



Supreme Court
New South Wales

Case Name: Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd

Medium Neutral Citation: [2017] NSWSC 1140

Hearing Date(s): 15 August 2017

Date of Orders: 31 August 2017

Decision Date: 31 August 2017

Jurisdiction: Equity

Before: Parker J

Decision: Challenge to adjudication determinations based on assignment fails and challenge based on denial of natural justice succeeds

Catchwords: Building and Construction – construction contracts – issuance of invoices for construction works – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 13 – construction – statutory right to progress payments – assignment of right to payment – availability of statutory procedure to seek adjudication determinations
Building and Construction – construction contracts – issuance of invoices for construction works – dispute concerning progress payments – adjudication determination – natural justice – identification of relevant reference date

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 8, 11, 13, 14, 15, 16, 17, 24, 25, 32
Conveyancing Act 1919 (NSW), s 12

Cases Cited: Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394

Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228

Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd [2016] HCA 52; (2016) 91 ALJR 233

Category: Principal judgment

Parties: Quickway Constructions Pty Ltd (Plaintiff)
Electrical Energy Pty Ltd (First Defendant)
Paul J Hick (Second Defendant)

Representation: Counsel:
HK Insall SC (Plaintiff)
FP Hicks/DJ Byrne (First Defendant)

Solicitors:
Hugh & Associates (Plaintiff)
Dentons Australia (First Defendant)

File Number(s): 2017/237797

Publication Restriction: Nil

JUDGMENT

- 1 These proceedings concern two adjudication determinations made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“BCISPA”).
- 2 In March 2017, the plaintiff (“Quickway”) engaged the first defendant (“Electrical”) to undertake electrical cable hauling works at a substation in Canterbury and at a substation in Leichhardt.
- 3 On 22 April, the first defendant sent the plaintiff an invoice in the sum of \$24,725.25 for works done at Canterbury as well as an invoice in the sum of \$41,250 for works done at Leichhardt. Electrical had previously entered into a factoring agreement styled “Full Service Factoring Agreement” (the “Factoring Agreement”) with Bibby Financial Services Australia Pty Ltd (now called Scottish Pacific (BFS) Pty Limited) (“Bibby”). Pursuant to the Agreement, each invoice contained a notation that it “had been assigned” to Bibby, and asking that payment be made directly to Bibby.

- 4 The invoices remain unpaid. Electrical invoked the BCISPA procedure and subsequently obtained adjudication determinations in its favour. Quickway has paid the amounts specified in the adjudication determinations into Court and obtained an interlocutory injunction preventing Electrical from taking any enforcement action under those determinations pending the result of these proceedings.

Issues for determination

- 5 Quickway contends that the effect of the Factoring Agreement and the notations on the invoices was to assign Electrical's entitlements under the invoices to Bibby, and that, as a result, the BCISPA procedure was not available to Electrical. This point applies to both invoices, and I was told it applied to a number of other invoices between the parties, as well as having obvious general implications in the construction industry.
- 6 Quickway also makes a specific complaint about the adjudication determination for the Leichhardt invoice. Quickway contends that in dealing with the adjudication application, the adjudicator failed to afford it natural justice and that the determination should be set aside for that reason also.

Availability of BCISPA for assigned debts

- 7 The Factoring Agreement is dated July 2013. It takes the form of an offer by Electrical to assign to Bibby ("the Client") every "Debt" owing from a "Customer" of Electrical under a "Contract of Sale", in return for payment of the "Purchase Price" of the Debt; and for the acceptance of that offer by Bibby. The term "Debt" is defined as follows:

Debt means an existing or future obligation of a Customer to make payment to the Client under a Contract of Sale, and includes:

- (a) all GST and other Taxes payable by the Customer in respect of the goods and/or services the subject of the Contract of Sale;
- (b) all rights of the Client under or in respect to the Contract of Sale including without limitation under retention of title, any guarantee, any security interest, insurance or any other Lien which the Client is or may be entitled to
- (c) the Client's accounts within the meaning of that term as defined in the PPSA,
- (d) all rights, title and interest of the Client in any of the following:
 - (i) cash, cheque or Negotiable Instrument received in satisfaction of any obligation to pay any Debt;

