SUPREME COURT OF QUEENSLAND

CITATION:	*Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* [2009] QSC 328
PARTIES:	**MARTINEK HOLDINGS PTY LTD** ACN 106 533 242 (applicant) **v** **REED CONSTRUCTION (QLD) PTY LTD** ACN 010 871 557 (respondent)
FILE NO/S:	BS 10664 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	8 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2009
JUDGE:	White J
ORDER:	**The application is dismissed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – whether the respondent should be restrained from seeking an adjudication certificate and filing a judgment in court pursuant to ss 30 and 31 of the *Building and Construction Industry Payments Act* 2001 (Qld) *Building and Construction Industry Payments Act* 2004 (Qld), s 18, s 21, s 24, s 30, s 31, s 100 *Property Law Act* 1974 (Qld), s 57 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 *John Holland Pty Ltd v Roads and Traffic Authority of NSW* (2006) 66 NSWLR 624 *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397 *Sutcliffe v Thackrah* [1974] AC 727 *Wormall Pty Ltd v Marchese Investments Pty Ltd* [2008] WADC 173
COUNSEL:	P Dunning SC, with GD Beacham, for the applicant JK Bond SC, with M Ambrose, for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
Holding Redlich Lawyers for the respondent

[1] The applicant, Martinek Holdings Pty Ltd ("Martinek"), has applied for a stay of the Adjudication Decision dated 17 September 2009 made by the adjudicator, Paul Roberts, in relation to Adjudication Application No. 1064504_486 and ancillary orders. In reality it is seeking an order restraining the respondent, Reed Construction (Qld) Pty Ltd ("Reed"), from proceeding under ss 30 and 31 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("the *Payments Act*") to seek an Adjudication Certificate and file a judgment in this court. It is concerned that if the Adjudication Amount is paid to Reed it will not be recoverable because of concerns about Reed's financial position.

[2] On 31 July 2006 Martinek and Reed entered into a contract[1] for the construction of a development in Mackay known as the Rivage Development. Martinek was the Principal and Reed was the Contractor. The parties appointed Paul Worroll of Reddog Architects as Superintendent for the Contract.

[3] Practical completion of the contract was achieved on 4 April 2008. The defects liability period was extended until 4 July 2009. The Superintendent in his letter to Reed noted:

> "We do advise that under Clause 35 should the defects not be completed prior to the completion of the Defects Liability Period then the Principal has the right to have the rectification works carried out by others. The cost incurred shall be certified by the Superintendent as monies due and payable to the Principal…"

By letter dated 22 July 2009 to Reed, the Superintendent noted that the extended defects liability period finished on 4 July 2009.

[4] On 31 July 2009 Martinek received Progress Claim No. 25 from Reed described as "Final Payment Claim" for the period ending 4 July 2009. That claim including GST was for $1,196,084.15. The following appeared at the foot of the claim:

> "This Final Payment Claim includes for the full release of retention monies held as security on this project and this is claimed as a result of the defect works that have been carried out throughout the defects liability period which expired on 4 July 2009."

This claim was described as being made under the *Payments Act* and it is undisputed that it was such a claim. In response the Superintendent advised that further time was required to assess Progress Claim No. 25. On the same date Martinek submitted a Payment Schedule pursuant to s 18 of the *Payments Act*.

[5] On 28 August 2009 Martinek received a copy of an Adjudication Application submitted by Reed to RICS Dispute Resolution Service, pursuant to s 21 of the *Payments Act*, to have its Progress Claim No. 25 adjudicated.

[6] On that day Martinek wrote to Reed that, because Reed had been notified by the Superintendent and/or Martinek's representative of continuing significant defects, Reed was not entitled to submit its Final Payment Claim until the work had been

---

[1] AS4000-1997 – General Conditions of Contract as amended.

completed in accordance with the contract. Reed was requested to withdraw Progress Claim No. 25 and to advise that it would rectify the defects.

[7] On 4 September 2009 Martinek submitted its Adjudication Response pursuant to s 24 of the *Payments Act*.

[8] On 7 September 2009 Reed wrote to Martinek in response to its letter of 28 August 2009 in which Reed contested that there were any outstanding defects which had not been attended to during the extended defects liability period. Reed, accordingly, declined to withdraw its Final Payment Claim.

