

IN THE COURT OF APPEAL

[1996] QCA 086

SUPREME COURT OF QUEENSLAND

Appeal No. 144 of 1995

Brisbane

Before Fitzgerald P.
 McPherson J.A.
 Helman J.

[Blue Chip P/L v. Concrete Constructions Group P/L]

BETWEEN:

BLUE CHIP PTY LTD
(ACN 010 748 302)

(Respondent)

Appellant

AND:

CONCRETE CONSTRUCTIONS GROUP PTY LTD
(ACN 008 390 074)

(Applicant)

Respondent

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 02/04/1996

The circumstances giving rise to this appeal are set out in the reasons for judgment of the other members of the Court.

In accordance with the principal's instructions that it did not wish at that time to deduct liquidated damages for the contractor's delay in practical completion, on 15 December 1994 the superintendent issued the contractor with a payment certificate for \$887,304.00, accompanied by a letter stating that the principal retained its right to all liquidated damages due. Assuming that the contractor then had no entitlement to an extension of time, the liquidated damages would have totalled \$630,000.00; 126 days at \$5,000.00 per day.

By 28 December 1994, when progress certificate no. 16 fell due for payment, the liquidated damages claimed by the principal had increased to \$770,000.00; 154 days at \$5,000.00. The principal deducted that sum and paid the contractor only \$117,304.00 in respect of certificate no. 16. Its sole claim to make this reduced payment was that such a course was authorised by the fourth paragraph of cl. 42.1 of the General Conditions of Contract. It should be noted at this point that when certificate no. 16 had been issued on 15 December, the contractor had been warned that the principal reserved its right to deduct the liquidated damages from the certificate “in the event that the principal determines such a deduction is appropriate”. Obviously, that was the conclusion which the principal had reached by 28 December when it deducted the liquidated damages from the certificate amount.

The argument for the principal was based on the introductory words to the fourth paragraph of General Condition 42.1 and, read by reference only to that clause, they provide a foundation for the principal’s submission. At its simplest, the principal claims that its obligation to make payment under that paragraph is subject to any amount which it is entitled to be paid by the contractor. However, in my opinion, that misses the point, at least where liquidated damages for late completion are the basis upon which the principal seeks to withhold payment.

The fourth paragraph of General Condition 42.1 must be taken with the remainder of that clause. What is certified is intended to be paid. While the third paragraph is unlikely to have extensive practical operation, the first paragraph provides for claims by the contractor, with supporting information, while the second paragraph requires the superintendent not only to assess the contractor's entitlement from the principal for the work done, but a variety of other amounts due from either principal to contractor and/or due from contractor to the principal. The payment certificate accounts for all these amounts, including any claim by the principal for liquidated damages for delay in practical completion if such a claim is made, and then certifies the amount to be paid whether by principal to contractor or contractor to principal. That is the payment for which the fourth paragraph of General Condition 42.1 provides, and the introductory words to that paragraph relied on by the principal lack the strength for the task to which it seeks to assign them. Their concern, primarily at least, is with matters of little, if any, direct relevance to the payment of certificates, either by whom, to whom or in what amount payment is to be made. Indeed, it is a curious effect to give to a phrase such as "subject to the provisions of the Contract" that it renders the material clause subject to a provision which the contract does not contain.

I agree with the other members of the Court that the appeal should be dismissed with costs to be taxed.

JOINT REASONS FOR JUDGMENT - McPHERSON J.A. & HELMAN J.

Judgment delivered the 2nd day of April 1996

Blue Chip Pty. Ltd., which is the appellant in this Court, engaged the respondent Concrete Constructions Pty. Ltd. to carry out the work of constructing an apartment building

in Brisbane. The written contract, under which the appellant is designated the principal and the respondent as the builder or contractor, is a lump sum contract incorporating standard General Conditions of Contract identified as AS 2124-1992 as well as other terms and conditions.

