# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Reed Constructions (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2009] QSC 345 |
| PARTIES: | **REED CONSTRUCTIONS (QLD) PTY LTD (ACN 010 871 557)**<br>(applicant)<br>**v**<br>**MARTINEK HOLDINGS PTY LTD (ACN 106 533 242)**<br>(respondent) |
| FILE NO: | BS 4723 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 4 November 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 29 July 2009; 30 July 2009 |
| JUDGE: | Daubney J |
| ORDER: | **1. The application be dismissed**<br>**2. The applicant pay the respondent's costs of and incidental to the application** |
| CATCHWORDS: | CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACT – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant served on the respondent a payment claim pursuant to s 17 of the *Building and Construction Payments Act* 2004 (Qld) – where the respondent did not file a payment schedule within 10 days of receiving the payment claim – where applicant claimed in those circumstances the respondent became liable to pay the amount claimed – whether payment claim served on the correct date – whether the claim served was a final payment claim<br><br>TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATITIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – |

CONDUCT CAUSING UNCERTAINTY OR CONFUSION – where respondent alleged misleading and deceptive conduct – where respondent claimed there was an agreement made or representations by the applicant that it would not pursue the payment claim for a period of time – where it was suggested that payment for a progress claim was not pursued so as not to prejudice joint venture negotiations between the respondent and applicant – whether there was any such agreement

*Building and Construction Industry Payments Act* 2004 (Qld)
*Trade Practices Act 1974* (Cth)
*Uniform Civil Procedure Rules* 1999 (Qld)

*Baxbex v Bickle* [2009] QSC 194, applied
*Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina Council* [2002] NSWSC 960, cited
*Bramble Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, applied
*Doolan v Rubikcon Pty Ltd* [2008] 2 Qd R 117, considered
*F.K. Gardner & Sons Pty Lt v Dimin Pty Ltd* [2006] 1 Qd R 10, applied
*Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd ATF The Keith Batt Family Trust* [2007] QSC 20, cited
*Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11, applied
*J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205, applied
*Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45, cited
*Salomon Smith Barney Australia Corp Finance Pty Ltd v Allgas Energy Ltd* (2001) QSC 72, cited
*Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32, considered

COUNSEL: M D Ambrose for the applicant
P Dunning SC and R Schulte for the respondent

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

[1] On 31 July 2006 the applicant builder and the respondent developer entered into a written agreement for the construction of the Rivage Development ("Rivage Contract"). The contract price was $26,955,195.30 inclusive of GST. It is not in issue the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*") applied to the Rivage Contract.

[2] On 3 April 2009 the applicant served on the respondent Progress Claim No. 24 ("the payment claim") pursuant to s 17 of the *BCIPA*, claiming the sum of $1,166,289.82.

[3] The respondent did not file a payment schedule within 10 business days of receiving the payment claim. It was submitted by the applicant that in those circumstances the respondent became liable to pay the amount claimed.[1] The applicant has now applied for judgment pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) for the sum of $1,166,289.82 as a liquidated debt under s19(2)(a)(i) of the *BCIPA.*

[4] The respondent opposes the grant of that application on the following bases:

> "(a) there was an agreement (independent of the construction contract) to suspend the Applicant's right to pursue a claim under the *BCIPA* – a forbearance to sue the Respondent – in exchange for being the Respondent's preferred building contractor for a particular development;
>
> (b) misleading or deceptive conduct by the applicant that lead the respondent to believe that the applicant would not pursue a claim against the respondent or in the alternative conduct amounting to estoppel on the same grounds;
>
> (c) invalidity of the payment claim because of the delivery of the second payment claim in respect of the same "reference date" with the effect that section 19(2) *BCIPA* is not engaged because of the non-compliance with the mechanisms of the *BCIPA*;
>
> (d) delivery of a payment schedule by the respondent within the time required by the Act such that the Applicant has no entitlement under section 19(1) *BCIPA.* This issue arises because the Applicant contends that the relevant "reference date" is 1 April 2009 whereas the Respondent contends that on a proper construction of the Building Contract between the Applicant and the Respondent the relevant reference date for a payment claimed issued on 3 April 2009 is 1 May 2009. The Respondent delivered a payment schedule under *BCIPA* within the time required.
>
> (e) Claim 24 is a final claim under the construction contract (see clause 37.4) and as such there was no entitlement to make a claim under *BCIPA* in the way such application is made here."

