

**JUDGMENT : Forde DCJ.** District Court of Queensland. Brisbane. 2<sup>nd</sup> March 2007

**Introduction**

- [1] By a tender dated 4 September 2006,<sup>1</sup> the applicant, Impulse Electrical (Aust) Pty Ltd, offered to carry out the supply and installation of a range of electrical work for the respondent, Mother Natures, at Westfield Shopping Centre, Chermshire, a northern suburb of Brisbane. The tender price of \$85,048.000 excluding GST was accepted by the respondent's agent, Remedial Building Services by facsimile on 24 September 2006.<sup>2</sup> A deposit of 10% was payable to the applicant. There was a request to commence work immediately as it was required to be completed by 15 October 2006. It was not suggested that Remedial Building Services did not have the necessary authority to so contract.
- [2] In fact, it appears that work commenced earlier than this 24 September 2006.<sup>3</sup> A Progress Claim No 1 was tendered through the applicant's solicitor at the hearing. It amounted to \$8,504.80 excluding GST. The due date for payment was given as 26 September 2006. A subsequent Progress Claim No 2 was issued on 27 October 2006.<sup>4</sup> The previous amount of \$8,504.80 was deducted leaving \$84,055.15 owing excluding GST. The latter figure included an additional variation of \$7,511.95. Subsequently, the Remedial Building Services wrote to the applicant and referred to incomplete works and asked it to revise the claim, including a variation.<sup>5</sup> Subsequently, on 7 December 2006, an amended Progress Claim No 2 was sent by the applicant to the respondent. It accepted the variations and the Value of Completed Work was given as \$90,133.59 with reference to the Previous Value of Work Completed of \$8,504.80. The amount claimed was \$89,791.67. In other words, it was an amended claim, although the original date of 27 October 2006 was kept, by mistake it is suggested by Ms Bonnett.
- [3] The claim was made under the Building and Construction Industry Payments Act 2004 (Qld).<sup>6</sup> The applicant seeks summary judgment under the provisions of that Act in the sum of \$89,791.67. In her affidavit, Ms. Bonnett states that the work was carried out.

**Relevant Legislation**

- [4] The relevant provisions of the *Building and Construction Industry Payments Act 2004 (Qld)* are as follows:
- Section 7 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.*
  - Section 8 provides: *How object is to be achieved - The object is to be achieved by—*
    - (a) *granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and*
    - (b) *establishing a procedure that involves—*
      - (i) *the making of a payment claim by the person claiming payment; and*
      - (ii) *the provision of a payment schedule by the person by whom the payment is payable; and*
      - (iii) *the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and*
      - (iv) *the payment of the progress payment decided by the adjudicator.*
  - Section 12 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.*
  - Section 17 provides: *Payment claims –*
    - (1) *A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).*
    - (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.*
    - (3) *The claimed amount may include any amount—*
      - (a) *that the respondent is liable to pay the claimant under section 33(3); or*
      - (b) *that is held under the construction contract by the respondent and that the claimant claims is due for release.*
    - (4) *A payment claim may be served only within the later of—*
      - (a) *the period worked out under the construction contract; or*

<sup>1</sup> Exhibit "MB 1 "to the affidavit of Margaret Anne Bonnett

<sup>2</sup> Exhibit "MB2"

<sup>3</sup> Exhibit 3

<sup>4</sup> Exhibit "MB3"

<sup>5</sup> Exhibit "MB4"

<sup>6</sup> the "Act"

- (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
- (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.
- Section 19 provides: Consequences of not paying claimant if no payment schedule -
    - (1) This section applies if the respondent—
      - (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
      - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
    - (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; or
        - (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
      - (b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.
    - (3) A notice under subsection (2)(b) must state that it is made under this Act.
    - (4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
      - (a) judgment in 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.
  - Section 100 provides: Effect of pt 3 on civil proceedings -
    - (1) Subject to section 99, nothing in part 329 affects any right that a party to a construction contract—
      - (a) may have under the contract; or
      - (b) may have under part 230 in relation to the contract; or
      - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.
    - (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
    - (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
      - (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
      - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.
  - Schedule 2 Dictionary provides:

**Reference date**, under a construction contract, means—
    - (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction 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 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.