- (ii) the Collection ADI Account;
- (iii) any Chattel Paper relating to a Debt; and
- (iv) Proceeds,

and includes both Debts which arise after the Commencement Date and Encumbered Debts;

8 Clause 3 provides:

3. ASSIGNMENT AND TITLE

3.1 Title Passes

- (a) Title to each Debt is deemed to pass to Bibby free of any Lien as the Debt arises even if the Client's right to obtain payment of the Purchase Price has ceased as provided under this Agreement.
- (b) Nothing in this clause will limit Bibby's rights in respect to future Debts under or by virtue of this Agreement.
- (c) The parties acknowledge and agree that all current and future Debts of the Client whether Approved or Disapproved will be assigned to Bibby on the terms and conditions of this Agreement.

3.2 Debts not Vested

If for any reason Title to a Debt does not absolutely vest in Bibby then:

- (a) the Client must hold that Debt on trust for and as fiduciary for Bibby;
 - (b) Bibby may at any time give notice to any Customer or to any other person of the existence of such trust and direct payment to Bibby; and
 - (c) the Client must take all steps and do all such acts and things as are necessary to ensure payment is made to Bibby.

3.3 Perfection of Title

The Client must do any and all things required by Bibby in order to perfect or protect Bibby's Title to the Assigned Debts promptly when required by Bibby.

3.4 Assignment Notices

The Client must:

- (a) notify each Customer that the Debt due by it has been Assigned to Bibby when the Debt arises;
- (b) ensure that invoices issued after the Commencement Date are sent to the Customer with an Assignment Notice duly affixed; and
- (c) provide to Bibby as Bibby requires Assignment letters in a form determined by Bibby which the Client hereby authorises Bibby to complete and send to Customers as Bibby determines.

3.5 Monies on Trust

- (a) The Client must hold all money received in respect to any Debt except money paid to it by Bibby, as fiduciary for and on trust for Bibby and must account to Bibby for such monies in its original form on the day of receipt by the Client

(b) Any such monies received by the Client must not be deposited to any account other than the Collection ADI Account nor otherwise comingled with any other monies.

(c) This clause does not give the Client authority to collect payment of any Debts and the Client must not do so other than as directed by Bibby.

9 Under the Factoring Agreement, assigned debts are classified as “Approved” or “Disapproved”. The finance provided by Bibby extends only to Approved Debts. In the case of Approved Debts, the Purchase Price is a percentage of the face value of the Debt; in the case of a Disapproved Debt, the Purchase Price is only the amount actually received by Bibby. It is a matter for Bibby’s discretion as to whether the Debt should be classified as an Approved Debt. Evidence from Electrical establishes that, as a matter of practice, Bibby would only approve a Debt for relevant purposes if the Customer issued a payment schedule undertaking to pay the Debt.

10 The work done at Leichhardt was done pursuant to a written contract between Quickway and Electrical. I refer to some of the provisions of that contract in more detail when dealing with the natural justice point below. The contract for the work at Canterbury, however, was informal.

11 Both of the invoices contained the following direction:

This invoice has been assigned to Scottish Pacific (BFS) Pty Ltd. All payments must be made payable and sent to Scottish Pacific (BFS) Pty Ltd.

12 A chose in action such as a claim in contract is assignable in equity for consideration, but such an assignment does not allow the assignee to maintain an action at law against the obligor in the assignee’s own name: for that purpose the chose in action must be assigned under the *Conveyancing Act 1919* (NSW), s 12. The invoices provided by Electrical to Quickway were, of course, in themselves only claims for payment. For there to be an assignment, either in equity or at law, it would be necessary to show that the underlying obligation had been validly assigned. Furthermore, to have an assignment at law, s 12 requires that the chose in action be a “debt or other legal chose in action”, as opposed to a bare cause of action or a part of a debt or chose in action.

13 Whether the underlying obligation could validly be assigned at law may be open to question in the case of one or both of the invoices the subject of these proceedings. However, Electrical did not submit that what was done was ineffective to assign its entitlements and I think, bearing in mind that this is a test case, that I should proceed on the assumption that the amounts claimed in the invoices were assignable choses in action which were assigned to Bibby as a result of the invoice notations, such that Bibby could thereafter maintain proceedings at law in its own name for payment.

14 BCISPA s 3 sets out the object of the Act:

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

15 The statutory entitlement to progress payments referred to in s 3(2) is created by s 8, which provides:

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.

