
ADJUDICATE TODAY ANNUAL SEMINAR 2019

QLD CASE LAW UPDATE

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RELEVANT CASES IN 2019

- 2018 - 268 Decisions released (June 2014 – 471 decisions)
- 3 Decisions challenged in Supreme Court in 2018, 1 declared void
- 2 Decisions challenged so far in 2019
- 1 Decision partially set aside by the Supreme Court in 2019

CRAGCORP P/L V QLD CIVIL ENGINEERING P/L [2018]QSC 203

Facts

- Brisbane City Council engaged Cragcorp to install a bridge over Wolston Creek
- Cragcorp engaged Qld Civil Engineering (**QCE**) as subcontractor
- QCE encountered rock 4 metres below surface
- Geotechnical information provided by Cragcorp indicated rock 10 metres below surface
- Variation claims followed – Payment Claim \$250,649.69
- Payment Schedule \$49,016.01- set off LDs and retention

CRAGCORP - ADJUDICATION

- QCE reduced claim in Adjudication to reflect entitlement to withhold retention under contract - \$212,297.85
- Cragcorp disputed in Adjudication entitlement to variations
- Adjudicator awarded \$205,218

CRAGCORP - SUPREME COURT

Void due to jurisdictional error on two primary grounds:

1. Adjudicator failed to perform the statutory task required under the Act
 - Failed to apply contract in assessing variations for latent conditions, no contractual provision and no reasons for accepting claim
2. Denied Cragcorp natural justice and did not give proper written reasons
 - Denied Cragcorp natural justice by interpreting the contract in a manner not contended for by either party and failing to provide Cragcorp an opportunity to provide submissions which might have persuaded the Adjudicator to reach a different decision

CRAGCORP – SUPREME COURT

ADJUDICATOR'S DECISION UPHELD

1. **First Ground** - Adjudicator failed to perform the statutory task required under the Act

- Question is not if Court would have come to same conclusion, but whether Adjudicator performed function under the Act
- Adjudicator sufficiently identified legal entitlement to variations and was entitled to disregard new reasons submitted for first time in Adjudication Response

2. **Second Ground** - Denied Cragcorp natural justice and did not give proper written reasons

- Adjudicator denied Cragcorp LDs on the basis that the parties came to a general understanding under a “good faith-based contract” and further found that Cragcorp did not provide any evidence of loss suffered
- Adjudicator based her decision on QCE’s submissions, but reached a different conclusion than contended for;
- Denial of natural justice must be substantial – consideration of substantial effect of the denial of natural justice and whether providing further opportunity to be heard would have made a difference
- No evidence provided by Cragcorp to show that Adjudicator would have made a different decision
- Not a case where the Adjudicator decided a significant issue of law on a basis for which neither party had contended
- Reasons – *“The Adjudicator makes a decision on material provided in accordance with the Act and whilst the reasons were scant, I do not consider there was a denial of natural justice because the reasons do not go into precise detail. It is clear enough from the reasons the conclusion reached and why”.*

LIVINGSTONE SHIRE COUNCIL V EARTHTEC P/L [2018] QSC 271

Facts

- Livingstone Shire Council engaged EarthTEC to carry out roadworks Scenic Highway between Yeppoon and Roslyn Bay
- EarthTEC Payment Claim of \$2.7M on 21 February 2018
- Council terminated contract on 14 March 2018
- EarthTEC's subcontractors served Subcontractors' Charges on Council pursuant to Subcontractors Charge Act 1974
- Council paid \$1,153,224.62 into Supreme Court
- Payment Schedule \$Nil – EarthTEC failed to comply with requirement to provide statutory declaration in relation to payment of subcontractors as required under Contract

LIVINGSTONE SHIRE COUNCIL - ADJUDICATION

- LSC argued in Adjudication that payments made into court must be accounted for otherwise it will be required to pay twice for the same work
- Adjudicator considered his jurisdiction is limited to consider matters in section 26(2)(a), which included section 4 of the Act
- Decided he did not have jurisdiction to consider possibility of general duplicate liability under Subcontractors Charges Act, without any express references to the Subcontractors' Charges Act in section 26(2)(a)
- “I find that I have no jurisdiction to consider the respondent’s general submission on its potential duplicate liability under the Charges Act, when section 4 of the Act does not apply to the specific facts of this dispute.”
- Adjudicator awarded an amount of \$1,364,696.80

