SUBCONTRACTORS' CHARGES AFTER THE SUBCONTRACTORS' CHARGES AMENDMENT ACT 2002 AND THE BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004

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INTRODUCTION

The Subcontractors' Charges Act 1974 (Qld) ('SCA') was amended in 2002 by the Subcontractors' Charges Amendment Act 2002 (Qld), to enhance security of payment for subcontractors. The Building and Construction Industry Payments Act 2004 (Qld) ('BCIPA') was enacted in 2004 to enhance security of payment to all contractors.

The Subcontractors' Charges Amendment Bill was introduced into parliament in 2001 by the Hon RE Schwarten, Minister for Public Works, Housing and Racing. In the Explanatory Notes to the Bill, the Minister explained that the Bill had its genesis in an inquiry into the security of payment within the building and construction industry, initiated by the Queensland government in 1996.[1]

Some of the considerations of the inquiry were the adequacy of the SCA and the confusion surrounding subcontractors' charges. The Bill incorporated some of the recommendations of the inquiry. The Bill was assented to on the 28 February 2002 and the Subcontractors' Charges Amendment Act 2002 (Qld) commenced on the 1 January 2003.

The Building and Construction Industry Payments Bill [genesis]

This paper outlines how the courts have considered the amendments and how the amendments are affected by the new Building and Construction Industry Payments Act 2004 (Qld) ('BCIPA').

SUBCONTRACTORS' CHARGES AMENDMENT ACT 2002

Object of the SCA and Amendments

The Act was designed to protect the interests of subcontractors and is remedial in character: Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd[2] per Chesterman J. Because the Act confers special rights and privileges, the enforcement of the Act depends on strict compliance with its terms.[3]

The objective of the 2002 amendments to the SCA was to 'enhance security of payment to subcontractors within the building and construction industry'.[4]

It attempted to do so by:

(i) expanding the application of the Act to enable a charge on security;

(ii) expanding the categories of persons entitled to claim a charge to include manufacturers of project specific material and suppliers of labour; and

(iii) better ensuring that subcontractors' claims relate only to the work carried out by requiring the subcontractor to provide a statutory declaration.[5]

There were a number of new sections inserted in the Act as discussed below.

New Definitions

Sections 3 and 3AA included new definitions of:

1. 'land' to include land that is under water;

2. 'project specific materials' to include materials made specifically for inclusion in the work, but excluding materials that could without substantial change be incorporated in other work or which could reasonably be converted to other use;

3. 'security' to describe the instruments used to secure performance under a contract;

4. 'supply of labour' to specifically exclude from the definition of 'work' the supply of persons who perform only administration functions; and

5. an extension to the definition of 'work' to include the manufacture of project specific materials and supply of labour for work the subject of a contract or subcontract.

Security

Section 5(1)(b) inserted a provision entitling the subcontractor to a charge on a security given for the purpose of securing, wholly or partly, the performance of a contract by the contractor or superior contractor.

Pre–Conditions as to Moneys Due

Subsection 5(6) clarified that:

1. any contractural provision still to be complied with (such as the certification of work or a dispute resolution procedure) does not have to be completed for a subcontractor to be entitled to claim a charge; and

2. damages or claims in tort are excluded under the Act.

This amendment was designed to overcome such cases as Henry Walker Etlin and James Hardie,[6] in which it was held that where a progress claim or part thereof became due on the issue of a payment certificate, where no certificate issued no money was due and the contractor's only claim was for damages.

Number of Claims

Sections 10(7) and (8) precluded the making of more than one claim in respect of the same item of work. Note that this regulates the making of claims not notices of charge.[7]

Ability of Subcontractor to Rely on Court Proceedings Commenced by Another Subcontractor

Section 12(3A) has been amended to limit the circumstances in which a subcontractor can rely upon the proceedings brought by another subcontractor in order to enforce their notice of claim of charge. The words 'whose charge has not been extinguished under section 15' have been added after the requirement that the subcontractor has given notice of claim of charge pursuant to section 10.

Institution of Court Proceedings

Subsection 15(1) was amended to reduce the time period for commencement of a court proceeding following notice of a claim of charge from two months to one month.

