

JUDGEMENT : Martin DCJ District Court Brisbane 22 October 2007

[1] By Originating Application, the applicant seeks judgment against the respondent pursuant to s 19 of the Building and Construction Industry Payments Act 2004 and r 658 of the Uniform Civil Procedure Rules 1999 in the sum of \$87,231.20, together with interest pursuant to s 67P of the Queensland Building Services Authority Act 1991.

[2] The respondent seeks orders in the alternative but including an order that the Originating Application be dismissed.

AFFIDAVIT CONTENTS

By Affidavit sworn 5 September 2007, the applicant asserted the following:

(a) The applicant carries on the business of decorative concrete resurfacing work for building projects under the name "G & L Beer Covercreting".

(b) On or about 20 January 2006 the applicant provided a quote to an employee of the respondent in respect of concrete resurfacing work (known as stencilcreting) for a building project at Burleigh Heads in the State of Queensland known as "Swell Burleigh Heads" (Swell).

(c) On the same day the respondent's employee provided a letter of acceptance with two copies of a subcontract agreement in respect of the work to be performed by the applicant.

(d) The applicant signed both copies of the subcontract and returned one to the respondent. An unsigned copy of the subcontract is annexed to the applicant's affidavit.

(e) The applicant commenced work the day following acceptance. The construction work that the applicant performed included preparing and cleaning bare concrete areas such as the balconies and driveways for the project and applying primers, base coats, stencilling, colouring and sealants over the concrete.

(f) On 7 August 2007 the applicant personally served on the respondent's office at Level 10, K Tower on the corner of Wickam and Ballow Streets, Fortitude Valley, a payment claim dated 5 August 2007 in the sum of \$87,231.20 made pursuant to the Building and Construction Industry Payments Act 2004.

(g) The respondent's time for service of a payment schedule in response was 10 business days after the service of the payment claim. The applicant did not receive from the respondent a payment schedule by 21 August 2007 (or at all).

(h) The payment claim served on 7 August 2007 remains unpaid.

[4] The respondent's managing director, Mr Geoffrey Murphy, by affidavit sworn 18 September 2007 asserted, inter alia, the following:

(a) Stencilcreting, or covercreting as it is also known, involves the application of a textured covering by spray painting it on to a prepared concrete surface. Spray painting is the application of paint by the use of a mechanical spray gun whether operated by air pressure or using a mechanical pump system. A sealer is then applied using a roller and tray.

(b) The project (Swell) comprised a hotel (148 hotel units), tavern, café, car parking and strata titled residential units (82 in number).

(c) The construction involved seven floors over several floors of car parking.

[5] The assertions of Mr Murphy, set out above, were not contested by the applicant.

[6] By affidavit sworn 14 September 2007, Mr Andrew Duncan Sinclair-Ford stated that on 27 August 2007 he performed a licence search on the Queensland Building Services Authority website and the search revealed that Gregory John Beer (the applicant) obtained a restricted painting and decorating licence. The licence search result is exhibit "ASF1" to the affidavit. The licence has a condition attached to it, namely, "restricted to residential spray on painting only". The licence start date was 28 April 2005.

[7] The evidence in relation to the applicant's licence is not contested.

SECTION 42 QUEENSLAND BUILDING SERVICES AUTHORITY ACT 1991 (THE ACT)

[8] The respondent has attacked the applicant's claim on a number of bases. One such basis is that the applicant's entitlement is prohibited by s 42 of the Act.

[9] S 42 of the Act relevantly provides as follows:

(1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act...

(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so....

(9) A person who contravenes this section commits an offence...

[10] The fundamental issue for determination by me is the interpretation of the words "a contractor's licence of the appropriate class under this Act" as used in s 42(1) of the Act.

[11] The respondent relied in part on the decision in **Cant Contracting Pty Ltd v Con Casella & Anor** [2006] QCA 538. In that case the Court of Appeal held that s 42 of the Act applied to defeat a claim under the Building and Construction Industry Payments Act 2004 if the builder did not hold the relevant licence.

[12] In this case it seems to have been accepted that the "painting and decorating licence" was a licence of the appropriate class for the type of work undertaken by the applicant. However, clearly the condition imposed on the

licence restricted the applicant's use of spray painting to "residential" only. Whatever "residential" may mean precisely, I am satisfied that the spray painting performed by the applicant on the Swell project was well beyond the restriction imposed on the licence. In any event, Counsel on behalf of the applicant informed me that for the purpose of this argument "the applicant concedes that the work that was done falls outside the restriction...". (T15 L40)

- [13] The question for determination is whether the "appropriate class" of licence in s 42(1) is to be read strictly so as to exclude a work-restrictive condition on the licence, or, whether the "appropriate class" of licence is to be read subject to any work-restrictive condition on a licence. Counsel for the applicant urged the former interpretation but conceded that if the latter interpretation were correct, the applicant could not succeed (T15 L40-50).

