

SUPREME COURT OF QUEENSLAND

CITATION: *Simcorp Developments and Constructions P/L v Gold Coast Titans Property P/L; Gold Coast Titans Property P/L v Simcorp Developments and Constructions P/L* [2010] QSC 162

PARTIES: **SIMCORP DEVELOPMENTS & CONSTRUCTIONS PTY LTD**
ACN 096 658 776
(applicant)
v
GOLD COAST TITANS (PROPERTY) PTY LTD ATF GOLD COAST NRL PROPERTY TRUST
ABN 51 826 843 853
(respondent)
GOLD COAST TITANS (PROPERTY) PTY LTD ATF GOLD COAST NRL PROPERTY TRUST
ABN 51 826 843 853
(applicant)
v
SIMCORP DEVELOPMENTS & CONSTRUCTIONS PTY LTD
ACN 096 658 776
(respondent)

FILE NO/S: SC No 1163 of 2010
SC No 2807 of 2010

DIVISION: Trial Division

PROCEEDING: Application – Leave to Discontinue
Application – Injunction and Declaration

DELIVERED ON: 18 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 23 March 2010

JUDGE: Douglas J

ORDER: **In SC No 1163 of 2010:**

- 1. Pursuant to r 304(2) of the *Uniform Civil Procedure Rules 1999*, that the applicant be granted leave to discontinue.**
- 2. That the applicant pay the respondent's costs of and incidental to the proceedings including the respondent's costs of and incidental to the application for discontinuance to be assessed on the indemnity basis.**

3. **Stay further proceedings in this court by the applicant in respect of the contract between it and the respondent dated 26 June 2009 until payment of those costs.**

In SC No 2807 of 2010:

1. **It is declared that the document titled ‘Payment Claim – 13’ dated 9 March 2010 produced by the respondent and delivered to the applicant on 10 March 2010 is not a valid payment claim pursuant to the provisions of the *Building and Construction Industry Payments Act 2004*.**
2. **The respondent be restrained from relying on the document titled ‘Payment Claim – 13’ dated 9 March 2010 produced by the respondent and delivered to the applicant on 10 March 2010 to support an adjudication application under s 21 of the *Building and Construction Industry Payments Act 2004* or for any other purpose as a payment claim pursuant to the *Building and Construction Industry Payments Act 2004* including the enforcement of the adjudication decision delivered 17 May 2010.**
3. **Order that the respondent pay the applicant’s costs of and incidental to the application on the standard basis.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – where the applicant, Simcorp Developments Pty Ltd, commenced proceedings in relation to payment claims made pursuant to the *Building and Construction Industry Payments Act 2004* – where the applicant, Simcorp Developments Pty Ltd, seeks leave to discontinue those proceedings in favour of a new claim - whether appropriate to stay further proceedings until costs are paid – whether costs should be paid on the indemnity basis

CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACT – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant, Simcorp Developments Pty Ltd, served a payment claim pursuant to the *Building and Construction Industry Payments Act 2004* on the respondent, Gold Coast Titans (Property) Pty Ltd – where a progress certificate had not been issued by the superintendent – where the payment claim included amounts covered by previous claims by Simcorp Developments Pty Ltd, which Simcorp Developments Pty Ltd now seeks to discontinue – whether payment claim served on correct date - whether payment

claim in breach of s 17(5) of the Act – whether payment claim valid

Building and Construction Industry Payments Act 2004, s 12, s 13(a) and (b), s 15(1)(a), s 17(4),(5) and (6), s 99

Uniform Civil Procedure Rules 1999 r 312

Colgate Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, applied

Doolan v Rubikcon Pty Ltd [2008] 2 Qd R 117, cited

Fitzgerald v Masters (1956) 95 CLR 420, applied

J Hutchinson Pty Ltd v Galform Pty Ltd [2008] QSC 205, cited

Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd [2008] NSWCA 279, distinguished

Reed Constructions (Qld) Pty Ltd v Martinek Holdings Pty Ltd [2009] QSC 345, cited

