

IN THE COURT OF APPEAL

[1995] QCA 273

SUPREME COURT OF QUEENSLAND

Appeal No. 17 of 1995

Brisbane

Before      Fitzgerald P.  
              Davies J.A.  
              McPherson J.A.

[Wulguru Heights P/L v. Merritt Cairns Constructions P/L]

BETWEEN:

<u>MERRITT CAIRNS CONSTRUCTIONS PTY LTD</u>	<u>Respondent</u>
A.C.N. 056 241 402	(Plaintiff)

AND:

<u>WULGURU HEIGHTS PTY LTD</u>	<u>Appellant</u>
A.C.N. 009 917 079	(Respondent)

**REASONS FOR JUDGMENT - FITZGERALD P.**

**Judgment delivered 16/06/1995**

The circumstances giving rise to this appeal are set out in the judgment of McPherson J.A.

Subject to the respondent's reliance on cl. 46.1 of the contract, both parties proceeded from the premise that, by the combined effect of cll. 42.1 and 42.2, the appellant was obliged to pay the respondent the amount certified by the superintendent less amounts deductible under sub-cl. 42.2(a) - which is of no present relevance - and sub-cl. 42.2(b) - which, so far as presently material, is confined to "amounts which the [appellant] is entitled to deduct under clause ... 42.10"; i.e.,

for present purposes, "any money due from the [respondent] to the [appellant]". The appellant's contention, which is disputed by the respondent, is that delays by the respondent caused loss to the appellant, which it is entitled to recover from the respondent; in accordance with the contract, that dispute has been, or is to be, referred to arbitration.

No authority was cited by the appellant to support the proposition that, at least in this context, the amount of a disputed unliquidated claim is "money due". In my opinion, such a proposition is manifestly incorrect.

The appeal should be dismissed, with costs to be taxed.

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FITZGERALD P.  
DAVIES J.A.  
MCPHERSON J.A.

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**Judgment delivered 16/06/1995**

**SEPARATE REASONS FOR JUDGMENT OF FITZGERALD P., DAVIES J.A. AND  
MCPHERSON J.A., ALL CONCURRING AS TO THE ORDER MADE**

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***Appeal dismissed with costs to be taxed.***

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**CATCHWORDS:** CONTRACT - amount due and payable - deduction  
for damages for delay - construction of  
provision in the Australian Standard General  
Conditions of Contract AS2124 - meaning of  
"money due" - whether expression "money due"  
includes amounts only contingently due -  
Community Development Pty Ltd v. Engwirda  
Construction Co. (1969) 120 C.L.R. 455

**Counsel:** W. Sofronoff Q.C. with him M.R. Bland for the  
Appellant  
P.A. Keane Q.C. with him M. Daubney for the  
Respondent

**Solicitors:** Sly and Weigall, Cannan & Peterson for the

Appellant  
Deacon & Milani for the Respondent

Date of Hearing: 24/05/1995

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ACN 056 241 402

Respondent

AND:

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ACN 009 917 079

Appellant

**REASONS FOR JUDGMENT - DAVIES J.A.**

Judgment delivered the 16th day of June 1995

The facts relevant to this appeal are set out in the reasons for judgment of McPherson J.A. which I adopt. His Honour has also in those reasons either set out or summarised the relevant contractual provisions upon the construction of which this appeal turns. It is nevertheless convenient, in order to express my own reasons for agreeing with his Honour, as I do, that the appeal should be dismissed, that I set out again some of those provisions.

Clauses 42.1 and 42.2 are relevantly in the following terms:

**"42.1 Payment Claims, Payment Certificates and Time for Payment.**

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include all amounts then due to the Contractor under the Contract or for breach thereof.

Within 14 days after receipt of a claim for payment the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

If the Contractor fails to make a claim for payment, the Superintendent may nevertheless issue a payment certificate.

