

SUPREME COURT OF QUEENSLAND

CITATION: *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors*
[2015] QSC 218

PARTIES: **BRB MODULAR PTY LTD**
ACN 114 678 349
(applicant)
v
AWX CONSTRUCTIONS PTY LTD
ABN 118 400 098
(first respondent)
**THE REGISTRAR (QUEENSLAND BUILDING AND
CONSTRUCTION COMMISSION)**
(second respondent)
JORAM (JOHN) MURRAY
(third respondent)

FILE NO/S: SC No 7073 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 July 2015

DELIVERED AT: Brisbane

HEARING DATE: 28 July 2015

JUDGE: Applegarth J

ORDERS:

1. **The application be dismissed.**
2. **The Registrar pay by cheque payable to the first respondent, AWX Constructions Pty Ltd, from the amount paid into the Court Sutors Fund by the applicant pursuant to an order made 22 July 2015:**
 - a. **the sum of \$3,935,707.39; and**
 - b. **interest calculated at the daily rate of \$833.95 from 24 July 2105 to the date on which the first respondent has received the money referred to in order 2(a) above.**
3. **The Registrar pay by cheque payable to the applicant, BRB Modular Pty Ltd, the balance of the amount paid into the Court Sutors Fund by the applicant pursuant to an order made 22 July 2015, together with any accretions due.**

- 4. The applicant pay the first respondent's costs of and incidental to the application on a standard basis, excluding the costs of and incidental to the interlocutory hearing on 22 July 2015 which remain reserved.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – 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 and an injunction restraining a sub-contractor from giving effect to it – where applicant submits that no reference date accrued pursuant to *Building and Construction Industry Payments Act 2004* (Qld) – where contract required submission of a statutory declaration before a payment claim could be made – where contract required the sub-contractor to depose that, to the best of its knowledge, all sub-contractors had been paid – where sub-contractor delivered a payment claim together with a statutory declaration in the prescribed form with the addition “other than those owed variations, payable by the head contractor” – where applicant submits that no reference date for the making of a payment claim arose as the declaration was not in the required form – whether the contractual condition is effective to exclude the sub-contractor's statutory entitlement to make a progress claim under the Act

Building and Construction Industry Payments Act 2004 (Qld), ss 4, 16, 99

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13(7), 13 (9)

Subcontractors' Charges Act 1974 (Qld), s 5

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 1; [2012] QSC 388, cited

De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd; Traffic Technologies Traffic Hire Pty Ltd v Build1 (Qld) Pty Ltd [2010] QSC 279, cited

HM Hire Pty Ltd v National Plant and Equipment Pty Ltd [2014] 2 Qd R 44; [2013] QSC 274, cited

John Goss Projects v Leighton Contractors (2006) 66 NSWLR 707; [2006] NSWSC 798, cited

John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd [2012] 2 Qd R 435; [2012] QCA 150, cited

Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd [2014] QSC 293, considered

McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd [2013] QSC 269, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 022, cited
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397, cited
State of Queensland v T & M Buckley Pty Ltd [2012] QSC 265, considered

COUNSEL: P R Franco QC and M H Martinez for the applicant
 D P O'Brien QC and L M Campbell for the first respondent

SOLICITORS: Holding Redlich for the applicant
 McInnes Wilson Lawyers for the first respondent

- [1] The applicant (BRB) and the first respondent (AWX) are parties to a construction contract by which AWX agreed to construct a camp and accommodation village at an LNG processing facility. Subject to certain conditions, AWX is entitled to make a progress claim on the 28th of each month. One of those conditions is compliance with cl 14.10 which provides that:
- “The Subcontractor must deliver to the Contractor’s Representative a completed and signed statutory declaration in the form set out in Schedule 3, at least 2 working days prior to the time when, subject to the requirements of clause 14.1(a) to (d), each claim for payment may be made pursuant to clause 14.1.”
- [2] Paragraph 5 of the prescribed statutory declaration requires the deponent to declare that:
- “To the best of my knowledge all sub-contractors and suppliers who have at any time been employed by the Subcontractor for work under the Subcontract have as at the date of this declaration been paid all moneys due and payable to them in respect of their employment in relation to that work.”
- [3] AWX delivered a payment claim together with a completed and signed statutory declaration in the required form, but added the following notation at the end of paragraph 5:
- “other than those owed variations, payable by the head contractor.”
- [4] BRB contested the payment claim, contending that it had not been made from a valid reference date, and so was not a valid payment claim under the Act. The matter proceeded to an adjudication. The adjudicator awarded AWX \$3,706,601.88 including GST. Relevantly, the adjudicator decided that the contract provided for the working out of a reference date. By reason of s 99 of the *Building and Construction Industry Payments Act 2004* (Qld), the contractual precondition did not affect a reference date arising for the purpose of making a payment claim under the Act.

- [5] BRB seeks a declaration that the adjudication determination is void for jurisdictional error, and an injunction restraining AWX from giving effect to it. The essence of BRB's case about jurisdictional error is that no reference date for the making of a payment claim under the Act had arisen. A contractual precondition to a reference date arising under the contract, namely the provision of a statutory declaration in the form provided for under the construction contract, was not complied with by AWX.
- [6] BRB identifies the key issue as being whether the parties' agreement that an entitlement to make a progress claim only arises after delivery of the statutory declaration is contrary to the Act.

