

JUDGEMENT: Tutt DCJ . District Court of Queensland. Brisbane 18th December 2008

Introduction:

[1] This is an application by the plaintiff ("applicant") for summary judgment to be entered against the defendant ("respondent") pursuant to r 292 of the Uniform Civil Procedure Rules 1999 (Qld) ("UCPR"). The proceeding before the court is an action in debt by the applicant to recover from the respondent the sum of \$107,061.50 (inclusive of GST) pursuant to the provisions of s 19 of the Building and Construction Industry Payments Act 2004 ("BCIPA").

Background facts:

- [2] The applicant is a licensed builder and carries on business as a construction manager. At the relevant time the respondent was undertaking a townhouse development at Deception Bay, Queensland.
- [3] The applicant's claim is that on or about 27 September 2006 the applicant and respondent entered into an oral agreement whereby:
- (a) the applicant would provide construction management services to the respondent for the duration of the development (160 working days);
 - (b) the respondent would pay to the applicant:
 - (i) a fixed fee of \$40,000 (plus GST); and
 - (ii) an amount equal to 40% of any saving achieved by the respondent consequent upon the applicant's input into the tender process (plus GST).¹
- [4] It is agreed that the respondent has paid the plaintiff the sum of \$40,000.00 plus GST pursuant to the terms of the contract but the dispute between the parties is in respect of the applicant's claim that the respondent is required to pay the additional sum which represents the alleged savings achieved by the applicant for the respondent's benefit.
- [5] The applicant's application is supported by the affidavits with exhibits of Carmel Turner and James Stack, company directors, filed 28 March 2008.

The law:

- [6] Rule 292 of the UCPR provides as follows:
- "(1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.*
- (2) If the court is satisfied that –*
- (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and*
 - (b) there is no need for a trial of the claim or the part of the claim;*
- the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."*
- [7] The test to be applied when considering whether summary judgment should be entered for either a plaintiff or defendant in a proceeding under rr 292 and 293 of the UCPR has been the subject of consideration by our Court of Appeal in the matter of **Deputy Commissioner of Taxation v Salcedo** [2005] QCA 227.
- [8] As stated by Williams JA at paragraph [11] with whom McMurdo P and Atkinson J agreed:
- "Rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in Part 24 of the Civil Procedure Rules (UK) which came into force in the United Kingdom in 1999. In **Swain v Hillman** [2001] 1 All ER 91 the Court of Appeal had to consider rule 24.2, the equivalent of rule 292. Lord Woolf MR said at 92:*
- 'The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.'*
- Later, again speaking of the rule, he said at 94:*
- 'It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant as a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.'*
- In his reasons at 95, Pill LJ accepted that the term 'real' was used in contradistinction to 'fanciful'. The third member of the court, Judge LJ, whilst recognising that summary judgment was a 'serious step', went on to say at 96:*
- 'This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable.'*
- [9] It is unnecessary for me to repeat what Williams JA said further in paragraphs [12] to [17] inclusive of his judgment but it is suffice to say that those paragraphs provide a succinct summary of the "test" to be applied by a judicial officer when considering an application for summary judgment under the UCPR. Further to this the comments of Atkinson J at paragraphs [42] and [45] are also apposite.

¹ Applicant's Statement of Claim filed 11 February 2008 at paragraph 2; Applicant's written submissions at paragraph 25.

BCIPA:

- [10] Further to the above principles to be applied when considering general applications of this nature, the current application must also be considered in the light of the somewhat unique provisions of the BCIPA.
- [11] The BCIPA “applies to construction contracts ... whether written or oral, or partly written and partly oral.”²
- [12] The “Object of Act” is contained in s 7 and provides:
“The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person –
(a) undertakes to carry out construction work under a construction contract; or
(b) undertakes to supply related goods and services under a construction contract.”
- [13] A “construction contract” is defined under the BCIPA in the following terms:
“Construction contract means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to another party.”³
- [14] Section 12 of the BCIPA provides:
“Rights to progress payments
From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.”
- [15] “Reference date” is also defined and includes:
“(b) if the contract does not provide for the matter –
(i) 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
(ii) the last day of each later named month.”
- [16] Section 17 of the BCIPA is a core section for present purposes and contains the specific provisions for the recovery of a progress payment under the BCIPA and the mechanism to achieve that payment.
- [17] Essentially the claimant must in the first place “serve a payment claim on the person who under the construction contract concerned is or may be liable to make the payment”⁴ and:
“(2) A payment claim –
(a) must identify the construction work or related goods and services to which the progress payment relates; and
(b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and
(c) must state that it is made under this Act.”
- [18] The payment claim must also be “served” within a certain timeframe.⁵
- [19] Section 18 of the BCIPA sets out what a respondent to a payment claim may do in reply to a claim and that is to serve “a payment schedule on the claimant”⁶ and in particular s 18 provides:
“(4) Subsection (5) applies if –
(a) a claimant serves a payment claim on a respondent; and
(b) the respondent does not serve a payment schedule on the claimant within the earlier of –
(i) the time required by the relevant construction contract; or
(ii) 10 business days after the payment claim is served.
(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”
- [20] Section 19 of the BCIPA provides for the “Consequences of not paying claimant if no payment schedule” (is served by a respondent to a claim) and relevantly subsection (2) provides:
“(2) The claimant –
(a) may –
(i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; ...
(4) If the claimant starts proceeding under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
(a) judgment in the favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
(b) the respondent is not, in those proceedings, entitled –
(i) to bring any counterclaim against the claimant; or
(ii) to raise any defence in relation to matters arising under the construction contract.”