Tailored Projects Pty Ltd v Jedfire Pty Ltd [2009] QSC 32, cited

Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd [2010] QSC 7, cited

COUNSEL: T Matthews for Simcorp Developments & Constructions Pty Ltd

P Dunning SC, with D Keane, for Gold Coast Titans (Property) Pty Ltd

SOLICITORS: Sawford Voll Lawyers for Simcorp Developments & Constructions Pty Ltd

Nyst Lawyers for Gold Coast Titans (Property) Pty Ltd

[1] **Douglas J:** These applications relate to claims for payment made pursuant to the *Building and Construction Industry Payments Act 2004*. Simcorp Developments & Constructions Pty Ltd (“Simcorp”) had commenced proceedings in relation to several claims in matter 1163/10 which it now wishes to discontinue in favour of a new claim because of a dispute as to whether the original claims had been served validly. It says the factual issue as to service will take too long to litigate. The respondent, Gold Coast Titans (Property) Pty Ltd as trustee for the Gold Coast NRL Property Trust (“Titans”), does not object to the discontinuance of the original proceedings but wants its costs on an indemnity basis and a stay of further proceedings until those costs are paid.

[2] It also argues that the new claim, payment claim 13, is not a valid claim under the Act. The bases for that argument are:

- payment claim 13 is not a payment claim under the Act but at most a progress claim;
- payment claim 13 does not comply with cl 37.4 of the relevant building contract because it claims retention monies that may only be released on a final certificate;
- there is more than one payment claim for each reference date; and

- the claim was issued while proceedings were still on foot in relation to the same subject.

[3] It is convenient to deal first with the argument that payment claim 13 is invalid.

Factual Background

- [4] Simcorp is a licensed building contractor which was engaged to build a multi-story building for Titans next to Skilled Park Football Stadium at the Gold Coast by a contract dated 26 June 2009. Titans, as trustee for the Gold Coast NRL Property Trust, owns the building site and is associated with the Gold Coast Titans team in the national rugby league competition. Titans purported to terminate the building contract by a letter from its solicitors dated 17 February 2010.
- [5] In arguing that payment claim 13 is invalid, Titans relied, in particular, on cl 37.2 and cl 37.4 of the contract. They provide for the certification of progress certificates by the superintendent under the contract before the making of a payment claim and the payment of retention money after a final certificate has issued. Their terms are:

“37.2 Certificates

Clause 37.2 is deleted and replaced with the following:

‘The Superintendent shall, by the 30th day of the month after receiving such a progress claim, issue to the Principal and the Contractor:

- (a) a progress certificate evidencing the Superintendent’s opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference (‘progress certificate’); and**
- (b) a certificate evidencing the Superintendent’s assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.**

If the *Contractor* does not make a progress claim in accordance with *Item 33(a)*, the *Superintendent* may issue the *progress certificate* with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate by the 30th day of the month after receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Contractor shall, upon receiving both such certificates, or upon a progress claim being deemed to be a progress certificate, deliver to the Principal an invoice (‘payment claim’) that:

- (a) complies with the requirements for a payment claim under section 17 of the BCIP Act; and**
- (b) complies with the requirements for a Tax Invoice under the GST Act.**

The Principal may, if it disputes the amount of a payment claim, deliver to the Contractor a payment schedule under section 18 of the BCIP Act ('payment schedule'), within 10 business days of receiving the payment claim.

The Principal must, within 15 business days after receiving a payment claim, pay to the Contractor, either the amount of the payment claim or the amount of the relevant payment schedule, as the case may be.

None of a progress claim, a payment claim, a *progress certificate* nor a payment of moneys shall be evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* shall be payment on account only.'

...

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' 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* ..." (Emphasis added.)

- [6] Simcorp's submissions depended in part on whether there was a reference date stated in or worked out under the contract. "Reference date" is defined in Sch 2 of the Act as follows:

"reference date, under a construction contract, means -

- (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; or
- (b) if the contract does not provide for the matter -
 - (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each later named month."