The parties' essential contentions

- [7] AWX argues that the contractual precondition of providing a statutory declaration in the form provided for under the construction contract unduly restricts the making of statutory payment claims under the Act and cuts across, rather than furthers, the objects and purpose of the Act. That precondition is said to lack utility and have a stifling effect on the making of a payment claim under the Act.
- [8] According to AWX, the basic purpose of the Act is to provide a statutory right to make a progress payment under a construction contract and to provide a mechanism for the prompt payment of an adjudicated amount. The purpose of the Act is to ensure on-going cash-flow between the contractor claimant and the other party to the construction contract. Creditors of the contractor, including sub-contractors, may incidentally benefit from the ongoing cash-flow, however the Act is not directly concerned with the relationships between a party to the relevant construction contract and third parties (including parties up or down the construction claim).
- [9] By contrast, BRB contends that the Act is concerned with protecting the position of third parties down the construction chain, such as sub-contractors. It argues that it would encourage payment to these sub-contractors if parties had freedom to agree that a contractor had no entitlement to make a progress payment claim until it had paid undisputed amounts due to its own sub-contractors.
- [10] Next, AWX argues that the consequences of non-compliance with the statutory declaration precondition are draconian. Unless a statutory declaration is provided in exactly the form required under the contract, no statutory payment claim could ever be made. A party in AWX's position would be prevented from making a payment claim under the Act if it owed any money to one of its sub-contractors, even a tiny amount.
- [11] BRB responds that the contractual condition is not onerous. It only requires the contractor to declare that, to the best of its knowledge, all sub-contractors have been paid as at the date of the declaration all moneys due and payable to them. Paragraph 8 of the required form provides a carve-out from this declaration in respect of certain matters in dispute. As a result, the contractor is obliged to do no more than declare that sub-contractors have been paid all *undisputed* amounts owing to them, to the best of the deponent's knowledge. BRB also argues that cl 14.10 does not, in terms, require strict or exact compliance with the form because the contract should be given a pragmatic and commercial construction.

A failure to dot an “i” would not mean that AWX had not “complied with clause 14.10” within the meaning of the contract.

- [12] Next, AWX argues that the requirement that a compliant statutory declaration be provided in order for a reference date to arise is of no relevant utility. BRB has no contractual relations with, or liability to, any of AWX’s sub-contractors. The status of relations between AWX and the sub-contractors has no bearing upon BRB’s indebtedness to AWX for the work AWX has undertaken under the construction contract or the assessment of any payment claim made under the Act. The statements in the declaration do not facilitate the statutory entitlement to a progress payment or the assessment of a payment claim by BRB under the construction contract. This is not a case in which there is a direct nexus between the required statements in the declaration and the contents of the payment claim.
- [13] BRB contends, however, that the required declaration has utility in informing it about the position of sub-contractors working on the project.
- [14] In summary, AWX’s case is that the precondition of providing a statutory declaration:
- impedes rather than further the objects of the Act;
 - is unduly onerous and the consequences of non-compliance are disproportionate and extreme; and
 - has no utility or relevance to the payment claim or its assessment.
- [15] BRB’s essential case is that whilst the contractual precondition may, in some situations, impede essential cash-flow to a contractor, on balance, the practical requirement to pay sub-contractors and to declare that they have been paid, encourages such third parties to be paid and thereby facilitates an important objective of the Act. The Act is said to be concerned with protecting the position of smaller sub-contractors down the contractual chain. If a contractor is unable to pay undisputed amounts due to its sub-contractors, then it would be insolvent, and BRB observes that it would not assist the sub-contractors for the principal to pay an insolvent contractor. BRB argues that in such a situation, the sub-contractors’ rights are best protected by serving on the principal a notice of charge under the *Subcontractors Charges Act 1974* (Qld).

Does the condition impede, rather than facilitate, the objects of the Act?

- [16] The resolution of this question depends on the identification of the objects of the Act, and an assessment of whether, on balance, the condition impedes them.
- [17] BRB’s case is that the Act is largely concerned with protecting smaller sub-contractors down the chain, and that a statutory declaration provision of the kind under scrutiny is a “pragmatic and commercial way to achieve this end”. It provides a party in AWX’s position with a strong incentive to pay sub-contractors undisputed amounts owing to them.

