SUPREME COURT OF QUEENSLAND

CITATION:	*Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd and Ors* [2013] QSC 298
PARTIES:	**KELLETT STREET PARTNERS PTY LTD (ACN 140 286 522)** (Applicant) v **PACIFIC RIM TRADING CO PTY LTD (ACN 010 795 767)** (First Respondent) and **ADJUDICATE TODAY PTY LTD (ACN 109 605 021)** (Second Respondent) and **CLIVE WARREN** (Third Respondent) and **CALLUM CAMPBELL** (Fourth Respondent)
FILE NO/S:	BS 4882 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2013
JUDGE:	Douglas J
ORDER:	**Order in terms of the draft subject to further submissions about its form and costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY – where the applicant and first respondent entered into an oral contract for building work – where work was done until March 2012 – where the first respondent made various payment claims under the *Building and Construction Industry Payments Act* 2004 (Qld) – where those claims were

adjudicated – where two disputed claims included claims for some of the same construction work performed in other, earlier claims – whether the payment claims were invalid – whether the applicant is entitled to declaratory relief

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 17, s 32(2)

Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd [2012] NSWSC 1571, cited
McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd [2013] QSC 269, cited
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2013] QSC 293, distinguished
McNab NQ Pty Ltd v Walkrete Pty Ltd [2013] QSC 128, cited
Tailored Projects Pty Ltd v Jedfire Pty Ltd [2009] QSC 32; [2009] 2 Qd R 171, followed
Spankie & Ors v James Trowse Constructions Pty Limited [2010] QCA 355, considered
Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd [2012] 2 Qd R 90; [2011] QSC 67, followed

COUNSEL: T Sullivan QC for the applicant
SC Fisher for the first respondent

SOLICITORS: Thomsons Lawyers for the applicant
Romans & Romans Lawyers for the first respondent

[1] This is an application for declarations that two adjudication decisions under the *Building and Construction Industry Payments Act* 2004 (Qld) are void. Ancillary relief is also sought for repayment of $53,713.54 plus interest already paid in respect of the first decision and to restrain enforcement of a judgment obtained as a consequence of the second decision. The basis for the application is that there were no "reference dates" under the Act available for each of the payment claims relevant to the two decisions.

Background

[2] The two relevant adjudication decisions were one of 14 November 2012 for a claim described as "Cabiria #11" and another of 17 May 2013 for a claim labelled "Cabiria #14". Cabiria was the site of an "oyster bar and luncheonette" where work was performed pursuant to an oral contract entered into in February 2011. There is a dispute as to whether it was a lump sum contract or a cost plus contract together with a design and management fee. I am not required to determine that issue.

[3] The adjudicators have determined that work was performed up until 28 March 2012, something the applicant concedes it cannot challenge in this proceeding. It had argued that the work done until that date was rectification work and not work under the contract. No claim for payment has been made for work performed since that

date and it is not in dispute that no further construction work has been performed since then.

[4] These two relevant claims were preceded by 10 earlier claims made between 5 May 2011 and 7 November 2011 numbered Cabiria #1, Cabiria #2, Cabiria #2A, Cabiria #3, Cabiria #4, Cabiria #5, Cabiria #6, Cabiria #7, Cabiria #8 and Cabiria #9. An eleventh claim, Cabiria #10, was a claim served and dated on 31 August 2012 and included a claim for payment for work performed in March 2012. It did not proceed to an adjudication as the adjudication application was withdrawn by consent.

[5] Cabiria #11 was the first of the adjudication claims relevant to these proceedings and included a claim for some of the same construction work performed in March 2012 as had already been claimed in Cabiria #10. The later claims, Cabiria #12, Cabiria #13 and Cabiria #14, also made claims for construction work performed in March 2012.

