

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S ECI 2015 00082

COMMERCIAL & INDUSTRIAL CONSTRUCTION GROUP PTY LTD  
(ACN 091 460 230)

Plaintiff

v

KING CONSTRUCTION GROUP PTY LTD  
(ACN 114 008 132)

First Defendant

and

MICHAEL HEATON QC

Second Defendant

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JUDGE: VICKERY J  
WHERE HELD: Melbourne  
DATE OF HEARING: 14 May 2015  
DATE OF JUDGMENT: 21 August 2015  
CASE MAY BE CITED AS: Commercial Industrial Construction Group Pty Ltd v King  
Construction Group Pty Ltd and anor  
MEDIUM NEUTRAL CITATION: [2015 ] VSC 426

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BUILDING AND CONSTRUCTION - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Application for judicial review of a determination of an adjudicator - Application for writ of certiorari to quash a decision of an adjudicator - Jurisdictional error - Error of law on the face of the record - Adjudication set aside - Validity of payment claim - Calculation of reference date for payment claim - Payment claim served more than once in respect of reference date - Right to progress payment - Whether work required to be done since preceding reference date - *Building and Construction Industry Security of Payment Act 2002* (Vic) application of ss 9(1), 9(2), 14(8), 14(9).

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Twigg QC with Mr R Andrew of counsel	Giannakopoulos Solicitors
For the Defendant	Mr D McAndrew of counsel	Minter Ellison

HIS HONOUR:

- 1 By Originating Process (RedCrest) filed 20 March 2015, the Plaintiff, Commercial and Industrial Construction Group ('CICG') seeks judgment or orders that the adjudication determination dated 11 March 2015 (the 'Adjudication Determination') made under the *Building and Construction Industry Security of Payment Act 2002* (the 'Act') purportedly made by the Second Defendant (the 'Adjudicator') be quashed or set aside.
- 2 CICG impugns the Adjudication Determination on the grounds that the subject payment claim made by the First Defendant ('King Construction'), dated 21 January 2015 ('the 21 January Payment Claim'), is invalid under the provisions of the Act.
- 3 The 21 January Payment Claim was made in respect of construction work undertaken on the Sunraysia Community Health Services project in Mildura, Victoria (the 'Project'). King Construction was the construction company engaged by CICG to construct works for the Project pursuant to a construction contract within the meaning of the Act.
- 4 The 21 January Payment Claim was made with respect to four November and December invoices and one further invoice, number 1226, in respect of previous work. A central issue is whether King Construction, in serving the 21 January Payment Claim, did so in breach of s 14(8) of the Act, and consequently served an invalid payment claim because the 21 January Payment Claim was a second payment claim made in respect of the reference date 5 January 2015.
- 5 Section 14(8) of the Act provides:
  - (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- 6 A relevant exception to s 14(8) is found in s 14(9) of the Act, which is in the following terms:
  - (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

7 A second central issue arises if it is found that the 21 January Payment Claim was made in respect of the reference date 3 February 2015, and not 5 January 2015, namely, whether there was any entitlement to a progress payment on 3 February 2015 because there was no work performed or materials supplied since the last reference date of 5 January 2015 and the next reference date 3 February 2015. The text of s 9(1) of the Act requires a progress payment made under the Act to be 'calculated by reference to' the relevant reference date. The question is whether this calls for work to have been performed since the last relevant reference date in order to found a valid payment claim under the Act by reference to the next reference date.

8 The right to a progress payment in respect of which a payment claim may be made, and its calculation by reference to a 'reference date' is provided for in s 9 of the Act, which is in the following terms:

- (1) On and from each reference date under a construction contract, a person –
  - (a) who has undertaken to carry out construction work under the contract; or
  - (b) who has undertaken to supply related goods and services under the contract –

is entitled to a progress payment under this Act, calculated by reference to that date.

- (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 –
    - (i) a date on which a claim for a progress payment may be made; or
    - (ii) a date by reference to which the amount of a progress payment is to be calculated –

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

- (b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or

(in the case of the first reference date) the date occurring 20 business days after –

- (i) construction work was first carried out under the contract; or
  - (ii) related goods and services were first supplied under the contract; or
- (c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that –
- (i) construction work was last carried out under the contract; or
  - (ii) related goods and services were last supplied under the contract; or
- (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –
- (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
  - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate* ; or
  - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –
    - (A) construction work was last carried out under the contract; or
    - (B) related goods and services were last supplied under the contract.

9 CICG claims that the Adjudication Determination, which was founded on the validity of the 21 January Payment Claim, was infected with a vitiating error going to jurisdiction, and as a result, it should be quashed. CICG seeks:

1. relief in the nature of certiorari pursuant to Order 56 to quash the adjudication determination on the following grounds:
  - a) jurisdictional error;
  - b) error of law on the face of the record.

2. a declaration that the adjudication determination is invalid pursuant to the principles enunciated in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421.

