

Progress Certificates – Deduction For Defects

Dames & Moore Pty Ltd v Jovista Pty Ltd,
Supreme Court of Western Australia, Master Sanderson, unreported, 26 May 1998.

Issue

This decision concerned whether the terms of a building contract obliged a contractor to pay to its subcontractor the amount stated in a progress certificate, regardless of the existence of any dispute that it may have with the subcontractor. The contractor alleged certain defective workmanship on the part of the subcontractor, and as a result, made a deduction from the amount to be paid pursuant to a progress certificate.

The facts

Dames & Moore Pty Ltd (“D&M”), as subcontractor, entered into an agreement with the defendant contractor Jovista Pty Ltd (“Jovista”) for the design of materials and equipment for a “Stockpile Reclaim and Recycle Conveying and Crushing System”.

D&M invoiced Jovista for payment in respect of various works performed. On 22 January 1998, Jovista issued to D&M payment certificate no. 3, from which it deducted two particular amounts, totalling \$170,000, alleged to be for defective design of the reclaimed feeder head chutes and crusher building, respectively.

D&M denied that Jovista was entitled to deduct that amount from the progress certificate and instituted an application for summary judgement.

On the other hand, Jovista argued that, properly construed, the contract permitted it the right to make deductions from a progress payment where it had a good defence to the amount claimed by the subcontractor.

The decision

D&M’s application for summary judgement failed. The decision may be contrasted to another recent case *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (unreported, Supreme Court of New South Wales, Rolfe J, 1 August 1997) (“*Algons*”), where the plaintiff subcontractor was held to be entitled to summary judgement against the contractor for the amount of \$480,260 the subject of a progress claim.

The two decisions illustrate the principles in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, namely, that (1) there is no general presumption in relation to a progress payment clause to the effect that payment of a progress certificate must be made without deduction, and (2) each contract has to be considered by having regard to its own particular terms.

As Master Sanderson pointed out, the facts in *Algons* were almost identical to the facts of the instant case, but with one major difference between the wording of the payment clauses in the respective contracts. The relevant part of clause 42 in *Dames & Moore Pty Ltd v Jovista Pty Ltd*, and the important differences with the *Algons* clause shown in bold, were as follows:

“Within fourteen (14) days of receipt of a claim for payment, the Contractor [**Main Contractor’s Representative**] shall assess the claim and shall issue to the Subcontractor a payment certificate stating the amount of the payment which, in the Contractor’s [**Main Contractor’s Representative’s**] opinion, is to be made by the Contractor to the Subcontractor or by the Subcontractor to the Contractor.”

Subsequently, in both clauses, it was stated that payment of a progress claim was not an admission of liability on the part of the contractor or evidence that the works had been executed satisfactorily, but was payment on account only. Further, in both clauses, a progress payment was expressed not to prejudice the right of either party to dispute the obligation to make payment under the dispute resolution procedure, and if necessary, an adjustment could be made subsequently between the parties.

Having regard to the particular words of the clause 42 before him, Master Sanderson considered that the clause provided to the contractor an unfettered right to decide what amount (if any) it paid to the subcontractor. By use of the words “*in the contractor’s opinion*”, the contractor was in complete control of whatever payments it made to the subcontractor. This, it was said, was the clear and obvious meaning of clause 42, notwithstanding that, first, no progress payments might be made at the whim of the contractor, and second, this interpretation did not appear consistent with the remaining context of clause 42.

The Master contrasted the *Algons* clause, where a claim for a progress payment required certification by the contractor’s representative. The amount of the progress payment was not a matter of the contractor’s own opinion. Whilst it was open to the contractor’s representative to make certain specific deductions from progress payments, clause 42.1 imposed an absolute obligation on the contractor to pay the amount certified by the representative. Rolfe J drew support for that conclusion from the facts

that payment was on account only, and that such payment did not prejudice the right of the contractor to dispute under clause 47 whether the progress certificate was indeed properly due and payable.

In *Algons*, the contractor's representative had not issued a payment certificate at all - the contractor simply decided not to pay the amount of the subcontractor's claim because it alleged that the subcontractor had completed the works late and had displayed poor workmanship. However, whether the certifier had certified an amount and failed to make any relevant deduction, or whether the certifier had issued no certificate whatsoever, Rolfe J held that there was an obligation on the contractor to pay against the progress certificate without deduction.

Master Sanderson noted that he would have had no hesitation in following *Algons* had it not been for the difference in contractual wording as to the subcontractor's entitlement to a progress claim.

Comment

The result in *Dames & Moore Pty Ltd v Jovista Pty Ltd* runs contrary to a line of authority that has consistently held that, in Australian standard form building contracts, the principal or contractor has very limited right to make deductions from progress certificates for any unliquidated claim it may have against, respectively, the contractor or subcontractor. These decisions have generally indicated that the latter's entitlement to payment without deduction of amounts certified is the quid pro quo for that party's obligation to continue working (and so incur costs) while the parties are in dispute: *Triden Contractors Pty Ltd v Belvista Pty Ltd* (1987) 3 BCL 203, *Sabemo Pty Ltd v De Groot* (1991) 8 BCL 132, *LU Simon Builders Pty Ltd v HD Fowles & Ors* [1992] 2 VR 189, *Grahame Allen Earth Moving Pty Ltd v Woodwork Bay Development Corporation Ltd* (unreported, Supreme Court of Queensland, 15 December 1988), *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Anor* (unreported, Supreme Court of Victoria, Hansen J 27 July 1995; Court of Appeal, 21 August 1995), *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521, and now most recently *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*, *supra*.

However, the decision in *Dames & Moore Pty Ltd v Jovista Pty Ltd* is reflective of the view in *Macmahon Contractors Pty Ltd and Advanced Pipeline Technology Pty Ltd v Power and Water Authority* (unreported, Supreme Court of Queensland Court of Appeal, 19 November 1996), where clause 42.8 of the NPWC3 General Conditions of Contract was considered. The Court of Appeal affirmed the trial judge's conclusion that upon the particular wording of that clause, the principal was entitled to deduct amounts from progress certificates where it claimed that the contractor had failed to perform any of its obligations under the contract.

Master Sanderson was clearly troubled by the notion that a consequence of the instant decision was that a subcontractor could be required to carry on work without receiving progress payments, which could very probably lead to financial disaster for the subcontractor. Indeed, it follows that if a claim by the contractor is substantial, and the contractor is allowed to deduct the amount of that claim from progress payments, this may affect the subcontractor's ability to continue to perform its obligations under the contract in circumstances where the contractor's claim may ultimately be held not to be successful.

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