

DISTRICT COURT OF QUEENSLAND

CITATION: *Park Avenue Constructions Pty Ltd v Sullivan* [2009] QDC 292

PARTIES: **PARK AVENUE CONSTRUCTIONS PTY LTD ABN 34116851328**
Applicant
v
SCOTT SULLIVAN
Respondent

FILE NO: **164 of 2009**

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: 10 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 20 August 2009

JUDGE: K S Dodds, DCJ

ORDER: **Judgment for the applicant against the respondent for \$50,636 together with interest at the default interest rate under the contract from 9 June 2009 to judgment.**

CATCHWORDS: BUILDING CONTRACTS – where identical purported payment claims served – where date on second purported payment claim different from first – where both purported payment claims for same reference date – where respondent did not respond to either purported payment claim – application for judgment

Building and Construction Industry Payments Act 2004
s 7, s 8, s 12, s 13, s 15(2), s 17, s 18, s 19, s 20, s 26, s 29, s
30, s 31

Uniform Civil Procedure Rules 1999 r 9, r 11(a)

Doolan and Anor v Rubikcon (Qld) Pty Ltd and Ors [2007]
QSC 168

RJ Neller Building P/L v Ainsworth [2008] QCA 397

Tailored Projects P/L v Jedfire P/L [2009] QSC 32

COUNSEL: D Topp for the applicant
M Hindman for the respondent

SOLICITORS: Greenhalgh Pickard Solicitors for the applicant
Sawford Voll Lawyers for the respondent

[1] This is an application brought under the *Building and Construction Industry Payments Act 2004* (the Act) for orders:

1. The applicant be at liberty to enter judgment against the respondent pursuant to section 19(2)(a) of the Act;
2. That in these proceedings the respondent not be entitled to bring any counterclaim against the applicant or raise a defence in relation to matters arising out of the construction contract pursuant to section 19(4)(b) of the Act;
3. Pursuant to rule 658 of the *Uniform Civil Procedure Rules 1999* (UCPR) judgment be given for the applicant in the sum of \$50,636 plus interest at the rate of 14.59% per annum pursuant to section 67P of the *Queensland Building Services Authority Act 1991* and section 15(2) of the Act from 28 May 2009 for invoice numbers 1414/06, 1414/V02 and 1414/V003 to date of judgment or payment of the claimed amount and costs.
4. Further and in the alternative, pursuant to rule 658 of UCPR judgment be given for the applicant in the amount of \$50,636 plus interest at the rate of 10% per annum pursuant to section 47 of the *Supreme Court Act 1995* from 28 May 2009 for invoice numbers 1414/06, 1414/V02 and 1414/V003 to date of judgment or payment of the claimed amount and costs.
5. Costs.

[2] The applicant and the respondent entered into a construction contract on 13 December 2007. It was an HIA standard form New Home Construction Contract. Pursuant to the contract the applicant was to construct a single story rendered home for the respondent. Work commenced on or about August 2008.

The Contract

- [3] The contract provided that the respondent was not a resident owner.¹
- [4] In clause 38.1 of the contract, the “works” were defined to mean “the works to be carried out, completed and handed over to the owner in accordance with this contract as shown in the contract documents including variations”.
- [5] Schedule 2, part A of the contract contained a “prescribed progress payment schedule”. The final item in the schedule was “practical completion”. That may be regarded as the final claim as that term was defined in the contract. The percentage due for practical completion was said to be the balance and the amount specified was \$40,268.82.
- [6] “Practical completion” was defined in the schedule to the contract as “the stage when the works:
- a) have been completed in accordance with the contract and all relevant statutory requirements apart from minor defects or minor omissions; and
 - b) are reasonably suitable for habitation”.²
- [7] Clause 25 of the contract also related to practical completion. Relevantly, it provided that on reaching practical completion “the builder must give the owner:
- a) a notice of practical completion stating the builder’s opinion of the date of practical completion; and
 - b) the final claim”.³

“Subject to subclause 25.4, the owner must within 5 working days of receiving the final claim, pay the amount of the final claim to the builder”.⁴

“The final claim is not due until the builder:

- a) gives the owner a defects document, signed by the builder, listing minor defects and minor omissions:
 - i. that are agreed to exist and the time for when those items will be completed or rectified; and
 - ii. that the owner claims to exist that the builder does not agree with;
- b) makes all reasonable efforts to have the owner sign the document to acknowledge its contents”.⁵

¹ Section 3(2)(b).

² Schedule 2 and Clause 38.1

³ Clause 25.2.