Clause 35.6 of the General Conditions is in the following form:

"Liquidated Damages for Delay in Reaching Practical Completion

If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure for every day after the Date of Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.

If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period up to and including the new Date for Practical Completion."

By an annexure to the General Conditions, the amount of liquidated damages under cl.35.6 was fixed as \$5,000 per day. The annexure also specified the date for Practical Completion under cl.35.2 as 48 weeks from date of acceptance of tender.

There were delays in construction of the building which, in the course of time, overran the Practical Completion date. The appellant principal was aware of the delay and, by letter dated 14 December 1994, was reminded by the contract superintendent (which was a firm called DDB Architects) that the date for Practical Completion was 27 July 1994; that the number of days to which liquidated damages applied was 126 days; and that the amount was \$5,000 per day. The total amount of such liquidated damages claimable by the principal was therefore \$630,000, which was also set out in the letter.

At the time the superintendent wrote that letter, a progress claim no.16 totalling \$887,304 for work completed by the contractor up to 30 November 1994 had been received.

The balance due after deducting the sum of \$630,00 on account of liquidated damages was \$257,304, which was another matter of which the superintendent's letter informed the principal. The letter went on to ask that the principal advise in writing by 15 December 1994 if it wished the liquidated damages amount to be deducted from the certificate for payment which the superintendent was about to issue in respect of progress claim no. 16.

For reasons which no doubt seemed good to it, the principal did not wish that course to be taken. Accordingly, by letter dated 15 December 1994, solicitors for the principal wrote to the superintendent advising that the principal "does not request you as Superintendent to deduct from the payment certificate due to issue today any sum by way of liquidated damages which have accrued under the contract to date". The letter went on to request the superintendent to issue a letter, to accompany the progress certificate, addressed to the contractor and notifying it that the principal reserved its right to deduct the amount of the liquidated damages from the amount of the payment certificate "in the event that the principal determines such a deduction is appropriate" under the provisions of the contract on the due date for payment.

The superintendent did as instructed. On 15 December 1994, DDB Architects forwarded to the contractor a payment certificate no.16 certifying an amount due to the contractor of \$887,304. They also notified the contractor of the principal's direction that it claimed the right to all liquidated damages due. Subsequently, the principal sent another letter dated 28 December 1994 reminding the contractor of the earlier reservation of its right to deduct liquidated damages, and enclosing a further certificate from the superintendent that the number of days since practical completion date had increased to 154 days. On that footing, the principal claimed to be entitled to deduct \$770,000 from the amount of \$887,304

due for payment under certificate no.16. A cheque in favour of the contractor for the balance of \$117,304 was enclosed.

The contractor did not accept this action by the principal. It gave a written notice to the principal that its failure to pay the full amount certified was a substantial breach of the General Conditions and required the principal to show cause why the contractor should not terminate the contract under cl.44.9 of those General Conditions. The principal responded with a notice of its own dated 2 February 1995, in which it sought to answer the contractor's notice on the ground that under the contract it possessed the power it had claimed to reserve the right to deduct the liquidated damages amount from the sum of \$887,304 certified by the superintendent on 15 December 1994 for payment to the contractor.

Apart from cl.35.6 which has been mentioned, the dispute turns on the provisions of cl.42.1 of the General Conditions. So far as material, it is in the following form:

"42.1 Payment Claims, Certificates, Calculations and Time for Payment

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 the value of work carried out by the Contractor in the performance of the Contract so that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged 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 amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. 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. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract

including but not limited to any amount due or to be credited under any provision of the Contract.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, 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 or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable."

The clause then proceeds to deal with payment for unfixed plant and materials, which is not a matter in issue here.