### **The 21 January Payment Claim**

- 10 The 21 January Payment Claim was served on that date. It consisted of a letter claiming a total sum of \$976,671.69 (including GST, or \$887,883.36 excluding GST). The letter noted 'Particulars of our payment claim under the Act are set out in the enclosed table, together with five invoices numbered 1203, 1206, 1211, 1223 and 1226.'
- 11 Invoice number 1203 was noted in the letter table as amounting to \$56,325.00 and was expressed to be issued in relation to 'October works completed as per October Progress Claim worksheet'.
- 12 Invoice number 1206 was noted in the letter table as amounting to \$672,496.37 and was expressed to be issued in relation to 'Concrete works completed as per 'Progress Claim'.
- 13 Invoice number 1211 was noted in the letter table as amounting to \$53,617.99 and was expressed to be issued in relation to 'reimbursement of funds paid to trades'.
- 14 Invoice number 1223, was noted in the letter table as amounting to \$83,040.00 and was expressed to be issued in relation to 'Concrete works'.
- 15 Invoice number 1226, was noted in the letter table as amounting to \$22,404.00 and was expressed to be issued in relation to 'Hire Items and Site Supervisor'.
- 16 All five invoices noted that they were payment claims made under the Act, consistently with the requirement in s 14(2)(e) of the Act.
- 17 There is no reference date stated in the 21 January payment claim pursuant to which any of the invoices was calculated, and no reference date was expressed in any of the invoices.

## The Payment Schedule

- 18 CIGG issued a payment schedule in response to what it described as 'King Construction Group's purported Payment Claim dated 21 January 2015' stating the scheduled amount to be '\$Nil'.
- 19 CIGG maintained that the 21 January Payment Claim was invalid for the reasons set out in its payment schedule in the following terms:

King Construction Group has purported to issue a Payment Claim dated 21 January 2015 in the sum of \$976,671.69 (incl. GST). CIGG maintains that the Payment Claim dated 21 January 2015 is invalid for the following reasons:

1. no further construction works were carried out by King Construction Group at the Sunraysia Community Health Service project between the previous reference date on 22 December 2014 and 21 January 2015; and
2. as there is no different or new work there is no new reference date and no entitlement to issue another payment claim for progress payments under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the Act').

King Construction Group's Payment Claim dated 21 January 2015 in the sum of \$976,671.69 (incl. GST) comprises four previous claims (being Invoices 1203, 1206, 1211 and 1223) and a new Invoice 1226 dated 21 January 2015. Particulars of the previous claims and the new claim are set out below:

Date of Payment Claim	Invoice number of Payment Claim	Amount claimed in Payment Claim
21 November 2014	Invoice 1203	\$56,325.00
26 November 2014	Invoice 1206	\$672,496.37
28 November 2014	Invoice 1211	\$53,617.99
23 December 2014	Invoice 1223	\$83,040.00
21 January 2014	Invoice 1226	\$22,404.00
	Subtotal	\$887,883.36
	GST	\$88,788.33
	Total incl. GST	\$976,671.69

There is no express provision for reference dates in any Contract or agreement between King Construction Group and CIGS. Accordingly Section 9(2)(b) of the Act applies to determine the reference dates under the Act. The first reference date occurs 20 business days after the construction works were first carried out by King Construction Group and each and every subsequent reference date occurs 20 business days after the previous reference date.

King Construction Group commenced works on 8 May 2014. Accordingly the reference dates pursuant to Section 9(2)(b) of the Act are as follows:

Reference date 1	<b>5 June 2014 (being 20 business days after 8 May 2014)</b>
Reference date 2	4 July 2014 (being 20 business days after 5 June 2014)

Reference date 3	1 August 2014 (being 20 business days after 4 July 2014)
Reference date 4	29 August 2014 (being 20 business days after 1 August 2014)
Reference date 5	26 September (being 20 business days after 29 August 2014)
Reference date 6	24 October 2014 (being 20 business days after 26 September 2014)
Reference date 7	24 November 2014 (being 20 business days after 24 October 2014)
Reference date 8	22 December 2014 (being 20 business days after 24 November 2014)

The Payment Claim dated 21 January 2015 includes amounts that were previously claimed by King Construction Group in Invoices 1203, 1206, 1211 and 1223 and an additional Invoice 1226 in the sum of \$22,404.00 (excl. GST).

With respect to Invoices 1203, 1206, 1211 and 1223 we confirm the following:

1. Each of these invoices has been previously issued;
2. Each of these invoices relate to a previous reference date;
3. CIGG has previously issued Payment Schedules in response to each of these invoices; and
4. CIGG has paid the Scheduled amount in each Payment Schedule.

In relation to Invoice 1226 in the sum of \$22,404.00 (excl. GST), this relates to hire items that were purportedly supplied during the period 1 October to 5 December 2014 and site supervision purportedly carried out during the period 1 October to 10 December 2014. While these works have not previously been claimed by King Construction Group, Invoice 1226 clearly states that the relevant works were performed in the period of October 2014 to December 2014. The works claimed in Invoice 1226 do not relate to new or different works performed since the previous Payment Claim (Invoice 1223) was issued on 23 December 2014. Accordingly the relevant reference date for Invoice 1226 would have been 22 December 2014. However, as Invoice 1223 has already been issued as the Payment Claim for 22 December 2014, Section 14(8) of the Act provides that Invoice 1226 is invalid as it is the second payment claim for the 22 December 2014 reference date.

Further, we confirm that because King Construction Group did not perform any construction work between 22 December 2014 and 21 January 2015 King Construction Group was not entitled to issue the Payment Claim dated 21 January 2015 in relation to the reference date on 21 January 2014.

