The Status of The Statutory Declaration as a Condition Precedent to a Payment Claim Under the Security of Payment Acts

Michael DG Heaton QC[1]

Abstract

Under most construction contracts a statutory declaration that workers and subcontractors have been paid is a requirement for payment of a progress claim under the contract. However, under the Security of Payment Acts*, at least in Queensland, New South Wales, ACT, Victoria, Tasmania and South Australia, this does not appear to be the case. This highlights that the* Security of Payment Acts *apply a different regime to the regime under the contract.*

Introduction

Most construction contracts contain a clause requiring a statutory declaration that suppliers, subcontractors and workers have been paid. For instance, clause 43 of AS4300-1995 incorporating Amendment No. 1 (October 2000) is headed 'Payment of Workers and Subcontractors'. It requires a statutory declaration that workers and subcontractors have been paid all monies due and payable to them. Clause 43.3 headed 'Withholding of Payment' provides that if the statutory declaration is not provided the principal may withhold payment until the statutory declaration is received by the superintendent.

What happens if a statutory declaration is not provided? The answer appears different according to whether the contractual regime or the *Security of Payment Acts* regime is applicable.

While a statutory declaration may be a condition precedent to payment of a progress claim under the contract, a review of cases in combination with analysis of the construction of the *Security of Payment Acts* reveals that a statutory declaration is not a condition precedent to a statutory payment claim. Thus two regimes can apply to the obtaining of a payment claim: one under the contract and the other under the *Security of Payment Acts*.

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The Authorities

Beckhaus v Brewarrina Council [2002] NSWSC 960; *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576; [2003] NSWCA 4 and *FPM Constructions & Anwar Yazbek v Council of the City of Blue Mountains* [2005] ADJ LR 10/10; [2005] NSWCA 147

This was a summary judgment application under the construction contract AS2124-1992 and under the New South Wales Act.

Macready AJ held as a matter of construction clause 42.1, which required the supply of such information as the superintendent might reasonably require, was not a condition precedent entitling suspension of the objection to assess. (This finding was successfully appealed in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*.[2]) Macready AJ also held that the supply of a statutory declaration required by clause 43 (which was not dissimilar to clause 43 in AS4300-1995 referred to on page 85) was not on its proper construction a condition precedent to liability, rather it merely entitled suspension of payment. This finding would appear to be inconsistent with the decision of the New South Wales Court of Appeal in *FPM Constructions & Aswan Yazbeck v Council of the City of Blue Mountains*,[3] where the Council contended it was entitled to withhold payment because the statutory declaration was false. Giles JA considered clause 43.2 stated a precondition to entitlement to payment, not an obligation, and it was better seen as a non-promissory obligation and the contractor would not be in breach of the contract if it failed to provide the statutory declaration. But if it was not provided or was ineffective because it was false, the principal could, but did not have to, withhold payment.[4] Basten JA, with whom Beazley JA agreed, considered the Council had shown a failure to comply with the precondition in clause 42.1 by tendering evidence that the statutory declaration was false.[5] He inferred that a statutory declaration will not satisfy clause 43.2 unless it is true and a statutory declaration will not be sufficient if it is merely believed to be true by the person making it. Further, a declaration which is in fact untrue will justify withholding of payment.[6]

Macready AJ then dealt with the plaintiff's claim for summary judgment under section 15(2)(a) of the NSW Act.[7] The Shire argued that unless a progress payment was due and payable in accordance with the contract there was no statutory entitlement under the NSW Act. Macready AJ rejected the submission. He referred to the definitions of 'construction contract', 'due date', 'progress payment', 'payment claim' and 'payment schedule' and the scheme of the NSW Act and stated the commencement of liability for a statutory progress claim is the due date, which in the case before him was the same as for contractual purposes.[8]

2 (2003) 56 NSWLR 576; [2003] NSWCA 4. Note however the strong descent of Young CJ in EQ at [60]-[80].
3 [2005] ADJ. LR 10/10; [2005] NSWCA 147.
4 See at [7] and [14].
5 See at [116].
6 See at [120].
7 A chart of the comparative provisions in each state is set out at the end of this paper.
8 See at [58].