## The statutory regime under the *BCIPA*

[5] In *Baxbex v Bickle*[2] I summarised the relevant statutory regime under the *BCIPA* as follows:

> "By s 7 of the *BCIPA*, its object is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work (or undertakes to supply related goods and services) under a construction contract. This objective is achieved:

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1 Section 18(4)(b)(ii) *Building and Construction Industry Payments Act* 2004 (Qld).

2 [2009] QSC 194 at [5]-[8]

(a) by granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and

(b) by establishing a procedure that involves the making of a payment claim, the provision of a payment schedule in response, the referral of a disputed or unpaid claim to an adjudicator for decision and the payment of the progress payment decided by the adjudicator.[3]

Part 2 of the *BCIPA* confers rights to progress payments. Section 12 provides that from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment.

The procedure for recovering progress payments is set out in Part 3 of the *BCIPA*. Under s 17 a person who is entitled to a progress payment under Part 2 may serve a payment claim on the person who is liable to make the payment. The formal requirements specified in s 17 compel the person making the payment claim to:

(a) identify the construction work or related goods and services to which the progress payment relates;

(b) state the amount payable;

(c) state that the payment claim is made under the *BCIPA*.

Section 18 enables the respondent to reply to the claim by providing a payment schedule to the claimant. Details of the content and service of the payment schedule are also dealt with in s 18. If the respondent does not serve a payment schedule on the claimant within the prescribed time, "the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the progress claim relates."[4]

[6] Section 19 of the *BCIPA* outlines the consequences of not paying the claimant if the respondent does not serve a payment schedule on the claimant within the time allowed under s 18 of the *BCIPA* or fails to pay the whole or part of any of the amount claimed. In such a case, the claimant may either:

(a) proceed in court to recover the unpaid amount as a debt due and owing, or

(b) pursue an "adjudication application" under the *BCIPA*.[5]

[7] If the claimant proceeds in court, the respondent is not entitled in those proceedings to bring any counterclaim or raise any defence in relation to matters arising under the contract.[6]

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3 Section 8 *Building and Construction Industry Payments Act* 2004 (Qld).
4 Section 18(5) *Building and Construction Industry Payments Act* 2004 (Qld).
5 Section 19(1),(2) *Building and Construction Industry Payments Act* 2004 (Qld).
6 Section 19(4) *Building and Construction Industry Payments Act* 2004 (Qld).

**The Rivage Contract**

[8] The "reference date" referred to in s 12 of the *BCIPA* is defined in the Act to mean, *inter alia*:

> "(a) a date stated in, or worked out under the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out or related goods and services supplied or undertaken to be supplied under a contract…"

[9] In relation to the making of progress payments, clause 37.1 of the Rivage Contract provides:

> "The *Contractor* shall claim payment progressively in accordance with *Item 28*. An early progress claim shall be deemed to have been made on the date for making that claim.
>
> Each progress claim shall be given in writing to the *Superintendent* and shall include details of the WUC [Work Under Contract] done and may include details of other moneys then due to the *Contractor* pursuant to the provisions of the *Contract.*"

[10] Item 28 provides that the time for making progress claims is the "first day of each month for Work Under Contract to the last day of that month to which the claim relates."

[11] By clause 37.1A of the Rivage Contract, "the dates stated in Item 28 for making a progress claim each month is the 'reference date' for the purpose of the *BCIP* Act."

**The payment claim – incorrect reference date**

[12] Payment Claim 24 was dated and served on the respondent on 3 April 2009. It was said by the applicant that this was for work up to 31 March 2009.