Within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor the amount due to the Contractor and shall with the payment provide written particulars of how the payment was calculated.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

**42.2 The Calculation of Payment.**

The amount due to the Contractor at the time for a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract or for breach of contract less -

- (a) amounts already paid under the Contract;
- (b) amounts which the Principal is entitled to deduct under Clause 42.3 or 42.10.

Where work is defective or omitted, the estimated

cost of rectifying the defect or omission shall be taken into account.

....".

The appellant's principal submission was that it was entitled to deduct damages which it claimed for delay, pursuant to cl.42.2(b), in order to ascertain the amount due under that clause and consequently under cl.42.1. Though the precise meaning of all that appears in those clauses is not completely clear, their general intention, read with cl.46, appears to be that, notwithstanding that claims and counter-claims may later be the subject of arbitration, a prima facie sum may be made payable by issue by the Superintendent of a payment certificate pursuant to cl.42.1.

It is unnecessary, for the purposes of this appeal, to decide whether the Superintendent's certificate is for the amount due or for the value of the work from which amounts coming within cl.42.2(a) or (b) are deducted; for unless the amount which the appellant seeks to deduct under cl.42.2(b) is deductible under that provision the appeal must fail.

The appellant accepts that it is not entitled to deduct the amount of its claim under cl.42.3. However it says that it is entitled to do so under cl.42.10 which provides:

**"42.10 Set Offs by the Principal.**

The Principal may deduct from moneys otherwise due to the Contractor any money due from the Contractor to the Principal and if those moneys are insufficient, the Principal can have recourse to retention moneys and, if they are insufficient, to security under the Contract."

The argument that the amount claimed by the appellant is

"moneys due" from the respondent pursuant to cl.42.10, which it is "entitled" to deduct under cl.42.2(b), has the fatal defect that the amount claimed is no more than that. It does not even have the benefit of a prima facie independent ascertainment as does the amount specified in the Superintendent's certificate. If the argument is correct it would mean that, by merely asserting a claim for an amount of damages the appellant could avoid the obligation which would otherwise arise under cl.42.1. The "moneys due" in cl.42.10 which give rise to an entitlement under cl.42.2(b) must, in my view, be more than merely an amount which the principal asserts the contractor is liable to pay.

For those reasons I agree that the appeal must be dismissed.



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BETWEEN

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ACN 056 241 402

Respondent

AND

WULGURU HEIGHTS PTY. LTD.

ACN 009 917 079

Appellant

**REASONS FOR JUDGMENT - McPHERSON J.A.**

Judgment delivered the 16th day of June 1995

The respondent is the Contractor and the appellant is the Principal under a contract made in 1993 for the construction of roadworks, drainage, sewerage and waste mains at a subdivisional development which the Principal was carrying out. In accordance with the procedure prescribed by the contract, the Contractor received monthly progress payment certificates issued by the Superintendent nominated under the contract in respect of work done by it. According to the Contractor's statement of claim the Principal paid the amount payable in the first certificate, but deducted and withheld various sums from the amounts certified in subsequent certificates. In this way a total of

\$204,577.80 was in the end left unpaid, which the Contractor claimed, together with interest, in action no. 1982 of 1994 commenced in the Supreme Court. The reason why the Principal withheld payment of those sums is that it believed there had been defective work and delays on the part of the Contractor causing loss or damage to the Principal. Both the liability of the Contractor for that loss and its amount are disputed.

The Principal applied for a stay of the action pending a reference to arbitration. The application came before Derrington J. who dismissed it. The Contractor then applied in the action for summary judgment of its claim, which was granted by Fryberg J. The Principal now appeals against both decisions.

The question before us involves the interpretation of various provisions in the Australian Standard General Conditions of Contract AS 2124. Rather than set out in full the whole of each clause in the contract, it is sufficient to summarise their effect, referring only to such parts of the clauses as are relevant and on which submissions before us were based.

