SUPREME COURT OF QUEENSLAND

CITATION:	*Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67
PARTIES:	**WALTON CONSTRUCTION (QLD) PTY LTD** ACN 100 833 225 (applicant) **v** **CORROSION CONTROL TECHNOLOGY PTY LTD** ACN 112 091 255 (first respondent) **RICS DISPUTE RESOLUTION CENTRE** ABN 18 089 873 067 (second respondent) **PAUL ROBERTS** (third respondent)
FILE NO:	SC No 10980 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATES:	12 November 2010; 8, 9 March 2011
JUDGE:	Peter Lyons J
ORDERS:	**1. The fifth payment claim made by the first respondent is invalid;** **2. The adjudication decision made by the third respondent is void; and** **3. The amount paid into Court by the applicant of $258,944.14 (plus accretions thereon) be released to the applicant.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where the applicant was the main contractor for a building project – where the first respondent was a sub-contractor engaged by the applicant – where the first respondent made a claim for payment from the applicant – whether the claim for payment was valid ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – POWERS, DUTIES AND DISCRETION OF ARBITRATOR – DUTY TO OBSERVE RULES OF NATURAL JUSTICE – where the third respondent made a

decision under the *Building and Construction Industry Payments Act* 2004 (Qld) regarding the claim for payment – whether the third respondent complied with the obligation to afford natural justice – whether the decision made by the third respondent was effectual

Building and Construction Industry Payments Act 2004 (Qld), s 12
Judicial Review Act 1991 (Qld), s 18, s 41

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, considered
Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106, considered
John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205, considered
Northbuild Construction P/L v Central Interior Linings P/L & Ors [2011] QCA 22, applied

COUNSEL: B E Codd for the applicant
M D Ambrose for the first respondent

SOLICITORS: DibbsBarker for the applicant
Holding Redlich for the first respondent

[1] **PETER LYONS J:** The applicant (*Walton Construction*) was the "main contractor" for a building project. The first respondent (*CCT*) was a painting sub-contractor engaged by Walton Construction. CCT has the benefit of the third respondent's decision made under the provisions of the *Building and Construction Industry Payments Act* 2004 (Qld) (*BCIP Act*), with reference to a claim dated 21 March 2010 (*fifth payment claim*). Walton Construction challenges the validity of both the decision and the fifth payment claim.

Background

[2] The contract between Walton Construction and CCT bears different dates, but appears to have been executed on behalf of CCT on 17 April 2009. The painting work the subject of the contract was to be carried out for a development at Arthur Street, Fortitude Valley, Brisbane. CCT commenced work under the contract on 26 August 2009, and made a series of payment claims. The evidence indicates that CCT did not work on the project after 15 December 2009. It issued the third payment claim on 21 December 2009, and the fourth payment claim on 21 February 2010. The fifth payment claim was sent to Walton Construction by facsimile on 22 March 2010.

[3] Consistent with a finding made by the third respondent, the hearing before me was conducted on the basis that, as the third respondent found, the contract was terminated on 15 January 2010, though CCT reserved its right to contest that finding in other proceedings. It was also accepted that the only basis for the finding was a Show Cause Notice issued by Walton Construction to CCT on 31 December 2009, and a response by CCT of 13 January 2010. These steps reflect the provisions of clause 44 of the contract. It therefore seems to me that I should proceed on the basis that the contract was terminated by Walton Construction on 15 January 2010,

pursuant to the right to do so found in clause 44.4. Neither party identified a basis for doing otherwise.

[4] Walton Construction responded to the fifth payment claim by a payment schedule dated 26 March 2010. On 13 April 2010, CCT made an adjudication application to the second respondent, and on 21 April 2010 Walton Construction provided an adjudication response. The second respondent referred the application to the third respondent, who then proceeded to determine it, giving a decision on 7 May 2010. He determined that an amount of $225,865.92 was payable to CCT by Walton Construction on 29 April 2010, and awarded interest at 18 per cent per annum. It is necessary to consider some aspects of the third respondent's decision in greater detail.

