

## Double payment claims – Trigger for litigation

by Beau Mollinger, Solicitor

A recent decision of the District Court of Queensland further considers judgments on disputed successive identical payment claims served under the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA).

### *Park Avenue Constructions Pty Ltd v Sullivan* [2009] QDC 292

#### Background

Park Avenue Constructions Pty Ltd (**Park Avenue**) was contracted by Sullivan under a HIA Standard Form New Home Construction Contract to construct a single story rendered home. Sullivan was not a resident owner, allowing the application of the BCIPA.

The contract required Park Avenue to submit a notice of practical completion and a final (payment) claim when reaching practical completion of the work. However, that final claim was not due until Park Avenue:

- gave Sullivan a defects document listing minor defects and omissions; and
- made all reasonable efforts to have Sullivan sign the document or acknowledge its contents.

Practical Completion was defined as:

*“the stage when the works:*

- have been completed in accordance with the contract and all relevant statutory requirements apart from minor defects or minor omissions; and*
- are reasonably suitable for habitation.”*  
(our emphasis)

Park Avenue gave notice of practical completion and made a final payment claim under BCIPA on 7 May 2009. A list of defects was included. Sullivan did not respond to the claim. Park Avenue took no further steps under the BCIPA on this first payment claim.

#### In Brief

by David Rodighiero, Partner

- The District Court, while confirming that identical payment claims are prohibited, if the earlier payment claim is invalid for any reason, the earlier payment claim will not invalidate a subsequent payment claim;
- The High Court, in overturning the decision of the NSW Court of Appeal, refused to extend the duty of care a principal may owe to a subcontractor to include an obligation to provide induction training in the safe method of carrying out the subcontractor's specialised task.

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Shortly after, the local authority issued a final inspection certificate to Park Avenue on 19 May 2009. Park Avenue then re-submitted its notice of practical completion with a new date of 21 May 2009 and an identical final (payment) claim (with merely an amended invoice date). Again, Sullivan provided no response and no payment schedule.

Park Avenue applied to the court for an order for judgment debt against Sullivan.

#### *The issue – Prohibition on successive identical payment claims*

The BCIPA prohibits successive payment claims in relation to the one reference date under the construction contract.<sup>1</sup>

There have been a recent line of cases that have confirmed an expanded prohibition imposed by the courts on identical payment claims where the subject matter of the payment claims are the same, except for different reference dates.<sup>2</sup>

Consequently, with Park Avenue seeking a judgment debt arising from the second payment claim, the validity of that successive payment claim was disputed.

Sullivan opposed Park Avenue's application for judgment debt on three grounds:

- that there had been two identical payment claims, and that reliance on the second payment claim was on an invalid payment claim giving rise to no right for judgment debt under the BCIPA;
- two payment claims containing the same reference date (practical completion) had been served and reliance on the second was prohibited by s 17(5) of the BCIPA; and
- the reference date (practical completion) had not in fact been achieved. In the absence of a reference date, the BCIPA would therefore not apply and the right to apply for judgment debt could not accrue under the BCIPA.

#### *The court's decision*

The court recognised that the validity of the second payment claim would be dependent on the validity of the first payment claim.

In turning to the first payment claim, the court noted that the BCIPA only conferred on Park Avenue a right to payment for a progress claim from a 'reference date', which was further defined under the BCIPA as a date on which a payment claim *may* be made.

The court interpreted the contractual provisions for practical completion as containing a pre-condition that the works would not be at that stage without fulfilment of all statutory requirements, including the local authority's final inspection certificate. (In this way the court linked an entitlement under the BCIPA with the provisions of the contract – reinforcing that the BCIPA does not necessarily sit outside the boundaries of what is agreed between the parties and that contractual compliance is an important element in using remedies under the BCIPA.)

Consequently Park Avenue gained no entitlement to make a progress claim under s 17 of the BCIPA until the final inspection certificate was issued on 19 May 2009. If Park Avenue had proceeded to court on the earlier payment claim it would not have succeeded. However Park Avenue proceeded on the subsequent payment claim.

Because the court found that the *first* payment claim was invalid, and only the subsequent payment claim was valid, the first two arguments raised by Sullivan failed. The court also rejected Sullivan's third argument, finding that practical completion had been achieved at the time of the second payment claim.

#### *What does this mean for Contractors and Principals?*

Contractors should be cautious to glean any satisfaction out of this judgment, over the less successful decisions for contractors in *The University of Sydney v Cadence Australia Pty Limited* [2009] NSWSC 635 (**Cadence**) and *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems* [2009] NSWSC 416 (**Novatec Construction Systems**), which also dealt with unsuccessful actions by contractors relying on successive identical payment claims.