(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 (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

16 Section 11 relevantly provides:

11 Due date for payment

(1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.

(1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:

(a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

(1B) A progress payment to be made to a subcontractor under a construction contract (other than a construction contract that is connected with an exempt residential construction contract) becomes due and payable on:

(a) the date occurring 30 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

(1C) A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:

(a) prescribed under section 101 of the *Civil Procedure Act 2005*, or

(b) specified under the construction contract,

whichever is the greater.

...

(8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

17 Section 13 sets out the payment claim procedure referred to in s 3(3). It relevantly provides:

13 Payment claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

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

(b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and

(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of 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.

...

(9) In this section:

supporting statement means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

18 Section 14 then provides:

14 Payment schedules

- (1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served,
 whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

19 Depending on the response (or non-response) by way of payment schedule, the Act creates certain rights to payment of liquidated sums as “debts”. If no payment schedule is served, the claimant is entitled to proceed in any court of competent jurisdiction to recover the amount claimed: s 15(2)(a)(i). If a payment schedule is served but money is not paid in accordance with that schedule, the claimant may likewise pursue debt proceedings to recover the amount specified in the schedule: s 16(2)(a)(i). In either case, the claimant may instead proceed by way of application for an adjudication determination: ss 15(2)(a)(ii), 16(2)(a)(ii). That process may also be followed to the extent that the payment schedule discloses a dispute as to the amount claimed: s 17(1)(a)(i). If the amount of the determination is not paid, an adjudication certificate may be obtained and registered as a judgment: ss 24, 25(1).

20 The Act thus provides various ways for the claimant to obtain a judgment and proceed to enforcement. However, the Act preserves the parties’ contractual rights so that when those rights ultimately come to be determined, the payments that have been made are taken into account and, to the extent necessary, repaid. Section 32 provides:

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

- (a) may have under the contract, or
- (b) may have under Part 2 in respect of the contract, or
- (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
- (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

21 If a judgment is obtained under the Act, the judgment debt so created is, I assume, assignable. Once the statutory entitlement has crystallised, as a result of failure to provide a payment schedule, or the provision of a payment schedule in a particular amount, then the debt so created **may** be assignable. But I do not think that the claimant's statutory rights before that point can be the subject of an assignment. Those rights are personal and depend upon the claimant's status as a party who has undertaken to do work under the relevant construction contract. In the present case, therefore, I do not think that the notation on the invoice could itself have had the effect of assigning Electrical's statutory rights to Bibby so that Bibby could enforce those statutory rights in its own name. It was not until the adjudication determination was made in favour of Electrical that a debt assignable at law came into existence. The effect of cl 3.2 of the Factoring Agreement is that prior to that date the claim had to be pursued in the name of Electrical, although Bibby was entitled to obtain the fruits of the process.

22 Quickway's essential contention is that neither invoice was a "payment claim" for the purposes of the Act. The term "payment claim" is defined as "a claim referred to in section 13" (which is set out at [17] above): s 4. It follows, according to Quickway, that Electrical cannot invoke or pursue the statutory procedure. If this contention is correct, the payment entitlements in question

will fall entirely outside the statutory scheme, because Bibby, not being a contractor, will not have standing under the Act either.

- 23 Quickway puts its contention in two different ways. In the first place, Quickway argues that each invoice was, because of the notation, a claim for payment by Bibby, not Electrical. This argument in its purest form is based on the form of the invoice; it does not depend on whether Electrical's contractual entitlement was actually assigned to Bibby.
- 24 I do not accept this argument. Neither invoice purported to make a claim by Bibby under the construction contract. Each invoice was issued by Electrical and in Electrical's name. All the notation was saying was that the contractual right to payment, which had originally accrued to Electrical under the construction contract, had been assigned to Bibby.
- 25 Quickway, however, also put a second argument that, even if each invoice was a claim by Electrical, they were not claims for payment to Electrical. Section 13(2)(b) requires that the claimed amount be "the amount of the progress payment that the claimant claims to be due". It does not expressly require that the amount be claimed to be due to the claimant. However, Quickway submits that s 13 must be so read by necessary implication, having regard to the provisions of the BCISPA as a whole. Quickway also submits that s 13 must be so read because otherwise there would be a potential for a respondent to have to pay twice: once to the contractor under the Act and separately to the assignee at general law.
- 26 In evaluating Quickway's submissions, I think the starting point is to recognise that the BCISPA is intended to create statutory rights to payment which can be enforced independently of, and in some cases inconsistently with, the parties' contractual rights. The Act requires the existence of a construction contract; but once that requirement is satisfied, the Act creates its own statutory entitlements to payment. An invoice issued pursuant to the contract may trigger contractual rights, as well as amounting to a "payment claim" for the purposes of the Act. In that sense, the invoices in this case may have had a dual character. But for the purposes of the Act, it is their statutory character which matters, not their effect under the general law.