[13] The applicant argued that the payment claim met the requirements prescribed in s 17(2) of the *BCIPA.* Pursuant to s 15(1) of the *BCIPA*, the due date for responding to that claim on the applicant's calculations was, therefore, 21 April 2009. The payment schedule was not issued by the respondent until 14 May 2009.

[14] It was submitted by the respondent that the payment claim was not issued on the reference date under the Rivage Contract, that is, the first day of the month and was therefore invalid or deemed to be served on the next reference date.

[15] Relevantly, clause 37.1 of the Rivage Contract provides that where a payment claim is served early it is deemed to be served on the next reference date. The question, then, was whether the payment claim served by the applicant on 3 April 2009 was then deemed to be a payment claim served on 1 May 2009.

[16] It was submitted by the applicant that the *BCIPA* makes it clear that the time for service of a payment claim is not restricted to the date specified in the contract. If it had been intended otherwise, s 12 would have read "On each reference date…". The applicant relied on the decision of Macready AJ in *Beckhaus Civil Pty Ltd*

*v Council of the Shire of Brewarrina Council*[7] and Nicholas J in *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd*[8] to support this proposition, referring to the fact that the *BCIPA* contemplates a duel system by creating a statutory system alongside any contractual regime.

[17] Counsel for the respondent argued that this reading of s 12 of the *BCIPA* would or could result in more than one payment claim issuing for the reference date. This would be at odds with s 17(5) of the *BCIPA* which prohibits more than one payment claim being served in relation to each reference date under the construction contract.

[18] As was said by Chesterman J (as he then was) in *J Hutchinson Pty Ltd v Galform Pty Ltd:*[9]

> "**[39]** The Act itself contains some indications that a contractor may not make more than one payment claim with respect to the same claim for payment under the contract. Section 17(5) provides:
>
> (5) A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.
>
> **[40]** A reference date is a date stated in or worked out under a construction contract as the date on which a claim for a progress payment may be made. The two payment claims in question were obviously in relation to the same reference date. They were for the same work. The claims were identical. The proviso to the prohibition is not, I think, relevant though its meaning is not readily apparent. Subsection (6) is, I think, meant to permit the inclusion in a subsequent payment claim made in relation to a different reference date of an amount previously claimed but disallowed, perhaps on the basis that the work was not completed. When completed the work may be included in a subsequent claim thought it had been asked for earlier."

[19] Further, Fryberg J in *Doolan v Rubikcon Pty Ltd,*[10] when considering the operation of s 17(5), observed:

> "That is not to say that the claim must include all work done up to that date. If something is omitted from a claim, notwithstanding that it could have been claimed on a particular reference date, there is no reason why it cannot be claimed on the next reference date. Likewise anything further which gives rise to a claim after the first of such reference dates, may also be included in the next claim. Subsection 17(6) permits also the inclusion of an amount which has been the subject of a previous claim but that does not mean that a previous claim can be the sole item included in the later claim."

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7 [2002] NSWSC 960.
8 [2005] NSWSC 45 at [47].
9 [2008] QSC 205.
10 [2008] 2 Qd R 117 at 121.

[20] I do not accept the applicant's proposition that the *BCIPA* allows a payment claim to be served from the accrual of each reference date as distinct from "on" each reference date.

[21] Acceptance of the applicant's contention would mean that more than one progress claim could be served in relation to each reference date. A similar issue was considered by Ann Lyons J in the matter of *F.K. Gardner & Sons Pty Ltd v Dimin Pty Ltd.*[11] In that case, the contract provided for a payment regime involving the submission of payment claims on the 28th day of each month. No claim was lodged in May 2006 but on or about 20 June 2006 the applicant issued a payment claim. It was submitted by the applicant in that case that it was irrelevant that the progress payment under the contract was submitted late if it was due on 28 May 2006 or early if it was due on 28 June 2006 because whilst it may have been a technical breach of the contract it did not affect the operation of the *BCIPA.*

[22] The respondent in that case submitted:[12]

> "The applicant's purported payment claim is not a valid claim pursuant to the Act. There is no entitlement to make a payment claim prior to the contractual reference day which is 28 June 2006..."

