SUPREME COURT OF QUEENSLAND

CITATION:	*Multiplex Constructions & Anor v Abigroup Contractors Pty Ltd* [2004] QSC 198
PARTIES:	**MULTIPLEX CONSTRUCTIONS PTY LTD** **ABN 96 008 687 063** (first applicant) and **WATPAC AUSTRALIA PTY LTD** **ABN 71 010 462 816** (second applicant) **v** **ABIGROUP CONTRACTORS PTY LTD** **ABN 40 000 201 516** (respondent)
FILE NO:	SC No 2909 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Queensland
DELIVERED ON:	25 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2004
JUDGE:	Chesterman J
ORDER:	**1. That the charge be modified omitting the amount claimed in respect of acceleration** **2. That the parties draw up an order reflecting the reduction**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS' CHARGES ACT (Q) – where the first and second applicants were the managing contractors for a construction development – where the first and second applicants subcontracted a part of the development to the respondent – where the respondent lodged a charge over moneys payable to the first and second applicants with respect to the work performed by the respondent – where the first and second applicants are seeking orders modifying or cancelling the charge – whether the first and second applicants or the respondent bears the onus of establishing that the charge should be modified or cancelled – consideration of the appropriate test to be applied by the Court in such an application

Re Jorss' Caveat [1982] Qd R 458, considered
Re Burman's Caveat [1994] 1 Qd R 123, considered
Gray v Morris [2004] QCA 5, considered
Rapid Contracting Pty Ltd (in liq.) v Multiplex Constructions Pty Ltd (unreported, Supreme Court of Queensland, Shepherdson J, 27 October 1998) BC9807786, followed
Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liq.) (unreported, Supreme Court of Queensland Court of Appeal, 13 August 1999) BC9904974, followed
Stucoid Pty Ltd v Stadiums Pty Ltd (1960) 107 CLR 521, considered
Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1954) 90 CLR 235, considered
Foran v Wight (1989) 168 CLR 385, considered

Subcontractors' Charges Act 1974 (Qld), s 3B, s 5(6), s 10, s 11, s 21
Real Property Act 1861 (Qld), s 99
Land Title Act 1994 (Qld), s 127
Contractors and Workmen's Liens Act 1906 (Qld), s 9

COUNSEL: Mr P H Morrison QC, with Mr P A Hastie, for the first and second applicants
Mr J K Bond SC, with Mr R C Schulte, for the first respondent

SOLICITORS: Minter Ellison for the first and second applicants
Allens Arthur Robinson for the respondent

[1] The applicants were partners in what was called the Lang Park Redevelopment Joint Venture ('the joint venture') the purpose of which was to design and build a football stadium in Brisbane on the site of the ground earlier known as Lang Park. The applicants contracted in May 2001 with the Department of Public Works ('the Department') for the construction of the stadium. In April 2002 the applicants made a subcontract with the respondent pursuant to which it undertook part of the construction work described as the Community Infrastructure West works. These involved the construction of bridges, plazas, road works, walkways and associated services, such as lighting and signs, together with improvements to the Milton railway station.

[2] On 14 November 2003 the respondent claimed and gave notice of claiming a charge pursuant to the provisions of the *Subcontractors' Charges Act* 1974 (Qld) ('the Act') over moneys payable to the joint venture by the Department. The charge claimed was for work carried out between 24 April 2002 until 14 November 2003 'pursuant to a subcontract for the performance of the work involved in the construction of the Community Infrastructure West.' The amount in respect of which the charge was claimed was $10,440,091.

[3] The applicants have applied pursuant to s 21 of the Act for orders cancelling or modifying the charge.

[4] Section 5 of the Act relevantly provides:

> '(1) If an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor is entitled to –
>
> (a) a charge on the money payable to the contractor … under the contractor's … contract …; and
>
> (b) …
>
> (2) The charge of a subcontractor secures payment in accordance with subcontract of all money that is payable or is to become payable to the subcontractor for work done by the subcontractor under the subcontract.'

Section 11 obliges a person to whom a notice of claim of charge is given pursuant to s 10 to retain a sufficient part of the money payable under the contract to satisfy the claim until an order of the court directs to whom and in what manner the money is to be paid. Section 21 provides:

> '(1) A person who alleges that the person is prejudicially affected by a claim of charge … may at any time make application to the court for an order –
>
> (a) that the claim be cancelled; or
>
> (b) that the effect of the claim be modified.
>
> (2) The court must hear and determine summarily an application made pursuant to this section and may make such order as it thinks fit.
>
> (3) …'

[5] The parties disagreed about who carries the onus of establishing that a claim of charge should be cancelled or modified, and about the test to be applied by the court when hearing such an application.

