SUPREME COURT OF QUEENSLAND

CITATION:	*Precept Services Pty Ltd v Concrete Equipment Australia (Trading) Pty Ltd & Anor* [2007] QSC 339
PARTIES:	**PRECEPT SERVICES PTY LTD ACN 083 675 709** (plaintiff/respondent) v **CONCRETE EQUIPMENT AUSTRALIA (TRADING) PTY LTD ACN 075 705 538** (first defendant/applicant) v **RINKER AUSTRALIA PTY LTD ACN 099 732 297** (second defendant)
FILE NO/S:	BS4026/07
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2007
JUDGE:	McMurdo J
ORDER:	**1. The plaintiff's claim of charge be modified by reducing the amount claimed to $148,340.51** **2. The sum of $119,054.53 together with accretions be paid out of court to the solicitors for the first defendant**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS' CHARGES ACT (QLD) – where claimant gave notice of claim – where notice not in approved form – where notice refers to claim for retention money – where notice otherwise in terms of claim for all money – whether notice inevitably uncertain – whether notice is against all money or retention money – whether s 5(5) of *Subcontractors' Charges Act 1974* (Qld) acts to convert claim into one against all money *Subcontractors' Charges Act 1974* (Qld), s 5(5), s 10(1), s 10(2), s 10(5), s 11, s 21, s 25 *Subcontractors' Charges Amendment Act 2002* (Qld), s 5(2) *FFE Group (Qld) Pty Ltd, Re* [1984] 1 Qd R 267, considered

Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd [2005] 1 Qd R 610, cited

COUNSEL: MD Evans for the applicant/first defendant
T Matthews for the respondent/plaintiff

SOLICITORS: McKays Solicitors for the applicant/first defendant
Sawford Voll Lawyers for the respondent/plaintiff

[1] This is an application challenging in whole or in part a notice of claim of a subcontractors' charge. The plaintiff was the subcontractor of the first defendant in relation to its construction of a concrete batching plant at Eagle Farm. The employer, as that term is used in the *Subcontractors' Charges Act 1974* (Qld), was the second defendant.

[2] The plaintiff gave the employer a notice of claim of charge on 11 April 2007. It claimed $291,768.95 of which particulars were given in an attached schedule. On the same day, the plaintiff gave a notice to the first defendant that it claimed a charge. When the plaintiff commenced these proceedings to enforce its charge, the employer promptly paid into court the sum of $267,395.04 pursuant to s 11. By its notice of payment into court, the employer said that these moneys were not retention moneys. Proceedings against the employer were then discontinued.

[3] The first defendant says that the notice given to the employer should be understood as a claim for a charge only upon any retention money payable by the employer. According to the employer's notice of payment into court and also the undisputed evidence here, none of the money in court was retention money. Accordingly, the first defendant says, no charge attaches to it and the money should be paid out to the first defendant. Alternatively, the first defendant argues that the notice to the employer was invalid because it was ambiguous as to whether it claimed only on retention money or also on any other money payable by the employer. Thirdly the first defendant points to differences between the notice it received and that sent to the employer, from which it argues that the plaintiff has failed to give to it the notice to the contractor required by s 10(1)(b).

[4] The plaintiff's notice to the employer was headed "Form 1 Version 1". Clearly this was an intended reference to a particular form which was an "approved form" under the Act. By s 10(5):

> "A notice of claim of charge may be in the approved form, but the validity of the notice is not affected by any inaccuracy or want of form if the moneys sought to be charged and the amount of the claim can be ascertained with reasonable certainty from the notice."

By s 25 the chief executive may approve forms for use under this Act. The currently approved forms[1] include two alternative Notices of Claim of Charge, numbered Form 1 and Form 1A. The approved Form 1 is headed "Notice of Claim of Charge". The approved Form 1A is headed "Notice of Claim of Charge – Retention Money Only". In the present case, the notice was headed "Notice of Claim of Charge", consistently with its self-description "Form 1".

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1 Published Gazette 21 June 2002 p 774

[5] The complication here comes from this part of the plaintiff's notice:

> "The Claimant hereby gives notice that the Claimant claims a charge in accordance with section 10 of the *Subcontractors' Charges Act 1974* on retention money that is now or will be payable by the Employer to the Contractor under the Contact."

That sentence is in terms of the approved Form 1A, not Form 1, under which the corresponding sentence does not have the word "retention". But thereafter the plaintiff's notice was in Form 1 and not Form 1A. In this notice, as in Form 1, there was a footnote after the word "money" in that first sentence which was as follows:

> "*Money* includes retention money. If retention money only is sought to be charged Form 1A should be used."

In Form 1A, the footnote after "money" in that first sentence reads:

> "If money additional to retention money is sought to be charged Form 1 should be used."

The notice also contained this sentence, again following the approved Form 1:

> "The Claimant requires the Employer to take the necessary steps to see that the money that is now or will be payable by the Employer to the Contractor is paid or secured to the Claimant."

