

SUPREME COURT OF QUEENSLAND

CITATION: *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd*
[2009] QCA 329

PARTIES: **MARTINEK HOLDINGS PTY LTD** ACN 106 533 242
(applicant/appellant)
v
REED CONSTRUCTION (QLD) PTY LTD
ACN 010 871 557
(respondent/respondent)

FILE NO/S: Appeal No 11361 of 2009
SC No 10664 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 15 October 2009

JUDGES: Chief Justice, Keane and Holmes JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal dismissed**
2. Appellant to pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where adjudication decision made in favour of the respondent under *Building and Construction Industry Payments Act 2004* (Qld) ("the Act"), obliging the appellant to pay the respondent \$919,634.91 with respect to its claimed progress payment – where adjudication decision converted into adjudication certificate and judgment of the Supreme Court under the Act – where superintendent under the contract between the parties issued its final certificate, obliging the appellant to pay the respondent \$72,027.27 with respect to its claimed progress payment – where the respondent served notice of dispute under contract with respect to superintendent's final certificate – whether the adjudication certificate or superintendent's final certificate prevails

Building and Construction Industry Payments Act 2004
(Qld), s 30, s 31, s 99, s 100

John Holland Pty Ltd v Roads and Traffic Authority of New South Wales [2007] NSWCA 140, considered

John Holland Pty Ltd v Roads and Traffic Authority of New South Wales (2006) 66 NSWLR 624; [2006] NSWSC 874, distinguished

Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd [2009] QSC 328, affirmed

COUNSEL: P J Dunning SC, with G D Beacham, for the appellant
J K Bond SC, with M D Ambrose, for the respondent

SOLICITORS: McInnes Wilson Lawyers for the appellant
Holding Redlich for the respondent

- [1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by His Honour, and with his reasons.
- [2] **KEANE JA:** An adjudication decision made under the *Building and Construction Industry Payments Act 2004* (Qld) ("the *Payments Act*") on 17 September 2009 in favour of the respondent ("Reed") has been converted into an adjudication certificate and judgment of the Supreme Court pursuant to s 30 and s 31 of the *Payments Act*. The appellant ("Martinek") seeks to have that judgment set aside or permanently stayed.
- [3] Under the adjudication decision, Martinek was obliged to pay Reed \$919,634.91 in respect of Reed's progress payment claim number 25 for work on the construction of the Rivage Development in Mackay. But on 24 September 2009, the superintendent under the contract for the work issued the superintendent's final certificate in respect of Reed's progress claim number 25. The superintendent's final certificate was issued pursuant to cl 37.4 of the contract.
- [4] By virtue of the superintendent's final certificate, an amount of \$72,027.27 was due to Martinek by Reed after taking into account the superintendent's assessment of Reed's claim at \$664,902.03 and deducting \$730,381.37 for moneys due to Martinek for rectification of defects in the work.
- [5] On 30 September 2009, pursuant to cl 42.1 of the contract, Reed served a notice of dispute in relation to the superintendent's final certificate.
- [6] Martinek commenced proceedings in the Trial Division of the Supreme Court contending that the final certificate issued by the superintendent under the contract trumps the adjudication decision by establishing the final position of the parties under the contract. On this basis Martinek argues that Reed may not pursue the inconsistent rights which would otherwise be available to Reed under the *Payments Act*. It was common ground between the parties at first instance and in this Court that the resolution of this issue turns on the interpretation of cl 37.4 of the contract. Before turning to a discussion of the contract, it is desirable to give a brief summary of the relevant provisions of the *Payments Act*.

The Payments Act

- [7] The *Payments Act* is intended to ensure that those who carry out construction work are entitled to claim and recover progress payments.¹ To that end the *Payments Act* establishes a procedure for the making and adjudication of progress claims.² Where a claim for a progress payment is disputed, it is decided by an adjudicator appointed under the legislation.³ The other party must pay the adjudicated amount to the contractor, and if it fails to do so, 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.⁴
- [8] By virtue of s 99 of the *Payments Act*, it is not permitted for parties to a construction contract to agree that the *Payments Act* shall not apply, but s 100 of the *Payments Act* ensures that the adjudication of progress claims does not prevent the parties from finally resolving their entitlements inter se under the contract in a court or otherwise in accordance with law. Section 100 is in the following terms:

"Effect of pt 3 on civil proceedings

- (1) Subject to section 99, 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."