Macready JA set out his conclusions at [60]–[67] as follows:

> *60. The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words 'person who is entitled to a progress payment under a construction contract' in s 13(1) refers to a contractual entitlement.*
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> *61. The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person who 'is entitled to a progress payment under a construction contract'. The words 'progress payment' are a defined term in the Act. It means a payment to which a person is entitled under s 8. That section fixes the time of the 'entitlement' given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s 9 uses similar words to s 13 in that it refers to 'a progress payment to which a person is entitled in respect of a construction contract' and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.*
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> *62. Section 11 then deals with the due date for payment in respect of 'a progress payment under a construction contract'. It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.*
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> *63. Thus s13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submissions were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:-*

ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.

64. In my view the submissions of the defendant are simply not arguable.

65. As under 42.1 the plaintiff is entitled to progress payments there is no reason why he cannot make the statutory claim at the same time as his contractual claim. The statutory claim must comply with section 13(2). On its face the document appears to do this and there was no submission to the contrary.

66. The fact that the statutory claim can be made at the same time as the contractual claim lends itself to the claims being made in the one document. Provided it is made clear in the document that this is the case then there could be no objection to this course.

67. Such a procedure causes no conflict with contractual provisions as to when the amount becomes due as s 11 ties the time in both instances to the time the payment is due under the contract. The reliance on dual rights may however cause problems in the dispute resolution phase of the matter. This is because there will be both the dispute resolution procedures in Part 3 division 2 and under the contract. That both may proceed at the same time is indicated by s 32(3) and s 34. Non-compliance with one of the systems will produce default results. That problem does not arise in this case, as there has already been default in respect of the statutory regime that leads to the liability under s 15 (2)."

Thus, the reference in section 13 of the NSW Act to a 'construction contract' was a reference to the statutory entitlement not the contractual entitlement.

Section 13 of the NSW Act at that time referred to 'a person who is entitled to a progress payment under a construction contract.' It has been amended to the words '… and a person who is or claims to be entitled to a progress payment.' Section 14 of the Victorian Act was amended to a person referred to in section 9(1) who is or claims to be entitled to a progress payment. Neither section now refers to 'under a construction contract'.

The contractual requirement of a statutory declaration under clause 43 was not a requirement under the Act for a statutory progress claim.

Macready AJ concluded the plaintiff was entitled to summary judgment under section 15(2)(a) of the NSW Act as well as on a contractual basis. The judgment was for $702,678.45.

Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd [2003] NSWSC 266

In this case Nicholas J had to deal with clause 42.1 of AS4300-1995 General conditions of contract for design and construction and sections 8 and 13 of the NSW Act.

The defendant argued the payment claim was premature and invalid because the claimant had not established it was then entitled to a progress claim under the contract.

The defendant's arguments were rejected on the basis that the statutory scheme created an entitlement based upon the reference date in section 8 of the NSW Act. At [52] Nicholas J set out paragraphs [60]–[65] of the judgment of Macready AJ, set out above, with approval and noted that these findings were not challenged in the Court of Appeal.

At [58] Nicholas J considered the arrangement under clause 42.1 to be irrelevant to the identification of a date for the purpose of fixing the reference date under section (2)(a)(i).

Nicholas J at [59] said:

> *59. The entitlement of a claimant pursuant to s.8(1)(a) and s.13(1) turns on the identification of the reference date as defined by s.8(2)(a)(i). It does not seem to me that there can be any statutory entitlement to a progress claim calculated otherwise than by reference to that date, noting that under s.8(1)(a) the entitlement is expressed to be '… on and from each reference date'. The Act gives the contractor a statutory right to recover money by issuing a claim (s.8 and s.13). It has been said that the Act offers to a claimant special statutory rights which override general contractual rights and place the claimant in a privileged position (Jemzone Pty Ltd v Trytan Pty Ltd (2002) NSWSC 395 at para 41 per Austin J). In order to exercise these rights compliance with the requirements which establish them are necessary.*

The requirements referred to by Nicholas J are the requirements of the Act and not the contract. Thus, Nicholas J concluded that a payment claim under the Act is referenced by the Act and not the contract. His Honour gave summary judgment for the plaintiff under section 15(2)(a) for $13,962,904. The judgment supports the proposition of the dual regimes; that is the statutory regime and the contractual regime.

Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd [2003] NSWSC 1103

Similar arguments to those put before Macready AJ and Nicholas J were also rejected by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd*.[9] At [60] Einstein J stated the statutory declaration would be relevant where a progress claim was made to the superintendent, but is not relevant where the Act is sought to be engaged and forms no part of a statutory payment claim.

ISIS Projects v Clarence Street [2004] NSWSC 714

In *ISIS Projects v Clarence Street* [10] McDougall J, on a summary judgment application, entered judgment for the plaintiff where the progress claim had been made but where no payment schedule under the Act was supplied. The amount claimed in progress claim no. 13 was $749,091.72. That amount included $718,353.45 outstanding under progress claim no. 12 and new work said to be valued at $30,738.23.

9 [2003] NSWSC 1103; BC200307500. See at [69]-[81]
10 [2004] NSWSC 714

An issue was whether clause 42.1 of the general conditions of contract required a payment claim to be supported by evidence and whether the lack of such evidence was a defence which could be raised on a summary judgment application in the light of section 15(4)(b)(ii) of the NSW Act. McDougall J found at [55] that there was no evidence that the superintendent required any information in relation to either progress claim and therefore he did not consider that the issue arose in fact. He also considered that even if the issue did arise in fact it would afford no defence. His Honour considered, on the proper construction of section 14(4) and sections 15(1), (2)(a)(i) and (4)(b)(ii), that Clarence Street was not entitled to raise any such matter as a defence in summary judgment proceedings. His Honour noted at [63] a defence that there is no relevant reference date (that is, that a statutory requirement has not been satisfied) is conceptually different to a defence that some contractually required information has not been supplied (that is, a defence, arising under the contract, that a contractual requirement has not been satisfied).

Clarence Street Pty Ltd v ISIS Projects Pty Ltd (2005) 64 NSWLR 448

The decision of McDougall J was affirmed on appeal, the Court of Appeal comprising Mason P, Giles JA and Santow JA. A second issue raised in the appeal by the appellant was that the 'due date' for progress payments had not arisen prior to the commencement of proceedings. In essence it was submitted contractual breaches nullified the validity of the progress claims both as grounds of contractual entitlement and in their statutory function as 'payment claims', the argument being clause 42.1 had not been complied with because of insufficiency of the supporting evidence/information. Mason P rejected the appellant's submission for several reasons. The first was that it was not entitled to be raised because of section 15(4)(b)(ii). Second, nothing in the facts suggested any contractual precondition of validity was unmet. There was no withholding of 'such information as the superintendent may reasonably require', because no such information had been required by the superintendent before the progress claims were sent. Mason P referred to *Brewarrina Shire Council* at [44] where it was said that any information the superintendent may reasonably require is information required by the superintendent prior to delivery of claims for payment and not thereafter.

At [63] Mason P said:

> *Thirdly, cl 42.1 did not express a date for payment other than 28 days from the end of the month after receipt by the Superintendent of the claim. This is so even if, which I doubt, the clause conditioned the obligation to pay upon provision of the supporting evidence of amount due and of the information that the Superintendent had reasonably required. The contractual stipulation for provision of evidence and information did not make that evidence or information part of the payment claims (Brewarrina at 582 [20]). In the unlikely event that there was a gap in the contractual expression of a due date for making the progress payment, s11(1)(b) supplied that gap, indicating dates that had come and gone by the time proceedings in the Supreme Court were commenced.*

Thus Mason P seemed to doubt the clause conditioned the obligation to pay upon the provision of supporting evidence and information the superintendent may reasonably require, and in any case, this was not relevant to a payment claim under the Act.

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

In this case Hodgson JA gave the judgment of the Court with which Mason P and Giles JA agreed. The contract was a standard form AS4303-1995 General conditions of subcontract for design and construction but clause 42.1 had an added requirement for the subcontractor to deliver with each claim for payment a statutory declaration warranting first that the subcontract works had been constructed in compliance with legislative requirements and clause 3.3.1 of Part B of AS4303, second that the value of any approved or directed variation is as stated in the claim for payment and third as to matters required by subparagraph (a) and (b) of clause 43.1 of the subcontract. The issue of the statutory declaration was raised in the context of a submission of denial of natural justice. Dealing with this submission Hodgson JA said at [76]–[77]:

> *76 As regards the lack of provision of a statutory declaration, Brodyn did not refer the adjudicator to the alteration to cl.42.1 referred to above, and did not suggest that the direction in writing referred to in cl.43.1 had been given. It made no reference to the provisions of s.127(5) of the Industrial Relations Act 1996, which authorise a principal contractor to withhold payment to a subcontract until the subcontractor gives a written statement that employees have been paid for work done in the relevant period.*
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> *77 Accordingly, even if ss.9 and 10 of the Act permit this matter to be taken into account, which is questionable, the failure of the adjudicator to mention the bald reference made by Brodyn to breach of cl.43 could not in these circumstances amount to a denial of natural justice.*

Thus Hodgson JA doubted the failure to provide statutory declarations was relevant to a payment claim under the Act.