- 27 In support of its arguments based on the language of the Act as a whole, Quickway pointed to s 11(1B), which I have quoted at [16] above. That provision refers to a progress payment “to be made to a subcontractor under a construction contract”. Quickway contended that the progress payments in question were not to be made to Electrical as subcontractor but rather were required, pursuant to the invoice notation, to be made to Bibby. Textually, reference to the payment as being “to be made to a subcontractor” in sub-s (1B) may only serve to distinguish such a payment from a payment to be made “to a head contractor” in sub-s (1A), where the prescribed period of time is different; it is notable that there is no reference in s 11(1C) to payment to anyone. Be that as it may, where s 11(1B) speaks of a “progress payment”, it is necessarily speaking of the statutory entitlement independent of the contractor’s contractual rights. The section refers to such a payment “under a construction contract”, but, in my opinion, all this does is identify the construction contract which is the precondition for the statutory right to progress payments.
- 28 The reference to a payment being made to a head contractor or a subcontractor is a reference back to the entitlement in favour of that contractor created by s 8: cf *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2016] HCA 52 at [61]. That entitlement is created as a matter of statute once the contractor has undertaken to do work under a construction contract, irrespective of whether the contractor has any entitlement to payment under the construction contract (or, strictly speaking, whether the contractor has done the work at all).
- 29 It is common ground that each of the contracts under which Electrical undertook to do the work in question was a “construction contract” for relevant purposes. It follows, in my view, that Electrical was entitled under s 13 to make a payment claim notwithstanding the assignment of its contractual right to payment.
- 30 Quickway referred to s 14(4), which I have set out at [18] above and which speaks of the respondent to a payment claim becoming liable to pay the claimed amount “to the claimant” on the due date for the progress payment.

However, I do not think this assists Quickway. The liability in question is a statutory one. The fact that the contractual right to payment may have been assigned to Bibby does not prevent a statutory liability from arising; indeed, the express reference to the payment being made “to the claimant” underlines that the statutory scheme is to create an entitlement in the contractor to receive payment whether or not the contractor has a contractual right to it.

- 31 I accept that it is a consequence of this view that, at least potentially, a respondent may have liabilities to two parties arising out of a payment claim: there may be a statutory liability to the contractor at the same time as a general law liability to the assignee. In answer to the suggestion that the respondent might pay the assignee and then be compelled to make a second payment to the contractor under statute, counsel for Electrical pointed out that a claimant cannot proceed to filing an adjudication certificate as a judgment for a debt unless it is accompanied by an affidavit to the effect that the debt has not been paid: s 25(2). Furthermore, even if a judgment is obtained, it is always open to the judgment debtor to apply in a proper case for a stay or an injunction: *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 449-450 [84]-[88]. Counsel submitted that if Quickway had paid Bibby in accordance with the invoice, it would not have been open to Electrical then to file an adjudication certificate for the same debt because the debt would have been paid; or, at least, Quickway would have had strong grounds to resist enforcement of any judgment obtained by Electrical before the parties' rights had been worked out at general law.
- 32 This, however, does not address the converse case where a contractor enforces a statutory right to payment and then (perhaps after the contractor has gone into liquidation) the assignee seeks to enforce the contractual right assigned to it. Payment by the debtor to the assignor after notice of the assignment is given is not, at general law, a discharge as against the assignee, and the Act contains no provision which would operate as a discharge in such circumstances. It would seem that the respondent would be liable to pay a second time, and would then have to claim the statutory payment back from the contractor in due course under s 32(3)(b).