For the reasons set out above, the Payment Claim dated 21 January 2015 is invalid.

### **The Adjudicator's Determination**

- 20 The Adjudicator delivered the Adjudication Determination on 11 March 2015.
- 21 He found as a matter of fact that the 21 January Payment Claim was a payment claim served on that date.

22 In the absence of any term of the relevant construction contract determining the applicable reference date or dates, the reference dates were to be calculated in accordance with s 9(2)(b) of the Act.

23 The Adjudicator considered that there were five issues before him for decision as to the validity or otherwise of the 21 January Payment Claim. They were stated by the Adjudicator as follows:<sup>1</sup>

First were the four Invoices 1203, 1206, 1211 and 1223 payment claims under the Act or simply claims under the contract seeking payment. If the Invoices were not payment claims under the Act I consider the consequences would be that the Payment Claim is valid and referable to a reference date of 5 January 2015 on the assumption that work commenced on 16 April 2014. The same consequences would apply if work commenced on 8 May 2014 save that the reference date would probably be 20 January 2015. Thus if I accept the Claimant's analyses any suggestion of invalidity of the Payment Claim would not arise.

Second what is the correct reference date to which the Payment Claim relates?

Third, what is the relationship between s 9 and s 14 and the correct construction of s 14(8) and s 14(9) of the Act?

Fourth, does a subsequent reference date in support of a payment claim require work between the former reference date and the subsequent reference date?

Fifth, can a payment claim be made relating to work done in periods prior to the period between the second last and last reference dates?

*Payment Claims - Invoices 1203, 1206, 1211 and 1223*

24 A question for the Adjudicator was whether the four invoices 1203, 1206, 1211 and 1223 were payment claims made under the Act, or were simply invoices issued under the relevant contract.

25 The Adjudicator found that the four invoices were payment claims made under the Act, and that they each complied with the requirements of ss 14(1) and (2) of the Act.<sup>2</sup>

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<sup>1</sup> Adjudication Determination [104]–[108].

<sup>2</sup> Adjudication Determination [120] and [194].

26 The four earlier invoices were all in respect of work done prior to the date of the issue of each, namely: 1203 dated 21 November 2014; 1206 dated 26 November 2014; 1211 dated 28 November 2014; and invoice numbered 1223 dated 23 December 2014.

*21 January Payment Claim*

27 The Adjudicator also found that the 21 January Payment Claim was a payment claim and included amounts previously claimed and not paid under the four earlier invoices.<sup>3</sup>

*Invoice 1226*

28 As to Invoice 1226, the Adjudicator found that this invoice was also included in the 21 January Payment Claim together with the four earlier invoices.

29 Invoice 1226 was dated 21 January 2015.

30 The Adjudicator found that Invoice 1226 was in respect of different work to the four earlier invoices.<sup>4</sup>

31 Invoice 1226 was with respect to work performed but not claimed in previous payment claims.

*Reference Dates*

32 The Adjudicator found that the reference date for Invoice 1223 was 5 January 2015.<sup>5</sup>

33 He also found that the reference date for the 21 January Payment Claim was 3 February 2015.<sup>6</sup>

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<sup>3</sup> Adjudication Determination [121].

<sup>4</sup> Adjudication Determination [191].

<sup>5</sup> Adjudication Determination [137].

<sup>6</sup> Adjudication Determination [137] and [194].

*Construction of the Act*

34 On his consideration of the authorities, the Adjudicator found that what is prohibited by s 14(8) of the Act is multiple payment claims for the same amount in respect of the same work in relation to one reference date.<sup>7</sup>

35 The Adjudicator specifically found that the 21 January Payment Claim did not transgress s 14(8) of the Act, and pursuant to s 14(9) this payment claim could include the unpaid amounts in invoices 1203, 1206, 1211 and 1223.<sup>8</sup>

36 He also rejected the submission that the 21 January Payment Claim could not be treated as a premature payment claim with respect to the reference date of 3 February 2015,<sup>9</sup> or that further work has to have been done after the previous reference date<sup>10</sup> or that it could not include work done in prior periods.<sup>11</sup>

37 He concluded that there was no necessary relationship between the reference date under s 9 of the Act and the time when the work is carried out under s 14 of the Act.<sup>12</sup> The Adjudicator concluded that the operation of both s 14(8) and s 14(9) of the Act did not require work to have been carried out between, what he described as 'the penultimate and ultimate reference dates'<sup>13</sup> and s 14(8) of the Act does not preclude a claim for work carried out in a period prior to what he described as 'the penultimate reference date'.<sup>14</sup>

38 The Adjudicator reasoned as follows:<sup>15</sup>

In this case the Payment Claim is for a different amount than in the earlier four Invoices as this Payment Claim includes the amount referred to in Invoice 1226. Invoice 1226 is in respect of different work to the four earlier invoices. Further on my analysis referred to above it is in respect of a different reference date. Further, on the basis of the authorities referred to above it is permissible for the Payment Claim to include amounts for work carried out prior to the penultimate payment claim and it is not necessary for the

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<sup>7</sup> Adjudication Determination [189].

<sup>8</sup> Adjudication Determination [192].