Third respondent's decision

[5] Walton Construction had made a submission to the third respondent that breaches of the contract by CCT had resulted in the issue of the Show Cause Notice and the subsequent termination of the contract by Walton Construction, resulting in loss or damage to it. The third respondent dealt with this early in his decision. When doing so, he made reference to clause 44.6 of the contract. That clause provides for what is to happen when work is taken out of the hands of the sub-contractor (CCT). It requires a representative of the main contractor to "ascertain the cost incurred … in completing the work". The third respondent came to the conclusion that this required Walton Construction to ascertain the amount of work completed by CCT pursuant to the contract, including CCT's entitlement and the value of day works and variations. This led the third respondent to conclude that the onus of proving the costs incurred by Walton Construction, and the final amount due under the contract, whether to Walton Construction or to CCT, was "entirely (Walton Construction's) obligation".

[6] Walton Construction had made a submission, the effect of which, as recorded by the third respondent, was that CCT did not lodge a payment (presumably intended to mean a payment claim) after termination of the contract in January 2010 "which was the last reference date opportunity under the contract"; and accordingly, that the payment claim was bound to fail. With respect to this submission, the third respondent said that clause 44.6 of the contract specifically provided for the rights and responsibilities of the parties in the event of termination, and "as with much of the contract, neither party has complied therewith". He then found Walton Construction was unable to rely on the assertion that CCT had "no further reference date opportunities after January 2010".

[7] Later in his decision, the third respondent set out to provide a valuation of the construction work. He first considered this by reference to the contract sum. He noted that CCT claimed that 90 per cent of the work under the original contract had been completed. He also noted that Walton Construction questioned the claimed percentage, but did not itself provide an assessment of the value completed. He then concluded, as "(Walton Construction) had not provided any evidence to persuade me that (CCT's) amount is incorrect, I have valued the total of contract works completed as $152,000", being the amount asserted by CCT. Having adopted this figure, he made an adjustment to give effect to an earlier adjudication decision.

[8] The third respondent then considered the painting work, the subject of the claim, which appears to have been external repainting, using a different painting system. He determined that the work was not simply the making good of defective work, but was a variation.

[9] The third respondent then considered that part of the claim relating to what were described as "day works". He noted that Walton Construction contended that the amounts claimed were not recoverable, because CCT had not obtained written confirmation of the requirement to carry out the work, in accordance with clause 17 of the contract. He noted, however, that signatures apparently of representatives of Walton Construction appeared on work records, and accordingly found "that the reasons given (by Walton Construction) in the payment schedule are unsupported and invalid". He then accepted the amounts claimed by CCT under this head, his conclusion being prefaced by the statement, "(h)aving reviewed the amounts in (CCT's) submissions which, on the basis of the information do not seem unreasonable, and in the absence of alternative values from (Walton Construction) …". However, he omitted two amounts, on the basis they duplicated amounts claimed on another occasion.

[10] The third respondent then considered a number of items identified as "Current Variations". He noted that Walton Construction contended that these were not recoverable, because they had not been the subject of a direction in writing, as required by clause 40 of the contract. He also noted that CCT gave credit for a variation relating to a stipple finish being replaced by plasterboard; also apparently not the subject of a direction in writing under clause 40. He took the view that neither party had complied with the clause. He then noted that the material provided by Walton Construction did not address each of the variations in the payment claim. He repeated his earlier conclusion to the effect that a consequence of the termination of the contract was that the onus of ascertaining and proving the final amount due under the contract lay entirely with Walton Construction. He made a finding that Walton Construction had not provided sufficient detail to support its valuation for the claimed variations (though he accepted one of its contentions, relevant to a claimed set off).

[11] He then accepted CCT's claim for each of the items described as "current variations", his conclusion again being prefaced by the statement, "(h)aving reviewed the amounts in (CCT's) submissions which, on the basis of the information do not seem unreasonable, and in the absence of alternative values from (Walton Construction) …". However, he identified several items as being included in an earlier payment claim, and accordingly, excluded them from the adjudicated amount.