[6] The applicants submitted that the respondent bore the onus of proving that its charge should not be cancelled or reduced. Mr Morrison QC, who appeared with Mr Hastie for the applicants, argued that the statutory right to charge moneys payable by an employer to a contractor is akin to the legislative scheme regulating caveats on the land title register and that authorities regulating the mode of applying to remove caveats should apply to applications to cancel or modify subcontractors' charges.

[7] I was referred to the decision of the Full Court, *Re Jorss' Caveat* [1982] Qd R 458, which is authority for the proposition that similar principles to those regulating a grant of interlocutory injunctions apply to applications to remove a caveat and that [at 465]:

> '.. the onus … lies upon the caveator … [to] first satisfy the court that … the evidence … does raise a serious question to be tried; and, having done so, … show that on the balance of convenience it would be better to maintain the status quo until trial of the action…'.

[8] The approach was reaffirmed by the Court of Appeal in *Re Burman's Caveat* [1994] 1 Qd R 123. It must be noted, however, that both authorities were concerned with s 99 of the *Real Property Act* 1861 (Qld), which provided that a caveatee may summon a caveator to attend before the Supreme Court to show cause why the caveat should not be removed. This formulation is quite different to s 21 of the Act (and indeed to s 127 of the *Land Title Act* 1994 (Qld)). Both those sections confer power on the court to determine an application for an order that a charge or caveat be abrogated. Ordinarily the onus of proving that an order giving a remedy should be made lies on the applicant who claims it. Section 99 of the *Real Property Act* by its terms suggested otherwise; that the respondent to the application, the caveator, had to show cause why the caveat should not be removed.

[9] In my opinion the applicants must show that the claim should be cancelled, or its effect modified, but nothing turns upon that conclusion. It is unlikely that the outcome of any application to cancel or modify a subcontractor's charge will depend upon where the onus of proof lies. The outcome of this application certainly does not depend upon that consideration. The parties have filed and read affidavits which, with the exhibits, run to thousands of pages.

[10] I doubt if one should import into s 21 a requirement that the court consider the balance of convenience between allowing a charge to continue and cancelling it. If there be such a requirement the material filed by the parties to which I was referred does not address the point. It is no doubt inconvenient to the applicants that $10,000,000 due to them pursuant to their contract with the Department is withheld but that is an inconvenience which the Act expressly contemplates and provides for. I was told that the applicants are companies of considerable worth. They are certainly very well known. The implication was that the charge is unnecessary to protect the respondent who will be able to execute any judgment it might obtain for moneys due under its subcontract, or damages for breach of it. I was not, however, provided with any specific evidence of the applicants' assets or liabilities. The fact that the applicants are said to be of substantial worth suggests that the hardship in being held out of their money is not critical to them. There is some advantage, and therefore convenience, for the respondent in maintaining the charge. It provides an incentive for the applicants to co-operate in having the litigation prepared and heard promptly. There is nothing which allows a finding of particular convenience or inconvenience one way or the other.

[11] The respondent disputes the applicants' submission that the test to determine whether the court should act in terms of s 21 of the Act is whether there is a serious question to be tried and whether the balance of convenience favours the continuation or cancellation of the charge. The respondent submits that the test should be akin to that applied when the court considers an application for summary judgment pursuant to the *UCPR* and relies upon a passage found in *Gray v Morris* [2004] QCA 5 for the proposition that relief should not be given pursuant to s 21 unless the claim of charge is 'one which cannot succeed' or one 'which has no prospect of success'.

[12] Those remarks were made in a slightly different context. I am not sure that they are entirely apposite to questions which will arise in applications for relief pursuant to s 21. I would accept that such an application cannot be determined against a subcontractor where the facts giving rise to an entitlement to claim a charge are disputed. I approach the application on the basis that the applicants must show that the respondent has no arguable case, or no fairly arguable case (I regard the terms as synonymous) in support of its charge.

[13] To find the onus this way is consistent with what was said by Shepherdson J in *Rapid Contracting Pty Ltd (in liq.) v Multiplex Constructions Pty Ltd* (unreported, Supreme Court of Queensland, 27 October 1998) BC9807786 and by Thomas JA in the same case on appeal (unreported, Supreme Court of Queensland Court of Appeal, 6 August 1999) BC9904974. The applicants must show that the basis for the charge claimed is untenable.

[14] Two points of substance were argued. The first is that the claim of charge is invalid because notice was given beyond the time allowed by the Act. The second was that a substantial part of the amount claimed is not for moneys due under the contract but for damages for breach of it which cannot comprise the subject of a subcontractor's charge.

[15] Notice of claim of charge was given on 14 November 2003. The parties agree that the subcontract works were practically complete on 29 May 2003.