[7] Item 28 of the contract reads:

“28 Progress Claims
(subclause 37.1)

- | | |
|-------------------------------|---|
| (a) Times for progress claims | 23rd day of each month for WUC executed to the 23rd day of that month |
| (b) Times for payment claims | On the 30th day of each month following the delivery of a progress claim under Item 27(a) |

[8] Because Item 28 prescribed that the times for payment claims were on the 30th day of each month following the delivery of a progress claim Mr Matthews’ submission for Simcorp was that there was no reference date stated in or worked out under the contract for February so that, for the reference date of 28 February 2010, the statutory procedures applied rather than those available under the contract. I shall discuss that submission later.

[9] Section 12 of the Act provides that a person is entitled to a progress payment from each reference date under a construction contract. Section 13 provides that the amount of a progress payment to which a person is entitled is the amount calculated under the contract and s 15 provides, relevantly, that a progress claim becomes payable if the contract contains a provision about the matter “on the day on which the payment becomes payable under the provision”.

[10] Section 17(4) then provides:

“17(4) A payment claim may be served only within the later of –

- (a) the period worked out under the construction contract; or
- (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.”

[11] Section 17(5) and s 17(6) are also relevant. They provide:

“17 **Payment claims**

...

- (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.” (Emphasis added.)

[12] Section 99 was also said to be relevant by Mr Matthews. It provides:

“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.”

[13] Payment claim 13 was contained in a document dated 9 March 2010 from Simcorp and delivered on 10 March 2010. It said that its reference date for the claim was 28 February 2010 and required Titans to pay \$5,205,068.13 within ten business days of receipt of the claim.

Is claim 13 a valid payment claim under the Act?

[14] Titans’ argument is that claim 13 was a progress claim under cl 37.2 of the contract that had to be certified by the superintendent, following that clause’s contractual procedure, before it became capable of becoming a payment claim under the Act. Those contractual procedures require the superintendent to issue a progress certificate “by the 30th day of the month after receiving such a progress claim”. If the Superintendent does not issue the progress certificate by that day the progress claim is deemed to be the relevant progress certificate. It is only after receipt of such a certificate, or its deemed receipt, that the contract envisages the contractor delivering a payment claim under s 17 of the Act. A certificate had not issued from the superintendent when the matter was argued before me.

Does the contract fail to prescribe a reference date for February?

[15] One issue raised by cl 37.2 and Item 28, and relied on by Mr Matthews, was that it referred to the time for payment claims as being on the 30th day of each month after receipt or delivery of the progress claim. February never has 30 days. That caused Mr Matthews to argue that there was no contractual reference date provided by the contract for February so that Simcorp could rely on its statutory rights to make a payment claim. The argument was that, because the contract did not provide a reference date for the month of February, such a reference date was provided by the definition of “reference date” in Sch 2 of the Act which allows a payment claim to be made from the last day of each month, in this case 28 February 2010, and to be issued 10 days from that reference date as it was on 10 March 2010.

[16] In that context he relied upon a decision of Fryberg J¹ confirming that a payment claim may be issued “from” a reference date and distinguished a decision of Daubney J² where his Honour had held that the Act did not allow a payment claim to be served “from the accrual of each reference date as distinct from ‘on’ each

¹ *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7.

² *Reed Constructions (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345.

reference date”. It is unnecessary for me to reach any conclusion about that difference of opinion as, in my view, the contract should be construed so as to recognise 28 February as an available reference date pursuant to its terms.

- [17] One approach to that issue is straightforward. The commonsense interpretation of this provision should require it to be construed so that the relevant date in February for the purpose of setting the time for a payment claim would be 28 February. It seems most unlikely that the parties to such a commercial contract intended to leave such a gap in its capacity to lay the basis for a reference date derived from the contract where every other month would have such a contractual reference date available. As Dixon CJ and Fullagar J said in *Fitzgerald v Masters*³: “Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency.”
- [18] Even if the date in Item 28 could not be changed by such a process of construction it is not clear to me that the contract fails to state a reference date or to permit one to be worked out in this case for reasons I shall now develop.