² Section 3(1)(a) of the BCIPA.

³ Schedule 2 to the BCIPA.

⁴ Section 17(1) of the BCIPA.

⁵ Section 17(4) of the BCIPA.

⁶ Section 18(1) of the BCIPA.

- [21] In keeping with the "Object of Act", I interpret the legislation to mean that if a respondent to a payment claim fails to serve "a payment schedule" on the claimant a statutory debt arises in the respondent to pay the claimant,⁷ which may be recovered "in any court of competent jurisdiction" and pursuant to s 19(4)(b) a respondent is expressly prohibited from bringing "any counterclaim against the claimant; ... or to raise any defence in relation to matters arising under the construction contract."
- [22] Although Part 3 of the BCIPA has "guillotine-like" consequences for a respondent which fails to reply under s 18 to a "payment claim", a respondent is not forever excluded from challenging the merits of the debt incurred, as s 100 preserves a respondent's rights under "a construction contract" to pursue "any civil proceedings" to establish or enforce any right which may accrue to a respondent under a construction contract.

Applicant's submissions:

- [23] The applicant submits that it is entitled to the relief claimed against the respondent on the following bases:
- (a) that it has performed the services it agreed to provide under its contract with the respondent and further "achieved savings on the tender price and the value of the additional works for the defendant in the sum of \$243,324.00 (exclusive of GST)";⁸ and
 - (b) that pursuant to the terms of its contract with the respondent, the applicant is entitled to the further payment of \$97,329.60 plus GST, being 40% of the alleged savings on the tender price.
- [24] The applicant further submits that:
- it is entitled to the relief sought as the BCIPA "provides a statutory mechanism for the recovery of payments pursuant to a building contract";⁹
 - "On 6 December 2007 the Applicant served a payment claim on the respondent. The payment claim:
 - (i) was served by pre-paid post and addressed to the principal place of business of the Respondent, being 2A Pine Mountain Court, Carina in the State of Queensland;
 - (ii) identified the construction work or related services to which the claim related;
 - (iii) stated the amount payable in accordance with the claim;
 - (iv) stated that it was made pursuant to the provisions of the BCIPA;
 - (v) was not served prior to the reference date;
 - (vi) was served within 12 months from the date on which the work was completed."¹⁰
 - "...the Respondent has failed or refused to serve a payment schedule responding to the payment claim";¹¹
 - it is a company entitled to a progress payment pursuant to a contract to carry out building works and/or related goods and services;¹²
 - the respondent is a person under the construction contract who may be liable to make the progress payment to the applicant;¹³
 - it has complied in all respects with the requirements for delivery of a payment claim under the BCIPA;¹⁴
 - Section 19 of the BCIPA imposes a strict liability on the respondent in respect of the statutory debt owing to the applicant where no payment schedule served;
 - the respondent is prohibited from bringing a counter-claim or raising any defence in relation to the matters arising under the construction contract in the circumstances;
 - consequently the applicant is entitled to summary judgment against the respondent for the amount claimed together with interest.

Respondent's submissions:

- [25] The respondent opposes the application and in general terms submits that:
- "the payment claim to be valid must comply with ss 12 and 17 of the BCIPA";¹⁵
 - the invoice that was rendered (by the applicant) does not conform with the BCIPA because of the reference date";¹⁶
 - for a party to avail itself of the provisions of the BCIPA "there ought to be strict compliance with the Act on the part of the applicant";¹⁷
 - the claim does not identify the work as required under s 17 of the BCIPA in that it does not identify the construction work or related goods and services to which the progress payment relates;
 - in any event there are "factual issues" which would preclude the granting of a summary judgment to the applicant.

