CONSTRUCTION CLAIMS AND DISPUTES

CASE LAW FACT SHEET

THE FACTS:

F K Gardner & Sons v Dimin

[2007] 1 Qd R 10

[2006] QSC 243 · Supreme Court of Queensland

A SUMMARY OF THE CASE THAT MAKES A PAYMENT CLAIM SENT TOO EARLY WORTH NOTHING





FACT SHEET

Too early = no claim and the Gardner Case

Why a claim sent before its date gets you nothing

What was this case about?

A builder was putting up an apartment block in Queensland. An $11.5 million job.

The contract said progress claims were made on the 28th of each month, for work done up to the 28th.

The builder put in its April claim on the 28th. It skipped May. Then it sent its next claim on 20 June, for $1,073,849.01. The owner's superintendent got it on 22 June.

The superintendent's payment schedule came back on 10 July. The builder said that was too late, and went to court for the full $1,073,849.01 as a debt. **It lost.**

What was the problem?

The builder hadn't claimed in May. It could still have claimed the work done up to 28 May. **Late was fine.**

But this claim was for work done in June. Under the contract, June work couldn't be claimed until 28 June. On 20 June the builder had no right to be paid for it, so it had no right to claim it. **Early was fatal.**

THE STING

The builder said the payment schedule was late.

The Judge never had to decide whether it was. In nearly any other story, a late schedule hands the claimant the full amount. Here it counted for **nothing**, because there was no valid claim for the schedule to answer.



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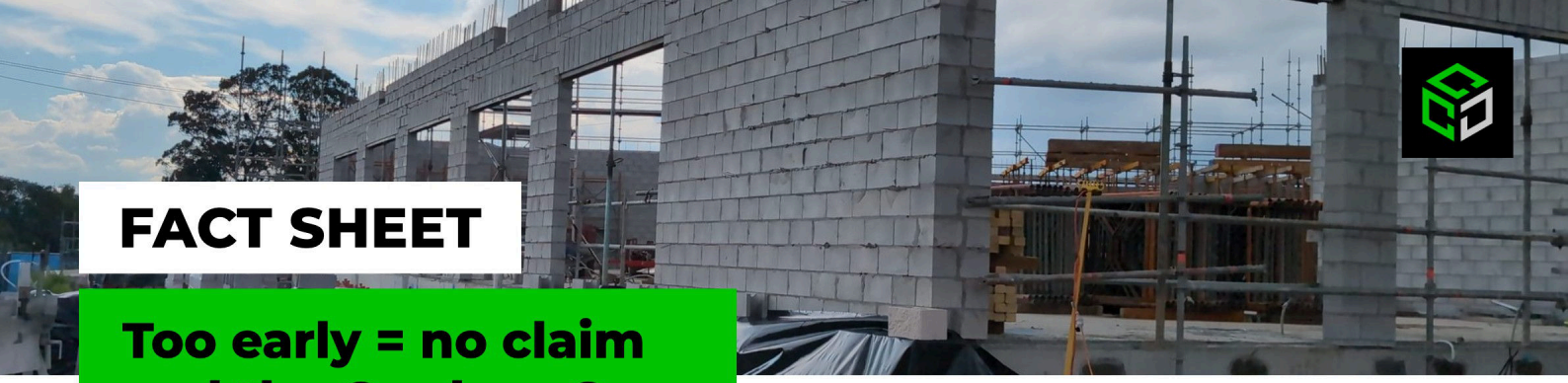
What the Court decided

This is a Queensland Supreme Court decision. Queensland courts and adjudicators still follow it under BIFA (formerly BCIPA). Justice Lyons ruled:

- Your right to a progress payment starts **from** each reference date. Not before.
- Only someone who has that right can send a payment claim.
- Work done up to 28 May could have been claimed. The June work couldn't be claimed until 28 June.
- On 20 June the builder had no right to be paid for the June work, and couldn't even claim one.
- The Act's words "or claims to be entitled" didn't save it. You can't claim a right that doesn't exist yet.
- The builder argued the Act's time limit let it claim any time inside it. That failed too. The right to claim still only starts on the claim date.
- No valid claim meant the timing of the payment schedule didn't matter. No debt. The builder's application was dismissed.

What about the other states?