[16] Section 10 of the Act provides:

> '(1) A subcontractor who intends to claim a charge on money payable under the contract to the subcontractor's contractor … -
>
> (a) must give notice to the employer … by whom the money is payable, specifying the amount and particulars of the claim … and stating that the subcontractor requires the employer … to take the necessary steps to see that it is paid or secured to the subcontractor; and
>
> (aa) … ; and
>
> (b) must give notice of having made the claim to the contractor to whom the money is payable.
>
> (1A) The claim is in respect of –
>
> (a) money payable to the subcontractor at the date of the notice; and
>
> (b) money to become payable to the subcontractor after the date of the notice for work done by the subcontractor prior to that date.
>
> …

(2) A notice of claim of charge may be given although the work is not completed or the time for payment of the money in respect of which the charge is claimed has not arrived, but if the work is completed must be given within three months after such completion.

(3) A notice of claim of charge in respect of retention money only may be given at any time while work under the contract mentioned in subsection (1) is being performed but must be given within 3 months after the expiration of the period of maintenance provided for by the contract and no later.

(4) If notice is not given pursuant to this section, the charge does not attach.

…

(7) To remove any doubt, it is declared that a subcontractor may make 2 or more claims in relation to money payable or to become payable to the subcontractor for work done by the subcontractor under a subcontract.

(8) However –

(a) each claim must be about a separate and distinguishable item of the work done by the subcontractor under the subcontract; and

(b) there must not be more than 1 claim about any 1 item.'

[17] Section 3B of the Act provides:

'3B When work specified in contract or subcontract completed

For the purposes of this Act the work specified in a contract or subcontract is deemed to be completed when, with such variations, omissions or deductions as have been duly authorised or agreed upon, it has been performed in accordance with the contract or subcontract, notwithstanding that the contractor or subcontractor –

(a) may then or subsequently be employed in doing additional or extra work that is connected with or related to the work but is not specified in the contract or subcontract; or

(b) may be liable to rectify defects in the work discovered since the performance thereof and during a period of maintenance provided for by the contract or subcontract.'

[18] Before turning to note the facts relevant to this part of the application and the arguments, it is necessary to observe a definition in the subcontract between the applicants and the respondent. It defined 'substantial completion' to be synonymous with the phrase 'completion of the subcontract works', which was defined to mean:

> '… that stage in the execution of the work under the subcontract when:
>
> (a) the works are complete except for a limited number of minor omissions and minor defects:
>
> (i) which the managing contractor's representative, in its absolute discretion, determines do not prevent the works from being reasonably capable of being used for their intended purpose, and
>
> (ii) which the managing contractor's representative determines the subcontractor has reasonable grounds for not promptly rectifying, and
>
> (iii) rectification of which will not prejudice the continued use of the works;
>
> (b) those tests which are required by the subcontract to be carried out and passed or satisfied before the works can be regarded as having reached the stage of completion … have been carried out and passed or satisfied;
>
> (c) documents and other information required under the subcontract which, in the opinion of the managing contractor's representative, are essential for the use … of the works have been supplied …; and
>
> (d) the certificate of classification for the works issued by the billing surveyor and all other necessary permits, registrations, approvals, certifications, consents or licences have been provided to the managing contractor's representatives.'

[19] The facts are not, or not substantially, in dispute. The subcontract works were substantially completed, within the definition just rehearsed, on 29 May 2003. Some of the work which, by the terms of the subcontract, the respondent was obliged to perform was not completed until after 14 August 2003. The value of that work was $327,095.53. The applicants accept that some defects in work done by the respondent were discovered prior to 29 May 2003 but not remedied before that day. The value of work done after 14 August 2003 but not paid for is only $55,586.30.

[20] The applicants argue that the evidence established convincingly that all work had been done under the subcontract by 29 or 30 May 2003. There are statements to that effect in a number of letters written on behalf of the respondent. There is, however, other evidence, the effect of which I have summarised, which shows that

work under the subcontract continued after 14 August and up to 14 November 2003. The admissions made by the respondent that work had finished earlier is only some of the evidence on the question. It would not be appropriate in a summary proceeding to act on the admissions and ignore evidence which suggested that the content of those admissions was wrong, especially when the applicants accept that some work under the subcontract was performed after 14 August.

[21] A perusal of the correspondence in which the admissions are contained shows that they were directed to the date when the subcontract work was practically complete or, in the more precise terms of the subcontract definition, 'completion of the subcontract works' had occurred. The admissions were directed towards the date when completion in accordance with the definition had occurred, not when all work required by the subcontract had, in fact, been performed.

