

Construction Alert

No more reference dates

November 2013

Introduction

Thomsons Lawyers was recently successful in having two adjudication decisions pursuant to the *Building and Construction Industry Payments Act 2004 (QLD) (BCIP Act)* declared void for a lack of reference dates in the Queensland Supreme Court decision of *Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd & Ors* [2013] QSC 298.

Facts

In early 2011, Kellett Street Partners Pty Ltd (**Kellett**), the principal of a number of Brisbane restaurants, entered into a verbal agreement with Pacific Rim Trading Co Pty Ltd (**Pacific Rim**) for the fit out of an oyster bar and luncheonette in Brisbane.

Pacific Rim performed the fit-out works and proceeded to issue Kellett with payment claims pursuant to the BCIP Act between 5 May 2011 and 7 November 2011. The oyster bar opened and began trading in August 2011.

In August 2012, Pacific Rim issued a payment claim labelled 'Cabiria #10' which claimed to works alleged to have been performed in March 2012. Pacific Rim did not take this claim to adjudication under the BCIP Act.

Following this, Pacific issued another four payment claims, being:

- 'Cabiria #11' on 30 September 2012;

- 'Cabiria #12' on 31 December 2012;
- 'Cabiria #13' on 8 February 2013; and
- 'Cabiria #14' on 24 March 2013.

The last date work was claimed to have been performed in each of these payment claims was March 2012.

Pacific Rim took payment claims 'Cabiria #11' and 'Cabiria #14' to adjudication under the BCIP Act and was largely successful in receiving payment for these claims. Kellett applied to the Supreme Court of Queensland for a declaration that these two adjudication decisions under the BCIP Act were void, as the payment claim 'Cabiria #10' issued in August 2012 had used the last available reference date.

Determining the last reference date

Section 17(5) of the BCIP Act provides that a claimant cannot serve more than one payment claim in relation to each reference date. It was Kellett's submission that the payment claim 'Cabiria #10' had exhausted the last available reference date of 31 March 2013, and hence, all claims served afterwards were void as they were made either with respect to the same reference date as 'Cabiria #10' or without a reference date at all.

Kellett relied on two separate submissions to establish that Pacific Rim no longer had any reference dates.

The first submission was that contractual obligation to

perform construction work (and entitlement to reference dates) under the contract was brought to an end on 28 March 2012 by way of a verbal statement from a director of Kellett to Pacific Rim that no more work was to be performed at the oyster bar.

The second submission relied on an interpretation of 'reference date' under the BCIP Act. Kellett submitted that, in the absence of a written contract stating otherwise, the reference date of a payment claim is determined by reference to the last day of the month in which work was undertaken, as named in the payment claim. This interpretation is in line with the decision of *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 (**Grid Projects**). Accordingly, in this matter, the last possible date work was alleged to have been undertaken was in March 2012, and the last reference date would be 31 March 2013.

In response, Pacific Rim primarily submitted that as it had not proceeded to adjudication with respect to the payment claims 'Cabiria #10,' 'Cabiria #12,' and 'Cabiria #13' and that where a payment claim has been withdrawn or not used, it has no effect and does not exhaust reference dates.

Decision

Douglas J disagreed with Pacific Rim's submissions, stating (at paragraph 17) that *'I am not persuaded that the payment claims became ineffective on the withdrawal of the adjudication applications or because they did not proceed to adjudication.'*

Further, he found that Pacific Rim had no more reference dates by reference to the decision in *Grid Projects*; was satisfied that the evidence established that the contract between Kellett and Pacific Rim was terminated on 28 March 2012 and held that the adjudication decisions made with respect to payment claims 'Cabiria #11' and 'Cabiria #14' were invalid.

Implications

This decision reinforces the position raised in New South Wales by *Grid Projects*; that where contracts are silent and the default definition of 'reference date' in the BCIP Act applies, claimants are not necessarily entitled to submit payment claims for 12 months following the completion of construction work.

Claimants and respondents using the BCIP Act are encouraged to be aware of this limit to reference dates under construction contracts when the default definition of 'reference date' applies:

- Claimants should be careful to make claims in months in which work has been performed and agitate those claims through adjudication.
- Respondents should be aware that they may withhold payment and defeat an adjudication under the BCIP Act in circumstances where the claimant has stopped performing work.

Further, claimants will have to be careful to ensure that they do not needlessly issue payment claims which may exhaust the last available reference date; noting that issuing a payment claim will use a reference date, regardless of whether the payment claim is then adjudicated upon or not.

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