

HOW EFFECTIVE ARE PRE-CONDITIONS TO REFERENCE DATES?

An analysis of the Queensland cases following BRB Modular v AWX Constructions Pty Ltd.

1. Introduction

The issue of construction contracts requiring certain conditions to be met before a reference date arises (such as the provision of a statutory declaration) has been further considered by the Supreme Court of Queensland in the recent decision of Applegarth J in BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors [2015] QSC218 (“*BRB Modular*”). This case follows the series of recent decisions by the Queensland Supreme Court involving this issue and a clear body of law has now been established.

2. Relevant Statutory Provisions

Under s.12 of the Building and Construction Industry Payments Act 2004 (Qld) (“*the Act*”) a claimant is conferred with a statutory entitlement to a progress payment “*from each reference date under a construction contract*”. Schedule 2 of the Act defines a “*reference date*” to mean:

- “(a) *a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract;*
- (b) *if the contract does not provide for the matter –*
 - (i) *the last day of the named month in which the construction work was last carried out, or the related goods and services were first supplied, under the contract; and*
 - (ii) *the last day of each latter named month”.*

It can thus be seen that the Act provides contracting parties with some freedom to agree on how a reference date is to be worked out under the contract. The question however relates to the extent of such freedom, especially given the provision set out in s.99 of the Act which reads as follows:

“99. No contracting out

- (1) *The provisions of this Act have effect despite any provision to the contrary in any contract agreement or arrangement.*
- (2) *A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it –*
 - (a) *is contrary to this Act; or*

- (b) *purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or*
- (c) *May reasonably be construed as an attempt to deter a person from taking action under this Act”.*

In order to analyse the impact of Applegarth J’s judgement it is first necessary to consider the previous cases that considered this issue.

3. Previous Cases

(a) *Simcorp Developments*

In *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC162 (“*Simcorp Developments*”) the relevant construction contract provided for a progress claim to be first made to the Superintendent and for the Superintendent to then issue a progress certificate by the 30th day of the month after receiving the claim, failing which the progress claim was deemed to be the progress certificate. The contract provision went on to provide that only after the progress claim had been made and the certificate had been received (or being deemed to have been received) would the claimant be able to make a payment claim under the Act. Douglas J held (at [25]) that the Act contemplates that the contract may contain provision for working out a period for services of a payment claim intended to be used in fixing when such a claim may be made and that therefore the provision within the contract was not inconsistent with the Act and did not contravene s.99.

(b) *John Holland*

In *John Holland Pty Limited v Coastal Dredging & Construction Pty Limited* [2012] QCA 150 (“*John Holland*”) the contract included a number of preconditions, including the requirement for a statutory declaration to be made by the subcontractor stating that it had paid its employees for any work it included in the payment claim before making a progress claim.

Fraser JA of the Queensland Supreme Court of Appeal (with whom White JA and Lyons JA agreed) held that the contractual provision contravened s.99 of the Act. His Honour emphasised that in considering whether a contractual provision contravened s.99 of the Act an analysis is required to be undertaken of the object of the Act (as set out in s.7 of the Act) and how that object is best achieved. His Honour noted that whereas the Act adopts contractual provisions concerning the amount of a progress payment (s.13(a)), the valuation of construction work (s.14), the date upon which a progress payment under a construction contract becomes payable (s.15(2)(a)), the amount held by the respondent which may be

included in a payment claim (s.17(3)(b)), the period within which a payment claim may be served (s.17(4)(a)), the time within which a payment schedule must be served if the respondent is to avoid becoming liable to pay the claimed amount (s.18(4)(b)(i)), none of those provisions bear upon the date upon which a statutory entitlement to progress payment accrues:

“Bearing in mind the statutory object and the role of s.12 and the definition of “reference date” in giving effect to that object, those provisions are incapable of justifying an implication that the date upon which a statutory entitlement to a progress payment accrues may be qualified by contractual provisions, other than those captured by the unambiguous terms of the definition of reference date” (at [19]).

His Honour considered that the effect of the respondent’s argument was that the relevant provisions of the contract had the effect of deferring the claimant’s statutory entitlement to make a monthly payment claim in accordance with the Act. Accordingly, His Honour concluded that such a provision was void because it purported to *“modify ... or otherwise change the effect of a provision of (the) Act”* (at [21]). Insofar as the Respondent relied on the decision of Simcorp Developments Fraser JA thought that the case had turned upon the construction of different contractual provisions and the application of s.17 and, in any event, Douglas J had in that case acknowledged that the consideration of any contractual provision must be examined subject to any application of s.99 of the Act.