<sup>9</sup> Adjudication Determination [193].

<sup>10</sup> Adjudication Determination [193].

<sup>11</sup> Adjudication Determination [193].

<sup>12</sup> Adjudication Determination [194].

<sup>13</sup> Adjudication Determination [194].

<sup>14</sup> Adjudication Determination [194].

<sup>15</sup> Adjudication Determination [191].

payment claim to be valid for there to have been work carried out between the penultimate payment claim and the ultimate payment claim or the last reference date.

39 The Adjudicator ruled<sup>16</sup> that a passage in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors (Jotham)*,<sup>17</sup> relied upon by CICG, was not to be read as requiring new work to enliven the s 14(9) exception, but could apply in any case where a payment claim contains any work (regardless of when it may have been undertaken) not previously claimed.

40 The Adjudicator placed reliance on the case of *Spankie & Ors v James Trowse Constructions Pty Limited*.<sup>18</sup>

41 On this basis the Adjudicator found that the 21 January Payment Claim was a valid payment claim under the Act, and proceeded to determine the adjudication.<sup>19</sup>

#### **Plaintiff's Submissions**

42 CICG submitted that a principal question for the Court's consideration is whether the Adjudicator had jurisdiction to adjudicate the 21 January Payment Claim payment claim served on it on 21 January 2015.

43 It submitted that the case turns on whether the 21 January Payment Claim, properly construed as a commercial document, was 'in respect of' a reference date for which the King Construction had previously served a payment claim, and submitted that the answer to that question is yes.

44 CICG submitted further that if the payment claim was served in respect of a reference date for which King Construction had previously served a payment claim, the payment claim was served in contravention of s 14(8) of the Act.

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<sup>16</sup> Adjudication Determination [154].

<sup>17</sup> [2013] VSC 552 [57] and [58] (Vickery J).

<sup>18</sup> [2010] QCA 355, see especially at [23].

<sup>19</sup> Adjudication Determination [195].

45 A payment claim served in contravention of s 14(8) of the Act, it submitted, is incapable of forming a jurisdictional basis for a valid adjudication under s 23 of the Act.

46 CICG deals with the submission of King Construction, where King Construction contends that, because the payment claim includes a claim for construction work performed but not previously claimed before the previous reference date, then the payment claim must have been served in respect of a later reference date.

47 In relation to this submission, CICG submits that the First Defendant's argument is a *non sequitur*, submitting that it does not follow that, because work was performed but not claimed in the payment claims in respect of a previous reference date, the payment claim must then be in 'respect of a' later reference date.

48 CICG submits further that in the context of the Act, the natural commercial reading of the payment claim is that it is made for a *progress payment* calculated by reference to<sup>20</sup> a previous reference date for which payment claim had been served.<sup>21</sup> It says that there is nothing in the payment claim itself that entitles the reader to infer that it was calculated by reference to a later reference date or that the payment claim was in respect of a later reference date.

49 It says that if the First Defendant had, after the previous reference date and before serving the payment claim, performed some further construction work for which it was then entitled to a progress payment, there could well be some support for its assertion. However, it did no further construction work beyond December 2014 and before service of the payment claim, for which it claimed be to entitlement to a progress claim, and therefore has no basis upon which to imply that the payment claim is in respect of any subsequent reference date.

50 The Plaintiff advanced two broad arguments on the s 14(8) issue:

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<sup>20</sup> See s 9(1) of the Act.

<sup>21</sup> See *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213 [22].  
*Commercial & Industrial Construction Group v King Construction Group*

1. First, it submitted that the Payment Claim of 21 January 2015 was a payment claim in respect of the reference date of 5 January 2015, which was also the reference date which applied to another payment claim made under the Act.
2. In support, the Plaintiff submitted that the work identified in the 21 January Payment Claim was all done before 5 January 2015. It said that where the body of work that has been claimed includes work, all of which was performed before 5 January 2015, and some of which was performed after the previous reference date of 3 December 2014, the only conclusion that a reader could reach is that the document is purporting to be calculated up to 5 January 2015, which was the relevant reference date.

51 As such, it was a second payment claim in respect of the same reference date (5 January 2015) as Invoice 1223 dated 23 December 2014. It was also a second payment claim with respect to other, and earlier, payment claims which were previously made and referable to earlier reference dates, being invoices numbered 1203 dated 21 November 2014 (for works in October 2014), 1206 dated 26 November 2014 , and Invoice 1211 dated 28 November 2014.

52 Second, the Plaintiff submitted that, if the Payment Claim is held to be a payment claim not in respect of the 5 January 2015 reference date but in respect of the 3 February 2015 reference date, as found by the Adjudicator, then there was no entitlement to a progress payment on 3 February 2015, and for this further reason the 21 January Payment Claim was invalid.

53 CICG submitted that, although s 9 of the Act permits a claimant to claim, in subsequent payment claims an amount previously claimed and not paid, the Act does not permit a claimant to claim an amount not previously claimed with respect to earlier reference dates in later payment claims.<sup>22</sup>

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<sup>22</sup> *Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd & Ors* [2013] QSC 298 [6]-[7], [18]. See also *Taylorred Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32.

