Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd* [1985] 1 Qd R 238, distinguished
*Henry Walker Etlin Contracting Pty Ltd v Mostia Constructions* [2001] QSC 089; SC No 1064 of 2000, 3 April 2001, referred to
*James Hardie Building Systems Pty Ltd v Epoca Constructions Pty Ltd* (1999) 15 BCL 199, referred to
*Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd* [1998] 2 Qd R 218, referred to
*Stapleton v FTS O'Donnell Griffin & Co (Qld) Pty Ltd* (1961) 108 CLR 106, followed

COUNSEL: J K Bond SC, with D A Kelly, for the appellant
H B Fraser QC, with P A Hastie, for the respondents

SOLICITORS: Carter Newell for the appellant
Minter Ellison for the respondents

[1] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the orders he proposes.

[2] **McPHERSON JA:** In May 2001 the Department of Works entered into a contract with the applicants Multiplex and Watpac for the redevelopment of Lang Park. The Department was, within the meaning of the *Subcontractors Charges Act* 1974, the "employer" under that contract and the applicants were the "contractor". The applicants then entered into a subcontract with the first respondent Abigroup for it to do a part of that work, which was known as the Community Infrastructure West Works. Abigroup was the "subcontractor" under the subcontract with the applicants.

[3] Under s 5(1)(a) of the Act every subcontractor has a charge on the money payable to the contractor under the contractor's contract; that is, in this case a charge on the money payable to the applicants under their contract with the Department. By s 5(2) that charge of the subcontractor:

> "secures 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."

That meant that Abigroup was entitled to claim a charge under the Act on the money payable to the applicants by the Department to secure payment, in accordance with Abigroup's subcontract with the applicants, of all money that was payable or to become payable to Abigroup for work done by it under its subcontract with the applicants.

[4] Under s 5(6) there is a definition, or rather a partial description, of what is meant in s 5(2) by "money that is or is to become payable to a subcontractor" for work done under the contract. By s5(6)(b), it does *not* include matters such as damages for breach of contract or in tort, or any amount payable as restitution or "reasonable compensation" for work done. What is more important for present purposes, s 5(6)(a) expressly *includes*:

> "(a) 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;"

[5] On 1 April 2003 Abigroup gave notice under s 10 of the Act claiming a charge for $1,559,158.70 on money payable by the Department to the applicants. A further such notice was given on 2 May 2003 in respect of another sum of $1,735,548.10 alleged to be owing to it under the subcontract. On 5 June 2003 the applicants were successful in obtaining an order of the Court cancelling the charges under s 21 of the Act. Abigroup now appeals against the order of cancellation.

[6] The amounts of $1.5 million and $1.7 million for which notices of charge were given represent money claimed for work alleged to have been done under the subcontract that, according to Abigroup, has either not been certified in full under the subcontract or for variations to the work that have not been assessed or paid in full. Those two amounts represent the shortfall between what had been claimed by Abigroup in its progress or payment claims and what was in fact certified and paid to it by the applicants.

[7] In *Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd* [1985] 1 Qd R 238, 243, it was said that under s 5(2) of the Act two things must co-exist before a charge was capable of being constituted under the Act. There must be money "payable or to become payable" to the subcontractor for work done under the subcontract, and it must be payable "in accordance with" the subcontract. In *Groutco,* the claim in respect of which the charge was asserted was for damages for breach of contract, which is something that is now expressly excluded by s 5(6)(b)(ii). However, in a series of decisions beginning with *Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd* [1998] 2 Qd R 218, 221, the decision in *Groutco* was treated as authority for saying that if, on completion, work under the contract remained to be valued by a certifier before the value certified was to be paid, "it would not come within the Act, even though the value of the work might be capable of assessment otherwise". See also *James Hardie Building Systems Pty Ltd v Epoca Constructions Pty Ltd* (1999) 15 BCL 199 and *Henry Walker Etlin Contracting Pty*

*Ltd v Mostia Constructions* (2001) 19 BCL 147, where it was held that a sum of money could not be said to be "payable or to become payable" to a subcontractor until the contractual requirements with respect to certification as to value, or resolution of a dispute about it, had been complied with.