The contract

- [9] Clause 37.1 of the contract deals with progress claims for the performance of work under the contract. Clause 37.2 authorises the superintendent to issue progress certificates in respect of progress claims. Clause 37.4 deals with the final payment claim and the superintendent's final certificate. Clause 37.4 provides as follows:

"37.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects liability period*, the *Contractor*, shall give the *Superintendent* a written *final payment claim* endorsed 'Final Payment Claim'

¹ *Building and Construction Industry Payments Act 2004 (Qld)*, s 7 and s 12.

² *Building and Construction Industry Payments Act 2004 (Qld)*, s 8(b).

³ *Building and Construction Industry Payments Act 2004 (Qld)*, s 23 to s 28.

⁴ *Building and Construction Industry Payments Act 2004 (Qld)*, s 30 to s 31.

being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.

Within 42 days after the expiry of the last *defects liability period*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.

Those moneys certified as due and payable shall be paid by the *Principal* or the *Contractor*, as the case may be, within 7 days after the debtor receives the *final certificate*.

The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:

- a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
- b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
- c) any accidental or erroneous inclusion or exclusion of *any work* or figures in any computation or an arithmetical error in any computation; and
- d) unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*."

[10] It is as well to set out here the terms of cl 42 of the contract:

"Dispute resolution

42.1 Notice of dispute

If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:

- a) a *Superintendent's direction*; or
- b) a claim:
 - i) in tort;
 - ii) under statute;
 - iii) for restitution based on unjust enrichment or other quantum meruit; or
 - iv) for rectification or frustration, or like claim available under the law governing the *Contract*,

then either party shall, by hand or by certified mail, give the other and the *Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

Notwithstanding the existence of a *dispute*, the parties shall, subject to clauses 39 and 40 and subclause 42.4, continue to perform the *Contract*.

42.2 Conference

Within 14 days after receiving a notice of *dispute*, the parties shall confer at least once to resolve the *dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the *dispute* has not been resolved within 28 days of service of the notice of *dispute*, that *dispute* shall be and is hereby referred to mediation.

42.3 Mediation

If within a further 14 days of a dispute being referred to mediation the parties have not agreed upon the mediator, the mediator shall be nominated by the President of the Queensland Master Builders' Association.

The party issuing the notice of dispute shall be responsible for convening and organising the mediation.

The mediation shall be conducted on the following basis:

- a) The mediation is to be conducted in accordance with the Arbitrators and Mediators Australia Pty Ltd's rules and a mediation of commercial dispute;
- b) Each of the parties must pay an equal share of the fees and expenses that the mediator is entitled to and any room hire charges; and
- c) If the dispute has not been resolved by mediation or is not otherwise resolved within the 60 days of the service of the notice of dispute, either party may pursue its rights at law.

..."

The decision at first instance

[11] In the proceedings below, Martinek argued that the superintendent's final certificate operated to supersede the adjudication decision.⁵ Reed argued that the superintendent's final certificate gave Martinek a contractual right to payment of \$72,027.27 but it did not produce a final settling of accounts which was apt to subsume or supersede the adjudication decision. In this regard, Reed relied particularly (though not exclusively) on the terms of cl 37.4(d) of the contract.

[12] The learned primary judge upheld Reed's contention. Her Honour concluded:⁶

⁵ Cf *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2006) 66 NSWLR 624 at 636 – 637 [51] – [52].

⁶ *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* [2009] QSC 328 at [30].

"... 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 the *Payments Act*. The Adjudication Decision stands until the final position has been reached between the parties."

The arguments in this Court

- [13] In this Court, the parties advanced essentially the same arguments as were advanced below. Because of my view as to the proper construction of cl 37.4 of the contract, it is not necessary to deal with the other arguments agitated on behalf of Reed.

