Adjudication and the effect of termination of the contract

Walton Construction (Qld) v Corrosion Control Technology [2011] QSC 67 will inevitably be cited as authority for the fact that after termination of the construction contract a payment claim cannot be made under the *Building and Construction Industry Payments Act 2004* Qld [the *BCIP Act*] or similar security of payment legislation in other States. The case should not be taken as authority for anything. To use a legal euphemism, the decision is *per incuriam*.

The claimant [Corrosion Control Technology Pty Ltd] carried out painting work for the respondent. When the work was 90% complete the respondent "terminated" the contract under clause 44.10 of the contract on 15 January 2010. The claimant then made a payment claim under the *BCIP Act* on 22 March 2010. On 7 May 2010 the adjudicator decided that the progress payment to be made by the respondent to the claimant was $225,865. The respondent applied to the Supreme Court for a declaration that the adjudicator's decision was void. On 3 June 2011 Peter Lyons J made the declaration.

He found that the payment claim was invalid and, consequently, the adjudicator's decision was void. At [38] of his judgment he found that the effect of termination under clause 44.10 was that:

(a) the right to make progress claims thereupon ceased; and

(b) reference dates did not accrue after termination of the contract.

The decision is *per incuriam* because conclusion (a) is based upon a misunderstanding of the Act and the law of contract and conclusion (b) is based upon a misinterpretation of the definition of 'reference date' in the Act.

The term 'termination' is often used in reference to contracts. But just as the words written or spoken that constitute a contract cannot be terminated, a contract cannot be terminated. As the *Rubaiyat of Omar Khayam* puts it:

> The Moving Finger writes; and, having writ,
> Moves on: nor all thy Piety nor Wit
> Shall lure it back to cancel half a line,
> Nor all thy tears wash out one word of it.

The term 'contract' is used in several ways. It can mean the written document. That can be destroyed but the rights and obligations thereunder don't terminate simply because the written contract ceases to exist. The term 'contract' is also used to describe the agreement between the parties at an instant in time. The parties may subsequently make another agreement so that then the contract between the parties is different to the contract at the earlier instance. But the contract at any instance always remains the contract at that point in time. It never ceases to exist as the contract at that point of in time.

When parties agree that a contract is terminated, they may intend that their respective rights should be as if there had never been a contract. Then they are said to have rescinded the contract *ab initio* [from the beginning]. Alternatively, the parties may intend that rights and obligations will be terminated from the date of agreement to terminate. That is *rescission in futuro*. The parties may intend that only accrued rights continue after termination. Alternatively, they may intend that accrued rights do not continue and each releases the other from any existing liabilities or future obligations under the contract. Another possibility is that they intend the termination to have the effect of acceptance of repudiation. The result would be that accrued rights continue but primary obligations are discharged and replaced by other obligations.

Forty years ago, recognising the ambiguity of the expression 'terminate the contract', I drafted a clause which has been reproduced in countless contracts and is now reproduced as clause 44.10 in the contract the subject of this case. Clause 44.10 provides that if the contract is terminated under clause 44:

> [T]he rights and liabilities of the parties shall be the same as they would be at common law had the defaulting party repudiated the Subcontract and the other party had elected to treat the Subcontract as at an end and recover damages.

The rights and obligations at common law are spelt out in many cases. It is unnecessary to describe them. It suffices to say that in a construction contract the effect of acceptance by the principal of the contractor's repudiation is that the contractor is discharged from the obligation to complete the work and the principal acquires a right to the damages that flow therefrom. Upon acceptance of repudiation the rights and obligations of the parties under the contract change but it is not true to say, as Lyons J says at [42], that there is no longer a contract.

If upon termination, there was no longer a contract, the claimant would have a right to a *quantum meruit* in a claim in restitution and the respondent would have no right to damages. Consequently, it is most important for a respondent that the contract should not cease to exist on 'termination'. For an illustration of the principles, see *Du Bosky & Partners v Shearwater Property Holdings plc* (1992) 61 Build LR 64 referred to at pp 166 to 169 of my book *Construction Claims*, 2nd edn 2006 Federation Press.

At [38] Lyons J states his opinion on the application of the common law when a contract is 'terminated for repudiatory conduct'. He acknowledges that accrued rights survive. If there was no longer a contract, accrued rights could not continue. He does not say that the claimant has no entitlement to claim payment under the contract for the 90% of work completed. He says that it seems to him that the right to make progress claims ceases. He provides no authority for that conclusion.

Even if the right under the contract to claim progress payments on account of moneys due under the contract ceased, the independent statutory right under s 12 of the Act would continue.

At [35] Lyons J acknowledges that an entitlement to a progress claim can exist under the construction contract or, independently, under s 12 of the Act. However, he found that the statutory right under s 12 was stymied because there was no reference date.

Section 7 of the Act provides that the object of the Act is to ensure that a person is entitled to receive and is able to recover progress payments. The claimant's entitlement to receive a progress payment is in Part 2 of the Act. Part 3 provides a mechanism intended to ensure that the claimant is able to recover progress payments.

Parties under a contract cannot bar the procedure for recovery of progress payments provided under s 17 of the Act. Section 99 of the Act renders void any provision of a contract to the extent to which it is contrary to the Act or purports to annul, exclude or restrict the effect of a provision of the Act.

If, as Lyons J finds at [42], the effect of clause 44.10 of the contract is to terminate the claimant's right to a progress payment then it must be void. The Court, in effect, found that the object of the Act was defeated by the terms of the contract. In the judgment, no reference was made to s 99 of the Act. The judgment is inconsistent with the object of the Act.