[8] Whether or not those decisions correctly reflected a principle laid down in *Groutco* it is now not necessary to determine. With effect from 1 July 2002, the Act was amended to insert in s 5 additional subsections (4) to (6), of which s 5(6)(a) has already been set out. Its provisions abrogate those decisions by providing in s 5(6)(a) that money is or is to become payable (and so is capable of being secured under s 5(2)) if payment of it is governed by a provision of the subcontract that is "still to be complied with." The two examples given in s 5(6)(a) are of provisions establishing a procedure for (i) the certification of, or (ii) the resolution of a dispute about, the amount, quality or value of work that has been performed. There is nothing to suggest that s 5(6)(a) is confined to the instances given in subparagraphs (i) and (ii) of paragraph (a). They are introduced by the word "including" and are provided only as examples of provisions under which money is payable or is to become payable to a subcontractor for work done under a subcontract the payment of which is secured under s 5(2). What is critical to the operation of s 5(6)(a) is the presence in the subcontract of a provision governing the payment of money that is or is to become payable to a subcontractor for work done under the subcontract, and that that provision "is still to be complied with."

[9] The insertion of s 5(6) has a tendency to extend the availability of the charge conferred by s 5(2). All well-drawn contracts for the performance of building or construction work contain provisions of some kind governing payment of money for doing the work. At any time before payment is made in full, it may be said that such a provision is "still to be complied with". But the two examples given in s 5(6)(a) provide some indication of what is being spoken of, and it is not necessary on this occasion to go beyond them. What they contemplate is that the contract must prescribe some procedure which is still to be complied with, for certification of the amount, quality or value of work performed under the subcontract, or for the resolution of a dispute about it.

[10] That being so, the ambit of s 5(6) and potentially of the charge under s 5(2), is now very wide. It includes claims for money payable or to become payable under the subcontract for work done that, as regards its amount, quality or value, is in dispute or has still to be resolved or certified in accordance with the contractual provision in question. Using the language of insolvency law, it is capable of including not only a debt presently due and payable to the claimant, as well as one that is "prospective" or yet to fall due, but one that may fall due on the happening of some uncertain future event or contingency that may (not will) occur in the future; for instance, upon certification of a claim by the supervising architect or the making of an award in an arbitration under the contract, as in *Community Development Pty Ltd v Engwirda Construction Company* (1969) 120 CLR 455, 459.

[11] Constituting a charge in accordance with the Act has the effect of limiting the contractor's freedom to dispose of money payable under the subcontract and of making the claimant subcontractor a secured creditor in the insolvency of the contractor: see s 11 of the Act, and *Stapleton v FTS O'Donnell Griffin & Co (Qld) Pty Ltd* (1961) 108 CLR 106. Widening the scope of the claims capable of supporting the charge conferred by the Act risks abuse at the hands of desperate or

unscrupulous subcontractors by enabling them to claim charges based on unfounded or exaggerated claims of payment for work they assert they have done, with the consequence of stultifying the contractor's power to deal with money received by it from the employer for payments to subcontractors in return for work being done. Since the inception of the Act in 1974, s 10 has, however, contained provisions specifying the details to be given in the notice of claim of charge that must be provided in order to constitute it.

[12] In association with the legislative changes effected to s 5 of the Act in 2002, the provisions of s 10 also underwent amendment designed to increase the obligations of a claimant in giving notice of claim of charge. Under s 10(1)(a) the amount and particulars of the claim must be certified as "as prescribed" and by "a qualified person" as defined in s 10A, which includes professional architects, engineers, quantity surveyors, and the like. The notice must by s 10C now be supported by a statutory declaration in the approved form concerning the correctness of the charge including the amount of the claim: see s 10(1B). Each claim, of which by s 10(7) more than one may be made, must be in respect of "a separate and distinguishable item of work done" by the subcontractor, and there must be no more than one claim in relation to any one item: s 10(8).

