

# SUPREME COURT OF QUEENSLAND

CITATION: *State of Qld v T & M Buckley P/L* [2012] QSC 265

PARTIES: **THE STATE OF QUEENSLAND THROUGH THE  
DIRECTOR-GENERAL, DEPARTMENT OF  
HOUSING AND PUBLIC WORKS**  
(applicant)  
v  
**T & M BUCKLEY PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) ACN 010 052 043**  
(first respondent)  
and  
**RICS DISPUTE RESOLUTION SERVICE ABN 18 089  
873 067**  
(second respondent)  
and  
**JENNIFER WYATT**  
(third respondent)

FILE NO: BS5229/12

DIVISION: Trial

PROCEEDING: Originating application

DELIVERED ON: 13 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 20 July 2012

JUDGE: Margaret Wilson J

ORDER:

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW –  
GROUNDS OF REVIEW – JURISDICTIONAL MATTERS  
– where first respondent served payment claim on applicant –  
where applicant served payment schedule in response to  
payment claim and matter referred to adjudication – where  
applicant seeks declaration that adjudication decision is void  
by reason of jurisdictional error – where applicant submitted  
that no reference date accrued pursuant to *Building and  
Construction Industry Payments Act 2004* which resulted in  
the payment claim being invalid and the adjudication decision  
being void – whether accrual of the statutory reference date is  
conditional upon the prior delivery of the statutory  
declaration – whether the adjudication decision was void

*Building and Construction Industry Payments Act 2004*  
(Qld), s 12, s 99, Schedule 2  
*Corporations Act 2001* (Cth), s 471B

*John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited* [2012] QCA 150, cited.  
*Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162, cited.

COUNSEL: P Dunning SC and G Beacham for the applicant  
 M H Hindman for the first respondent

SOLICITORS: Clayton Utz for the applicant  
 Allens Linklaters for the first respondent

- [1] **MARGARET WILSON J:** This application relates to a claim for payment made pursuant to the *Building and Construction Industry Payments Act 2004* (“*BCIPA*”).
- [2] On or about 16 December 2010 the applicant (the State of Queensland) and the first respondent entered into a contract for construction work in relation to a building at Burleigh Heads.
- [3] On 17 April 2012 the first respondent served a payment claim (“the April payment claim”) on the applicant, purportedly pursuant to *BCIPA*. The applicant served a payment schedule in response to the payment claim and the matter was referred to adjudication. On 5 June 2012 the adjudicator found that the first respondent was entitled to a progress payment.
- [4] By an originating application filed on 14 June 2012, the applicant seeks a declaration that the adjudication decision is void by reason of jurisdictional error.

### **Leave to proceed**

- [5] The first respondent was placed in liquidation on 29 June 2012.
- [6] At the commencement of the hearing I gave the applicant leave to proceed pursuant to s 471B of the *Corporations Act*.

### **Relevant provisions of *BCIPA***

- [7] Section 12 of *BCIPA* provides –

#### **“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.”

### **The contract**

- [8] Relevantly, the contract provides –

#### **“42 CERTIFICATES AND PAYMENTS**

**42.1 Payment Claims, Certificates, Calculations and Time for Payment**

Subject to the prior receipt by the Superintendent of the information required by Clause 43.2, at the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require.” (emphasis added)

...

“43.2 Prior to the making of a payment claim:

- (a) the Contractor must deliver to the Superintendent a statutory declaration in the form attached to these Conditions by the Contractor, or where the Contractor is a corporation, by the representative of the Contractor who is in a position to know the facts attested to that:
  - (i) all subcontractors and any sub subcontractors performing work under the Contract have been approved by the Superintendent in accordance with Clause 9.2; and
  - (ii) all subcontractors of the Contractor have been paid all that is due and payable to such subcontractors up to the date of submission by the Contractor of a progress claim in respect of the work under the Contract; and
  - (iii) ...
  - (iv) ...
  - (v) ...; and

if requested in writing, reasonable supporting documentary evidence thereof.”

