



Supreme Court
New South Wales

Case Name: Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd

Medium Neutral Citation: [2020] NSWSC 1702

Hearing Date(s): 30 November 2020

Date of Orders: 30 November 2020

Decision Date: 30 November 2020

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Summons dismissed with costs; Plaintiff to pay to the First Defendant moneys paid into Court

Catchwords: BUILDING AND CONSTRUCTION – whether adjudication determination under the Building and Construction Industry Security of Payment Act 1989 should be quashed – reference date – whether cl 4.1 of the construction contract was one by or in accordance with which the date for a progress claim was determined – whether term expressly nominates the date by which the claim may be made – whether s8(2)(a) of the Building and Construction Industry Security of Payment Act 1999 enlivened

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW)

Cases Cited: Greenwood Futures v DSD Builders [2018] NSWSC 1407
Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2014] NSWSC 1413
Quasar Constructions v Demtech Pty Ltd [2004]

NSWSC 116

Category: Principal judgment

Parties: Waco Kwikform Ltd (Plaintiff)
Complete Access Scaffolding (NSW) Pty Ltd (First Defendant)
Callum Campbell (Second Defendant)
Adjudicate Today Pty Ltd (Third Defendant)

Representation: Counsel:
B Le Plastrier (Plaintiff)
D Weinberger (First Defendant)

Solicitors:
HWL Ebsworth Lawyers (Plaintiff)
HBA Lawyers (First Defendant)

File Number(s): 2020/295113

EX TEMPORE JUDGMENT (REVISED)

- 1 The plaintiff, Waco Kwikform Ltd, seeks to challenge an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) that it pay the defendant, Complete Access Scaffolding (NSW) Pty Ltd ("CAS"), \$301,856.36.
- 2 The sole basis of the challenge to the adjudication determination is that the relevant payment claim was "not a valid claim as there was no reference date" (para C14 of the List Statement).
- 3 The parties agree that this question turns on whether or not the construction contract between them made "express provision" with respect to "the date on which a claim for a progress payment may be made" for the purpose of s 8(2)(a) of the Act as it then stood.
- 4 S 8(2)(a) at the relevant time provided:

8 Rights to progress payments

...

(2) In this section, **reference date**, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work

carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter – the last day of the named month in which the construction work was first carried out ... under the contract and the last day of each subsequent month.

5 The relevant provision in the contract is clause 4.1:

“4.1 Claims submitted by the 20th day of the month will, if approved by Waco Kwikform, be paid by the end of the following month. If any part of a claim is not approved then such part will not be paid and the Subcontractor will be provided with the reasons for the non-payment.”

6 Mr Le Plastrier, for Waco, accepted that if cl 4.1 was not a "term of the contract" in accordance with which the "date on which a claim for a progress payment may be made" was to be "determined" for the purposes of s 8(2)(a), then Waco's challenge to the determination must fail.

7 For that reason Mr Le Plastrier and Mr Weinberger, who appeared for CAS, directed submissions to that question at the outset of the hearing before me today and agreed that, were I to come to the conclusion that cl 4.1 is not such a term, that would resolve the proceedings.

8 In my opinion in order for a term to be a term of the contract for the purpose of s 8(2)(a), the term must be one which expressly nominates the date by which the claim for a progress payment may be made.

9 That is, the term must be one where a date can be identified from the terms of the contract itself as being "the date on which a claim for a progress payment may be made".

10 In my opinion that calls for a provision in the contract that, by its own terms, determines the date by which the payment claim can be made.

11 Thus, in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 Barrett J said at [21] that what was needed was:

“... an express contractual regime for the claiming and making of progress payments in the ordinary sense.”

12 Similarly, McDougall J in *Greenwood Futures v DSD Builders* [2018] NSWSC 1407 said at [61] that what was needed was a provision that:

“... expressly nominates dates for the making of payment claims.”

- 13 An example of such a provision is was referred to by Ball J in *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 at [5] being a provision that “the Contractor shall be entitled to claim payment progressively in accordance with *Item 28*” and where “Item 18” provided “The last day of each month for [Work] done to the second last day of the month”.
- 14 In my opinion cl 4.1 is not such a provision.
- 15 It does not require CAS to make any claim.
- 16 It contemplates that CAS may choose if and when to make a claim and makes provision for when payment for that claim would be made, if the claim were made by the twentieth day of the month, and if the claim were approved.
- 17 The clause contemplates that the date “on which a claim for a progress claim may be made” is at CAS's discretion.
- 18 That day chosen by CAS would not be determined "by or in accordance" with the “terms of the contract and cl 4.1 in particular; but by CAS itself.
- 19 As Mr Weinberger pointed out, under cl 4.1 CAS could make any number of claims in the days leading up to the twentieth day of the month and, indeed, could make multiple claims in one day.
- 20 On Waco's construction, each of those dates would be reference dates.
- 21 Mr Le Plastrier pointed to s 13(5) of the Act, which provides that a claimant cannot serve more than one payment claim in respect of each reference date.
- 22 But it would follow from Waco's construction of cl 4.1 that CAS could serve a payment claim for each reference date created by its decision to submit a claim under cl 4.1.
- 23 That cannot be right.
- 24 In my opinion cl 4.1 is not a term of the kind contemplated by s 8(2)(a).
- 25 As s 8(2)(a) is not engaged, the question of reference date is to be determined in accordance with s 8(2)(b).

- 26 It is common ground that, in that event, there was a reference date for the purpose of the determination.
- 27 It follows that the challenge to the determination fails.
- 28 The summons should be dismissed with costs.
- 29 I order that the plaintiff pay out to the first defendant the moneys paid into Court following the commencement of these proceedings.

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