Article Information

Author: Robert Riddell
Service: Construction Litigation, Project Finance, Projects & Construction, Property & Development, Property & Development Finance, Property Development
Sector: Aged Care & Senior Living, Infrastructure, Private Clients, Real Estate, Transport & Logistics

---

Zombie reference dates and payment claim graveyards

Despite its innocent appearance, Section 8(1) of the Building and Construction Industry Security of Payment Act 1999 (NSW) (Act) has proven a complex, opaque and over-analysed provision. Although practically repealed by the 2018 Amending Act, its original form will continue to haunt us, and the hallways and court rooms in Phillip St, to gradually fade away as the years pass.

Section 8 in its previous form, and many of the judgments that have considered it, have derailed many payment claims, adjudication applications, adjudication determinations summary judgment applications and other enforcement action. It has embarrassed and frustrated many adjudicators, lawyers and claims consultants. It is not difficult to put the case that it has not served the object of the Act[1] particularly well, indeed it has often been its Achilles's heel.

Contorting legal analysis has led to evolving, convoluted and at times conflicting judicial guidance, often making legal advice like a form-guide. Right up there with and sometimes closely related to, the dramas and conflicting judicial guidance around repetitious claims.

This was recognised by the New South Wales Government so, for contracts entered into after 20 October 2019, reference dates are abolished and a new regime introduced, entitling a claimant to make a claim under section 13 on and from the last day of the month in which construction work was first carried out and on and from the last day of each subsequent month, unless the contract made provision for an earlier date.

However, the reference date zombies will continue to haunt pre-21 October 2019 contracts perplexing, frustrating and perhaps terrifying claimants for years to come.

The purpose of this insight is to make stakeholders[2] aware or perhaps remind them of the problems and complexities associated with the zombie reference dates and to remind us of some of the common and at times embarrassing hidden traps, so as to identify them early before adjudicators fees are incurred unnecessarily and avoid spraying the legal costs of defending invalid determinations to the wind.

The form of section 8 that applies to construction contracts entered into before 21 October 2019 is:

8. ***Rights to progress payments***

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, reference date, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services

supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

The form of section 8 that applies to construction contracts entered into on and from 21 October 2019 is simply:

8 Right to progress payments

A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.

For the sake of completeness, section 13 was also amended on and from 21 October 2019 to include the new subsections 13 (1A) – (1C):

13 Payment claims

(1A) A payment claim may be served on and from the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month.

(1B) However, if the construction contract concerned makes provision for an earlier date for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month.

(1C) In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination.

Claims made before the applicable reference date

Many contracts, particularly those bespoke in nature, include a term to the effect that payment claims may be made monthly, on say the 25th day of each month, but then continue to provide that payment claims made before that date "*shall be deemed to have been made on the date for making that claim*", or words to that effect.

However reference dates arise "*on and from*" the date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made. The Supreme Court has held and the Court of Appeal has upheld the view that the deeming provisions, such as the above do not convert the reference date in to some earlier date.[3] This would also seem to be the case for contracts from 21 October 2019 onwards, although there is as yet no authority precisely on that point.

A person that serves a payment claim relying on a clause deeming claims served early to be claims served on the reference date will not be "*a person referred to in section 8(1) who is ... entitled to a progress payment*". They will instead likely be mauled by the zombie.

Milestone or stages as reference dates (or not)

Setting out percentages (or other amounts) of the contract sum payable upon the achievement of milestones or stages is problematic as zombie reference dates, for a number of reasons. Firstly, there is often room for argument as to whether a stage of the work has been completed or a milestone achieved, making it a rather vague, perhaps unreliable mechanism for establishing reference dates. An oft-cited example is "*Completion of brick works*". It might be the case that all of the brick work will be completed other than the window sills, as that bit needs to be postponed to enable the flashing to be installed correctly when the windows are put in place. Strictly speaking, not all the brick work has been complete despite only perhaps 1% being postponed for very practical reasons.

Care needs to be taken to ensure that the provision specifying the amount or percentage of the contract sum claimable upon achievement of a stage or milestone actually addresses the date upon which a payment claim may be made. The amount payable upon reaching a stage and the date for claims are not necessarily the same thing. It may be that, if not addressed clearly, there will be scope for section 8(2)(b) to apply, which may not be desirable, particularly for a principal.