[9] The following appears in the schedule –

“Times for Payment Claims: (Clause 42.1) .....  
 If nothing stated – Monthly”

[10] The applicant failed to provide a statutory declaration under clause 42.3 at or prior to the delivery of the April payment claim.

[11] In the applicant’s submission, the consequence is that:

- (a) no reference date accrued pursuant to *BCIPA* which entitled the first respondent to make the April payment claim;
- (b) the payment claim delivered by the first respondent was, therefore, invalid;

(c) consequently, the adjudication decision was void, because of the absence of a valid payment claim.

[12] The applicant made such a submission to the adjudicator, who rejected it.

### **Reference date**

[13] Reference date” is defined in schedule 2 of *BCIPA*—

“*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.”

[14] Counsel for the applicant submitted that while the “reference date” must be a specific date, the legislation allows the parties to have their own mechanism for arriving at it. The contract provides, in clauses 42.1 and 43.2, a mechanism for working out the date for payment claims within the meaning of paragraph (a) of the definition of “reference date”. Times for payment claims not having been inserted in the annexure to the contract, the time for payment is “monthly” - that is, on the monthly anniversary of the commencement of work.<sup>1</sup>

[15] Counsel for the first respondent submitted that on its proper construction, paragraph (a) restricts what can be taken into account in working out the reference date to “the contract” itself. In other words, it must be possible to find within the contract not only the formula but also every fact to be inserted into the formula. She acknowledged that it may be permissible to insert a date of commencement of work ascertained from extrinsic evidence in working out the date for contractual progress claims, but submitted that it is not permissible to do so in working out the reference date for the purposes of a progress payment under *BCIPA*.

[16] Senior counsel for the first respondent submitted in reply that the words “worked out” in paragraph (a) are words of wide ambit, and that they should not be read down to “as stated in the contract”.

[17] By paragraph (a) of the statutory definition, “reference date” means a date “stated in” or “worked out under” the contract. Whether a date is one “stated in” the contract depends on the proper construction of the words used in the contract without reference to extrinsic evidence (with the possible exception of evidence of the matrix of facts).

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<sup>1</sup> *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576.

- [18] According to the *Oxford English Dictionary Online*, one of the meanings of “work out” is –

“To go through a process of calculation or consideration so as to arrive at the solution of (a problem or question), to solve; also, to reckon out, calculate.”

- [19] Just as a mathematical problem may be solved or “worked out” by applying values to a given formula, so may a “reference date” be “worked out under the contract” by applying facts to a formula found within the contract. In my view counsel for the first respondent’s submission ignores the true import of the expression “worked out under”. If it were correct, there would arguably be no distinction between a date “stated in” the contract and one “worked out under” it, because in each case the date would be one ascertained by construction of the contract without reference to extrinsic evidence.
- [20] I am satisfied that paragraph (a) of the definition of reference date is applicable in the present case.

### **The requirement for a statutory declaration**

- [21] The effect of clauses 42.1 and 43.2 is that a contractual claim for a progress payment may not be made unless the statutory declaration has already been delivered.
- [22] Counsel for the applicant submitted that the statutory reference date will not accrue unless and until the statutory declaration has been delivered.
- [23] Counsel for the first respondent submitted that accrual of the statutory reference date is not subject to compliance with the pre-condition of delivery of a statutory declaration.

### ***John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited*<sup>2</sup>**

- [24] In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited* Coastal Dredging (which I shall refer to as “the subcontractor”) served a payment claim on John Holland (which I shall refer to as “the principal”). An adjudicator held that the subcontractor was entitled to payment of a certain sum. The principal contended that the adjudication decision was void because the subcontractor’s payment claim was not made from a valid “reference date” as required by s 12 of the Act.
- [25] Under the subcontract “Reference Date” was defined as meaning –

“...the date when the Subcontractor may submit a Payment Claim to John Holland in accordance with clause 12.6 and Schedule A, and has the same meaning as defined in [BCIPA].”

“Payment Claim” was defined in such a way that it meant a claim under the contract rather than a claim under *BCIPA*. Schedule A provided, relevantly, that “Reference Date” meant the 28<sup>th</sup> of each month.

