SUPREME COURT OF QUEENSLAND

CITATION:	*Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 293
PARTIES:	**LEAN FIELD DEVELOPMENTS PTY LTD** **ACN 140 897 052** (applicant) **v** **E & I GLOBAL SOLUTIONS (AUST) PTY LTD** **ACN 155 548 477** (first respondent) and **SCOTT PETERSSON** (second respondent)
FILE NO:	5936 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2014
JUDGE:	Applegarth J
ORDER:	**1. The application is dismissed.** **2. The applicant pay the first respondent's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACT – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT AND RECOVERY OF PROGRESS PAYMENTS –where the applicant seeks a declaration that an adjudication decision is void by reason of jurisdictional error – where applicant submits that no reference date accrued pursuant to *Building and Construction Industry Payments Act* 2004 (Qld) – where the contract required submission of a draft payment claim before payment claim could be made – where on numerous previous occasions the applicant paid without requiring the submission of a draft payment claim – whether the accrual of a reference date can be made conditional – whether a condition which prevents a statutory entitlement from accruing is rendered ineffective by section 99 of the Act – whether the applicant had waived its right to require a draft

payment claim – whether the applicant was estopped from relying on the clause requiring a draft payment claim

Building and Construction Industry Payments Act 2004 (Qld) ss 7, 8, 12, 99 schedule 1

Ace Property Holdings Pty Ltd v Australian Postal Corporation [2011] 1 Qd R 504; [2010] QCA 055, cited
Beckhaus v Brewarrina Council [2002] NSWSC 960, cited
Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) 56 NSWLR 576; [2003] NSWCA 4, cited
BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd [2012] QSC 214, cited
Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd [2013] 2 Qd R; [2012] QSC 388, cited
De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd [2010] QSC 279, cited
John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd [2012] 2 Qd R 435; [2012] QCA 150 , cited
John Holland Pty Ltd v Coastal Dredging Construction Pty Ltd (unrpt) per Dalton J 29 February 2012, cited
McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd [2013] QSC 269, cited
Mansouri and Anor v Aquamist P/L (2011) 27 BCL 194; [2010] QCA 209, cited
Minister for Commerce v Contrax Plumbing [2004] NSWSC 823, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd [2005] NSWSC 45, cited
Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor [2008] NSWCA 279, cited
Quasar Constructions Pty Ltd v Demtech Pty Ltd [2004] NSWSC 116, cited
Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd [2010] QSC 162, cited
Spankie v James Trowse Constructions Pty Ltd [2010] QCA 355, cited
State of Queensland v T & M Buckley Pty Ltd [2012] QSC 265, cited
The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142, cited
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387; [1988] HCA 7, cited

COUNSEL: P L O'Shea QC with M J May for the applicant
B E Codd for the first respondent

SOLICITORS: Cooper Grace Ward for the applicant
Mills Oakley for the first respondent

[2] The applicant contracted for the first respondent to supply services relating to high voltage and fibre optic cables. The first respondent was awarded $527,783.08 by the second respondent's adjudication decision under the *Building and Construction Industry Payments Act* 2004 (Qld).

[3] The appellant alleges that the decision is affected by jurisdictional error because:

(a) clauses 33.7 and 33.8 of the contract required a draft claim for payment to be delivered on a certain date before a payment claim could be delivered under the contract;

(b) the reference date worked out under the contract as the date on which a claim for a progress payment may be made was a date not earlier than 14 days after the delivery of the draft claim for payment;

(c) no draft claim for payment was delivered;

(d) as a result, no reference date arose under the contract, and the first respondent could not make a valid payment claim.

[4] The first respondent submits that:

(a) clauses 33.7 and 33.8 do not provide for a date to be "worked out" under the contract with the consequence that the "reference date" is the last day of each calendar month;

(b) alternatively, s 99 of the Act means that clauses 33.7 and 33.8 are void to the extent they condition a "reference date" coming into existence by such a requirement, since these provisions change the effect of the Act which gives a statutory entitlement to a progress payment;

(c) alternatively, the applicant waived the requirement for compliance with clauses 33.7 and 33.8 or is estopped from relying on non-compliance with those clauses as a basis for resisting the payment claim.

[5] In essence, the applicant replies:

(a) Contrary to the first respondent's contention about the meaning of "worked out", a reference date may be worked out by applying a formula in the contract to facts which arise after the contract's formation.

(b) The statutory entitlement in s 12 of the Act only arises once there is a reference date. A clause which affects whether or when a reference date occurs cannot be said to confine or affect an entitlement since there is no entitlement until there is a reference date. It is therefore circular to say that a clause specifying a reference date is void because it modifies the claimant's entitlement to monthly reference dates, when such an entitlement would only arise if the clause specifying the reference date is void. Moreover, cl 33.8(a) in providing that a payment claim shall be delivered not earlier than 14 days after the delivery of the draft payment claim is the very kind of clause contemplated by the statutory definition of "reference date".

(c) There was no waiver and the elements of an estoppel are not established by the evidence.

Issues

[6] Three substantial issues arise for decision:

1. Does cl 33.8(a) of the contract provide how the reference date is worked out?

2. If so, are clauses 33.7 and 33.8 of no effect in respect of the first respondent's statutory entitlement to a progress payment because of s 99 of the Act, even if they are effective to govern a contractual entitlement to make a payment claim?

3. Is the applicant precluded on the grounds of waiver or estoppel from relying on non-compliance with clauses 33.7 and 33.8?

Background

[7] The first respondent entered into an agreement with the applicant for the supply of high voltage and fibre optic cables in Central Queensland. No formal contract was signed by the parties but documents were exchanged setting out the terms and conditions of the work to be carried out.

[8] Clauses 33.7 and 33.8 provide:

"33.7 Draft Payment Claims

(a) At the times stated in Appendix 1 (Sub-subcontract Specific Details), under Clause 36, and/or upon the issue of a Practical Completion Certificate, Sub-subcontractor shall deliver to the Subcontractor Representative a draft claim for payment supported by evidence of the amount due to Sub-subcontractor and such information as the Subcontractor Representative may reasonably require. Draft payment claims shall include the value of work carried out by Sub-subcontractor in the performance of the Sub-subcontract to that time together with all amounts then otherwise due to Subcontractor arising out of the Sub-subcontract.

(b) If the time for any draft payment claim under the preceding paragraph falls due on a day which is not a Working Day, Sub-subcontractor shall submit the draft payment claim on the next following Working Day.

(c) Within fourteen (14) days after receipt of a draft payment claim which complies with the requirements of Clause 33.7(a), the Subcontractor Representative shall issue to Sub-subcontractor a preliminary assessment of the amount which, in the opinion of the Subcontractor Representative, is due

to Sub-subcontractor in relation to the draft payment claim.

33.8 Payment Claims

(a) Not earlier than fourteen (14) days after the delivery of the draft claim for payment, Sub-subcontractor shall deliver to the Subcontractor Representative a Payment Claim in the form contained in Exhibit B (Compensation). Payment claims shall include all work carried out by Sub-subcontractor in the performance of the Sub-subcontract to that time together with all amounts due in respect of such work together with any amount otherwise due to Sub-subcontractor under the Sub-subcontract.

(b) If the time for any payment claim under the preceding paragraph falls due on a day which is not a Working Day, Sub-subcontractor shall submit the payment claim on the next following Working Day.

(c) For the avoidance of doubt, the date referred to in Clause 33.8(a) is the 'reference date' for the purposes of the BCIPA."