In *Greenwood Futures v DSD Builders*[4], the contract required the contractor to give the developer a written claim for progress payment "for" the completion of each identified stage of the works. McDougall J said[5] :

> *"The only specification of when a progress claim may be submitted is that contained in clause 17.3. That sub clause contemplates that the stage in respect of which the progress payment is claimed will be complete. It requires the claim to be made "for the completion of [that] stage". It does not say that the claim must be made immediately upon completion of that stage, or indeed any other date that is defined by reference to completion of that stage (for example, "on the 30th day of the month in which completion of that stage is achieved"). It may be assumed that a builder seeking to maintain its cash flow, will submit the progress claim as quickly as it can following completion of the stage to which it relates. But that does not enable the date for submission of the progress claim to be "determined".*

It is also worth bearing in mind that a provision which goes beyond fixing a mechanism for determining the date on which the contractor is to be paid, and which:

- Imposes conditions on the occurrence of the reference date;
- Modifies or restricts the circumstances in which a contractor is entitled to a progress claim;
- Inordinately delays or effectively prevents a reference date from arising;
- Unjustifiably impeaches the making of a payment claim or renders the statutory entitlement practically elusory;
- Imposes serious conditions which make a reference date more a theoretical possibility than an actuality; or does not facilitate a statutory entitlement to a progress payment

will or maybe invalidated by section 34[6] and it is often not terribly difficult for a claimant to convince an adjudicator that is the case.

Termination and taking the work out of the contractor's hands

It has been accepted for sometime that, unless the contract provides to the contrary, if the contract was entered into before 21 October 2019, that no further reference dates will arise after its termination.[7]

So, if the contract was entered into before 21 October 2019 and the contract is terminated there may be a lacunae, where the last reference date has already been spent, in respect of work performed between that reference date and the date the contract is terminated.

If however, a reference date has accrued prior to the termination and it has not been spent, it may well still be available to base a payment claim under the Act after termination. The prevailing authority, *Parrwood*[8] is that termination and taking the work out of the contractor's hands does not effect rights that had accrued under the Act before suspension (and logically before termination). Ball J observed that there was nothing in the judgment in Southern Han[9] to suggest that what the High Court said was intended to affect rights that had accrued under the Act before suspension. He noted that the High Court said that no reference date and no right to a progress payment could be pursued after suspension, but found that does not prevent a party from pursuing a claim in respect of a right to a progress payment (reference date) that arose/accrued before suspension [and presumably termination].

Taking work out of the contractors hands: even a little bit of work

The High Court has mused that the cessation of reference dates also applies where only part of the work is taken out of the contractor's hands and the contractor is obliged to complete the balance:

> *"True it is that clause 39.4 would have permitted Southern Han to take only some of the work out of Lewence's hands, in which case to interpret that clause as suspending payment for the work other than that taken out of Lewence's hands would mean that Lewence would have been obliged to continue with other work for which it would not be paid until completion of the section 39.6 process ..."*[10]

That seems rather harsh, and is obiter, but the High Court saw it as justified, given that work could only in that contract be taken out of the contractor's hands as a consequence of a "substantial breach", which is not unusual.

The relationship between the work claimed and the reference date

The question often arises whether a payment claim can include items of work or construction related goods and services that were performed or provided after the reference date. Until very recently, authority on this point was hard to come by. The judgment of the Court of Appeal in *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd****[11]*** clearly indicates that work performed or construction related goods and services provided after the reference date should not be included in the payment claim. That case's main claim to fame is that the adjudicator determined a reference date different to the dates propounded by either party, without seeking their submissions in respect of his preference found to be a failure of

natural justice. However the Court of Appeal also found that the reference date determined by the adjudicator could not have been correct in any event. This was because the contract had been terminated by the Principal and the entitlement to progress claims under the contract did not survive termination and that gave rise to a jurisdictional error by the adjudicator.

The natural justice issue was that the adjudicator had determined it on a basis for which neither party had contended (i.e. reference date of 28 October 2018). At first instance, Ball J stated:

> *"The choice of reference dates had a substantial effect on the outcome of the determination. It provided an answer to Hanson's submissions that Brolton had made progress claims for work done after 25 September 2018, which were not permitted by the contract. It also provided an answer to Hanson's submission that any claim for extensions of time and delay costs were only submitted after the reference date (on 28 September 2018). It follows that [by finding a reference date of 23 October 2018] there was a substantial denial of natural justice."*

An implication of that seems to be that work done after the reference date and claims for extension of time and delay costs after the reference date are not validly included in the payment claim. The Court of Appeal agreed in considering whether the denial of natural justice was material. In a unanimous judgment the courts stated [at 68]:

> *"The adjudicator's decision to proceed on the basis of 23 October 2018 reference date was plainly material insofar as it substantially affected the quantum of the determination which the adjudicator purported to make. As the primary judge observed at [43], the choice of the later reference date provided an answer to Hanson's submission that Brolton's payment claim included claims for work done after a 25 September 2018 reference date, as well as claims for delay costs due to extensions of time which had not been the subject of any Variation Application made before that earlier reference date."*

So not only is a claimant not entitled to claim work performed or construction related goods and services provided after the reference date in the payment claim, it is also not entitled to rely upon claims for extension of time or delay costs only submitted after the reference date.