Blueview Constructions Pty Ltd v Vain Lodge Holdings Pty Ltd [2005] VCC 1325

Here, His Honour Judge Shelton (the Judge in charge of the Building Cases List in the County Court and prior to his appointment a very experienced building and construction solicitor) dealt with a submission in a summary judgment application that it was necessary for the plaintiff to show, in respect of each of three progress claims, there was a progress payment due and payable in accordance with the terms of the contract, that it had not done so and therefore the defendant had an arguable defence on the merits. His Honour referred to the judgment of Macready AJ in *Beckhaus v Brewarrina Shire* [2002] NSWSC 960, considering section 13(1) of the NSW Act (similar to section 14(1) of the Victorian Act) and the conclusion of Macready AJ that entitlement to a progress payment did not refer to a contractual entitlement. His Honour then set out parts of the judgment of Macready AJ which have been set out above, in particular [52], [60], [61], [62], [63] and [64].

Judge Shelton further noted that section 3(1) of the Act states the object of the Act in virtually identical terms to those set out in [63] of *Beckhaus*.

Judge Shelton further noted the decision was followed by Nicholas J in *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd* [2003] NSWSC 266 (see particularly at [52] and [53]) and in *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45 (referring to [46]).

His Honour said at [13]–[15]:

> *13 Mr Levine sought to rely upon the New South Wales Court of Appeal decision in Brewarrina Shire Council v Beckhaus Civil Pty Ltd [2003] NSWCA 4, which by a majority set aside the summary judgment entered by Macready AJ at first instance. This decision was followed by the Court of Appeal in Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd (2004) VSCA 18. I note, however, that the majority in the New South Wales Court of Appeal in Brewarrina Shire Council made no reference to the comments of Macready AJ, which I have referred to above. Indeed, it made no reference at all to the provisions of the New South Wales Act. Further, in Walter Construction, Nicholas, J stated, at paragraph 52, following the quotation of paragraphs 60 to 65 of Macready AJ's judgment in Beckhaus:*
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> *'There was no challenge to these findings in the appeal from His Honour's order for summary judgment: Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) NSWCA 4.'*
>
> *14 The contract in Aquatec-Maxcon was entered into in February 1997, well before the coming into operation of the Act on 31 January 2003. Aquatec-Maxcon makes no reference to the Act.*
>
> *15 In my view, it is appropriate to follow the approach taken by Macready AJ and Nicholas J in the cases cited. Thus I conclude that the plaintiff was under no obligation pursuant to section 14(1) of the Act to show compliance with the provisions of the Contract.*

Age Old Builders Pty Ltd v John Arvanitis & George Arvantitis [2006] VCC 1827

The issue was again raised before his Honour Judge Shelton in this case. His Honour said at [16]–[19]:

> *16 There appears to have been confusion as to precisely what the contractual requirements were for claiming progress payments. Mr Cafari submitted that at the time of serving Progress Claim 20 the plaintiff was aware that the previous procedure of submitting claims to the defendant's financier who engaged a quantity surveyor to assess the claim could not be followed. Therefore, he submitted, the procedure for claiming a progress payment reverted to that set out in the Contract which required submission of Progress Claims to the architect. I am far from satisfied that this is so.*
>
> *17 In any event, I am of the view that there was no obligation upon the plaintiff to show compliance with the provisions of the Contract for making progress claims prior to making a Payment Claim. I have set out my reasons for so concluding in Blueview Constructions Pty Ltd (trading as WRS Constructions) v Vain Lodge Holdings Pty Ltd (2005) VCC 1325, a judgment delivered on 15 November 2005. In brief, section 4 defines 'progress payment' as a 'payment to which a person is entitled under section 9'. Section 9 then provides that:*