[12] The third respondent then dealt with matters raised on behalf of Walton Construction by way of contra charges or set off. At an early stage of his consideration of these matters, the third respondent stated, "I would repeat my findings under the preliminary issues items above in respect of the Show Cause Notice that, having terminated (CCT's) sub-contract, the onus of proofing (*sic*) (and ascertaining) both the costs incurred and the final amount due under the contract is entirely (Walton Construction's) obligation." The third respondent then gave consideration to these matters before ultimately determining the adjudicated amount.

Contentions of the parties

[13] The second and third respondents played no role in the hearing before me.

[14] Walton Construction submitted that the fifth payment claim was not a payment claim to which the *BCIP Act* applied, in essence because the Act permits only one payment claim for each reference date; and payment claims had been made in respect of earlier reference dates. For that reason, the fifth payment claim was invalid, in the sense that it did not give rise to the operation of those provisions of the *BCIP Act* which would follow from making a payment claim in accordance with that Act. The subsequent discussion in these reasons of the validity, or invalidity, of actions purportedly taken under the *BCIP Act* is intended to reflect this sense.

[15] CCT submitted that notwithstanding the third respondent's finding of termination (accepted for the purpose of the current proceedings), at least one further reference date accrued thereafter; and that although the fourth payment claim might be said to be made with respect to that reference date, the fourth payment claim was itself invalid. Accordingly, the fifth payment claim was a payment claim to which the Act applied. However, CCT also seemed to rely upon a passage from *Brodyn Pty Ltd v Davenport*,[1] the effect of which is that after termination of a contract, reference dates continue to occur on a monthly basis.

[16] Walton Construction further submitted that the third respondent's decision was a nullity because, in a number of respects, the requirements of natural justice were not complied with. One related to the third respondent's reliance upon clause 44.6 of the contract. Associated with this was the conclusion reached by the third respondent in relation to an onus said to fall on Walton Construction. Walton Construction said, without challenge, that it had not had the opportunity to make submissions about these matters.

[17] Another aspect of Walton Construction's case in relation to natural justice requirements related to the manner in which the third respondent dealt with the variations identified in the fifth payment claim. It was submitted on behalf of Walton Construction that the third respondent did not give it the opportunity to deal with the question, identified in its submissions in these proceedings, as a waiver of the provisions of the contract relating to variations.

[18] Walton Construction also alleged a failure to comply with natural justice obligations on the basis that the third respondent concluded that the fifth payment claim was validly made, by virtue of the way the parties had dealt with contractual provisions; but did so without giving Walton Construction the opportunity to make submissions about this line of reasoning.

[19] CCT accepted that natural justice obligations applied to the third respondent's decision making. However, it submitted that the references to clause 44.6 were not material to the third respondent's decision. It also submitted that it had raised in its adjudication application the issue described by Walton Construction as the waiver of contractual provisions.

[20] The written submissions on behalf of Walton Construction also raised some other matters, which it ultimately did not pursue. In particular, it made a submission that

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1 (2004) 61 NSWLR 421 at 443.

the fifth payment claim was not valid, because the amounts claimed had been included in a previous payment claim. It accepted that it could not succeed on this ground, in light of the decision of the Court of Appeal in *Spankie & Ors v James Trowse Constructions Pty Ltd*.[2]

[21] Walton Construction's written submissions also included a submission that the third respondent's decision was a nullity, as in reaching his decision, the third respondent failed to exercise the powers conferred on him in good faith. That submission was not pressed at the hearing.

Available remedies

[22] Part 5 of the *Judicial Review Act* 1991 (Qld) (*JR Act*) provides that prerogative writs are no longer to be issued by the Court, and makes provision for an alternative form of order. Section 18 of the *JR Act* provides that that Act does not apply to decisions made under an enactment mentioned in Schedule 1, Part 2, which includes a decision made under Part 3, Division 2 of the *BCIP Act*. Section 26 of the *BCIP Act*, found in Part 3, Division 2, authorises the making of a decision of the kind made by the third respondent.