The plaintiff's notice did not follow the approved Form 1A which is in these terms:

> "The Claimant requires the Employer to take the necessary steps to see that the retention money that is now or will be payable by the Employer to the Contractor is paid or secured to the Claimant."

[6] By s 10(1)(b) a claimant must give notice of having made the claim to the contractor. There are again alternative forms which have been approved under s 25: Form 2 and Form 2A, the latter being relevant for a charge claimed on retention money only. The plaintiff gave the first defendant a notice in Form 2, not Form 2A, and there was nothing within the text of this notice which indicated that the claim was against retention money only.

[7] The first question involves the proper interpretation of the plaintiff's notice to the employer. Was it a claim against only retention money? If it was then s 5(5) would have to be considered because the plaintiff argues that this would result in the claim being against all money, not only retention money. Alternatively, was it a claim against all money on its proper interpretation? Or is the notice inevitably uncertain as to the money sought to be charged, so that it was invalid?

[8] The first defendant seeks support from *FFE Group (Qld) Pty Ltd*[2], where McPherson J (as he then was) held invalid a notice claiming a charge "upon the money and/or retention money" then or thereafter payable. That notice was invalid because it was not possible to ascertain with reasonable certainty the money charged. As McPherson J said[3] it was important for the notice to disclose whether it was a claim in respect of retention money only, because of the relevance of that matter to the time limits under s 10, the required response of the employer under s 11 and the time for commencement of proceedings under s 15. The present notice,

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2 [1984] 1 Qd R 267

3 [1984] 1 Qd R 267 at 271

of course, is in different terms and *FFE Group* does not answer the question of its proper interpretation.

[9] I do not think that it is relevant to look at the notice given to the first defendant in interpreting the notice given to the employer. The Act does not provide for the employer to be given a copy of what is sent to the contractor. It does require that in the notice sent to the employer it be possible to ascertain with reasonable certainty "from the notice" the moneys sought to be charged.[4] It is what that notice would convey to the employer, unassisted by what had been sent to the contractor.

[10] However, it is appropriate to construe the notice not only with the benefit of the Act but also the content of the approved forms. The plaintiff's notice bears a close resemblance to Form 1. More specifically, beyond its heading as a "Form 1 Notice of Claim of Charge" there are two instances in which the text is irreconcilable with this being a claim on retention money only. The first is the footnote and the second is the expressed requirement that the employer take the necessary steps to see that "the money that is now or will be payable by the Employer to the Contractor" is paid or secured to the claimant. When read with s 10(1D)[5] and that footnote, "the money that is now or will be payable" would include but not be limited to retention money.

[11] By s 10(2), a notice of claim of charge which is not limited to retention money must be given within three months of the completion of the work required by the subcontract.[6] By s 10(3), a notice in respect of retention money only must be given within three months after the expiration of the period of maintenance provided for by the head contract. According to this notice, the plaintiff had only just completed the work required by its subcontract so that the notice, if of the kind governed by s 10(2), was within the time prescribed. Had the notice been outside that period, but within the s 10(3) period, that circumstance would have been relevant to its interpretation. But if a claimant was within time under s 10(2), there would be no apparent reason why it would limit its claim to only retention money, because there might be other money payable by the employer and indeed earlier than any retention money. So the timing of the notice is relevant, but of course not determinative.

[12] The plaintiff seeks support from what the employer did in response to its notice, which was to treat it as not limited to retention money. However the employer's conduct, assuming that its conduct might evidence its understanding of the notice, is not relevant to the present question, which is how the notice should have been understood.

[13] The tension between the reference to retention money and those other features of this notice does not mean that its meaning is hopelessly uncertain. In my conclusion, the moneys sought to be charged can be ascertained with reasonable certainty from the notice and that money is all money payable or to become payable under the head contract. It sufficiently appears that the claimant's intention was to claim a charge over all money and in terms of the approved Form 1, but that by a clerical slip, the word "retention" was added.

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4 s 10(5)

5 s 10(1D) provides: "To remove any doubt, it is declared that when a charge on money payable under a contract is allowed, the claim includes a charge on retention money"

6 *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] 1 Qd R 610

[14] Accordingly, this notice was not invalid for uncertainty and upon its proper interpretation, the notice corresponded with the notice given to the first defendant. That is sufficient to dispose of the first defendant's argument for the payment out of *all* of the moneys paid in by the contractor.

[15] It is unnecessary then to consider the effect of s 5(5), but having regard to the arguments, it is appropriate that I briefly explain my view that s 5(5) would not have saved this notice, had it claimed only retention money or had it been uncertain.

[16] Section 5 provides in part as follows:

> "(1) If an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor is entitled to –
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> (a) a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract; and
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> (b) subject to subsection (4), a charge on any security for the contractor's, or superior contractor's, contract or subcontract.
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> …
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> (5) To remove any doubt, it is declared that, for a subcontractor's claim of charge relating to retention money only -
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> (a) the charge to which the subcontractor is entitled under subsection (1)(a) is not limited to merely a charge *on* retention money; and
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> (b) the charge to which the subcontractor is entitled under subsection (1)(b) is not limited to merely a charge on any security that has been exchanged for, or is held instead of, retention money."