[9] The first 14 payments in relation to work on the contract were made without requiring a draft claim for payment. There was a meeting between the parties on 22 January 2014 where Mr Board the site controller for the applicant and Mr Bond a director of the first respondent discussed how invoices were to be submitted. Mr Board says that at the meeting his main concern was the fact that the first respondent had been making claims based on incorrect rates, items and prices which were not in the contract. In order to rectify this Mr Board put together a spreadsheet which the first respondent could use in order to correctly calculate future claims for payment.

[10] Mr Bond agrees that a spreadsheet was provided and that the first respondent used the spreadsheet in order to generate future claims for payment. He says that he has no recollection of there being any discussion of "draft payment claims" or the like at the meeting on 22 January 2014.

[11] The first respondent continued to issue invoices without providing a draft payment claim. The appellant made no complaint about this. On 31 March 2014 Mr Bond caused invoice number 409 to be issued to the applicant for $1,149,646. This invoice purported to be a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld).

[12] On 11 April 2014 the applicant served a payment schedule on the first respondent in respect of invoice 409 for the amount of $58,653.84. The payment schedule did not challenge the validity of the claim. On 28 April 2014 the first respondent served an adjudication application under s 21 of the Act in respect of invoice number 409.

[13] The applicant's adjudication response raised for the first time the issue of invalidity on the basis of the failure to comply with the requirement for a draft payment claim under clauses 33.7 and 33.8 of the contract.

[14] On 11 June 2014 the adjudicator awarded the first respondent $527,783.08.

[15] There is no contest that the contract is governed by the Act and that the first respondent carried out "construction work" within the meaning of the Act. The parties also accept that an adjudication decision may be set aside or declared void for jurisdictional error. A jurisdictional error will arise where one of the requirements for a valid payment claim under the Act is not met. One such requirement is that a reference date has arisen under the contract at the time the payment claim is made.

Relevant statutory provisions

[16] The purpose of the Act is to provide a statutory mechanism for the recovery of progress payments for the carrying out of "construction work". The scheme of the Act has been summarised in a number of leading decisions, and it is unnecessary to repeat what was said in those cases.[1] Jackson J stated:

> "The essential operative effect of BCIPA is that it confers a statutory right to a provisional progress payment upon a claimant who qualifies for that right, with provisions to speedily value and establish the right without curial proceedings and to vindicate the established right by enforcing it as a court judgment. Commercially, that outcome has an important cash-flow effect."[2]

[17] Central to the Act's operation is s 12 which confers a statutory entitlement to a progress payment from each reference date under a construction contract in certain circumstances. Section 12 states:

> "**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."

[18] "Progress payment" is defined in Schedule 2 of the Act:

> "**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

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1 They include *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355 at [9]-[11]; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at 546-550 [52]-[66]; *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] 2 Qd R 435 at 441-442 [15]-[19] ("*John Holland*").

2 *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2013] 2 Qd R 1 at 9 [41].

(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'."

[19] Payment claims for progress payments are governed by s 17. Section 17 relevantly provides:

"**17 Payment claims**

(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).

...

(4) A payment claim may be served only within the later of —

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

[20] As may be seen, critical to the statutory entitlement to claim a progress payment is a "reference date under a construction contract".

[21] "Reference date" is defined in Schedule 2 of the Act:

"**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."[3]

[22] Section 99 addresses provisions of a contract that are contrary to the Act or have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of the Act. It states:

"**99 No contracting out**

(1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.

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

(a) is contrary to this Act; or

(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

(c) may reasonably be construed as an attempt to deter a person from taking action under this Act."

Does cl 33.8(a) of the contract provide how the reference date is worked out?

The parties' contentions

[23] Shortly stated, the contract provides that a reference date only arises 14 days after the delivery of a draft payment claim, and that the draft payment claim must itself be delivered on a specified date each month. According to the applicant, if no draft payment claim was delivered on that date, then no "reference date" could arise.

[24] The first respondent notes that the contract does not alone permit the reference date to be ascertained, but relies on facts which occur after the contract's formation. It submits that the statutory definition, properly construed, means that a reference date can only be "worked out" by the application of the terms of the contract alone, and not by reference to post-formation conduct which may or may not occur.

[25] The applicant rejects that contention, and says that the expression "worked out" permits a date to be calculated by reference to conduct after the formation of the contract. All that is necessary is that the formula for calculating the date be

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3 Emphasis added.

contained in the contract. Its argument is supported by the following passages of the decision of Margaret Wilson J in *State of Queensland v T & M Buckley Pty Ltd*[4]:

> "[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).
>
> [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."

[26] The first respondent submits that Wilson J was not called upon to consider whether the "facts" referred to at [19] of that decision were temporarily constrained. Nor was her Honour called upon to distinguish between a "fact" that exists independent of the contract on formation, and an event which occurs by reason of the actions of the parties to the contract and which, according to the first respondent, is not a "fact" at the time of formation and may never become a "fact" because it is contingent upon later conduct.

[27] The first respondent seeks to draw a distinction between what are said to be two different processes:

(a) The objective calculation of a date which comes into existence at the time of formation of the contract, or comes into existence by the operation of the contract, absent particular conduct by the parties.

(b) One which makes the existence of a "reference date" conditional upon the conduct of the parties, rather than any objective, determinable criteria available on formation.

According to the first respondent, a contract which provides that there will not be a reference date until the contractor has ticked certain boxes does not work out a

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4 [2012] QSC 265 ("*T & M Buckley*").

reference date in the sense contemplated by the statutory definition. Such a provision conditions the formation of reference dates. Clauses 33.7 and 33.8 are said to go beyond providing how a date upon which a claim for payment is worked out and, instead, go to the formation of the entitlement to claim for payment.

[28] The first respondent submits that the intent of the legislation is to provide certainty that a person who carries out construction work is entitled to recover progress payments on a periodic basis which is objectively ascertainable. Only when the periodic basis is able to be worked out under the contract can it be said that the contractual limb of the definition of reference date could apply. The narrower interpretation of "worked out" for which it contends is said to produce no absurdity and to be consistent with the objects of the Act.

[29] According to the first respondent, a broad meaning of "worked out" which permits a reference date to be ascertained by reference to the post-formation conduct of the parties would allow a party to "contractually condition" the formation of a statutory reference date which, in turn, would deny the statutory entitlement to a progress payment. If such an approach was accepted, it would be prohibited by s 99 of the Act.

Decision

[30] The term "worked out" is not defined in the Act. The ordinary meaning of "worked out" in this context connotes a process of calculation.[5] Absent some contextual basis to not apply that ordinary meaning, the statutory definition of "reference date" would seem to allow a reference date to be worked out by applying a formula to facts that are capable of being ascertained. For example, it might provide that a claim for a progress payment may be made 14 days after event X occurs. There is no compelling reason why the fact in question should not be something within the power of a party to bring about. For instance, a contract might provide that a claim for a progress payment may be made 60 days after the contractor commences the works and every 60 days thereafter. The first and subsequent reference dates are worked out by reference to the conduct of the contractor after the formation of the contract in commencing work. In such a case the existence of a reference date is conditioned by the conduct of one of the parties. There is nothing absurd about such an outcome, and it might be inconvenient if the parties could not agree such a provision. It would be odd if the parties could not negotiate, subject to limits imposed by s 99, a formula to work out a reference date which applied to the conduct of one of the parties, rather than rely on the default position set by sub-paragraph (b) of the statutory definition. Subject to limits imposed by s 99 and the assumption in s 12 that there will be a reference date under a construction contract, the parties should be free to agree provisions for the timing of claims for progress payments by reference to post-formation events, including events that depend on a party's conduct.