Her Honour said:[13]

> "Under the contract, no claim could have been made for this work until 28 June 2006 and it has not been submitted that there was any agreement between the parties to change this date…"

[23] In all the circumstances, I am not persuaded that the applicant's interpretation is correct. The critical words found in Item 28 of the Schedule provide the time for making progress claims is the "*first day of each month* for Work Under Contract to the last day of that month to which the claim relates" (emphasis added). There is no evidence to suggest that this contractual provision was altered by agreement between the parties.

[24] There is also nothing in the *BCIPA* which overrides the contractual provisions. Section 12 merely confers the right to make a claim.[14] The procedure for asserting that entitlement is governed by the terms of the contract and there is nothing inconsistent between the procedure stated in the contract and the provisions of the *BCIPA.* In fact, later provisions of the *BCIPA* stress adherence to the terms of the contract. For example, s 13 states that the amount of a progress payment to which the person is entitled is (a) the amount calculated *under the contract* (emphasis added). Similarly, pursuant to s 14 construction work carried out is to be valued under the contract.

[25] It is, however, primarily s 15 on which the respondent relies to support its argument. The section contemplates that that there will be a progress payment and

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11 [2006] 1 Qd R 10.

12 At [22]

13 At [23]

14 See Mullins J at [6] in *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd ATF The Keith Batt Family Trust* [2007] QSC 20.

that progress payment becomes payable *on the day* on which payment becomes payable under the provisions of the contract.

[26] Accordingly, I consider that the correct interpretation is that of the respondent; that the contract contemplates that the progress claim be made *on* the first of the month. On this interpretation, there can only be one opportunity per month to make a progress claim. However, as was noted by Fryberg J in the *Rubikcon* case, where a progress claim is not made on the first of the month, the right to claim has not been lost entirely, but merely postponed until the first day of the following month.

[27] The second paragraph of clause 37.1 of the Rivage Contract reinforces this interpretation:

> "An early progress claim shall be deemed to have been made on the date for making that claim."

This must be understood as meaning that an early claim takes effect from the next date and a late claim (that is a claim which does not fall on the first of the month) is an early claim for the next period.

[28] For these reasons I find that the payment claim served on 3 April 2009 was deemed to have been made on 1 May 2009. On 14 May 2009, the respondent served on the applicant a payment schedule pursuant to s18 of the *BCIPA* in response to Progress Claim No. 24. Accordingly, the respondents delivered a payment schedule under the *BCIPA* within the time required such that the applicant has no entitlement under s 19(1) of the Act.

**A progress claim or a final claim?**

[29] It was also argued by the respondent that Progress Claim 24 was not a progress claim but a final claim.

[30] In relation to the making of a final claim, clause 37.4 of the Rivage Contract provided:

> "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 both to 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*…"

[31] The applicant contended that Payment Claim 24 was not, and could not have been, a final claim for several reasons:

> "(a) The Respondent states that the defects liability period does not end until 4 July 2009. The contrary is not asserted by the Applicant;

(b) Payment Claim 24 was not endorsed with the words "Final Payment Claim" as required by clause 37.4 of the Contract;

(c) Payment Claim 24 was not seeking to finalise all payments under the contract and expressly excluded retention in the amount of $100,000.00."