LIVINGSTONE SHIRE COUNCIL – SUPREME COURT

Void due to jurisdictional error

1. Adjudicator erred in his construction of s 26(2) of the Act when he construed that section as prohibiting him from considering properly made submissions by Livingstone Shire Council that the amount paid into court under the *Subcontractors Charges Act* should be taken into account
2. Neither party contended that section 26(2) prohibited the Adjudicator from considering the Council's submissions on duplication of payments made into court and as the Adjudicator did not give the parties an opportunity to make further submissions, he failed to provide natural justice to the parties

LIVINGSTONE SHIRE COUNCIL – SUPREME COURT

ADJUDICATOR'S DECISION PARTIALLY DECLARED VOID

- Guidance on interpretation of s 26(2) – “[29]... *The use of the word only in s 26(2) prevents an adjudicator from considering a matter not identified in the subsection, but does not exclude from consideration something which comes within one of those matters. The language of the subsection does not preclude from consideration a statutory provision raised in a payment schedule or a properly made submission*”
- Adjudicator not precluded by s 26(2) from considering a properly made submission that the respondents liability to the claimant was discharged by the operation of s 11(6) of Subcontractors' Charges Act
- No error of law - Adjudicator committed jurisdictional error by misdirecting himself as to his obligations under s 26(2) and failed to take into account properly made submissions
- The Adjudicator called for further submissions on four occasions, but did not indicate to the parties that he had formed the view that there was a jurisdictional impediment to him considering the Council's submissions based on s 11(6) of the *Subcontractors Charges Act 1974*

FULTON HOGAN CONSTRUCTION P/L V QH & M BIRT P/L [2019] QSC 23

Facts

- Fulton Hogan entered into a subcontract for \$8.8 million with QBirt to construct a dam
- Payment Claim approximately \$2.8 million
- Adjudication Application \$1,851,984.17
- Payment Schedule - \$10,544.61

FULTON HOGAN - ADJUDICATION

- Adjudicator awarded \$1.3 million
 - Variations \$411,050.98
 - Reversed previous set off of \$426,362.18 and added this to the adjudicated amount
 - Relied on the amount agreed between the parties as previously paid/certified thereby adding a further \$508,001.15 to the adjudicated amount

FULTON HOGAN – SUPREME COURT

Void due to jurisdictional error

1. The Adjudicator adjudicated claims that were not included in the payment claim, by reversing the set off claims and accepting the amount agreed by the parties as previously certified
2. The Adjudicator failed to give adequate reasons for valuations and denied Fulton Hogan natural justice
 - Rate for removal and replacement of unsuitable material

FULTON HOGAN – SUPREME COURT

ADJUDICATOR'S DECISION PARTIALLY DECLARED VOID

- No jurisdictional error in determination of set off dispute. “...It was for the Adjudicator to act on his understanding of the Payment Claim. He understood the Payment Claim to include a claim in respect of the set offs. If this understanding involved an error, then it was an error within jurisdiction”
- No jurisdictional error in adjudicator's use of the amount agreed by the parties as the amount previously certified. Any error is also an error within jurisdiction
- Adjudicator committed jurisdictional error in his valuation of contract items . He did not undertake the task required of him. The Adjudicator's reasons were inadequate and there has been a denial of natural justice
- “[250] The Adjudicator did not explain why he was not satisfied that the removal and replacement rate was applicable to the nature of the work undertaken by QBirt. Nor did he explain why he did not apply the rate QBirt claimed had been agreed to the work (that is, the separate rates for removal and replacement).”
- “[251] The adjudicator's reasons do not demonstrate that he endeavoured in good faith to consider the issue in contest (cf Brookhollow). They do not reveal his reasoning processes (cf Bauen). They are opaque (cf Sierra).”

OTHER CASES

- *Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd* [2018] QSC 310 – Not excluded contract under s3(2)(c) of Act expressly provides for progress claims to be paid for value of work, despite profit sharing at end of project
- *Low MCC Pty Ltd & Ors* [2018] QSC 6 – milestone payments & reference dates
- *St Hilliers Property Pty Ltd v Pronto Solar Innovations Pty Ltd* [2018] QSC 14 – piling work for solar farm is building work under QBCC Act
- *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65 – reference date and termination