⁴ Clause 25.3.

⁵ Clause 25.4.

“If the owner believes that practical completion has not been reached, the owner must within 5 working days of receiving the notice of practical completion give the builder a written notice stating:

- a) the owner’s requirements for the works to reach practical completion; and
- b) the provisions of this contract that relate to each requirement”.⁶

“The builder must, on receiving the owner’s notice, complete those requirements that in the builder’s opinion are necessary to reach practical completion”.⁷

“On completion of those requirements, the builder must give a further notice of practical completion stating the new date of practical completions and subclause 25.3 applies.”⁸

- [8] Clause 4 of the contract provided for progress payments. Relevantly, “the builder must give the owner a written claim for a progress payment for the completion of each stage”.⁹

“A progress claim is to state:

- a) the amount claimed for the stage;
- b) the amount of any addition or deduction for variations;
- c) the amount of any addition or deduction due to a prime cost item or provisional sum item;
- d) the amount of any other addition to or deduction from the contract price made under this contract; and
- e) the sum of the above amounts”.¹⁰

The owner must pay a progress claim to the builder within 5 working days of receiving the progress claim.¹¹

- [9] Clause 33.1 of the contract provided that “If the owner does not pay any amount owing to the builder in full by the due date, then the owner must pay default interest on such amount that is unpaid from time to time”.

Default interest was defined in clause 38.1 as “means the annual rate equal to the Commonwealth Bank overdraft index rate: quarterly charging cycle plus 5%”.

The Evidence

- [10] The evidence before the court indicated that a final inspection certificate was issued by a building certifier on behalf of the local authority, certifying that the building work being dwelling and swimming pool, complied with the building

⁶ Clause 25.5.

⁷ Clause 25.6.

⁸ Clause 25.7.

⁹ Clause 4.3.

¹⁰ Clause 4.4.

¹¹ Clause 4.5.

approval or with certificates of inspection accepted from competent persons at listed stages of the construction. It certified that as at inspection date of 19 May 2009 the building was satisfactory.

[11] In the meantime by letter dated 7 May 2009 the applicant wrote to the respondent. The letter set out clauses 25.3 and 25.4 of the contract. Pursuant to those clauses it enclosed the applicant's defect list and action items regarding the property. It explained that the defects document was the outstanding items agreed or not agreed by the applicant and the action dates for rectification. It asked that the defects list be signed and returned. It advised the final payment was due on 14 May 2009. It also enclosed 3 tax invoices for payment. Each invoice stated that it was a payment claim under the Act.

- Invoice 1414/V02 was dated 31 April 2009 and was described as "Variation V02". It was a claim for \$2099 described as "Variation V02 Removal Pool Dig Machine hire for loading".
- Invoice 1414/V003 was dated 1 May 2009 and was described as "Variation V03". It was a claim for \$8268 described as "VARIATION V03 Delay costs due to stop work 25 November, 56 days at the contract rate".
- Invoice 1414/06 was dated 1 May 2009 and was described as "Progress claim 06". It was a claim for \$40,269 described as "PRACTICAL COMPLETION STAGE".

[12] So far as the evidence discloses, the respondent did not respond to the 7 May 2009 letter and enclosures.

[13] By letter dated 21 May 2009, the applicant wrote to the respondent in the following terms:

"We advise that we recently studied the form 21 Final Completion Certificate from Council and advise that the new date for Practical Completion is 21 May 2009.

The final payment is due on the 28 May 2009."

Accompanying the letter were the same invoices except the invoice date had been altered to 21 May 2009.

[14] The respondent did not respond to these invoices.

The Act

[15] Section 12 of the Act provides that from each reference date under a construction contract, a person who has undertaken to carry out construction work, such as this applicant, is "entitled to a progress payment".

[16] A "reference date" under a construction contract means "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---”¹².

[17] Section 13 provides for the amount of a progress payment. It is the “amount to which a person is entitled in relation to a construction contract” and is either:

- “(a) the amount calculated under the contract; or
- (b) if the contract does not provide for the matter the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out---.”

[18] Section 17 provides that a person “mentioned in section 12 who is or claims to be entitled to a progress payment may serve a payment claim on the person who, under the construction contract concerned is or may be liable to make the payment”.¹³ “A payment claim may be served only within the later of –

- (a) the period worked out under the construction contract; or
- (b) the period of 12 months after the construction work to which the claim relates was last carried out---”.¹⁴

“A claimant can not serve more than one payment claim in relation to each reference date under the construction contract”.¹⁵

[19] Payment claim is defined in the Dictionary to mean “a claim referred to in section 17”.