[13] These amendments to the legislation may not eliminate all possibility of abuse resulting from extending the scope of the claims for payment for which a statutory charge may now be made; but they serve, as Mr Bond SC for Abigroup contended, to demonstrate that the legislature was conscious of the risks involved in that extension, and in amending s 10 took steps to limit the potential for such abuse as far as possible. The contractor or any other person prejudicially affected by a claim of charge retains the right to have the charge cancelled or its effect modified: see s 21, as amended; and also to recover damages from someone who lodges a notice of claim of charge without reasonable cause: see s 22, as amended.

[14] We therefore reject the submission of the applicants as respondents to the appeal that the effect of the amendments to s 5 of the Act introduced by *Subcontractors Charges Amendment Act 2002* was restricted to eliminating the decision in *Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd* [1998] 2 Qd R 218 and others that have followed it. In so far as *Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd* [1985] 1 Qd R 238, or some of what was said in it, lends support to a narrow interpretation of what may be made the subject of a charge under s 5, it must now be read in the light of the amendments to that and other provisions of the Act that were introduced in 2002.

[15] We turn now to inquire whether the subcontract in the present case satisfies the requirements of s 5 of the Act in its amended form. We have already given our impression of the potential impact of s 5(6) on the scope of the expression "money that is payable or is to become payable" in s 5(2). Abigroup submits that its subcontract with the applicants contains a provision, which is "still to be complied with", governing payment of money for work done by it under the subcontract, and that constitutes:

> "(ii) a provision establishing a procedure for the resolution of a dispute about the amount, quality or value of work that has been performed."

[16] As we have seen, there is a difference or dispute between the parties about the amount or value of work performed by the subcontractor under the subcontract, or variations of it, arising out of progress or payment claims submitted by Abigroup which, after being rejected wholly or in part by the applicants, were made the subject of the two charges claimed by the notices given in April and May 2003. If there is an applicable provision in the subcontract establishing a procedure in terms of s 5(6)(a)(ii) for the resolution of that difference or dispute, it is common ground between the parties that it is "still to be complied with".

[17] The applicants say there is no such provision. Like many others of its kind, the subcontract in this instance consists of several documents, which are described in cl 2 of the Formal Instrument of Agreement as comprising among others:

1. a Formal Instrument of Agreement;
2. Special Conditions of Contract; and
3. a set of Australian Standard Subcontract Conditions designated AS 2545 – 1993.

Clause 3 of the Formal Instrument provides that any conflict or inconsistency between the provisions of those documents is to be resolved in accordance with the order of precedence set out in clause 2. Clause 3 is expressed to take effect "without limiting clause 8.1 of the Subcontract Conditions". Clause 8.1, under the heading "discrepancies", declares that the several documents forming the subcontract are taken to be mutually explanatory of one another. This accords with the general approach which prevails in interpreting provisions of documents forming a single contract. Such provisions are, if possible, to be interpreted so as to render them harmonious with each other: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109-110 (Gibbs J). There are several instances here in which the Standard Conditions have been altered in the Special Conditions by the deletion or substitution of other specific provisions which are listed in the Subcontract. Subject to those instances, it is only where there is, within the meaning of clause 3, a conflict or inconsistency between the terms and provisions of the various Subcontract documents that the order of precedence laid down in clause 3 of the Formal Instrument will prevail.