[23] In *Northbuild Construction P/L v Central Interior Linings P/L & Ors*,[3] although recognised as not being necessary for the Court's decision,[4] the Court gave consideration to the operation of s 18(2) of the *JR Act*, in respect of the *BCIP Act*, in light of the decision of the High Court in *Kirk v Industrial Court (NSW)*.[5] White JA concluded that the exclusion of decisions under Part 3, Division 2, of the *BCIP Act* from review under the *JR Act* "is limited to review of decisions not infected by jurisdictional error".[6] McMurdo P expressed a similar view.[7] Chesterman JA took the view that, because the effect of s 18(2) of the *JR Act* was that that Act did not apply to a decision under Part 2, Division 3, of the *BCIP Act*, the abolition of the prerogative writs generally effected by s 41 of the *JR Act* was of no effect; and that the prerogative writs available before the commencement of the *JR Act* remained available in respect of such a decision.[8]

[24] The judgments in *Northbuild* do not suggest that the Court is without power, where the third respondent's decision does not comply with essential pre-conditions found in the *BCIP Act*, to declare that the decision has no effect; indeed, the contrary seems to have been recognised.[9]

[25] In the present case, Walton Construction seeks declaratory relief, whether pursuant to s 128 of the *Supreme Court Act* 1995 (Qld), or under the inherent jurisdiction of the Court, or pursuant to s 41 of the *JR Act*; together with consequential injunctive relief. Save to the extent that, if such relief were made available by s 41 of the *JR Act*, it would only be available for jurisdictional error, there is, in my view no

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2 *Spankie & Ors v James Trowse Constructions Pty Ltd* [2010] QCA 355.
3 *Northbuild Construction P/L v Central Interior Linings P/L & Ors* [2011] QCA 22.
4 Ibid at [50], [52].
5 (2010) 239 CLR 531.
6 *Northbuild* at [78].
7 *Northbuild* at [6].
8 *Northbuild* at [33]-[37].
9 Expressly by Chesterman JA in *Northbuild* at [32], [37], see also [25]; and at least by implication by White JA: see [50]-[51].

reason to doubt the availability of the relief sought by Walton Construction in the present case.

Validity of the fifth payment claim

[26] A convenient starting point is s 12 of the *BCIP Act*, which confers a right on an entity in the position of CCT, in the following terms:

> **"12 Rights to progress payments**
>
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

[27] The section makes reference to two expressions which are significant in the present context. One is "reference date"; the other is "progress payment".

[28] The term "reference date" is defined in schedule 2 of the *BCIP Act* as follows:

> **"reference date**, under a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later named month."

[29] It can be seen from the definition that, except where the contract "does not provide for the matter", a reference date is to be identified by reference to the contract. That would occur if the contract states a date on which a claim for a "progress payment" may be made, or the contract makes it possible to work out such a date. Otherwise, reference dates are to be determined by the application of paragraph (b) of the definition.

[30] Before it is possible to apply paragraph (a) of the definition, it is necessary to determine whether the contract makes provision for progress payments. The expression "progress payment" is defined in schedule 2 of the *BCIP Act* as follows:

> "**progress payment** means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section—
>
> (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or

> (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or
>
> (c) a payment that is based on an event or date, known in the building and construction industry as a 'milestone payment'."

[31] The primary meaning of the expression is a payment to which a person becomes entitled under s 12, except in a case where the contract does not "provide for the matter", on each date on which a claim for a progress payment might be made under the contract; and otherwise monthly. However, there are three extended meanings for the expression found in the definition, to which I shall refer for convenience as a final payment, a one-off payment, and a milestone payment. No further definition of these expressions is found beyond the definition of "progress payment" cited above.