Leap–Frogging

Subsection 21(3) provides for specific instances in subsection 21(1) where a person may be prejudicially affected by a claim of charge.

If, because of a claim of charge, the payment or release of security to a person (the affected person) higher up the contractual chain than the subcontractor is delayed or otherwise affected or the affected person has made payment to a person who is a contractor or superior contractor of the claiming subcontractor, the affected person is prejudicially affected within the meaning of subsection 21(1).

This section only limits the circumstances in which a subcontractor may successfully claim a 'leapfrog' charge. The court must still determine whether a claim of charge should be either cancelled or its effect modified.[8]

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004

The objective of the Building and Construction Industry Payment Act 2004 (Qld) is to entitle certain persons who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply. This is achieved through rapid adjudication.

The Building and Construction Industry Payment Bill was introduced into parliament on 25 November 2003.[9] Minister Schwarten, in his second reading speech on 26 November 2003, stated that:

Improving payment outcomes for all parties operating in the building and construction industry is a key priority for this government. Security of payment has been an issue for many decades, particularly in relation to subcontracts.

He outlined a number of reforms, such as the recent amendments to the QBSA Act, which he said:

... coupled with the long standing Subcontractors' Charges Act 1974, mean subcontractors working in Queensland currently enjoy a raft of legislative protection measures designed to improve their payment prospects. However, these legislative measures of themselves will not necessarily result in improved cash flow outcomes operating in the building and construction industry.

However, the minister noted that previous reforms did not address all problems faced by subcontractors, because:

... [t]here are instances in the industry where a claim for payment by a subcontractor or supplier is disputed by his or her superior contractor resulting in payments being held up for lengthy periods while the dispute is being resolved.

The minister stressed the SCA could still be utilised:

The Bill will not in any way affect the operations of the Subcontractors Charges Act 1974. Subcontractors will continue to utilise this act as

they have always done. However, a subcontractor will not be permitted to start, continue or enforce an adjudication once they lodge a notice of charge under the Subcontractors Charges Act 1974. In essence, subcontractors will be required to choose which statutory initiative they wish to utilise to obtain payment for construction work done. There will be nothing to stop subcontractors from switching from one statutory initiative to the other if they believe that due to changing circumstances the alternative option will result in a better payment outcome.'

He concluded the second reading speech by saying:

The building and construction industry, and particularly subcontractors, will benefit substantially from introduction of this bill.

The minister's comments show that BCIPA was intended ameliorate a problem for subcontractors under the SCA: essentially, a charge does not assist the subcontractor with its cash flow.

Adjudication

Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal of competent jurisdiction.

Under section 21 of the BCIPA, a claimant may apply for adjudication if the respondent serves a payment schedule on the claimant but the schedule amount is less than the amount claimed in the payment claim. A claimant may also apply for adjudication if the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date.[10]

If the respondent fails to serve a payment schedule and does not pay the whole or any part of the amount claimed, the claimant may also apply for adjudication.[11]

Short time frames apply for making an adjudication application. Where no payment schedule is served, the whole process from claim to adjudication can take only 35 business days.[12]

Limits on SCA

Section 4(2) of the BCIPA provides that a claimant who gives a notice of claim of charge under the SCA, may not under Part 3 of the BCIPA start or continue proceedings or another action in relation to all or part of the construction work or related goods and services.

However, a claimant may serve a payment claim under Part 3 of the BCIPA in relation to the construction work or related goods and services the subject of a construction contract, if the notice of claim of charge under the SCA is withdrawn.[13]

Serving a Caim Under the SCA After Adjudication

As mentioned above, if a claimant served a claim under the BCIPA, the claimant could have the claim adjudicated in 35 business days.

Alternatively, that same claimant, if it did not proceed to adjudication, would have three months to lodge a charge under the SCA after completion of subcontract the work or after the expiration of the period of maintenance provided for by the contract.[14] However, in circumstances where a subcontractor proceeded to adjudication and was not successful or only partially successful, there is still an opportunity for some 55 days to lodge a notice of charge under the SCA.