[32] Both Mr Cole (the applicant's Chief Executive) and Mr Horton (the Contract Administrator) agreed in evidence that they understood there to be two retention amounts under the Rivage Contract:

1. One to be released at practical completion; and
2. One to be released upon the making of the final claim.[15]

[33] Mr Cole also agreed that it was common ground that prior to the making of progress claim 23 practical completion had been reached.[16] At this time there was approximately $1,000,000.00 left to be paid.[17]

[34] Mr Cole also agreed that:

(a) the applicant claimed and obtained release of the practical completion retention with Progress Claim 23;[18] and

(b) within Payment Claim 24 was approximately $500,000 of the retention monies which were part of the final claim retention monies.[19]

[35] In relation to (b) Mr Cole said that he knew those retention monies were to be released on the making of the final claim[20] and that he knew he had no contractual entitlement to it other than the making of a final claim.[21] It is clear that the contractual regime was one whereby the balance was only to be released on the issuance of a final certificate.[22]

[36] The Rivage Contract Superintendent, Mr Worroll, said that he treated Payment Claim 24 as a final claim[23] on the basis that he believed there was a full release of the retentions[24] and from an email copied to Mr Worroll from John Harris (of Link Project Solutions) to Mr Cole referring to arrangements between them "in order to finalise money under the contract."[25] It was put to him in cross-examination that the document did not in fact, seek a full release of the retention because of the words "Less contingency for external defects, $100,000."

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15 Mr Cole at page 53 of transcript 29/7/09 at lines 1-20; Mr Horton at page 57 of transcript 29/7/09 at lines 40-60.
16 Page 40 of transcript 29/7/09 at lines 36-40.
17 Page 40-41 of transcript 29/7/09 at line 60 & 1.
18 Page 53 of transcript 29/7/09 at lines 1-10; see Mr Horton page 57 of transcript lines 50-60.
19 Page 53 of transcript 29/7/09 at lines 10-20.
20 Page 53 of transcript 29/7/09 at lines 50-60.
21 Page 54 of transcript 29/7/09 at lines 1-10.
22 Clause 5.4 of the General Conditions.
23 Page 3 of transcript 30/7/09 at lines 50-60.
24 Page 2 of transcript 30/7/09 at lines 22- 30
25 Affidavit of P Worroll 2/7/09 paras 9-10, ex PW1 (pp1-5).

[37] Applying the reasoning of Ann Lyons J in *F.K. Gardiner*, I am of the view that as Progress Claim 24 sought relief which was part of the final retention monies, for which there could be no entitlement unless it was a final claim, Progress Claim 24 was, in fact, a final claim. As a result, the Superintendent had, pursuant to clause 37.4 of the Rivage Contract, 42 days to make an assessment of the claim.

**Misleading and deceptive conduct**

[38] Having determined that the applicant's claim is deemed to have been served on 1 May 2009, it is not necessary for me to determine the claim of misleading and deceptive conduct raised by the respondent. For the sake of completeness, however, I should express the following views.

[39] The respondents' main defence to the application was an allegation of misleading and deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) ("*TPA*") namely, that there was an agreement or representations made by the applicant that it would not for a period of time (including the period in which the Payment Claim 23 was served), serve a payment claim. The respondent argued that, in reliance upon that representation, no payment schedule was served.

[40] On 30 May 2008, the applicant served the respondent with Progress Claim 23 for $141,162.39. On 8 May 2009, the respondent paid the applicant the sum of $154,345.16 (including GST) being payment of Progress Certificate No. 23 plus interest in the sum of $12,882.77. The respondent contended that at no time in the interim did the applicant take any step to enforce its rights under the *BCIPA* in respect of Progress Claim 23. The agreement alleged by the respondent to exist was an understanding that while joint venture negotiations between the parties in respect of another property in Leichardt Street were underway ("Joint Venture Negotiations"), monies otherwise payable by the respondent to the applicant under the Rivage Contract would be suspended.