Clause 42.1 provides for delivery by the Contractor to the Superintendent, at stated times, of claims for payment, supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. The claims for payment are to include "all amounts then due to the Contractor under the Contract or for breach thereof". Within a specified time after receiving such a claim the Superintendent is required to issue to both Principal and

Contractor a payment certificate stating the payment which in the opinion of the Superintendent is to be made by the Principal to the Contractor. Within a further time that is specified:

"the Principal shall pay to the Contractor the amount due to the Contractor and shall with the payment provide written particulars of how the payment was calculated."

Payment of those moneys is to be a payment on account, and not evidence of value of the work, or an admission of liability or that the work has been executed satisfactorily.

So far, one would be justified in supposing that what these provisions mean is that the Principal is bound to pay the amount certified by the Superintendent as the payment which is to be made by the Principal. That is so because cl.42.1 provides that the Principal "shall pay to the Contractor the amount due to the Contractor", and there is no means of ascertaining the amount due except by reference to the amount stated in the Superintendent's certificate. In response to that, the Principal stresses that cl.42.1 also requires the Principal to provide with its payment "written particulars of how the amount of the payment was calculated". There would, it is said, be no point in imposing that requirement if the Principal were not entitled to make deductions from the certified amount to allow for claims it may have against the Contractor, which is what the Principal was doing here when it withheld payment of the full amounts certified by the Superintendent. It was simply making deductions from the amounts certified so as to allow for its own claims against the

Contractor for damages for defective work and delay.

The Principal's submission to that effect was said to derive support from cl.42.2, which provides:

"The amount due to the Contractor at the time for a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the contract or for breach of contract less -

- (a) amounts already paid under the Contract;
- (b) amounts which the Principal is entitled to deduct under clause 42.3 or 42.10.

Where work is defective or omitted, the estimated cost of rectifying the omission shall be taken into account."

The matter of any defective work may on this occasion be passed by. Although the Principal originally made a claim for defective work, Mr Soffranoff Q.C. for the Principal acknowledged that no reliance was being placed on appeal upon damages for defective work to justify withholding of payments by the Principal. Nor is there any suggestion that the Principal's claim arose out of any omission. Its claim against the contractor was confined to damages for delay.

It was submitted that the Principal's contention that it was entitled to make deductions on account of damages for delay was supported by the presence in cl.42.2 of the heading to the clause, which is **Calculation of Payment**, and by the opening words "The amount due to the Contractor at the time for a claim for payment ...". It was pointed out that the words "the amount due to the Contractor" were the same as the words used in

cl.42.1 in describing what it is that the Principal "shall pay to the Contractor". There are, however, some obvious difficulties in construing cl.42.2 in this way. The first is that the opening words refer not to the amount due at the time payment is due to be made by the Principal but to the amount due "at the time for a claim for payment" by the Contractor. At that time the Contractor would not ordinarily or necessarily know that the Principal was about to make a claim for damages or what the precise amount of it was going to be. It is not until payment is made by the Principal that it is required by cl.42.1 to provide written particulars stating how that payment is calculated.

That is one difficulty confronting the Principal's argument. The other is that, in calculating the amount due to the Contractor at the time for a claim for payment, cl.42.2 is specific about what may be deducted. It is to be the amount then due to the Contractor "less" one or both of the two items specified in sub-cll. (a) and (b) in cl.42.2. Subclause (a) does not assist the Principal. It refers to amounts already paid under the Contract. Subclause (b) refers to amounts which the Principal is entitled to deduct under cll. 42.3 or 42.10.

Clause 42.3 is concerned with retention moneys. The Principal is entitled to deduct "from moneys otherwise due to the Contractor" specified percentages of retention moneys. The percentages are those (if any) that are specified in the Annexure to the contract, so that they can be readily

identified. Clause 42.10, which is headed **Set Offs by the Principal**, provides as follows:

"The Principal may deduct from moneys otherwise due to the Contractor any money due from the Contractor to the Principal and if those moneys are insufficient, the Principal can have recourse to retention moneys and, if they are insufficient, to security under the Contract."