THE APPLICANT'S ARGUMENT

- [14] In support of the interpretation urged on behalf of the applicant, Counsel pointed to s 42 of the Act being a penalty provision and submitted that such a provision must be interpreted narrowly. Counsel also pointed to Pt 7 Div 4 of the Act which provides for disciplinary proceedings against licensees for contravention of, inter alia, a licence condition. Counsel for the applicant submitted that the Act sets up two levels of control:

"If you breach the lower level, the conditions imposed on the licence, then as a consequence you are exposed to disciplinary proceedings.

If you breach the upper level, the class of licence, then you are also exposed to the ramifications of s 42..."

- [15] Whilst s 42 is a penal provision and also provides for severe consequences otherwise, in interpreting the provision, one must have regard to the purpose of the legislation. A primary object of the Act is to regulate the building industry to ensure the maintenance of the proper standards in the industry (s 3). The obvious purpose of s 42 of the Act is to prohibit a person from carrying out building work unless licensed for that work.

- [16] Counsel for the applicant further argued that there was a need to interpret s 42(1) narrowly because of "the uncertainty and interference to the building industry that would arise if the section were to include the condition attached to those licences...".

By way of example, Counsel referred to the conditions in relation to financial circumstances imposed by s 35(3) of the Act. Counsel submitted:

"...If at any time during the period of the contract, the licensee's financial circumstances fail to satisfy the relevant financial requirements stated in the board's policies, the licensee would be in breach of the conditions of its licence and would be in breach of s 42(1)..."

With respect, there is no merit in this argument. A breach of a condition in relation to financial circumstances is not within the purview of s 42.

OTHER PROVISIONS IN PART 3 OF THE ACT

- [17] Pt 3 of the Act deals with all aspects of "Licensing". S 42 is found in Div 7 of Pt 3, which division is headed "Requirement to be licensed". Div 1 of Pt 3 provides for "Classes of licences". S 30 of Div 1 provides that licences are to be divided into classes by regulation. Pt 41 of the regulations provides for the painting and decorating licence. Pt 41 sets out, inter alia, the qualifications and experience necessary for such a licence. Div 2 of Pt 3 is headed "Entitlement to licence" and under s 31 of the Act, a person is entitled to a licence if the authority is satisfied, inter alia, that the person has the qualifications and experience required by the regulation in relation to the licence of the relevant class. Div 3 of Pt 3 is headed "Grant of licence". S 34 of that division provides relevantly that if the authority is satisfied that the applicant is entitled to a licence, the authority must issue a licence of the appropriate class.

- [18] Div 4 of Pt 3 provides for "Conditions of licence". S 35(1) provides:

"A licence may be granted subject to such conditions as the authority considers appropriate"

- [19] Div 6 of Pt 3 is headed "The register". Consistently with s 35(1), s 39 of that division provides, relevantly, that the register must include the particulars in relation to each licensee of "the class of licence held by the licensee and any special conditions to which the licence is subject".

- [20] Sch 2 of the Act, the dictionary, provides: "condition includes a limitation or restriction."

CONCLUSION

- [21] In my opinion, a "licence of the appropriate class" in s 42(1) is to be read subject to any work-restrictive condition on a licence. To interpret the provision otherwise would render ineffective the imposition of work-related conditions on a licence and defeat the obvious purpose of s 42 of the Act. The words "licence of the appropriate class" are to be interpreted with regard to the purpose of s 42 and to the mischief the section is designed to overcome.¹

- [22] In *Cant*, the Court of Appeal was not concerned with the argument before me. However, McMurdo J stated what is, in my respectful view, the plain meaning of s 42 in the context of the Act:

"S 42 of the Queensland Building Services Authority Act 1991... prohibits a person from carrying out, or undertaking to carry out, building work unless that person holds a licence which is appropriate for that work." (Emphasis added).

- [23] By virtue of s 35(1) of the Act, the applicant's licence of the specified class (painting and decorating) was granted subject to a restriction that he was permitted to perform residential spray on painting only. The restriction

¹ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

prohibited the applicant from spray on painting of the Swell Project. In my view, the applicant was therefore relevantly unlicensed.

[24] It follows that, in my view, the applicant contravened s 42(1) of the Act and must therefore fail on his application. It is unnecessary to traverse the other issues raised on behalf of the respondent.

[25] I will hear submissions as to the appropriate orders.

Mr. F. G. Forde for the applicant instructed by Clayton Utz

Mr. B. Codd for the respondent instructed by Dibbs Abbot Stillman.