

Construction Alert

Queensland Court of Appeal restricts contracting parties' ability to qualify reference dates under a construction contract

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Introduction

A recent decision of the Queensland Court of Appeal has significant implications for the application of conditions precedent to submitting payment claims in construction contracts. In *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd & Ors* [2012] QCA 150, the Court of Appeal held that a failure to adhere to contractual warranties and preconditions in relation to the form and content of a progress claim did not qualify the date upon which the statutory entitlement to a progress payment under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) accrued.

Facts

John Holland Pty Ltd (**John Holland**) contracted with Bechtel Australia Pty Ltd for the performance of certain construction works. It subcontracted a portion of those works to Coastal Dredging & Construction Pty Ltd (**Coastal Dredging**).

Coastal Dredging submitted a payment claim under the BCIPA for \$5,042,837.79 and proceeded to adjudication in respect of that claim. The adjudicator determined that John Holland was liable to pay Coastal Dredging the amount of \$3,571,790.20.

John Holland applied to the Supreme Court for a declaration that the adjudicator's decision was void on two grounds:

- First, that the payment claim was not made from a valid reference date as no reference date had arisen.
- Second, that John Holland was denied natural justice because the adjudicator found, 'on a basis for which neither party contended', that a contractual bar in relation to Coastal Dredging's claim for delay damages was inapplicable.

The first ground attracted more extensive consideration in his Honour Justice Fraser's decision (with whom Justices Peter Lyons and White agreed) and, as discussed below, is of significance to the application of BCIPA for all contracting parties.

Decision

Reference date

John Holland argued that no reference date had arisen under the subcontract due to Coastal Dredging's failure to strictly adhere to certain warranties in clause 12.6 of the subcontract. That clause provided, in part:

'The Subcontractor may submit a Payment Claim to John Holland only on each Reference Date. The Subcontractor

warrants to John Holland that Payment Claims will:

.....

(b) be in the format John Holland requires including the provision of a statutory declaration as required under clause 12.17;

.....

The Subcontractor warrants and represents that if a Payment Claim does not comply with the conditions set out in this clause 12.6:

(h) that Payment Claim is void; and

(i) the Reference Date for the purposes of the Security of Payment Act shall be the same day on the following month.'

Relevantly, the subcontract also defined 'Reference Date' to mean *'the date when the Subcontractor may submit a Payment Claim to John Holland in accordance with clause 12.6 and Schedule A, and has the same meaning as defined in the Security of Payment Act'*.

John Holland argued that the proper construction of the contractual definition of reference date was that its accrual was conditional upon satisfaction of the matters in clause 12.6 and that reference to the subparagraphs of clause 12.6 was necessary to identify the date 'worked out under' the subcontract, within the meaning of paragraph (a) of the definition of 'reference date' in the BCIPA. Specifically, it submitted that Coastal Dredging (by its own admission) failed to comply with the warranty given in clause 12.6(b), and that as a result, until compliance with that warranty, clauses 12.6(h) and (i) prevented a reference date from arising from which Coastal Dredging was entitled to submit a payment claim under the BCIPA.

Justice Fraser rejected John Holland's contentions and found that the first sentence of clause 12.6 of the subcontract, read with the definition of reference date, was enough to confer on Coastal Dredging an entitlement to make a progress claim. His Honour held at [18]:

'...the contractual provisions to which reference may be made for the purpose of ascertaining the "reference date" are those which state, or provide for the working out of, the date on which a progress payment claim "may be made". The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims....'

Accordingly, his Honour held that compliance with the warranties in clause 12.6 of the subcontract was not, for the purposes of the definition of 'reference date', a condition of the entitlement to submit a payment claim and John Holland could not identify a circumstance in which those provisions could defer Coastal Dredging's statutory entitlement to a progress payment.

By then finding that the intention of clauses 12.6(h) and (i) was to *'defer what otherwise would have been [Coastal Dredging's] statutory entitlement to a progress payment from a reference date ascertained in accordance with the [BCIPA]'*, his Honour found that those clauses were void under section 99 of the BCIPA as they purported to modify or otherwise change the effect of a provision of the BCIPA.

Ramifications

The Court of Appeal's decision in *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd & Ors* is a significant development in relation to the application of conditions precedent to submitting payment claims in construction contracts. It appears that parties cannot qualify the date upon which the statutory entitlement to a progress payment accrues by including contractual warranties and preconditions in relation to the form and content of progress claims. All that parties may do is work within the unambiguous terms of the definition of 'reference date' in BCIPA; that is, by nominating the 'date' upon which progress claims may be submitted.

The decision therefore stands to widen the gap between a party's contractual right to determine the method by which a reference date is worked out and the statutory right conferred by the BCIPA to enjoy the benefit of a reference date free of encumbrances such as adhering to contractual warranties and preconditions.

Advice for Principals

Principals and contractors cannot assume that contractual warranties and preconditions in relation to the form and content of progress claims will qualify the 'reference date' upon which payment claims under the BCIPA may be submitted to it. Whilst such contractual provisions will impact upon the contractual validity of progress claims and are important to manage risk and facilitate the provision of information to allow an appropriate assessment of progress claims under the contract, it appears they have limited application to the statutory validity of payment claims under the BCIPA.

Advice for Claimants

Similarly, contractors and subcontractors should carefully consider the effect of contractual provisions which seek to limit the circumstances upon which a reference date arises when making progress claims. Notwithstanding seemingly water-tight contractual preconditions, the Court of Appeal's decision places primacy on a claimant's unimpeded statutory right to a progress payment. Whilst sound contract administration still necessitates compliance with all contractual provisions, claimants whose progress claims have been rejected on the grounds of a failure to adhere to a contractual precondition or warranty should consider their statutory rights under the BCIPA and seek appropriate legal advice.

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