[41] The respondent's Director, Mr Martinek, deposed to the fact that as a consequence of the negotiations, it was agreed that:

1. "if the Joint Venture Negotiations were agreed and finalised, any money owing by the respondent to the applicant (including the amount certified in Progress Certificate No. 23) under the Rivage Contract would be applied as the applicant's equity contribution to the entity purchasing the Leichardt Site; and
2. while the Joint Venture Negotiations continued no further payments would be required to be made by the respondent to the applicant pursuant to the Rivage Contract."[26]

[42] The applicant argued that these allegations were based on agreements and not representations or identified conduct. It was contended that the respondent had not discharged its onus of proving on the balance of probabilities that the applicant had contravened s 52 of the *TPA* because the evidence of Mr Martinek was "extraordinarily vague as to how the agreements came to be" and provided no more than "evidence of an ongoing negotiation about a proposed joint venture" as the

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[26] Affidavit of J Martinek 28/7/09 paras 29 and 30; Affidavit of J Martinek 19/5/09 para 8.

existence of the agreement was something he "took from" meetings and conversations.

[43] Mr Martinek, under cross examination, said that while such an agreement was in existence at the time of receiving progress claim 23, this was never put in writing.[27] He argued that upon receipt of Progress Claim 23, he did not question why it had been issued, nor did he inform the Superintendent, Red Dog Architects, that no further payments were to be made.[28] It is indeed curious that Mr Martinek, who sought to rely on the alleged agreement, did not notify the Superintendent, being the person who administered the contract and had the power to issue certificates.

[44] This may, however, be explained by Mr Martinek's contention that during the next year, no demand was received from the applicant for the payment of Progress Claim 23.[29] Mr Worroll in his evidence also makes a similar observation.[30]

[45] Mr Reed conceded in both his oral evidence[31] and his affidavit[32] that the reason Mr Reed did not pursue the respondent for the payment of Progress Claim 23 was:

1. his desire to secure a contract worth approximately $32,000,000 to build on the Leichardt Street site; and

2. because the contract would be with a principal with which he had already had satisfactory dealings with.

[46] Mr Cole, also agreed that these two factors made the joint venture contract for the Leichardt Street property an attractive project[33] and there was a concern for damaging the commercial relationship needed to enter such a project if the progress claim payment on the Rivage Contract was pursued.[34]

[47] Mr Cole said he had telephone discussions with both Mr Worrell and Mr Harris regarding payment of Progress Claim 23, but he conceded that he did not follow up either of them in writing[35] and that when he became aware in early July 2008 that Mr Martinek was unable to pay he was "happy to put it on hold" in the hope of obtaining the development and building profits if the Leichardt site joint venture was able to proceed.[36]

[48] Mr Reed wrote to Mr Martinek on 23 September 2008 outlining Mr Reed's understanding of the potential joint venture. The letter refers to various discussions between the parties and, after setting out proposed terms of the agreement, states:

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27 Page 65-66 of transcript 29/7/09.
28 Page 65 lines 13-31; 39-43.
29 Affidavit of J Martinek 28/7/09 paras 31, 33, 34.
30 Affidavit of P Worroll 2/7/09 paras 3-5.
31 Page 24 of transcript 29/7/09 at lines 1-40.
32 Paragraphs 6 & 7.
33 Page 43 of transcript 29/7/09 at lines 6-16.
34 Affidavit of S Cole 28/7/09 Paras 41, 72-73; page 42 of transcript 29/7/09 lines 18-25 and page 44 of transcript.
35 Page 45 of transcript 29/7/09 at lines 45-50.
36 Page 46 of transcript 29/7/09 at lines 20-30.

> "This would effectively see both RCQ and Martinek holding $1 million in "equity" each upon transfer of the land. In return for RCQ's position, I would anticipate retention and variations to the amount of $1 million would be off set from the Rivage project. This proposal is subject to RCQ being provided with appropriate tax advice ensuring they are not materially prejudiced under the proposed arrangement, which we would obtain during the due diligence period…"

[49] There appears to be some disagreement about when these negotiations commenced.[37] Mr Reed in oral evidence agreed that discussions about the proposed joint venture agreement took place in the second half of 2008[38] and into 2009 and neither he nor Mr Cole said to Mr Martinek at any point stated that joint venture negotiations were at an end.[39] It appears that negotiations moved from discussing a joint venture under which the respondent would have had an interest in the development, to the purchase of the site by Mr Reed or the applicant and with/without another company around Christmas 2008/early 2009. The respondent contends that in a conversation between Mr Jim Martinek, Mr Ken Reed and Mr Stephen Cole, it was agreed that, in addition to the joint venture negotiations:

> "(a) Reed Construction would be permitted to investigate finding a third party with experience as a hotel operator to purchase the Leichhardt Site from Martinek Holdings; and
>
> (b) in the alternative to Martinek Holdings, Reed Construction would be permitted enter into a joint venture agreement with the third party to develop the Leichhart Site."