[31] The first respondent accepts that subparagraph (b) of the statutory definition is a default position and that monthly reference dates are not mandatory. The Act appears to allow the parties to agree a reference date that is worked out by reference to an event which may not occur, for example, a milestone that is reached when a certain length of pipe is laid. It is hard to see any valid distinction between a

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5 See the meaning adopted by Wilson J in *T & M Buckley* at [18] quoted in [25] above.

contractual milestone and an event which is similarly within the ability of a party to bring about, such as the submission of a certain document. In such cases, post-formation facts to which the contractual provision for the working out of the reference date applies permit a reference date to be worked out. There seems no reason in principle, and nothing in the Act, as to why the parties could not provide for reference dates to be worked out according to the post-formation conduct of one of the parties. A reference date which is worked out according to a post-formation event which is not certain to occur may make a reference date, and therefore the statutory entitlement, conditional. But there is nothing in the definition of "reference date" or elsewhere in the Act which prohibits a reference date being worked according to an event which is not certain to occur.

[32] The first respondent's approach does not accommodate the examples of a reference date calculated by reference to post-formation facts such as the date a contractual milestone is reached or the date the contractor delivers a simple piece of paper. An interpretation of "reference date" which precluded parties from adopting such a provision should not be preferred unless there are good reasons to displace the ordinary meaning of that term. This approach accords with the view that a reference date may be worked out under the contract by applying a formula found within the contract to facts.[6] The words "worked out" and the context of the Act do not suggest that the relevant facts cannot come into existence after the contract's formation and include the conduct of one of the parties. Such conduct may be as capable of objective determination as any other fact to which the contractual formula applies.

[33] The first respondent's consequentialist argument that the wider interpretation should not be adopted because it would permit provisions which fall foul of s 99 is not sufficient to adopt the narrower meaning contended for by it. A contract which erects requirements which pre-condition the coming into existence of a reference date may be inimical to the Act and be invalided by s 99. To take an extreme example, a contract which provides that the date on which a claim for a progress payment may be made is 14 days after the contractor has finally jumped through 47 burning hoops may render the reference date illusory. It may be practically impossible to jump through so many hoops. The statutory entitlement to a progress payment, as contemplated by s 12, from each reference date would be effectively denied.

[34] Section 99 may operate to invalidate certain contractual conditions which effectively prevent or inordinately delay a reference date arising. For example, it has been said that if a contract provided for yearly reference dates the provision would be so inimical to the statutory entitlement as to be avoided by a provision like s 99.[7] However, the possibility that certain contractual provisions, which effectively prevent the accrual of a reference date, may be invalidated by s 99 of the Act does not require "worked out" to be given the narrow meaning for which the first respondent contends. It simply means that s 99 may have work to do in the context of an Act which grants an entitlement to progress payments and which, in the section defining the entitlement, assumes that there will be a reference date.

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6 *T & M Buckley*.

7 *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [54].

[35] In summary, I do not accept the first respondent's submission to the effect that a reference date is not "worked out" if a fact to which the contractual formula applies in calculating that date is the post-formation conduct of a party. This submission does not derive support from the ordinary meaning of "worked out" in the context of the Act. The Act envisages the calculation of a date by applying a contractual formula to a fact or facts. It makes no distinction between a fact in the form of a party's post-formation conduct and other facts.

[36] If adopted, the first respondent's approach would completely preclude parties from agreeing that a reference date be worked out according to the date upon which one of them does something. Yet such a contractual provision may be practical, suit the parties' interests and facilitate the timely payment of progress payments under a construction contract. The Act expressly accords some freedom to parties to agree provisions that permit a reference date to be worked out. The first respondent's approach would prevent the parties from agreeing to a provision that calculated the date when a claim for a progress payment may be made by reference the date upon which some simple step was taken by a party. Such an outcome is not supported by the language of the Act or its purpose.

[37] The first respondent's arguments about the meaning of "worked out" have the attraction of providing a definition of "reference date" which avoids a statutory entitlement failing to accrue because a contractor is unable to meet some onerous condition upon which a reference date depends. However, those consequences are better addressed by s 99, than by adopting an artificial interpretation of "worked out".

[38] Subject to the limits on contractual freedom imposed by s 99 a reference date may be "worked out" by applying the formula in the contract to post-formation facts, including facts which are dependent on the conduct of the parties. Clause 33.8(a) provides for a reference date to be worked out.

Are the provisions of clauses 33.7 and 33.8 invalidated to the extent that they purport to condition a reference date arising?

The parties' submissions

[39] In general terms, s 99 of the Act renders a provision of a contract void to the extent it is contrary to the Act or purports to change the effect of the Act. The relevant provisions of the contract to be considered in this context are the mandatory requirements to submit a draft payment claim on, and only on, a specific date, failing which no reference date arises and no payment claim can be made. The first respondent submits that whilst such a provision may condition a contractual entitlement to a progress payment, it is ineffective to condition a statutory payment claim. The mandatory requirement detracts from the effect of the Act which entitles a contractor to a progress payment "From each reference date". The Act envisages that there will be such a reference date and that a statutory payment claim may be made after each reference date has arisen.

[40] Clauses 33.7 and 33.8 are said by the first respondent to interfere with the statutory regime by mandating conduct occur on a particular day as a condition upon a "reference date" coming into existence. The contract provides for the possibility of a "reference date", not its actuality.

[41] Moreover, the mandatory draft payment claim is confined to work completed as at the date of submission of that document. At least 14 days must elapse after the delivery of the draft payment claim until the contractor is able to deliver a payment claim. As a result, there is no nexus between the content of the "draft payment claim" submitted under cl 33.7 and the payment claim permitted by cl 33.8. The position might be otherwise if the draft payment claim and the payment claim related to the same work and the same period, allowing the contractor to refine and correct its draft payment claim in the light of the preliminary assessment. However, the absence of a nexus between the content of the two documents leads the first respondent to describe the mandatory requirement for a draft payment claim as "no more than an artificial, and impermissible, constraint on the right to claim for payment under BCIPA". The contractual provisions purport to confine the entitlement to claim for payment in a manner which has no direct nexus with the work for which payment is claimed, and this is said by the first respondent to be at odds with the statutory entitlement to claim for work completed by the "reference date". Other aspects of the provisions are said to impose manner and form requirements conditioning the formation of the reference date.

[42] The applicant submits that the first respondent's submissions about interfering with the statutory regime lack precision in not identifying:

(a) any specific part of s 99 which is alleged to be engaged or how any contractual provision is "contrary to the Act"; or

(b) the entitlement given to a claimant under the Act which is excluded, modified, restricted or otherwise changed.

The Act states in s 8(a) that its object is to be achieved by "granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments". But the relevant entitlement is found in s 12 and only arises from each reference date. There is nothing in the Act which suggests that the entitlement to progress claims must arise at least monthly.

[43] The applicant accepts that, speaking generally, the right to receive a progress payment under the contract is separate from, and not co-extensive with, the right to make a claim under the Act. It also accepts that in some situations the contractor will have a right to claim under the Act even when it does not have a right to claim under the contract. But that does not mean that the right to claim under the Act is entirely independent of the contract. Indeed, the Act takes the contract between the parties as the basis for its operation in a number of areas, including the setting of reference dates. Against this background, the applicant submits that it is not contrary to the Act to create conditions on a reference date arising. It is only where the contract does not provide for a reference date to be worked out that the Act provides a default position.