[18] In adopting cl 42.1 of the Australian Standard Conditions, cl 42.1 of the Subcontract Special Conditions deleted two paragraphs and inserted another. Otherwise, the standard form of cl 42.1 was, so far as material, incorporated in the Subcontract. It is a lengthy provision, which is concerned with payment claims (which is the description given in the Subcontract to progress claims), certifications, calculations and times for payment. It begins by saying that at times specified in the Annexure and also upon the issue of a Certificate of Practical Completion, the Subcontractor is to deliver to the Representative of the Main Contractor (as the applicants are described) claims for payments supported by evidence of the amount due to Abigroup as Subcontractor. Within 21 days of receipt of such a claim, the Contractor's Representative is to issue to the applicants and to Abigroup a payment certificate stating the payment which in his opinion is to be made by applicants. Such a certificate, or any Final Certificate issued under cl 42.8, is to allow for amounts paid under the Subcontract and for amounts otherwise due to the Subcontractor arising out of the Subcontract.

[19] Under the 4$^{th}$ paragraph of cl 42.1, the Main Contractor (meaning the applicants) must within 35 days of its Representative receiving the claim for payment or within 14 days of issue of the payment certificate, pay to the Subcontractor Abigroup an

amount not less than that shown in the certificate to be due. The 4th paragraph of cl 42.1 proceeds as follows:

> "a payment made pursuant to this clause shall not prejudice the right of either party to dispute under clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, the main contractor or subcontractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable."

The 5th paragraph of cl 42.1 provides that:

> "Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that the work has been executed satisfactorily, but shall be a payment on account only, except as provided in clause 42.8"

Clause 42.8 deals with the Final Certificate and payments under it. It contemplates the service of a notice of dispute under cl 47; otherwise, the Final Certificate is to be evidence that the works have been completed in accordance with the Subcontract.

[20] Clause 47 is a provision that contains a procedure for resolution of disputes. It will be necessary to consider it again in due course; but for the moment it is enough to say that the applicants submit that it does not apply to or provide for resolution of the disputes about Abigroup's payment claims, or the alleged shortfalls in payments arising out of them, which led to its claims being made to charges under the Act. The applicants' submission is that the 4th paragraph of cl 42.1 does not confer, or even purport to confer, any right to dispute all components of or omissions from a payment certificate issued by the Contractor's Representative. All it does, it is said, is to provide that payment of a progress certificate shall not prejudice the right of either party to dispute under cl 47 whether the amount paid is properly due. The fact is, however, that, while the reference in 4th paragraph is concerned primarily to ensure that payment of a claim delivered and certified under cl 42.1 will not prejudice the right of either party to dispute under cl 47 whether the amount so paid is the amount properly due and payable, it does, in so providing, clearly recognise the existence of a right in the parties to submit a dispute about such a matter to resolution under cl 47. It is, in our view, really not possible to read or regard that paragraph in any other way.

[21] On turning to cl 47, it is seen to contain a series of provisions directed to providing a procedure for the settlement of disputes between the subcontractor Abigroup and the Managing Contractor, as the applicants are described in this clause. With one major qualification, there is no doubting that these provisions sufficiently constitute a provision answering the description in s 5(6)(a)(ii) of the Act of a procedure for resolution of a dispute about the amount or value of work that has been performed. The apparent difficulty for Abigroup arises from the 1st paragraph of cl 47.1, which provides:

> "This clause 47 applies in respect of each of the following:
>
> (a) Any dispute that the Subcontractor has with the determination of a claim made under clause 46.

(b) Any claim in tort, equity or under any statute in relation to, or arising out of the Subcontract or the Subcontract works against the Managing Contractor."

[22] Clause 46, when it is consulted, turns out to be concerned with any claim by the Subcontractor "in respect of or arising out of a breach of the Subcontract": see cl 46.1. It admittedly is not apt to comprehend the subject matter of Abigroup's claims in this case, which are in the nature of claims for payment arising under or in accordance with the contract itself. Nor are they, within cl 47.1(b), claims in tort, equity or under any statute in relation to or arising out of the Subcontract or the Subcontract works against the Managing Contractor.

