RESPONSIBILITY FOR FAILURE TO CERTIFY PROGRESS PAYMENTS—WHERE ARE WE NOW?

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INTRODUCTION

It had long been considered that parties entering into standard construction contracts could take some comfort from the certainty in the manner in which their rights and obligations were interpreted. It had been judicially recognised that one of the advantages of adopting standard contracts was that the parties have the benefit of judicial determinations as to their meaning.

Justice Byrne of the Supreme Court of Victoria in *Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd* [2000] VSC 402 acknowledged that the interpretation of the operation of general condition ('GC') 42.1 of AS 2124 1992 had been certain for many years. This in turn had enabled legal advisers to advise confidently in respect to the law and its application.

In Queensland there is a line of decisions (e.g. *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 QdR 521; *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49) which had established the principles of interpretation in respect of clause 42.1.

On 17 February 2003, however, the decision of the Court of Appeal of New South Wales in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2003] NSWCA 4 introduced uncertainty to the area of law regarding the legal effect of noncertification or late certification of progress claims. It was considered that, if the decision found favour in other jurisdictions, it would have serious consequences regarding the manner in which contracts are administered.

The Victorian Court of Appeal in *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* [2004] VSCA 18 reconsidered the decision of Justice Byrne J and said that it could see no reason why it should not accept the majority decision in *Brewarrina*.

While the decision in *Brewarrina* was handed down more than 4 years ago, there have been no further determinations to resolve the divergent views of the majority of the New South Wales Court of Appeal.

This article considers the historical interpretation of clause 42.1 and the impact of *Brewarrina* and the determination of the Victorian Court of Appeal in *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* and subsequent decisions considering these issues.

THE POSITION PRIOR TO BREWARRINA

A brief summary of the authorities prior to Brewarrina is set out below:

In *Re Concrete Constructions Group Pty Ltd* [1997] 1 QdR 6 it was recognised that while the process involved in GC 42.1 concerned the lodging, certifying and paying of progress claims, such claims and payments are always intended to be provisional only. That is, they await the issue of a final certificate in which the ultimate indebtedness is ascertained. Before the issue of the final certificate no payment is capable of finally determining the rights of the parties.

The effect of this decision was to expressly recognise that progress payments paid pursuant to GC 42.1 do not prejudice the rights of either party under GC 47 to dispute whether the amount so paid is the amount properly due and payable.

The consequences of a superintendent's failure to issue a payment certificate was considered by the Qld Court of Appeal in *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 QdR 521

The principal in *Zauner's* case unsuccessfully attempted to argue that the contractor had provided insufficient evidence to support its claim for summary judgment. Byrne J dismissed the argument and said that:

It is sufficient that the claims pursuant to GC 42.1 have been made and not responded to or, in the case of the last claim that a valid certificate has issued.

At that time it appeared clear that the obligation of the superintendent was to issue a progress certificate within the time specified in the contract. The decision of the New South Wales Court of Appeal in *Brewarrina* and the subsequent decision of the Victorian Court of Appeal in *Acquatec-Maxcon* cast doubt on the above legal principles.

BREWARRINA SHIRE COUNCIL V BECKHAUS CIVIL PTY LTD

On 17 February 2003, the New South Wales Court of Appeal upheld an appeal by the Brewarrina Shire Council ('the principal') from a decision that the contractor was entitled to summary judgment for $702,678 on its progress claim on the basis that the superintendent had not issued a payment certificate within the time prescribed by the contract. It was accepted by the parties that the superintendent had not issued a payment certificate within the time stipulated by GC 42.1.

At the first instance, in response to the parties' submissions and after referring with approval to the decisions of *Algons* and *Devaugh*, Byrne J at first instance granted summary judgment in favour of the contractor on the basis that GC 42.1 provided that if the superintendent fails to issue a payment certificate within time, the principal is required to pay the amount of the progress payment in full. The principal argued that, under GC 42.1, the superintendent's obligation to issue a payment certificate was subject to a condition precedent that the contractor supports the claim for payment with evidence of the amount due to it, and with any further information, the superintendent reasonably required. The Court of Appeal by a majority of two to one overturned the decision at first instance and held that this was a condition precedent to the issuing of a payment certificate.