[9] On 22 September 2009 Martinek received a copy of the Adjudication Decision dated 17 September 2009 which contained an Adjudicated Amount of $919,634.91 (including GST) as being payable by Martinek to Reed.

[10] By letter dated 22 September 2009 Reed's lawyers demanded that Martinek pay the Adjudication Amount together with the value of the adjudication fees and interest, amounting to $946,624.12, within five business days from 21 September 2009. In default, steps would be taken to enforce the Adjudication Decision.

[11] On 24 September 2009 the Superintendent provided his Final Certificate to Martinek and Reed in respect of the Final Payment Claim No. 25. The Superintendent certified the amount finally due by Reed to Martinek as $72,027.27 (including GST). That amount was arrived at after assessing Reed's Final Payment Claim at $664,902.03 less amounts due and payable to Martinek by Reed of $730,381.37 leaving a balance as certified.

[12] Martinek's solicitors responded to Reed's demand on 24 September 2009 that the Final Certificate had been issued pursuant to cl 37.4 of the contract and, as a consequence, the Adjudication Decision was redundant. The solicitors requested that Reed not proceed further to judgment.

[13] Reed served a Notice of Dispute dated 30 September 2009 in relation to the Superintendent's Final Certificate pursuant to cl 42.1 of the contract. Reed wrote:

> "We refer to the final payment certificate issued by the Superintendent dated 24 September 2009 (**Final Payment Certificate**). RCQ [Reed] disputes the Final Payment Certificate in its entirety and states that the sum of $1,024,322.81 plus GST is due and payable by Martinek to RCQ, being the sum claimed in the adjudication claim dated 28 August 2009 and interest payable on the amount awarded in the Adjudicator's Decision to today's date as set out below in table 1."

The notice developed more fully the bases for the rejection of the Final Payment Certificate.

[14] The parties engaged in further correspondence about undertakings and the filing of the application. An interim injunction was granted by the court until 4.00 pm on 5 October 2009 which was extended upon Martinek extending its undertakings as to damages until the delivery of this decision.

[15] Martinek contends that it obtained final relief in respect of the parties' entitlements under the construction contract by the issue of the Final Certificate with the

consequence that Reed may no longer enforce the Adjudication Decision because it is inconsistent with the final position under the contract. Reed, on the other hand, contends that, on its proper construction, the contract does not establish on a final basis what is owed under the contract but only prima facie evidence of the monies due and payable.

[16] Clause 37.1 of the contract concerns progress claims and cl 37.2 progress certificates from the Superintendent. Clause 37.4 concerns the final payment claim and certificate. Its construction and relationship to the *Payments Act* is at the heart of the dispute. It provides:

> "**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* except for:
>
> a) fraud or dishonesty relating to the *WUC* or any part thereof or to any matter dealt with in the *final certificate;*
>
> b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
>
> c) any accidental or erroneous inclusion or exclusion of *any work* or figures in any computation or an arithmetical error in any computation; and
>
> d) unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*."

[17] Mr Dunning SC, who appeared with Mr Beacham for Martinek, submitted that the language of cl 37.4 permits the conclusion that the Superintendent's Final Certificate was conclusive evidence and established on a final basis what is owed

under the contract. That is, in effect, it "undid" the effect of the prior determination by the Adjudicator, to use the language of McDougall J in *John Holland Pty Ltd v Roads and Traffic Authority of NSW*[2], a case upon which Mr Dunning relied heavily.

[18] Mr Bond SC who appeared with Mr Ambrose for Reed conceded that the Final Certificate meant that Martinek had a contractual right to payment of the amount identified as due and payable by Reed to Martinek, namely $72,027.27, but it was not final so as to bring about the accounting envisaged in s 100 of the *Payments Act*.

[19] The terms of cl 37.4 need to be examined closely for each party takes a different view of their meaning and effect.

[20] The second paragraph of cl 37.4 may conveniently be set out again:

> "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 Contract."

Those words should be considered with the last paragraph:

> "The *final certificate* shall be conclusive evidence of accord and satisfaction, in discharge of each party's obligations in connection with the subject matter of the Contract except for…"

Relevant for this application is the exception in (d):

> "unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*."