The contractor in this case was in the fortunate position that its payment claims were referable to a reference date fixed by definition under the contract, but open to an interpretation of facts. Had the successive payment claims been merely mid-contract and referable to the date on which payment claims fell due, the contractor may not have found itself successful (as was the case with other cases before the court this year).

At the same time, contractors should read the case as supporting the proposition that *fatal* errors in earlier payment claims can be cured by subsequent payments claims. It lends some hope to contractors who find themselves in such a difficult situation, without the need to consider rectification of their position as futile in light of the judgments in *Cadence*, *Novatec Construction Systems* and the earlier decisions of *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC168 and *Tailored Projects P/L v Jedfire P/L* [2009] QSC 32.

For principals the case also sends a clear message that ignoring BCIPA payment claims is (and always has been) a potentially costly error. Even in circumstances where a principal disputes the validity of a payment claim under the BCIPA or contract, in light of the provisions of the BCIPA that prohibit a defence being raised by the principal in

such circumstances, a principal is better served expressing that dispute at the time in which a payment schedule or certificate falls due under the contract or the BCIPA, rather than leaving such arguments until the matter has unnecessarily and expensively progressed to litigation.

<sup>1</sup> *Building and Construction Industry Payments Act 2004* (Qld) s13.

<sup>2</sup> *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635; *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems* [2009] NSWSC 416.

## Principal Contractor found not liable for specific activity

*by Peter Dovolil, Associate*

In the recent decision of *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox* [2009] HCA 35, the High Court declined to extend the duty of care owed by principal contractors to independent contractors.

The facts in *Fox* were as follows. Leighton Contractors Pty Ltd (**Leighton**) were the principal contractors for the construction site at the Hilton Hotel in Sydney. Leighton contracted with Downview Pty Ltd (**Downview**) to perform concreting for certain parts of the project. Downview in turn contracted the concrete pumping to Mr Quentin Still (**Still**) and Mr Jason Cook (**Cook**) who in turn, on the date of the incident, had engaged Mr Warren Stewart (**Stewart**) as a driver and Mr Fox (**Fox**) (the plaintiff in the action) as his offside. Stewart and Fox were using a concrete pump truck supplied by a company called Shark Shire Plumbing Pty Ltd at the request of Still and Cook.

On the date of the incident, upon arrival on site, Stewart and Fox met Still and proceeded to level 4 of the site, which was the access level. All three then proceeded to carry a number of pipes to level 12, where the concrete was to be poured. The concrete was poured and, upon completion, Stewart, Fox and Still prepared for the task of line cleaning (which involves blowing a polyurethane ball, known as a 'sponge' through the pipes with compressed air). The sponge was initially blown through without incident, although was ineffective in cleaning the pipes. Still subsequently decided to use a hessian bag filled with dacron (a composite material used as insulation) to blow through the pipes. During this process, the hessian bag became stuck and it was agreed that Still would increase the air pressure. Prior to doing so, Fox was instructed to move away and proceeded to stand some 30 feet from the end of the pipe. When the pressure was increased, the hessian bag was expelled, which caused the pipe to whiplash and strike Fox on the head.

Fox commenced proceedings against Leighton, Downview and Warren Stewart Pty Ltd, the employer of Stewart. At first instance, Fox succeeded only against Warren Stewart Pty Ltd. The proceedings against Leighton and Downview were dismissed on the basis that there was no relevant breach of duty of care. Warren Stewart Pty Ltd was subsequently de-registered, and accordingly Fox appealed the decision against Leighton and Downview.

The Court of Appeal upheld the appeals, finding that both Leighton and Downview were subject to a common law duty of care. The Court of Appeal found that the duty owed by Leighton included taking steps to ensure that all persons on site receive induction training (a requirement of the *Occupational Health and Safety Regulation 2001* (NSW)). The Court of Appeal relied on the New South Wales Occupational Health & Safety legislation to conclude that the required induction training would have addressed line cleaning and that *'the conclusion that the failure to provide induction training contributed to the accident was an inference properly available on the evidence and one which should have been drawn'*.

Leighton and Downview appealed the Court of Appeal decision to the High Court and were successful. The High Court noted that the Court of Appeal had interpreted Leighton's induction training obligations under the *Occupational Health and Safety Regulation 2001* (NSW), on the basis that *'such training was required to cover the relevant health and safety topics set out in the Code of Practice'* and concluding that *'the relevant code of practice*



*for present purposes was that for pumping concrete which included clause 3.18' (which was the part of the pumping code which specifically dealt with line cleaning and, amongst other things, dealt with the need to tie the end of the pipe to the waste bin).*

The High Court accepted that the induction training

was required to cover the relevant health and safety topics set out in the Code of Practice, however noted that the Code of Practice was not the 'Pumping Code' but rather a document produced by the WorkCover Authority of New South Wales titled 'Code of Practice: Occupational Health and Safety for the Construction Industry'.

