SUPREME COURT OF QUEENSLAND

CITATION:	*EHome Construction Pty Ltd v GCB Constructions Pty Ltd* [2020] QSC 291
PARTIES:	**EHOME CONSTRUCTION PTY LTD** ABN 72 607 445 009 (applicant) **v** **GCB CONSTRUCTIONS PTY LTD** ABN 26 151 244 254 (first respondent) **RANJIT KHOSLA J1077622** (second respondent) **THE ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO/S:	BS 6386 of 2020
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED EX TEMPORE ON:	18 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2020
JUDGE:	Bond J
ORDER:	**1. The originating application is dismissed.** **2. The question of the order which should be made as to costs will be determined on the papers and in this regard the parties are directed to file and serve submissions on that question within seven days of today, such submissions to be limited to three pages.** **3. The sum of $668,342.58 together with any accretions thereto which has been paid into Court by the applicant must be paid out to the first respondent.** **4. Order 3 is stayed until 4 pm on 25 September 2020.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where a payment claim was made for work carried out up to termination of a construction contract – where the payment claim was made, and the adjudication determined, on the basis

that the claim was a final payment claim – whether the payment claim was made within time – where the payment claim included an amount for retention monies – whether the payment claim was a valid payment claim – whether the adjudication decision was affected by jurisdictional error

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 75

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd [2020] QSC 133, applied

COUNSEL:	R A Perry QC, with I Erskine, for the applicant J Baartz for the first respondent No appearance for the second and third respondents
SOLICITORS:	Anthony Delaney Lawyers for the applicant Mills Oakley for the first respondent No appearance for the second and third respondents

HIS HONOUR: This is an application for declarations that a payment claim served by the first respondent on the applicant is void because it did not comply with the requirements of the *Building Industry Fairness (Security of Payment) Act* 2017 (**BIFA**). The application further seeks a declaration that the adjudication in respect of that payment claim, namely, a decision by the second respondent dated 5 June 2020, is not a valid adjudication pursuant to BIFA and is void. The second respondent and the third respondent have not participated in the proceeding. Accordingly it is convenient to refer to the first respondent simply as the respondent and the second respondent as the adjudicator.

There is no significant dispute in relation to the factual background. The applicant provides domestic and commercial building and construction services in Queensland. The respondent is a builder and contracted with the applicant to undertake construction of a five-storey building on land at Surfers Paradise. The construction contract value was for a little over $5 million.

The contract was entered into in October 2018. Between 2 November and 20 December 2019, the respondent issued 14 payment claims to the applicant. Payment claims 12, 13 and 14 have not been paid by the applicant. Based on that, the respondent, on 20 December 2019, issued a show cause notice under the contract. The last work that the respondent carried out was on or about 20 December 2019. There was a response by the applicant to the show cause notice on 31 December 2019.

On 6 January 2020, the respondent suspended the works under the contract. On 4 February 2020, the respondent purported to terminate the contract. On 5 February 2020, the applicant purported to terminate the contract on the basis that the respondent's termination the previous day was a repudiation of the contract. It is common ground, therefore, as between the applicant and the respondent that, at the latest, as at 5 February 2020 the contract between them had been terminated.

A little over a month later on 6 March 2020, the respondent issued a payment claim, which was payment claim number 15, seeking payment of $889,892.32. The payment claim is in evidence

before me. It sought to claim for all work which had been carried out by the respondent up to and including the date of termination less the amounts previously paid by the applicant.

The result of structuring a claim in this way meant that it claimed for works that had not been paid for. But also, necessarily, its claim incorporated an amount of a claim for retentions that had been deducted from the value of previous claims during the course of the contract. That much becomes apparent from the tax invoice which formed part of payment claim 15, which expressed the claim in this way:

Total works completed up to 4 February 2020	$4,671,101.36
Retentions to be released	$179,540.28
Less previously certified	-$3,862,108.35
Subtotal	**$808,993.01**
Add GST of 10%	$80,899.30
Total	**$889,892.32**

A payment schedule was delivered on 19 March 2020 and an adjudication application lodged on 8 March 2020. The adjudicator accepted the adjudication application on 20 April 2020. An adjudication response was delivered on 7 May 2020, and on 8 June 2020 the adjudicator delivered the adjudication decision. An adjudication certificate was issued on 9 June 2020 for the amount of $614,265.

Two arguments supporting the claim for declaratory relief were pressed before me by the applicant. Neither has any merit.

In order to understand the arguments that were advanced, it is necessary first to understand the bases upon which adjudication decisions may be the subject of jurisdictional error and the juridical basis upon which courts examine that issue. I dealt with that at length in my decision of *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* [2020] QSC 133 at [32] to [42], and I will not repeat the propositions that I there advanced. Each of the arguments advanced by the applicant turned on the proposition that there had been no compliance with one of the basic and essential statutory requirements, namely, the service of a valid payment claim.