Is there a reference date stated in, or worked out under the contract?

- [19] The claim itself was made on 10 March 2010 which would make it an “early progress claim deemed to have been made on the date for making that claim”; see cl 37.1. It would, therefore, be deemed to have been made on 23 March 2010 as Item 28 provides that the time for a progress claim is the 23rd day of each month for work under the contract executed to the 23rd day of that month. Titans argued that no certificate was required from the superintendent under the contract until 30 April 2010 as the “date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made.” Its submission was that that date was the “30th day of the month after receiving such a progress claim”, referring to the language of cl 37.2. It argued that “after” qualified the word “month” to achieve that result.
- [20] It is not particularly important for the present application but my view of that submission is that the relevant date is the 30th day of the month during which the progress claim is received rather than the 30th day of the following month, namely 30 March 2010 in this case. I have reached that conclusion partly on the basis that the natural grammatical reading of the phrase “after receiving a progress claim in accordance with subclause 37.1” is that it qualifies the word “Superintendent” in the preceding clause: “If the Superintendent does not issue the progress certificate by the 30th day of the month.”
- [21] The phrase describes the event which triggers the superintendent’s obligation to issue a progress certificate. If one relocated that phrase to follow the word “Superintendent” in the sentence, the meaning and grammatical structure would be clearer. For that reason it does not seem to me to be correct to interpret the words simply by concluding that the word “after” by itself qualifies the word “month” to require the certificate to issue, in this case, at the end of April.
- [22] Item 28 of the contract, in my view, also supports this approach. While it contains a similar ambiguity to that contained in cl 37.2, in prescribing the time for a progress

³ *Fitzgerald v Masters* (1956) 95 CLR 420, 426-427. For a general discussion see *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis, 4th ed, 2002) at 26-040.

claim as “the 23rd day of each month” and for a payment claim as “On the 30th day of each month following the delivery of a progress claim”, it seems consistent with my understanding of the sentence in cl 37.2 that the words “following the delivery of a progress claim” create a precondition for the timing of the payment claim rather than a description of the month at the end of which the payment claim should be made. The difficulties of construction posed by the terms of cl 37.2 and Item 28 appear to stem from the fact that cl 37.2 is a substitution for a standard clause of a precedent which has not been adapted as well as might be hoped.

- [23] Leaving that issue to one side, it is my view that the contract does identify a date on which a claim for a progress payment may be made, namely 30 March 2010. Even if I am wrong about that particular date because of an error in the interpretation issue I have just discussed, the date would be 30 April 2010. It is only if one concluded that could not be done that one needs to adopt para (b) of the definition of “reference date” as the statutory means of identifying such a date.

The status of claim 13

- [24] Let me then return to the main argument between the parties, whether claim 13 is merely a progress claim under the contract and not a payment claim under the Act. Mr Dunning SC, for Titans, relied on ss 12, 13, 15 and 17(4) of the Act to argue that it clearly contemplated that the contract had a significant role to play in identifying when a payment claim under the Act could be made, contrary to Mr Matthews’ submission that s 99 of the Act made it clear that the contract could not limit his client’s statutory rights.
- [25] Here it seems clear to me that the Act contemplates that the contract may contain provisions for working out a period for service of a payment claim intended to be used in fixing when such a claim may be made. This contract contains such provisions. Its terms are not inconsistent with the provisions of the Act and do not attract the effect of s 99.
- [26] Failure to adhere strictly to the statutory regime for the recovery of claims has been held to preclude reliance on the special statutory rights available under the Act.⁴ It has also been held that the Act does not override the contractual provisions and stresses adherence to their terms.⁵ Consequently claim 13 should have been treated by Simcorp simply as a progress claim and not as a payment claim under the Act.

Does Simcorp have separate rights under the Act to deliver a payment claim?