The High Court noted that the 'OHS induction training' which, under the regulations, Leighton was required to ensure that each person coming on site had received included the following three categories:

- general induction training;
- task specific induction training; and
- site specific induction training.

It was noted further that training for the first two categories is to be provided by way of a documented training course and only once, subject to the requirement that a person re-entering the workforce after an absence of two years or more, requires further training. The third was obviously to be provided prior to commencing on site and would include information about the procedures relevant to the specific worksite.

The High Court accepted Leighton's argument that the duty imposed upon it by the Court of Appeal required that it provide induction training to Fox and Stewart in the safe method of line cleaning, a task that forms part of the activity of pumping concrete. The High Court stated that if Leighton owed such a duty to Fox and Stewart, then it owed a duty to provide induction training in every specialised activity in relation to the trades of every person on site.

The High Court went on to state that

*'there is no reason in principle to impose a duty having this scope on the principal contractor. The latter is unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and principals to independent contractors'*.

The representatives of Fox advanced a narrower submission than the Court of Appeal findings. It submitted that the scope of the duty imposed upon Leighton, if it did not extend to providing the relevant training, at least extended to ensuring through the induction process that all contractors coming on site had been provided the relevant training previously. This submission was rejected, with the High Court stating that even if this general proposition was to be accepted, Fox faced the following obstacles which could not be overcome:

- whatever the scope of the duty, it can be discharged by the exercise of reasonable care. No evidence was led at trial as to what action Leighton took to ascertain whether workers coming onto site had received activity specific training, and whether that action was reasonable;
- in the absence of expert evidence, the conclusion that such training would have included reference to clause 3.18 of the Pumping Code should not be drawn; and
- there was no evidence as to whether Fox or Stewart had previously received activity specific OH&S training.

## Conclusions / Lessons

Whilst the High Court refused to extend the duty owed by principal contractors to independent contractors on site, the decision serves as a timely reminder that in some circumstances a principal contractor may incur a liability.

It is settled law that principal contractors can incur a liability for directly authorised acts of independent contractors and in respect of acts of independent contractors where the principal has had a role in creating the risk of injury, a failure to properly co-ordinate the activities of multiple contractors on site and for a breach of the duties that a principal contractor will owe solely as an occupier. The High Court, in refusing to accept the submissions advanced by Fox, agreed that this case did not warrant consideration of the principal contractor's exposure.

It is important for principal contractors to note that in Queensland there are differing workplace health and safety laws to those under consideration in the Fox decision.

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In the Fox decision, it was specifically noted that no claim for breach of statutory duty was made by Fox given that section 32 of the *Occupational Health and Safety Act 2000* (NSW) specifically states that the obligations imposed under the Act do not confer a private right of action in civil proceedings. The Queensland *Workplace Health and Safety Act 1995* (QLD) (WHS) has no equivalent section. Further, it has been accepted in Queensland that workplace health and safety obligations provide employees with a correlative private cause of action against their employers.

Whilst the extent of the law currently limits the private cause of action to employees against employers, the WHSA places particular obligation upon principal contractors and obiter comments in recent decisions have indicated a willingness to consider extending the correlative private cause of action beyond only the employer.

We accordingly recommend that principal contractors be acutely aware of their obligations under the WHSA and the way in which the Act prescribes that same can be discharged. This will allow the best opportunity to successfully defend not only civil causes of action, but criminal prosecution proceedings should they be brought by the Department of Workplace Health and Safety.

## Presentation...

Patrick Mead presented at the **LexisNexis Infrastructure and Major Projects Summit** in Sydney on 26 November 2009 on the topic of *Infrastructure issues in Major Projects including Project Alliances* which included such areas as:



- Scope of policy coverage and policy triggers - contract works/liability
- Policy exclusions with respect to defects in design, material and workmanship
- Rights of recovery against co-assureds and waiver of subrogation
- Application of dual insurance where there is principal controlled cover
- Damages for breach of contract for failing to note interests
- Innovative insurance solutions in alliance projects

For further information or to obtain a copy of the presentation, contact Jaqueline Stephan on (07) 3000 8335 or via email at [jstephan@carternewell.com](mailto:jstephan@carternewell.com)



**Carter Newell takes this opportunity to wish everyone a safe and happy festive season.**

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