[44] According to the applicant, because the parties are "free to define their reference date" a clause which affects when a reference date occurs is not at odds with the statutory entitlement. There is no entitlement until there is a reference date. A clause which affects whether or when a reference date occurs cannot be said to confine or affect an entitlement since there is no entitlement until there is a reference date. It is therefore circular to say that a clause specifying a reference date is void because it modifies the claimant's entitlement to monthly reference

dates, when such an entitlement would only arise if the clause specifying the reference date is void

[45] The applicant's submissions emphasise the primacy of the parties' freedom to agree a reference date which, in practice, may never materialise. By contrast, the first respondent's submissions emphasise that there are limits upon the validity of clauses which condition the coming into existence of a reference date or operate to defer what otherwise would be a reference date by virtue of the Act.

The issues

[46] These submissions raise two general issues:

(a) What limits are imposed by s 99 on the validity of a clause which provides whether or when a reference date actually occurs?

(b) Are the conditions imposed by clauses 33.7 and 33.8 upon the making of a claim for payment of no effect insofar as they unjustifiably prevent what would otherwise be a reference date for the purpose of a statutory right to a progress payment from arising?

The Act

[47] Expressed in general terms, the Act confers a statutory entitlement to a progress payment. The statutory entitlement to a progress payment may co-exist with a contractual entitlement to a progress payment.

> "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 statutory entitlement to progress payments even where the contract itself makes provision for progress payments."[8]

Referring to the comparable New South Wales Act, McDougall J stated, "Generally speaking, the Act seeks to strike a balance between freedom of contract on the one hand and protection of the statutory right to a progress payment on the other".[9] The same observation may be made about the Queensland Act.

[48] Section 12 clearly makes the statutory entitlement to a progress payment depend upon a reference date. The definition of "reference date" indicates that the parties' contract may provide for the working out of a reference date and if it does so, then the contractual provision applies rather than the default position in subparagraph (b) of the statutory definition. Regard to the general purpose of the Act and s 8(a)'s statement that the Act's object is achieved by granting an entitlement to a progress payment does not allow one to ignore that the statutory entitlement depends on a "reference date" which may be agreed upon by the parties by stating it or providing for how it is to be worked out.

[49] There are limits, however, on the extent to which contractual provisions can operate to preclude a reference date coming into existence in accordance with such a

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8 *John Holland* at 442 [17] .

9 *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [40].

contractual formula, and thereby remove what would otherwise be a statutory entitlement to obtain a progress payment. Subject to those limits, the parties can agree a clause which provides when a reference date will arise and, indeed, whether or not a reference date will actually occur.

Limits

[50] Not all provisions which affect a contractual entitlement to a progress payment affect the statutory entitlement to a progress payment. According to the first respondent:

> "Contractual preconditions on the entitlement to deliver a contractual payment claim,[10] the liability to make payment under a contract,[11] or which operate to defer what would otherwise be the statutory entitlement to claim,[12] do not constrain the right to claim for payment[13] or the amount to be adjudicated[14] under the BCIPA.
>
> Contractual constraints as to the form of a valid claim for payment under a contract neither inform the validity of a '*payment claim*' under the BCIPA[15] nor affect the existence of a '*reference date*' which has accrued.[16]"

These propositions are not in dispute. However, authorities to the effect that certain contractual conditions about the form in which a contractual claim for a progress payment must be made do not affect a co-existing statutory entitlement to a progress payment, or operate to affect or defer an existing "reference date", do not specifically address the status of a contractual provision which conditions whether or not a reference date will arise.

[51] The first respondent relies upon these authorities by way of analogy to contend that a condition which prevents what otherwise would be a reference date from arising is ineffective. If absent a certain contractual provision, the effect of the Act would be to confer a statutory right to a progress payment on each reference date determined by any remaining contractual provisions or the monthly default position, then s 99 invalidates the provision. This argument identifies the right to a progress payment in s 12, and places limits on the parties' freedom to contract about whether and when a reference date will arise. However, reliance on s 99 to sweep away provisions which condition whether and when a reference date arises potentially would mean that any provision which conditions a reference date coming into

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10 *T & M Buckley* at [41]; *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214 at [17].

11 *John Holland Pty Ltd v Coastal Dredging Construction Pty Ltd* [2012] 2 Qd R 435 at [17]. *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279 at [3], [21].

12 *John Holland Pty Ltd v Coastal Dredging Construction Pty Ltd* [2012] 2 Qd R 435 at [21]. *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269 at [26].

13 *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [59] to [64]; *Mansouri and Anor v Aquamist P/L* (2011) 27 BCL 194 at [15]; *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 at [46].

14 *Ibid; Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 at [52] and [55].

15 *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279 at [53] and [54]. *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576 at 582 [20] and [21].

16 *John Holland Pty Ltd v Coastal Dredging Construction Pty Ltd* (unrpt) per Dalton J 29 February 2012 at L27 T3.

existence would be invalid. Such an outcome should not be accepted in the context of an Act which allows parties to provide for the working out of a reference date.

[52] Section 99 has some work to do in this context, but it cannot simply invalidate all contractual conditions about when a reference date under a construction contract will arise. To take the hypothetical example of a contract which provides that a reference date will arise after the contractor has laid a certain length of pipe, it would be odd if the freedom which the Act confers upon the parties to agree such a mechanism for a reference date to be worked out was entirely removed by the operation of s 99. That said, the freedom of the parties to negotiate a provision by which a reference date is worked out is limited. It is limited by the inclusion in the Act of s 99 and the terms of the Act which contemplate that an actual, not an illusory reference date will be provided for by the parties, in default of which there will be monthly reference dates.

[53] In conferring a statutory entitlement to a progress payment from each reference date under a construction contract, the Act should not be taken to contemplate a reference date which is practically illusory. Were it otherwise, the purpose of the Act could be defeated by a clause which erected onerous hurdles which in practice prevent a reference date from arising or which so delay it as to be inimical to the Act's purpose of granting an entitlement to progress payments.

[54] The interpretation which best achieves the Act's purpose is one which recognises that there are limits on the validity of contractual provisions which determine whether or when a reference date will actually arise. In summary, I conclude that there are limits imposed by virtue of:

- the Act's purpose in granting an entitlement to progress payments;
- the terms of s 12 by which that entitlement arises from each reference date under a construction contract; and
- the terms of s 99,

upon the freedom of parties to provide whether and when a reference date arises for the purpose of the Act.

The authorities

[55] Statements to the effect that parties to a construction contract which contain a system of progress payments are not "meant to be denied their agreed system and forced onto the timing and quantification"[17] contained in the Act just because the express terms of the contract did not adopt a statutory definition should not be taken too far or out of context. Statements about these matters should not be taken as authority for the proposition that parties have an unlimited freedom to agree provisions about timing and quantification. If that freedom was unconstrained, the s 12 entitlement to a progress payment could be rendered practically illusory or defeated by a contractual provision which prevented a reference date from arising. Such a condition might have little or no utility in facilitating the Act's purpose and unjustifiably prevent a reference date arising.

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17 *Quasar Constructions Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116 at [21].