- [18] Whilst conceding that the provision may be said to impede the operation of the Act by stopping cash-flow in a case such as this, BRB argues that it also facilitates the operation of the Act because, in practice, the provision requires more than a piece of paper. In substance, it requires a party to pay undisputed amounts to sub-contractors in order to provide the required statutory declaration, and the practical requirement to pay sub-contractors is said to encourage contractors to keep cash flowing down the chain to sub-contractors. On balance, the provision is said to do more to facilitate, than to impede, the objects of the Act.
- [19] The objects of the Act have been stated elsewhere.¹ The Act provides a statutory mechanism for the recovery of progress payments for the carrying out of “construction work”. It gives a statutory entitlement to a provisional progress payment to a contractor who qualifies for that entitlement. The right to such a payment and the valuation of that right may become the subject of an adjudication process, and the adjudication decision may be enforced as a court judgment. Commercially, that outcome has an important cash-flow effect.² The Act provides a speedy means of ensuring cash-flow to a party from the party with which it contracts.³
- [20] The Act confers an entitlement upon *a party to a construction contract* who qualifies for that entitlement. The Act does not give any entitlement to third parties to be paid out of a progress payment, or for the progress payment to be secured for their benefit.
- [21] One of the incidental benefits of cash flowing to a contractor who has an entitlement under the Act is that money will flow to that contractor’s creditors, including any sub-contractors. But the Act does not address the position of third parties, and certainly does not single out sub-contractors for special treatment over other creditors. The Act proceeds on the basis that a contractor to whom a progress payment is made will deal with the moneys it receives in accordance with its legal obligations.
- [22] The interests of third parties are not irrelevant, in the sense that they may stand to gain from the benefit that the Act gives in providing a cash-flow to a contractor who has an entitlement under the Act. But those third parties are not the primary beneficiaries of the Act’s provisions, and the Act does not purport to regulate relations between a contractor and third parties. For example, the Act does not oblige a contractor to whom a progress payment is made in accordance with the contractor’s statutory entitlement to pay its creditors. The obligation to do so is left to the general law and commercial realities.
- [23] BRB points to certain statements made by the responsible Minister in the Second Reading Speech for the Bill which became the Act. The Minister rejected a proposed “pay when paid provision”.⁴ In doing so, he referred to “developers, big builders and all of those people who would use their might and power against the small sub-contractors” and stated that the legislation was about “protecting the small sub-contractors”. These statements recognise that small sub-contractors experience cash-flow problems and that the payment

¹ *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 [52] at 546 – 550 [66]; *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] 2 Qd R 435 at 441 [15] – 442 [19] (“*John Holland*”).

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

³ *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2014] 2 Qd R 44 at 54 [28] – 55 [29].

⁴ Hansard, Queensland Legislative Assembly (18 March 2004), 863.

to them of a progress payment in accordance with the legislation should not depend upon a bigger builder being paid. As a result, the Act provides that a “pay when paid provision” has no effect.⁵

- [24] BRB submits that these Ministerial statements are supportive of the view that the statutory declaration provision accords with the objects of the Act. I disagree. The Minister identified a core concern in enacting the legislation, which justified the rejection of a proposal from the Master Builders Association of Queensland for a “pay when paid provision”. The concern was for sub-contractors to receive progress payment under the Act. That concern might be said to extend to sub-contractors who are unable to pay some of their sub-contractors.
- [25] The Act does not condition the right to make a payment claim in accordance with its provisions upon the contractor first paying its sub-contractors or other third parties to whom it owes money. The Act does not qualify the obligation to make a progress payment to which a contractor is entitled under the Act in circumstances in which the other party to the construction contract reasonably believes the contractor is insolvent or to be on the brink of insolvency, or reasonably believes the contractor is presently unable to pay third parties. The Act provides a statutory entitlement *despite* these sort of circumstances. It may be said that the Act provides the entitlement *because* in some cases a contractor is unable to pay third parties, including sub-contractors, money that is owed to them, and requires a progress payment to do so.
- [26] The Act does not require a contractor to prove that all of its sub-contractors (or, for that matter, other creditors) have been paid. Such a requirement might be said to undermine the Act’s purpose of ensuring cash-flow to a party from the party with whom it contracts.
- [27] The position may be illustrated by an example. Contractor X has two construction contracts. One is at Mine A for Company A, and another is at Mine B for Company B. X pays its creditors on time. It expects to receive a \$1 million progress payment on 15 August from Company A, and to use that money to pay \$100,000, which will become owing to a sub-contractor on Project B on 25 August. X also expects Company B to pay it \$1 million for work which it has done on Project B, and is in a position to make a payment claim so that it will receive the \$1 million from Company B on 31 August.
- [28] Company A unexpectedly goes into administration, or for some other reason fails to pay the \$1 million which is due to be paid on 15 August. Under a contractual provision of the kind which BRB seeks to uphold, X would not be entitled to receive the \$1 million from Company B on 31 August. This is because X is unable to pay the sub-contractor on Project B. It could not pay that sub-contractor because it did not receive the \$1 million from Company A. The contractual provision in question would prevent it receiving \$1 million from Company B and paying its sub-contractor out of that money. X’s cash-flow would be disastrously affected, not only by not receiving the \$1 million owed to it by Company A, but also by the operation of the contractual provision which disentitles it to a progress payment of \$1 million from Company B.

⁵ The Act, s 16.

