SUPREME COURT OF QUEENSLAND

CITATION:	*Vantage Holdings Pty Ltd v JHC Developments Group Pty Ltd* [2011] QSC 155
PARTIES:	**VANTAGE HOLDINGS PTY LTD (ACN 097 178 240)** (plaintiff) **v** **JHC DEVELOPMENT GROUP PTY LTD (ACN 083 315 393) TRADING AS JHC DEVELOPMENT GROUP (BN 2063691)** (defendant)
FILE NO:	11525 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 January 2011
JUDGE:	Daubney J
ORDERS:	**1. The plaintiff's application for summary judgment is dismissed;** **2. The defendant's application for a stay is dismissed;** **3. The defendant shall file and serve its defence within 14 days;** **4. This proceeding shall be remitted to the District Court;** **5. The costs of each application shall be reserved.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS - where the plaintiff claims payment of outstanding balances by the defendant – where the plaintiff served claims for progress payments. PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM

CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff files an application for summary judgment – where the application is by its express terms made pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the defendant had filed a notice of intention to defend – whether the application is one for judgment pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld).

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the defendant files an application seeking that the proceeding be stayed – where the stay is sought pursuant to the Court's inherent jurisdiction and pursuant to s 53 of the *Commercial Arbitration Act* 1990 (Qld) – whether the matter is "a matter agreed to be referred to arbitration".

Building and Construction Industry Payments Act 2004 (Qld), ss 15, 18, 19
Commercial Arbitration Act 1990 (Qld), s 53
Queensland Building Services Authority Act 1991 (Qld), s 67P
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), rules 16(g), 139, 144, 292

Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd [2005] NSWCA 49, cited
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119, cited
R J Neller Building Pty Ltd v Ainsworth[2009] 1 Qd R 390, cited
Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd [2008] NSWSC 1405, cited
Sail Isle v Body Corporate for Surfers Aquarius [2006] QDC 109, cited

COUNSEL: S B Whitten for the plaintiff
D Logan for the defendant

SOLICITORS: Mills Oakley Lawyers for the plaintiff
Pan & Partners Lawyers for the defendant

[1] This proceeding was commenced by a claim and statement of claim filed on 21 October 2010. Before service was effected, the plaintiff sought and obtained leave to file an amended claim and amended statement of claim. Those were filed on 26 October 2010, and were subsequently served on the defendant.

[2] By the amended claim and amended statement of claim, the plaintiff claimed $1,733,161.20 as a debt owing pursuant to the provisions of the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"). The claim was alleged to arise out of contracts entered into on or around 8 February 2010 between the plaintiff, a building contractor, and the defendant property developer for the plaintiff to design and construct for the defendant apartment complexes on properties at:

(a) 703 Kingston Road, Waterford West ("the Waterford West contract");

(b) 30-32 Frodsham Street, Albion ("the Albion contract");

(c) 2274-2276 Gold Coast Highway, Mermaid Beach ("the Mermaid Beach contract"), and

(d) 11-13 Henry Street, Redcliffe ("the Redcliffe contract").

[3] The amended statement of claim pleaded the terms of the contracts by which:

(a) the plaintiff was entitled to serve claims for progress payments on the defendant at monthly intervals on the 25th day of each month, and

(b) within 10 days after service of a payment claim, the defendant was to reasonably and fairly assess the claim and either:

(i) pay the amount of the claim, or

(ii) pay the part of the claim to which the defendant considered the plaintiff was entitled, and give written reasons and particulars for the difference between the amount claimed and the amount paid.

[4] The plaintiff then pleaded, in summary, that on 29 September 2010 it served the following progress claims on the defendant:

(a) Waterford West contract – payment claim for $767,483.22;

(b) Albion contract – payment claim for $468,817.86;

(c) Mermaid Beach contract – payment claim for $668,691.48;

(d) Redcliffe contract – payment claim for $1,161,943.27.

[5] The plaintiff alleged that on 1 October 2010, the defendant made payments of certain amounts under each of the contracts, leaving the following balances:

(a) Waterford West contract - $448,303.29;

(b) Albion contract - $303,474.67;

(c) Mermaid Beach contract - $418,397.73;

(d) Redcliffe contract - $562,985.42.