<sup>2</sup> [2012] QCA 150. An application for special leave to appeal to the High Court was withdrawn.

- [26] Clause 12.6 of the subcontract provided that the subcontractor might submit a payment claim to the principal “only on each Reference Date” and the subcontractor warranted that the payment claim would be in the format required by the principal (which included a statutory declaration that (inter alia) subcontractors and employed workers had been paid). The subcontractor warranted that if the payment claim did not comply, it would be void and the reference date would be the reference date for the next month. “Payment claim” was defined as a claim for payment of the subcontract sum submitted by the subcontractor to the principal strictly in accordance with the subcontract, and “reference date” was defined as having the same meaning as it has under the Act.
- [27] Fraser JA identified the critical issue as being the effect of these provisions of the subcontract upon the reference date for the purposes of s 12 of the Act. His Honour said –
- “[17] In considering that issue, the object of the Act expressed in s 7, and how that object is to be achieved, expressed in s 8, must be borne in mind. An interpretation of the Act which best achieves its purpose is to be preferred to any other interpretation.<sup>3</sup> Relevantly, s 8 makes it clear that the purpose of the Act is not merely to give statutory force to a contractual entitlement to progress payments. Rather, the fundamental object of ensuring an entitlement to progress payments is to be achieved by granting a statutory entitlement to progress payments even where the contract itself makes provision for progress payments. The extent to which those separate contractual and statutory entitlements coincide must be derived from the operative provisions of the Act.
- [18] Section 12 confers upon a person who has undertaken to carry out construction work a statutory entitlement to recover a progress payment from each ‘reference date under a construction contract’, which is defined to mean, so far as is presently relevant, ‘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, ...under the contract...’. Accordingly, the contractual provisions to which reference may be made for the purpose of ascertaining the ‘reference date’ are those which state, or provide for the working out of, the date on which a progress payment claim ‘may be made’. The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims or the consequences of breaching warranties about the form and content of progress claims.”
- [28] In that case the Court construed the contractual provision as conferring an unconditional entitlement to deliver a payment claim on the 28<sup>th</sup> day of each month. That was the reference date for the purposes of *BCIPA*. The contractual warranties as to the form and content of a contractual progress claim and the consequences of breach of those warranties did not affect the reference date under the statute, which was the 28<sup>th</sup> day of the month.
- [29] In *John Holland* sub-clauses of clause 12.6 provided –

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<sup>3</sup> *Acts Interpretation Act*, s 14A(1).

“...The subcontractor warrants and represents that if a Payment Claim does not comply with the conditions set out in this clause 12.6:

- (h) the Payment Claim is void; and
- (i) the Reference Date for the purposes of [BCIPA] shall be the same day on the following month.”

[30] The Court held that these sub-clauses were void by reason of s 99(2)(b) of *BCIPA*, which provides –

**“99 No contracting out**

...

- (2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it—

...

- (b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or

...”

Fraser JA said –

“[21] The effect of the appellant’s argument is, therefore, that cl 12.6(h) and (i) operated to defer what otherwise would have been the respondent’s statutory entitlement to a progress payment from a reference date ascertained in accordance with the Act. The intended effect of cl 12.6(h) might be debatable, but cl 12.6(i) certainly purports to have that effect. It follows that it (and cl 12.6(h) if it would have a similar effect) is void as a provision that, in terms of s 99(2)(b) of the Act ‘purports to ... modify ... or otherwise change the effect of a provision of this Act, or would otherwise have the effect of ... modifying, or otherwise changing the effect of a provision of this Act’.”

***Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd***<sup>4</sup>

[31] In *Simcorp Developments & Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* the contract provided –

**“37.2 Certificates**

Clause 37.2 is deleted and replaced with the following:

“The Superintendent shall, by the 30th day of the month after receiving such a progress claim, issue to the Principal and the Contractor:

<sup>4</sup> [2010] QSC 162.