Majority judgment

Ipp JA, with whom Mason P agreed, held that the provision of information by the contactor to the superintendent must be a condition precedent to the superintendent issuing a payment certificate. A failure by the contractor to support the progress claim with evidence and the required information meant that the superintendent was not obliged to issue a payment certificate. According to Ipp JA, unless the requisite evidence and information supported the claim, the superintendent was not obliged to issue a payment certificate in response. However, Ipp JA made it clear that the request for evidence or information reasonably required by the superintendent had to be made prior to the contractor delivering the progress claim.

This issue raises uncertainty and begs the question whether the reasonableness requirement includes making the request sufficiently in advance to enable the contractor to comply with the request. Ipp JA did not refer to the authorities discussed above. Moreover, Ipp JA's reasoning sits uncomfortably with the third paragraph of GC 42.1, in that the paragraph provides that the superintendent 'may' issue a payment certificate notwithstanding that the contractor has failed to make a claim for payment under GC 42.1. This clause is premised on the basis that little or no evidence may have been provided.

Minority judgment

Young CJ in Eq in dissent referred to the above cases and noted that the decisions emphasise that GC 42.1 does not finally determine the rights of the parties. It merely provides a fast and convenient method of ensuring that the contractor has sufficient funds to pay its subcontractors and providers of materials (*Re Concrete Constructions Group Pty Ltd* [1997] 1 QdR 6 T 12 and 13; *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49).

The Chief Judge preferred a purposive construction of the clause. This required freedom from technicalities and the minimisation of the possibilities of dispute and did not provide for the inclusion of conditions precedent to performance.

Despite Young CJ in Eq's conclusion, he did not agree with the proposition at first instance that in the event the superintendent did not have sufficient information, the superintendent should assess the payment at nil. The Chief Judge preferred the view that the superintendent should 'do the best he could do with the information on hand'. This is consistent with the requirement of the superintendent acting as independent certifier to act fairly and in the interests of both parties to the contract (see *Penni Corporation v Commonwealth* [1969] 2 NSWR 530).

AQUATEC-MAXCON PTY LTD V MINSON NACAP PTY LTD

The issue was again reconsidered, on 5 March 2004, by the Victorian Court of Appeal in *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* [2004] VSCA 18.

The court unanimously upheld an appeal by Aquatec Maxcon (the 'head contractor') and overturned the decision of Byrne J that Minson (the 'subcontractor') was entitled to summary judgment for unpaid progress claims. In reaching this decision, the Victorian Court of Appeal was asked to consider *Brewarrina* in terms of a subcontractor's right to summary judgment for unpaid progress claims under GC 42.1 of AS 4303–1995

No payment certificates had been issued by the superintendent with respect to three progress claims. However, as in *Brewarrina*, there were documented requests made by the superintendent for information to support previous progress claims.

The head contractor argued that summary judgment was not available to the subcontractor on the basis that the progress claims did not comply with the formal requirements of GC 42.1 or alternatively, it was at least arguable that the progress claims did not comply with those requirements, on the basis that the information provided to support the progress claims was insufficient to enable the superintendent to make a determination.

Byrne J, at first instance, determined that the claims contained sufficient information to comply with the requirements of GC 42.1

The Court of Appeal

The head contractor relied upon the majority decision in *Brewarrina* in support of the contention that there was a triable issue as to whether sufficient evidence and information as required by GC 42.1 was provided prior to or with the progress claims.

The Court of Appeal in observing that the decision of *Brewarrina* was a recent carefully considered decision of the New South Wales Court of Appeal dealing with the construction of GC 42.1 and also appeared to be the only decision on the particular point of construction of that clause, found that for the purposes of the appeal there was no reason why they should not accept the decision of *Brewarrina* as accurately construing the relevant provisions of GC 42.1.

For the purposes of the appeal the Court of Appeal accepted that the proper construction of GC 42.1 'may well be' conditional upon the resolution of the factual dispute in respect of the information required by and given to the superintendent. Accordingly, whether progress claims were 'supported by evidence' of the amount due to the subcontractor and such information as the superintendent may reasonably require (when construed as conditions precedent) were 'triable issues'.

RECENT CONSIDERATIONS OF BREWARRINA AND AQUATEC

While not considering it necessary to determine whether evidence and information supporting a progress claim is a condition precedent to payment, Debelle J of the Supreme Court of South Australia in *Onesteel Manufacturing Pty Ltd v United KG Pty Ltd* [2006] SASC 119 was of the view that the obligation imposed on United as subcontractor was that expressed in *Brewarrina*, namely that the contractor is obliged to support its claim for a progress payment with evidence and such information as the principal's representative may reasonably require. Debelle J also noted that the decision in *Brewarrina* has been criticised by the editor of Dorter & Sharkey, Building and *Construction Contracts in Australia* (2nd ed.) para 10-230. His Honour expressed the view that he was inclined to agree with the editor of Dorter & Sharkey that the proper and better solution is to improve the drafting of the clause.