- [29] The purpose of the Act, and for that matter the interests of third parties such as the sub-contractor in the example which I have given, would seem to be advanced by ensuring the cash-flow to X of the progress payment which falls due on 31 August. Without it, X may face insolvency, with catastrophic consequences for it, its workforce and its creditors. A contractual provision of the kind under scrutiny in this case would have such a consequence.
- [30] The essential issue is whether the Act's objects are advanced by confining its benefits to those contractors who may be in the fortunate position of being able to pay all of its sub-contractors. Expressed differently, are the objects of the Act advanced or impeded by allowing parties to exclude what would otherwise be a statutory entitlement to a progress payment in circumstances where the contractor is unable to declare that all of its sub-contractors have been paid?
- [31] In my view, they are impeded because such a provision halts the flow of cash to a contractor who needs it, and the purpose of the Act is to ensure such a cash-flow.
- [32] While it may be said that such a provision has the beneficial effect of encouraging contractors to pay sub-contractors when they are able to do so, and thereby benefits certain third parties, the payment of third parties is not the focus of the Act. The Act's focus is on the parties to a construction contract. The principal object of the Act of ensuring cash-flow to a party which establishes a statutory entitlement to a progress payment (including those who are on the brink of insolvency) is best advanced by not enforcing contractual provisions which purport to exclude that statutory entitlement by requiring a contractor to declare, when it is unable to do so, that all of its sub-contractors have been paid.
- [33] To the extent it is appropriate to take account of the interests of third parties, rather than the parties to a construction contract, third parties who are owed money by a contractor who is entitled to a statutory progress payment would seem to be better served by facilitating cash-flow to the contractor, particularly a contractor who has fallen upon temporary hard times, than by restricting such a cash-flow. The contractual requirement to declare that, to the best of the contractor's knowledge, all sub-contractors and suppliers have been paid all moneys due and payable to them (a requirement which the legislature has not seen fit to include as a condition upon the conferral of a statutory right) may encourage contractors to pay undisputed amounts to its sub-contractors, and thereby benefit third parties. However, on balance, that benefit to third parties is outweighed by the benefit to contractors and their creditors (including sub-contractors) of the cash-flow which the Act provides to contractors who require a cash-flow to pay their creditors, stay in business and complete construction contracts.
- [34] I conclude that the relevant condition impedes rather than facilitates the objects of the Act.

BRB's reliance on the New South Wales Act

- [35] I do not consider that this conclusion is altered by the fact that the New South Wales Parliament enacted a provision that a “head contractor” which submits a payment claim must accompany it with “a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned”.⁶ Whilst both the Queensland Act and the New South Wales Act have similar objects, their provisions are not identical. The Queensland Parliament, despite amending the Queensland Act in recent years, chose not to follow New South Wales in enacting such a provision. Also, the New South Wales requirement applies to a “head contractor”, and so the New South Wales Parliament did not apparently see any advantage in imposing such a requirement upon an intermediate contractor or sub-contractor in AWX's position.
- [36] BRB submits that the fact that the New South Wales legislature chose to mandate such an approach for head contractors is a strong indication that the approach:
- (a) is not inimical or contrary to legislation such as the Queensland Act; and
 - (b) serves a good purpose consistent with the objects of such legislation.

I consider that the New South Wales provision reflects the fact that the New South Wales Parliament has made a different legislative judgment to that of the Queensland Parliament about whether such a provision impedes or facilitates the objects of the Act in the case of contracts between a principal and head contractor. The legislative judgment reached by the New South Wales Parliament in that context should not be taken as reflecting the legislative judgment taken by the Queensland Parliament in enacting different legislation and in not amending that legislation so as to adopt a provision similar to the New South Wales provision, let alone one which would extend to all construction contracts.

- [37] The Queensland Parliament may be taken to have made the legislative judgment that such a provision is unnecessary to achieve the purposes of the Act, or that such a provision is inconsistent with the purposes of the Act.
- [38] The question remains whether the Queensland Parliament has accorded the freedom to parties to a construction contract to impose such a restriction on the payment of a statutory progress payment entitlement in circumstances in which the Parliament chose not to impose such a condition as part of the statutory scheme. For the reasons already given, and for the reasons which follow, I consider that the Queensland Act does not accord parties such a freedom in respect of constraints on the payment of statutory progress payments, as distinct from progress payments to which there is a contractual entitlement.

BRB's insolvency argument

- [39] BRB argues that if a contractor were unable to pay undisputed amounts due to its sub-contractors, it would be insolvent.⁷ BRB contends that, as a general rule, it would not assist the sub-contractors for the principal to pay an insolvency contractor. Rather, the

⁶ *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(7) and (9).

⁷ It points to the fact that the statutory declaration addresses a point in time before any progress claim is made.

sub-contractors' rights would be best protected by serving on their principal a notice of charge under the *Subcontractors' Charges Act 1974 (Qld)*.⁸ In general terms, s 4 of the *Building and Construction Industry Payments Act 2004 (Qld)* permits a contractor to do so, but not also to start or continue proceedings under part 3 of that Act. In simple terms, a contractor may give a notice of claim of charge under the *Subcontractors' Charges Act 1974 (Qld)* or pursue a payment claim under the Act, but not do both.