[22] The real dispute between the parties concerned the construction of s 10 of the Act. It was whether a notice of claim of charge must be given within three months of the completion of the work in respect of which the claim was made, or whether the Act allows three months from completion of the subcontract works as a whole for the giving of notice. This is the importance of 14 August 2003, the date three months prior to the notice. The whole of the subcontract works were not complete until after that date but all but about $55,000 in value of the work had been completed earlier. Strangely, this point has never before arisen for decision.

[23] The applicants point out that s 10(2) requires the notice of claim of charge to be given within three months of the completion of the work, not the whole of the subcontract work or 'work under the contract', which is a phrase used elsewhere in the Act. The applicants further submit that s 3B does not help the resolution of the dispute because it is a 'deeming provision' which does not allow one in a particular case to determine when, as a matter of fact, work was completed. Moreover, it is submitted that its subject matter is completion of work 'specified in a … subcontract', whereas s 10(2) speaks only of work, which must therefore be taken to be the items of work specified in a notice.

[24] Alternatively the applicants argue that if s 3B is relevant then it requires consideration of what the terms of a particular contract have to say about when work due under the subcontract has been completed. This, it is submitted, is the meaning of the phrase found in s 3B, '… work specified in a subcontract is deemed to be completed when … it has been performed in accordance with the … subcontract …'. The argument is that the subcontract in question has provided that work was completed when it reached the stage described in the definition of 'completion of the subcontract work' and that happened incontrovertibly on 29 May 2003.

[25] The applicants' construction of s 10 depends essentially upon the point that subsection (2) refers to 'the work' and not the work 'under the contract' or the work 'specified in a … subcontract', which expressions appear elsewhere. It is therefore said that the Act draws a distinction between the whole of the work required by a subcontract and something less, called 'the work', which must be that part of the work which is made the subject of a claim of charge. There is no doubt that a charge may be claimed for less than the whole of the work required by a subcontract, and that charges may be claimed serially for items of work as a subcontract progresses.

[26] If the applicants' submission is accepted, there is an inconsistency between s 10(1A) and 10(2). The former provides that the claim must be ("is") in respect of moneys payable to the subcontractor for work done by the subcontractor *prior* to the notice, while the latter provides that a notice of claim of charge may be given although the work is not completed. The two provisions can be reconciled if 'the work' referred to in subsection (2) is the whole of the subcontract work. A notice of claim of charge may then be given in compliance with subsection (1A), for work done prior to the notice. There will be no conflict with subsection (2) because the work, which need not be completed before a notice is given, is the whole of the subcontract work. Reading subsection (2) this way, the time limit does not commence to run until all the work required by the subcontract has been done.

[27] This construction gives a certain symmetry to s 10. Subsection (3) deals with claims of charge in respect of retention moneys only. It allows notice to be given up to three months 'after the expiration of the period of maintenance provided for by the (head) contract'. If subsection (2) is read as I suggest, it allows notice to be given up to three months from completion of the subcontract. In each instance there would be a limitation period running from the complete performance of contractual obligations. If the applicants' submission is accepted, for the purposes of subsection (2) there will be different time limits in respect of every different item of work, in the sense that the three month period will commence to run when each item is finished. It would be relatively easy to determine in any particular case when all of the subcontract works were completed. It is probably less easy to determine when particular items of work are complete. To ensure its protection, a subcontractor would have to give notice in respect of every separate item of work, within three months of finishing it.

[28] Questions of convenience aside the Act was designed to protect the interests of subcontractors and is remedial in character. It is in keeping with a remedial construction of the Act that s 10(2) be read as giving a subcontractor three months from the completion of his subcontract works to claim a charge. Such a construction reduces scope for confusion, lessens the burden on the subcontractor to give notice when it is busy doing the work, and provides additional time for giving notice.

[29] Although it is not clear, I think it likely that s 3B was intended to assist in determining the commencement of the three months allowed by s 10(2). It is true that the section is to be used when it is necessary 'for the purposes of the Act' to ascertain when work 'specified in a subcontract' is completed. The applicants object that s 10(2) is not part of the Act that speaks of 'work specified in a … subcontract'. I have indicated my opinion that when subsection (2) speaks of 'work', it means the work to be done under a subcontract. If s 3B does not apply to s 10(2), it does not appear to serve any purpose.

[30] The applicants thought s 3B may apply to s 10(3) but this is unlikely because that subsection does not depend for its operation upon the date when work specified in a contract or subcontract is completed. It allows a notice of claim of charge to be given in respect of retention money at any time while work under the contract is going on, and up to the expiration of three months from the expiration of the period of maintenance. No determination of the date on which work specified in the contract is completed is necessary. The parties and the terms of their contract will determine when the maintenance period expired.