[50] It seems to me that there was no 'bright line' between the joint venture negotiations and the purchase of the site negotiations. It was also conceded by Mr Reed that he did not say to Mr Martinek, either in person, or in writing that the negotiations over the possible *purchase* of the site were at an end.[40]

[51] The respondent contends that, at the time of entering into the purchase offer negotiations, it was agreed:

> "(a) that should they proceed to an agreement, and the Proposed Joint Venture not proceed:
>
> (i) Reed Construction (and the third party) would purchase the Leichhardt Site from Martinek Holdings at a full market value (**Purchase Price**);
>
> (ii) Reed Construction would rectify all outstanding defects in the Rivage Development;
>
> (iii) following receipt of the Purchase Price by Martinek Holdings, and upon the completion of all outstanding defects in the Rivage Development, Martinek Holdings would pay Reed Construction:

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37 Points of Claim para 9, Points of defence para 9(a).

38 Confirmed by Mr Cole Pg 42 transcript 29/7/09 at lines 1-5.

39 Mr Reed page 28 of transcript 29/7/09 at lines 20-40; Mr Cole page 52 of the transcript at lines 20-25.

40 Page 30 of transcript 29/7/09 at lines 6-10.

A. the amount of $141,462.39 (including GST) claimed in Progress Claim no. 23;
B. any variations to the Rivage Contract that had been agreed to by Reed Construction and Martinek Holdings and had not already been paid by Martinek Holdings; and
C. Retention monies held under the Rivage Contract;

(b) until both these negotiations and the Joint Venture Negotiation were concluded, the suspension of rights in relation to the Rivage Contract would operate (**the Purchase Offer Negotiation Suspension of Payment Claim and Entitlement Agreement)**."

[52] It was further asserted by the respondent that, "Alternatively, if for any reason the Purchase Offer Negotiations Suspension of Payment Claim and Entitlement Agreement was not binding on Reed Construction, it represented to Martinek Holdings to the effect that it would act in accordance with the constrains on its entitlement to make claims for the payment (**the Purchase Offer Negotiation Suspension of Payment Claim and Entitlement Representation)**."

[53] Mr Martinek said that, as at 3 April 2009 he believed that both the Joint Venture Negotiations and the Purchase Offer Negotiations were still proceeding. In a telephone conversation on 30 April 2009 between Mr Cole and Mr Martinek, the respondent was informed by the applicant that it would be pursuing full payment of the amount claimed in Progress Claim 24. Mr Martinek said that in a further conversation with Mr Cole on that same day, he promised to make full payment of the amount in Progress Claim 23 on 8 May 2009 and that Mr Cole stated that the Purchase Offer Negotiations were still underway.[41] It was contended by the respondent that as a result of these telephone conversations it was represented to the respondent, *inter alia*, that the proposed Joint Venture Negotiations and Purchase Offer Negotiations were ongoing and that the respondent did not have to make payment or take any action under the *BCIPA* in relation to Progress Claim 24. In essence, that the amount in Progress Claim 24 would "be dealt with either in accordance with the Joint Venture Negotiation Agreement or the Third Party Purchase Offer Negotiation or upon notification that such negotiations were at an end (**30 April Representation**)." Accordingly, in reliance upon this representation no payment was made for the amount claimed in Progress Claim 24 nor was a payment schedule issued.