(c) **BHW Solutions**

In BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd [2012] QSC 214 (*“BHW Solutions”*) the relevant provision of the construction contract stated that a progress claim shall contain *“a declaration in the form in Schedule 3 which shall be a precondition to payment and if not provided or incomplete or false the Contractor may withhold payment until received”*. The contract spelled out the format of the statutory declaration that the Claimant was required to provide and this included a statement to the effect that all employees, workers, subcontractors and suppliers who at any time have carried out work or supplied goods under the subcontract had been paid in full all that was owed to them by the claimant up to the date of submission of the relevant claim. The claimant’s payment claim was not accompanied by the statutory declaration set out in the contract and thus the respondent argued that the claimant was not entitled to a progress payment.

Mullins J agreed with the reasoning of Fraser JA in *John Holland* (and in particular the passage quoted in (b) above). Mullins J found that the relevant contract clause was concerned with how a progress claim was to be made under the contract and not with regulating a payment claim made under the Act. His Honour stated that there is no requirement under the Act that payment claims be accompanied by a statutory declaration and that accordingly the claimant’s claim was not invalid in the absence of such a declaration.

(d) **T&M Buckley**

In the *State of Queensland v T & M Buckley Pty Ltd* [2012] QSC 265 (“*T&M Buckley*”) the relevant clause within the construction contract stated that the times that payment claims could be made were subject to the superintendent first receiving a statutory declaration. Thus, as the claimant had not provided a statutory declaration the respondent argued that a reference date had not yet occurred and that therefore the payment claim submitted by the claimant was invalid. Wilson J concluded that the right to deliver a contractual claim on the date stated was conditional upon the prior delivery of the statutory declaration but, the claimant’s right to issue a payment claim under the Act is not conditional upon the prior delivery of a statutory declaration. Thus Wilson J held that a claimant’s entitlement to claim for payment under the Act is not constrained by any of the contractual preconditions.

(e) **Lean Field**

In *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust.) Pty Ltd & Anor* [2014] QSC 293 (“*Lean Fields*”) Applegarth J considered the validity of a contractual term that provided:

- a “reference date” only arose 14 days after the delivery of a draft payment claim; and
- the draft payment claim must be delivered on a specified date each month.

His Honour noted that the case law can be classified into the following two general categories:

- (i) cases where a reference date has arisen, but the contract purported to defer or extinguish the reference date if certain conditions were not met; and
- (ii) cases where a reference date had not arisen because the contract placed conditions on the reference date arising.

In respect of the first category it is clear that provisions which defer or extinguish the statutory rights that flow from the reference date arising are ineffective however, the provisions that fall into the second category may be effective, subject to the operation of s.99 of the Act. His Honour considered that the Act envisaged the calculation of a reference date by applying a contractual formula. For example, a contractual provision that provided for the making of a payment claim “*every 60 days after the contractor commences the work*” would be valid.

His Honour thought that not every contractual provision which conditions when a reference date arises would be said to be inimical to the Act and void as a result of s.99. Equally not every provision which conditions whether or when a reference date arises can be said to be immune from the operation of s.99. There is no hard and fast rule about the validity of such condition:

“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. In assessing the validity of such a condition, a useful enquiry is whether it facilitates or impedes the purpose of the Act. 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. A condition is likely to be contrary to the Act or unjustifiably change the effect of the Act’s provisions when it does not facilitate a statutory entitlement to progress payments or the resolution of the progress claims made under the Act. It is likely to be the case where the condition impedes the making of a progress claim, with no corresponding benefit in achieving the Act’s purpose.

The inquiry into the validity requires the identification of the condition or conditions in the absence of which there would be statutory entitlements to a progress payment. Even a condition which has some utility in a contract making a payment claim and receiving a progress payment may be excessively onerous and be invalid because of unjustified effect in denying a party what otherwise would be a statutory entitlement. A condition which has no significant utility in terms of the scheme created by the Act may be invalid, not because it is particularly onerous, but because it impedes a statutory entitlement without any corresponding benefit”. (at [75-76]).

Having thus articulated the need to consider the relevant contractual provision from the prism of whether it serves to “*facilitate or impede*” the purpose of the Act and as to whether the provision has “*significant utility*” in terms of the scheme of the Act, Applegarth J proceeded to analyse the specific provision within the contract. His Honour considered that the specific requirement of the provision requiring the contractor to deliver a draft payment claim on a particular date lacked utility in terms of facilitating the purpose of the Act and extinguished what otherwise would be a statutory entitlement to a progress payment and was therefore contrary to the object of the Act. The provision also unjustifiably modified, restricted or otherwise changed the effect of the Act which contemplates that a progress payment will be able to be made after the reference date arises.