[6] In each instance, it was contended that:

(a) by operation of s 18(5) of the BCIPA, the defendant became liable to pay the balance to the plaintiff on 9 October 2010, and

(b) the plaintiff is entitled to recover the balance from the defendant as a debt owing to the plaintiff, by operation of s 19(2)(a)(i) of the BCIPA.

[7] The plaintiff further claimed interest on these outstanding balances, calculated pursuant to s 15 of the BCIPA and s 67P of the *Queensland Building Services Authority Act* 1991 (Qld).

[8] On 24 November 2010, having been served with the amended claim and amended statement of claim, the defendant filed a Conditional Notice of Intention to Defend, by which it asserted:

> "TAKE NOTICE that the Defendant says that the proceeding is irregular and should be STAYED under Rule 16g for the following reasons:
>
> 1 The Plaintiff is seeking the recovery of monies pursuant to section 19(2)(a)(i) of the Building and Construction Industry Payments Act 2002 (BCIP).
>
> 2 Section 19(4)(b)(ii) of the BCIP provides that judgment is not to be entered where the Respondent is entitled to raise a defence in relation to matters arising under the construction contract.
>
> 3 The Plaintiff and the Defendant have a dispute arising under all construction contracts the subject of these proceedings.
>
> 4 The dispute has been referred to arbitration and the Honourable Ian Callinan has been appointed Arbitrator.
>
> 5 The matters the subject of the arbitrators are the matters the Defendant is entitled to raise pursuant to Section 19(4)(b)(ii) of BCIP and these proceedings should be stayed pending the conclusion of the arbitration."

[9] On the following day, 25 November 2010, the defendant filed an Amended Conditional Notice of Intention to Defend, which stated:

> "TAKE NOTICE that the Defendant says that the proceeding is irregular and should be STAYED under Rule 16g for the following reasons:
>
> 1 The Plaintiff is seeking the recovery of monies pursuant to section 19(2)(a)(i) of the Building and Construction Industry Payments Act 2004 (BCIP).
>
> 2 Prior to the issue of the amended statement of claim payments were made by the Defendant to the Plaintiff that are not disclosed in the amended statement of claim.

3 The amounts claimed are the amounts of disputed variations to the contracts.

4 The disputes regarding entitlement to variations and the cost of those variations arose in June 2009.

5 On or about 26th July 2010 the Plaintiff gave a Notices of Dispute for two of the contracts.

6 The issues in the Notices of Dispute also pertain to all other contracts.

7 As required by the Contracts a conference has held to resolve the disputes.

8 The disputes were not resolved at the conference and the Plaintiff elected pursuant to the terms of the contracts to refer the disputes to arbitration.

9 The Honourable Ian Callinan QC has been appointed Arbitrator.

10 Prior to the electing to appoint an Arbitrator Plaintiff agreed that in the event that the Defendants interpretation of the Contracts was correct it would not be entitled to any payment for the dispute variations.

11 The Plaintiff acted unreasonably and unconscionably in bring and/or proceeding with this action as it has appointed an Arbitrator to determine the validity of the only amounts that were outstanding at the time of the issue of the amended statement of claim.

12 The Defendant says that this action be stayed pending the determination by the Arbitrator.

13 The amount of the claim is now within the jurisdiction of the District Court and the action should be transferred to the District Court at Brisbane."

[10] It appears from the material that further payments were made by the defendant under each of the contracts on 1 December 2010, such that as at 2 December 2010 the total of the balances which the plaintiff said remained unpaid under the four contracts was $288,542.22.

[11] On 2 December 2010, the plaintiff filed an application which, by its express terms, was made pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 292 for judgment for the (then) balance claimed of $288,542.22 plus interest.

[12] On 9 December 2010, the defendant filed an application seeking an order under r 16(g) of the UCPR that the proceeding be stayed.

[13] By the time these applications came on for hearing, further monies had been paid by the defendant to the plaintiff under the contracts, such that the balance which the plaintiff contended remained due to it, and for which it sought judgment, had reduced to $105,741.21 plus interest of $22,446.96.

[14] The parties filed a significant volume of affidavit material in support of their respective applications. These affidavits give rise to patent factual contests between the parties.