However including work undertaken or claims for EOTs made after the reference date does not necessarily invalidate the payment claim. In the court below where Ball J held:

there was nothing in Southern Hand that requires for a payment claim to be valid, it must only relate to work done before the reference date in respect of which the payment claim was served [29];

the validity of the payment claim does not depend upon when the work it covered was performed [31];

This however only goes to the validity of the payment claim, as opposed to whether works performed after the reference date or notices served after the reference date should be taken into account in determining the payment claim and arriving at the adjudicated amount.

The reference date relied upon by the adjudicator

It is not compulsory for an adjudicator to identify the reference date upon which a payment claim is based, unless the existence of an available reference date is an issue in the adjudication[12].

If it is a matter in issue then the adjudicator must determine it. The adjudicator must not determine a date for which neither party has contended, unless the parties have been given the opportunity to make submissions in respect of the adjudicator's theory. Failure to commit the parties to have a say in this exposes the determination to being challenged on the basis of a jurisdictional error and being found a failure by the adjudicator to apply the appropriate measure of natural justice. There is ample on this in the section above.

When a reference date will not be implied by section 8(2)(b)

If the construction contract entered into before 21 October 2019 addresses reference dates in a competent manner, then your stuck with it. It matters not that you cannot identify a date that works for your claim. The implication of a date under section 8(2)(b) is academic if the issue is addressed by the contract.

> *"The Contract having made express provision in cl 37.1 fixing the date for the claiming of progress payments*

under the Contract, s 8(2)(b) could have no application. The requisite reference date was potentially capable of having arisen only in the application of s8(2)(a).” ***[13]***

The Ongoing Work Myth

There was, for a while, good authority for the proposition that a reference date did not arise where no construction work was carried out or related goods and services provided since the previous claim (which presumably relied upon a valid reference date).[14] This acted to prevent many repetitious claims progressing to adjudication and provided an answer to many summary judgment applications.

However that approach was, for present purposes, terminated in 2015 when McDougall J changed his mind, finding that a reference date does not have to be supported in the manner suggested above and that the only temporal limitation on reference dates and is that set out in the section 13(4) i.e.

- The period determined by or in accordance with the terms of the construction contract; or
- The period of 12 months after the construction work to which the claim relates was last carried out…

whichever is the later [15].

There is also scope for a final reference date to be specifically provided.

Conclusion

This insight is not a comprehensive summary of issues that can arise with reference dates. There are plenty more.

Clearly construction contracts entered into before 21 October 2019 are exposed to a larger array of technicalities and show-stoppers than those entered in to after that date, but this is not exclusively the case. The time frames and expense involved in the prosecution of an adjudicated payment claim are material issues for contractors’ cash-flows. These issues are magnified if the determination is contested.

The simple message is either be across the technicalities or if it is not within your stock in trade, retain a construction specialist lawyer or an experienced security of payment claims consultant to assist you safely navigate through the payment claim graveyard.

References:

[1] S.3(1) of the Act

[2] Mainly claimants, respondents, claims consultants, lawyers and adjudicators.

[3] *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613 upheld by the Court of Appeal in [2017] NSWSCA 289

[4] [2018] NSWSC 1407

[5] At 63

[6] Stevenson J *Castle Constructions v Ghossayn Group Pty Ltd* [2017] NSWSC 1317

[7] If however the contract was entered into on or after 21 October 2019 section 13(1C) of the Act now provides a right to make a payment claim on and from the date of the determination (but this is not, strictly speaking, a reference date (at least by definition))

[8] *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWSC 208

[9] *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52

[10] Supra at 77

[11] [2020] NSWCA 63

[12] *Kembla Coal & Coke v Select Civil & Ors* [2004] NSWSC 628 at paragraph 37

[13] *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd [2016]* ibid at 73

[14] *Trustees of the Roman Catholic Church for the Diocese of Lismore v TF Woollam & Son [2012] NSWSC 1559, cited with approval in Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd [2012] NSWSC 1571 and Draybi One Pty Ltd v Norms Carpentry & Joinery Pty Ltd [2013] NSWSC 1676.*

[15] *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd [2015] NSWSC 955*