[32] The contract made provision in clause 42.1 for CCT to make payment claims. That clause, in effect, dealt with the making of claims prior to completion; the making of a claim consequent on the issue of a Certificate of Substantial Completion; and the making of a Final Payment Claim. Clause 42.1 formed part of the standard conditions of contract. Part C of the annexure to the standard conditions, in clause 18, identified the 21st day of each month as the day on which payment claims were to be made, no doubt a reference to payment claims made prior to completion.

[33] Notwithstanding the language of clause 42 (referring to Substantial Completion), clause 42.1A of Part C of the annexure made provision for a payment claim described as a "Practical Completion Payment Claim", to be made within 11 weeks after the issue of the Certificate of Practical Completion for works under the Main Contract. Clause 42.7 of the contract required the making of a Final Payment Claim, within 21 days after the expiry of the Defects Liability Period.

[34] It can therefore be seen that the contract made provision for dates for the making of payment claims prior to completion; for a period within which to make a payment claim after practical completion; and for a period within which to make a final payment claim. I note, however, that in its written submissions, CCT contends that a consequence of the amendments found in the annexure to the standard conditions of contract was that the contract made no provision for a payment claim subsequent to the Practical Completion Payment Claim.

[35] There was no suggestion that the effect of the definition of "progress payment" was to confine the operation of paragraph (a) in the definition of "reference date" to a situation where the contract specifically made provision for the date for making a payment claim in respect of the payment, a right to which is conferred by s 12 of the *BCIP Act*, rather than an analogous right conferred by the contract. That seems to me to reflect the correct approach to this definition. The definition of "reference date" seems to use the expression "progress payment" in paragraph (a) as including a contractual provision granting an entitlement to a payment analogous to a payment for which s 12 makes provision. That use of the expression appears also to occur in s 8(a) of the *BCIP Act*. Accordingly, I propose to proceed on the basis that a contractual provision providing for payments of a kind analogous to those the subject of s 12 is a contractual provision relevant for the application of paragraph (a) of the definition of "reference date".

[36] On that basis, it seems to me that the contract made provision for the dates for making claims for progress payments, and accordingly provided the means for the determination of reference dates for the *BCIP Act.* Further, it seems to me that the contract dealt comprehensively with the times for making claims for payments, including claims the subject of the extended definition of "progress claim".

[37] Clause 44 of the contract dealt with default. Clause 44.2 made provision for Walton Construction to give a notice to show cause in relation to a substantial breach of the contract. Clause 44.4 provided that if CCT failed to show reasonable cause why Walton Construction should not do so, Walton Construction might either take the work out of the hands of CCT, or terminate the contract. Clause 44.5 set out a procedure to be followed, when Walton Construction acted under clause 44.4 to take work out of the hands of CCT. Clause 44.10, on the other hand, dealt with the consequences of termination, under the alternative right given to Walton Construction by clause 44.4. In such a case, clause 44.10 provided that, "the rights and liabilities of the parties shall be the same as they would be at common law had the defaulting party repudiated the Subcontract and the other party had elected to treat the Subcontract as at an end and recover damages."

[38] When a contract is terminated for repudiatory conduct, accrued rights survive.[10] Rights which arise under a term of a contract which, as a matter of construction, was intended by the parties to survive termination, are also available to the parties notwithstanding termination: for example, rights which arise under an arbitration clause,[11] or a liquidated damages clause.[12] However the specific identification of such clauses, and the rationale for their operation after termination, demonstrate that generally, terms of a contract do not operate after termination. The effect of clause 44.10 seems to me to be that the right to make progress claims, together with the accrual pursuant to the contract of the dates on which those claims might be made, ceases with the exercise of the contractual right to terminate, conferred by clause 44.

[39] In this context, it is necessary to consider a passage from the judgment of Hodgson JA with whose judgment the other members of the New South Wales Court of Appeal agreed, in *Brodyn.*[13] His Honour said with reference to s 8(2) of the New South Wales Act, which defines "reference date":[14]

> "However, s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits of s 13(4) (the equivalent to s 17(4), limiting the period within which to make a claim to 12 months after the relevant work was carried out): reference dates cannot support the serving of any payment claims outside these limits."