[54] In *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*[42] McHugh JA (as he then was) said:

> "Nevertheless a contract may be inferred from the acts and conduct of parties as well or in the absence of their words. The question in this class of case is whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all of the essential elements of an expressed contract." Similarly, Justice Holmes in *Salomon Smith Barney Australia Corp Finance Pty Ltd v Allgas Energy Ltd*[43] at [54]-[55] referring

41 Affidavit of J Martinek 2/7/09 para 95; Affidavit of J Martinek 19/5/09 para 18.
42 (1988) 5 BPR 11, 110 at 11,117
43 (2001) QSC 72.

> to *Winks v W H Heck & Sons Pty Ltd*[44] when considering post-contractual conduct, emphasises that it is not necessary to pinpoint offer and acceptance in a classical sense "unless it affords direct evidence to the formation of the conduct, the conduct of the parties is relevant only where it leads to the necessary inference that somewhere, somehow, the parties must have made a particular agreement."

[55] This passage was quoted with approval by Heydon JA (as he then as) in *Bramble Holdings Ltd v Bathurst City Council*.[45]

[56] Accepting that contracts may indeed be inferred from the conduct of the parties, I consider that the evidence discloses that in 2008 there was a tacit understanding between the parties that payment was to be suspended while the joint venture negotiations were on foot, and that this understanding continued into 2009 when joint venture negotiations had proceeded into sale negotiations.

[57] In the second half of 2008, when the global financial crisis had taken its toll on the building industry and work was rapidly diminishing because of the economic situation, [46] it is plain to see why, as a matter of commerciality, Reed Constructions would have delayed asking for the outstanding moneys under the Rivage Contract in the hope of securing the joint venture contract.

[58] In my view, the critical point in time was early 2009, when the parties had undoubtedly moved from negotiations as to the joint venture to the sale of the site by the respondent. Counsel for the respondent submitted that while the difference was that the Martinek company was not to have an interest in the purchaser company, the features that were important to the applicant, and had inclined it not to pursue the monies owing under the claim, remained just as germane to the purchase option as it did to the joint venture option. That is, "the drivers remained there to acquire this particular property because of the unique value that Reed saw in it, in terms of its development potential, to be able to build on it and to acquire it from Mr Martinek on terms that were acceptable." I accept this proposition.

[59] Accordingly, I find that as late as 30 April 2009 it was represented to the respondent that money need not be paid under Progress Claim 24. In the absence of any notification by the applicant that the Joint Venture Negotiations or Purchase Offer Negotiations were at an end, I am of the view that:

1. there was a tacit agreement between the parties to suspend the applicant's right to pursue a claim under the *BCIPA;* and
2. this was reinforced by the applicant's misleading and deceptive conduct which lead the respondent to believe that the applicant would not pursue a claim against the respondent.

**Estoppel claim**

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44 [1986] 1 Qd R 226 at 238.

45 (2001) 53 NSWLR 153 at 178.

46 Mr Cole page 41 of transcript 29/7/09 lines 5-9; Mr Reed page 24 of transcript 29/7/09 at lines 45-60.

[60] It is evident from the affidavit of Mr Martinek that the respondent also raised an estoppel in relation to the delivery of the payment claim. Douglas J in *obiter* in *Tailored Projects Pty Ltd v Jedfire Pty Ltd*,[47] when considering a similar defence, commented that he would not consider such a ground as the basis for refusing relief and it was more appropriate for litigation contemplated by s 100 of the *BCIPA*. I agree with the applicant's contention that, to the extent such an estoppel is raising a point about the proper interpretation and application of the contract, it falls within the exclusion in s 19(4)(b)(ii) of the *BCIPA* as being "a defence in relation to matters arising under the construction contract." In any event I am of the view that this case has, and should be, determined having regard to purely contractual principles. I do not, therefore, think it necessary to consider this argument in further detail.

**Findings**

[61] In all the circumstances I order that the application be dismissed and the applicant pay the respondent's costs of and incidental to this application.

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47 [2009] QSC 32 at [25].