

Case Note

Tenix Alliance Pty Limited v Magaldi Power Pty Limited [2010] QSC 7

Bill Morrissey and Julia Lawrence¹

Abstract: The recently decided case of *Tenix Alliance Pty Limited v Magaldi Power Pty Limited* [2010] QSC 7 canvassed and considered a number of important provisions of the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA).

Facts

The applicant in this case, Tenix Alliance Pty Limited (Tenix Alliance), entered into a subcontract agreement with the respondent head contractor, Magaldi Power Pty Limited (Magaldi), under which Magaldi was to dismantle an existing power system at the Millmerran Power Station and to erect a new system in its place. The subcontract provided that the contract price was \$2,484,000.

During the course of the subcontract, Tenix Alliance issued a payment claim, which was endorsed as having been made under BCIPA. The payment claim was for an amount of approximately \$2.7 million, and comprised of:

- (a) progress payments for work completed under the contract during the relevant period;
- (b) 91 variations totalling \$380,961.07; and
- (c) prolongation costs of \$1,283,202.25.

In response to the payment claim received, Magaldi purportedly issued a payment schedule to Tenix Alliance, within the time specified under BCIPA.

Issues

Tenix Alliance brought an application in the Supreme Court of Queensland for summary judgment under section 19(2)(a)(i) of BCIPA, alleging that the payment schedule issued by Magaldi was invalid, on the basis that it failed to comply with sections 18(2)(b) and 18(3) of that Act, by failing to:

- (a) state the amount that Magaldi proposed to pay; and
- (b) give reasons why the scheduled amount was less than the claimed amount.

In its defence, Magaldi argued that:

- (a) the payment schedule was valid, having satisfied the requirements of BCIPA; and
- (b) in any event, it was under no obligation to issue a payment schedule, because the payment claim issued by Tenix Alliance did not comply with the requirements of BCIPA.

¹ Bill Morrissey is a partner in the Infrastructure and Dispute Resolution Group of McCullough Robertson Lawyers. Julia Lawrence is a solicitor in the Infrastructure and Dispute Resolution Group of McCullough Robertson Lawyers.

Decision

Validity of the payment claim – Service of claim ‘on’ or ‘after’ reference date

Magaldi submitted that the payment claim issued by Tenix Alliance was invalid on the grounds that it had not been served on the relevant reference date under BCIPA. In making this argument, Magaldi relied upon the decision in *Reed Constructions (Old) Pty Limited v Martinek Holdings Pty Limited* [2009] QSC 345 as authority.

In *Reed*, Daubney J held that section 12 of BCIPA, when read in conjunction with section 17 of BCIPA, entitles a claimant to serve a payment claim only ‘on’ a reference date, not ‘on and after’ a reference date. With respect, this decision departed from the views held by most commentators. Justice Daubney in *Reed* considered that if a claimant was entitled to serve a payment claim ‘after’ a reference date, it may result in multiple payment claims being served in respect of a single reference date, an outcome which would be inconsistent with the legislative intent of section 17(5) of BCIPA.

In *Tenix*, Fryberg J respectfully departed from the *Reed* decision, finding that the words of section 12(5) would, on their face, suggest that the entitlement to issue a payment claim extended to any time after the relevant reference date. In considering *Reed*, His Honour declined to follow Daubney J’s reasoning, rather finding as follows:

‘It is true that BCIPA does not permit two claims to be made in respect of the one reference date. It is, however a considerable jump from that proposition to conclude that BCIPA does not permit one claim to be made after the relevant reference date but in respect of that date. It does not seem to me that the words of BCIPA require such a conclusion’.

His Honour concluded that there was no inconsistency between a party being entitled to serve a payment claim after a reference date, and section 17(5) of BCIPA. On this basis, His Honour did not consider Tenix Alliance’s payment claim to be invalid on account of it not having been served specifically on the relevant reference date under BCIPA.

Validity of payment claim – inclusion of ‘incompetent’ prolongation claim

Magaldi further argued that Tenix Alliance’s payment claim was defective on the basis that it included a claim for prolongation costs which had not yet arisen. It was submitted the prolongation claim was maligned because it:

- (a) was not a claim ‘for’ construction work as required under BCIPA; and
- (b) included amounts in respect of a period subsequent to the date of the claim.

Magaldi argued that the wrongful inclusion of the prolongation claim in the payment claim resulted in the invalidity of the entire claim.

In considering these submissions, Fryberg J noted that the word ‘for’ had been given a wide meaning in the previously determined authorities handed down by the Courts. He found that the word ‘for’ was wide enough to include a claim for delay if the claim was made pursuant to a provision in the relevant contract. On the facts in the present case, Fryberg J found that Tenix Alliance were entitled to include a claim for prolongation costs in their payment claim.