**Progress Payments**, means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section—
    - (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
    - (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or...

[5] It is not argued that the Progress Claim failed to identify the work carried out, the amount and that the claim was made under the Act. In fact the schedule to Exhibit "MB5" accepts that some of the work was not carried out and the claim is adjusted downwards to reflect that fact. It also deletes one of the details relating to variations to reflect the submission of the respondent's agent Remedial Building Services. No specific dates were given for the progress payments. In that event, paragraph (b) of the definition "reference date" is applicable. For example,

Progress Claim No 1 the reference date was 30 September 2006 and for Progress Claim No 2 was 31 October 2006 or a later date given the amended claim. One can infer that the work was done by then. Subsequently, when the Remedial Building Services asked for an adjustment for incomplete work it was reflected in a subsequent Progress Claim which in effect was Claim No 2 in an amended form. There was no further claim for work done.

- [6] Further, it is not argued that the electrical work is not “construction work” within the meaning of s 10 of the Act. It is also noted that as the applicant has proceeded under s 19(2)(a)(i) of the Act, the respondent is not entitled to bring a counter claim or raise any defence in relation to matters arising under the construction contract. Section 100 provides that the prompt recovery of a progress payment is without prejudice to other rights the parties may have.

#### Issues on hearing

- [7] The applicant argues that no payment schedule was received from the respondent pursuant to s 18(2) of the Act. In that event, it was submitted that it is entitled to payment pursuant to s 18(5). Section 19(2)(a)(i) allows the applicant to proceed to recover the amount of a debt in a summary way by an originating application.<sup>7</sup>
- [8] Mr Matthews for the respondent in his oral address suggested that it was implied in the contract that the applicant was not entitled to be paid further until it completed the works under the contract. That argument overlooks the statutory requirement which defines “reference date” absent any such provision in the contract. The respondent contends that the applicant cannot serve more than 1 payment claim in relation to each reference date under the construction contract.<sup>8</sup> It further contends that there is a serious factual contest as to whether the applicant performed the work described in Exhibit “MB5”. It was submitted further, as it has not proved when the work was commenced, that the applicant had no right under s 12 of the Act to a progress payment as defined. The final argument was that at the time the payment claim was posted on 7 December 2006, the entitlement to a progress claim had not arisen. In some way, the last point is tied to the previous point. In the absence of any reference dates under the contract, the relevant reference date is “the last day of the named month in which the construction work was first carried out” and “the last day of each later named month.”<sup>9</sup> It has been observed<sup>10</sup> that the definition of “progress payment” in s 13 and as defined in the Act can include a claim for the whole price of the contract. Exhibit 2 establishes that the work commenced in September and that a progress claim was made for that. Thus, the last day of September was the first relevant “reference date” and thereafter October 31 and so on.

#### The “reference date” and the “progress claims”

- [9] After the facsimile dated 29 November from the respondent’s agent,<sup>11</sup> one can infer that no further work was done but rather adjustments were made resulting in the amended Progress Claim No 2 sent on 7 December 2006. There is nothing remarkable about sending successive claims which may include earlier claims. Such claims can be made for up to 12 months.<sup>12</sup> The equivalent New South Wales legislation is the *Building and Construction Industry Security of Payment Act 1999* (NSW). The Court of Appeal in *Falgat Constructions Pty Ltd Equity Australia Corporation Pty Ltd*<sup>13</sup> was dealing with s 13 which is mirrored in s 17 of the Act (Qld). Hodgson JA referred to his earlier decision of *Brodyn Pty Limited v Davenport*.<sup>14</sup> In that case, his honour held that s 8(2)(b), its equivalent being the definition of “reference date” in the schedule of the Queensland Act, provides “for a starting reference date but not a concluding one”.<sup>15</sup> The only limit is that it be made within 12 months. Successive payment claims do not necessarily have to be in respect of additional work.<sup>16</sup> For example, his honour pointed out that later claims may include losses and expenses from suspension of work. Therefore even if additional work was done it does not effect the efficacy of a subsequent payment claim. It is open to infer in the present case that no future work was done after 29 November 2006. There was no suggestion by either side in fact that additional work may have been performed after 27 October 2006.
- [10] It is convenient to look at the facts in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*.<sup>17</sup> The contractor, R & R, had issued Claim No 8 and subsequently issued Claim No 9. The latter covered the same work as Claim No 8.<sup>18</sup> No further work was performed after Claim No 8 was made. *Brookhollow* did not serve a payment schedule in relation to Claim No 9 in accordance with the relevant provision of the New South Wales legislation, s 14(4). The equivalent in Queensland is s 18(4)((b)(ii). In that event, under the Queensland Act, the respondent becomes liable to pay the amount claimed.<sup>19</sup> It was argued in *Brookhollow* that Claim No 9 was a second payment claim in respect of the same reference date and so as Claim No 8 related to the same reference date, Claim No 9 was prohibited by s 13(5) of the relevant provision which is s 17(5) in Queensland. A similar argument was adopted in

