SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Mining & Construction Pty Ltd v Isaac Regional Council* [2014] QSC 231
PARTIES:	**CIVIL MINING & CONSTRUCTION PTY LTD** ABN 18 102 557 175 (applicant) **v** **ISAAC REGIONAL COUNCIL** ABN 39 274 142 600 (respondent)
FILE NO/S:	BS 8169 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2014
JUDGE:	Philip McMurdo J
ORDER:	**The cross-application by the respondent filed on 4 September 2014 is refused.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant and respondent entered into a contract for the construction of road works – where there was an extensive history of disputes as to payments owed under the contract - where the parties invoked the dispute resolution provisions under the contract, including mediation and arbitration – where the applicant made a payment claim under the *Building and Construction Industry Payments Act* (Qld) 2004 (the Act) – whether the applicant can pursue its statutory remedies under the Act concurrently with arbitration proceedings – whether the claim is an abuse of process. *Building and Construction Industry Payments Act* (Qld) 2004, s 17(5), s 17(6) *Falgat Constructions Pty Ltd v Equity Australia Corporation*

Pty Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49, applied.
J Hutchinson Pty Ltd v Galform Pty Ltd & Ors [2008] QSC 205, distinguished.
Kingston Building (Australia) v Dial D [2013] NSWSC 2010, cited.
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, cited.

COUNSEL: R A Holt QC, with G Beacham, for the applicant

D P Morzone QC, with C Taylor, for the respondent

SOLICITORS: Clayton Utz for the applicant

Wilson Ryan Grose for the respondent

[1] In 2013 the parties entered into a contract for road works to be constructed by the applicant ("CMC") for the respondent ("the Council"). The works have reached practical completion but the extensive history of disputes and litigation continues. Now there is this challenge by the Council to a claim for a payment under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"). CMC served this claim (described as claim 11) on 11 August 2014. The Council says that the claim is an abuse of the statutory scheme. It seeks a final injunction to prevent its progress. This case was commenced by CMC seeking, in effect, a declaration that its payment claim is in all respects valid.

[2] Claim 11 is for a final payment in the amount of $14,812,899.92. The Council delivered a payment schedule in response to it, proposing to pay $177,276.40. At the same time it contended that the claim was an abuse of process under the Act. On 1 September, CMC denied that contention and said that it would proceed to an adjudication under the Act.

[3] The Council says that such an adjudication would be an abuse of process having regard to these circumstances. Firstly, nearly all of the components of claim 11 were within previous claims, which were the subject of adjudications although the decisions were subsequently set aside by orders in this court. Secondly, as CMC is aware, the claim is substantially disputed by the Council. Thirdly, CMC has also invoked the dispute resolution provisions of the parties' contract, which resulted in a mediation and which is expected to result in an arbitration of effectively the same matters which would have to be decided by an adjudicator under the Act.

[4] The first of the relevant previous claims by CMC is that dated 22 August 2013, which sought a payment of $14,536,121.93. In its payment schedule, the Council proposed to pay $1,996,846,39. In October 2013, an adjudicator allowed an amount of $8,669,461.88. The Council successfully applied to this court to have that decision declared void, on the ground that it had not been effectively served. The court's judgment was dated 5 December 2013.

[5] On the following day, CMC presented a new claim under the Act, described as claim 8, seeking a payment of $20,063,483.16. This was said to be based upon the value of the work completed to 22 November 2013 ($36,345,065.83 excluding GST). CMC applied for an adjudication of that claim and the adjudicator's decision was delivered on 14 February 2014, allowing an amount of $9,923,090.87. Again,

the Council applied to have the decision declared void. After a hearing of some of the issues, in which the court indicated that the Council's argument as to defective service in this case also would be upheld, on 31 March 2014 the parties agreed to an order which set aside that adjudication decision. There is a substantial overlap between that claim 8 and the present claim 11.[1] Claim 11 was made after a settlement of some of the issues between the parties at the mediation in July. According to claim 11, the value of the work completed to 16 July 2014 is $36,451,859.29.