The first argument sought to rely on an alleged inability of the claimant to demonstrate that the subject payment claim had been given before the end of the periods referred to in ss 75(2) or 75(3) of BIFA. Somehow, the applicant sought to confine this argument to s 75(3). But I was unable to see how that was logically a satisfactory way to proceed. It is for the applicant in a case like this to demonstrate the existence of jurisdictional error because a condition for the valid exercise of jurisdiction has not been met. In this context, that means it is for the applicant to demonstrate that, relevantly, a payment claim was given after the end of one of the periods provided for in ss 75(2) and 75(3) of BIFA.

The applicant cannot demonstrate that.

The most obvious reason for that is that, contrary to the applicant's argument, the present payment claim was to be regarded as a payment claim which related to a final payment, and it was given before the end of the longest of the periods referred to in ss 75(3)(a), (b), (c) or (d). The candidate for the potential longest of the periods which was open was s 75(3)(c). The applicant's

argument was that one could not effectively work out how those periods were to work. Well, if that were so, then it would mean that there was no coherence to the applicant's argument that there had been a failure to comply with one of the essential statutory requirements that conditioned the adjudicator's jurisdiction.

But putting that problem to one side, the argument that one cannot work out the applicable periods cannot be accepted.

In the present case, it was correctly pointed out by counsel for the respondent that the Act says in s 67(2):

> *However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.*

In this case, it is common ground that the contract did not provide for the reference date surviving beyond termination, nor did it purport to prevent that. Accordingly, it is common ground that in relation to the construction contract between these two litigants, which it is common ground was terminated either on 4 February 2020 or on 5 February 2020, the final reference date for the contract is necessarily either 4 or 5 February 2020. That conclusion is significant because it means that BIFA contemplates the possibility of a payment claim being advanced by reference to that reference date. I see no difficulty in characterising payment claim number 15 advanced by the respondent as a payment claim which relates to a final payment within the meaning of s 75(3). Final payment is defined in s 75(6) as:

> ***final payment*** *means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.*

Payment claim 15 was a payment claim which related to something that can be described as a progress payment that is the final payment for construction work carried out under this construction contract. If that is so and given that the question of whether the payment claim was valid (in the sense of being issued within time) must be intended to be evaluated at the time a payment claim is being made, one asks oneself whether the payment claim was given before the end of whichever of the periods specified in the subparagraphs to s 75(3) was the longest.

Where s 75(3)(c) says:

> *6 months after the completion of all construction work to be carried out under the construction contract;*

what does it mean?

The only construction work to be carried out under this construction contract has already been completed. It had to be completed prior to 5 February 2020 because it was common ground that the construction contract had been terminated. It follows that the payment claim was made before the end of that period.

The argument of the applicant that, somehow, one cannot work out any of the periods referred to in the subparagraphs of s 75(3) in the context of a construction contract that has been terminated is a surprising one.

I have already identified why it is that one construes BIFA as contemplating that a claimant has a right to a progress payment after the final reference date and that a final reference date must exist when a contract is terminated. It follows that the intention of the legislature is that there ought to be dates capable of being worked out under s 75(3). The proposition of construction that I have advanced is consistent with that revelation of intention.

However, even if the characterisation of the present payment claim was not to be regarded as a "payment claim [which] relates to a final payment" within the meaning of s 75(3), then it would necessarily therefore fall within the ambit of s 75(2) which simply says, "the claim must be given before the end of whichever of the following periods is the longest", and (b) would apply: "the period of 6 months after the construction work to which the claim relates was last carried out…". There is no dispute that payment claim 15 was made within that period.

Somehow the argument was advanced on behalf of the applicant that one could not resurrect jurisdiction by reference to s 75(2) because the claim had been advanced as a final payment claim and dealt with as a final payment claim under BIFA. I reject that proposition. As I have said, I think the better view is that it is very clear that the payment claim should be characterised as a payment claim to which s 75(3) applies. But if that is wrong, then s 75(2) applies. The question whether there is a failure to comply with a condition that the adjudicator's jurisdiction turns upon, which failure has happened because a payment claim was not validly made, simply requires the judicial officer considering that argument to apply s 75. There is no argument that justifies a conclusion in the circumstances of this case that the claim was not given before the end of statutory applicable periods made operable by either s 75(2) or s 75(3). The first argument advanced by the applicant must fail for this reason.

I note for completeness that a suggestion was made that if I was minded to reject the jurisdictional complaint by examination of s 75(2), that would give rise to natural justice concerns because the claim was advanced as a final claim and dealt with by the adjudicator as a final claim. I am not able to discern any issue of substance in this argument.

