2020 SOUTH AUSTRALIAN CASES

1.Commercial Fitouts Australia Pty Ltd v Miracle Ceilings (Aust) Pty Ltd [2020] SASC 11

Section 13(4)(b) of the South Australia Security of Payment Act provides that a payment claim is required to be served within the period of 6 months after the construction work to which the claim relates were last carried out (or the related goods and services to which the claim relates were last supplied).

In the present case, the claimant served a payment claim on the respondent for the amount of $43,113.00. The amount claimed comprised of five tax invoices. Only one of the invoices related to work that was carried out within the six month period, but that invoice had been paid. The remainder of the invoices related to work that the claimant had performed more than six months before the date of the payment claim. The respondent (plaintiff) argued that the claimant's payment claim related to work that was the subject of the four unpaid invoices but because that was work that had not been performed within the six month period, the payment claim did not comply with section 13(4)(b) of the Act and was therefore invalid and that the adjudicator had no jurisdiction to adjudicate the payment claim. The claimant agreed that the provisions relating to section 13(4)(b) did not apply because the nature of the commercial arrangements agreed between the parties was that of a running account. To support its position, the claimant referred to the manner in which its payment claim had been presented which identified the 13 invoices it had submitted to the respondent during the course of the project works, viz:

CONTRACT WORK INVOICE	AMOUNT INCL GST	PAID INCL GST
67	$19,322.05	$0.00
68	$10,595.20	$10,595.
69	$16,365.80	$16,365.
70	$20,362.65	$10,193.
71	$9,081.60	$9,081.
72	$14,710.30	$9,412.
73	$18,115.90	$18,115.
74	$13,764.30	$5,439.
75	$12,108.80	$12,108.
76	$5,203.00	$5,203.
77	$5,628.70	$5,628.
78	$7,260.55	$7,260.
79	$3,784.00	$3,784.
TOTAL VALUE OF CONTRACT WORK	$156,302.85	$113,188.
	CLAIMED AMOUNT	$43,113.

Thus the claimant argued that if the 13 invoices are treated as a running account then there is no reason to characterise the payment claim as limited to the work in respect of the four unpaid invoices (invoices 67,70,72 and 74).

Stanley J referred to the High Court of Australia's decision in *Air Services Australia v Ferrier* (1995-1996) 185 CLR 483 where Dawson, Gaudron and McHugh JJ described the nature of a "running account" as follows:

> *"[T]he significance of a running account lies in the inferences that can be drawn from the facts that answer the description of a "running account" rather than the label itself.*

A running account between traders is merely another name for an active account running from day to day, as opposed to an account where further debits are not contemplated (56). The essential feature of a running account is that it predicates a continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded. Ordinarily, a payment, although often matching an earlier debit, is credited against the balance owing in the account. Thus, a running account is contrasted with an account where the expectation is that the next entry will be a credit entry that will close the account by recording the payment of the debt or by transferring the debt to the Bad or Doubtful Debt A/c.

If the record of the dealings of the parties fits the description of a "running account", that record will usually provide a solid ground for concluding that they conducted their dealings on the basis that they had a continuing business relationship and that goods or services would be provided and paid for on the credit terms ordinarily applicable in the creditor's business." (at 504 – 505) (emphasis added)

Stanley J however noted the following qualification that the High Court judges had expressed in respect to the nature of a running account:

"Commonly, … the relationship between a debtor and creditor will involve more than a single transaction. It will often involve a number of dealings in which goods or services are supplied at regular intervals but the payments for those goods or services neither are made regularly nor, when made, are appropriated to a specific or even the most recent delivery of the goods or services." (emphasis added)

Stanley J stated that for jurisdictional purposes, the critical question here is not whether the parties were dealing on a running account basis, but rather whether progress payments were made in respect of specific invoices which related to specific work pursuant to the construction contract between the parties.

"This requires identification of the relevant jurisdictional fact, namely whether the payment claim served on 22 March 2019 related in any way to construction work which was last carried out in the preceding six months. The only construction work that answered that description was the work that related to invoice 79. That invoice was dated 25 September 2018. It was an invoice in the amount of $3,784.00. That amount was paid on 27 September 2018. The terms of the payment claim itself issued by (the claimant) identified the payment claim as relating to the unpaid invoice 67 and the part-paid invoices 70, 72 and 74. It is the case that the payment claim identifies 13 separate invoices, nine of which are indicated as having been fully paid, but those 9 invoices cannot reflect a claim for a progress payment in respect of the construction work to which those invoices relate because of the fact that they had been paid. Reference to those invoices in the payment claim cannot make the work to which those invoices relate, and in particular, the work done in respect of invoice 79, a claim for payment for the particular construction work to which these nice invoices relate.