[31] If the definition in s 3B does apply to the question of when the work referred to in s 10(2) is completed, then it may be seen that the respondent had not completed its subcontract before 14 August 2003. After that date it performed work described in the subcontract and was liable to rectify defects discovered before it had fully performed its subcontractual obligations.

[32] There remains to consider the applicants' submission that s 3B requires an examination of contractual terms in order to determine whether the subcontract works have been performed in accordance with its terms. Their point is, as I mentioned, that in accordance with those terms the work was finished at the end of May 2003. Most, if not all, building contracts for substantial sums contain a definition of 'practical completion' or, as in this case, 'substantial completion'. By definition the state of affairs defined by a building contract as practical or substantial completion is not completion of the whole of the contract works. If it were there would be no need for a separate contractual definition. Typically, practical completion allows the principal to go into possession and commences the running of the maintenance or defects liability period. It may trigger other contractual rights or obligations but 'practical completion' is not the same as the complete performance of subcontract works.

[33] When s 3B speaks of work being performed 'in accordance with the subcontract' it refers, in my opinion, to performance to the standards and specifications called for by the contract. The terms of s 3B are inconsistent with an intention that, for the purposes of the Act, a building subcontract is completed when, by the terms of the contract, the subcontractor has achieved practical completion. That would have been easy enough to say, if it was intended. The provisos found in the section would, in that event, be quite unnecessary.

[34] In his very helpful and comprehensive submissions Mr Morrison QC drew my attention to a number of decisions in New Zealand concerned with the construction and operation of legislation conferring liens on workmen and contractors to obtain payment. I consider the meaning of the Act to be sufficiently plain to be ascertainable without reference to those historical materials. Likewise I have not been assisted by the decision of the High Court is *Stucoid Pty Ltd v Stadiums Pty Ltd* (1960) 107 CLR 521, which decided that the time permitted by s 9 of the *Contractors and Workmen's Liens* Act 1906 (Qld) allowed a subcontractor seven days from the completion of the whole of the subcontract works to make his claim.

[35] I consider that the time allowed by s 10(2) of the Act for giving notice of claim of charge commenced to run on the completion of the whole of the subcontract works. Accordingly the notice of claim of the charge in question was given within three months of that completion.

[36] The applicants argued that if the charge is not cancelled it should be modified by reducing the amount subject to the charge because about $6,000,000 of the moneys claimed are not truly moneys payable pursuant to the subcontract, but are moneys claimed by way of damages for breach of the subcontract. Section 5(6) of the Act provides that money which may be payable to a subcontractor for work done under the subcontract, and hence which can support a charge, does not include damages for breach of the contract.

[37] The amount in dispute, about $6,000,000, is claimed by the respondent as moneys due under the subcontract for acceleration, compression, delay and disruption. The background to the claim is that there was limited time available to build the stadium. It was important to the Department to have it ready for an important football game on 1 June 2003. The respondent claims that there were delays and disruptions to its program of works caused by the applicants' failure to provide adequate drawings and information. Because of delays in giving drawings, errors in drawings and conflicts between drawings, the respondent could not plan and execute its subcontract works efficiently or expeditiously. It is also said that the applicants had grossly underestimated the extent of the subcontract work. Variations to the subcontract extended its scope and value by more than 64 per cent. The respondent claims that it was entitled to an extension of the time to complete its works but its claim for extra time was only partly recognised. The result was that the respondent, in order to complete in the time allowed by the applicants, had to perform its work within a compressed time frame. It did so by accelerating its works and devoting more men and material to the task. This caused it to incur additional expense which is the subject of this part of the claim.

The details of the claim are to be found in exhibit 29 to the affidavit of Mr Taylor filed 30 March 2004.

[38] The subcontract dealt with acceleration. Clause 33.5 provided:

> 'Acceleration
>
> The managing contractor may direct the subcontractor to accelerate the execution of any part of the subcontract work.
>
> The subcontractor may notify the managing contractor in writing of any reasonable objections it has to a direction to accelerate …
>
> If the subcontractor does not object to the direction to accelerate the subcontractor shall promptly … notify the managing contractor in writing of the additional direct costs in will incur in complying with the direction.
>
> The managing contractor may, after receiving the subcontractor's notice of costs … do one of the following:
>
> (a) withdraw the direction, or
> (b) affirm the direction in writing along with a statement of each of the following:
>
> (i) that the managing contractor accepts the amount of additional costs …
> (ii) the details of the required acceleration
> (iii) the adjusted date for completion of the subcontract works
>
> The subcontractor's entitlement to be paid the costs of any acceleration shall be subject to each of the following:

(a) A condition that the subcontractor completes the subcontract works by the adjusted date for completion …

(b) The amount of acceleration costs payable to the subcontractor … shall be limited to the additional direct costs notified by the subcontractor under … this subclause, and

(c) The subcontractor should be entitled to only the acceleration costs actually expended … that the subcontractor can verify to the managing contractor's satisfaction.'