I turn then to the alleged second jurisdictional error. That argument derives from an invitation to apply the logic accepted by Ball J in *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* [2020] NSWSC 409, who declared void and set aside a payment claim that included a claim for an amount paid under a guarantee, holding that the claim was not one for construction work or related goods or services undertaken or to be carried out or supplied under a construction contract.

If, for some reason, because of the nature of the claim advanced, a payment claim that purported to be a payment claim could not be regarded as a valid payment claim under BIFA, I have no difficulty with the conclusion that jurisdictional error would have been demonstrated. In *Acciona* at [34] I said that:

> *…the valid exercise of an adjudicator's jurisdiction is conditioned on the decision having complied with [certain] "basic and essential" statutory requirements (with the result that a decision which has not complied with [those] requirements would be void)…*

One of those requirements is the service by a claimant on the respondent of a payment claim. So if something is not actually a payment claim, even though it purported to be, then jurisdictional error would be established in that way.

But this claim plainly was a payment claim. *Grocon* is not applicable to this sort of payment claim. That conclusion is arrived at simply by a proper understanding of the nature of rights conferred under BIFA and the definitions that are relevantly applicable.

Under s 75(1) of BIFA, "a person … who is, or who claims to be, entitled to a progress payment may give a payment claim to the person … who, under the relevant construction contract, is or may be liable to make the payment".

Payment claim is a term defined in s 68 which provides that:

> *A **payment claim**, for a progress payment, is a written document that—*
> *(a) identifies the construction work or related goods and services to which the progress payment relates; and*
> *(b) states the amount (the **claimed amount**) of the progress payment that the claimant claims is payable by the respondent; and*
> *(c) requests payment of the claimed amount; and*
> *(d) includes the other information prescribed by regulation.*

Payment claim 15 fell within that definition. The only reason suggested to justify the conclusion that it would not fall within that definition was that it claimed, in effect, return of retention monies because of the way that it calculated the claim. The notion is that it is not a claim "for" construction work. That argument seems to me to be flawed. The claim expressed in the way that it was, as I have already described, was a claim for payment for construction work. Retention amounts were amounts that had been deducted from the value of construction work already completed. So a claim expressed as this one was simply cannot be characterised as other than a payment claim within the meaning of this Act.

It follows from this conclusion that the second of the arguments advanced by the applicant also fails.

It was pointed out that there were alternative arguments that also necessitated the conclusion that the argument should fail. Some of those arguments, I thought, had merit.

The first ran, essentially, in this way: that even if a payment claim which sought a return of retention monies that had been previously deducted from earlier payment claims could not be characterised as a claim for construction work (which I note is a proposition I reject), that conclusion would not necessarily mean that a payment claim which claimed for more than just return of retentions should not be characterised as a payment claim.

To put it another way: this alternative argument accepts, for the sake of argument, the hypothesis that a payment claim which claimed only for retention monies might be not a valid payment claim, and points out that in the circumstances of this case only a comparatively small proportion of the claim could be identified as referable to retentions. The characterisation exercise necessary to be

done in order to deal with the jurisdictional argument is a characterisation exercise that has to be done in relation to the entirety of the payment claim.

In those circumstances, even if there were a flaw in a payment claim in that it claimed something that could not be advanced as part of the payment claim, because the majority of the payment claim was for things that plainly could be claimed for in a valid payment claim, the payment claim still could be appropriately characterised as such. I think that proposition is correct.

Acceptance of that proposition means that even if I am wrong in the hypothesis that the claim for retention monies can be regarded as a valid payment claim, I would still reach the conclusion that the payment claim should be properly characterised as a valid payment claim because the claim for retentions represented only a relatively small proportion of the payment claim.

There was another alternative argument advanced by counsel for the respondent as a fallback (that I would not accept), and that was the reliance on s 101(4) of BIFA which says:

> *If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under this chapter is affected by jurisdictional error, the court may—*
>
> *(a) identify the part affected by the error; and*
>
> *(b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.*

The proposition was that if there was error, only a part of the adjudicator's decision was affected by error. But logically, if – and this is a proposition I reject – the inclusion of a claim for something that cannot be the subject of a payment claim did mean that the payment claim could not be validly regarded as a payment claim, then that error would infect the entirety of the adjudicator's decision and no part of it could be resurrected by operation of s 101(4).

The order I make is that I dismiss the application. I will hear the parties on costs.

…

I make the following orders:

1. The originating application is dismissed.
2. The question of the order which should be made as to costs will be determined on the papers and in this regard the parties are directed to file and serve submissions on that question within seven days of today, such submissions to be limited to three pages.
3. The sum of $668,342.58 together with any accretions thereto which has been paid into Court by the applicant must be paid out to the first respondent.
4. Order 3 is stayed until 4 pm on 25 September 2020.