NEW CASES SINCE AMENDMENTS TO THE SCA

'Work'

In Griffiths Powerline Maintenance Pty Ltd v IDS Consulting Services Pty Ltd,[15] Boulton DCJ considered the amended definition of work and held that the clearing of trees for the erection of transmission towers was a necessary and integral part of the construction process. Use of the term 'hire' was not determinative, and that the subcontract was not a mere hire of machinery, but a contract for services to be provided.

Hire of plant and machinery—whether it is 'work'—Re Leighton Contractor–Gradeline Contracting

In Sempec Pty Ltd v Stockport [2004] QDC 087, the subcontract works involved 'contract engingeering, estimating and tendering services' for the Gatton Bypass road works. Wall DCJ considered and preferred the view expressed by Holmes J in Sun Engineering (Qld) Pty Ltd v Dynac Pty Ltd (in liq)[16] that the definition of 'work' in section 3 of the Act is an inclusive definition, by the use of the term 'includes' rather than 'means' in the definition.

In Re Stockport (NQ) Pty Ltd (subject to deed of arrangement)[17] Wilson J held that survey services such as the placement of survey pegs and batter boards was 'in connection with the taking of measurements' and was excluded by f(ii) of the definition of work.

Leap–Frogging

In Re University of Queensland,[18] a subcontractor, Broen, gave notice of claim of charge to both the employer and a superior contractor, Baulderstone, but not to the contractor with whom the subcontractor had contracted. The subcontractor's charge 'leap–frogged' the contractor with whom the subcontractor had

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contracted. That contractor was in administration.

The head contractor had already paid the contractor for the work done by the subcontractor. Therefore either the head contractor paid twice for the same work (once to the contractor and once to the subcontractor), or the subcontractor received nothing for the work. As Mullins J put it 'a loss is to fall on one of two innocent parties'.[19]

Baulderstone submitted that the 2002 amendments limited a subcontractor to one notice or charge based on a claim for specified work. The subcontractor, it was argued, could not lodge a charge, and a leap–frogging charge, in respect of the same claim.

Mullins J rejected this argument. As to the amendments to sections 10(7) and (8), Mullins J held that there was:

... nothing in the Act to preclude a subcontractor lodging two notices of claim of charge based on the one claim where each of the notices is given to a different contractor or employer. The extent to which the claim is satisfied under one charge must affect the amount of the claim which can be pursued under the other charge.

Mullins J held that, in relation to the insertion of s21(3) by the amendments, that

... [t]his reform does not reverse the effect of Hewitt Nominees No 2 in recognising the validity of a leapfrogging.

However, this was not the end of the matter, because, as noted above, the head contractor had already paid the superior subcontractor for those subcontract works. Pursuant to s21 SCA, if a person is 'prejudicially affected' by the claim of charge, the court has a discretion to make any order it thinks fit.

Mullins J held that amendments to the SCA which deem contractors as prejudicially affected, was a departure from the approach of protecting the subcontractor in cases where a loss is to fall on one of two innocent parties:

The fact that the Legislature has expressly chosen to deem a person in the position of Baulderstone in relation to Broen's notice of claim of charge dated 18 December 2002 to be prejudicially affected by that notice of claim of charge is a particularly significant consideration as to whether the discretion conferred by s21(2) of the Act is exercised.. The Legislature has introduced a departure from the approach of protecting the subcontractor in preference to the superior contractor, when the superior contractor has already paid for the work done by the subcontractor which is the subject of the leapfrogging charge.[20]

It followed that the notice of claim was cancelled.

Action to Enforce

A subcontractor may claim the benefit of a proceeding commenced by someone else, if when that proceeding is commenced, it has already given notice claiming its charge and the one month in section 15 has not expired and steps are then taken to join the proceeding. If another subcontractor did not commence a proceeding within one month, then the charge would be extinguished.[21]

Damages Claim

In Re Barclay Mowlem Constructions,[22] the applicant superior contractor applied for cancellation on the basis the claim included damages for

breach of contract or a quantum meruit claim, both of which are expressly excluded by subsection 5(6)(b). Muir J held that as the claim included claims for breach of contract and quantum meruit, that were expressly excluded by subsection 5(6)(b) and the charge was held to be invalid.