- 33 On the facts of this case, Bibby had the protection of cl 3.2 as well as cl 3.5 creating a trust in its favour, so that it is very unlikely that Bibby would ever have brought its own direct claim for payment, even if Electrical had gone into liquidation. Nevertheless, it must be accepted that, in theory, circumstances could arise in which a respondent could be required to pay under statute and then be subjected to a claim by a third party assignee.
- 34 In my opinion, this consideration is relevant to the question of construction before me, but it cannot be decisive. I do not think there is any room in the Act for adopting a construction which would prevent a claimant from proceeding with enforcing the payment procedure in circumstances where the entitlement in question had been assigned to a third party. In my view, the language creating a statutory right in favour of a contractor to progress payments in accordance with the statutory procedure is too clear to permit some sort of statutory reading down. I am fortified in this view by the fact that it was obviously the intention of the legislature in enacting the BCISPA to enable a contractor to obtain progress payments despite the inconvenience and potential injustice of requiring the respondent to pay and have to claim restitution later. Factoring arrangements are well known, and I think that it would be a surprising gap in the legislative scheme if the existence of such a factoring arrangement was to prevent statutory rights under the BCISPA from arising, or from being enforceable.
- 35 Accordingly, I reject Quickway's contentions based on the assignment of Electrical's entitlements to Bibby.

Procedural fairness

- 36 The Leichhardt works were done pursuant to a standard form contract. The works were identified in the contract as three separate portions, described as "separable portions" number 1a, 1b and 2. Lump sum figures were provided for each of the three "separable portions". The date for access of the site and date for commencement of the works were specified as 6 March 2017 and the date for completion as 28 April 2017. Clause 1.2 of the General Conditions provided:

1.2 Period for execution of the Subcontract Works

The Subcontractor must commence the Subcontract works on the date stated in the Particulars and complete the Subcontract Works within the period stated in the Particulars or, alternatively, as agreed in writing by the parties in accordance with all Statutory Requirements.

37 Clause 5.3 provided:

5.3. Payment Terms

(1) The Subcontractor must submit to Quickway its claims for payment (Payment Claim) for Subcontract Works performed, which must include:

- (a) calculations and evidence substantiating the amount claimed;
- (b) a statutory declaration which states that as at the Payment Claim date, wages, payroll tax (if any) and worker's compensation premiums of or in respect of all employees engaged in carrying out work under the Subcontract have been paid and confirming all subcontractors and suppliers have been paid in accordance with their applicable terms of trade and which is not misleading or deceptive in any way; and

(c) any other information Quickway may reasonably require.

(2) Subject to clause 5.3(4) and clause 5.3(5), within ten Business Days of receipt of a Payment Claim, Quickway will issue to the Subcontractor a payment schedule stating:

- (a) the Payment Claim to which the payment schedule applies;
 - (b) the amount of the Payment Claim which in the opinion of Quickway (subject to clause 5.3(4) and clause 5.3(5)), is payable by Quickway; and
 - (c) if the amount in the payment schedule is less than the amount in the Payment Claim, the reasons why.

(3) Subject to clause 5.3(6), payments will be paid within the time frame set out in Item 4 of the Particulars. Any payment by Quickway is on account only and is not evidence of any Subcontract Works having been carried out in accordance with the requirements of the Subcontract.

(4) The Subcontractor will not be entitled to claim payment for materials, plant or equipment which have not been affixed to the Site, unless the parties otherwise agree in writing.

38 The contract provided that the date of submission for payment claims was to be the last working day of each calendar month and payment would be made 30 days after the end of the month in which the claim was submitted.

39 As I have mentioned, the invoice in question was issued on 22 April 2017 (it was in fact dated 21 April). The invoice claimed payment of the contractual lump sums for separable portions 1a and 2.

40 No payment schedule was served in response, but rather than proceed to claim payment pursuant to s 15(2)(a)(i), Electrical opted to proceed by way of

claim for an adjudication determination. Notice was given to this effect pursuant to s 17(2). This triggered a further opportunity for Quickway to serve a payment schedule. Quickway did so, asserting the amount due was nil. A number of grounds were put forward in support of this position in Quickway's schedule, and in the covering letter which accompanied it. The schedule stated:

1. The Claim is not a payment claim for the purposes of section 13 of the Act as it does not identify the construction work (or related goods and services) to which the progress payment relates, as required by section 13(2) of the Act;
2. The Claim does not contain the calculations and evidence substantiating the amount claimed, as required under clause 5.3(1)(a) of the Subcontract;
3. No statutory declaration was submitted with the Claim, as required under clause 5.3(1)(b) of the General Conditions of the Subcontract; and
4. The Claim was not submitted on the reference date in accordance with the Act.