[15] The relevant factual scenario contended for by the defendant was deposed to by its director, Peter Huang. After describing difficulties and differences which arose between the parties with respect to variations and design difficulties, Mr Huang said:

> "6. In early July 2010 the problems with the Albion and Waterford contracts were the most pressing and expensive and the Plaintiff issued dispute notices under the contracts for these two contracts.
>
> 7. A conference was held at the office of the Plaintiff's Solicitors on 2 August 2010, and at this conference the following (or to like effect) was agreed, and/or the plaintiff's representatives made representations to the following effect:
>
> i That the Plaintiff would immediately continue work on all projects and attempt to bring them in on time;
>
> ii That the Plaintiff would comply with the requirements of Project Services for all projects notwithstanding that it would not get directions from the Defendant;
>
> iii That the Plaintiff would continue to claim variations for all projects as it saw fit;
>
> iv That the Parties would confer in relation to the variation claims at the end of all the projects;
>
> v That the disputes in the Notices would proceed to arbitration;
>
> vi That the decision of the Arbitrator would apply to other disputes about variations for all of the contracts and assist the parties to resolve those disputes.
>
> 8. After the Conference the Plaintiff proceeded with the works on a timely basis and complied with the requirements of Project Services. The benefit for the Plaintiff is that by completing the works it was not in breach of contract or exposed to liquidated damages and due to the agreement reached at the Conference it did not lose its rights to argue for the variations."

[16] In relation to the "payment claims" on which the proceeding is based, Mr Huang said:

> "10 In late August 2010, following the conference, I received Progress Claims for each of the Projects. I processed and paid these Progress Claims. The Claims included amounts for variations and I expected this in view of what was agreed, and represented by the plaintiff, at the Conference. In processing the Claims I deducted the amounts

claimed for variations. I paid the adjusted amount with a Payment Certificate. I also adjusted the amount of the retentions from 5% to 10%.

11 When I received the Progress Claims at the end of September 2010 I processed and paid them in the same manner. I considered that I had complied with the agreement reached, and representations made, at the Conference.

12 The August Progress Claims did not refer to the Building and Construction Industry Payments Act 2004. The September claims were in the same form but those for Waterford and Mermaid Beach had one line "This claim is made under the Building and Construction Payments Act 2004" the word "Industry" was omitted. The Albion and Redcliffe claims had a line "This claim is made under the building and construction industry payments act 2004" (no capital letters).

13 I cannot recall if I noticed the fact that the form of the Progress Claims had altered by the addition of one more line. At the time I was relying on the agreement reached at the Conference and it was expected that the Plaintiff was continuing to submit its claims for variations as these were to be decided after the Arbitration and at the end of the projects."

[17] The plaintiff has filed affidavits by persons who attended the meeting on 2 October 2010 on its behalf. It is sufficient to observe that they flatly deny that the agreement asserted by the defendant was reached at the meeting in August 2010. Counsel for the plaintiff also highlighted differences in the alleged content of the agreement by reference to different versions recounted in different affidavits filed on behalf of the defendant, in email correspondence shortly after the August meeting, and indeed as set out in the Conditional Notice of Intention to Defend.

The application for summary judgment

[18] As I have already noted, the plaintiff's application is expressly brought pursuant to r 292, which provides:

> "**292 Summary judgment for plaintiff**
>
> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that –
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[19] It is clear from the terms of r 292(1) that a defendant must serve a notice of intention to defend prior to a plaintiff being able to make an application under r 292.

[20] The UCPR distinguish between a notice of intention to defend and a conditional notice of intention to defend. Rule 139 specifies that a notice of intention to defend must be in the approved form and must have the defendant's defence attached to it.

[21] Conditional notices of intention to defend are dealt with in r 144:

> "**144 Conditional notice of intention to defend**
>
> (1) A defendant who proposes to challenge the jurisdiction of the court or to assert an irregularity must file a conditional notice of intention to defend.
>
> (2) Rule 139(1)(b) does not apply to a conditional notice of intention to defend.
>
> (3) If a defendant files a conditional notice of intention to defend, the defendant must apply for an order under rule 16 within 14 days after filing the notice.
>
> (4) If the defendant does not apply for an order under rule 16 within the 14 days, the conditional notice of intention to defend becomes an unconditional notice of intention to defend.
>
> (5) Within 7 days after a conditional notice of defence becomes an unconditional notice of intention to defence, the defendant must file a defence.
>
> (6) A defendant who files an unconditional notice of intention to defend is taken to have submitted to the jurisdiction of the court and waived any irregularity in the proceeding."