[56] A provision which inordinately delays or effectively prevents a reference date from arising would be contrary to the Act's objective of conferring a statutory entitlement to a progress payment from a reference date. That purpose is protected by s 99 of the Act. A provision which unjustifiably prevents or inordinately delays a reference date from arising is invalidated by s 99 because it is contrary to the Act. Such a provision unjustifiably changes the effect of the Act in granting a statutory entitlement to a progress payment. The contractual provision is void to that extent, but is not void to the extent that it governs a co-existing contractual entitlement.

[57] That the freedom to agree provisions about the timing and quantification of statutory entitlements to progress payments is constrained by a statutory provision like s 99 finds support in the observations of Hodgson JA in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*.[18] Those observations endorsed the view of McDougall J at first instance that contractual provisions relied upon by the Minister which had the effect of delaying the reference date might be rendered void by the NSW equivalent of s 99 of the Queensland Act. Hodgson JA expressed the opinion that a provision of a contract as to the determination of reference dates, or as to the calculation of the amount of progress payments, could be such as to restrict the operation of the Act within the meaning of s 34 of the NSW Act, even though the Act expressly defers to such provisions. Hodgson JA stated:

> "For example, if a contract provided for yearly reference dates, or provided that such progress payments should be calculated on the basis of one percent of the value of work done, in my opinion such provisions could be so inimical to s 3(1), s 3(2) and s 8(1) as to be avoided by s 34."

The applicant notes that these observations were not necessary for the decision and that Hodgson JA refrained from deciding the appeal on that ground.

[58] Bryson JA did not join in Hodgson JA's observations to the effect that s 34 invalidated some parts of cl 42 of the construction contract in that case. Rulings by McDougall J on the interaction between the construction contract in the case and s 34 were said to be open to question. As the appeal did not turn on that issue, Bryson JA found it unnecessary to pursue the matter further, and did consider the correctness of McDougall J's conclusion that certain parts of cl 42 of the construction contract were ineffective because of s 34 of the NSW Act. However, his Honour did not specifically question the general proposition that s 34 of the NSW Act could apply to a case of the kind hypothesised by Hodgson JA and that the section constrains the freedom of parties to determine whether and when a reference date will arise. The third member of the New South Wales Court of Appeal, Brownie AJA, preferred not to express an opinion about whether s 34 of the NSW Act invalidated the particular parts of the contract.

[59] The observations of Hodgson JA upon which the first respondent relies in this case command respect. Whilst the other two members of the court did not express a view about whether certain parts of the clause in that case were invalidated, they did not contest the general proposition that a provision of a contract which determines a reference dates may be invalidated by provisions similar to s 99 of the Queensland Act.

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18 [2005] NSWCA 142 at [51]-[54].

[60] In *State of Queensland v T & M Buckley Pty Ltd*,[19] Margaret Wilson J considered a contract which conditioned the delivery of a claim for payment upon the delivery of a statutory declaration. Her Honour concluded that the accrual of the statutory reference date was not conditional upon the prior delivery of the statutory declaration. In the circumstances, the question of whether the condition was void under s 99 did not arise. As a result, the present issue of what conditions are permissible under the Act did not arise for decision.

[61] The parties' submissions referred to the decision of Douglas J in *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd*[20] in which a contract provided for a progress claim to be made to a superintendent. The superintendent was then to issue a progress certificate by the 30th day of the month after receiving the claim, failing which the progress claim was deemed to be the progress certificate. The contract provided that a payment claim under the Act could be made upon the certificate being received or being deemed to being received. The contractor sought to rely upon a progress claim lodged with the superintendent as the payment claim under the Act, without having made a further payment claim after the issue or deemed issue of the payment certificate. Douglas J held that there was no valid payment claim under the Act and that the terms which provided for the working out of a period of service of a payment claim were not inconsistent with the Act and did not attract s 99. Douglas J made clear that his conclusion turned upon the specific terms of the contract before him. Subsequent decisions have emphasised that the conclusion that s 99 did not apply in that case turned upon the specific contractual provisions.[21]

[62] The observations of the Court of Appeal in *John Holland* about the decision in *Simcorp Developments* and the reservations expressed by Bryson JA in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* suggest that the operation of a provision such as s 99 upon contractual provisions which affect the determination of a reference date depend upon the construction and effect of the particular contractual provisions.

[63] *John Holland* was not concerned with a contractual provision of the present kind. However, both parties understandably referred to the decision and sought to derive support from it for their respective contentions. In *John Holland*, the construction contract included a number of conditions about payments claims and the subcontractor warranted that if a payment claim did not comply with those conditions, then it was void and that the reference date for the purpose of the Act would be the same day on the following month. The appellant in that case submitted that the proper construction of the contractual definition of a reference date was that its accrual was conditional upon satisfaction of the matters in the clause. Fraser JA observed that the effect of contractual provisions upon the procedure for vindicating the statutory entitlement to progress payments was not an issue in the appeal, and that it was not necessary to attempt "a comprehensive reconciliation of general statements in the cases concerning the relationship between the Act and the contracts with which it is concerned".[22] It was only necessary to deal with the narrow issue about the effect of certain clauses of the contract upon

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19 [2012] QSC 265 at [41]-[43].

20 [2010] QSC 162.

21 *John Holland* at 443 [22]; *State of Queensland v T & M Buckley Pty Ltd* [2012] QSC 265 at [40].

22 *John Holland* at 441-442 [16].

the reference date for the purpose of s 12 of the Act. After referring to relevant sections of the Act, Fraser JA stated:

> "19. The Act adopts contractual provisions concerning the amount of a progress payment (s 13(a)), the valuation of construction work and related goods and services (s 14), the date upon which a progress payment under a construction contract becomes payable (s 15(1)(a)), the rate of interest payable on the unpaid amount of a progress payment that has become payable (s 15(2)(a)), the amount held by the respondent which may be included in a payment claim (s 17(3)(b)), the period within which a payment claim may be served (s 17(4)(a)), and the time within which a payment schedule must be served if the respondent is to avoid becoming liable to pay the claimed amount (s 18(4)(b)(i)). None of those provisions bear upon the date upon which the statutory entitlement to progress payments accrues. Bearing in mind the statutory object and the role of s 12 and the definition of 'reference date' in giving effect to that object, those provisions are incapable of justifying an implication that the date upon which the statutory entitlement to a progress payment accrues may be qualified by contractual provisions **other than those captured by the unambiguous terms of the definition of 'reference date'**."[23]

[64] The applicant correctly submits that implicit in the words I have emphasised is an acceptance of the proposition that contractual provisions captured by the unambiguous terms of the definition of "reference date" can qualify the statutory entitlement to a progress payment. However, the passage does not say, and does not suggest, that there are no limits on the extent to which statutory entitlements to a progress payment may be qualified by a contractual provision which determines whether or not a reference date arises. *John Holland* was concerned with a different issue and different contractual provisions to those with which I am concerned. In that context, it simply confirmed that contractual provisions may define a reference date. It is authority for the proposition that certain contractual provisions which purport to defer what otherwise would have been a parties' statutory entitlement to a progress payment from a reference date ascertained in accordance with the Act will be void by virtue of s 99 of the Act.[24] The decision does not determine the issue that arises from my determination.

[65] The authorities establish that contractual provisions which require, as it were, a contractor to jump through a number of hoops, failing which, a reference date that has arisen is deferred are invalidated. It might be observed that, on the applicant's argument, whilst the Act does not permit a reference date that has arisen to be deferred until the hoops are jumped through, it permits a contract to provide that a reference date will not arise until the same hoops are jumped through. This curiosity or anomaly may simply be that. It may be, as Mr O'Shea QC who appeared with Mr May for the applicant submitted, that this curiosity follows from the wording of the Act. If this is so, then the curiosity or anomaly must be accepted,

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23 At 442 [19] (emphasis added).