- [40] The first limb of BRB's argument is that if a contractor were unable to pay undisputed amounts due to its sub-contractors, then it would be insolvent. In developing this argument, BRB puts to one side the scenario of a contractor's intransigent refusal to pay undisputed amounts owing to its sub-contractors. Leaving aside the case of a contractor who *chooses* not to pay sub-contractors undisputed amounts, BRB contends that if a contractor is *unable* to pay sub-contractors, then it must be insolvent. I accept that a party which has not paid all of its sub-contractors all of the money owed to them on a particular date may be insolvent. The failure to pay a sub-contractor may be an indication of insolvency. But it does not necessarily prove insolvency. In the example given above, Company X may not have the immediate *cash* resources to pay the sub-contractor, but may be able to pay the sub-contractor by immediately selling a vital piece of equipment at a fire sale price. It would avoid insolvency and be able to pay its debt, but its future would be bleak. This is the kind of situation which the Act seeks to avoid by ensuring the cash-flow of a contractor who has a statutory entitlement under the Act.
- [41] BRB's argument is that a provision which withholds payment of a statutory progress payment to a contractor, whose only outstanding debt may be a relatively small amount due to one sub-contractor, is in the best interests of its sub-contractors. I suspect that most sub-contractors would disagree and prefer to be paid out of the statutory progress payment. A provision like cl 14.10 holds up what would otherwise be payment of a statutory progress payment. This carries the risk of insolvency and the winding-up or bankruptcy of the contractor, along with others below it in the contractual chain and other creditors. It may be cold comfort to a sub-contractor in such a situation that the principal is sitting on what would otherwise have been a substantial payment. Insolvency and liquidation of the contractor, together with the termination of contracts as a result of an insolvency event, are likely to mean that whatever money is eventually paid to the contractor who is then in liquidation will be dissipated on lawyers and liquidators. I am not persuaded that withholding payment to a contractor who is suffering a temporary shortage of liquidity and who may be on the brink of insolvency is likely to assist sub-contractors. Instead, they are more likely to be assisted by a developer or head contractor paying a contractor a statutory progress payment to which it is entitled in the expectation that it will then pay its creditors.
- [42] I am also not persuaded that the sub-contractors' rights would be best protected by a payment not being made to the contractor, with the sub-contractor instead serving a notice of charge under the 1974 Act. The contractual provision of the kind under consideration means that a progress payment is not payable. Section 5 of the 1974 Act makes provision for a charge "on the money payable to the contractor". The contractual provision of the kind under scrutiny would be an answer to any claimed charge, namely that there is no

⁸ Section 4 of the *Building and Construction Industry Payments Act 2004 (Qld)* contemplates that a contractor may choose to give a notice of claim of charge under the *Subcontractors' Charges Act 1974 (Qld)* in relation to construction work or related goods and services, subject to that construction contract.

money payable by the principal to the contractor. Rather than a sub-contractor being embroiled in arguments about the effect of any notice given by it under the 1974 Act, the interests of a sub-contractor would appear to be better served by the party with which it has a contract and which owes it money being paid, leaving the sub-contractor to negotiate suitable arrangements for payment and to pursue legal proceedings if they are not.

- [43] Insofar as the purpose of the Act in ensuring the cash-flow of contractors incidentally benefits third parties, the interests of those parties would seem to be best assisted by not giving effect to contractual provisions which purport to allow a principal to withhold payment of what would otherwise be a progress payment to which the contractor is entitled under the Act. In the case of a contractor who experiences a temporary loss of liquidity, and whose solvency may be in doubt, the Act seeks to avoid, if possible, such a contractor being placed into liquidation, with potentially disastrous consequences for the contractor, its employees and its creditors.
- [44] I acknowledge the risk that a truly insolvent company which receives a progress payment may not be able to satisfy the debts owed to all of its creditors, including sub-contractors. The payment made by the principal or head contractor may end up in the hands of certain creditors, including secured creditors, rather than sub-contractors. However, the risk of insolvency is a risk which the legislation shifts to the principal.⁹ The risk that some creditors, but not certain sub-contractors, will be paid out of a progress payment is a risk which the legislature chose not to address. It left the regulation of a contractor's relations with third parties to other laws.
- [45] It is not always obvious that a contractor suffering a temporary lack of liquidity is insolvent and a sub-contractor may be in a poor position to make an informed judgment about whether the contractor is in fact insolvent or not. In terms of comparative risk, a sub-contractor may prefer to take its chances of being paid by a contractor who receives a progress payment rather than take the chance of ever being paid out of the money which the principal or head contractor withholds. Ultimately, if some creditors of a contractor are unfairly paid over some sub-contractors, then laws governing insolvency address that issue. Secured creditors are likely to be in a position of advantage under either scenario.
- [46] If it is appropriate to take account of the interests of third parties, including sub-contractors, in determining whether a contractual provision of the kind under scrutiny in this case impedes rather than facilitates the objects of the Act, then the position of sub-contractors is likely to be advanced by not permitting such a contractual position to exclude what would otherwise be a statutory entitlement to a progress payment. Facilitation of a contractor's cash-flow through the payment of a statutory progress payment is likely to enhance the prospects of sub-contractors being paid when they most need it. The alternative of leaving the sum in question in the hands of a principal or head contractor to await the resolution of claims (by which time the contractor may have been wound up or made bankrupt) may be of little practical assistance to a sub-contractor.

⁹ *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at 401 [40].

The circumstances in which a contractual provision will be ineffective for the purposes of the Act

- [47] Section 99(1) states that the provisions of the Act “have effect despite any provision to the contrary in any contract, agreement or arrangement”. In addition, s 99(2) provides that a provision of any contract agreement or arrangement is void to the extent to which it:
- (a) is contrary to the Act; or
 - (b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of the Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of the Act.
- [48] Provisions of this kind should be applied according to their terms and no more widely.¹⁰ In interpreting and applying the provisions of s 99, it is necessary to pay due regard to the objects of and policy underlying the Act. That said, the Act does not require the Court to “strain to find that a provision of a contract offends the Act”.¹¹
- [49] I had occasion to consider the operation of s 99 of the Act in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd*¹² and observed that in assessing the validity of a condition, a useful inquiry is whether it facilitates or impedes the purpose of the Act. That observation was not intended to place a gloss upon s 99 or to be a substitute for the words of the statute. I accept BRB’s submission that a contractual provision could not be contrary to the Act simply because it does not further the objects of the Act. In considering whether a provision of a contract is contrary to the provisions of the Act or otherwise is ineffective by reason of s 99, it is necessary to be specific about how the Act and its operation are said to be affected by the contractual provision. As I observed in *Lean Field*, 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. 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. The 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”.¹³ 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.¹⁴
- [50] If, absent a contractual provision, a contractor would have a statutory entitlement to make a claim for a progress payment under the Act, then the provision will have the effect of excluding, modifying, restricting or otherwise changing the effect of the Act. The position is otherwise where, even absent the provision, there would be no entitlement under the Act, for example, because no reference date will have arisen.