[22] It will be seen that, within the terms of that rule itself, there is a further distinction between a conditional notice of intention to defend and an unconditional notice of intention to defend. The consequences of a conditional notice of intention to defend becoming an unconditional notice of intention to defend are specified in r 144(6).

[23] On any view of it, when the plaintiff filed its application pursuant to r 292, the defendant had not filed a notice of intention to defend (within the meaning of that term under r 139).

[24] There was argument before me as to the efficacy of the defendant's amended Conditional Notice of Intention to Defend. That argument concerned the question as to whether the defendant's application for a stay pursuant to r 16(g) had been made within the time limit prescribed by r 144(3). For present purposes, however, the fact of the matter is that even if one has regard only to the Conditional Notice of Intention to Defend filed on 24 November 2010, the 14 day period prescribed under r 144 was still running when the plaintiff filed its application for summary judgment pursuant to r 292. Accordingly, even on that view, the defendant had only filed a conditional notice of intention to defend (which was then still operational as such), and had not filed a notice of intention to defend.

[25] In short, the plaintiff was premature in filing the application for summary judgment pursuant to r 292.

[26] In the course of argument, the plaintiff sought to characterise the application as one for judgment pursuant to the BCIPA. It referred in particular to s 19 of the BCIPA, which provides:

> "**19 Consequences of not paying claimant if no payment schedule**
>
> (1) This section applies if the respondent –
>
> (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
>
> (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
>
> (2) The claimant –
>
> (a) may –
>
> (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or
>
> (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
>
> (b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.
>
> (3) A notice under subsection (2)(b) must state that it is made under this Act.
>
> (4) If the claimant starts proceeding sunder subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
>
> (a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
>
> (b) the respondent is not, in those proceedings, entitled –
>
> (i) to bring any counterclaim against the claimant; or
>
> (ii) to raise any defence in relation to matters arising under the construction contract."

[27] The argument sought to be advanced for the plaintiff was to the effect that the present application was one for judgment in respect of the claimed amount, on the

basis that this was a debt owing, pursuant to s 19, for which it could obtain judgment.

[28] That submission can, however, be dealt with briefly:

(a) There is nothing in s 19 of the BCIPA which provides a procedure for a judgment to be entered summarily for the claimed debt; and

(b) The application, as filed, was by its express terms brought pursuant to r 292.

[29] The application for summary judgment must therefore be dismissed.

The application for a stay

[30] The defendant applied pursuant to r 16(g) for a stay of this proceeding. That application was purportedly brought for the purpose of complying with r 144(3). In fact, the application was not brought within 14 days of the date on which the original Conditional Notice of Intention to Defend was filed, but was brought within 14 days of the filing of the amended Conditional Notice of Intention to Defend. Argument was advanced before me as to whether the application was efficacious or not. It seems to me, however, that there is no reason why the application for a stay cannot be dealt with on its merits, regardless of whether it was (at worst for the defendant) filed a day late in respect of the time limit relating to the original Conditional Notice of Intention to Defend. The failure to comply with r 144(3) may have had some effect on the status of the original Conditional Notice of Intention to Defend by converting it into an unconditional notice, but that does not impact on the defendant's ability to apply for a stay. I note in passing that a similar approach was adopted by Robin QC DCJ in *Sail Isle v Body Corporate for Surfers Aquarius*.[1]

[31] In July 2010, the plaintiff served on the defendant Notices of Dispute pursuant to the "dispute resolution" provisions of the Waterford West contract and the Albion contract. Each of those contracts relevantly provided:

> "**SECTION 13 DISPUTE RESOLUTION**
>
> **13.1 NOTICE OF DISPUTE**
>
> 13.1.1 If a Dispute arises then either party may give the other written notice of Dispute which adequately identifies and provides details of it.
>
> 13.1.2 Notwithstanding the existence of a Dispute, the parties must continue to perform this Agreement.
>
> **13.2 CONFERENCE**
>
> 13.2.1 Within 14 days after receiving a notice of Dispute, the parties must confer at least once to resolve the Dispute or to agree on methods of doing so. At every such conference each party must be represented by a person having authority to agree to such resolution or methods. All aspects of such

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1 [2006] QDC 109.

conferences except the fact of occurrence are to be privileged.