His Honour did, however, agree with Magaldi that Tenix Alliance were not entitled to claim for prolongation costs subsequent to the date of the payment claim. In His Honours judgment, a claim for delay after the date of the claim was too remote to be considered a claim ‘for’ construction work as required by BCIPA.

Despite His Honour’s finding that Tenix Alliance’s inclusion of the claim relating to prolongation costs subsequent to the date of the claim was incorrect, His Honour held that the inclusion of one aspect of the claim incorrectly did not serve to invalidate the entire payment claim.

On the basis of his findings, His Honour found the payment claim to be a valid claim under BCIPA. In awarding judgment to Tenix Alliance, His Honour discounted the claimed amount by:

- (a) amounts already paid; and
- (b) an amount representing the claim for prolongation costs subsequent the date of the claim, which His Honour found was wrongly included in the claim.

Validity of the payment schedule

Tenix Alliance alleged that the payment schedule served by Magaldi was invalid as it failed to satisfy the requirements of section 18(2)(b) and section 18(3) of BCIPA. Section 18(2)(b) provides that:

‘a payment schedule...must state the amount of the payment, if any, that the respondent proposes to make’.

Section 18(3) states:

‘if the scheduled amount is less than the claimed amount, the payment schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent’s reasons for withholding payment.’

Magaldi argued that its payment schedule complied with the requirements of section 18(2)(b) and section 18(3). Magaldi’s payment schedule consisted of two columns. The first column was headed ‘Further reply by Magaldi in response to Tenix’s claim’ and the second column was headed ‘Estimated amount Magaldi may offer during negotiation with Tenix subject to satisfactory inspection of all supporting documents’.

Magaldi submitted that the first column comprised the reasons for withholding payment, and the second column merely stated amounts which Magaldi may be willing to negotiate about in the future, not amounts Magaldi was presently proposing to pay. They argued that, on its proper construction the payment schedule stated that they proposed to make no payment to Tenix Alliance. Justice Fryberg rejected this submission. His Honour considered that the logic of Magaldi’s submission dictated that the schedule could not be read as alleging to pay nothing, as it could be read as promising to the pay amounts they were willing to negotiate on, upon the satisfaction of the conditions stated.

His Honour noted with approval the dictum of Chesterman J in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333 that:

‘one should not approach the question of whether a document satisfies the description of a payment schedule from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description’

His Honour found that the amounts Magaldi stated it was willing to negotiate on did not, ‘*on a fair reading amount to a statement that Magaldi [did] not propose to pay any amount in respect of them*’. As such, the payment schedule failed to comply with the statutory requirements of BCIPA.

Following from this, His Honour found that Magaldi’s purported payment schedule did not comply with the requirements of section 18(2)(b) of BCIPA and was, on this basis, invalid. His Honour did not give detailed consideration to the alleged failure of the payment schedule to comply with section 18(3) of BCIPA, but noted that whether reasons given in a payment schedule are adequate to satisfy section 18(3) in each case is a matter of degree.

Conclusion

For the reasons set out above, the Court in *Tenix* determined that the payment claim issued by Tenix Alliance was valid, and the payment schedule issued by Magaldi was invalid. The Court awarded judgment in favour of Tenix Alliance for the claimed amount, less:

- (a) amounts already paid; and
- (b) amounts claimed on account of prolongation subsequent to the date of the payment claim.

There are a number of key lessons to take from *Tenix*. Firstly, the case highlights the importance of issuing a valid payment schedule, and serves as a reminder of the severe consequences under BCIPA that flow in circumstances where a party fails to do so. A payment schedule must state, clearly and unequivocally, the amount that the respondent proposes to pay in response to the claim, and if that amount is less than the claimed amount, the reasons for withholding the difference.

Secondly, the decision in *Tenix* potentially operates to curtail a claimant’s entitlement to recover unpaid portions of the claimed amount under section 19(2)(a)(i) as a debt owing, to the extent that the unpaid portions of a claim are found to be erroneously constructed or incompetent. In awarding Tenix Alliance judgment in the amount of the unpaid portion of its claim, less an amount representing the portion of the prolongation claim attributable to a period subsequent to the date of the payment claim, the Court has indicated a preparedness to assess not only the validity of the claim but, to an extent, its merits.

Finally, the case highlights the lingering uncertainty with respect to the proper construction of, and interaction between, sections 12 and 17(5) of BCIPA. In adopting a contrary approach to Daubney J in *Reed*, His Honour has highlighted existing uncertainty as to whether a payment claim can be validly issued ‘after’ a reference date, or whether it is necessary that payment claims be issued only ‘on’ the reference date. In order to obtain certainty on this point, it will be necessary for an appellate court to consider this issue for determination before any clear stance can be taken.