“Clauses 33.7 and 33.8 provide for the possibility of a reference date, not its actuality. Whether or not a reference date arises is contingent upon compliance on a particular day with a condition which has no significant utility in terms of facilitating the payment of a progress payment to which the first respondent would otherwise have a statutory entitlement. The condition thereby amounts to an unnecessary and impermissible constraint on the right to claim for payment under the Act. The requirement that the draft payment claim be delivered on a particular day may have some limited utility to

the processing of an actual payment claim, however, that utility is not apparent in circumstances where the actual payment claim relates to a different work undertaken during a different period...

Whilst the definition of “reference date” means a reference date may be worked out by such a provision, the provision does no more than work out when a reference date will arise. It makes a reference date contingent upon compliance with a condition which has little, if any, practical utility in facilitating payment of a statutory entitlement. The condition does little to facilitate such a payment being made but carries the potential that no statutory payment will be made if the condition is not complied with. Given that absence of any direct nexus between the draft claim for payment and the actual claim for payment in terms of the period of work and the actual work that is covered by each document, it is hard to see why, for example, a delay of one day in delivering the required draft payment claim should extinguish what otherwise would be a statutory entitlement to a progress payment. I conclude that the mandatory requirement operates to unjustifiably impede a reference date from arising” (at [88 to 89] (emphasis added).

4. The Further Clarification Provided in BRB Modular

In BRB Modular the contract provided that, subject to certain conditions, the claimant was entitled to make a progress claim on the 28th day of each month. One of those conditions required compliance with clause 14.10 which provided 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 14.5.1 (a) to (d), each claim for payment may be made pursuant to clause 14.1”.

Paragraph 5 of the prescribed statutory declaration requires the deponent to declare:

“To the best of my knowledge all subcontractors 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”.

The claimant subcontractor 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”.

The respondent contested the payment claim on the basis that it had not been made from a valid reference date and that therefore the payment claim was not a valid claim made under the Act. The matter proceeded to adjudication and the adjudicator decided that the claimant was entitled to a significant adjudicated amount. The respondent sought a declaration that the adjudicated decision is void for jurisdictional error. The key issue was whether the parties’ agreement that an entitlement to make a progress claim only arises after delivery of the statutory declaration was contrary to the Act.

In the adjudication the respondent argued that the contract required the claimant to provide a statutory declaration that complied with clause 14.10 and that the claimant’s failure to provide such a compliant declaration meant that no *“reference date”* was available for the making of a payment claim. Although Applegarth J thought that the manner in which the claimant had framed its argument before the adjudicator was somewhat artificial (as the matter might have been *“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”* at [63])), His Honour nonetheless concluded that the adjudicator was correct in finding 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.

In the proceedings before the Court the respondent argued that there were strong policy reasons for supporting the requirement for the claimant to provide a statutory declaration of the nature set out in clause 14.10 of the contract. The respondent submitted that the object of the Act is primarily concerned with ensuring that money flows down the contractual chain and that accordingly the requirement to provide a statutory declaration that complied with clause 14.10 would encourage a claimant to pay its own subcontractors before making a progress claim. If a claimant (so the respondent contended) would be unable to pay undisputed amounts due to its subcontractors then it would be insolvent, and it would therefore not assist these subcontractors if the Respondent were to pay an insolvent claimant.

Applegarth J rejected the respondent’s argument. His Honour, in underscoring the policy objectives of the Act, arrived at the following conclusions:

- (a) The adjudicator had jurisdiction to decide the Claimant’s payment claim. The respondent’s argument that no reference date had arisen for the making of a payment claim under the Act had not been established;
- (b) The contractual provision in question (viz: clause 14.10) has no real utility in advancing the purpose of the Act. Its content and practical operation had the effect of depriving a contractor of a progress payment to which it would be entitled in the absence of a contractual provision. Such a

contractual provision had 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 was deprived of its cash-flow;

- (c) 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 objects of the Act. It is inconsistent with the purpose of the Act of ensuring cash-flow to such a contractor;
- (d) Any benefits such a clause may have in encouraging a contractor to pay subcontractors 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 subcontractors) of essential cash flow;
- (e) Encouraging a contractor to pay its subcontractors, 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 subcontractors. 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 would otherwise 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 subcontractors 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 subcontractors, other creditors and workers in the construction industry. To the extent the interests of those third parties should be taken into account, then their interests are better served by the contractor being paid a progress payment, rather than by essential cash-flow being blocked.

(Refer to [69] to [73]).

5. Summary

Applegarth J's decision in *BRB Modular* clarifies the parties' limited contractual freedom to impose preconditions as to when a reference date for the making of a progress payment claim under the Act can arise. His Honour's decision emphasises that the primary objective of the Act is to ensure that a contractor who has carried out construction work (or provided related goods and services) is able to make and obtain a progress payment and thereby maintain its cash flow. Contractual provisions which have the effect of excluding, modifying, restricting or otherwise changing a contractor's statutory entitlement to a progress payment and which serve no real utility (or impede the Act's purpose), are void.

J Murray AM

17 August 2015