It will be seen that by the fourth paragraph of cl.42.1 the principal is required to pay to the contractor (... shall pay to the contractor ...) " ... an amount not less than the amount shown in the certificate as due to the contractor ...", and it was obliged to make that payment within 28 days after receipt by the superintendent of the claim for payment, or within 14 days of issue of the payment certificate. Certificate no. 16 in the present case issued on 15 December 1995. On any view, therefore, the amount certified of \$887,304 was payable by 29 December 1994, whereas the principal paid only \$117,304 within that time. On the face of it, the principal was in breach of cl.42.1

The principal's response is to stress the qualifying words "Subject to the provisions of the Contract ..." by which the fourth paragraph of cl.42.1 is introduced. Armed with that qualification, the principal then resorts to cl.35.6. As has been observed, it is the clause

which provides that the contractor is to be indebted to the principal for liquidated damages at the daily rate specified in the annexure. The second paragraph of cl.35.6 proceeds to add that "if, after the contractor has paid or the principal has deducted liquidated damages, the time for practical completion is extended", then the principal must forthwith repay to the Contractor any liquidated damages paid or deducted in the period up to the new date for practical completion.

The principal next seizes on the words "the principal has deducted liquidated damages" in cl.42.1 in order to found the following argument. There is no express provision in the General Conditions authorising the principal to deduct liquidated damages. On the contrary, the only provision authorising such a deduction is that which appears in the second paragraph of cl.42.1. What it does is to require the superintendent (not the principal) to allow in any certificate issued pursuant to cl.42.1, or in any final certificate, amounts due from the contractor to the principal. Because of this, there is, it is said, nothing in the contract on which the quoted words can operate. It follows, so the principal contends, that the appropriate words are to be supplied by implying into the contract a power on the part of the principal to make a deduction for liquidated damages from the amount certified to be due under a progress payment certificate, which, it is to be assumed, is exercisable at any time before it pays the amount of that certificate.

A series of considerations, six in all, was advanced by Mr Gore Q.C. for making the implication contended for. The first was that, without it, the power to deduct liquidated damages would be restricted to a deduction by the superintendent under the authority conferred by cl.42.1, which it was contended was quite "inapposite" to the power which by cl.35.6 the principal is assumed to have. In consequence, the quoted words in the second paragraph of cl.35.6 would be deprived of all meaning or effect. The second consideration

focused on the case where the superintendent failed to issue a certificate within the time specified, in which event the principal is required by cl.42.1 to pay the amount of the contractor's claim. The third matter relied on was that, under the first paragraph of cl.35.6, the amount of liquidated damages constitutes a debt owing by contractor to principal. The fourth that by cl.42.10 the principal is expressly authorised, from money due to the contract, to deduct any money due from the contractor to the principal "otherwise than under the contract". The fifth was that liquidated damages accrue on a daily basis, so that more will or may have accrued and be owing 28 days after receipt of the progress claim than at the date of the superintendent's certificate, thus leaving some days of delay unaccounted for. Finally, it was said that the contractor was in any event adequately protected under the contract: it has a contractual right to apply for an extension of time, as well as to insist on repayment of any sum overpaid; and a right to refer any dispute for resolution under the provisions of cl.47.

The principal's submissions are not without a degree of cogency. It is possible, however, to discover an answer, or at least a partial answer, to most of them in the fact that the process involved is one of making, certifying and paying progress claims. Such claims and payments are, in building contracts in the common form, always intended to be provisional only. See *Hudson's Building Contracts* (11th ed.), vol. 1 §§ 6.186-6.189. That is to say, they await the day when a final certificate issues, in which the ultimate indebtedness by one party to the other is ascertained and fixed. Before that stage is reached, it is generally correct to say that no payment is capable of finally determining the rights of the parties with respect to matters in dispute between them. So much is expressly recognised in this instance by cl.42.1, providing as it does at the end of the fourth paragraph of that clause that a payment made pursuant to it does not prejudice the right of either party under cl.47 to dispute whether the amount so paid is the amount properly due and payable. If the dispute is determined

under cl.47, a liability then attaches to one party or the other to pay the difference between the amount already paid and the amount that was properly due and payable.