[39] The applicants did not expressly direct the respondent to accelerate the execution of its subcontract works. They deny that they gave any such direction. The respondent submits that a review of the circumstances surrounding the performance of the contract and subcontract works gives rise to the inference that a direction was given, or is to be implied from those circumstances.

[40] The circumstances from which the implication is said to rise are laid out in the affidavit of Mr Harrington. They may be summarised as:

(a) On 5 November 2002 the respondent sought an additional 55 working days to complete its subcontract. This would have made the date for completion of the subcontract works 19 June 2003. The claim for the extension of time was based upon delays caused to the applicants principally by changing the design of the subcontract works and requiring additional work which disrupted the performance of the subcontract and extended its scope. On 25 November 2002 the applicants allowed only 19 additional working days.

(b) The joint venture and the Department had made public commitments that the stadium would be finished in time for the football match on 1 June 2003.

(c) On 8 November 2002 the respondent made an offer to the joint venture to accelerate the subcontract work. On 11 November the joint venture refused to give such a direction but required the respondent to use its best endeavours to mitigate delays, and on subsequent days, 9, 18, 26 & 27 November the applicants urged the respondent to supply additional resources to its subcontract works.

(d) It was impossible for the respondent to complete the subcontract by the extended date for completion without accelerating its performance.

(e) The respondent's offer to accelerate contained several conditions which the joint venture would have to satisfy if the acceleration was to achieve completion by the nominated completion date. Though denying it had directed or would direct the respondent to accelerate, the joint venture in fact complied with several of the specified conditions. The

> conditions and the applicants' actions in respect of them are set out in paragraphs 38 and 42 respectively of Mr Harrington's affidavit. It is not necessary to set them out in full. They concern the manner in which the building work might progress without delay.

[41] The applicants point to the contemporaneous correspondence which, they submit, proves conclusively that there was no direction to accelerate. On 24 October 2002 the respondent wrote to the joint venture confirming a request from its representative that the respondent 'provide a plan to complete all the works by the original date'. The letter went on to indicate that the respondent would 'prepare a plan to complete the works at earliest … in accordance with clause 33.5 acceleration.' On 28 October 2002 the joint venture replied:

> 'We advise, for the avoidance of any doubt, that we have not requested you to formulate a plan to accelerate the works to meet your general completion date.
>
> Extensions of time will be dealt with in accordance with the relevant contract provisions … We do not therefore require you to submit an acceleration proposal.'

[42] Notwithstanding this information on 8 November 2002 the respondent wrote to the joint venture to present:

> '… an offer of acceleration, including for specific disruption of costs, in accordance with clause 33.5 … (which) requires a high level of involvement and commitment by (the joint venture) and the respondent.'

The letter went on to say that a detailed action plan of costings had been prepared, that time was of the essence and that 'an order to accelerate an agreement to the action plan is required by 15 November 2002.'

[43] On 11 November 2002 the joint venture replied:

> 'We advise that for the time being we do not require you to accelerate the work, nor have instructed you to do so.
>
> We will complete an adjudication on your extension of time claim and, if valid, grant an extension … to which you are entitled.
>
> In the meantime you are reminded of your obligations to use your best endeavours to mitigate delays.'

[44] On 23 November the respondent wrote again to the joint venture to complain about its handling of claims for an extension of time and to point out that the respondent was:

> '… currently incurring additional costs … due to the (joint venture) not awarding due extensions of time …'

[45] On 2 December 2002 the joint venture wrote to the respondent stating that it had awarded what it believed to be the respondent's 'full entitlement to extensions' and to inform the respondent that the date for practical completion was 20 May 2003. On 4 December 2002 the respondent replied disputing that the extensions of time granted were sufficient and submitting the dispute about extensions to the mechanism found in clause 47 of the subcontract. On 21 December the joint venture replied suggesting that the respondent should submit further details of its claim for additional extensions of time which it would consider and determine within fourteen days of receiving the more detailed claim. The letter concluded:

> 'For the avoidance of any doubt we would also take this opportunity to remind you that we have not instructed you to accelerate the works.'

On the same day in a letter sent to the joint venture by facsimile transmission, the respondent advised that it had forwarded the additional claim material on 18 December and reminded the joint venture that the respondent had 'been forced to accelerate by (the joint venture's) failure to adjudicate EOT correctly …'.