[23] That is, however, not the end of the matter. As Mr Bond points out, all that cl 47.1 says is that cl 47 applies in respect of each of (a) and (b) in cl 47.1. It does not say that cl 47 applies *only* to or in respect of those two matters, or that it does not apply to anything else, such as payments or certificates under cl 42.1. Indeed, the 4th paragraph of cl 42.1 contemplates that there may be disputes under cl 47 about the amount paid or payable, as well as a determination ("whether under clause 47, or as otherwise agreed") of those disputes. It is not in our view possible to read the opening words of cl 47.1 as if they represented an exhaustive code or catalogue of all the matters that are or may be the subject of the process of dispute resolution under cl 47. In addition, there is nothing in special condition cl 47.1 that is inconsistent with the right recognised in cl 42.1 of submitting to resolution under cl 47 a dispute whether the amount paid on a certificate is the amount that is properly due and payable.

[24] There are various prescriptions in cl 47 for the delivery of notices or the doing of other acts within specified times. Some of those provided for in cl 47.1 are, as appears from their terms, applicable only to claims falling within (a) and (b) of cl 47.1. Otherwise, the procedure is for the most part sufficiently mapped out "if", as is declared in the 2nd paragraph of cl 47.1 "this clause 47 applies". The same is broadly true of other provisions in cl 47.2, 47.3, 47.4, and so on. There is no need to examine them in detail to demonstrate that the procedure envisaged in cl 47 is capable of being applied to the resolution of a dispute about the matters which have been raised by Abigroup in or by their claims of charge. If it was the applicants' intention to avoid s 5(6)(a)(ii) of the Act by excluding from the Subcontract any provision for dispute resolution concerning amount or value of work performed, cl 42 and cl 47 fail to achieve that object.

[25] In the result, we are satisfied that, within the terms of s 5(6)(a)(ii) of the Act, the Subcontract contains a provision establishing a procedure for resolution of a dispute about the amount or value of work that has been performed by the Subcontractor under the Subcontract, and that here that provision still has to be complied with. It follows that money that is to become payable to Abigroup pursuant to that provision if complied with is capable of supporting a charge under s 5(2) of the Act. Abigroup has a further submission not advanced at the hearing below, which it has included in its notice of appeal under leave to amend given on appeal. It relies on s 5(6)(a)(i) of the Act, which depends for its operation on the existence of a subcontractual procedure for certification of the amount, quality, or value of work that has been performed.

[26] Clause 42.7 of the Subcontract requires lodgement of a Final Payment Claim within 21 days after expiry of the Defects Liability Period of 52 weeks commencing on the date of completion of the works, which in this instance will not happen until mid-2004. The Subcontractor is obliged to include in the Final Payment Claim all monies which it considers to be due from the Main Contractor under the Subcontract, after which the certifier is required by cl 42.8 to issue a Final Certificate certifying the amount that is finally due, which the Contractor must pay. The effect of such a Certificate is to bar further claims by the Subcontractor; however, in issuing it, the certifier is required under cl 42.2 to correct any error discovered in any previous certificate, and so is not bound by his previous decisions, (which would include those that gave rise to the claims of charge in the present case), but will be bound to reconsider them. This appears to have the consequence that the procedure for final certification of the amount, quality or value of work that has been performed answers the description in s 5(6)(a)(i) of the Act. It may also have the consequence that many, perhaps most, contracts which contain provision for final certificates in this or a similar form will attract the operation of s 5(6)(a)(i). It is, however, not necessary to determine that question finally on this occasion. Abigroup has succeeded on its submission based on s 5(6)(a)(ii), which is sufficient for the purposes of the proceedings.

[27] The appeal is allowed with costs. The orders made on 5 June 2003 cancelling the claims of charge dated 1 April 2003 and 2 May 2003 are set aside, and the application dated 14 May 2003 is dismissed. The costs of and incidental to the proceedings at first instance, including the costs incidental to the application to stay the enforcement of the orders for cancellation, are to be paid by the respondents to this appeal.

[28] **WILSON J:** I agree with the reasons for judgment of McPherson JA and there is nothing I wish to add.