Most of the considerations relied on by the appellant are capable of being accommodated by keeping firmly in mind that the character of the payments with respect to which problems are said to arise are only provisional. That is so in the case of the second, third, fifth and sixth of those considerations. The fourth, which concerns the principal's power under cl.42.10 to deduct from what is owing to the contractor money that is due to the principal "otherwise than under the contract" appears, with respect, to reinforce the contractor's argument in this case. It is a specific provision catering expressly for a liability arising beyond or outside the contract, about which the superintendent may fairly be assumed to know nothing, and concerning which he is given no power of determination under the contract. If cl.42.10 is properly to be regarded as conferring authority to deduct such a sum from the amount of a certified claim, then it is understandable that an express provision to that effect should have been inserted in the contract. It says nothing about the right claimed by the principal to make a deduction which the second paragraph of cl.42.1 expressly requires to be allowed for by the superintendent in calculating the amount of a progress payment.

In the end, the real obstacle to implying the term contended for by the principal is that, judged by any objective standard, it is not necessary in order to give effect to the intention of the parties or to make the contract workable. It is true that, to return to the first consideration advanced, cl. 35.6 speaks of the principal deducting liquidated damages, whereas by cl.42.1 it is the superintendent that is required to allow for an amount of liquidated damages in the certificate of payment. But it is by no means impossible to view such a deduction as made by the principal if it is made by the superintendent at the insistence of the principal. Despite the fact that cl.35.6 describes the contractor as being "indebted" to

the principal for liquidated damages for delays beyond the date of practical completion, it cannot be doubted that it is for the principal to decide if he wishes to assert a claim to any such damages and to insist they are deducted from the amount of each progress payment as calculated and certified by the superintendent. If he does not, liquidated damages will not be deducted, if at all, until a later progress claim, or the final claim, is made by the contractor. It does considerably less violence to the words of cl.35.6 and cl.42.1 to read the contract in this way than to make the implication contended for by the principal.

The way in which the implied term is formulated is that "the principal may deduct liquidated damages from money due to the contractor". Such a term would be directly opposed to the express provision in the fourth paragraph of cl.42.1 requiring the principal to pay the contractor "an amount not less than the amount shown in the certificate as due to the contractor ...". It would also require the words "subject to the provisions of the contract ..." to be read as referring to implied as well as express provisions of the contract. Although that is not an impossible interpretation, it is not one which any ordinary reader of the contract would consider so obvious as to be taken for granted. In a contract which, like this, contains extensive and detailed provisions regulating the rights of the parties, the process of implying terms is not something to be undertaken except where the need or the context compels it. That is especially so in a matter like progress payments, which are ordinarily critical to the survival of the contractor and so to the completion of the project. If not paid as he goes, on a substantial project like this, the contractor will soon be forced to stop work. His express right to payments certified by the superintendent should not be qualified by discovering hidden meanings extricated from half expressed reservations in other parts of the document.

In our view the term contended for by the appellant is not to be implied in the General Conditions of contract in this case. It follows that the appeal fails and should be dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 144 of 1995

Brisbane

[Blue Chip Pty. Ltd. v. Concrete Constructions Group Pty. Ltd.]

BETWEEN

BLUE CHIP PTY. LTD.

(Respondent)

Appellant

AND

CONCRETE CONSTRUCTIONS GROUP PTY. LTD.

(Applicant)

Respondent

Fitzgerald P.
McPherson J.A.
Helman J.

Judgment delivered 02/04/96

Separate reasons by Fitzgerald P., concurring in the order proposed in the joint reasons for judgment by McPherson J.A. and Helman J.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS **BUILDING CONTRACT - Implied terms - Express right to payments certified by the superintendent should not be qualified by discovering hidden meanings extricated from half-expressed reservations in the other parts of the document.**

Counsel: D. Gore Q.C., for the appellant

 R. Hold S.C. for the respondent

Solicitors: Stubbs Barbeler Grant for the appellants

 Corrs Chambers Westgarth for the respondent

Hearing Date: 8 March 1996