13.2.2 If a Dispute has not been resolved within 28 days of service of a notice of Dispute then it must be referred to arbitration unless the party giving the notice of Dispute informs the other party in writing within that 28 days that if elects to have the dispute determined by expert determination.

13.3 ARBITRATION

Arbitration will be effected by an arbitrator nominated by the President or Chief Executive Officer of the Organisation specified in Schedule 26.

13.4 EXPERT DETERMINATION

13.4.1 Expert determination is to be:

.1 effected by an expert nominated by the President or Chief Executive Officer of the organisation set out in Schedule 26; and
.2 in accordance with the rules referred to in Schedule 26;

13.4.2 Except to the extent that the rules in sub-clause 13.4.1 provide otherwise:

.1 each party bears its own costs and contributes one half of the expert's fee;
.2 all aspects of every expert determination except the fact of occurrence are to be privileged;
.3 the expert must as a condition of its appointment agree to issue a written determination of the dispute within the number of days from the appointment of the expert specified in Schedule 26, unless otherwise agreed between the parties;
.4 the expert is not to act as arbitrator; and
.5 the determination of the expert is finale and binding on the parties.

13.5 OTHER REMEDIES NOT PRECLUDED

Nothing in this Section prejudices the right of a party to institute proceedings to enforce payment due under this Agreement or to seek injunctive or urgent declaratory relief."

[32] Each of these Notices of Dispute raised issues arising under the proper interpretation of the contract. For example, the Notice of Dispute under the Waterford West contract was, relevantly, as follows:

"3.1 The dispute is as to the proper interpretation of the Agreement, namely:

(a) whether, in the absence of any direction in writing from the Principal requiring the Contractor to carry out a Variation and notwithstanding that it appears that the State clearly

wishes for the Principal to accommodate the proposed land resumption to the front of the Site:

(i) the Contractor is obliged under the Agreement to design and construct the Works so that they accord with the Principal's Project Requirements, and in particular the configuration of the Site and the Works shown in the Design Documents listed in Schedule 3 of the Agreement (noting that such design and construction will ***not*** *accommodate the proposed land resumption to the front of the Site; and*

(ii) the Contractor will be carrying out an act of intentional breach or repudiation if it carries out the design and construct the Works so that they accord with the Principal's Project Requirements and in particular the configuration of the Site and the Works shown in the Design Documents listed in Schedule 3 of the Agreement; or

(b) whether the Contractor by the Agreement, contracted with the Principal to provide a completed project satisfactory to the requirements of the Department of Public Works, such that the Contractor is required to carry out any work of changes imposed by the State and particularly Project Services, without need of a specific Variation or additional amounts form the Principal; and

*(c) whether clause 17.3 of the Agreement makes the terms of the Development (Turnkey) Contract – For Land Sale and Project Design and Construction between the Principal and the State ("****Turnkey Contract****") applicable to the Agreement, such that the Contractor is bound by the Turnkey Contract and must do all things required by Project Services in relation to the Project and the subject land the Project is upon."*

[33] In August 2010, the parties attended a conference in an attempt to resolve these disputes, but were unable to reach resolution.

[34] Subsequently, and in accordance with the terms of the respective contracts, the President of the Institute of Arbitrators and Mediators Australia nominated an arbitrator. The parties have taken steps in the arbitration, and it is ongoing.

[35] The defendant contends, however, that the present proceeding should be stayed pending determination of the arbitration. The stay is sought:

(a) pursuant to the Court's inherent jurisdiction, and

(b) pursuant to s 53 of the *Commercial Arbitration Act* 1990 (Qld) ("CAA").

[36] This Court clearly has the inherent power to stay proceedings pending the outcome of an arbitration. That power co-exists with the power conferred by s 53 of the CAA. The inherent power is, however, rarely invoked because of the extensive

statutory jurisdiction to stay which is available for domestic and international arbitrations.[2] Section 53 of the CAA provides:

> "**53 Power to stay court proceedings**
>
> (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied –
>
> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
>
> (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration;
>
> may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as thinks fit.
>
> (2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.
>
> (3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court form another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement."