Queensland	An early claim fails. That's this case.
NSW	Same result. The High Court said so in *Southern Han*, and nothing in the NSW Act saves an early claim.
Victoria	**Victoria is different.** For claims served on or after 15 April 2026, an early claim isn't thrown out. It's treated as served on the first day it was allowed, and the builder's clock starts from then.
SA, Tasmania, the ACT and WA	Each Act sets the day a claim can be made from, and none of them saves an early one. Treat early as dead.
NT	Your contract sets your claim date. Go by the contract.



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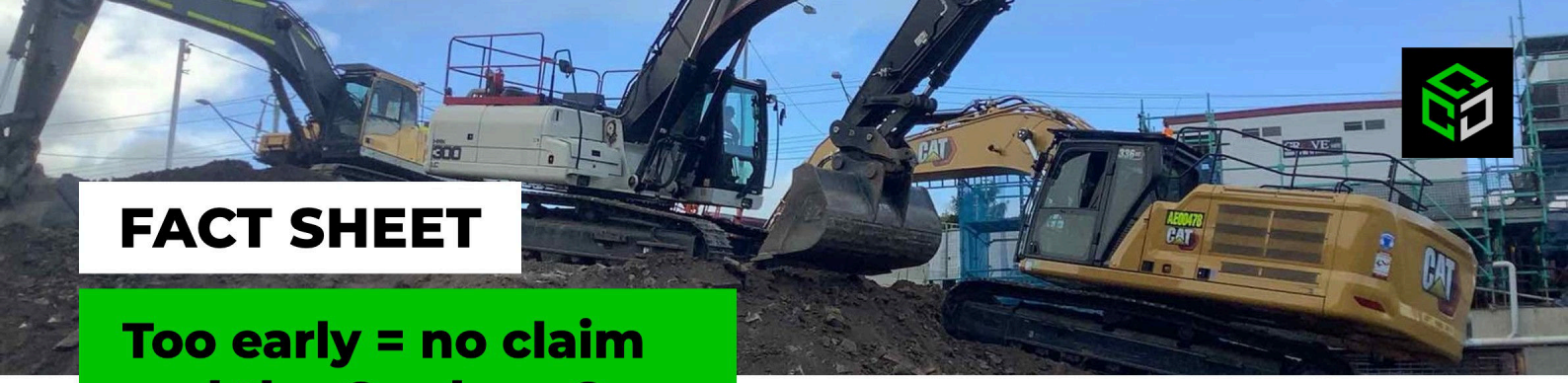
In simple terms

- **Late is fine. Early is fatal.** You can claim last month's work after its date has passed. You can't claim this month's work before this month's date.
- Outside Victoria, early isn't keen. It's **fatal**.
- Even in Victoria, going early gets you nothing. The clock still starts on your claim date.
- One day early is the same as a month early.
- A late payment schedule won't rescue an early claim.

On or after your date. Never before.
That works in every state.

What this means for subbies

- Find your claim date before you send anything. It's in your contract. If the contract doesn't say, it's usually the last day of the month.
- Send your claim **on** that date or after it. On the day itself is fine.
- Don't bank on a contract clause that says an early claim "is taken to be made" on the claim date. A clause can't give you a right the Act hasn't given you yet.
- Gone early? Don't argue about it. Put the same amount in your next claim, sent on or after the next claim date.
- One claim per claim date. Two claims against the same date and the second one's no good.



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Quick example

Your contract says:

> *"Payment claims are to be made on the 25th of each month."*

You were flat out last month and didn't claim. On the 21st of this month you send one claim covering this month's work.

The builder says nothing. Fifteen business days go by. No payment schedule.

You think the full amount is now due. **Here's the truth:**

- ✗ This month's work went in four days early. That's the Gardner mistake.
- ✗ There's nothing for the builder to answer, so saying nothing costs it nothing.

Correct move:

- ✓ Claim last month's work now, or wait until the 25th and put it all in one claim.

BOTTOM LINE

Your right to claim starts on your claim date. Not the day before.

Late is fine. Early is fatal. However late the builder's reply, an early claim isn't a claim.

Suffer from insomnia? - read the full judgment

If you're really keen to read exactly what Justice Lyons had to say, or you just want something to put you to sleep tonight, you can read the full judgment **here**.



Not Sure When Your Claim Date Is?

If your builder's gone quiet on a claim and you're not sure it went in on the right day, reach out. I'll go through your contract and your dates with you.



PHONE

0418 168 368

EMAIL

jason@ccandd.com.au

WEB

www.ccandd.com.au

TALK TO JASON

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