[6] The contract contains an agreed regime for dispute resolution. Clause 47.1 provides that if a dispute arises between the parties out of or in connection with the contract, then either party shall deliver to the other and to the Superintendent a notice of dispute. On 22 January 2014, CMC served such a notice. Clause 47.2 provided for the Superintendent to give to each party its decision on the dispute, which the Superintendent did on 5 March 2014.

[7] Clause 47.2 further provides that if either party is dissatisfied with the decision of the Superintendent then the parties should confer to attempt to resolve the dispute. There was correspondence between the parties on 18, 19 and 21 March 2014 to that end.

[8] On 26 March 2014, the applicant served some seven further Notices of Dispute under cl 47, to which the Superintendent responded on 15 April 2014.

[9] All of these disputes became the subject of a mediation which commenced on 2 June 2014, resulting in a settlement of some issues which was reached on 10 July 2014. The mediation ended on 16 July 2014, which, as I have mentioned, was the reference date for the current payment claim 11.

[10] Clause 47.2 further provides that in the event that the dispute is not resolved by a conference between the parties, then either party may, by notice in writing to the other, refer the dispute to arbitration or litigation. On 25 August 2014, the Council's lawyers wrote to CMC's lawyers seeking confirmation that CMC would continue with the dispute resolution process under cl 47 and would not proceed to an adjudication for payment claim 11. They nominated three potential arbitrators. In my view, this letter was not a referral to arbitration but that point is of no consequence. The dispute could be referred immediately by either party and the Council's point is that the whole process under cl 47 has been set in train by CMC.

[11] In the submissions for the Council, it was suggested that CMC had referred the dispute to arbitration as early as 17 March 2014. However, it was not open to either party to refer a dispute to arbitration at that stage, because there had not been a conference between them. In any case, that was before Notices of Dispute numbered 2 to 8 had been served on 26 March 2014.

[12] Claim 11 is for a final payment, but the definition of "progress payment" in the Act includes a final payment under a construction contract.[2] As was held in *Kingston Building (Australia) v Dial D*,[3] the mere use of the provisions of this Act[4] to pursue

---

1 There were no intervening claims under the Act as the numbering might have indicated.

2 Subparagraph (a) of the definition in Schedule 2 of the Act.

3 [2013] NSWSC 2010.

4 In that case the corresponding Act in New South Wales being the *Building and Construction Industry Security of Payment Act* 1999 (NSW)

a final payment claim could not of itself amount to an abuse of process.[5] And that is not the Council's case. Its case is that it is the combination of the circumstances of the two previous failed adjudications, the Council's known and substantial dispute of the claim and CMC's pursuit of the same result through the contractual dispute resolution process which together make this a claim which is an abuse of process.

[13] The previous adjudications were declared void because of defective service. In neither case therefore did the adjudicator have jurisdiction. But in neither case was the result such as to prevent a further claim being made. The setting aside of the decisions of the adjudicators put the parties in the same position as if there had been no adjudication. CMC could not serve more than one payment claim in relation to the same reference date under the construction contract: s 17(5). Although claim 11 for the most part includes amounts which were within claim 8, on its face it has a different reference date and the Council's submissions conceded that it was not precluded by s 17(5). CMC was entitled to make a further claim which included amounts which had been the subject of a previous claim: s 17(6). Of themselves, the circumstances of the previous adjudications would not make this new and different claim an abuse of process.

[14] The second factor advanced by the Council is CMC's knowledge that its claim is substantially disputed. That factor, at least alone, could never be a bar to the pursuit of a claim under the Act, which provides claimants with the remedy of an adjudication in the very circumstance where their claims are disputed. This circumstance of a dispute on substantial grounds is apparently inspired by something said in *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors*,[6] to which I will return.