54 Thus it was put that, given the 21 January Payment Claim was served in breach of s 14(8) of the Act, or there was otherwise no entitlement to make the claim, the Adjudicator's acceptance of the 21 January Payment Claim to found his jurisdiction is a vitiating error, which went to his jurisdiction to determine the Adjudication Application. As a consequence the Adjudication Determination should be quashed.

### **First Defendant's Submissions**

55 The First Defendant proceeded on the assumption that the finding of the Adjudicator in relation to the reference date applicable to the 21 January Payment Claim was correct, and the reference date for that payment claim was 3 February 2015. It said that in his finding that the reference date applicable to the 21 January Payment Claim was 3 February 2015, the Adjudicator did not fall into error.

56 King Construction contended that the 21 January Payment Claim was not in breach of s 14(8) of the Act, because no other payment claim was served in respect of the 3 February 2015 reference date.

57 As to Invoice 1226 included in the 21 January Payment Claim, it submitted that, on a proper construction of the Act, it is permissible for a claimant to include not only claims for work performed since the last reference date, but also claims for earlier work undertaken prior to the last reference date which had not been the subject of any previous claim. It relies primarily on the decisions of the New South Wales Court of Appeal in *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd*<sup>23</sup> and on the Queensland Court of Appeal decision in *Spankie & Ors v James Trowse Constructions Pty Ltd*.<sup>24</sup> These and other decisions to the same effect, it submitted, make it clear that there is no necessary relationship between a reference date and when the work, which is the subject of the payment claim, was carried out.

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<sup>23</sup> [2002] NSWCA 238.

<sup>24</sup> [2010] QCA 355 ('Spankie').

58 The First Defendant acknowledged that its submission in this regard may be at odds with the approach of this Court in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors*.<sup>25</sup>

59 Nevertheless, it submitted that s 9 of the Act is expressed in general terms and is broad enough to encompass a claim for unclaimed and unpaid work performed before any previous reference date. There is no requirement in s 9(1) of the Act (or any other provision of the Act, including s 14(8), expressly or by necessary implication) for there to be new work performed since the last reference date to support a valid payment claim made in respect of work done by reference to earlier reference dates which was not the subject of any earlier payment claim.

### Analysis and Conclusion

#### *Factual Matrix*

60 The following factual matrix is found by this Court on the material before the Adjudicator.

61 King Construction purported to issue the 21 January Payment Claim dated 21 January 2015 on that date in the sum of \$887,883.36 (excl. GST or \$976,671.69 incl. GST).

62 No further construction works were carried out by King Construction on the Project beyond 17 December 2014.

63 King Construction's 21 January Payment Claim comprises four previous claims (being Invoices 1203, 1206, 1211 and 1223) and a new Invoice 1226 dated 21 January 2015 for work not previously claimed for (the 'Additional Invoice'). Particulars of the previous claims and the new claim are set out below:

Date of Payment Claim	Invoice number of Payment Claim	Amount claimed in Payment Claim
21 November 2014	Invoice 1203	\$56,325.00
26 November 2014	Invoice 1206	\$672,496.37

<sup>25</sup> [2013] VSC 552, see especially at [43] ('*Jotham*').  
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*King Construction Group*

28 November 2014	Invoice 1211	\$53,617.99
23 December 2014	Invoice 1223	\$83,040.00
21 January 2014	Invoice 1226	\$22,404.00
	Subtotal	\$887,883.36
	GST	\$88,788.33
	Total incl. GST	\$976,671.69

### *Reference Dates*

- 64 Entitlements to progress payments under the Act are to be 'calculated' by reference to reference dates which are in turn produced pursuant to the formulae prescribed in s 9 of the Act.
- 65 There is no express provision for reference dates in the construction contract between King Construction and CICG. Accordingly, s 9(2)(b) of the Act applies to determine the reference dates under the Act. The first reference date occurs 20 business days after the construction works were first carried out by King Construction and each and every subsequent reference date occurs 20 business days after the previous reference date.
- 66 King Construction commenced works on 16 April 2014. The first reference date therefore occurred 20 days later, and successive reference dates occurred 20 business days after each previous reference date.
- 67 On this basis the reference dates pursuant to s 9(2)(b) of the Act calculated for the Project are set out in the following table (the 'Table of Reference Dates'):

Reference date 1	19 May 2014 (being 20 business days after 16 April 2014)
Reference date 2	17 June 2014 (being 20 business days after 19 May 2014)
Reference date 3	15 July 2014 (being 20 business days after 17 June 2014)
Reference date 4	12 August 2014 (being 20 business days after 15 July 2014)
Reference date 5	9 September (being 20 business days after 12 August 2014)
Reference date 6	7 October 2014 (being 20 business days after 9 September 2014)
Reference date 7	4 November 2014 (being 20 business days after 7 October 2014)
Reference date 8	3 December 2014 (being 20 business days after 4 November 2014)
Reference date 9	5 January 2015 (being 20 business days after 3 December 2014)
Reference date 10	3 February 2015 (being 20 business days after 5 January 2015)

- 68 For the purposes of this proceeding there are three reference dates of particular importance, namely the last three in the Table of Reference Dates being: 3 December 2014; 5 January 2015; and 3 February 2015.