24 Ibid at 443 [21].

since it is not the function of a court to construct its own idea of a desirable policy and impute it to the legislature.

[66] There is a distinction between two categories of case. The first is where a reference date has arisen and the contract purports to require a payment claim to meet certain conditions in making a payment claim or provides that if certain conditions are not met, the payment claim is ineffective and the reference date is deferred. In such a case, the statutory reference date is not conditional upon compliance with the condition, such as the delivery of a statutory declaration.[25] Also the contract is ineffective to defer what would have otherwise been the contractor's statutory entitlement to a progress payment from a reference date.[26] The second category of case, and the one with which I am concerned, is where a reference date has not arisen because the contract purports to provide that no reference date will arise until certain conditions are fulfilled. Authorities about the first category of case do not determine what the position should be in the second category.

Two general propositions

[67] Two general propositions may be stated as a result of the Act's recognition that the parties may agree upon a contractual provision which permits a reference date to be worked out, and the constraint imposed by s 99 of the Act upon such a provision.

[68] The first proposition is that not every provision which conditions when a reference date arises (and therefore potentially affects whether or not a reference date will arise) could be said to be inimical to the Act and void as a result of s 99. There is nothing explicit in the statutory definition of "reference date" which prevents parties from agreeing that a reference date will arise when a party does something, for example, the completion by the contractor of a defined part of the work.

[69] The second proposition is that not every provision which conditions whether or when a reference date arises can be said to be immune from the operation of s 99. For example, a provision which stated that a reference date only arose once the principal was of the opinion that it should pay a progress payment might have the practical effect of making the existence of a reference date dependant upon a subjective state of mind which might never exist. It might make the existence of a reference date and the statutory entitlement to a progress payment illusory.

[70] By contrast, it is possible to imagine a condition which may facilitate the prompt payment of claims made under the Act, not unjustifiably inhibit a reference date arising and thereby be consistent with the purpose of the Act. For example, it is possible to imagine a condition which provided that a reference date arises a few days after a contractor has provided a basic document which simply estimates what work will have been done by the time of the reference date and its expected value. Such a condition might be said to reduce the element of surprise in the payment claim that is delivered after the reference date arises and enable the principal to prepare for its payment.

[71] The two general propositions that I have advanced, and these examples, suggest that it is impossible to say that provisions which condition the timing of a reference date for the purpose of the Act are necessarily valid or necessarily invalid.

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25 *State of Queensland v T & M Buckley Pty Ltd*.

26 *John Holland*.

[72] It might seem somewhat unsatisfactory that there is no hard and fast rule about the validity of such conditions. But this is the consequence of an Act which provides some freedom to the parties to determine when a reference date arises, and which does not automatically impose the default position of monthly reference dates if the agreed condition is not met.

[73] As unsatisfactory as it may be to have an ill-defined dividing line between those conditions for the working out of a reference date that are effective and those which are not, other alternatives are no more satisfactory:

(a) A position whereby no conditions on reference dates are effective would preclude parties from agreeing conditions which suit their needs and facilitate the timely payment of progress payments. Such a position would be inconsistent with the limited freedom given to parties by the Act to agree how reference dates are worked out.

(b) A position whereby all conditions on reference dates arising are effective is contrary to the Act's objective. It would allow a contract to include a condition which in practice prevents a reference date from arising and thereby effectively denies a contractor the statutory entitlement to a progress payment which would accrue in the absence of that condition.

Rather than adopt either of these two positions with their undesirable consequences, the Act provides some scope to impose conditions.

[74] The purpose of the Act and the role which s 99 plays in constraining the contractual freedom of parties to modify the entitlements which the Act confers means that the parties do not have an unconstrained freedom to contract about when a reference date will arise. The Act does not allow the contract to impose onerous conditions which make a reference date more of a theoretical possibility than an actuality. Likewise, the example given by Hodgson JA, of a contract which provides for an annual reference date, would seem to be inimical to the purpose of the Act and invalidated by s 99.

[75] The extent to which a particular condition is contrary to the Act or purports to change the effect of the Act depends upon its content and practical consequences. In assessing the validity of such a condition a useful inquiry is whether it facilitates or impedes the purpose of the Act. A provision which has the purpose of regulating contractual rights to progress payments may not be appropriate to condition a statutory right to a progress payment. A condition is likely to be contrary to the Act or unjustifiably change the effect of the Act's provisions where it does not facilitate a statutory entitlement to progress payments or the resolution of payment claims made under the Act. This is likely to be the case where the condition impedes the making of a payment claim with no corresponding benefit in achieving the Act's purpose.

[76] The inquiry into validity requires the identification of the condition or conditions in the absence of which there would be a statutory entitlement to a progress payment. Even a condition which has some utility in a contractor making a payment claim and receiving a progress payment may be excessively onerous and be invalid because of its unjustified effect in denying a party what otherwise would be a statutory entitlement. A condition which has no significant utility in terms of the

scheme created by the Act may be invalid, not because it is particularly onerous, but because it impedes a statutory entitlement without any corresponding benefit.

The applicant's circularity argument

[77] If the Act allowed an unlimited freedom to include conditions that had to be fulfilled before a progress payment claim could be made, even conditions which were practically impossible to fulfil, then the applicant's circularity argument would have some force. The unfulfilled condition would prevent a reference date from arising, and there is no statutory entitlement until there is a reference date. It would not make sense to speak of an entitlement under the Act being changed because until the reference date arises, there is no entitlement. However, for the reasons given above, there are limits upon the freedom of parties to provide whether and when a reference date arises for the purposes of the Act.

[78] Because the parties' freedom to contractually provide whether or not a reference date actually occurs is constrained by s 99, it is possible to say that, absent a particular condition that is invalidated by s 99, the effect of the Act would be to confer a statutory right to a progress payment. Section 99(2)(b) might be invoked in such a case because:

(a) in the absence of the relevant condition the effect of the Act is to give an entitlement to a progress payment from a reference date;
(b) the condition purports to change or changes the effect of the Act.

There is nothing circular in identifying a statutory entitlement which would exist in the absence of a particular condition and saying that the condition changes the effect of the Act.

[79] This meets the applicant's circularity argument. But reliance upon s 99(2)(b) would permit, in theory, any condition which purports to change what otherwise would be a statutory entitlement to be invalidated, and accord no real scope to the parties to agree conditions for the working out of a reference date which are consistent with the Act's purpose.

[80] The limit on the parties' freedom to include conditions which are inimical to the Act's purpose, which unjustifiably impede the making of a payment claim under the Act or which make the statutory entitlement practically illusory is derived from the Act's purpose, its terms and particularly s 99 which invalidates certain contractual provisions. Contractual conditions which are inimical to the Act's purpose, which unjustifiably impede the making of a payment claim under the Act or which otherwise make the statutory entitlement practically illusory are contrary to the Act and invalidated by s 99(2)(a).

Are the conditions imposed by clauses 33.7 and 33.8 of no effect insofar as they unjustifiably prevent a reference date from arising?

[81] The applicant submits that, even if there is a limit on what the parties can specify in relation to reference dates, that limit is not engaged in this case. It submits that the limit might perhaps be engaged where the power to bring into existence a reference date is given solely to the proprietor or where only one reference date is specified, at some distant point in the future. In this case the clause is said to leave it entirely within the first respondent's power to bring about a reference date. Also, the thing

that had to be done to bring about the reference date was not onerous: all the first respondent needed to do was to submit its payment claim in draft form before submitting it formally as a claim under the Act.