[46] On 20 December the respondent wrote to the joint venture to advise that it had incurred additional costs in attempting to meet the 20 May completion date. On 9 January 2003 the joint venture replied:

> 'We have consistently reminded you of the fact that we have not ordered you to accelerate the works, and considering the content of your letter we feel we should once again emphasise that we do not require you to accelerate the works.
>
> It is clear however that you believe you are entitled to further extensions, and as a result it appears that you believe that you can accelerate the works at our cost. We advise therefore that if you expect to be reimbursed before any acceleration measures implemented by you to date, then you will be sadly disappointed as we have no intention of paying for acceleration other than acceleration that we order pursuant to clause 33.5 of the subcontract.
>
> We confirm that to the extent, if any, that you are entitled to further extensions to time, then further extensions will be granted … At present … we do not believe that you are entitled to any further extensions. As such there is no need to accelerate the works at our behest.'

[47] On 10 March 2003 the respondent submitted a claim for the costs of acceleration to the joint venture. It was accompanied by a letter which read in part:

> 'We confirm that
>
> - (The respondent) commenced acceleration activities to meet opening in time for first match
> - On 8 November 2002 (the respondent) submitted an acceleration offer … to complete 15 May 2003. This offer was rejected …

- (The joint venture) have consistently denied any liability to (the respondent) whilst simultaneously ordering that the work be completed by 20 May 2003.
- … (the respondent) has continued to incur delays which would lead to extensions of time … However, to meet the State Government's commitment (the respondent) has continued to proactively take whatever actions are required to complete the works prior to the first game …

We respectfully suggest that if the (joint venture) continues to deny the reality that EOT's are overdue and that (the respondent) is accelerating and compressing the works … the (joint venture) are putting the project as risk … which could be minimised by a more realistic approach in accordance with the contract.'

[48] The joint venture replied on 17 March 2003:

> 'We reiterate that we have not instructed you to accelerate and if you have done so then you have done so of your own accord and presumably have done so in order to mitigate delays of your own making … If you are entitled to extensions then we will grant the appropriate extension of time … We emphasise however, for the avoidance of any doubt, that we do not require you to accelerate in lieu of any entitlement that you may have for an extension of time which is properly due to you under the subcontract.'

[49] The applicants point to the formulation of the respondent's claim for the costs of acceleration. In a number of places the claims are identified as damages for breach of contract rather than for moneys due pursuant to it. The respondent answers this by explaining that the claim was prepared by an engineer, not a lawyer, and that if the claim can be advanced, at least arguably, as one for moneys due under the contract then regardless of how it was described it is one that would support a charge and the court ought not summarily cancel it or modify its effect. The respondent also stresses the fact that the court is not in a position to make any findings of fact and must approach the application on the basis that the facts asserted in the respondent's material are accurate.

[50] I accept this latter submission. The applicants can only succeed if on the material it can be shown that the respondent does not have an arguable case that the applicant directed an acceleration of the works. Unless the contention that there was an inferred or implied direction is untenable the application should fail.

[51] Notwithstanding this approach the difficulties confronting the respondent are insuperable.

[52] It may be accepted that, as the respondent submits, clause 33.5 does not insist that a direction to accelerate be in writing. In this instance 'direct' means 'to give authoritative instructions to; to command or order'. Occasions when a direction by a head contractor to a subcontractor to accelerate works in a multi-million dollar project are not express, will be rare. An implication or inference that such a direction has been given will require the clearest evidence.

[53] In addition, clause 33.5 contemplates that a direction will be explicit, though it may be oral, because the subcontractor must respond to it by giving notice in writing of any reasonable objection or by promptly giving written notice of what the direction will cost. These provisions indicate that the subcontractor must at a given point in time understand that it has been given a direction. This will create difficulty if the direction arises inferentially. The direction must be of such a nature that upon receipt of an objection the managing contractor may withdraw it. There are obvious difficulties in withdrawing a direction which exists only by inference or implication from past facts.

[54] It is essential to the operation of clause 33.5 that the subcontractor, before it takes steps to accelerate, gives written notice of the costs which will be incurred in the acceleration. Upon receipt of the notice the managing contractor (the applicants) must either withdraw the direction to accelerate, or affirm it in writing, specifying that it accepts the additional costs, and giving details of the acceleration. This did not happen.