69 The reference date for Invoice 1223 (the '23 December Payment Claim') was 5 January 2015. This was because Invoice 1223 was served on 23 December 2014 in respect of payment for work performed after the previous reference date, which was 3 December 2014. The next reference date was 5 January 2015. Accordingly, Invoice 1223 as a payment claim under the Act was served prematurely, prior to the arrival of the next reference date, but it was nevertheless valid, the rights under the Act being activated and becoming operable upon the arrival of the next reference date, in this case being 5 January 2015.<sup>26</sup>

70 The reference date for the 21 January Payment Claim was also 5 January 2015, and not as found by the Adjudicator 3 February 2015.<sup>27</sup> This was because no further work had been performed under the construction contract after 17 December 2014 and before 21 January 2015, the date when the 21 January Payment Claim was served.

71 Putting s 14(8) to one side for the present, the claimant, King Construction, was entitled to a progress payment under the Act calculated by reference to the relevant reference date determined in accordance with s 9 of the Act.

72 In this case, the appropriate method of calculation by reference to the Table of Reference Dates is to first consider the date of the payment claim, which in the case of the 21 January Payment Claim is 21 January 2015, and then apply to it the immediately preceding reference date, which is 5 January 2015.

73 In my opinion, there is no warrant for applying the reference date which followed the making of the 21 January Payment Claim, namely 3 February 2015, and applying this reference date to the 21 January Payment Claim, for the following reasons:

- (a) there is nothing in the 21 January Payment Claim itself that entitles the reader to infer that it was calculated by reference to a later reference date or that the payment claim was in respect of a later reference date;

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<sup>26</sup> *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 [107].

<sup>27</sup> Adjudication Determination [137] and [194].

- (b) King Construction performed no further construction work on the Project beyond 17 December 2014 and before service of the payment claim, for which it claimed to be entitled to a progress claim, and it therefore had no factual basis upon which it could be inferred that the 21 January Payment Claim was in respect of any subsequent reference date; and
- (c) it does not follow that, by reason that the relevant reference date for the 23 December Payment Claim (Invoice 1223) was 5 January 2015, the relevant reference date for the 21 January Payment Claim was the reference date which next followed, namely 3 February 2015.

74 The Adjudicator found that there was 'confusion and inconsistency in endeavouring to marry the invoices with reference dates'.<sup>28</sup> He came to the following conclusion as to the reference dates which applied to the 23 December Payment Claim and the 21 January Payment Claim:<sup>29</sup>

Ultimately I have come to the view that I should, in accordance with the Respondent's submissions, apply the judgment of Vickery J in *Metacorp* at [107]-[114]. It follows that the relevant reference date for Invoice 1223 is reference date No.9 being 5 January 2015. It further follows that the relevant reference date for the Payment Claim of 21 January 2015 is reference date No.10 being 3 February 2015.

75 The passages in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*<sup>30</sup> relied upon by the Adjudicator to establish the reference date for the 21 January Payment Claim do not assist. They dealt with the validity of a payment claim served prior to the applicable reference date. These passages in *Metacorp* did not deal with how a reference date is to be determined or applied pursuant to s 9(2)(b) of the Act.

76 With respect to the Adjudicator, I find that he fell into error in his determination that the reference date for the 21 January Payment Claim was 3 February 2015. The correct reference date for this payment claim was 5 January 2015.

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<sup>28</sup> Adjudication Determination [135].

<sup>29</sup> Adjudication Determination [137].

<sup>30</sup> [2010] VSC 199 [107]-[114].

*The Four Earlier Invoices*

- 77 The 21 January Payment Claim included amounts that were previously claimed by King Construction in Invoices 1203, 1206, 1211 and 1223 (the 'four earlier invoices') and the Additional Invoice 1226 in the sum of \$22,404.00 (excl. GST).
- 78 The 21 January Payment Claim was a purported payment claim and included the four earlier invoices.
- 79 With respect to the four earlier invoices (Invoices 1203, 1206, 1211 and 1223) the following findings are made:
- (a) Each of these invoices were issued on the dates referred to above, and prior to 21 January 2015;
  - (b) Invoices 1203, 1206, and 1211 related to previous reference dates;
  - (c) The four invoices were payment claims made under the Act, in that each complied with the requirements of ss 14(1) and (2) of the Act;
  - (d) The four invoices were all in respect of work done prior to the date of the issue of each, namely: 1203 dated 21 November 2014; 1206 dated 26 November 2014; 1211 dated 28 November 2014; and invoice numbered 1223 dated 23 December 2014 (the '23 December Payment Claim');
  - (e) CICG had previously issued Payment Schedules in response to each of these invoices; and
  - (f) CICG paid the Scheduled amount in each Payment Schedule, but did not pay the full amount claimed in each relevant payment claim. There remained amounts unpaid on each invoice.

*The Additional Invoice*

- 80 In relation to the additional invoice (Invoice 1226), the following findings are made:

- (a) This invoice relates to hire items that were purportedly supplied during the period 1 October to 5 December 2014 and site supervision purportedly carried out during the period 1 October to 10 December 2014;
- (b) Invoice 1226 was dated 21 January 2015;
- (c) Invoice 1226 states, as I accept was the fact, that the relevant works were performed in the period of October 2014 to December 2014;
- (d) Invoice 1226 was with respect to work performed before the previous reference date of 5 January 2015 but not claimed in previous payment claims;
- (e) The works claimed in Invoice 1226 do not relate to new or different works performed *since* the previous payment claim comprised in Invoice 1223 being the 23 December Payment Claim, issued on 23 December 2014;
- (f) No work was performed after the December payment claim (Invoice 1223) in respect of which any entitlement to a progress payment arose.