[32] The contractor delivered a payment claim under the Act, purportedly pursuant to *BCIPA*. The principal contended that it was merely a progress claim under the contract and not a payment claim under the Act. It was common ground that the superintendent had not issued a progress certificate and was not deemed to have done so. The principal argued successfully that the claim could not be treated as a payment claim under *BCIPA* because the entitlement to deliver such a claim had not accrued, that entitlement coming into existence only after receipt of the superintendent's certificate or its deemed receipt.

[33] Douglas J said –

“[25] Here it seems clear to me that the Act contemplates that the contract may contain provisions for working out a period for service of a payment claim intended to be used in fixing when such a claim may be made. This contract contains such provisions. Its terms are not inconsistent with the provisions of the Act and do not attract the effect of s 99.

[26] Failure to adhere strictly to the statutory regime for the recovery of claims has been held to preclude reliance on the special statutory rights available under the Act.<sup>5</sup> It has also been held that the Act does not override the contractual provisions and stresses adherence to their terms.<sup>6</sup> Consequently claim 13 should have been treated by Simcorp simply as a progress claim and not as a payment claim under the Act.

...

[29] Here, the Act clearly stipulates that the date a progress payment under a contract becomes payable depends on the day on which the payment becomes payable under the contractual provision; see s 15(1)(a). There was no argument that the provision for reference to the superintendent was void under the sections of the *Queensland Building Services Authority Act 1991* referred to in s 15(1)(a). Nor was it a provision to the contrary of the provisions of the Act for the purposes of s 99.

[30] In this case under this legislation and this contract it seems to me that the issuing or deemed issuing of a progress certificate by the superintendent is a necessary precondition to the delivery of a payment claim under s 17 of the Act. If there were no provision in the contract fixing a date for delivery of a payment claim or deeming that a superintendent's certificate had issued within a certain period after the delivery of a progress claim my conclusion would be different but that is not the case here.

[31] For those reasons claim 13 was not, when the matter was argued before me, then capable of laying the basis for a payment claim as it

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<sup>5</sup> *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10, 15 at [24]; *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] 2 Qd R 172, 176 at [18] and 178 at [21]; *Baxbex Pty Ltd v Bickle* [2009] QSC 194 at [17]; *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345 at [21] and [24]; *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd* [2003] NSWSC 266 at [59] and *Gemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, 50 at [41].

<sup>6</sup> *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345 at [13] – [14].

had not then been dealt with by the superintendent under the contract.”

- [34] In *John Holland* Fraser JA did not find it necessary to decide whether *Simcorp Developments* was correctly decided. His Honour said -

“[22] Douglas J’s observation in *Simcorp Developments & Constructions P/L v Gold Coast Titans Property P/L* that the Act does not override contractual provisions must be understood as being subject to any application of s 99. That decision is otherwise not on point. His Honour’s conclusions that the contractor’s claim in that case should have been treated simply as a progress claim under the contract and not as a payment claim under the Act,<sup>7</sup> and that the ‘issuing or deemed issuing of a progress certificate by the superintendent is a necessary pre-condition to the delivery of a payment claim under s 17 of the Act’, turned upon the construction of quite different contractual provisions and the application of s 17.”

### Submissions

- [35] After discussing *John Holland* and *Simcorp Developments*, counsel for the applicant submitted –

“24. Thus, the law is that a contractual provision may validly impose a condition upon the accrual of a reference date by providing that the reference date accrues only after certain steps have been taken, although it cannot create an entitlement to a reference date in unconditional terms, and then purport to defer or avoid that entitlement if certain conditions are not met.

25. The contractual provision in the present case is of the former kind. It provides that, subject to (ie upon the condition that) clause 43.2 being complied with, a reference date will accrue at the time provided for in the annexure (the annexure states that reference dates will accrue ‘monthly’ – properly construed, that means that they accrue upon the monthly anniversary of the date on which the work commenced under the contract).<sup>8</sup>

...

27. So the effect of clause 42 is that a reference date will not accrue unless and until the statutory declaration required by clause 43.2 has been delivered.”

- [36] Counsel for the first respondent submitted, *Simcorp Developments* was wrongly decided because, contrary to the view expressed by Douglas J,<sup>9</sup> the clause fell foul of s 99. She submitted that even if that case was correctly decided, it should be confined to its own facts. She said -<sup>10</sup>

<sup>7</sup> [2010] QSC 162 at [26].