Discussion

- [14] In my respectful opinion, the learned primary judge's decision was correct. Reed's notice of dispute of 30 September 2009 engaged the terms of cl 37.4(d) to deny to the superintendent's certificate the effect for which Martinek's argument contends.
- [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 the *Payments Act*, but in this case, the terms of cl 37.4(d) of the contract reflect an intention that the "accord and satisfaction" and the "discharge of obligations" between the parties not be effected by the superintendent's certificate while the issues the subject of Reed's notice of dispute remain "unresolved".
- [16] It may be accepted that s 100(1)(a) of the *Payments Act* provides that the rights conferred by the *Payments Act* 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". But under the terms of cl 37.4(d) of the contract, the superintendent's certification has not yet come into effect to entitle Martinek to refuse payment of the adjudication amount, save insofar as the sum of \$72,027.27 may properly be set off against the adjudication amount.
- [17] On Martinek's behalf it is argued that the second and third paragraphs of cl 37.4 are to be read separately from the fourth paragraph. That argument is unpersuasive for two reasons. First, one must attempt to give all the paragraphs of cl 37.4 an operation by which each paragraph works in harmony with the others: the fourth paragraph should not be read as an operative stand alone provision; rather, its natural reading is as an explanation and qualification of the effect of the second and third paragraphs. Secondly, both the second and the fourth paragraphs of cl 37.4 speak in terms of the evidentiary effect of the superintendent's certificate: that is an express invitation to treat the fourth paragraph as an explanation and qualification of the effect of the superintendent's certificate as "evidencing the moneys finally due and payable between the Contractor and Principal on any account ... in connection with the subject matter of the contract."
- [18] Martinek relies upon the decision of the New South Wales Courts in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*,⁷ but in that case the contract in question did not contain an equivalent of cl 37.4(d). It should be noted that the contract in issue in *John Holland* expressly provided by cl 42.7.1(d) that "the Superintendent must issue a Final Payment Schedule within 28 days after receipt of the Final Statement if: ... (d) there are no outstanding claims or disputes

⁷ (2006) 66 NSWLR 624 esp at 636 – 637 [51] – [52] and [2007] NSWCA 140 esp at [62].

between the Contractor and the Principal." It may be that, as was urged on behalf of Martinek, the superintendent under the contract at issue in *John Holland* might himself have resolved the "outstanding ... disputes" in the course of arriving at the Final Payment Schedule. But to say this is merely to emphasise that the contract at issue in *John Holland* contemplated that the superintendent's certificate was capable of settling accounts finally between the parties. In this case, cl 42, which provides the relevant dispute resolution mechanism, excludes that possibility. Further, in the contract in issue in *John Holland*, cl 42.5 provided that the issue of the Final Payment Schedule under cl 42.7 constitutes "conclusive evidence that all work under the Contract has been finally and satisfactorily executed ... except in so far as it is provided [sic] in any proceedings ... or ... arbitration ... that the said Final Payment Schedule is erroneous by reason of fraud, defects or omissions or accidental or arithmetical error." The effect of this provision was to make the Final Payment Schedule "conclusive evidence" until the contrary was established as a fact. Here cl 37.4(d) operates to deny even that effect to the superintendent's final certificate while disputes under cl 42 are unresolved.

- [19] The courts should not be astute unduly to confine the operation of the *Payments Act*. In this respect I concur with the observations of the learned primary judge:⁸

"The concern of Martinek is, of course, that the perceived financial instability of Reed may make a final determination in which it is, in net terms, successful, illusory. In *RJ Neller Building Pty Ltd v Ainsworth* ([2008] QCA 397) Keane JA, with whom the other members of the court agreed, noted at para 40 after discussing the purposes of the *Payments Act*:

'Accordingly, the risk that a builder might not be able to refund monies ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.'

..."

Conclusion

- [20] In my respectful opinion, on the proper construction of cl 37.4, it is only the moneys certified as due and payable by a certificate unqualified in its effect by the fourth paragraph of cl 37.4 that give rise to a right to payment in accordance with the third paragraph of cl 37.4. Because the effect of the superintendent's certificate is qualified in this way, it can give rise to no right in Martinek under the contract which is apt to trump the effect of the adjudication decision.

Orders

- [21] Martinek's appeal should be dismissed.
- [22] Martinek should pay Reed's costs of and incidental to the appeal to be assessed on the standard basis.
- [23] **HOLMES JA:** I agree with the reasons of Keane JA and the orders he proposes.

⁸ [2009] QSC 328 at [30] (footnotes in original).