41 When Electrical came to submit its adjudication application, Electrical provided its response to the points raised in Quickway's schedule. Electrical took the position that it had sufficiently identified the works done by reference to the contractual description and pointed out that it was under no statutory obligation (as opposed to a contractual obligation) to lodge a statutory declaration. In answer to the fourth point, Electrical stated:

39. The Payment Claim was made based on a Reference Date provided pursuant to s 8(2)(a) of the Act, for example 28 April 2017.

42 Quickway's response to the adjudication application contained the following response:

13. The High Court of Australia recently determined that the existence of a "reference date" as defined by section 8(2) is a precondition to making a valid payment claim: *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 at 61 and 70; *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613 at 18, 44, 46, 49 and 53.

14. Section 8(2)(a) rather than 8(2)(b) is the operative provision in the present case. The Contract expressly provides for monthly payment claims, which must be made on the "last working day of each calendar month" (Contract, page 2 - Tab 2).

15. It is common ground that:

- (a) the Invoice dated 21 April 2017 is the Alleged Payment Claim;
- (b) by email on 22 April 2017, the Claimant sent the Alleged Payment Claim by email;
- (c) the subject line of the email says "April Invoicing"; and

(d) the Claimant relies on 28 April 2017 as the reference date - see paragraph 39 of the Claimant's submissions.

16. The Alleged Payment Claim does not nominate a reference date nor was it made on a reference date.

17. The Respondent makes these submissions based on the Claimant's representation of a 28 April 2017 reference date and for the purposes of these submissions only, the Respondent relies on the reference date of 28 April 2017 as asserted by the Claimant.

18. The Alleged Payment Claim was made before the reference date. The Alleged Payment Claim is therefore not a "payment claim" for the purposes of the Act.

19. It is a jurisdictional requirement under the Act that a "reference date" exists under the Contract within the meaning of section 8(1) of the Act for a valid payment claim in accordance with section 13(1) of the Act to be made.

20. A payment claim made before the relevant reference date arises is not a payment claim pursuant to the Act: *Southern Han* at 61: "[the contractor is] entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of s8(1) is a precondition to the making of a valid payment claim under s13(1)". The position was confirmed recently by the Supreme Court of NSW in *Regal* at paragraphs 44, 46, 49 and 53, including: "where the reference date has not arrived in fact, the payment claim will be ineffective". See further *Walter Construction Group Ltd v SPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, per Nicholas J where the Supreme Court of NSW held that premature service of a payment claim is invalid; cf section 13(4)(a).

21. Based on the foregoing, the Invoice (purported payment claim) referred for this "adjudication application" is not a payment claim pursuant to the Act.

43 In his determination, the adjudicator said:

I ... cannot accept the Respondent's submissions. The Respondent argues that the Payment Claim was served on 22 April 2017 and is therefore premature because the reference date is 30 April 2017. If the relevant reference date was 30 April 2017 as the Respondent contends then the Respondent would be correct. However, I am satisfied from the Claimant's material that the work the subject of the Payment Claim was undertaken in March 2017. Therefore, the reference date arose on 31 March 2017. There is no evidence before me to indicate the reference date on 31 March 2017 had been used by a previous payment claim. Therefore, I am satisfied that reference date arose on 31 March 2017 on and from which the Claimant was entitled to serve a Payment Claim.

44 BCISPA s 17(3) sets out various requirements for a valid adjudication application. The relevant substantive requirements so far as the form of the application are concerned are as follows:

17 Adjudication applications

(3) An adjudication application:

(a) must be in writing, and

...

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

...

(h) may contain such submissions relevant to the application as the claimant chooses to include.