[15] As for the third factor, CMC's use of the process under cl 47, the Council's argument accepts that ordinarily a claimant may pursue concurrent remedies by claims under the Act and court proceedings, and in particular, it accepts the reasoning of Handley JA (with whom Santow JA and Pearlman A-JA agreed) in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*.[7] In that case, a judge had restrained a builder from pursuing its statutory remedies under the equivalent New South Wales Act where the builder had also sued for moneys owing. A proceeding was commenced in the District Court in April 2004 claiming about $400,000 from the proprietor arising from the relevant building construction. A judge ordered the builder to provide security for costs and stayed that proceeding until the security was provided. Without providing that security, the builder then served a payment claim seeking payment of about one half of its claim in the court proceeding. The payment claim became the subject of an adjudication application. Before an adjudicator accepted the appointment, the builder was restrained from pursuing its statutory remedy. But the Court of Appeal dissolved that injunction.

[16] Handley JA discussed the four grounds on which the injunction had been granted. The first was that the statutory claim was vexatious and oppressive, having regard to the concurrent proceedings in the court, although they had been stayed. Handley JA said that there was no basis for holding that the claim was vexatious and oppressive because "the statutory rights are adjudicated on an interim basis and supplement the rights of the parties under the general law which can be finally determined by a

---

5 [2013] NSWSC 2010 at [19].

6 [2008] QSC 205.

7 (2005) 62 NSWLR 385.

court …".[8] The second ground was that the "statutory adjudication would frustrate the … Court's task",[9] as to which Handley JA said that in general, this could result if the statutory proceedings "were commenced or carried on close to a trial"[10] but that was not the case there. The third ground was that the builder had made an election by commencing proceedings in the court to which it should be held. Handley JA said that "this necessarily depends upon the view that the builder's rights under the statute are alternative and inconsistent with his rights at common law",[11] for which view there was no basis. The builder was entitled to pursue his rights concurrently provided that this did not interfere with the fair trial of the court proceedings.[12] The final ground was that the judge had said that on a proper construction of the Act, any statutory proceedings had to be completed before court proceedings were commenced, which Handley JA said was an erroneous construction.[13]

[17] Similarly, there is no impediment to the concurrent pursuit of the process under cl 47 of the contract and CMC's remedies under the Act. The ultimate remedies under cl 47 are "arbitration or litigation". There is no basis for supposing that the pursuit of an arbitration is different from litigation for present purposes. An adjudicator's decision is an interim one and does not finally resolve the rights of the parties under the contract, as would an arbitration. The remedies may be pursued concurrently.

[18] I return to *J Hutchinson Pty Ltd v Galform Pty Ltd* upon which the Council's argument heavily relied, where Chesterman J granted an injunction restraining a subcontractor from proceeding further with an adjudication of its claim. It was held that this claim, the adjudication application and the adjudication were oppressive and an abuse of process because they were "a means by which [the subcontractor] sought to evade the conduct of legal proceedings the parties had agreed should determine [the subcontractor's] right to be paid …".[14] In that sense, the case could be likened to the present one. But there are important differences deriving from the particular history of that dispute. An earlier claim by the subcontractor had been the subject of an adjudication in its favour. The subcontractor obtained a judgment in this court for the adjudicated sum and sought to enforce it. The head contractor (Hutchinson) applied to restrain that enforcement. That interlocutory application was compromised by the subcontractor agreeing not to enforce the judgment and Hutchinson's undertaking to pay the judgment sum into court, pending the determination of Hutchinson's challenge to the adjudicator's decision upon the basis that it had been denied procedural fairness. Hutchinson then commenced separate proceedings to make that challenge. At the same time, the subcontractor applied to the court to restrain Hutchinson from calling up some bank guarantees under the subcontract. These various disputes were the subject of further interlocutory orders made by consent. As conditions of those orders, there were undertakings given by each party. Hutchinson undertook that it would not enforce the bank guarantees

---

8 *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385 at 389-390 [26].

9 Ibid 390 [27].

10 Ibid.

11 Ibid 390 [28].

12 Ibid.

13 Ibid 390 [29].

14 *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors* [2008] QSC 205 at [52]

until further order. The subcontractor undertook to not enforce its judgment and further undertook that it would not:[15]

> "otherwise seek to enforce the adjudication decision made … on 23 October 2007 and/or the judgment obtained by it on 2 November 2007 until further order."