[55] The respondent's argument is that the applicants' conduct amounted to a direction, or gave rise to the implication that there had been a direction, and that its denials that it had in fact directed the respondent to accelerate constituted a repudiation of the contractual terms found in clause 33.5. The consequence is, so it is submitted, that the respondent was absolved from the obligation to perform its part because the applicants had made it clear that they would not accept the respondent's performance. Reliance was placed upon *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 246-7 and *Foran v Wight* (1989) 168 CLR 385 at 418. The respondent accepts that it did not comply with the clause in that it did not give written notice of the additional direct costs it would incur in complying with the direction. The concession seems correct. The respondent did on two occasions provide information to the applicants about the costs of acceleration, once when it offered to accelerate and set out its anticipated costs of doing so, and secondly, when it had substantially accelerated the works and made a claim for the costs of doing so. Neither intimation was of the character required by the clause.

[56] I doubt that the contractual principle relied upon applies in this situation. In *Peter Turnbull* Dixon CJ said (246-7):

> '… it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent …, it was equal to performance thereof … But a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention.'

Kitto J said (251):

> '… the refusal necessarily conveys to B that he need not trouble to fulfil a condition to which A's obligations under the contract are subject, because even if he does A would still not perform his obligation.'

[57] The principle cannot assist the respondent where its performance of the condition was necessary for clause 33.5 to have any effect. It may be accepted that the applicants clearly intimated that it was pointless for the respondent to give written notice of the cost of acceleration and dispensed with its obligation to do so. But not having given notice, the respondent had no right to the additional costs of acceleration unless the applicants affirmed the direction in writing which contained the matters set out in subparagraphs (b)(i), (ii) and (iii). This is not a case where dispensing with the respondent's obligation to comply with the clause by itself gave rise to a liability in the applicants to pay the costs of acceleration. Unless the precise terms of the clause were fulfilled there was no such right. This is not a case where a defendant's obligation to pay moneys pursuant to a contract were conditional upon the plaintiff performing some precondition which the defendant prevented or refused to accept. This is a case where, before a right to payment under the contract arose, both parties had to co-operate and interact in performing their respective obligations. Performance, or the waiver of performance by the respondent, does not give rise to a right to the costs of acceleration. The applicants had also to play a part, and if they did not, the clause could not operate.

[58] This is not to say of course that the respondent might not have a valid claim for damages for breach of contract. Indeed it asserts it has such a claim but it will not support a charge under the Act.

[59] If it be right that the circumstances gave rise to an implication that the applicants directed the respondent to accelerate pursuant to clause 33.5, the applicants were then obliged to object to the direction or give written notice of the additional direct costs it would incur in complying with the direction. It did not object. The only communication capable of amounting to notice of the additional direct costs it would incur is the offer of 8 November 2002. The correspondence which followed from the applicants unambiguously rejected the offer and denied that any direction had been given. The communications can only be understood as a withdrawal of any implied direction, notwithstanding the difficulty mentioned earlier of withdrawing an implied direction. If the proper analysis of fact be that the respondent did not give written notice of additional costs because the applicants had intimated there was no point in it doing so, the correspondence must still be read as a withdrawal of any implied direction.

[60] A further obstacle in the respondent's path is that the implication of a direction cannot stand in the face of the express and explicit communications from the applicants that they were not directing acceleration. One is familiar in life, as in the law, with those who say one thing and do another but it is not, in my opinion, permissible to draw an inference that an event has occurred when there is direct and cogent evidence that it has not. Clause 33.5 conferred a right on the applicants to direct acceleration. They had an option whether to make such a direction or not. It is not possible to infer they did so when they expressly indicated they had not and refused to contemplate doing so.

[61] This is not to say that the applicants may not have been in breach of contract in not giving such a direction. That is a matter yet to be determined. Nor is it to deny that the applicants exerted pressure on the respondent to complete its works by the end of May 2003. It is obvious that the applicants intended to put pressure on the respondent to achieve that result without exercising the power given to it under clause 33.5. As I have indicated in those circumstances it is not sensible to infer

that it directed acceleration. If its conduct amounted to a breach of its contractual obligations it will be liable in damages.

[62] I doubt that the circumstances identified by the respondent are sufficient to give rise to an inference that the applicants directed acceleration. The circumstances are equivocal. They are equally consistent with the applicants' stated position that they genuinely believed the respondent was not entitled to more than nineteen days extension and that the respondent was obliged by its subcontract to complete the works by the extended date without additional payment for acceleration, as they are with the respondent's contention. The circumstances are also consistent with the applicants cynically attempting to manoeuvre the respondent into accelerating its works without incurring any liability to pay for it doing so. The circumstances do not unequivocally point to one rather than the other conclusion. It is not possible to draw one inference rather than another.

[63] Accordingly the claim for moneys due to the respondent for acceleration pursuant to the subcontract is unarguable.

[64] It follows that the effect of the charge should be modified by omitting the amount claimed in respect of acceleration. That amount was not clearly identified. The parties should draw up an order reflecting the reduction.