- 45 The only essential requirements are, therefore, that the application is in writing and that it identifies the payment claim and relevant payment schedule. There is no express statutory obligation to identify the reference date; indeed, there is no obligation to provide submissions on any particular issue. Nevertheless, I agree with the analysis put forward in Quickway's adjudication response at [13], quoted at [42] above. The decision in *Southern Han* underlines that the identification of the correct reference date is an essential element in defining the claimant's statutory entitlement to a payment claim. An application which does not clearly identify the relevant reference date and analyse the contractual and statutory entitlements to a progress claim under that reference date runs the risk of putting the application on an erroneous basis.
- 46 In the present case, Electrical's adjudication application did refer to the need to identify a reference date, but the date referred to, 28 April 2017, was only referred to as "a" reference date and was described as being "for example". Counsel for Electrical argued that the use of the phrase "for example" meant that the date given did not limit the actual date which Electrical could contend for. He emphasised that adjudication applications would often be prepared by business people rather than lawyers and need to be prepared according to a rapid timetable. That may be so, but it seems to me to tend to the opposite conclusion. The date of 28 April 2017 was in fact, as a Friday, the last business day for the month of April. It would be the reference date for work done in April. In my opinion, no other date being mentioned, it was reasonable for Quickway to proceed on the basis that 28 April 2017 was being put forward as the relevant reference date, irrespective of the use of the words "for example".
- 47 Quickway's adjudication response at [15(d)] and [17] (quoted at [42] above) make it quite clear that Quickway was proceeding on the basis that the reference date was 28 April 2017. In dealing with the application on the basis

that the relevant reference date was 31 March 2017, the adjudicator was therefore addressing the claim on a basis which Quickway had expressly not considered.

- 48 Counsel for Electrical contended that this made no practical difference. In counsel's submission, the evidence was such as to establish beyond doubt that the progress payments claimed were justified under a reference date of 31 March. In these proceedings, further accounting evidence was led which was said to show that the expenditure had been incurred in March.
- 49 I do not accept these submissions. Electrical's application did not include any evidence as to when the work was done; in fact, as we have seen, Electrical argued (successfully) that its contractual obligation to support the invoice with a statutory declaration did not apply for statutory purposes. It is not clear to me what the adjudicator was referring to in saying that the evidence before him established that the work (that is, "separable portions" 1a and 2) was undertaken in March. Certainly it was reasonable to infer, having regard to the commencement date of 6 March, that work under the contract had been commenced in that month; however, I can see nothing in the material before the adjudicator which established (let alone beyond argument) that the particular jobs which were the subject of the claim in the invoice had been completed by 31 March. To my mind, the fact that the invoice was not issued until 22 April tends to suggest the possibility that the work was not completed by 31 March.
- 50 Nor does the further evidence led in these proceedings fill the gap. It consists of ledger entries which appear to record expenses (materials, subcontractor payments, etc) associated with the works. Those expenses commence on 7 March and extend into July. The amounts posted in the period up to 31 March are in fact relatively small, consisting of only a few thousand dollars at most. I do not think that this evidence establishes that the works in question were completed by 31 March.
- 51 If the claim had been presented under the reference date of 31 March, it might have been possible to claim something for the work done to that point, but the application did not proceed on this basis. Had it done so, the adjudicator would

have needed to consider how much Electrical was entitled to as at that date. The onus is on the adjudicator to conduct a sufficient review of the material to satisfy himself or herself that the statutory requirements are met; it is not simply a matter of considering and rejecting the respondent's submissions for the application to succeed: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at 399 [52].

52 Accordingly, I think that the adjudicator unfortunately fell into a denial of natural justice. His adjudication decision was based on a view of the case which Quickway did not have a proper opportunity to address.

Conclusions and orders

53 I conclude that:

- (a) Quickway's challenge to the two adjudication determinations based on the assignment of the underlying obligations to Bibby fails;
- (b) Quickway's challenge to the Leichhardt adjudication determination based on denial of natural justice succeeds.

54 I will leave it to the parties to formulate orders to deal with consequential matters such as the payment out of the monies held in Court, the payment of interest and costs. If the parties cannot reach agreement on these orders, I will hear argument.

55 The orders of the Court are:

1. Order that the interlocutory injunction granted on 7 August 2017 be discharged.
2. Direct that within 28 days the plaintiff bring in orders giving effect to the conclusions I have reached in this judgment, or arrange with my Associate for the proceedings to be listed for argument on the proper form of such orders.

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