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10 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; *Re Dingjan; ex parte Wagner* (1995) 69 ALJR 284 at 290.

11 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 365.

12 *Tiplady v Gold Coast Carlton Pty Ltd* (1984) ATPR ¶45-646 at ¶45-659.

13 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 443.

14 Ibid at [63].

[40] This passage would appear to support the view that monthly reference dates continue to accrue, at least under the New South Wales Act, for twelve months after the cessation of work, notwithstanding termination of the contract. However, there are differences, which seem to me to be not without importance, between the statutory provisions which identify reference dates, in the legislation in the two States.

[41] Thus, s 8(2) of the New South Wales Act commences, "***reference date,*** in relation to a construction contract …". The definition in the *BCIP Act* commences, "***reference date,*** under a construction contract … ". Further, paragraph (b) of s 8(2) of the New South Wales Act commences with the words "if the contract makes no express provision with respect to the matter"; whereas paragraph (b) of the definition in the *BCIP Act* uses a different expression, as noted, relating to whether the contract "provide(s) for the matter".

[42] The use of the expression "under a construction contract" found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract "under" which there might be a reference date.[15] The conclusion that a reference date does not occur after termination of a contract is, in my view, also consistent with the general nature of the payments for which provision is made by the *BCIP Act*, that is to say, payments which are of a provisional nature, made over the life of the contract.[16]

[43] The second difference which I have noted between the two definitions is also of significance. The language used in the *BCIP Act* gives greater primacy to the provisions of the contract dealing with the making of a claim for a progress payment than does the language of the New South Wales Act.

[44] For these reasons, I am not prepared to adopt the statement from the judgment of Hodgson JA in *Brodyn* as reflecting the effect of the definition of the expression "reference date" in the *BCIP Act*.

[45] In my view, the contract provides for reference dates, by both enabling their identification, and by providing in effect that there is no right to make a progress claim after the contract is terminated under clause 44.10, with the consequence that no further reference date of this kind would then accrue.

[46] It was not submitted that the fifth payment claim was served in relation to a reference date prior to the termination of the contract on 15 January 2010. Implicit in the position taken on behalf of CCT is the proposition that other payment claims were served in relation to reference dates which preceded termination. Otherwise, it might be said that, notwithstanding my view of the effect of clause 44.10, the fifth payment claim was valid, by virtue of the provisions of the *BCIP Act*.

[47] However, CCT also submitted that, in any event, a further reference date occurred after termination. CCT relied on decisions from other jurisdictions to support this submission. The first of those decisions is *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd.*[17] In that case, the contract was terminated, and no work was

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15 In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J appears to have adopted similar reasoning in relation to the operation of the relevant Victorian statutory provisions: see [171], [175].

16 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [17]; cited in *Gantley* at [172].

17 [2004] NSWSC 905.

done thereafter. However three further claims were made which purported to be claims under the New South Wales legislation. McDougall J held that, although the contract made provision for monthly reference dates, that provision ceased to have effect after termination. He then held that one additional reference date occurred after termination, in relation to which a final payment claim might be served.[18] Although in *Brodyn* Hodgson JA expressly stated that *Holdmark* was wrongly decided,[19] that statement does not directly affect this part of the decision in *Holdmark.*

[48] In *Holdmark*, McDougall J said:[20]

> "In some cases, contracts make provision for the occurrence of reference dates after termination or cessation of work. As I have indicated, those cases may be put to one side. Where there is no provision, then, in my view, there is but one more reference date. That is the reference date that, according to either the contractual or statutory scheme, occurs (or would have occurred) next after termination or cessation of the work. The builder, in my judgment, may make a final payment claim by reference to that date."

[49] There is no further explanation for this statement. The passage just set out is not without some difficulty. At an early point, his Honour excludes from consideration cases where the contract makes provision for the occurrence of a reference date after termination. He then proceeds to conclude that there may be a reference date after termination by reference to the "contractual … scheme". However, for the cases being considered, the contractual scheme is assumed not to make provision for a reference date after termination. The words "or would have occurred" may have been included in recognition of this; but the consequence is that a reference date identified in this way does not seem to me to be a "date determined by or in accordance with the terms of the contract".