> *'(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 …*
>
> *… is entitled to a progress payment under this Act, calculated by reference to that date.'*
>
> *18 It will be noted that the wording "entitled to a progress payment" is then picked up in section 14(1).*
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> *19 Section 9(2)(a)(1) defines 'reference date' for the purposes of sub-section (1) as 'a date on which a claim for a progress payment may be made'. Under the terms of the Contract this is the 15th day of each month. In coming to the conclusion in Blueview Constructions that there was no obligation upon the plaintiff to show compliance with the terms of the Contract in relation to the making of a progress claim, I relied upon comments made in Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina (2002) NSWSC 960 at paragraphs 52 and 60 – 64 per Macready A.J., which were followed in Walter Construction Group Ltd v CPL (Surry Hills Pty Ltd) (2003) NSWSC 266, particularly at paragraphs 52 and 53 per Nicholas J., and Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd (2005) NSWSC 45 at paragraph 46, again per Nicholas J."*

Thus His Honour was of the clear view that contractual requirements were not prerequisites for payment claims under the Act.

Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd [2008] NSWCA 279; BC200809639

In this case the judgment was given by Allsop P with whom Giles and Hodgson JJA agreed. Hodgson JA said at [53] that he adhered to the view he expressed in *Transgrid v Siemens Ltd* [2004] NSWSC 395; (2004) 61 NSWLR 521 at [35] and *John Holland Pty Ltd v Road and Traffic Authority of New South Wales* [2007] NSWCA 19 at [38], to the effect that 'calculated in accordance with the terms of the contract' in section 9(a) of the Act does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed. Further, at [54] His Honour said:

> *This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not ipso facto entitled to payment because of the operation of a deeming provision such as clause 37(2) of the contract in this case.*

AC Hall Air Conditioning Pty Ltd v Schiavello (Vic) Pty Ltd [2008] VCC 1490

Here, His Honour Judge Shelton in a summary judgment application, dealt with a submission that the payment claims were not made in accordance with the provisions of the contract and did not comply with section 14 of the Act. He said at [17]:

> *17 In any event, I have set out my views on these matters previously in Age Old Builders Pty Ltd v John Arvanitis and George Arvanitis [2006] VCC 1827 (23 June 2006) as follows: …*

His Honour then set out paragraphs [17]–[19] of that judgment (quoted above) and went on to state:

> *18 I appreciate that the Act has been amended but that is of no relevance to my comments above.*

This highlights that the Act provides a statutory regime, distinct from the contractual regime.

Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors [2010] VR 141; [2010] VSCA 199

In *Metacorp* Vickery J dealt with a submission that a statutory declaration supplied under clause 43(b) of AS2124-1992 as amended was false therefore no payment was due and there was no failure on Metacorp's part to make payment of any scheduled amount by the due date for payment under section 18(1)(a)(ii) of the Act. It was Metacorp's contention that Andeco had failed to comply with clause 43 in that it provided statutory declarations in relation to payment of subcontractors that were contradicted by statutory declarations provided by the subcontractors themselves. Vickery J was satisfied that the adjudicator had jurisdiction conferred under section 18(a)(i) of the Act. In the alternative at [204] Vickery J considered that if the foundation for jurisdiction of the adjudicator springs from section 18(a)(ii) in the proceeding before him, then Metacorp failed to discharge its evidentiary burden to establish that 'the precondition to payment provided by clause 43(b) of the Contract' was not satisfied.

In dealing with the statutory declarations from the subcontractors Vickery J noted there was insufficient information and evidence before him for him to conclude in accordance with *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 that he could not be positively satisfied on the balance of probability that the statutory declaration supplied by Andeco by Mr Nadinic was false: see paragraphs [214]–[219].

Vickery J at [220] said:

> *Accordingly, I find on the evidence before me that the precondition in clause 43(b) of the contract was satisfied by Andeco, and it was not disentitled to payment on payment claim 15 by reason of non-compliance with the condition.*

Vickery J in that passage referred to 'the precondition in clause 43(b) of the contract' and to being satisfied that Andeco was not disentitled to payment simply because of alleged non-compliance 'with the condition'.