<sup>7</sup> *A E Smith & Son Pty Ltd v Coastline Constructions Pty Ltd* BD2504 of 2006 per McGill DCJ p 4.10 to 5.12 referring to *Vanbulan v Blackbird Energy Pty Ltd* [2006] QDC 285 per Brabazon DCJ

<sup>8</sup> Section 17(5) of the Act

<sup>9</sup> Schedule 2 – definition of “reference date”

<sup>10</sup> Per Williams J in *Cant Contracting Pty Ltd v Casella* [2006] QCA 538 at [13]

<sup>11</sup> Exhibit “SM4”

<sup>12</sup> s17(4) and (6); *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Limited* [2006] NSWCA 259 at [36] per Hodgson JA with whom Handley JA and Hunt AJA agreed

<sup>13</sup> [2006] NSWCA 259

<sup>14</sup> [2004] NSWCA 394 at [62]-[66]

<sup>15</sup> *Ibid.* [63]

<sup>16</sup> *Ibid.* [64]

<sup>17</sup> An unreported decision of Palmer J NSWSC 30 January 2006.

<sup>18</sup> *Ibid.* [9]

<sup>19</sup> s 18(5) of the Act.

the present case. What was said by Palmer J. was that the payment claim, that is, Progress Claim 2, does not need to demonstrate whether it is prohibited by s 17(4) or (5). That is, all that is required is that s 17(2) has been complied with. His honour likened the payment claim to a Statement of Claim. The plaintiff is required to set out the facts and circumstances and then the defendant decides which defences to raise. In other words, the respondent in the present case ought to have delivered a payment schedule pursuant to s 18. It failed to do so. The respondent could have raised the issues in s 17(4) relating to the claim being delivered within 12 months or s 17(5) relating to serving more than 1 claim. This is in accord with the reasoning of Palmer J. who was dealing with the equivalent provision in New South Wales s 13.<sup>20</sup> It followed that as no such defence was raised in the payment schedule, then it cannot be relied upon as a defence on a summary judgment application under s 19(2) of the Queensland Act.<sup>21</sup>

- [11] His honour applied both *Brodyn*<sup>22</sup> and *Nepean Engineering Pty Ltd v Total Process Services (in liq)*.<sup>23</sup> These authorities support the view that if the respondent fails to provide a payment schedule in a timely way and in compliance with s 18 then it cannot on a summary judgment application seek to resist on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s 17.<sup>24</sup> At no stage did the respondent provide the schedule which challenged the Progress Claim No 2 as amended in so far as it related to a reference date. Section 12 provides that 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.” Section 17 specifically relates to s 12. A failure to serve a schedule under s 18 provides a serious limitation to the respondent on a summary judgment application. However, the onus is on the applicant to show that it has complied with the statutory requirements to bring a summary application.<sup>25</sup>
- [12] It has been submitted that strict compliance with the statutory requirements is necessary.<sup>26</sup> In fact in the case of *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd*<sup>27</sup>, Nicholas J. when commenting upon compliance with ss 8 and 13 (ss 12 and 17 Qld Act) stated that in order “to exercise these rights compliance with the requirements which establish them are necessary”. In the subsequent case of *Nepean*,<sup>28</sup> Ipp JA who agreed with Hodgson JA stated: Provided that a payment claim is made in good faith and purports to comply with s 13(2)<sup>29</sup> of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15.<sup>30</sup>
- [13] It is not necessary to determine whether the strict approach or the reasonable compliance approach is desirable. In the present case, applying either approach, I find that the applicant has proved the necessary elements of s 17 to allow it to proceed and obtain summary judgment under s 19 of the Act, absent any payment schedule as required under s 18.