¹⁰ *John Goss Projects v Leighton Contractors* (2006) 66 NSWLR 707 at 722 [78], cited with approval in *John Holland* at 441 [14] and 443 [23].

¹¹ *Ibid.*

¹² [2014] QSC 293 at [75] – [77] (“*Lean Field*”).

¹³ *Lean Field* at [75].

¹⁴ *Ibid.*

Is the contractual provision onerous?

- [51] AWX contends that the precondition of providing the required statutory declaration is unduly onerous, and one reason for this is that the relevant statutory declaration must be given strictly in the terms provided in the form contained in Schedule 3 to the contract. Unless a statutory declaration is provided in exactly that form, then no statutory payment claim could be made. As a result, a party in its position would be prevented from making any statutory payment claim if it delivered a statutory declaration which did not use the exact words stated in the contract (even if it had paid all of its sub-contractors). It will also be prevented from making a claim under the construction contract if it owes any money to its sub-contractors, even a trivial amount to only one sub-contractor.
- [52] The clause does not, in its terms, require strict or exact compliance with the required form and the contract should be given a commercial construction. It is unlikely that the parties intended that cl 14.10 would not be complied with if there was some trivial non-compliance, for example, by the accidental omission of an inconsequential word in the preparation of the required statutory declaration. However, the clause does not expressly permit only substantial compliance or contain any qualification upon the requirement to provide a statutory declaration which includes paragraph 5 without any qualification. Whilst paragraph 8 of the form of statutory declaration permits certain matters in dispute to be excluded, the effect of the contract is to require a party in AWX's position to declare that amounts which are not in dispute have been paid. The declaration in the form required could not be completed if, for example, to the knowledge of the contractor, a sub-contractor had not been paid \$10 but had been paid the remaining \$999,990 that was payable to it.
- [53] An inability to make the required declaration may have draconian consequences. However, it does not mean that the requirement to complete the form is particularly onerous. That said, the consequences of making a false declaration are significant and where a contractor has many sub-contractors, complex arrangements with them and complicated accounting records, it is possible that a deponent may be reluctant to make a solemn declaration that, to his or her knowledge, every last cent which is due and payable to each and every sub-contractor has been paid. The declaration in paragraph 5 starts "To the best of my knowledge ...". This makes the requirement to give such a declaration less onerous than one which requires a declaration as to the actual state of matters. In fact, it could be said that a declaration in this form places a premium upon ignorance and would encourage a deponent to know as little as possible about the state of payments to sub-contractors, thereby reducing its utility. However, in circumstances in which the deponent might be expected to know about the contractor's state of accounts, I do not consider that the requirement to complete the statutory declaration is unduly onerous.

The consequences of non-compliance

- [54] AWX is on stronger ground in submitting that the consequences of non-compliance are disproportionate and extreme. For example, one can imagine a situation in which paragraph 5 of the declaration cannot be completed in an unqualified form because there is some minor amount owing to a sub-contractor. The principal may have requested that some minor works be undertaken and a sub-contractor is conveniently engaged to perform them on or about the date when the necessary statutory declaration must be delivered in

order to make a payment claim under the construction contract. For some good reason, the contractor has been unable to pay the amount in question, for example, because the sub-contractor has left the site and cannot be reached or there is some administrative reason why the \$1,000 payment cannot be processed that day. In such a case, cl 14.10 could not be complied with and there would be a severe consequence. A payment claim could not be made under the Act and the contractor would be deprived of a statutory entitlement to make a payment claim for an amount which may be vital to its cash-flow and the completion of the contract. The principal's contractual right to withhold what otherwise would have been a payment to which the contractor was entitled as a matter of statutory right would have severe consequences for the contractor and its creditors, including sub-contractors.

- [55] Subject to paragraph 8 of the declaration in relation to certain disputed matters, the relevant contractual provision requires the declaration about the payment of sub-contractors to be made without qualification, even a qualification which explains that the unpaid amount is trivial or which provides a compelling or justifiable reason as to why the amount in question (however small) has not been paid. The practical consequences of not complying with the condition are severe.