Section 12 of the Act provides that a payment claim may be made 'from each reference date'. The respondent's argument was that the claimant could never enforce its entitlement to a progress payment because there would never be a reference date for making the claim.

'Reference date' is defined in Schedule 2 of the Act. The relevant parts of the definition are:

> 'reference date' under a construction contract, means-
>
> (a) a date stated in, or worked out under the contract as the date on which a claim for a progress payment may be made …;
> (b) if the contract does not provide for matter-
> (i) …
> (ii) the last day of each later named month.

The Court found that for the subject payment claim there was no date stated in the contract and no date could be worked out under the contract. At [42] Lyons J says, "There is no longer a contract 'under' which there might be a reference date".

He found that even though the contract did not provide for a reference date for the payment claim, the default provision in paragraph (b) of the definition of reference date did not apply.

At [45] Lyons J said:

> In my view, the contract provides for reference dates, by enabling their identification, and by providing, in effect, that there is no right to make a progress claim after the contract is terminated under clause 44.10, with the consequence that no further reference date of this kind can accrue.

Lyons J accepts that the law in NSW is different and that *Brodyn v Davenport* [2004] NSWCA 394 at [443] supports the view that monthly reference dates continue to

accrue in NSW for 12 months after the cessation of work, notwithstanding termination of the contract.

At [41] says that the law in Queensland is different because:

(a) s 8(2) of the *Building and Construction Industry Security of Payment Act 1999* [the *NSW Act*] commences 'reference date, in relation to a construction contract …' where the BCIP Act commences 'reference date, under a construction contract; and

(b) paragraph (b) of s 8(2) of the *NSW Act* commences with the words 'if the contract makes no express provision with respect to the matter, whereas paragraph (b) of the definition in the *BCIP Act* commences with the words 'if the contract does not provide for the matter'.

This illustrates the problems that those drafting legislation create when they rephrase sentences. Can it really be said that by making these changes to the words used in the *NSW Act* the Queensland Parliament intended to make the law in Queensland different to the law in NSW so as to prevent contractors in Queensland from making payment claims after termination of the contract? Did Parliament really intend that the Queensland Act should create the gross injustice that this judgment reflects? Or is it that the Court has misconstrued the *BCIP Act*?

But even if there was no longer a contract, why wouldn't there be a reference date under paragraph (b) of the definition? The Court cannot have it both ways. Either there is a subsisting contract which provides for a reference date for the payment claim or paragraph (b) applies and the reference date is the last day of each named month.

In *Brodyn*, Hodgson J at [443] decided that if the contract does not provide for a reference date for a payment claim, the *NSW Act* does. The same interpretation should be applied to the *BCIP Act*. With respect, the different words identified by Lyons J do not change the meaning of 'reference date'.

The reference date determines the time when the entitlement can be claimed. There cannot be an entitlement to a progress payment and no time when the entitlement arises. The parties cannot contract out of the Act and defeat an entitlement under s 12 by providing a time (a reference date) for claiming some entitlements but no reference date for claiming other entitlements. For every entitlement to a progress payment, there must be a reference date.

It is not apparent from the judgment what standard general conditions of contract were used in the subject contract but they appear to be based upon AS2124. The clause numbers referred to in the judgment and the wording of the clauses follow closely AS2124-1992.

At [32] Lyons J says that clause 42.1 of the contract 'in effect, dealt with the making of a claim prior to completion; the making of a claim consequent on the issue of a Certificate of Substantial Completion; and the making of a final claim'.

Clause 42.1 of the contract is not set out. Clause 42.1 of AS2124-1992 provides:

> At the times for payment claims stated in the Annexure and upon issue of the Certificate of Practical Completion and within the times prescribed by clause 42.7 the Contractor shall deliver to the Superintendent claim for payment …

There are many times for making progress payments. They are:

> A. at the times for payment claims stated in the Annexure;
> B. upon issue of the Certificate of Practical Completion; and
> C. within 28 days after expiration of the Defects Liability Period.

Time A is usually at monthly intervals. It cannot be read as 'at the times for payment stated in the Annexure but not after issue of the Certificate of Practical Completion'.

It is possible to envisage many circumstances where the claimant would be entitled to additional progress payments after the issue of the Certificate of Practical Completion and before the time for the final payment claim. Following practical completion the claimant may complete work which was incomplete at practical completion, rectify defects or carry out variations on the instructions of the respondent.

The reference dates are all of A, B and C. They are not A until practical completion, then B and then no progress claims until only C. The reason for having an additional reference date upon the issue of the certificate of practical completion is because in many standard general conditions 50% of the security or retention moneys is to be released then. The claimant should not have to wait until the final certificate to make progress claims for the additional work.

The words of clause 42.1 in the contract before Lyons J are not cited in the judgment and Lyons J provides no reason for making the assumption that clause 42.1 of the contract 'in effect' only provides for making progress claims prior to completion. He does not say what 'completion' is. His decision is based upon an assumption that is peculiar to the particular contract. The judgment is not authority for making a similar assumption in any other contract. If the judgment is not *per incuriam*, then it should be easy distinguish it on the basis that the provisions of the contract [relating to times for making progress claims] are not spelt out in the judgment.

Section 17(4) provides the only limitation in the Act on the period within which a payment claim may be made. However, Lyons J at [38] found that clause 44.10 of the contract had the effect of imposing a time bar not found in the Act. If clause 44.10 had that effect then it would be void under s 99 of the Act [No contracting out].