Where a variation is a claim to secure payment due under the contract but, is a claim for damages under a collateral contract, then it cannot be the subject of a notice of charge under the SCA.[23]

No Certification

In Multiplex I (Abigroup Contractors Pty Ltd v Multiplex Constructions Pty Ltd & Ors),[24] the subcontractor lodged a charge over moneys that had not been certified in full under the subcontract, and included variations that had not been assessed or paid in full. The principal applied to have the charges cancelled on the basis that the notice claimed moneys that had not been certified as payable and therefore the claims were not for 'moneys payable' as there was no procedure under the subcontract for resolution of these disputed claims.

The court at first instance accepted both arguments and cancelled the charges. The Court of Appeal,[25] however, set aside this order and allowed the charges. McPherson JA indicated that what was critical to the operation of subsection 5(6)(a) was the presence in the subcontract of a provision governing payment of money that is or is to become payable to the subcontractor for works done under the subcontract, and that the provision 'is still to be complied with'.

Time Limits

In Multiplex II,[26] after the works had reached practical completion, the subcontractor lodged a further charge. Chesterman J decided to approach the application on the basis that the applicant head contractor must show that the respondent subcontractor had no arguable case, and that the charge claimed is untenable.

The builder argued that the subcontractors' charge was invalid as it had been given outside the three month time limit (from completion of the subcontract works); and the amount claimed was for damages for breach of contract, not for moneys due under the subcontract.

Did the Act require the notice of claim of charge to be given within three months of the completion of the works the subject of the claim, or within three months of the completion of the subcontract works as a whole?

Chesterman J held that the work referred to in section 10(2) must therefore be the whole of the subcontract work if the sections are to be reconciled, and applied consistently.

In the Court of Appeal, Jerrard JA has considered and upheld both the test regarding what has to be proven for the charge to be cancelled and the decision in relation to the work as defined in section 10(2).[27]

Multiplex v Abigroup [2005] QCA 61 Section 10(2)—time by which notice to be given—the words 'the work is completed' refer to completion entire works not completion of the works the subject of the notice.

The application by the joint venturers under s21 for an order modifying Abigroup's notice of claim of a charge was an application in which the joint venturers had the onus of satisfying the judge that Abigroup had no arguable, or fairly arguable case in support of its claimed charges; the joint venturers were obliged to show that the basis of the charge claimed was untenable. It follows that such an application could not be determined against a subcontractor where there is evidence, capable of acceptance although disputed, of facts giving rise to an entitlement to claim a charge were disputed. The learned trial judge held as to the relevant onus and appropriate approach by a judge on a s21 application in the terms which I have quoted in this paragraph, relying in turn on remarks by Shepherdson J in Rapid Contracting Pty Ltd (in liq) v Multiplex Constructions Pty Ltd [1998] QSC 227 (27 October 1998), and by Thomas JA in that same case in appeal on 6 August 1999.[28]

The Act both does not have any section proceeding s10(2) to which the expression in s10(2) 'the work' would naturally refer; and does not have any preceding section authorising giving of a notice before the completion of the work in respect of which the charge is claimed.

... the construction of s10(2) that the learned trial judge accepted is the correct one, imposing one cut off date in respect of all notices of claims of subcontractor's charges. That date is ascertained by the application of s3B to the subcontract.

The judge noted that since most, if not all, building contracts for substantial sums contain a definition of either or both 'practical' or 'substantial' completion, it would have been easy enough for the legislature to declare in s3B that a building subcontract was completed when, by its terms, the subcontractor had achieved practical or substantial completion, had that been the purpose of s3B.

I agree with the learned trial judge that it was when the statutory definition in s3B was satisfied that the time bar provided in s10(2) started to run. I observe that contracting parties would usually find it relatively easy to identify when in fact the s3B definition of deemed completion applied. Accordingly I would dismiss the joint venturers' cross–appeal against that part of the judgment.

Abigroup's argument relied on the principles described in Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1954) 90 CLR 235 at 246–8 (per Dixon CJ) and 250–52 (per Kitto J), and repeated in Foran v Wight (1989) 168 CLR 385 at 417–9, in the judgment of Brennan J. Those were expressed in Peter Turnbull v Mundus Trading by Dixon CJ as being that it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof.