Applicant's submissions

[6] The applicant submits that the last available reference date accrued either on 30 November 2011 or 31 March 2012. Mr Sullivan QC for the applicant submitted that the claimant first respondent could only serve one payment claim in relation to each reference date; relying on s 17(5) of the Act. It provides that a claimant can not serve more than one payment claim in relation to each reference date under the construction contract. See also my decision in *Tailored Projects Pty Ltd v Jedfire Pty Ltd*[1] where I agreed with the argument that "where more than one payment claim issues for a reference date, the first must be considered to be the payment claim for the reference period so that any subsequent claims for that reference period are invalid."

[7] Mr Sullivan argued further that there were 10 payment claims made up to 7 November 2011. There were then five further claims, Cabiria #10 to Cabiria #14, made from August 2012 to March 2013, each of which claimed in respect of construction work, including the cost of material supplied, in March 2012. The evidence supports that submission. The argument then was that the claims that could be pursued with the reference date at the end of March 2012 had been exhausted by Cabiria #10. His submission therefore was that, on two separate legal bases, no reference date was available in respect of the claims described as "Cabiria #11" or "Cabiria #14".

[8] The first argument was that the contractual obligation to perform construction work had been brought to an end at least by 28 March 2012, after which no further reference date could arise. The submission was that the proper conclusion on the facts was that the first respondent had accepted a statement by the applicant's Mr Webb made on that day that he did not want it to perform any more work at the site with the result that the contract had come to an end.

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1 [2009] 2 Qd R 171, 175-176 at [14].

[9] For that submission, he relied on the decision of Peter Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*[2] where his Honour, in distinguishing the situation in New South Wales from that arising under the Queensland legislation, said that it was difficult to conclude that a reference date occurs after termination:

> "[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'.
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> [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. 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.
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> [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."

[10] The Chief Justice followed his Honour's decision in *McNab NQ Pty Ltd v Walkrete Pty Ltd*.[3] See also Applegarth J's decision in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd.*[4] *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* has recently been distinguished in different factual circumstances by Mullins J in *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd.*[5] In that case there had been a payment claim that related to an outstanding reference date in respect of which the claimant had not previously made a payment claim.

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2 [2011] QSC 67 at [41]-[44].
3 [2013] QSC 128 at [28]-[34].
4 [2013] QSC 269 at [21]-[24].
5 [2013] QSC 293 at [15]-[18].

[11] Here there is no doubt that at least the obligation to perform work had terminated by 28 March 2012. The submission went on to argue that, based on the proper construction of the definition of "reference date" and s 12 of the Act dealing with the right to progress payments, the last reference date appears to be when the last construction work was performed before March 2012, which Mr Sullivan submitted was in November 2011, a reference date he submitted was spent by the preceding claim, "Cabiria #10" and the effect of s 17(5) of the Act and my decision in *Tailored Projects Pty Ltd v Jedfire Pty Ltd*. [6] Whether or not that is the case the likely conclusion is also that the contract had terminated by 28 March 2012 and no reference date could occur after then based on the reasoning in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*.

[12] His second argument was that the proper construction of the definition of "reference date" and the operation of s 12[7] and s 17 of the Act had the effect that the last day of the month in which the last construction work occurred was the last available reference date. On that submission, if March 2012 was the last month in which construction work occurred, then the "Cabiria #10" claim had already made a claim for that work so that there was no further reference date available for the claims described as "Cabiria #11" and "Cabiria #14".

[13] For that conclusion, he relied on the decision of Stevenson J in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd*.[8] He relied in particular on the following passages of his Honour's reasons:

> "[21] In my opinion, in the context in which it appears in s 8 of the Act, the expression 'named month' means the month 'named' in the claim for a progress payment as being the month in which the work referred to in the claim for progress payment was undertaken.
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> [22] Thus, the 'last day of the named month in which the construction work was first carried out' in this case was 30 November 2011; as construction work was first carried out in November 2011.
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> [23] Similarly, 'the last day of each subsequent named month' was the last day of each subsequent month in which work was undertaken, as named in a claim for progress payment.
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> [24] The last month 'named' in a claim for progress payment as being a month in which work was undertaken was June 2012; hence the last 'reference date' to arise under the contract was the last day of that month: 30 June 2012.
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> [25] Proyalbi served a payment claim (that of 2 July 2012) in respect of that 'reference date'.