[50] Nor is it apparent from the reasons of McDougall J how the statutory scheme might be regarded as providing for a single reference date after termination. Moreover, at least in the context of the *BCIP Act*, it is not easy to see how the statutory scheme operates in a case where the contract makes provision for reference dates.

[51] The next case relied upon for CCT is the decision of the New South Wales Court of Appeal in *Brodyn.* While that decision would support the occurrence of reference dates after termination, it does so on the basis of statutory provisions; and as I have indicated, I am not prepared to apply that decision because of differences in the relevant statutory language.

[52] For CCT, some reliance was also placed on *Gantley Pty Ltd v Phoenix International Group Pty Ltd.*[21] In that case, Vickery J had to apply the Victorian legislation equivalent to the *BCIP Act*, as it was prior to amendments which became effective on 30 March 2007 (*Old Act*). However, his Honour also considered the effect of the legislation incorporating those amendments (*New Act*).

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18 See ibid at [19]-[37].

19 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [65].

20 *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 at [26].

21 [2010] VSC 106.

[53] For a contract to which the *Old Act* applied, his Honour found that a payment claim might be served after termination of the contract only if the contract expressly or impliedly provided for that to happen, or provided for a reference date subsequent to termination; or if the relevant reference date had arisen prior to termination.[22]

[54] Although *obiter*, Vickery J also considered the effect of the *New Act*. His Honour expressed the view that under that Act, where a construction contract has been terminated, a final payment claim may be made. However, it would appear from the general context in which this conclusion is expressed, and in particular from his Honour's discussion of *Holdmark*, that his conclusion was influenced by provisions found in the *New Act* which are not found in the *BCIP Act*. They include specific provision for the occurrence of a reference date for a final payment claim, including the occurrence of such a date independently of the expiry of a defects liability period, or the issue of a final certificate. His Honour was also influenced by the express provision limiting the making of a payment claim for a final payment under the *New Act.* These provisions are not found in the *BCIP Act*. In this context, his Honour did not refer to the expression "reference date under a construction contract", in the Victorian equivalent to s 12 of the *BCIP Act*, which might be thought to limit the statutory right to make a payment claim for a final payment, to cases where the contract remains in existence. For this reason, and because his Honour's observations are *obiter* and apply to a different statutory context, it seems to me more appropriate to attempt to apply the language of the *BCIP Act*, than to adopt his Honour's conclusion.

[55] Section 12 of the *BCIP Act* plainly confers a statutory right to a final payment for construction work (or for related goods and services). However it does so "(f)rom each reference date under a construction contract". That right leads to a right to make a payment claim under s 17, though a claimant may serve only one payment claim "in relation to each reference date under the construction contract".[23]

[56] I have previously mentioned the definition of "reference date", and the role accorded to contractual provisions in it. It seems to me to be inconsistent with the statutory language to conclude that a statutory right to a final payment accrues independently of a reference date; or that a reference date occurs after termination, at least where that would be contrary to the effect of the contract. Accordingly, in my view, no reference date occurred in respect of the contract between the parties, after its termination.

[57] In *Gantley*, Vickery J drew attention to the need to consider whether, on the basis of the reference date occurring after termination, a payment claim which might otherwise be authorised under the *New Act* as a payment claim for a final payment, was in substance a payment claim for a final payment.[24] That question was not addressed in the submissions by the parties, and is not one which arises here, as in view of the conclusion expressed earlier, no reference date occurred after the contract was terminated.

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22 See *Gantley* at [174]-[175].

23 See s 17(5) of the *BCIP Act.*

24 *Gantley* at [224]-[244].

