

SUPREME COURT OF QUEENSLAND

CITATION: *Cant Contracting P/L v Casella & Anor* [2006] QSC 242

PARTIES: **CANT CONTRACTING PTY LTD** (ACN 079 036 025)
(plaintiff)
v
CON CASELLA
(defendant)
MICHELLE LYNDSAY CASELLA
(defendant)

FILE NO/S: SC No 5925 of 2005

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 September 2006

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2006

JUDGE: de Jersey CJ

ORDER:

- 1. That the plaintiff have leave to amend its claim in accordance with the amended claim in Ex 1 to the affidavit of Troy Jonathan Lewis filed 3 August 2006**
- 2. That there be judgment for the plaintiff against the defendants in the amount of \$493,339.45 together with interest under s 47 of the *Supreme Court Act 1995 (Qld)* from 15 April 2006 to judgment**
- 3. That the defendants pay the plaintiff's costs of and incidental to the application filed 3 August 2006, to be assessed on the standard basis**

CATCHWORDS: BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – statutory right of debt recovery under s 19 *Building and Construction Industry Payments Act 2004 (Qld)* – where no payment schedule delivered – unlicensed builder – whether statutory right of recovery is qualified by s 42 *Queensland Building Services Authority Act 1991 (Qld)*

Building and Construction Industry Payments Act 2004 (Qld), s 10, s 17, s 18, s 19
Queensland Building Services Authority Act 1991 (Qld), s 42, s 43

Brodyn Pty Ltd t/as Time Cost and Quality [2004] NSWCA 394, cited

Lucas Stuart Pty Ltd v Council of the City of Sydney [2005] NSWSC 840, cited

COUNSEL: M J F Burnett for the plaintiff
P J McHugh for the defendants

SOLICITORS: Holding Redlich for the plaintiff
Graham & Associates for the defendants

- [2] **de JERSEY CJ:** By its original claim, the plaintiff claimed \$493,339.45 as monies owing under an agreement between the parties of 1 November 2004, or on the basis of a quantum meruit under s 43 of the *Queensland Building Services Authority Act* 1991 (Qld).
- [3] It is common ground between the parties that on or about 1 November 2004, the plaintiff and the defendants agreed that the plaintiff manufacture, supply and erect poultry houses for the defendants. It was likewise not disputed that the agreement was a “construction contract” within the meaning of the *Building and Construction Industry Payment Act* 2004 (Qld) (see Sch 2 and s 10). The terms of the contract relating to payment entitled the plaintiff to what that Act terms “progress payments” (Sch 2). See the document headed “quotation”. It is also not disputed that the plaintiff carried out the work under the contract, for which the plaintiff has not been paid notwithstanding demand, in the amount of \$493,339.45, the amount presently claimed.
- [4] On 31 March 2006, the plaintiff served on the defendants a “payment claim” under s 17 of that Act. There is no dispute about the procedural regularity of that claim. Section 18 entitled the defendants to serve, in response, a “payment schedule”, within a prescribed timeframe. That was not done.
- [5] Section 18(5) provides that in such circumstances, the defendants “become liable to pay the claimed amounts...on the due date for the progress payment to which the payment claim relates”. Section 19 then operates to entitle the plaintiff to “recover the unpaid portion of the claimed amount...as a debt owing to the (plaintiff)”. The plaintiff seeks to amend the claim to add an alternative claim for the sum as a debt due under s 19 of that Act.
- [6] Mr McHugh, who appeared for the defendants, did not oppose the grant of leave to amend the claim. There is no limitations issue, and on 5 July 2006, the plaintiff delivered an amended statement of claim adding this basis for relief. Leave to amend the claim to bring it into conformity with the amended statement of claim should therefore be granted.
- [7] In their original form, the claim and the statement of claim needed to confront the circumstance that on the evidence before me, the plaintiff did not, when it carried out the relevant work, hold the requisite contractor’s licence. That may eventually become a matter of dispute, if the proceeding continues, but for present purposes that is where the factual position sits. Consequently, the plaintiff would be limited, in its recovery, by s 42(4) of the *Queensland Building Services Authority Act* 1991. But Mr Burnett, who appeared for the plaintiff, submitted that would be irrelevant

to the claim added by amendment, founded on s 19 of the *Building and Construction Industry Payments Act 2004*.