- [27] Mr Matthews also argued that the Act provided a separate means of serving a payment claim independently of the procedures envisaged by the contract. That seems unlikely to me having regard to the sections to which I have referred. He relied on views expressed by Hodgson JA⁶ in the New South Wales Court of Appeal, dealing with their similar legislation. His Honour said:

⁴ *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10, 15 at [24]; *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] 2 Qd R 172, 176 at [18] and 178 at [21]; *Baxbex Pty Ltd v Bickle* [2009] QSC 194 at [17]; *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345 at [21] and [24]; *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd* [2003] NSWSC 266 at [59] and *Gemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, 50 at [41].

⁵ *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345 at [13] – [14].

⁶ *Plaza West Pty Ltd v Simon’s Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [53] – [54].

“I adhere to the view I expressed in *Transgrid v Siemens Limited*⁷ and *John Holland Pty Limited v Road and Traffic Authority of New South Wales*⁸, to the effect that ‘calculated in accordance with the terms of the contract’ in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed.

This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent’s certificate, has not been satisfied; and it means equally that contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.”

- [28] Clause 9(a) of the New South Wales legislation is the equivalent of s 13(a) of the Queensland Act to which I have referred earlier and which provides that the amount of a progress payment to which a person is entitled is the amount calculated under the contract. If the contract does not provide for the matter the amount of the progress payment is calculated on the basis of the work carried out; see s 13(b). Mr Dunning’s submission was that his Honour was there dealing with a situation where a deeming provision under a contract affected the calculation of money owing and had nothing to do with the requirements of making a progress claim under the Act after particular steps had been taken.
- [29] Here, the Act clearly stipulates that the date a progress payment under a contract becomes payable depends on the day on which the payment becomes payable under the contractual provision; see s 15(1)(a). There was no argument that the provision for reference to the superintendent was void under the sections of the *Queensland Building Services Authority Act 1991* referred to in s 15(1)(a). Nor was it a provision to the contrary of the provisions of the Act for the purposes of s 99.
- [30] In this case under this legislation and this contract it seems to me that the issuing or deemed issuing of a progress certificate by the superintendent is a necessary precondition to the delivery of a payment claim under s 17 of the Act. If there were no provision in the contract fixing a date for delivery of a payment claim or deeming that a superintendent’s certificate had issued within a certain period after the delivery of a progress claim my conclusion would be different but that is not the case here.
- [31] For those reasons claim 13 was not, when the matter was argued before me, then capable of laying the basis for a payment claim as it had not then been dealt with by the superintendent under the contract.

Non-compliance with cl 37.4 of the contract

- [32] Titans’ argument in this context was that claim 13 claimed the balance of the total contract price including retention monies only able to be released on a final certificate. That is an issue that could be raised in a payment schedule and dealt with by an adjudicator and is not one which, of itself, would require the relief

⁷ [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35].

⁸ [2007] NSWCA 19 at [38].

sought here of a declaration that it is not a valid payment claim and an injunction preventing the claim from proceeding.⁹

Is there more than one payment claim for each reference date?