I also observe that the decision by Muir J in Qline Interiors concerned the position of a plaintiff who had delivered progress claims under a subcontract, which the recipient defendant was required by the contract to assess. The learned judge expressed the view that where such a claim had been delivered prior to the termination of the contract, but not assessed by the defendant in breach of its obligation to do so, then the court might proceed to decide, as a question of fact, the amount of the payment to which the plaintiff was entitled. The learned judge cited the principle which prevents a person from taking an advantage of the nonfulfilment of a condition the performance of which has been hindered by himself, and the related principle which 'exonerates one of two contracting parties from the performance of the contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party'.

Secured Creditor

In Re Stockport (NQ) Pty Ltd,[29] the issue which arose is how the administrators of Stockport were to deal with the creditors of Stockport who have lodged proofs of debt as creditors for the purpose of the administration of the Deed, and who also claim to be secured creditors of Stockport by virtue of the SCA and so may be entitled to recover some or all of their debts as a result of a statutory charge from moneys outside of the fund established under the Deed.

The key issue was whether any charge under the SCA does arise only upon the giving of notice by the several claimant creditors under s10 of the Charges Act. No notices under s10 were given before the commencement of the Deed.

Mansfield J held that creditors of Stockport who are entitled to a charge under s5 SCA on money payable to Stockport and who have given notice of the claim under s10 SCA after the commencement of the administration (being the date specified in the Deed pursuant to s444A(4)(i) of the Corporations Act) and whose claim has not been extinguished, or whose claim under the Charges Act has not been withdrawn, are secured creditors of Stockport for the purposes of s444D(2) of the Corporations Act and of the Deed, and are not bound by the Deed from realising their respective securities.

His reasons were that the SCA creates what is in effect a 'floating charge'. While it does not crystallise over or attach to the money owed from the employer to the superior contractor, until the giving of notice under s10, they pre–existed the giving of the notice under s10.

Accordingly, the rights of the chargees were not affected by the subsequent Part 5.3A administration.

Subcontractors need to be careful not to double dip as a secured creditor under the SCA and an unsecured creditor in the winding up: Re Surfers Paradise Investments Pty Ltd (in liq).[30]

There is no inconsistency between section 451D of the Corporations Act and section 15 of the SCA— they can and should be read together and a subcontractor can give a notice of charge during the administration.[31]

Piggy Backing

State of Queensland v Walter Construction Group[32] was a proceeding before Wilson J to enforce a charge.

In August 2003 the State of Queensland contracted Walter for the Mt Lindesay Highway Duplication. In February 2005 Walter was placed into voluntary administration, and by end of March 2005 was placed into liquidation. In May 2005 the State of Queensland paid monies into court in respect of the 28 notices of intention to claim charge. All of the notices of claim of charge were given after the contractor had gone into liquidation.

Section 15 of the SCA states that states that a charge is extinguished if the person claiming it fails to commence proceedings within one month after giving the notice of the claim of charge pursuant to s10.

A subcontractor gave a notice of claim but did not commencement proceeding within two months.

Another subcontractor, who gave a notice of claim of charge a few days later, commenced

proceeding on a date which was both within two months of its own notice and two months of the first subcontractors' notices.

More than two months after giving its notice of claim of charge, the first subcontractor applied to be joined as a party in the proceeding commenced by the second subcontractor. It was held by the Court of Appeal that is should be joined.

The court stated that there was no reason why s15 should be the dominant section. That was held to be so where more than one contractor has given a notice of claim of charge under s10 and one of them has commenced proceedings in accordance with the time limits in section 15(1). The proceeding in respect of a charge under the Act in section 15(1) includes an action brought on behalf of every other subcontractor pursuant to section 12(3)(b). Accordingly, as long as the party gives notice of claim of charge pursuant to s10 and becomes a party to the action pursuant to section 12(3)(b) the time limit stated in section 15(1) applies only to that action in respect of that claimant. It is irrelevant whether the claimant becomes a party to the action within the time stated in s15(1) for the commencement of the action.

Amendment of the Subcontractors' Charges Act

In 2002 a number of amendments were made to the Act. Section 12(3A) was amended to provide a subcontractor can only be deemed to have brought a charge where they have not only given their notice of claim pursuant to section 10 but also 'whose charge has not been extinguished under section 15'.