[37] Counsel for the defendant submitted that s 53 could be invoked in the present case because the present proceeding is "in respect of a matter agreed to be referred to arbitration". In my view, that is not the case.

[38] The matters referred to arbitration, even on the most advantageous case for the defendant, concern the proper interpretation of the agreements between the parties with respect to the entitlement of the plaintiff to claim variations in respect of changes to works required by government authorities.

[39] True it is that the payment claims issued by the plaintiff in September 2010 included claims for payment in respect of those variations. But the defendant did not reply to the payment claims by serving payment schedules in accordance with s 18 of the BCIPA. That section provides:

> "**18 Payment schedules**

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2 *Halsbury's Laws of Australia* at 25-175.

> (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
>
> (2) A payment schedule –
>
> (a) must identify the payment claim to which it relates; and
>
> (b) must state the amount of the payment, if any, that the respondent proposes to make (the ***scheduled amount***).
>
> (3) If the schedules amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
>
> (4) Subsection (5) applies if –
>
> (a) a claimant serves a payment claim on a respondent; and
>
> (b) the respondent does not serve a payment schedule on the claimant within the earlier of –
>
> (i) the time required by the relevant construction contract; or
>
> (ii) 10 business days after the payment claim is served.
>
> (5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."

[40] By the operation of s 18(4) and (5), the failure to deliver payment schedules under the BCIPA triggered the liability to pay the amounts of the progress claims. The present proceeding is expressly one to recover the balance of those payment claims as debts owing (pursuant to s 19 of the BCIPA).

[41] The defendant would seek to argue that conduct of, and representations made by, the plaintiff's representatives constituted misleading or deceptive conduct in connection with the negotiations surrounding the institution of the arbitration process, such that the plaintiff ought not be entitled to rely on the payment claims. On a similar basis, the defendant would seek to contend that the plaintiff is estopped from relying on the payment claims. Those may well be matters of defence which are available to the defendant to seek to defeat the claim for the debt said to arise by operation of the BCIPA.[3] But those are not the same disputes as are raised under the Notices of Dispute, which inform the content and ambit of the arbitration between the parties.

[42] In short, I am not satisfied that this proceeding, which is a claim to recover a debt under statute, is "in respect of a matter agreed to be referred to arbitration" for the purposes of s 53 of the CAA.

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[3] The ability of a party to raise defences founded on s 52 of the *Trade Practices Act* 1974 (Cth) and in estoppel, notwithstanding the provisions of s 19(4) of the BCIPA, was canvassed in *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119.

[43] Even if I am wrong about that, however, the parties expressly agreed in cl 13.5 of each of the relevant contracts that nothing in the dispute resolution section of the contract "prejudices the right of a party to institute proceedings to enforce payment due" under each contract.

[44] That contractual provision is completely consistent with the notion that it is open to a party to a building contract to seek concurrently to enforce rights which it claims to have under the BCIPA and rights which it claims to have under the contract.[4] This entitlement of the builder to pursue payment in reliance on the terms of the statute while simultaneously being engaged in arbitration over interpretation of the terms of the contract is also a reflection of the policy underlying the BCIPA, described by Keane JA in *R J Neller Building Pty Ltd v Ainsworth*[5] as follows:

> "[40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner."

[45] It follows that I would not, in any event, have been satisfied that the existence of the arbitration between the parties would, in the circumstances of this case and having regard to the nature of this claim, have justified a stay of the present proceeding.

[46] The application for a stay will also be dismissed.

Conclusion

[47] As the application for a stay of the present proceeding is to be dismissed, it is appropriate also to order that the defendant file and serve its defence. It should do so within 14 days.

[48] As recorded above, the amount claimed as a debt by the plaintiff has now reduced to $105,741.21. It is no longer appropriate for this proceeding to be prosecuted in this Court, and accordingly there will be an order remitting the action to the District Court.

[49] There will, accordingly, be the following orders:

1. The plaintiff's application for summary judgment is dismissed;

2. The defendant's application for a stay is dismissed;

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4 *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* [2005] NSWCA 49; *Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd* [2008] NSWSC 1405.

5 [2009] 1 Qd R 390 at [40].

3. The defendant shall file and serve its defence within 14 days;

4. This proceeding shall be remitted to the District Court;

5. The costs of each application shall be reserved.