The cases referred to above do not appear to have been cited to Vickery J. There does not appear to have been argument before Vickery J as to whether clause 43, and in particular 43(b), was a condition precedent to payment by the principal under the Act. The arguments and the analysis by His Honour appear to simply assume that a statutory declaration was a condition precedent to the entitlement to proceed under the contract and as that precondition had been met the issue did not arise.

Further it does not appear to have been argued before His Honour that under the Act, as distinct from the contract, a statutory declaration is not a precondition or condition precedent to a claim to payment under the Act.[11]

417 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor [2012] VSC 235

In this case St Kilda Road submitted that the statutory declaration provided by Reed in support of its payment claim no. 16 was false and untrue and that a statutory declaration in the form submitted did not satisfy the requirements of clause 38.1 of the contract. Further, under the construction contract Reed had no entitlement to be paid any sum in respect of payment claim no. 16 and the payment claim was not valid for this reason. St Kilda Road further submitted that the adjudicator wrongly made a finding that the Act did not empower or require him to consider whether the statutory declaration was false. This was put as an error on the face of the record resulting in the adjudication determination being amenable to the issue *certiorari*.

At [84] Vickery J considered that the adjudicator may have made a wrong finding of fact and it was open to him to arrive at a different conclusion on the issue. Equally there was some evidence upon which the adjudicator could have arrived at the finding of fact which he did namely that the claimant had complied with clause 38.1 even though the respondent questioned the veracity of the claimant's documents. St Kilda Road's submission on the point therefore failed.

St Kilda Road also alleged the adjudicator erred in finding that the statutory declaration was true by finding that Reed had complied with clause 38.1 of the contract by providing it. However, Vickery J rejected this submission on the basis that there was some evidence for the adjudicator to have found that the statutory declaration was true and that Reed had complied with clause 38.1 of the contract.

Again in this case it appears to have been assumed that the statutory declaration was a condition precedent to entitlement to proceed under the contract and that applied under the Act as well. Even the references in the judgment of Vickery J to *FMP Constructions & Anor v Council of the City of Blue Mountains* [2005] NSWCA 340 were to the contractual regime and not to a case under the Act. His Honour referred to a statement by Basten JA at [120] that a declaration which is in fact untrue will justify the withholding of a payment. But this was applicable under the contract and no reference was made to the Act because the action was under the contract and not under the Act. To similar effect was the statement at [14] of Giles JA, that under the contract, if a statutory declaration was not provided or the statutory declaration which was provided was ineffective or was false, the principal was entitled to withhold payment and in its discretion could make a direction payment pursuant to clause 34.3.

11 See the judgment of Vickery J at [192]-[220].

John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd & Ors [2012] QCA 150

In this case the appellant argued that as Coastal Dredging had failed to comply with some clauses of clause 12.6 of the subcontract, no reference date had arisen such as to entitle Coastal Dredging to make the payment claim. Coastal Dredging conceded it had not complied with clause 12.6(b) in relation to the payment claim. This clause required a statutory declaration and supporting evidence 'reasonably required' by the appellant that subcontractors and employed workers had been paid as well as the provision of any additional information, statements, certifications or statutory declarations as the appellant may reasonably require or consider desirable. Further clause 12.6 contained a warranty that Coastal Dredging warranted and represented that if a payment claim did not comply with the conditions set out in clause 12.6 it was void and the reference date for the purpose of the *Security of Payment Act* shall be the same day on the following month.

Fraser JA delivered reasons with which White JA and Peter Lyons J agreed. Fraser JA rejected the appellant's argument. At [17] and [18] Fraser JA said:

> *[17] In considering that issue, the object of the Act expressed in s 7, and how that object is to be achieved, expressed in s 8, must be borne in mind. An interpretation of the Act which best achieves its purpose is to be preferred to any other interpretation. Relevantly, s 8 makes it clear that the purpose of the Act is not merely to give statutory force to a contractual entitlement to progress payments. Rather, the fundamental object of ensuring an entitlement to progress payments is to be achieved by granting a statutory entitlement to progress payments even where the contract itself makes provision for progress payments. The extent to which those separate contractual and statutory entitlements coincide must be derived from the operative provisions of the Act.*
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> *[18] Section 12 confers upon a person who has undertaken to carry out construction work a statutory entitlement to recover a progress payment from each 'reference date under a construction contract', which is defined to mean, so far as is presently relevant, 'a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, ...under the contract...'. Accordingly, the contractual provisions to which reference may be made for the purpose of ascertaining the 'reference date' are those which state, or provide for the working out of, the date on which a progress payment claim 'may be made'. The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims or the consequences of breaching warranties about the form and content of progress claims.*

