

Construction Alert

Supreme Court narrows definition of construction contract

March 2013

Introduction

The recent decision of the Queensland Supreme Court in *Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4* has provided further guidance on the definition of 'contract, agreement or other arrangement'. The decision also demonstrates a continued willingness of the Court to declare adjudication decisions void under the *Building and Construction Industry Payments Act 2004 (Qld) (BCIP Act)*.

Facts

Matrix Projects (Qld) Pty Ltd (**Matrix**) and Tony Jason Luscombe (**Luscombe Builders**) entered into a "Period Subcontract" whereby Luscombe Builders agreed to perform "works yet to be agreed" for a period of 12 months in respect of repair works to buildings damaged by the 2011 floods (**Period Subcontract**). As a part of the Period Subcontract, a work order would be raised for each individual project. On at least nine occasions a work order was raised by Matrix to Luscombe Builders under the Period Subcontract (**Individual Work Orders**).

In relation to another five projects, Luscombe Builders did not receive a work order pursuant to the Period Subcontract but rather received oral directions from Matrix instead (**Oral Directions**). Any work ordered under the Oral Directions by Matrix could be accepted or rejected by Luscombe Builders.

On 31 August 2012, Matrix sent a letter to Luscombe Builders terminating all work (**Termination Letter**).

Luscombe Builders submitted a single payment claim under the BCIP Act for work done under the Period Subcontract, Individual Work Orders and the Oral Directions (**Payment Claim**). Subsequently an adjudicator awarded Luscombe Builders an amount of \$407, 455.19.

Matrix applied to the Court to have the adjudicator's decision declared void based on the following three grounds.

The Contract Ground

The issue before the Court was whether the Period Subcontract, the Individual Work Orders and the Oral Directions constituted a single 'construction contract' for the purposes of the BCIP Act or whether they formed multiple, separate agreements.

Matrix's position was that the:

- Period Subcontract was not a 'construction contract' as it was an agreement for work not yet agreed;
- Individual Work Orders constituted multiple individual 'construction contracts'. In the alternative, the Period Subcontract and the Individual Work Orders could be construed as a 'construction contract'; and
- Oral Directions were separate and distinct from the Period Subcontract and therefore a separate 'construction contract'.

Luscombe Builders' position, with which the adjudicator agreed, was that the Period Subcontract, Individual Work Orders and the Oral Directions constituted a single 'construction contract' as the definition of 'contract, agreement or other arrangement' as defined under the BCIP Act was wide enough to capture all three agreements.

The Court ultimately held that the work undertaken by Ludscombe Builders was divisible into work done pursuant to the Period Subcontract and work done under the Oral Directions. The Period Subcontract and the Oral Directions were therefore held by the Court to be two separate construction contracts for the purposes of the BCIP Act. As a result, the Payment Claim was not a valid payment claim under the BCIP Act as it contained work from both the Period Contract and the Oral Directions.

Exercise of adjudicator's power and denial of natural justice

The Payment Claim contained work up to the date of the Termination Letter. The adjudicator made the decision that Luscombe Builders was entitled to what was payable until the end of the Period Subcontract. This was not the basis upon which Luscombe Builders had made its claim. The adjudicator did not request the parties to provide submissions on his alternative view of valuing the Payment Claim.

Matrix's position was that any claim for payment by Luscombe Builders must be valued as at the date of the Termination Letter and that the failure of the adjudicator to do so was a failure to exercise his power under the BCIP Act and by not requesting further submissions had denied Matrix natural justice.

Luscombe Builders' position was that the adjudicator is entitled to make an error in making his decision and that the type of error made by the adjudicator was not one in which that voids his decision.

Justice Douglas found that the adjudicator's decision was

beyond his power and the error amounted to a "fundamental misapprehension of the task the adjudicator faced". Justice Douglas also found that by not requesting the parties' submissions in relation to this alternate view of valuing the Payment Claim, he had denied Matrix natural justice.

Implications

Definition of construction contract

Until now, the courts have given the definition of construction contract, more specifically the phrase 'contract, agreement or other arrangement' with respect to the BCIP Act a very wide interpretation.

This case highlights that although the definition ordinarily ascribed to the phrase 'other arrangement' is cast wide, care must be taken when submitting payment claims under the BCIP Act in circumstances where multiple projects/work orders are involved.

Exercise of adjudicators' powers/Denial of natural justice

In relation to the denial of nature justice point raised by Matrix, there is nothing in this decision that raises any novel points of law.

However, the courts have only in very few circumstances declared the decisions of adjudicators void on the basis of a failure to exercise their responsibilities. This case provides a welcome change for respondents, and to a lesser extent claimants, that the courts are holding adjudicators to a higher standard with respect of them fulfilling their duties under the BCIP Act

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