

SUPREME COURT OF QUEENSLAND

CITATION: *Leighton Contractors v Vision Energy* [2010] QSC 353

PARTIES: **LEIGHTON CONTRACTORS PTY LTD (ACN 000 893 667)**
(applicant)
v
VISION ENERGY PTY LTD (ACN 114 305 985)
(respondent)

FILE NO/S: BS4424/10

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 17 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 7 May 2010

JUDGE: Margaret Wilson J

ORDER: **1. that the application be dismissed; and**
2. that the applicant is to pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – where the applicant subcontracted lighting and electrical installation to the respondent pursuant to a schedule of rates contract in February 2009 – substantial completion of the works in December 2009 – applicant submitted release and waiver to respondent pursuant to contract – where respondent could provide written response to the details in the release and waiver – where release and waiver was "final and binding" on both parties if respondent failed to return or respond, and to the extent it did not disagree with the details in it –where respondent submitted progress claim pursuant to *Building and Construction Industry Payments Act 2004 (Qld) s 17* – where applicant served a payment schedule – where respondent lodged an adjudication application under the *Building and Construction Industry Payments Act 2004 (Qld) s 21* – where adjudication certificate was filed in Supreme Court in May 2010 as a judgment debt pursuant to *Building and Construction Industry Payments Act 2004 (Qld) s 31(1)* – whether applicant had been released from any interim

entitlement the respondent had against it pursuant to the adjudication of the progress claim

Building and Construction Industry Payments Act 2004 (Qld)
ss 17-35, 99, 100

Building and Construction Industry Security of Payment Act 1999 (NSW), s 32

Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd
[2009] QCA 329, applied

John Holland Pty Ltd v Roads and Traffic Authority (NSW)
(2006) 66 NSWLR 624 at [33], cited

COUNSEL: BD O'Donnell QC and P Hastie for the applicant
P Dunning SC and GD Beacham for the respondent

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

- [1] **Margaret Wilson J:** The applicant ("Leighton") is the main contractor to Brisbane Airport Corporation Pty Ltd in relation to the Brisbane Airport Corporation Northern Access Road Project. It subcontracted lighting and electrical installation work for the project to the respondent ("Vision") pursuant to a schedule of rates contract dated 24 February 2009. In this proceeding Leighton seeks declaratory and injunctive relief against Vision to prevent it from relying on or enforcing an adjudication decision under the *Building and Construction Industry Payments Act 2004* ("*BCIPA*").

Adjudication decision

- [2] Vision achieved "substantial completion" within the meaning of the contract on 15 December 2009.
- [3] On 24 February 2010 Vision submitted Progress Claim 13 (received by Leighton the next day) in the sum of \$2,977,335 including GST, or \$2,706,668 excluding GST. It was for payment for work based on a later, higher schedule of rates, said to be based on variation orders numbered 1 – 50 (including new variations numbered 13 – 50), and a reassessment of its night work claim (less some back charges). The progress claim was stated to be a payment claim under s 17 of *BCIPA*.
- [4] On 10 March 2010 Leighton replied to the claim by serving a payment schedule under s 18 of *BCIPA*, stating a negative scheduled amount of (\$833,380) including GST, or (\$757,618) excluding GST.
- [5] On 23 March 2010 Vision lodged an adjudication application under s 21 of *BCIPA* in an amount less than its claim – namely, \$2,674,094 including GST, or \$2,430,995 excluding GST.

- [6] On 19 April 2010 the adjudicator determined that Vision was entitled to a progress payment of \$1,232,938.57 including GST.¹ The decision was served on Leighton on 22 April 2010.
- [7] On 5 May 2010 an adjudication certificate was issued pursuant to s 30 and of *BCIPA*. Vision filed this in the Supreme Court the next day,² pursuant to s 31(1) of *BCIPA*, which provides –

"31 Filing of adjudication certificate as judgement debt

- (1) An adjudication certificate may be filed as a judgement for a debt, and may be enforced, in a court of competent jurisdiction."

Release and waiver

- [8] Clause 36 of the contract was in these terms –

"36. RELEASE

36.1 Upon the Works reaching Substantial Completion and upon Leighton's determination of the amount to which the Contractor is then entitled Leighton shall provide the Contractor with a Release and Waiver in the form included in Annexure D completed by Leighton with the appropriate details.

36.2 Upon receipt by the Contractor of the Release and Waiver described in Clause 36.1 the Contractor shall duly execute the same and deliver it to Leighton.