In relation to section 15 the timeframe for commencing proceedings in respect of the charge under section 15(1)(b) was changed from two months to one month.

Submissions and Analysis

One of the subcontractors (the twentieth) served its notice of claim of charge in February 2005 and commenced its proceed in April 2005. It argued that the claim was not extinguished as section 451D of the Corporations Act states that time under a statute does not run where a party is prevented from taking action due to a party being in administration.

Wilson J held [para 20–21] that as the twentieth subcontractor gave its notice of claim of charge during the period of administration it was prevented from commencing a proceeding during the period of the administration. Consequently, the one month period under section 15 of the Act did not run until the conclusion of the administration. As the twentieth subcontractor commenced its dealing within one month of the conclusion of the administration it was within time and was not extinguished by section 15(3). It was held that there was no inconsistency with section 451D of the Corporations Act and section 15 of the Act that they should be read together.

A number of other subcontractors (ninth, tenth, twenty–third and twenty–sixth) gave notices of claims of charge but did not commence the right proceeding in their own right. They argued that as other subcontractors had started proceedings within one month of the date on which each of them gave their notice of claim of charge they were deemed under section 12(3A) of the Act to have been commenced on behalf of the ninth, tenth, twenty–third and twenty–sixth subcontractors.

Wilson J considered the criteria laid down in s12(3A) that must be fulfilled where a subcontractor has not commenced proceedings

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within the one month limit. The subcontractor must be one:

1. who has given notice of claim of charge pursuant to s10;

2. whose charge has not been extinguished under s15; and

3. who in accordance with the rules of court and the Act becomes a party to the existing proceeding.

It was noted [para 25] that the first two are expressed in the past tense, while the third is expressed in the future tense. It was held that past and future are to be determined from the point at which the 'other' subcontractors proceeding is commenced. That is, a subcontractor can claim the benefit of proceedings commenced by another subcontractor where those proceedings are commenced within one month of the first subcontractor giving its notice of claim of charge and as long as it thereafter takes steps to be joined in the proceeding.

It was held that the amendment to s12(3A) made it clear that where another subcontractor does not commence proceedings within one month of the first subcontractors notice of claim of charge it is extinguished and will not be revived by another subcontractor outside the one month period.

Overall it was held that all subcontractors considered above had valid charges under the Act.

Does BCIPA make the SCA Redundant?

No. The case Belmadar Constructions v Environmental Solutions Interntaional[33] illustrates why.

The plaintiff, Belmadar, entered into a subcontract with ESI to carry out the earth works and to construct civil, structural and building work for the Mildura West project for about $4.5m.

In mid–October 2004, Belmadar asserted that its works had been brought to 'technical completion' and on 29 September 2004 submitted progress claim number 15 to ESI seeking approximately $2.5m.

The response of ESI by letter of 13 October 2004 was to approve a payment of only about $280,000. There seems to have been a difference as to the value of variations claimed.

On 21 October 2004 Belmadar set in train the adjudication proceeding under the Building and Construction Industry Security of Payment Act 2002 (Vic).

On 12 November 2004 Belmadar obtained an adjudication in the sum of $1,349,648 which was payable on 31 October 2004. Under s25 of the Victorian Act, ESI either had to pay that amount to Belmadar or to commence proceedings disputing the amount and to give security for that amount. (This was formerly the case under the equivalent NSW legislation.)

ESI did neither, so Belmadar was entitled to seek judgment for that amount plus interest. On 19 November 2004 Balmadar filed an originating motion in this proceeding seeking judgment for the adjudicated amount.

However, on 18 November, the Commonwealth Bank as chargee had appointed joint receivers and managers of the property of ESI. On 19 November 2004, ESI resolved, pursuant to s436A of the Corporations Act 2001, to appoint administrators under Part 5.3A. The consequence of the appointment of the administrators is to stay the proceeding.

On 16 December 2005 the creditors of ESI resolved that the company execute a DOCA and this was done on 6 January 2005. Clause 6 of the deed established a moratorium which prohibits creditors from instituting or prosecuting any legal proceeding in respect of its claim against the company.