- [8] Mr McHugh essentially submitted that the otherwise apparently plain right of recovery arising in the plaintiff's favour under s 19(2) of the *Building and Construction Industry Payments Act* should be read as subject to the qualified right of recovery limited by s 42 of the *Queensland Building Services Authority Act*. The amendment to the claim having been made, Mr Burnett sought summary judgment for the amount claimed, on the basis of his construction of the *Building and Construction Industry Payments Act*. Mr McHugh accepted that if Mr Burnett's construction were upheld, summary judgment should be given, and in the amount claimed. The question is purely one of statutory construction, and it is one which can and should be answered summarily.
- [9] Mr Burnett rightly conceded that had the defendants wished to rely on the absence of the requisite licence in response to the plaintiff's claim, as made in its "payment claim" under s 17 of the *Building and Construction Industry Payments Act*, the defendants could have done so in a "payment schedule" under s 18. The issue is whether, the defendants' having failed to deliver a payment schedule, the defendants can resist the plaintiff's apparent right to judgment under s 19(2)(a) by subsequently raising the licensing issue; in other words, whether the ultimate operation of the mechanism established by the *Building and Construction Industry Payments Act* is to be read as subject to a supervening qualification arising from s 42 of the *Queensland Building Services Authority Act*.
- [10] Apart from the absence of any expression of such a qualification in s 19 of the *Building and Construction Industry Payments Act*, Mr Burnett pointed to the circumstance that that Act does in other situations import certain provisions of the *Queensland Building Services Authority Act*. See, especially, s 26(2)(a), which obliges an adjudicator to have regard to Part 4A of the *Queensland Building Services Authority Act*. Section 19 of that Act does not fall within its Part 4A.
- [11] A broadly comparable situation confronted the Supreme Court of New South Wales in *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840, a decision given on 23 August 2005. No payment schedule had been delivered, yet the respondents sought to rely on various defences in the context of a claim for summary judgment. On the basis of legislation in materially the same terms as these, Einstein J said (para 21):
- "...the Court may comfortably be satisfied that...the Council has become 'liable to pay the claimed amount to the claimant under s 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section', within the meaning of these words as found in s 15(1)(a). The critical words are 'has become liable to pay the claimed amount to the claimant under s 14(4)'. These words create what may be described as a strictly mechanical scheme. Whilst ever the environment concerns the engagement of the fast track interim provisions of the Act [as opposed to the parties retained curial rights to have a final determination of their dispute on a later occasion] there is simply no room for moving outside of this scheme...the Council can be seen by its stance in the instant proceedings to seek to

move outside this strictly mechanical scheme. The Act permits no such thing.”

- [12] The New South Wales Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394, dealt with the relevance, to the statutory right to recover the amount claimed as a debt, of the absence of the requisite builder’s licence. The legislation was again comparable. In this case the respondent delivered a payment schedule in response to a payment claim, but omitted to raise as a ground for non-payment the fact that the builder was not licensed. The point was first raised on appeal. Hodgson JA said (para 82):

“...the civil consequences for an unlicensed contractor for its breach of s 4 are those set out in s 10, and not any wider deprivation of remedies ... this is confirmed by the different provisions of s 94 ... the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the HBA (*Home Building Act*).”

- [13] I accept Mr Burnett’s submissions.

- [14] I make the following orders:

1. That the plaintiff have leave to amend its claim in accordance with the amended claim in Ex 1 to the affidavit of Troy Jonathan Lewis filed 3 August 2006;
2. That there be judgment for the plaintiff against the defendants in the amount of \$493,339.45 together with interest under s 47 of the *Supreme Court Act* 1995 (Qld) from 15 April 2006 to judgment;
3. That the defendants pay the plaintiff’s costs of and incidental to the application filed 3 August 2006, to be assessed on the standard basis.