[82] The first respondent contests this. First, it submits that it is erroneous to characterise the draft payment claim as consisting of a draft of the matters which would be contained in the actual payment claim. Each relates to different work done during different periods. Secondly, the requirement to provide a draft claim for payment supported by evidence of the kind required by cl 33.7(a) on a particular day, failing which the right to make a claim for payment is extinguished, is said to be onerous. If no draft claim for payment is provided on the specified date, no reference date arises. The contract is said to provide for the possibility of a reference date, not its actuality.

[83] The first respondent makes the additional submission that if the draft claim for payment is provided within the narrow window of opportunity, but is defective in its form so as to not constitute a draft payment claim of the kind envisaged by cl 33.7, then the possibility of a reference date accruing is also extinguished. Contests over whether the draft claim for payment complies with the requirements of cl 33.7 might only be resolvable by litigation, a result which is submitted by the first respondent to be another factor which attracts the operation of s 99.

[84] In response to this last submission, namely that a reference date might not come into existence because of the form of the draft claim for payment, the applicant submits that the contract distinguishes between "a draft payment claim which complies with the requirements of Clause 33.7(a)", which engages the obligation to issue a preliminary assessment in accordance with cl 33.7(c), and a "draft claim for payment" which does not necessarily have to comply with the requirements of cl 33.7(a) in terms of its form or content.

[85] There is force in this submission, but if it is correct then it operates to reduce the utility of any draft claim for payment, and begs the question of what the point would be in requiring the respondent to provide a piece of paper styled draft payment claim which did not comply with the requirements of cl 33.7(a) on a particular date. Such a requirement would seem to have no utility in terms of advancing the purpose of the Act, and whilst less onerous than being required to deliver a draft payment claim which complies with the requirements of cl 33.7(a), would jeopardise an entitlement to a statutory progress payment in the event the document was not delivered on the required date. It is hard to see the utility of being required to deliver a non-compliant piece of paper.

[86] If, however, the draft payment claim includes the matters required by cl 33.7(a) then it is of questionable utility. The required draft payment claim relates to work done during a different period to the period covered by the actual payment claim. Any preliminary assessment would be of only some of the work. The sub-contractor might choose to include in the actual payment claim previously unmentioned work which was undertaken prior to the date of the draft payment claim. Even if it does not, the preliminary assessment given under cl 33.7(c) is not binding.

[87] The applicant describes the requirement to submit a draft payment claim and to obtain a preliminary assessment of it in accordance with cl 33.7(c) as a "useful

separate step enabling the parties to assess the necessity for a payment claim under the Act before making such a claim." However, in circumstances:

- in which there is no direct nexus between the content of the "draft claim for payment" submitted under cl 33.7 and any payment claim submitted under cl 33.8 because they relate to different periods and different work;
- where the actual payment claim can include additional items; and
- where any preliminary assessment does not bind the applicant in its response to the later payment claim

the mandatory requirement to deliver a draft payment claim on a particular date lacks utility, at least so far as the first respondent is concerned, in making a payment claim under the Act and being paid upon that claim. Its utility, so far as the applicant is concerned, is that a failure to comply with the mandatory requirement prevents a reference date from arising and extinguishes what otherwise would be a statutory entitlement on the first respondent's part to a progress payment.

[88] Clauses 33.7 and 33.8 provide for the *possibility* of a reference date, not its actuality. Whether or not a reference date arises is contingent upon compliance on a particular day with a condition which has no significant utility in terms of facilitating the payment of a progress payment to which the first respondent would otherwise have a statutory entitlement. The condition thereby amounts to an unnecessary and impermissible constraint on the right to claim for payment under the Act. The requirement that the draft payment claim be delivered on a particular day may have some limited utility to the processing of an actual payment claim, however, that utility is not apparent in circumstances where the actual payment claim relates to different work undertaken during a different period. The requirement to deliver draft payment claim on a particular day may not seem very onerous, depending upon what is required in terms of its form and contents and the potential for dispute about its compliance with cl 33.7(a) and whether it is supported by the information referred to in that provision. However, even if the formal requirements of the draft payment claim are not onerous, the question remains about the point in terms of the Act of such a mandatory requirement in circumstances where a failure to comply with it extinguishes the statutory right to a progress payment.

[89] Whilst the definition of "reference date" means a reference date may be worked out by such a provision, the provision does more than work out when a reference date will arise. It makes a reference date contingent upon compliance with a condition which has little, if any, practical utility in facilitating payment of a statutory entitlement. The condition does little to facilitate such a payment being made, but carries the potential that no statutory progress payment will be made if the condition is not complied with. Given the absence of any direct nexus between the draft claim for payment and the actual claim for payment in terms of the period of work and the actual work that is covered by each document, it is hard to see why, for example, a delay of one day in delivering the required draft payment claim should extinguish what otherwise would be a statutory entitlement to a progress payment. I conclude that the mandatory requirement operates to unjustifiably impede a reference date from arising.

[90] Such a provision, which lacks utility in terms of facilitating the purposes of the Act and which extinguishes what otherwise would be a statutory entitlement to a progress payment, is contrary to the Act. That is because it unjustifiably modifies, restricts or otherwise changes the effect of an Act which contemplates that a progress payment will be made after a reference date arises.

[91] Clauses 33.7 and 33.8 unjustifiably condition the accrual of a reference date. They are ineffective by reason of s 99 of the Act to the extent they affect what would otherwise be a right to make a payment claim under the Act and to be paid a statutory entitlement. They remain effective in respect of a contractual entitlement to a progress payment.

Summary on the issue of validity

[92] The draft claim for payment which is a mandatory condition for the making of a payment claim under the Act has no direct bearing on the contents or processing of an actual payment claim. This is because:

(a) it relates to a different period and different work to the period and the work covered by the payment claim; and

(b) if, as the applicant contends, the "draft claim for payment" referred to in cl 33.8(a) need not be one which complies with the requirements of cl 33.7(a), it may not necessarily contain any information which is of use with respect to the period covered by the draft payment claim, let alone the period covered by the payment claim.

The condition has little, if any, utility in facilitating the making of a payment claim under the Act and in the payment of a progress payment to which the contractor otherwise would be entitled. Failure to deliver a draft payment claim on the one day window of opportunity for delivering such a document extinguishes what would otherwise be a reference date worked out under the contract or a default reference date. The condition unjustifiably impedes rather than facilitates a reference date arising and thereby defeats a statutory entitlement to a progress payment.

[93] There may be circumstances in which it is possible to condition not only when, but whether or not, a reference date will arise. Such a condition may be justified as facilitating the purpose of the Act. Clauses 33.7 and 33.8, however, cannot be justified on this basis. They go beyond the freedom to contract about how a reference date is worked out. Section 99 renders such provisions ineffective.

[94] The adjudicator was correct to conclude that the provisions were ineffective to preclude a reference date from arising. The provisions in the contract working out a reference date being ineffective, a reference date arose in accordance with the statutory default position. The result is that the adjudicator had jurisdiction to determine the application before him. The application should be dismissed.