⁷ Section 18(5) before.

⁸ Applicant's Statement of Claim at paragraph 7; Applicant's written submissions at paragraph 26.

⁹ Sections 3, 7, and 8 of the BCIPA.

¹⁰ Applicant's written submissions at paragraph 28.

¹¹ Ibid paragraph 29.

¹² Section 12 of the BCIPA.

¹³ Section 17(1) of the BCIPA.

¹⁴ See s 103 of the BCIPA; s 39 of the Acts Interpretation Act 1954.

¹⁵ Respondent's written submissions at paragraph 3.

¹⁶ Hearing Transcript (H.T.) page 13 line 1.

¹⁷ H.T. page 13 line 9.

Applicant's response:

[26] In response the applicant submits that the payment claim made to the respondent in December 2007 complied with the BCIPA and although the same invoice dated "27/09/2007" was forwarded "on 6 December 2007" it is noted thereon that "this claim is made under the Building and Construction Industry Payments Act 2004" and sufficiently identifies "the construction work and services" to which the claim relates.

Findings:

- [27] On the material filed and the submissions made I make the following findings:
- (i) that on or about 27 September 2006 the applicant and respondent entered into an oral agreement which satisfies the definition of a "construction contract" within the meaning of that term as set out in the BCIPA;
 - (ii) between September 2006 and September 2007 the applicant provided "construction work or supply related goods and services under the contract" thereby entitling it to a "Right to progress payments" under the BCIPA;¹⁸
 - (iii) on 6 December 2007 the applicant served a payment claim on the respondent which complied with s 17 of the BCIPA in that the claim was forwarded to the respondent "by ordinary prepaid post to the defendant's (respondent's) principal place of business at 2A Pine Mountain Court, Corinna, in the State of Queensland" and otherwise complied with provisions of the section;¹⁹
 - (iv) the respondent has failed to serve a payment schedule on the applicant within the terms of s 18 of the BCIPA as a consequence of which the respondent is liable to the applicant for the amount claimed as a debt owing pursuant to s 19(2)(a)(i) of the BCIPA;
 - (v) I find further that the applicant is entitled to the relief claimed herein as the authorities of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Anor*²⁰ and *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)*²¹ support the view that if a respondent fails to provide a payment schedule in a timely way and in compliance with the legislation, then it cannot seek to resist a summary judgment application on the grounds that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s 17.²²
- [28] As to whether "there are factual issues" between the parties which might otherwise preclude the granting of relief under r 292(2) of the UCPR, these are matters which the respondent is entitled to challenge in another forum but not sufficient to resist the current application before the Court.
- [29] It follows therefore that the applicant is entitled to summary judgment against the respondent in the sum of \$107,062.56.00 inclusive of GST together with interest thereon as allowed by law and costs.
- [30] The parties to have liberty to apply.

- ORDER:**
1. Judgment for the applicant against the respondent in the sum of \$107,062.56.
 2. Interest on judgment sum as allowed by law.
 3. The respondent to pay the applicant's costs of and incidental to the application to be agreed or assessed on a standard basis.
 4. Parties to have liberty to apply.

P W Telford for the applicant instructed by BCI Duells Lawyers
C F O'Meara for the respondent instructed by Michael O'Brien Lawyers

¹⁸ Section 12.

¹⁹ See affidavit of Carmel Turner filed 28 March 2008 at paragraph 2 and Exhibit "CT1"; See also a number of authorities which deal with the format of the payment claim to be delivered and the manner in which it "must identify the construction work or related goods and services to which the progress payment relates" including: *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [76] and [77]; *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232 at [11]; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [65]-[68]; *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20]; *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited* [2003] NSWSC 1103 at [52]-[55]; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 at [14], [17] [21]; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)* [2005] NSWCA 409; *Vanbeelan v Blackbird Energy Pty Ltd* [2006] QDC 285.

²⁰ [2004] NSWCA 394.

²¹ [2005] NSWCA 409.

²² *Brooke Hollow Pty Ltd v R&R Consultants Pty Ltd* (2006) NSWSC 1 at 44-49 per Palmer J referred to by Forde DCJ at paragraph [11] in *Impulse Electrical (OUST) Pty Ltd v Mother Nature's Chermiside Pty Ltd* (2007) QDC 023.