[19] In May 2008, the subcontractor delivered another payment claim which included the amount which had been the subject of the adjudication and the judgment. This second claim was referred for adjudication. The adjudicator allowed this second claim but only to the extent that it repeated the earlier claim.

[20] Chesterman J upheld Hutchinson's argument that the subcontractor's cause of action, as accepted by the second adjudicator, had merged in the judgment.[16] Consequently, he held the adjudication purportedly made was not one which was permitted by the Act and was void.[17] Chesterman J said that there was a second basis upon which Hutchinson was also entitled to relief, which was that the subcontractor's invocation of the procedures under Part 3 of the Act, was in the circumstances of that case, an abuse of process. His Honour said:

> "[47] … The second payment claim and adjudication application subverted, and were no doubt intended to circumvent, the orders of the court made by consent … [The subcontractor] knew that Hutchinson disputed the legal validity of the first adjudication on the basis that its submissions had not been taken into account. It agreed to the payment of the judgment sum into court pending the outcome of proceedings to determine the legal efficacy of the adjudication. It undertook not to enforce the adjudication until further order. … [The subcontractor] only had to succeed in its contention that the adjudication was valid to obtain payment out of court of the judgment sum. Instead it sought to disregard the agreed procedures to resolve its entitlement to the judgment sum by seeking a second adjudication on the very same claim.
>
> [48] I readily infer that its purpose in doing so was not to obtain payment of a sum honestly thought due from the performance of its subcontract but to deprive the applicant of the legal protection it had obtained, by consent, against an obligation to pay moneys as to the existence of which there was a genuine doubt.
>
> [49] The institution of a fresh payment claim and adjudication application was a breach of the undertaking given by [the subcontractor] to the Court. It was an attempt to obtain payment when it had accepted that its right to payment was genuinely disputed on substantial grounds.
>
> …

---

15 *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors* [2008] QSC 205 at [18]

16 Ibid [36].

17 Ibid [37] and [46].

> [52] The second payment claim, adjudication application and adjudication were oppressive and therefore an abuse of process. They were a means by which [the subcontractor] sought to evade the conduct of legal proceedings the parties had agreed should determine [the subcontractor's] right to be paid the judgment sum. It was an attempt to deprive the applicant of the safeguards to its position and to evade the undertaking it gave the court with respect to the judgment it had obtained. It is, of course, ordinarily vexatious and oppressive to sue twice for the same debt. It is clearly so when the debt has already merged in a judgment."

[21] Plainly the history in that case was markedly different from the present case. Most importantly, the new payment claim and adjudication application was, in Chesterman J's view, a breach of an undertaking given by the claimant to the court. That undertaking was given as part of an agreed process for the determination by the court of the parties' dispute. It was in that context that his Honour referred to the right to payment being "genuinely disputed on substantial grounds".[18] Ultimately, the judgment provides no assistance for the Council's argument.

[22] Of course, as Gaudron J said in *Ridgeway v The Queen*:[19]

> "Abuse of process cannot be restricted to 'defined and closed categories' because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case." (footnotes omitted)

But it is for the Council, which seeks to restrain the use of the process under the Act, to demonstrate an abuse. The evident purpose of CMC is to have the benefit of the expeditious nature of the statutory process in pursuit of a claim which, the Council does not suggest, is advanced with no belief in its merit. Undoubtedly there will be a greater burden upon the Council in having to contest this payment claim concurrently with an arbitration. But it is well established that the statutory and other remedies for the same dispute may be pursued concurrently. And other matters upon which the Council relies provide no basis for concluding that the present case falls outside that principle.

[23] Therefore the cross-application by the Council filed on 4 September 2014 will be refused. The originating application seeks a declaration that the service by CMC of the payment claim and any referral of that claim to adjudication is not an abuse of process because of the commencement and continuation of the dispute resolution process under cl 47 of the contract. A declaration in those terms would not account for all of the circumstances upon which the Council relied. But in my view it is unnecessary for any declaration to be made having regard to the disposition of the Council's cross-application.

---

18 *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors* [2008] QSC 205 at [49].

19 (1995) 184 CLR 19 at 75.