36.3 If, within 10 Business Days of Leighton providing the Release and Waiver to the Contractor, the Contractor fails to:

- (a) duly execute and return the Release and Waiver to Leighton; or
- (b) provide details in writing to Leighton as to where it disagrees with the Release and Waiver;

then apart from any mathematical error and/or exceptions listed in the Release and Waiver:

- (c) the details contained in the Release and Waiver shall be final and binding on Leighton and the Contractor; and
- (d) the Contractor shall be barred from making any further claims against Leighton and Leighton shall be fully released and discharged from all claims, demands and causes of action and proceedings of every kind and nature which the Contractor has or might have had or might assert which arise out of or in connection with the Works Contract or the work under the Works Contract.

If the Contractor provides the details required by paragraph (b) above:

- (e) within the time required, then the provisions of paragraphs (c) and (d) above shall apply to the extent that the details

¹ *BCIPA* s 26.

² BS 4615/10.

provided by the Contractor do not disagree with the Release and Waiver provided by Leighton to the Contractor;

- (f) Leighton shall provide the Contractor with a written response to those details, which may be in the form of an amended Release and Waiver; and
- (g) if the Contractor:
 - (i) disagrees with Leighton's written response it shall submit a Prescribed Notice to Leighton in accordance with Clause 45.1; or
 - (ii) does not submit a Prescribed Notice to Leighton in accordance with paragraph (i) above, Leighton's written response shall be final and binding on Leighton and the Contractor."

Clause 45 was concerned with claims, and clause 46 with dispute resolution.

- [9] On 9 April 2010 Leighton sent Vision a document headed "Release and Waiver" which provided that Vision released Leighton in consideration of payment of the negative amount of (\$757,618) excluding GST. The covering letter was mistakenly dated 10 March 2010.
- [10] On 12 April 2010 Vision responded in these terms –

"Notwithstanding the invalidity of this letter Vision disagrees with the value claimed by Leightons, which is the current subject of adjudication."
- [11] On 19 April 2010 Vision sent a further letter –

"Vision is and remains willing to execute the release excluding all matters the subject of adjudication."
- [12] On 21 April 2010 Leighton provided a written response under clause 36.3(f).
- [13] On 4 May 2010 Vision gave Leighton a Prescribed Notice under clauses 36.3(g)(i) and 45.1 of the contract. It disputed what was recorded in the Release and Waiver and claimed \$2,674,094 including GST as set out in its adjudication application submissions, or in the alternative \$1,232,938.57 including GST being the amount of the adjudication decision in its favour.

The issue

- [14] In the circumstances, has Leighton been released from any interim entitlement Vision might have had against it pursuant to the adjudication of the progress claim?

This application

- [15] Leighton was obliged to pay the adjudicated amount by 30 April 2010 – that is, five business days after the adjudicator's decision was served on it.³ It filed this application on 29 April 2010.

³ *BCIPA* s 29(2).

- [16] The day before the application was heard, Vision filed an adjudication certificate in the Supreme Court, and the adjudicated amount became enforceable as a judgment debt.⁴
- [17] At the conclusion of the hearing, Vision gave an undertaking not to enforce the judgment debt prior to delivery of judgment and reasons for judgment in this application.

The Release and Waiver

- [18] The Release and Waiver Leighton sent Vision was in the form in annexure D to the contract. It provided -

"RELEASE & WAIVER

Pursuant to the Contract and in consideration of the Total Amount of Account as set out in item 1.4 below which has been or is to be paid to the Contractor, the Contractor fully releases and discharges Leighton and the Principal and their respective employees' consultants and agents from and against all claims, demands and causes of action and proceedings of every kind and nature which the Contractor may or might have had or might assert arising directly or indirectly out of the Contract or the works and/or services under the Contract or in relation to the Contract and in accordance with the terms of this Release and Waiver except for its rights (if any) with respect to the amounts (if any) set out in terms 2.3 and 3.2 below and the exceptions to this Release and Waiver set out hereunder.

Exceptions to this Release and Waiver (if any):

There are no exceptions to this Release and Waiver.