*Whether s 14(8) Contravened*

81 Section 14(8) of the Act prevents a claimant from serving more than one payment claim in respect of each reference date under the relevant construction contract. In relation to a construction contract where there is no express provision in relation to a reference date, by the operation of the opening words of s 9(2) of the Act, this includes a reference date calculated in accordance with s 9(2)(b) of the Act.

82 In my opinion, the 21 January Payment Claim was 'in respect of' a reference date for which the First Defendant had previously served a payment claim. As earlier found, the reference date for the 21 January Payment Claim was 5 January 2015.

83 Further, as earlier found, the reference date for the 23 December Payment Claim (comprised in Invoice 1223) was also 5 January 2015.

- 84 The 21 January Payment Claim was also in respect of 3 other invoices, being Invoice 1203 dated 21 November 2014; Invoice 1206 dated 26 November 2014; and Invoice 1211 dated 28 November 2014. As earlier found, these were all issued and served as payment claims made under the Act, and each was issued in respect of earlier reference dates. The 21 January Payment Claim, to the extent that it made claims in relation to work the subject of these invoices, was also in respect of reference dates for which the First Defendant had previously served these payment claims.
- 85 Invoice 1226, the Additional Invoice, was also claimed as part of the 21 January Payment Claim. It was a second or further payment claim with respect to the 5 January 2015 reference date and confronted the bar in s 14(8) because the reference date for the 23 December Payment Claim (comprised in Invoice 1223) was, in common with the 21 January Payment Claim, also 5 January 2015. The Additional Invoice, being included in the 21 January Payment Claim, rendered that payment claim being relevantly 'in respect of' the 5 January reference date for the purposes of s 14(8) of the Act.
- 86 In support of the conclusion that the reference date for the 23 December Payment Claim was, in common with the 21 January Payment Claim, also 5 January 2015, is the finding that no further construction work was carried out by King Construction on the Project between the date of the earlier payment claim, being the 23 December Payment Claim and the date of the 21 January Payment Claim, the date of the last work performed being 17 December 2014. Accordingly, there was no work which was likely to attract the operation of any different reference date to the reference date which applied to the 23 December Payment Claim. Both payment claims were referable to the same reference date, being 5 January 2015. There was no work done on the project which, in the usual course, would be likely to attract the application of the 3 February 2015 reference date, as found by the Adjudicator.
- 87 Further, on a fair commercial reading of the 21 January Payment Claim, it was made in respect of the reference date which immediately preceded its service, being the

next earlier reference date of 5 January 2015 and the payment claim was calculated by reference to that date.

88 It certainly does not follow that because work had been performed in December 2014, but not claimed for in respect of the 5 January 2015 reference date, the 21 January Payment Claim must have been in 'respect of' the later reference date of 3 February 2015.

89 On its face, and for these reasons, the 21 January Payment Claim was in breach of s 14(8) of the Act.

*Whether s 14(9) Exception Operated*

90 A question then arises as to whether the exception in s 14(9) of the Act applies. The exception in s 14(9), if it applies, works to limit the operation of subsection (8) by not preventing a claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

91 The precise terms of s 14(9) of the Act need to be considered and applied. Subsection (8) does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

92 In the present case, the exception in s 14(9) would apply to any unpaid portions of the payment claims represented by the four invoices being Invoice 1203 dated 21 November 2014; Invoice 1206 dated 26 November 2014; Invoice 1211 dated 28 November 2014; and Invoice 1223 dated 23 December because in each case the full amount as claimed was not paid either in full, or at all. Thus the exception in s 14(9) applies to these four invoices claimed as part of the 21 January Payment Claim, but only to the extent of the unpaid portions of those payment claims.

93 This leaves the remaining Invoice 1226, which was also comprised in the 21 January Payment Claim. This invoice was with respect to work performed before the end of December 2014 but had not been claimed in any previous payment claim. Because

this claim had never been the subject of a previous claim, the exception provided by s 14(9) could not apply.

*Consequences of Breach of s 14(8)*

94 Absent the application of s 14(9), the terms of s 14(8) provide for a prohibition. They indicate a clear statutory intention that what may be advanced by a claimant as a payment claim that is in respect of the same reference date as a previous claim, is not to be treated as a payment claim made under the Act, and is invalid.

95 The scheme of the Act is such as to render it impermissible to claim only some part of the work performed in relation to a particular reference date, only to make a further claim for further work at a later time, where the further work performed and claimed for is in respect of the same earlier reference date.

96 If such conduct was to be permitted, a claimant could serve more than one payment claim in respect of each reference date for different items of work, resulting in the potential for multiple payment claims being made in respect of each reference date, each requiring individual assessment by a respondent on construction projects. Further, and contrary to a key objective of the Act, this may in turn result in multiple adjudication applications being made in relation to different parts of what is in effect, or should be, the same payment claim.