Counsel for Belmadar referred Byrne J to Mansfield J's decision in Re Stockport (NQ) Pty Ltd.

Byrne J noted that this was a Federal Court decision about the SCA. Under this Act a subcontractor is entitled to a charge on money payable by the principal to the contractor to secure payment of money payable by the contractor to the subcontractor under the subcontract. By s10, a subcontractor who intends to claim a charge must give notice to the principal and, if the notice be not given, the charge does not attach.

Byrne J noted that in circumstances similar to the present, certain subcontractors of the contractor claimed to be its secured creditors by virtue of the statutory charge. They had, however, given s10 notices only after the commencement of the external administration of the contractor. Mansfield J construed the statute as giving to them a statutory charge arising from the terms of the statute; not upon the giving of the s10 notice. The giving of the notice is akin to the crystallising of a pre–existing floating charge. Accordingly, the rights of the chargees were not affected by the subsequent Part 5.3A administration.

In a case such as is presently before me, it is the taking of these steps after the commencement of the administration which would create a security which did not previously exist, thereby advantaging the creditor at the expense of the body of creditors.

Byrne J held that he should approach the situation in the same way as did Austin J in

the Summit Design case. It is important that once the processes for an orderly management and winding up of the affairs of a company in financial distress are set in train that the statutory rights of and limitations upon the rights of all concerned, including unsecured creditors under the Corporations Act 2001, be respected and given effect to. Nothing appears from the facts of this case to dictate a different approach.

One further consideration bears upon this question of principle. The procedure for adjudicating the claim of a subcontractor under the Act is, as I have observed, an interim one. It does not finally determine the entitlement of the subcontractor. The procedures for recovery against the principal have the same characteristic. In an insolvency situation it would be very undesirable that such interim relief which is available to a particular class of creditor should intrude upon the administration of the company at a time when all other entitlements are placed in suspension pending decisions as to the fate of the company and as to the getting in of and the distribution of its assets.

REFERENCES

1. Subcontractors' Charges Amendment Bill 2001, Explanatory Notes

2. [2004] QSC 198

3. Re Stumann v Spansteel Engineering [1986] 2 Qd R 471

4. Subcontractors' Charges Amendment Bill 2001, Explanatory Notes

5. See the Subcontractors' Charges Amendment Bill of 2001

6. [2001] QSC 089; (1999) 15 BCL 199

7. Re University of Queensland and Baulderstone Hornibrook Pty Ltd [2003] QSC 158

8. Re University of Queensland and Baulderstone Hornibrook Pty Ltd [2003] QSC 158

9. The Bill had to be reintroduced after the Queensland state elections on 7 February 2004, and on 18 March 2004 Minister Schwarten again read his second reading speech, which was essentially the same as the one read on 26 November 2003.

10. Building and Construction Industry Payments Act 2004 (Qld) Section 21(1)(a)

11. Building and Construction Industry Payments Act 2004 (Qld) Section 21(1)(b)

12. Building and Construction Industry Payments Act 2004 (Qld) Section 21(3)(c)(iii)

13 Building and Construction Industry Payments Act 2004 (Qld) Section 4(6)

14. Subcontractors' Charges Act 1974 (Qld) Section 10(2) and (3)

15. [2003] QDC 055

16. [2000] QSC 213

17. Unreported QSC 02/05/2003

18. Re University of Queensland [2003] QSC 158

19. Re University of Queensland [2003] QSC 158, para [35]

20. Re University of Queensland [2003] QSC 158, para [37]

21. State of Queensland v Walter Construction Group Limited [2005] QSC 241

22. [2003] QDC 10

23. Quality Concrete v Honeycombes Townsville [2005] QSC 12

24. [2003] QSC 173

25. Abigroup Contractors Pty Ltd v Multiplex Constructions Pty Ltd & Ors [2003] QCA 501

26. Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd [2004] QSC 198

27. Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd [2005] QCA 61

28. [1999] QCA 306

29. [2003] FCA 31; (2003) 44 ACSR 324

30. [2003] QCA 458

31. State of Queensland v Walter Construction Group Limited [2005] QSC 241

32. [2005] QSC 241

33. [2005] VSC 24