<sup>8</sup> *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576 at [50].

<sup>9</sup> [2010] QSC 162 at [25], [29].

<sup>10</sup> Outline of Submissions on behalf of the First Respondent

“39. The contract in that case operated such that -

- a. The contractor was first required to issue a progress claim (clause 37.1). The progress claim was required to be issued by the 23<sup>rd</sup> day of each month for WUC (work under contract) executed to the 23<sup>rd</sup> day of that month (Item 28 – [7] in the decision);
- b. The superintendent by the 30<sup>th</sup> day of the month after receiving the progress claim was required to issue a progress certificate (clause 37.2 – [5] in the decision);
- c. If the contractor did not make a progress claim, the superintendent could still issue a progress certificate. If the superintendent did not issue a progress certificate in response to the progress claim, the progress claim was deemed to be the progress certificate (clause 37.2 – [5] in the decision);
- d. Upon receipt of the progress certificate (or the deeming of the progress claim as the progress certificate) the contractor was required to deliver an invoice (‘payment claim’) that complied with the requirements for a payment claim under section 17 of the Payments Act (clause 37.2 – [5] in the decision). The times for payment claims stated in Item 28 of the contract were –

‘On the 30<sup>th</sup> day of each month following the delivery of a progress claim under Item 27(a)’<sup>11</sup>.

40. Douglas J described those later words as a ‘pre-condition for the timing of the payment claims’ (at [22]). It is noted that there is no such pre-condition for the timing of the payment claim in this case – the Annexure provided that reference dates arise monthly.”

[37] Her submissions continued that in *Simcorp Developments* the reference date for a “payment claim” as described under the contract did not arise until a series of steps had been undertaken. The result would have been different, she submitted, if the time for payment claims had been expressed simply as the 30<sup>th</sup> day of each month, or the 23<sup>rd</sup>, which was when the contract allowed for progress claims to be made.

[38] In her submission, there are two parallel schemes at play – the contractual scheme and the statutory scheme, and all of the requirements for a contractual claim are not necessarily imposed on the statutory scheme. She submitted that if paragraph (a) of the definition of “reference date” is applicable in the present case, the reference date is the time stated in the annexure as the date on which a contractual payment claim may be made, shorn of pre-conditions.

[39] In reply, senior counsel for the applicant acknowledged that conceptually there is a difference between a progress claim under the contract and a payment claim under *BCIPA*, and submitted that the definition of “reference date” seeks at least to build a bridge between the two systems. In his submission the two systems come together because the definition of “reference date” picks up the contractual arrangements, and does so quite deliberately.

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<sup>11</sup> At [7]. Query whether 27(a) should have been a reference to 28(a) which seems more logical.

**Discussion**

- [40] In *Simcorp Developments* the right to deliver a payment claim was held not to accrue until a progress certificate was issued or deemed to be issued. Because the time for payment claims in Item 28 was calculable by reference to the delivery of the progress claim, and not the progress certificate, it seems to me arguably incorrect that the issue of the progress certificate was a pre-condition to the accrual of the statutory reference date. In any event, I agree with counsel for the first respondent that that decision should be confined to its own facts.
- [41] In the present case, the right to deliver a contractual claim on the date stated in the Annexure is conditional upon the prior delivery of the statutory declaration. The condition affects the right to deliver the contractual claim, but not the date on which it may be delivered once there is an entitlement to do so.
- [42] The statutory reference date is the date worked out under the subcontract on which a claim for a progress payment may be made. That date is the monthly anniversary of the commencement of the work, regardless of whether the subcontractor has delivered the statutory declaration required by clause 43.2 of the subcontract. In other words, accrual of the statutory reference date is not conditional upon the prior delivery of the statutory declaration.
- [43] In the circumstances, the question of whether the pre-condition is void under s 99 does not arise.

**Disposition**

- [44] The adjudication decision was not void by reason of jurisdictional error.
- [45] I will hear the parties on the form of the order and on costs.