#### “Serious factual contest”

- [14] The respondent submits that as there is a serious factual contest as to whether the applicant has performed the electrical work as described in exhibit “MB5”, it has no right under s 12 of the Act to the progress payment. The respondent referred to r292(2) of the UCPR relating to the summary judgment procedure. If one applies the test that “whether there exists a real, as opposed to a fanciful, prospect of success”<sup>31</sup> it is clear to me that under the scheme of the Act, once the respondent failed to deliver the payment schedule that it had no prospects of defending the present application for summary judgment. The ignorance of Mr Iannelli, the sole director of the respondent, to the requirements of the legislation does not assist the respondent. It is not necessary to look further at the matter in dispute.<sup>32</sup> If the approach to the interpretation of the Act is wrong, there is a serious question to be tried for part of the claim of 20%<sup>33</sup> judgement could be given for the balance.
- [15] As suggested by counsel for the respondent in his written submissions, one of the purposes of making a payment claim under the Act is with “the hope that the recipient will fail to respond with a “payment schedule”. This is consistent with the objects of the Act. The consequences of that are provided for in s 18(5) of the Act. An overview of the objects was considered in *Cant’s* case.<sup>34</sup>

#### “The relevant reference date”

- [16] The respondent submitted that s 12 requires that there be ascertained the relevant reference date. In the present case it is provided for in the Schedule to the Act as the contract did not provide for it. The case referred to of *Gardner*<sup>35</sup> was dealing with a specific date in the contract of 28 June 2006. There was an attempt to make a

<sup>20</sup> *Brookhollow* op. cit. at [46]

<sup>21</sup> *Ibid.* [48]

<sup>22</sup> op. cit.

<sup>23</sup> [2005] NSWCA 409; [2005] 64 NSWLR 462

<sup>24</sup> *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [41]–[49] per Palmer J.

<sup>25</sup> per McGill DCJ in *Smith V Coastline Construction* op.cit. p 3.40

<sup>26</sup> *F.K.Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] QSC 243 per Lyons J. referring to *Walter Construction Group Ltd v CPL (Surrey Hills) Pty Ltd* [2003] NSWSC 266 at [59] per Nicholas J.

<sup>27</sup> [2003] NSWSC 266 at [59].

<sup>28</sup> op.cit. at [76]; see also the observation of Hodgson JA at [36 – 39] who adopted a “reasonable compliance test.”

<sup>29</sup> s 17(2) of the Qld Act

<sup>30</sup> s 19 of the Qld Act

<sup>31</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232

<sup>32</sup> *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110 at [62] per McDougall J

<sup>33</sup> See para 16 of the affidavit of Mr Salafia.

<sup>34</sup> Op. cit per Jerrard JA at [42] and McMurdo J at [52]

<sup>35</sup> Op. cit

payment claim for a period prior to that date which related to work done before 20 June 2006. Her honour held that the applicant was not entitled to the progress payment claimed as at 20 June 2006.<sup>36</sup> That case can be distinguished from the present case which relies upon the statutory definition of "reference date". This was discussed above.

**Orders**

1. Judgment for the applicant against the respondent in the sum of \$89,791.67 together with interest pursuant to the Supreme Court Act at the rate of 9 per cent from 2 February 2007.
2. It is further ordered that the respondent pay to the applicant its costs of and incidental to the application to be assessed.

Mr A. Hoare for the Applicant instructed by McKays Solicitors  
Mr T. Matthews for the Defendant instructed by Hatzis Lawyers.

<sup>36</sup> Op. cit. [34]