The arguments involved the effect of s 5(5)(a). Each accepted that the preliminary words of the subsection, particularly the expression "claim of charge *relating to* retention money only", referred to retention money under the head contract and not the subcontract. Then each argument accepted that the words "charge on retention money" within paragraph (a) also referred to retention money under the head contract. That second assumption is clearly correct, but the first is not. In my view the words "claim of charge relating to retention money only" refer to retention money under the subcontract.

[17] There are, perhaps, four reasons for that conclusion. Within the same subsection different words have been used: the apparent intention is to distinguish between the charge first referred to and the charge in paragraph (a), for otherwise the same words would have been used. Secondly, that interpretation would serve some

apparent purpose, in putting paid to any argument that a subcontractor wanting to secure retention moneys under its subcontract would be limited to retention moneys under the head contract. Thirdly, that this was the purpose was indicated by the Explanatory Notes to the relevant Bill[7] by which s 5(5) was inserted.[8] According to the Note:

> "Subsection 5(5) is inserted to clarify that a subcontractor's charge *for* retention money only is not limited to a charge *on* retention money, and that a subcontractor's charge upon security is not limited to a charge on security held in place of retention money." (emphasis added)

Fourthly, upon the premise that the expression "claim of charge relating to retention money only" refers to retention money under the head contract, neither party was able to explain a logical purpose or effect of paragraph (a) of s 5(5).

[18] The plaintiff's argument was that a claim of charge *on* retention money only should nevertheless act as a claim of charge on all money. As was submitted for the first defendant, that would cause considerable complication in the operation of other provisions. In particular it would cause an employer difficulty in knowing how it should respond to the notice. The applicant said that the employer should be under no difficulty because it should then treat the notice as simply a claim for a charge on all money, not only retention money. And as to the different periods allowed for the giving of a notice of claim of charge by s 10(2) and s 10(3), the plaintiff said that a notice given within the s 10(2) period would charge all money, but a notice given outside that period but within the s 10(3) period would be effective to charge retention money only. That argument requires several layers of gloss to be applied to the language of the Act. And it does not serve any evident purpose, beyond the particular predicament of this subcontractor had its claim had been interpreted as one for a charge on retention money only.

[19] The first defendant's argument was that s 5(5)(a) was intended to have no effect other than by declaring "that a person who serves a claim (on) retention money only is not prevented, on the basis of some form of election, from serving a subsequent claim for moneys generally in respect of other work." That would be a logical purpose, for which it may or may not have been necessary to insert an express provision. But this is not such a provision. By s 5(5) it is declared that for a certain claim of charge, the subcontractor is to be entitled to a certain charge. It speaks of the charge the subject of that certain claim of charge, not of some other claim or charge.

[20] It follows that had I accepted the first defendant's arguments as to the meaning or uncertainty of the notice, the plaintiff's position would not have been salvaged by s 5(5).

[21] The alternative application is for an order pursuant to s 21(1) to modify the charge to reduce it by excluding certain amounts claimed in the notice of claim of charge as variations. The first defendant says that these items, if payable, are not amounts payable according to the subcontract but upon some other basis such as damages for breach of contract or as an extra-contractual remedy such as reasonable

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7 Subcontractors' Charges Amendment Bill 2001

8 By *Subcontractors' Charges Amendment Act 2002* s 5(2)

compensation for work done, thereby being outside the ambit of a subcontractor's charge: s 5(2); s 5(6).

[22] The plaintiff concedes that all but two of the items challenged were improperly within its claim of charge because they are not amounts payable according to the subcontract but are claimed on some other basis. There are two items then to be considered.

[23] The first is item number 6 which is a claim for in total $253 for an alleged variation described as "plasterer's delay pulling cables through in office". The plaintiff is an electrical subcontractor and the complaint is that because plasterers did not pull cables through the walls, the plaintiff had to do so. On its face, this is not a claim pursuant to some term of the contract and it should be excluded from the charge.

[24] The other is item number 19, for the total sum of $149.50 and described as "costs incurred due to conduits not installed when foundations were put in the water area so had to be hand dug". An affidavit on behalf of the plaintiff asserts that the plaintiff claims this amount "as a variation for the costs of additional work undertaken as a result of (the first defendant's) request". The first defendant has not demonstrated that this is an extra contractual claim and it will remain.

[25] The result is that the conceded items (totalling $118,801.53) and item 6 should be removed from the claim of charge and should be paid out with accretions to the first defendant.

[26] It will be ordered that the plaintiff's claim of charge be modified by reducing the amount claimed to $148,340.51 and that the sum of $119,054.53 together with accretions be paid out of court to the solicitors for the first defendant. I shall hear the parties as to costs.