The issue was also considered by Warren CJ of the Victorian Supreme Court in *Krane Constructions v Sopov* [2005] VSC 237. While His Honour expressed reservations regarding the application of *Brewarrina* and *Aquatec* to the matter before him, he said he was bound by the adoption of *Brewarrina* in *Aquatec*, or at the very least, ought to regard *Brewarrina* as highly persuasive.

His Honour also noted that prior to *Brewarrina*, established law stated that the consequence of late certification was that the principal was obliged to pay the full amount of the contractor's claim within 28 days from submission of the claim and a late certification was ineffective, which was the view of Byrne J in *Zauner Construction Pty Ltd v No 2 Pitt Street Pty Ltd* and the Queensland Court of Appeal in *Daysea Pty Ltd v Watpac Pty Ltd*. However, given the apparent change in the law since *Brewarrina* and *Aquatec*, his Honour was of the view that the defendant's contention that certification of a claim under clause 42.1 is subject to the condition precedent that sufficient evidence and information be provided to the superintendent to assess the claim must hold.

CONCLUSION

While the decision of the Courts of Appeal in New South Wales in *Brewarrina* and Victoria in *Aquatec–Maxcon* considered AS 2124–1992 and AS 4303–1995 respectively, their effect (particularly in those jurisdictions) may be far greater. The relevant GC 42.1 appears

substantially in the same form in the following standard contracts: AS 2124–1986, AS 2987–1987, AS 2545–1993 and AS 4300–1995. Although not in the same form, consideration should be given to AS 4000–1997, AS 4902–2000 and JCC suite of contracts.

Subject to the issue being reconsidered by the Court of Appeal or further appeal, it appears that the interpretation of GC 42.1 on this issue has now been settled in New South Wales and Victoria [and possibly South Australia]. In summary, the obligation of a superintendent to issue a payment certificate under the above standard contracts is subject to a condition precedent that the contractor supported the progress claim with evidence of the amount due to it and with such information as the superintendent might reasonably have required. Unless the requisite evidence and information supported the claim, the superintendent was arguably not obliged to issue a payment certificate in response to it. However, the superintendent would need to have identified the required information prior to the lodgement of the claim. Making a request after the lodgement of the progress claim would not be in accordance with GC 42.1 [*Brewarrina* per Ipp JA at [44]].

It should also be noted that in both cases, the courts referred to a history of prior requests by the superintendent for further information to enable the superintendent to assess and certify the claims.

In Queensland at least, considering the weight of the unanimous decision of the Court of Appeal in *Daysea Pty Ltd v Watpac Aust Pty Ltd* [2001] QCA 49 per Davies, Williams JJA and Mackenzie J and the decision of the Western Australian Court of Appeal in the matter of *Devaugh Pty Ltd v Lamac Developments Pty Ltd* [1999] WASCA 280 there may be some uncertainty as to whether these decisions will be adopted in these jurisdictions. However, in the circumstances, where the superintendent has identified the required information prior to the lodgement of the progress claim, the writer considers that the decision and reasoning of Brewarrina is likely to be adopted.

Brewarrina raises an issue as to whether parties wishing to enter into a contract will need to consider whether they are prepared to agree to the evidence or information requirements referred to in the first paragraph of GC 42.1. This also raises a further issue for contractors who attempt to obtain payment by way of summary judgment where evidence or information has been requested. It may arise that parties who would have previously been successful will fail because the questions of whether the request is reasonable and has been complied with, will give rise to triable issues and thereby defeat an application for summary judgment, which in the past was likely to succeed.

Considering the uncertainty as to the approach that would be adopted in other jurisdictions, notwithstanding the decisions of *Brewarrina* and *Aquatec-Maxcon*, the best course of action is for the superintendent to deliver his certification within the prescribed time regardless of whether the contractor has failed to comply with any condition precedent to the right to claim. It goes without saying that the failure to certify a contractor's claim in time may put the principal in a difficult position if the contractor's claim is overstated. Clearly, this may prejudice the principal, because the contractor would then have had a significant tactical win, leaving the principal exposed to the risk of being unable to recover any over-payment in the event the contractor later becomes insolvent.

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