Requirement to accord natural justice

[58] In *Brodyn* Hodgson JA identified the absence of any "substantial denial of the measure of natural justice that the Act requires to be given" as essential for a valid adjudicator's decision.[25] That conclusion was adopted by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors.*[26] His Honour's view was in turn applied by McMurdo J in *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No 2).*[27] It appears to have been endorsed by the Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors.*[28] The correctness of the proposition was not in issue in these proceedings.

[59] A number of the New South Wales decisions referred to by Applegarth J in *John Holland* held that there is a substantial denial of the measure of natural justice of the legislation required to be given, when an adjudicator has decided a dispute on a basis for which neither party has contended.[29] Again, this proposition was not in issue in these proceedings.

[60] In *John Holland*, Applegarth J held that there was a substantial denial of the required measure of natural justice, when the matter about which the adjudicator did not provide an opportunity to be heard was a point on which the adjudicator's decision was based, and was significant to the actual determination.[30] This proposition, too, was not in issue.[31] It may well encompass the proposition from the New South Wales cases referred to by Applegarth J.

Natural justice and the adjudicator's determination of validity of the fifth payment claim

[61] Walton Construction alleges that the adjudicator failed to accord it natural justice when determining the validity of the fifth payment claim. The validity of the fifth payment claim is a matter to be determined in these proceedings. It is common ground that the third respondent's decision about the validity of the fifth payment claim is of no significance in these proceedings, and in particular, has no effect on the challenge by Walton Construction to the validity of the fifth payment claim. In those circumstances, it seems to me that this point is of academic interest only. Since the third respondent did not have the power to determine in a way which is binding, or at least of some authority, the question whether the fifth payment claim was valid, it is difficult to see that he had any obligation to accord natural justice in respect of it. Alternatively, it may be thought that, in these proceedings, Walton Construction has had full opportunity to deal with the validity of the fifth payment claim; and accordingly, any breach of natural justice requirements in this respect in the adjudication proceedings has been "cured".

[62] I would therefore not be prepared to find the third respondent's adjudication decision to be invalid for this reason.

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25 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [55].
26 [2009] QSC 205.
27 [2010] QSC 166 at [10].
28 [2011] QCA 22: see for example [127] per White JA.
29 See also *Spankie & Ors v James Trowse Constructions Pty Ltd* [2010] QCA 355 at [10].
30 *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205 at [40].
31 *Spankie & Ors v James Trowse Constructions Pty Ltd* [2010] QCA 355 at [10].

Materiality of clause 44.6 to the adjudicator's decision

[63] An essential element of the third respondent's decision was the determination of the amount recoverable by CCT as a progress payment. It will be apparent from the summary of the reasons of the third respondent, given earlier, that he had reached the view that clause 44.6 was applicable; and on a number of occasions he relied upon that conclusion in determining amounts payable to CCT. In my view, the finding that clause 44.6 of the contract was applicable was a proposition upon which the third respondent's decision was based, and was significant to the determination of the progress payment.

[64] It was not in issue that the third respondent had not given the parties an opportunity to make submissions on the question whether clause 44.6 had application. In those circumstances, in my view, there has been a substantial denial of the measure of natural justice that the *BCIP Act* requires to be given. If the decision were otherwise thought to be valid, I would consider it to be invalid on this ground.

Other issues

[65] It will be recalled that CCT had made a submission to the effect that the fourth payment claim was invalid. Conclusions expressed earlier in these reasons make it unnecessary to determine the correctness of this submission, which raises a question of some complexity, and which, in another case, might be decisive. Accordingly, I do not propose to determine it.

[66] Walton Construction submitted that the third respondent had failed to accord it natural justice in relation to the waiver of the contractual provisions governing variations. For similar reasons I do not propose to determine this question.

Conclusion

[67] In my view, the fifth payment claim was not a payment claim satisfying the requirements of the *BCIP Act*, and attracting its operation. It, and the resulting adjudicator's decision, are in this sense invalid. If that conclusion were not correct, I consider that the adjudicator's decision is invalid, because of a failure to accord the measure of natural justice required by the *BCIP Act*.