Miscellaneous points

[95] The first respondent raised other issues in connection with the validity of these clauses. One was that the additional constraint in cl 33.7(a) of "such information as the Sub-contractor Representative may reasonably require" injects uncertainty as to the formation of a "reference date" by allowing the sub-contractor's representative

to interfere by adding requirements and rendering the task of making a compliant "draft payment claim" something quite different from that contemplated at the time the contract was formed. I do not agree. Strictly speaking, it is the delivery of the "draft claim for payment", not any information which the Subcontractor Representative may reasonably require that is the event from which the reference date is worked out.

[96] Next, to the extent that the clauses impose manner and form conditions upon the making of a compliant draft payment claim and a valid payment claim, such a manner and form precondition may be ineffective to prevent a reference date from arising or a valid payment claim being made under the Act, irrespective of their effect upon a contractual entitlement to a progress payment. This conclusion follows from the cases earlier discussed in which manner and form conditions have been held to be ineffective. However, the critical issue in this case is not about a manner and form condition. It concerns a condition about the timing of a reference date.

[97] Finally, the first respondent submits that the requirement for a "draft claim for payment" as a precondition to the existence of a "reference date" has the effect of circumventing the 10 business days for the provision of a payment schedule under the Act, so as to give the applicant more time in which to prepare the payment schedule than is prescribed. I do not agree. For the reasons earlier given, the payment claim that is made may bear little resemblance to the draft payment claim. In any case, the applicant still only has the 10 business day period provided for under the Act to respond to an actual payment claim.

Estoppel and waiver

[98] My conclusion that the adjudication decision was not affected by jurisdictional error makes it unnecessary to address the first respondent's third substantial argument which relied upon waiver and estoppel. For completeness, I shall do so relatively briefly.

[99] The first respondent contends that the applicant:

(a) waived its entitlement to insist upon compliance with clauses 33.7 and 33.8 as a ground for resisting a claim for payment; or

(b) is estopped from relying on such non-compliance.

Its case on waiver acknowledges that "waiver by election" requires actual knowledge of facts which gave rise to alternative and inconsistent rights and an election between those rights.[27] The election which gives rise to a waiver in this case is said to be that the applicant did not, at any stage prior to the adjudication response, and notwithstanding numerous previous claims for payment, insist upon the delivery of a "draft claim for payment" and instead elected to pay upon those claims.

[100] As for estoppel, the first respondent claims that it relied upon the applicant's conduct in receiving and paying claims for payment without recourse to the

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[27] *Ace Property Holdings Pty Ltd v Australian Postal Corporation* [2011] 1 Qd R 504 at 550-554 [147]-[159].

requirements contained in clauses 33.7 and 33.8. It also says that it relied upon the absence of any complaint in the payment schedule as to non-compliance in preparing and making the adjudication application.

[101] The applicant responds that the evidence does not support a finding of waiver or estoppel. As to the elements of estoppel where a party seeks to prevent another from relying on its legal rights, the applicant points to the statement of principle of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* that to establish an equitable estoppel it is necessary for the plaintiff to prove that:

> "(1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;
>
> (2) the defendant has induced the plaintiff to adopt that assumption or expectation;
>
> (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation;
>
> (4) the defendant knew or intended him to do so;
>
> (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
>
> (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."[28]

The evidence

[102] A number of tax invoices were delivered by the first respondent and payments were made on an informal basis. An initial tax invoice (number 396) was sent pursuant to a purchase order and before the work under the contract commenced. The evidence shows that tax invoices and payments did not occur in accordance with contractual arrangements. For example, all issued invoices sought payment within a 14 day period, which was known not to be in accordance with the contract. None of the invoices, prior to the one the subject of this proceeding, was endorsed with a reference to it being a payment claim under the Act, and none of them had attached a "proforma invoice" in the form of attachment 5 to exhibit B to the contract.

[103] Representatives of the parties met on 22 January 2014 and there was discussion about the use of a spreadsheet to calculate the amount to be claimed. The evidence indicates that there was no discussion at that meeting about draft payment claims.

[104] The evidence supports the applicant's position that what occurred prior to the making of the payment claim that led to the adjudication is that the first respondent submitted informal invoices and the applicant was content to pay them. This course of conduct does not bespeak of an election by the applicant between inconsistent rights. In addition, its conduct was not such as to represent that a different legal

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[28] (1988) 164 CLR 387 at 423.

relationship then existed between the parties, or that the applicant expected that a particular legal relationship would exist between the parties other than the legal relationship embodied in the contract. The conduct of the applicant in receiving tax invoices and paying them in circumstances in which it was not legally obliged to pay them was simply an informal arrangement. The evidence of Mr Bond did not bear out that the first respondent assumed that a new and different legal relationship existed such that the first respondent was not required to comply with the terms of the contract. The conduct of the first respondent in submitting a payment claim under the Act which was endorsed in a form that accorded with the contract's requirements shows that the first respondent did not in fact assume that it was relieved from the requirement to comply with the terms of the original agreement.

[105] Mr Bond, on behalf of the first respondent, acknowledged in his oral evidence that nothing had been said to him by the applicant to the effect that it did not need to deliver a draft payment claim in accordance with the contract. He accepted that submitting the payment claim under the contract without first submitting a draft was not the result of anything said or done by the applicant. He accepted that he embarked on the course of sending a claim without first sending a draft payment claim because that was what he commenced to do at the start of the contract and he never changed.

[106] Because most of the claims for payment were not claims under the contract, it is hard to see how the conduct in question could have induced an assumption on the part of the first respondent that it was not necessary to comply with the contract. The mere payment of invoices which did not purport to be claims under the contract could not reasonably induce reliance.

[107] Another important factor in precluding an estoppel is that there is no evidence that the applicant knew that the first respondent was acting on the basis of an assumption that a different legal relationship existed between them, such that the first respondent was entitled to assert a legal right to payment without compliance with the draft payment claim procedure and the other requirements of the contract.

[108] The evidence tends to establish that prior to the contentious payment claim, the first respondent simply submitted informal tax invoices, the applicant agreed to pay those amounts and that neither the applicant nor the first respondent assumed that the other was relieved from the requirements of the contract if it wished to assert its legal rights.

[109] The applicant did not raise issues concerning compliance with clauses 33.7 and 33.8 in its payment schedule. Instead, the issue was raised in its response to the adjudication application. Whilst the failure to initially raise the issue in the payment schedule may have influenced the first respondent to make the adjudication application, there is no satisfactory evidence that the first respondent would have acted any differently if the issue had been raised in the payment schedule. The adjudicator gave the parties the opportunity to make submissions about the reference date point. The adjudicator was required to be satisfied that there was a reference date irrespective of the parties' submissions. The adjudicator was required to determine the relevant terms of the contract, and if certain terms of the contract had been waived by the applicant or the applicant was estopped from relying upon them, then this would have had implications for the adjudication. However, the first respondent has not established that the applicant waived its

entitlement to insist upon compliance with clauses 33.7 and 33.8 or that the applicant is estopped from relying on non-compliance with these provisions as a ground for resisting a claim for payment.

[110] The first respondent has not established the waiver or estoppel contended for by it.

Conclusion and orders

[111] The first respondent has succeeded upon the second ground of its opposition to the application. Section 99 of the Act renders clauses 33.7 and 33.8 void to the extent they condition a "reference date" under the Act and a statutory entitlement to a progress payment coming into existence. A reference date had arisen at the time the payment claim was made under the Act. As a result, the adjudicator had jurisdiction to determine the adjudication proceeding.

[112] Subject to hearing the parties as to the terms of the orders, the orders will be:

1. The application is dismissed.

2. The applicant pay the first respondent's costs of and incidental to the application to be assessed on the standard basis.