Lack of utility in terms of the Act

- [56] This is not a case in which the subject matter of the relevant statutory declaration relates directly to the proposed payment claim. It does not declare information in relation to the work undertaken by the contractor and its value. It does not relate to a matter in respect of which BRB has a liability, since BRB does not have contractual relations with, or liability to, any of AWX's sub-contractors. The status of relations between AWX and one or more of its contractors does not directly bear on BRB's indebtedness to AWX for the work AWX has undertaken under the construction contract or the assessment of any payment claim made under the Act.
- [57] A party in BRB's position may have an interest in receiving information about disputes that exist between its contractor and sub-contractors, and in ascertaining whether its contractor has paid sub-contractors all the money that is owed to them. These and similar legitimate interests in receiving information cannot be equated, however, with information which has utility in terms of the purposes of the Act. The receipt of a statutory declaration that contained paragraph 5 in an unqualified form would not be of any great utility to BRB in processing a payment claim in respect of AWX's work under the construction contract.
- [58] Any utility which it has in that regard and in thereby facilitating the assessment of a payment claim made under the Act and the valuation of the statutory right, and any benefit which such a provision has in terms of encouraging parties in the position of AWX to pay their sub-contractors if they are able to, are outweighed by the adverse consequences of non-compliance with the condition to the cash-flow of a contractor who would, absent the contractual provision, be entitled to a statutory progress payment.

Clause 14.10 excludes what would otherwise be a statutory entitlement and is contrary to the Act

- [59] Without the inclusion of cl 14.10 in the contract (and assuming compliance with other preconditions which are not in issue in this case or which would otherwise be ineffective to prevent a statutory entitlement arising), AWX would have a statutory entitlement to a progress payment. I accept AWX's argument that the consequences of non-compliance with cl 14.10 are severe. Those consequences will be disproportionate in a case in which the relevant non-compliance is trivial or where there is a reasonable justification for not being able to give a declaration in the form of paragraph 5 without qualification.
- [60] The contractual provision has no real utility in advancing the purposes of the Act. Non-compliance with the statutory declaration precondition thwarts the payment of a statutory payment claim which otherwise would be payable on or after the reference date. The withholding of such a payment affects cash flowing to a contractor and the contractor, in turn, paying its creditors, including sub-contractors. The contractual provision enables a party to withhold payment in a case in which a contractor experiences a temporary lack of liquidity or otherwise has a good reason to not pay a sub-contractor.¹⁵ Depriving such a contractor of the cash-flow required to carry on its business and complete the construction contract is inconsistent with the objectives of the Act.
- [61] The condition impedes rather than facilitates the purpose of the Act. It has little, if any, practical utility in facilitating the payment of a statutory entitlement. Its practical operation is to impede the payment of a statutory entitlement without any corresponding benefit. Any utility which the condition has in terms of facilitating payment of a statutory entitlement and advancing the objectives of the Act is outweighed by its effect in excluding what would otherwise be an entitlement to a progress payment and thereby ensuring cash-flow to the contractor.
- [62] For the purpose of the present application, I proceed on the assumption that other preconditions for the making of the relevant pay claim were satisfied or that any other conditions were unenforceable for the purposes of the Act. On that assumption, the inclusion of cl 14.10 in the contract had the effect of excluding, modifying, restricting or otherwise changing the effect of the Act which, absent cl 14.10, would have conferred an entitlement to a progress payment under the Act on the reference date that was stated or worked out under the contract. Because cl 14.10 has this effect, it is void to the extent to which it affects rights and liabilities under the Act. It may be effective in terms of contractual entitlements as between the parties, but it is ineffective to deprive AWX of what would have been a statutory entitlement to payment in the absence of cl 14.10. For these reasons, the provision is contrary to the Act. The provisions of the Act which have the effect of conferring a statutory entitlement to a progress payment have effect, despite this provision.

¹⁵ For example, for fear that to do so would constitute a preferential payment over other creditors.

AWX's alternative argument

- [63] BRB's case before the adjudicator which relied upon non-compliance with cl 14.10 was framed in terms of there being no available reference date. The thrust of the argument is to the effect that provision of a compliant declaration in terms of cl 14.10 was one of the matters which permitted a reference date to be worked out and until there was compliance with, amongst other things, cl 14.10, a reference date did not arise on the 28th of each month. I regard it as somewhat artificial to frame the issue as BRB did before the adjudicator as involving a reference date issue. The matter might be better framed as one involving the effectiveness, for the purposes of the Act, of a contractual precondition to the making of a claim for a progress payment on the date stated in the contract. However, this was the manner in which the argument was framed and I conclude that the adjudicator was correct to find that the effect of the provision was to impede what would otherwise be a statutory entitlement without providing any corresponding benefit in the context of the Act.
- [64] AWX advances an alternative argument, namely that this is not a case in which the reference date fell to be "worked out". There was a date stated in the contract for the making of payment claims, namely the 28th of each month, and, properly construed, the conditions in cl 14.1(b) and cl 14.10 did not affect the date nominated for making of a progress claim. Rather, they were directed to the validity of any payment claim. On this argument, there simply was a reference date stated in the contract and one does not have to have regard to cl 14.1(b) and cl 14.10 in order to work it out. The competing argument is that, adopting a broad view of the meaning of "worked out", the reference date is worked out according to the fulfilment of the various conditions. It is unnecessary for me to resolve this contest. If AWX is correct in its alternative argument, then the same substantial issue arises in a different context. Rather than the issue being framed in terms of a reference date, the issue is whether the payment claim which was made was a valid one or not for the purposes of the Act because of non-compliance with the provisions of cl 14.10.
- [65] The same issues which I have canvassed about the content and effect of the contractual provision arise in this context. The result is the same. The contractual provision is ineffective to prevent AWX from making a payment claim for a progress payment to which it is entitled as a matter of statutory right.
- [66] The result which I have reached is the same as that reached in *State of Queensland v T & M Buckley Pty Ltd*,¹⁶ which involved broadly similar provisions. In that case the making of a payment claim was subject to the prior receipt by the superintendent of certain information required by a clause in the contract. Justice Margaret Wilson concluded that the right to deliver a contractual claim on the date stated in the contract was conditional upon the prior delivery of the statutory declaration. The condition affected the right to deliver the contractual claim, but not the date on which it may be delivered once there is an entitlement to do so. The accrual of the stated reference date was not conditional upon the prior delivery of the statutory declaration. The conclusion that the entitlement to make a claim under the Act was not affected by the requirement to deliver the statutory declaration derived support from authorities such as *John Holland*. Her Honour found it