FINANCIAL STATUS

| 1. ACCOUNT DETAILS | Amount (\$) (EXC GST) | Amount (\$) (INC GST) |
|--|----------------------------------|----------------------------------|
| 1.1 Original Contract Amount | 4,572,568 | 5,029,825 |
| 1.2 Variations or other Contract adjustments | 1,076,093 | 1,183,702 |
| 1.3 Any other adjustments (eg statutory provisions) | (730,707) | (803,778) |
| 1.4 Total Amount of Account | 4,917,954 | 5,409,749 |
| | | |
| 2. PAYMENT DUE | Amount (\$) (EXC GST) | Amount (\$) (INC GST) |
| 2.1 Total Amount of Account as per 1.4 above | 4,917,954 | 5,409,749 |
| 2.2 Less previous payments | 5,675,572 | 6,243,129 |
| 2.3 Less cash retention or any other withholding (if any) which shall be held by Leighton or the Principal subsequent to this date | 0.00 | 0.00 |
| 2.4 Total payment due | (757,618) | (833,380) |
| | | |
| 3. Non cash Security and/or Retention | | AMOUNT (\$) |
| 3.1 Amount of non cash security or retention (if any) held by Leighton or the Principal due to be released at this date | | 107,637 |
| 3.2 Balance of non cash security or retention (if any) which shall be held by Leighton or the Principal subsequent to this date | | 107,637 |

TERMS OF RELEASE AND WAIVER

1. The Contractor accepts the amount set out in item 2.4 as the final payment under the Contract except for its rights (if any) with respect to the amounts (if any) set out in items 2.3 and 3.2 and the exceptions (if any) to this Release and Waiver set out on this Release and Waiver.

...

⁴ BCIPA s 31(1).

4. The Contractor hereby indemnifies Leighton and the Principal against and forever waives and relinquishes all or any claims, liens, encumbrances, levies, attachments and all other rights whether known or unknown arising directly or indirectly out of the Contract or the works and/or services under the Contract or in the [sic] relation to the Contract."

[19] The Release and Waiver was akin to a final certificate under a construction contract. It had to contain "appropriate details", and it could contain express exceptions⁵.

[20] Vision had 10 business days from receiving that document in which to give Leighton written details of where it disagreed with it.⁶ If Vision did not do so –

"...then apart from any mathematical error and/or exceptions listed in the Release and Waiver"

the provisions of paragraphs (c) and (d) of clause 36.3 applied. The exceptions referred to were those exceptions (if any) already expressed in the document when Leighton provided it to Vision. If Vision did provide written details of where it disagreed, then the provisions of paragraphs (e), (f) and (g) applied. By paragraph (e), the provisions of paragraphs (c) and (d) applied –

"...to the extent that the details provided by the Contractor [did] not disagree with the Release and Waiver provided by Leighton to the Contractor".

[21] By its letter of 19 April 2010, Vision said it was willing to execute the Release and Waiver in respect to all matters except those the subject of the adjudication. In so doing it "provide[d] details in writing to Leighton as to where it disagree[d] with the Release and Waiver" as contemplated by paragraph (b) of clause 36.3. Accordingly by paragraphs (e) and (c), the Release and Waiver became binding on both parties except in relation to the matters the subject of the adjudication pursuant to paragraph (c), and pursuant to paragraphs (e) and (d), there was a barring of claims and a corresponding release and discharge.

[22] Leighton provided Vision with a written response in accordance with paragraph (f) on 21 April 2010, and Vision gave Leighton a Prescribed Notice under paragraph (g) on 4 May 2010.

BCIPA

[23] *BCIPA* provides a procedure for the making and speedy adjudication of progress claims.⁷ If the respondent to an adjudication does not pay the claimant contractor the "adjudicated amount", the contractor may obtain an adjudication certificate, which may be filed as a judgment for a debt and enforced in a court of competent jurisdiction.⁸ The grounds on which a respondent may apply to have such a judgment set aside are limited by s 31(4), which provides –

"31 Filing of adjudication certificate as judgement debt

...

⁵ cl 36.1; 36.3; pro forma in annexure D to Works Contract between Leighton and Vision.

⁶ cl 36.3(b).

⁷ ss 7, 8, 23 – 28.

⁸ *BCIPA* ss 30 – 31.

- (4) If the respondent commences proceedings to have the judgement set aside, the respondent –
- (a) is not, in those proceedings, entitled –
 - (i) to bring any counterclaim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge the adjudicator's decision; and
 - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings."

[24] While the parties to a construction contract may not contract out of the *BCIPA*⁹, an adjudication does not finally determine their rights in the sense that a party may "claw back" progress payments it is forced to make through the adjudication process in subsequent civil proceedings.¹⁰ Section 100 provides –

"100 Effect of pt 3¹¹ on civil proceedings

- (1) Subject to section 99,¹² nothing in part 3 affects any right that a party to a construction contract –
 - (a) may have under the contract; or
 - (b) may have under part 2 in relation to the contract; or
 - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.
- (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal –
 - (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
 - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings."