He then stated in [19] that:

> *…Bearing in mind the statutory object and the role of s 12 and the definition of 'reference date' in giving effect to that object, those provisions are incapable of justifying an implication that the date upon which the statutory entitlement to a progress payment accrues may be qualified by contractual provisions other than those captured by the unambiguous terms of the definition of 'reference date'.*

Then, at [20], Fraser JA stated:

> *… In particular, cl 12.6 is not open to the construction that compliance with the warranty in cl 12.6(b) is, for the purposes of the statutory definition of 'reference date', a condition of the entitlement to submit a payment claim conferred by the first sentence of cl 12.6.*

Fraser JA further concluded at [21] that if the impugned clauses operated to defer what would have been the subcontractor's statutory entitlement to a progress payment from the reference date ascertained in accordance with the Act, they would be void under section 99 of the Act, which makes void a provision that purports to modify or change the effect of a provision of the Act.

Thus the Queensland Court of Appeal rejected the argument that contractual preconditions or conditions precedent could, if not complied with, bar a claim for a progress payment under the Act.

BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd [2012] QSC 214

Mullens J in this case followed *John Holland v Coastal Dredging*. It was a summary judgment application opposed by Altitude Constructions on the basis that BHW had failed to fulfil a contractual condition precedent to any entitlement to payment in that it had failed, *inter alia*, to provide a declaration in the form of schedule 3 to the contract, and which, with other conditions, was said under the contract to be a precondition to payment and if not provided or incomplete or false the contractor may withhold payment until received. It was common ground that no statutory declaration had been provided. Mullens J referred in detail to the judgment of Fraser JA in *John Holland v Coastal Dredging* referred to above and concluded at [17] that the relevant clause in the contract was not concerned with regulating a payment claim under the Act but rather with how to make a progress claim under the contract. He concluded:

> *There is no requirement in the Act for payment claims to be accompanied by such a declaration. The applicant's payment claims in this matter are therefore not invalid in the absence of a declaration under clause 7(d)(iii).*

Judgment was entered for BHW.

Synthesis

The cases referred to above (save for *Metacorp* and *470 St Kilda Road*, where the issue was not raised for consideration) are all to the effect that the contractual requirement of the supply of a statutory declaration is not a requirement, condition or condition precedent to making a payment claim under the Acts and receiving payment under the Acts.

It is clear that claimants may make claims both under the Acts and under the contract and often the one claim will fulfil both purposes.

Dual regimes exist, one under the Acts and the other under the contract. The two regimes may not always be consistent. The contractual regime must give way to the purpose and objects of the Acts where claims are made under the Acts. The regime under the Acts is however interim to maintain cashflow.

In each of the Acts entitlement to a progress payment takes the reference date as the starting point for the claims under the Acts. Further subsequent references in the Acts to the progress payment are references to a progress payment under the Acts, not the contract.

The Courts have adopted a purposive construction to the Acts to provide a facility for prompt interim payment on account for contractors and subcontractors pending final determination of any disputes arising under the construction contract, for example see *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183.

Each of the Acts contain non-contracting out provisions.

Chart:

Topic	QLD	NSW	VIC	ACT	TAS	SA
Object	s.7	s.3	s.3	s.6	s.3	s.3
Means to achieve object	s.8	s.3	s.3	s.6	–	s.3
Entitlement to progress payment and reference date	s.12 s.15	s.8 s.11	s.9	s.10	s.12	s.8 s.11
Due date for payment	s.15	s.11	s.12	s.13	s.19	–
Progress payments	s.17	s.13	s.14	s.15	s.17	s.13
Valuation of construction work	s.14	s.10	s.11	s.12	s.13	s.10
Payment schedules	s.18	s.14	s.15	s.16	s.18	s.14
Consequences of failure to provide payment schedule	s.18	s.14	s.15	s.16	s.19	s.14
Consequences of failure to pay claimed amount where no payment schedule provided	s.19	s.15	s.16	s.17	s.19	s.15
No contracting out	s.99	s.34	s.48	s.42	s.11	s.32