This conclusion is founded on two propositions. First, pursuant to s 13(2) the payment claim must identify with reasonable specificity the work which is the subject of the payment claim to enable the respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally, and to define the issues in dispute between the parties which the adjudicator is to resolve, and

> *to enable an adjudicator, if appointed to determine the adjudication application. Second, the circumstances of the payments made in this case implies an appropriation of payments made by (the respondent) to (the claimant). The circumstances of the payments imply that the payments have been made by (the respondent) in respect of specific invoices. Most importantly, the circumstances by which the plaintiff paid the sum of $3,784.00 on 27 September 2018, implies that this payment was made in respect of invoice 79."* ([21]-[22]).

Accordingly, having concluded that the construction work which invoice 79 related was not the subject of the payment claim, it followed that the payment claim was not made within six months of the performance of the work claimed in respect of the invoices 67, 70, 72 and 74 as required under s 13(4)(b) and that therefore the adjudication decision was made in want of jurisdiction.

2.Wärtsilä Australia Pty Ltd v Primero Group Ltd [2020] SASC 162

Background

The claimant was entitled, under the contract it had entered into with the Respondent, to a progress payment upon achieving Subcontract Works Completion ("SW Completion"). SW Completion required that, inter alia, various Manufacturers Data reports were to be provided to the respondent and completed quality assurance documentation were to be available for inspection. On 28 February 2020, the claimant sent an email to the Respondent containing a hyperlink to a One Drive folder where these documents had been uploaded but, due to technical issues relating to the sheer volume of the documents (there were over 100,000 documents), the respondent was not able to download the documents until 2 March 2020.

On 2 March 2020, the claimant served a payment claim under the Act on the respondent for an amount of $85 Million. The payment claim stated that the reference date was 28 February 2020, being the date when the claimant had sent the email that had contained the One Drive folder. The respondent replied by way of a payment schedule, scheduling a $nil amount and stating that the payment claim was not supported by a reference date. The claimant referred its payment claim to adjudication and the adjudicator determined that the claimant was entitled to an adjudicated amount of $15 Million. The respondent applied for judicial review.

The relevant clause in the construction contract provided for the following requirements for SW Completion:

> *"(2)… the test, inspections and commissioning required by this Subcontract (including Schedule 3) to have been carried out before SW Completion have been carried out, passed and the results of the tests, inspections and commissioning* ***provided to (the respondent)****;*
>
> *…*
>
> *(8)… the completed quality assurance documentation…is complete and* ***available for inspection at the Facility Land****."* (emphasis added)

The respondent argued that the provision of a hyperlink is not the provision of the documentation that is contemplated in item (2) above because the documents were not able to be downloaded. Thus, if the documentation was not able to be completely downloaded by 28 February 2020, the documentation cannot be said to have been provided on that day. Similarly, the documentation required by item (8) was not available for inspection.

The claimant argued that the reference date had come into existence by 28 February 2020 because SW Completion had been achieved by that date as the documents referred to in items (2) and (8) of the definition were provided in an email that had been sent on that day. The claimant also argued that the *Electronic Communications Act 2000* (SA) ("EC Act") permitted the contractual obligation for the provision of documents to be satisfied by electronic communications. The claimant contended that it would not be in breach of the obligations relating to SW Completion because of the technical difficulties at the respondent's end and that the date when the respondent completed downloading the documents is not relevant to whether the documents were provided or available for inspection on 28 February 2020. The claimant also highlighted that there had been a general agreement between it and the respondent that

documents required under the Scope of Works would be provided by electronic communications and that in any event the Respondent had never requested a hard copy of the documents. Accordingly, the claimant argued that the respondent had waived the requirement for hard copies to be provided as a condition precedent for SW Completion. The claimant submitted that once it had sent the respondent an email with an hyperlink providing access to the documents on the One Drive server on 28 February 2020, the documents were provided and available for inspection at the Facility Land by anyone who had access to that hyperlink and that, in those circumstances, SW was achieved and the jurisdictional fact existed.

