

## Construction Alert

### Termination of Contracts and the right to issue payment claims under the *Building and Construction Industry Payments Act 2004 (Qld)*

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The recent Supreme Court of Queensland decision of *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67 (**Walton**) has a significant impact on a claimant's right to pursue payment under the *Building and Construction Industry Payments Act 2004 (Qld)* (**BCIP Act**) following the termination of a construction contract.

It had previously been accepted in Queensland that, in accordance with the decision in New South Wales in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 (**Brodyn**), monthly reference dates under a construction contract continue to accrue for 12 months after the cessation of work, notwithstanding termination of the contract. That is, despite termination of the contract, a claimant may still serve a payment claim and proceed to adjudication under the BCIP Act.

However, the decision of Justice Peter Lyons in *Walton*, which turns on the interpretation of both a clause that is common to standard form Australian construction contracts and the definition of 'reference date' under the BCIP Act, confirms that claimants may no longer have recourse to the BCIP Act following the termination of a contract. The decision has important consequences for claimants and respondents.

#### The facts in *Walton*

Walton Construction (Qld) Pty Ltd (**Walton Construction**) engaged Corrosion Control Technology Pty Ltd (**CCT**), a painting subcontractor, for works at a development at Fortitude Valley, Brisbane. Following a show cause notice issued by Walton Construction, and a response from CCT, Walton Construction terminated the subcontract on 15 January 2010.

Despite termination of the subcontract, CCT continued to submit payment claims under the BCIP Act in respect of reference dates that occurred after the date of termination. In respect of the last payment claim submitted on 22 March 2010, CCT proceeded to adjudication under the BCIP Act and received a favourable determination in the amount of \$225,856.92.

On review before the Queensland Supreme Court, Walton Construction submitted, amongst other things, that the last payment claim was not a payment claim to which the BCIP Act applied, in essence because the BCIP Act permits only one payment claim for each reference date, and the reference dates occurring prior to termination of the subcontract had already been exhausted.

CCT submitted that, notwithstanding termination of the subcontract, at least one further reference date accrued thereafter. It relied on *Brodyn*, arguing that reference dates continue to occur on a monthly basis after the termination of a contract.

#### Reference dates

Section 12 of the BCIP Act entitles a person to a progress payment 'from each reference date under a construction contract'. As such, an understanding of the term 'reference date' is important insofar as correctly submitting claims under the BCIP Act is concerned.

'Reference date' is defined in schedule 2 of the BCIP Act to mean:

- a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made; or

- if the contract does not provide for the matter, the last day of the named month in which the works to which the payment relates was first carried out and the last date of each subsequent month.

Two limitations to submitting payment claims are relevant to the decision in Walton. Firstly, multiple payment claims under the BCIP Act cannot be made in respect of the same reference date. Secondly, unless the contract provides for a longer period, a payment claim must be submitted within 12 months after the works to which the claim relates was last carried out.

## The decision in Walton

Applying clause 44.10 of the subcontract, which dealt with the consequences of termination of the subcontract, and a strict interpretation of the definition of 'reference date' under the BCIP Act, Justice Lyons found that no reference dates occurred in respect of the subcontract after its termination and, accordingly, the right to submit progress claims in relation to reference dates occurring after the date of termination ceased with the exercise of the contractual right to terminate. Accordingly, the last payment claim was not a payment claim which satisfied the requirements of the BCIP Act and it was, together with the resulting adjudicator's decision, invalid.

## Contractual interpretation

In reaching the decision, Lyons J first considered a matter of contractual interpretation. The relevant provision of the subcontract, on which his Honour's judgment turned, was clause 44.10 of AS2545 which was in the following terms:

*'...the rights and liabilities of the parties shall be the same as they would be at common law had the defaulting party repudiated the Subcontract and the other party had elected to treat the Subcontract as at an end and recover damages.'*

Notably, this clause is reproduced in common standard form construction contracts AS2124, AS4300 and AS4902 and is found in substantially the same terms in AS4000 and AS4901.

Lyons J considered the nature and rationale of the limited class of contractual rights which survive termination and which are available to the parties notwithstanding termination, namely rights which arise under an arbitration clause or a liquidated damages clause. His Honour found that, without the specific identification of such clauses, and

the rationale for their operation after termination, terms of a contract generally do not operate after termination. At paragraph [38], Lyons J stated:

*'The effect of clause 44.10 seems to me to be that the right to make progress claims, together with the accrual pursuant to the contract of the dates on which those claims might be made, ceases with the exercise of the contractual right to terminate...'*

## Statutory interpretation

Having considered clause 44.10 of the subcontract, Lyons J then turned to the decision in Brodyn and an interpretation of the definition of 'reference date' under the BCIP Act. Brodyn stands for the proposition that, under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**), monthly reference dates continue to accrue for twelve months after the cessation of work, notwithstanding termination of the contract. However, his Honour distinguished Brodyn due to the differences between the statutory provisions which identify reference dates in the Queensland BCIP Act and the NSW Act. Lyons J noted that the definition of 'reference date' in the NSW Act used the expression '*in relation to a construction contract*' whereas the definition in the Queensland BCIP Act uses the expression '*under a construction contract*'. Lyons J found this subtle difference to be critical. In his Honour's opinion (at [42]):

*'The use of the expression "under a construction contract" found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract "under" which there might be a reference date.'*

As a result, a reference date pursuant to which CCT could serve a payment claim under the BCIP Act did not arise after the termination of the subcontract.

It is important to note that his Honour's finding relates to reference dates occurring after the termination of a contract. Paragraph 46 of the judgment leaves it open to inference that payment claims submitted under the BCIP Act after the date of termination of a contract but which are submitted in respect of reference dates occurring prior to termination which have not yet been exhausted, would be valid.

## Discussion

The decision of Lyons J in Walton presents a new risk to claimants and an interesting opportunity for respondents.

The comfort that was previously provided to claimants by Brodyn and the availability of reference dates pursuant to which payment could be pursued after termination under the BCIP Act, appears, at least for now, to be lost. However, with careful drafting, the impact of Walton can be avoided.

## Tips for claimants

Where engaged under a contract containing a clause of similar substance to clause 44.10 in Walton, claimants are now faced with the prospect of losing the right to pursue payment under the BCIP Act in circumstances where a contract is terminated. To seek payment after termination, it may only do so in respect of reference dates occurring prior to termination which have not yet been exhausted or, if such reference dates are not available, pursuant to its rights at general law or by way of arbitration if the contract so provides.

However, with careful drafting, such a result can potentially be avoided. By specifically identifying in the contract that reference dates under the contract survive termination, the right to issue payment claims after termination should fall into the 'class of contractual rights which survive termination' identified by Lyons J. In this way, the right to issue payment claims under the BCIP Act after termination would be preserved.

In the absence of such a term, there are significant implications for the timing of 'strategic' payment claims. For example, claimants should consider pursuing larger claims that are generally left until the conclusion of the project, such as claims for delay costs, at an earlier stage so as to avoid the risks associated with any potential termination of the contract.

## Tips for respondents

The decision in Walton represents an important consideration for respondents and how they treat a contract in circumstances where they anticipate receiving large ambit claims from claimants. There is now an incentive for respondents to seek advice as to its right to lawfully terminate a contract at later stages in a project. In the right circumstances, by lawfully terminating, a respondent would force a claimant to seek payment by much more expensive and time consuming means, such as arbitration or litigation.

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