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6 [2009] 2 Qd R 171, 175-176 at [14] and [17].

7 "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."

8 [2012] NSWSC 1571 at [13]-[42].

[26] Section 13(5) of the Act provides: -

> 'A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.'

[27] On the face of it, that would appear to prevent Proyalbi from serving a second payment claim (such as that of 14 August 2012) in respect of that reference date."

[14] By the same reasoning the first respondent should have been prevented from serving the claims labelled Cabiria #11 and Cabiria #14 which are, accordingly, invalid.

First respondent's submissions

[15] Mr Fisher for the first respondent pointed out that the payment claim made in Cabiria #10 was one where the adjudication application was withdrawn by consent. Similarly Cabiria #12's adjudication application was withdrawn and Cabiria #13 did not proceed to the point of a formal adjudication application. His submission was that, where a payment claim has been withdrawn, it is of no effect and does not lead to the result prescribed by s 17(5) that a claimant cannot serve more than one payment claim in relation to each reference date under the construction contract. He conceded that there were no decisions on which he could rely for that conclusion. He submitted, however, that s 17(6), which provides that s 17(5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim, assisted in reaching that conclusion.

[16] In addressing the issue arising from the discussion by Peter Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*, which I have discussed above, he argued that the evidence did not indicate that the contract had been terminated by Mr Webb's telling the first respondent the contract had finished and that it was not to perform any more work at Cabiria as there was no evidence that the first respondent had accepted that conduct as concluding the contract.

Discussion

[17] Section 32(2) of the Act permits a claimant to withdraw an application by notice served on the adjudicator and to make a new adjudication application, but the Act makes no provision to the effect that a payment claim thereby becomes ineffective. I am not persuaded that the payment claims became ineffective on the withdrawal of the adjudication applications or because they did not proceed to an adjudication.

[18] The proper conclusion is then that the payment claim, Cabiria #10, was a payment claim in relation to the reference date at the end of March 2012 with the effect that the first respondent can not serve other payment claims in relation to that reference date. Section 17(6) does not affect that conclusion given the cases that have analysed the section. Its effect has been described, when read in the context of the

preceding provisions, as being "merely to ensure that no implication may be drawn that s 17(5) precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim."[9] In other words if the claimant has further reference dates it may be able to repeat the same claim for an unpaid amount previously claimed, but that requires the existence of further reference dates, which is not the case here.[10]

[19] I have also formed the view that the proper conclusion from the evidence is that the contract between the applicant and the first respondent was terminated by the conversation involving Mr Webb for the applicant on 28 March 2012. The evidence that the first respondent did not return to the job after then and the absence of evidence that it disputed that conversation as terminating the agreement makes me feel confident in concluding that, after that conversation on 28 March 2012, the oral building contract had concluded or been terminated. In following the decision of Peter Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* I conclude that no reference date can occur after that termination.

[20] The submissions made by Mr Sullivan for the applicant lead to the conclusion, therefore, that the claims in Cabiria #11 and Cabiria #14 were invalid. Although Mr Fisher argued that I should not exercise my discretion to grant the declaratory relief sought, my view is that, where the adjudication decisions are invalid, it is appropriate to make declarations to that effect and to set them aside with the consequences that should follow in respect of the repayment of the amount paid with interest and the issuing of an injunction to restrain enforcement of any judgment debt obtained in the adjudication in respect of Cabiria #14.

Order

[21] I shall make an order in terms of the draft subject to further submissions about its form and costs.

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9 See *Spankie & Ors v James Trowse Constructions Pty Limited* [2010] QCA 355 at [23] and generally at [23]-[28].

10 Nor was it the case in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571.