97 Section 14(8), when read with the exception in s 14(9), is designed to address this mischief and should be given a construction which supports its statutory purpose. The privileges conferred on claimants by the Act are appropriately addressed with the balancing facility provided by s 14(8).

98 It follows that an adjudication determination founded upon an invalid payment claim, is also an invalid exercise under the Act. A payment claim served in contravention of s 14(8) is incapable of providing a jurisdictional basis for a valid adjudication conducted under s 23 of the Act.

*No New Work*

- 99 As a further and distinct ground of invalidity, CIG submitted that the 21 January Payment Claim was invalid also because no further construction work had been carried out by King Construction on the Project between the previous reference date (which it claimed to be 22 December 2014 but in fact was 5 January 2015) and the date of the claim, being 21 January 2015. It claimed as a consequence, King Construction was not entitled to issue the 21 January Payment Claim containing the Invoice 1226, even though Invoice 1226 had not previously been claimed, because it was in respect of work performed to which the earlier reference date (of 5 January 2015) was applicable.
- 100 However, in my opinion, the fact that an item of work could have been claimed as part of a payment claim served in respect of an earlier reference date, but was not, is not a bar to it being claimed in a later payment claim made in respect of a later reference date, provided that s 14(8) is not breached. The time when the work is done may be relevant to a determination as to the correct reference date which applies to a payment claim served in respect of that work. However, the time when the work is done is not a factor which *per se* determines the validity of the payment claim.
- 101 The text 'calculated by reference to [the relevant reference date]' in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.
- 102 As long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act. The statutory scheme for the making of valid payment claims provides for no other requirement in

relation to the time when the work the subject of the payment claim was performed, or when the materials were supplied.

103 In *Jotham*,<sup>31</sup> in its analysis of s 14(9) of the Act, the Court said this at [43]:

On a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference date under the construction contract.

104 This passage is not to be construed as importing any further requirement for a valid payment claim governed by when the work claimed for was performed or when the materials claimed for were supplied. It is confined to explaining how, in the opinion of the Court, the exception in s 14(9) of the Act is intended to operate.

105 Although the relevant legislation in New South Wales and Queensland providing for the equivalent of s 9(1) of the Act is phrased in slightly different terms, judicial statements, including those from the Court of Appeal in both jurisdictions, support the operation of the section and the construction which I have found. In both cases the statutory equivalents to s 9(1) of the Act were considered, and in both cases the interstate legislation omits the phrase 'calculated by reference to' the [relevant reference date].

106 Section 8(1) of the NSW Act<sup>32</sup> provides in relation to the right to a progress payment:

**Rights to progress payments**

8 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person:
  - (a) who has undertaken to carry out construction work under the contract, or
  - (b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

<sup>31</sup> [2013] VSC 552.

<sup>32</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW).  
*Commercial & Industrial Construction Group v King Construction Group*

107 Section 12 of the Queensland Act<sup>33</sup> provides in relation to the right to a progress payment:

**12 Rights to progress payments**

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

108 In *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd*<sup>34</sup> Heydon JA concluded that the payment claim in issue was valid, and said at [53]:

Accordingly, on the true construction of the *Building and Construction Industry Security of Payment Act 1999* it is permissible for a person entitled to a progress payment under a construction contract to serve a payment claim on the person who under the contract is liable to make the payment even though the claim relates to work done in periods prior to the month in which the payment claim is served.

109 In *Doolan v Rubikcon (Qld) Pty Ltd & Ors*<sup>35</sup> Fryberg J held:

It seems to me that there is a one to one relationship between the claim made and the reference date on which it is made.

...

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.

110 In *Spankie*<sup>36</sup> Fraser JA observed at [20]:

[20] Returning to the legislative provisions, there is nothing in the definition of 'reference date' to cut down the broadly expressed entitlement created by s 12. The definition merely identifies the date from which each right to a progress payment accrues. These provisions do not suggest that there is any relationship between a 'reference date' and the time when work under the contract is carried out. In particular, the reference in the definition to work carried out under the contract does not imply that the work the subject of a particular progress payment must have been carried out after a previous reference date.

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<sup>33</sup> *Building and Construction Industry Payments Act 2004* (Qld).

<sup>34</sup> [2002] NSWCA 238.

<sup>35</sup> (2008) 2 Qd R 117.

<sup>36</sup> [2010] QCA 355.

111 In relation to s 9(1) of the Act, in my opinion, the addition of the words 'calculated by reference to' the [relevant reference date] in Victoria, makes no material difference to the meaning or operation of the sub-section, when considered against its counterpart provisions in NSW and Queensland.

112 In the light of my finding that the 21 January Payment Claim was in breach of s 14(8) of the Act because it was served by the claimant following the earlier service of the 23 December Payment Claim in respect of the same reference date, being 5 January 2015, and was invalid for that reason, it is strictly unnecessary for the Court to determine this further and distinct ground of invalidity claimed by CICG.

113 However, and for completeness, I find that this further and distinct ground of invalidity claimed by CICG cannot succeed.

*Orders*

114 Subject to hearing further from the parties, I propose to make the following orders:

1. Relief in the nature of certiorari is granted pursuant to Order 56 to quash the Adjudication Determination on the ground of jurisdictional error.
2. The First Defendant is to pay the Plaintiff's costs of the proceeding.

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