[21] The conclusive status of the Final Certificate was challenged by Mr Bond. He referred to s 57 of the *Property Law Act* 1974 (Qld) which provides relevantly:

> "(1) Subject to any other Act, a provision in a contract or instrument to the effect that a certificate, statement or opinion of any person shall be or be received as conclusive evidence of any fact in the certificate, statement or opinion contained shall be construed to mean only that such certificate, statement or opinion shall be or be received as prima facie evidence of that fact."

The general law on the conclusivity of certificates is, however, preserved in subsection (2). It provides:

> "This section shall not apply to –
>
> (a) a certificate statement or opinion of a person who, in making the certificate or statement or informing the opinion, is bound to act judicially or quasi-judicially or as arbitrator or quasi-arbitrator; or …"

---

[2] (2006) 66 NSWLR 624 at [51]–[52]. That expression was not supported by Giles JA on appeal [2007] NSWCA 140 at [62] but conveys the practical effect of what is contended for.

[22] In *Sutcliffe v Thackrah*[3] the House of Lords overruled a long held view that an architect certifying works under a contract could not be liable in negligence because he or she is acting as a quasi-arbitrator and thus obliged to act judicially. Lord Morris commented on the characterisation of an architect or similar professional in that role:[4]

> "A person will only be an arbitrator or a quasi-arbitrator if there is a submission to him either of a specific dispute or of present points of difference or of defined differences that may in the future arise and if there is agreement that his decision will be binding. The circumstance that an architect in valuing work must act fairly and impartially does not constitute him either an arbitrator or a quasi-arbitrator. The circumstance that a building owner and contractor agreed between themselves that a certificate of an architect showing a balance due is to be conclusive evidence of the works having been duly completed and that the contractor is entitled to receive payment does not of itself involve that the architect is an arbitrator or a quasi-arbitrator in giving his certificate."

[23] The Queensland Law Reform Commission in its Report to Parliament on property law reform with respect to the proposed s 57 of the *Property Law Act* clearly intended to exempt certificates given by architects and engineers under building and construction contracts and bring them within subsection (2). But that must be read in light of the House of Lords decision which was subsequent to the Report,[5] and which is strongly persuasive authority.

[24] Exceptions to the conclusivity of the certificate are set out in the final paragraph of cl 37.4. At common law there were two recognised exceptions of illegality and fraud.[6] The parties are, of course, free to make what other exceptions they wish and have done so, namely, where there are unresolved issues the subject of a notice of dispute pursuant to cl 42 and served as provided for. As mentioned above, Reed has served its Notice of Dispute to the Final Certificate.

[25] Mr Bond submits as a further reason why the final certificate is not "final" a provision in cl 2.2 of Annexure Part B which amends the definition of "Final Certificate" in cl 1 of the contract to include the words:

> "which certificate also serves the purpose of the Payments Schedule required under the BCIP Act [the *Payments Act*]."

No doubt in recognition of the provisions in s 99 of the *Payments Act* that parties may not contract out of the Act the parties inserted in Annexure Part B a new provision cl 44 to the following effect:

> "The parties acknowledge the BCIP Act [the *Payments Act*] contains legislative provisions regarding, among other things:
>
> (a) The submission of progress claims by the Contractor;
> (b) The provisions of a Payment Schedule (a "Progress Certificate" and the "Final Certificate" under the Contract) and the payment of progress claims by the Principal; and

---

3 [1974] AC 727.
4 [1974] AC 727 at 752–753.
5 See report of the Law Reform Commission Re Property Law Report QLRC 16 at p 49.
6 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 per Starke J at 615 and 656.

> (c) Disputes that may arise regarding progress claims and progress payments, including adjudication processes available under the BCIP Act."

By cl 44.2 the parties agreed that the contract was amended to render it consistent with the requirements of the *Payments Act.*

[26] Mr Dunning referred to the decision in *John Holland* as supporting Martinek's position. It was a factually different situation to the present and may be briefly summarised. John Holland contracted with the Roads & Traffic Authority for the construction of a road and associated bridgeworks. Under the terms of the contract John Holland provided security for the due performance of its obligations under the contract. In the course of carrying out the works determinations were made pursuant to the New South Wales equivalent of the *Payments Act*. The adjudicated amounts were in excess of the amount of the security held by the Roads & Traffic Authority. The adjudicated amounts were paid and after the works achieved practical completion John Holland asked for the return of half the security which was declined. John Holland's application for return of the security was unsuccessful at first instance and on appeal. Clause 42.5 of that contract provided that the issue of the final payment schedule constituted conclusive evidence that all work under the contract had been finally and satisfactorily executed by the contractor (John Holland) "except insofar as it is provided in any proceedings…or…arbitration…that the said Final Payment Schedule is erroneous by reason of"[7] fraud, defects or omissions or accidental or arithmetical error. In his reasons McDougall J noted: "Fortunately no question arose as to the "finality" of a certificate subject to such wide exclusions".[8]