Stanley J's decision

Stanley J held that the hyperlink did not amount to provision of the documents for the purposes of item (2) of the definition of SW Completion because the provision of the hyperlink merely provided a means by which the Respondent was permitted to download documents stored in the cloud:

> *"Until it did so these document had not been provided."*

His Honour also held that the hyperlink did not amount to the making of the documents available for inspection by the respondent for the purposes of item (8) because until all the documents were downloaded, they ere not capable of being inspected at the Facility Land:

> *"The contractual requirement in item (2) that the specified documents be "provided to the Contractor" must be understood in its commercial context. The same proposition applies in relation to the contractual requirements in item (8) that the specified documents are "available for inspection by the Contractor at the Facility Land"."*[1]

Stanley J emphasised that a common sense and businesslike construction of the contractual requirements that the documents be provided and are available for inspection necessarily requires that the documents were capable of being downloaded on 28 February 2020 and, based on the evidence His Honour found that they were not:

> *"What the Subcontract requires is provision of the documents or the documents being available for inspection. In my view, that contractual requirement is not met by the provision of a hyperlink if it does not provide the means to access and retrieve the documentation by the relevant date. The documents are not available to be inspected if they cannot be read."*[2]

His Honour applied the decision of *Conveyor & General Engineering v Basetec Services & Anor* [2015] Qd 265 and *Clarke v Australian Computer Society Inc* [2019] FCA 2175:

> *"97. Support for this contruction is found in the reasons of Phillip McMurdo J in Conveyor & General Engineering v Basetec Services & Anor and Wigney J in Clarke v Australian Computer Society Inc.*

[1] [94]
[2] [105]

98. In Conveyor & General the Court had to consider whether the two files which were stored on "Dropbox" had been served in accordance with s 39 of the Acts Interpretation Act 1954 (Qld) (AIA). Dropbox is a service similar to that provided by OneDrive. It is a facility whereby an electronic file is remotely stored by a third party so that any computer, with the relevant authority, can view the file. Basetec had sent Conveyor & General an email with contained hyperlinks to the two files stored on Dropbox. McMurdo J held that the files stored on Dropbox had not been served with the meaning of s 39 of the AIA. Section 39 provided that a document could be served by "leaving it at, or sending it by post, telex, facsimile or similar facility" to a corporation's office. McMurdo J, relying on an earlier judgment of Austin J in the New South Wales Supreme Court in Austar Finance Group Pty Ltd v Campbell, held that the documents in the Dropbox file had not been "left" at or "sent" to the applicant's office at least until the applicant went to the Dropbox site and opened the file and probably not until its contents had been downloaded to a computer at the applicant's office. This was because where an electronic message is received and held by a remote third party server nothing can be said to have been "left" at the receiver's premises, at least until the email is accessed.

99. In Conveyor & General the Court further considered whether the inclusion of the Dropbox hyperlinks in the email meant that the information from the Dropbox files had been given via an electronic communication within the meaning of s 11 of the Electronic Transactions (Queensland) Act 2001 (Qld) (ET Act). The ET Act relevantly defined "electronic communication" to mean "a communication of information in the form of data, text or images by "guided or unguided electromagnetic energy". While McMurdo J found that s 11 of the ET Act did not apply because the applicant had not agreed to be electronically served, he also held that even if it did, the information in the Dropbox file was nevertheless not part of the relevant electronic communication, which was the email. That was because none of the data, text or images within the documents on the Dropbox server were communicated "by guided or unguided electromagnetic energy". Rather, there was an electronic communication of the means by which other information in an electronic form could be found at, read and downloaded from the Dropbox website. McMurdo J said"

> *Actual service does not require the recipient to read the document. But it does require something in the nature of a receipt of the document. A document can be served in this sense although it is in electronic form. But it was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt.*

100. The reasoning in Conveyor & General was applied by the Federal Court in Clarke v Australian Computer Society. That case concerned, inter alia, whether for the purposes of the rules of the respondent society, a file which was able to be accessed via an hyperlink which was included in an email could be regarded as having been "sent" to the recipient of the email. The rules defined "send" to mean "transmit to an address specific to each recipient ... by electronic communication". Wigney J held that the information, in the form of data or text, sent by the respondent society in an email, was transmitted to an email address specific to each recipient. However, Wigney J in holding that the information or data in the hyperlinked files was not sent to the recipients of the email having regard to the definition of "send" in the rules, said:

> *It cannot, however, be concluded that the data in the hyperlink files referred to in the email were transmitted to an address specific to each email. Rather, as in*