[25] In *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd*¹³ Keane JA said –

"[8] ...s 100 ... ensures that the adjudication of progress claims does not prevent parties from finally resolving their entitlements *inter se* under the contract in a court or otherwise in accordance with law.....

[15] It may be accepted that the final settling of accounts between contractor and principal established under the terms of the contract may supersede the interim adjudications effected under [*BCIPA*]...

[16] It may be accepted that s 100(1)(a) of [*BCIPA*] provides that the rights conferred by [*BCIPA*] upon a party who has the benefit of an adjudication decision must ultimately yield to 'any right that a party to a construction contract may have under the contract'...."

⁹ *BCIPA* s 99.

¹⁰ *BCIPA* s 100; and see *Brodyn Pty Ltd t/as Time cost and Quality v Davenport* [2003] NSWSC 1019 per Einstein J on similar NSW legislation.

¹¹ ss 17 - 35 (procedure for recovering progress payments).

¹² By s 99 the provisions of *BCIPA* apply despite any provision to the contrary in any contract, agreement or arrangement.

¹³ [2009] QCA 329.

In *John Holland Pty Ltd v Roads and Traffic Authority (NSW)*¹⁴ McDougall J said of s 32 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (which is in similar terms to s 100 of *BCIPA*) –

"[33] ...Its place in the scheme of the Act is to reinforce the interim nature of adjudication determinations, and to provide that parties' legal rights (as decided by a court or tribunal) are given full effect notwithstanding what may have been determined by an adjudicator and what may have been done in pursuance of, or obedience to, that determination."¹⁵

Discussion

- [26] In *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd*¹⁶ an adjudicator had ordered Martinek to pay an adjudicated amount to Reed. The contract provided that the final certificate should be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations, except for unresolved issues the subject of any notice of dispute pursuant to the dispute resolution provision of the contract, served before the seventh day after the issue of the final certificate. Reed served such a notice of dispute. Martinek contended that the final certificate operated to supersede the adjudication decision. Reed contended that the final certificate gave Martinek a contractual right to payment of the amount stated in it, but that it did not produce a final settling of accounts which subsumed or superseded the adjudication decision. Reed's contention was upheld by the primary judge and the Court of Appeal. The Court of Appeal held that on the proper construction of the contract, the final certificate did not effect accord and satisfaction or mutual discharge of obligations while the issues the subject of the notice of dispute remained unresolved. As the primary judge said –

"...Once a dispute in compliance with the contract has occurred in respect of the Final Certificate it cannot be said that the Final Certificate has finality so as to bring into play the allowance provisions in s 100 of [BCIPA]. The Adjudication Decision stands until the final position has been reached between the parties."¹⁷

- [27] The Court of Appeal contrasted the contractual provisions in *John Holland Pty Ltd v Roads and Traffic Authority of NSW*.¹⁸ There the contract provided that the superintendent's final payment schedule should be conclusive evidence of the final amount owing by one party to the other until the contrary was established as a fact. In such a case the superintendent's final payment schedule would be apt to trump the effect of the adjudication decision.
- [28] The present case is perhaps unusual in that by the operation of clause 36 the parties have finally resolved all their entitlements *inter se* except those the subject of the adjudication decision.
- [29] Be that as it may, their respective rights to have those matters finally determined are not affected by the barring of claims and corresponding release and discharge pursuant to paragraph (d) of clause 36.3, because, by paragraph (e), paragraph (d) applies only to the extent Vision did not disagree with the Release and Waiver

¹⁴ (2006) 66 NSWLR 624; [2006] NSWSC 874 at [33].

¹⁵ An appeal against his Honour's decision was dismissed: [2007] NSWCA 140.

¹⁶ [2009] QCA 329.

¹⁷ [2009] QSC 328 at [30].

¹⁸ (2006) 66 NSWLR 624 .

document provided by Leighton. It is not necessary to consider whether enforcement of the judgment debt would satisfy any of the descriptions of "claims, demand and causes of action and proceedings...." in paragraph (d).

- [30] Paragraph (g) of clause 36.3 has the effect that there will be no final determination unless and until the dispute that was the subject of the adjudication decision is either resolved according to the dispute resolution procedure, or abandoned.
- [31] Until then, the adjudication decision stands.
- [32] The judgment was duly entered. Vision may enforce the judgment debt against Leighton at any time until there is a final determination of the matters the subject of the progress claim.
- [33] I will hear the parties on the form of the orders which should be made, and on costs.