- [33] It seems clear that the previous claims made by Simcorp, the subject of the proceedings it now wishes to discontinue, related to work done before earlier reference dates which is the same as work described in claim 13 said to relate to 28 February 2010 as a reference date. Titans' submission is that this is contrary to s 17(5) of the Act prohibiting the service of more than one payment claim in relation to each reference date under the contract.
- [34] Section 17(6), which provides that s 17(5) does not prevent the claim from including in a payment claim an amount that has been the subject of a previous claim, has been interpreted in several decision of this Court. One view is that s 17(6) is "meant to permit the inclusion in a subsequent payment claim made in relation to a different reference date of an amount previously claimed but disallowed, perhaps on the basis that the work was not completed. When completed the work may be included in a subsequent claim though it had been asked for earlier."¹⁰ It has also been held that it is not necessary that a claim must include all work done up to that date.¹¹
- [35] Where, as here, claim 13 relates to all the work done in relation to the reference dates of the earlier claims, the conclusion seems inescapable that service of claim 13 is prohibited by s 17(5) unless Titans is correct in its argument that those claims, or some of them, had not been served.¹² That is the issue that Simcorp wishes to abandon by discontinuing its previous proceedings. It is Simcorp's position, however, that it had served the earlier claims but merely wishes to avoid protracted problems of proof of those facts. In other words it continues to assert that it has served the previous claims as well as claim 13 in circumstances where claim 13 covers the same work referred to in the earlier claims. It did not seek to argue that it had not served the earlier claims or that claim 13 was not caught by the effect of s 17(5) because of lack of such service. In those circumstances, it is my view that Simcorp should now be precluded from relying on claim 13 on this basis, breach of s 17(5), also. Its rights to commence normal civil proceedings under s 100 of the Act remain.

Claim issued while proceedings still on foot in relation to the same subject matter

- [36] The argument for Titans was that claim 13 was issued while the earlier proceedings in this Court were still on foot with the intention of litigating Simcorp's entitlement to payment for the same work the subject of those earlier proceedings. Prima facie that can amount to an abuse of process, particularly if a subsequent claim were made in Court while the existing claim was still on foot. Here, there were, however, attempts to negotiate a discontinuance of the earlier proceedings by Simcorp on the basis that it pay Titans' costs as agreed or to be assessed. That attempt foundered because Titans wished to have its costs paid in a fixed sum and then wanted to oppose any discontinuance. Before me Titans did not oppose the discontinuance but wanted its costs on an indemnity basis.

⁹ See *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32 at [20].

¹⁰ *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205 at [39] – [40].

¹¹ *Doolan v Rubikcon Pty Ltd* [2008] 2 Qd R 117

¹² Section 17(5) provides that a claimant cannot serve more than one payment claim.

- [37] With that background in mind I would be loath to prevent claim 13 from proceeding simply on that basis as Simcorp clearly intended to discontinue the earlier proceedings.

Costs of the discontinuance

- [38] Titans seeks its costs of the discontinuance of the earlier proceedings on the indemnity basis on the ground that there is some special or unusual feature of the case justifying the Court's departure from the ordinary practice.¹³
- [39] Where, as here, the ground for discontinuance was Simcorp's wish to avoid proof of what should have been a reasonably simple issue, service of the earlier claims, and where its proposed substitute claim was relied on as a payment claim in breach of the construction contract's clear procedures and contrary to s 17(5) of the Act it does seem to me to be a case where an order for indemnity costs is justified. Titans has been put to considerable expense and delay in proceedings that will not bear on the substantive issues in dispute simply because of Simcorp's poor choices in pursuing its claims and probably its inability to prove easily the normally straightforward issue of service of its previous claims.
- [40] Titans also sought an order that any further proceedings whether in this Court or by delivery of another payment claim under the Act be stayed pending the payment of the costs of that discontinuance. Having regard to the unsatisfactory and unnecessarily complex nature of the litigation they have faced so far at the suit of Simcorp that too is a course that commends itself to me at least in respect of the issuing of proceedings in this Court.¹⁴ I am reluctant to impose such a stay in respect of their rights under the Act at this stage as events may have moved on since the hearing of the application.

Orders

- [41] Consequently, I shall make the declaration and grant the injunction sought in the application by Titans in matter 2807 of 2010 and order Simcorp to pay Titans' costs of and incidental to the proceedings in matter 1163 of 2010 including its costs of and incidental to the application for discontinuance on the indemnity basis. I shall also stay further proceedings in this court by Simcorp in respect of the contract between it and Titans dated 26 June 2009 until payment of those costs.
- [42] In matter 2807 of 2010 I order that the respondent pay the applicant's costs of and incidental to the application on the standard basis.

¹³ *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 232-234 especially at [4] –[5].

¹⁴ See *Uniform Civil Procedure Rules* 1999 r 312.