> *Conveyor & General, the email comprised an electronic communication of the means by which other information in electronic form could be found, read and downloaded on the hyperlinked websites.*
>
> *Nor could the information, in the form of data or text, in the hyperlinked files, in any sense be considered to have been "transmitted" to an email address specific to the recipients, at least unless, and until, the recipient clicked on the links and read, downloaded or printed the data in the files. Again, what was transmitted to them was the means by which they could read, download or print those files or the data in them.*
>
> *101. In my view, notwithstanding the different language used in the AIA in Conveyor & General and the society's rules is Clarke, the underlining reasoning in those decisions is equally applicable to this case. The MDRs in item (2) were not provided to Wärtsilä on 28 February 2020 because they were not capable of being fully accessed, read and downloaded by Wärtsilä on that date. Likewise, the MDRs in item (8) were not available for inspection by Wärtsilä at the facility land on that date because they were not capable of being fully accessed, read and downloaded by Wärtsilä on that date."*[3]

Stanley J also rejected the Claimant's argument that the provisions of the EC Act, permits the contractual obligation of the provision of documents to be satisfied by electronic communication and that it prescribes the time of receipt of electronic communication to be the time when it is capable of being retrieved by the address:

> *"114. Primero seeks to invoke the provisions of the EC Act on the basis that first, it permits the contractual obligation for the provision of documents to be satisfied by electronic communication, and second, that it prescribes the time of receipt of electronic communication to be the time when it is capable of being retrieved by the addressee.*
> *115. I do not accept that submission for two reasons.*
>
> *116. Section 8 provides that if, under a law of this State, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication where certain prescribed conditions are satisfied. Section 10 provides that if, under a law of this State, a person is required to produce a document that is in the form of, inter alia, paper, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where certain prescribed conditions are satisfied.*
>
> *117. Both s 8 and s 10 prescribe circumstances that condition the operation of those provisions. Those circumstances include: first, that at the time the information is given by means of electronic communication, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and second, that the person to whom the information is required to be given consents to the information being given by means of an electronic communication.*
>
> *118. In this case the first of these prescribed circumstances was not met. The evidence is that the OneDrive hyperlink was generated by Pimero and access to the hyperlinked*

[3] [97] – [101]

file could be removed by Pimero at its discretion. Accordingly, I find it was not reasonable to expect that, at the time the hyperlink was sent to Wärtsilä on 28 February 2020, the documents referred to in item (2) and item (8) would be readily accessible so as to be useable for subsequent reference.
119. The evidence is insufficient to enable me to make any finding as to whether Wärtsilä gave its consent to the information being given by means of an electronic communication as defined in the EC Act. In any event, it is not necessary to decide this question.

120. That is because there is a more fundamental answer to this submission. The EC Act does not apply to the subcontract. The definition of "electronic communication" in s 5(1) of the EC Act is in substantially the same terms as the definition of that term in the ET Act. Conveyor & General and Clarke stand as authority for the proposition that the provision of the MDRs by hyperlink does not constitute an "electronic communication" for the purposes of the EC Act. I propose to follow the approach taken in Conveyor & General and Clarke. They are persuasive judgments of single Judges of the Queensland Supreme Court and the Federal Court. I am not satisfied that they are plainly wrong. No submission was put that I should not follow them on the basis that they were wrongly decided. Accordingly, the EC Act does not apply to the email from Primero to Wärtsilä on 28 February 2020 containing the OneDrive hyperlink.

121. This conclusion makes it unnecessary to decide Primero's submission based on s 13A of the EC Act. It is also unnecessary to address Wärtsilä's submission that there was no valid provision of the MDRs or they were not made available at the facility land because of the breach by Primero of cl 40 of the subcontract.

122. However, in the event this case goes further I address these issues briefly.

123. Primero submits that s 13A(1)(a) of the EC Act prescribes the time of receipt of an electronic communication under that Act to be the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. Primero contends that the MDRs were capable of being retrieved at Wärtsilä's email address once the email containing the hyperlink was received by Wärtsilä. In accordance with s 13A the documents were provided or made available to Wärtsilä on 28 February 2020.

124. I do not accept this submission. It fails because the evidence demonstrates the full MDRs were not capable of being retrieved until 2 March 2020. It is not the email containing the hyperlink that was the relevant electronic communication for the purposes of SW Completion, but the MDRs. Although the email was capable of being retrieved and thus having a deemed time of receipt, the MDRs were not."[4]

[4] [114] – [124]