There, says the Principal, is the source of its right to make deductions from the amount certified as due to the Contractor and payable by the Principal under cl.42.1; its claims for damages for delay were therefore capable of being deducted under the authority conferred by cl.42.10.

In passing on that submission, it is necessary to put on one side any difficulties about setting off an unliquidated claim against a liquidated sum. When read in conjunction with the other clauses already mentioned, cl.42.10 can be seen to incorporate its own solution to problems of that kind. The deduction which the Principal is authorised by cl.42.10 to make is a deduction "of any money due from the Contractor to the Principal". The expression "money due" is not apt to describe a claim which, as regards liability, has not yet been determined, and, as regards quantum, has not yet been ascertained. The Principal's claim for damages for delay is an assertion of a liability which at present is entirely contingent in character.

The word "due", when used in reference to a debt or amount of money, is susceptible of more than one shade of meaning. It is possible for it to refer to a sum presently payable, or owing but not yet payable. Which of these meanings it bears depends

on the context in which it appears. See *ex parte Kemp, Re Fastnedge* (1874) L.R. 9 Ch. App. 383, 387. However, as the decision in that and other cases show, it does not, without more, include an amount that is only contingently due; that is, a liability of which it cannot at present be predicated that there will in the future ever be any amount payable at all: cf. *Community Development Pty. Ltd. v. Engwirda Construction Co.* (1969) 120 C.L.R. 455, 439.

That an amount only contingently due is not intended to be included in the expression "money due" from the Contractor in cl.42.10 is, moreover, supported by the fact that what cl.42.2(b) speaks of are amounts which the Principal is "entitled" to deduct under cl.42.10. Until judgment is given in a money sum, or there is agreement or an award of the amount being claimed as damages for delay, it cannot be said that the Principal is "entitled" to deduct any money in respect of that claim. Both its title to the money and its right to deduct it remain in dispute. Clause 46.1 lays down a procedure for submission to arbitration of disputes between the parties that arise out of the contract. It ends with the following provision:

"Notwithstanding the existence of a dispute, each party shall continue to perform the contract. In particular, the Contractor shall continue with the work, and the Principal shall continue to comply with clause 42.1".

Clause 42.1 is, it will be recalled, the provision which requires that the Principal "shall pay to the Contractor the

amount due to the Contractor" within a specified number of days after the Superintendent has issued a payment certificate.

Taken together, these considerations show that the Principal is not entitled to avoid or defer its obligation under cl.42.1 to pay the amount certified by the Superintendent by asserting a set-off or cross-claim for damages for delay on the part of the Contractor. The Principal's remedy, if in the end its claim for damages is vindicated, is to obtain an order under the final provisions of cl.42.2, which authorises the arbitrator to order repayment with interest of an amount which has been overpaid, whether pursuant to a Superintendent's certificate or otherwise. No doubt that is a reason why the contract provides for a retention sum or for security for performance by the Contractor.

In respect of contracts containing provisions in the same or substantially the same terms as these standard General Conditions of Contract, a similar conclusion has been reached in a number of decisions in the Supreme Court; in particular by Dowsett J. in *Graham Allen Earthmoving Pty. Ltd. v. Woodwark Bay Investment Corporation Limited* (No. 4304/1988; Dec. 15, 1988), which was followed by Williams J. in *Thiess Constructions Pty. Ltd. v. Pavements & Excavations Pty. Ltd.* (No. 3709/1989; Feb. 2, 1990), and by Thomas J. in *McMahon Constructions Pty. Ltd. v. Lynch Mining Limited* (No. 81/1991; Feb. 27, 1991) in affirming a decision of Master White (as she then was), as well as on yet another occasion by Master White in 1991. Derrington



J. followed that line of authority in the present case. We think his Honour was correct in doing so.

The appeal should be dismissed with costs.