[27] Mr Dunning particularly relied upon the following passage in his Honour's reasons:[9]

> "In a practical sense, the final determination for balance owing under a construction contract may "undo" the effect of a prior determination by an adjudicator of the amount of a progress payment. But that is because the final determination – however it is made – establishes, on a final basis, the amount owing by one party to the other. If the final determination is made by a court, or arbitral or other tribunal, of competent jurisdiction then it establishes finally and conclusively (of course, subject to any appeal that may lie) the relevant rights of the parties to the contract."

He added:[10]

> "There is no reason why a final determination by the Superintendent could not "undo" the effect of a prior determination by an adjudicator in just the same way as a final determination by a court or arbitral or other tribunal might do so."

[28] Of this proposition Giles JA in the Court of Appeal said:

> "It is not correct that retention of security "undoes" an adjudicator's determination, or that a superintendent who in performing his

---

7 (2006) 66 NSWLR 624 at [16].
8 (2006) 66 NSWLR 624 at [16].
9 (2006) 66 NSWLR 624 at [51].
10 (2006) 66 NSWLR 624 at [52].

> contractual function comes to a determination negates a statutory right to retain an adjudicated amount. The adjudicator's determination remains, and brings payment of the adjudicated amount, but that is interim and subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings."

His Honour continued:

> "If in civil proceedings it is decided that the contractor was entitled to $10 or $30 rather than the $20 determined by the adjudicator, that does not undo the adjudicator's determination. It has done its work in ensuring "prompt interim progress payment on account, pending final determination of all disputes" (per Ipp JA in *Brewarrina Shire Council v Beckhau Civil Pty Ltd*.)[11] So also if, in the manner earlier described, the contractual mechanisms result in a contractual obligation on the principal to pay the contractor or the contractor to pay the principal. The contractor's right under the Act is to receive the adjudicated amount, but subject to final determination, and if the final determination involves the superintendent determining that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, the superintendent is not negating the contractor's statutory right."

[29] That proposition is not challenged by Mr Bond. Here something more has occurred. Under the contract there is a dispute about the findings in the Final Certificate. That was the position in *Wormall Pty Ltd v Marchese Investments Pty Ltd*[12] a decision of Principal Registrar Gething in Western Australia. A determination made under the Western Australian equivalent of the *Payments Act* was for a certain amount and the final certificate issued with a net amount to be paid by the judgment creditor to the judgment debtor. It was argued that it would be unjust to require the judgment debtor to pay the creditor the larger sum in circumstances where the final balance under the contract had been determined, not as an amount owing by the judgment debtor to the judgment creditor but as an amount owing by the judgment creditor to the judgment debtor. In that case both parties challenged the final certificate. That being so, the adjudication determination stood as an interim payment which the judgment creditor had a statutory right to receive. Relying on *John Holland*, Registrar Gething held that there was no finality and that if the parties could not agree under the contract an arbitrator would make a decision. The final determination would bring about either a refund or a further payment.

[30] So, too, here. Once a dispute in compliance with the contract has occurred in respect of the Final Certificate it cannot be said that the Final Certificate has finality so as to bring into play the allowance provisions in s 100 of the *Payments Act.* The Adjudication Decision stands until the final position has been reached between the parties. The concern of Martinek is, of course, that the perceived financial instability of Reed may make a final determination in which it is, in net terms, successful, illusory. In *RJ Neller Building Pty Ltd v Ainsworth*[13] Keane JA, with

---

11 [2005] NSWCA 248 at [219].
12 [2008] WADC 173.
13 [2008] QCA 397.

whom the other members of the court agreed, noted at para 40 after discussing the purposes of the *Payments Act*:

> "Accordingly, the risk that a builder might not be able to refund monies ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner."

His Honour referred to other factors which might warrant a stay of execution which, so far as the material reveals here, are not present.

[31] Accordingly, the application is dismissed.