¹⁶ [2012] QSC 265.

unnecessary to decide whether the precondition was void under s 99, considering that the matter did not arise.

- [67] The result in *T & M Buckley* is consistent with other authorities which are to the effect that contractual preconditions on the entitlement to make a payment claim under a construction contract, or the liability to make payment under a contract, do not constrain the right to claim for payment under the Act.¹⁷ Whilst *T & M Buckley* does not rest that conclusion on s 99, I consider that s 99 of the Act operates to render such contractual preconditions ineffective for the purposes of the Act. While such provisions may be effective for the purpose of a contractual entitlement, they are ineffective to exclude what would otherwise be a statutory entitlement to a progress payment.

Other matters

- [68] It is unnecessary to address another matter raised by AWX's submissions to the effect that the statutory declaration met the requirements of cl 14.10.

Conclusion

- [69] The adjudicator had jurisdiction to determine AWX's payment claim. BRB's argument about jurisdictional error, namely that no reference date for the making of a payment claim under the Act had arisen because of non-compliance with cl 14.10, has not been established. The contractual precondition relied upon by BRB to deny AWX a progress payment under the Act was ineffective to prevent AWX from making its payment claim dated 28 January 2015 and to rely upon the reference date stated or worked out in the contract.
- [70] The contractual provision has no real utility in advancing the purpose of the Act. Its content and practical operation has the effect of depriving a contractor in AWX's position of a progress payment to which it would be entitled in the absence of that contractual provision. Such a contractual provision has the effect of excluding, modifying, restricting or otherwise changing the beneficial effect of the Act in conferring a statutory entitlement to a progress payment upon a contractor. By depriving a contractor of such a progress payment, the contractor (and, in turn, its creditors including sub-contractors) is deprived of an important cash-flow.
- [71] The purpose of the Act is to ensure cash-flow to a party which qualifies for a statutory entitlement. The limited contractual freedom which the Act confers upon parties to agree certain matters, including the working out of a reference date under the contract, does not extend to the imposition of a contractual provision of the kind under consideration. Such a condition purports to exclude what would otherwise be a statutory entitlement to a progress payment. The practical operation of such a provision prevents cash flowing to a contractor. Rather than having utility in facilitating the making, processing and determination of claims made under the Act, the contractual provision impedes the

¹⁷ *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214; *De Neeffe Signs Pty Ltd v Build1 (Qld) Pty Ltd*; *Traffic Technologies Traffic Hire Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279; *John Holland; McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269.

objects of the Act. It is inconsistent with the purpose of the Act of ensuring cash-flow to such a contractor.

- [72] Any benefits such a clause may have in encouraging a contractor to pay sub-contractors if it is able to do so before making a payment claim are outweighed by its draconian consequences in depriving a contractor (and, in turn, the contractor's creditors including sub-contractors) of essential cash-flow.
- [73] Encouraging a contractor to pay its sub-contractors, if it is able to do so, before itself making a payment claim, is desirable. But contractors who experience a temporary shortage of liquidity may be unable to pay their sub-contractors. The Act is intended to assist them to do so by providing a cash-flow from developers and head contractors for whom they have done work. A contractual provision which has the effect of stopping that cash-flow pursuant to what otherwise would be a statutory right, is contrary to the Act's purpose. Whatever benefit such a provision has in the case of contractors who are able to pay their sub-contractors is outweighed by the consequences for contractors who are not able to do so. Depriving contractors of the cash-flow which the Act is intended to ensure harms contractors. It has incidental consequences for sub-contractors, other creditors and workers in the construction industry. To the extent the interests of those third parties should be taken into account in a case such as this, their interests are better served, in general, by the contractor being paid a progress payment, than by essential cash-flow being blocked.

Orders

- [74] The orders will be:
1. The application be dismissed.
 2. The Registrar pay by cheque payable to the first respondent, AWX Constructions Pty Ltd, from the amount paid into the Court Suitors Fund by the applicant pursuant to an order made 22 July 2015:
 - a. the sum of \$3,935,707.39; and
 - b. interest calculated at the daily rate of \$833.95 from 24 July 2105 to the date on which the first respondent has received the money referred to in order 2(a) above.
 3. The Registrar pay by cheque payable to the applicant, BRB Modular Pty Ltd, the balance of the amount paid into the Court Suitors Fund by the applicant pursuant to an order made 22 July 2015, together with any accretions due.
 4. The applicant pay the first respondent's costs of and incidental to the application on a standard basis, excluding the costs of and incidental to the interlocutory hearing on 22 July 2015 which remain reserved.
- [75] I will hear the parties on the issue of the costs which were reserved by Bond J on 22 July 2015.