[20] Section 18 provides that “a respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant”.¹⁶ If a claimant serves a payment claim on a respondent and “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 is served”¹⁷

then “the respondent becomes liable to pay the claimed amount on the due date for the progress payment to which the progress claim relates”.¹⁸

The Submissions

[21] The respondent opposed the application supported by three submissions:

- Firstly, the respondent submitted the applicant had made two identical payment claims. The second payment claim, the one upon which the applicant relied was therefore invalid. The decision of *Doolan and Anor v*

¹² Schedule 2.

¹³ Subsection (1).

¹⁴ Subsection (4).

¹⁵ Subsection (5).

¹⁶ Subsection (1).

¹⁷ Subsection (4).

¹⁸ Subsection (5).

Rubikcon (Qld) Pty Ltd and Ors [2007] QSC 168 per Fryberg J was said to support the submission.

- Secondly, two payment claims had been made by the applicant in relation to the same reference date, namely practical completion. Section 17(5) of the Act prevented service of more than one payment claim in relation to each reference date. Therefore the second payment claim was invalid. The decision of *Tailored Projects P/L v Jedfire P/L* [2009] QSC 32 per Douglas J was said to support the submission.
- Thirdly, the relevant reference date practical completion had not arrived. Under clause 4.3 of the contract, the applicant was required to give the respondent a written claim for a progress payment for the completion of each stage. The relevant stage was practical completion, that is, the stage when the works had been completed in accordance with the contract and all relevant statutory requirements apart from minor defects or minor omissions and were reasonably suitable for habitation. There was evidence by affidavit from an experienced building inspector and tradesman that practical completion had not been reached. The payment claims had not been made pursuant to a reference date under Act.

Decision

[22] If it be the case that the purported payment claims made on 21 May 2009 were valid payment claims as provided for in the Act, then the applicant's claim for judgment must succeed. That is because of the provisions of section 19 of the Act which provide that 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---.¹⁹

The claimant may recover the unpaid portion of the claimed amount from the respondent as a debt owing to the claimant in any court of competent jurisdiction---.”²⁰

In proceedings to recover that debt, the respondent is not entitled -

“(i)to bring any counterclaim against the claimant; or

(ii)to raise any defence in relation to matters arising under the construction contract”.²¹

[23] The purported payment claims accompanying the letters of 7 May 2009 and 21 May 2009 were identical except for the dates upon them. It is relevant to consider whether they were both payment claims under section 17 of the Act. That is because if the purported payment claims of 7 May 2009 were not in truth payment claims under section 17, that will be relevant to whether the later payment claims contravene section 17(5).²²

¹⁹ Subsection (1).

²⁰ Subsection (2)(a)(i).

²¹ Subsection (4)(b).

²² Section 17(5).

- [24] The Act confers on a person such as the applicant an entitlement to a progress payment “from each reference date”.²³ A reference date is a date stated in or worked out under the construction contract as the date on which a claim for a progress payment may be made.²⁴
- [25] Here, by virtue of the terms of the contract, when the 7 May 2009 purported payment claims were made, the reference date for the final payment (practical completion under the terms of the contract) had not been reached. That was because the works had not been completed in accordance with all relevant statutory requirements until final building inspection and that had not occurred until 19 May 2009. No entitlement under the contract to the progress payment then existed.
- [26] Under section 17 of the Act only a person mentioned in section 12 i.e. a person entitled to a progress payment may serve a payment claim.²⁵ As at 7 May 2009 the applicant was not such a person.
- [27] Whether a person claiming to be entitled to a progress payment is entitled is a matter which an adjudicator may decide.²⁶ The scheme of the Act requires a respondent to respond to a payment claim with an appropriate payment schedule. An adjudication may then occur, consistent with the objects of the Act.²⁷
- [28] The policy of the Act is for prompt payment of progress claims or prompt adjudication of a dispute about a claim for payment by an adjudicator while recognising that at a later time in court proceedings a full trial of issues in dispute may occur.²⁸
- [29] In *RJ Neller Building P/L v Ainsworth* [2008] QCA 397 Keane JA with the concurrence of Fraser JA and Fryberg J said “It is evidently the intention of the BCIP Act, and, in particular, s 31 and s 100 to which reference has been made, that the process of adjudication established under that Act should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract, where those parties operate in a commercial, as opposed to a domestic, context. This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined.”²⁹

“the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the claim.”

²³ Section 12.

²⁴ Dictionary, schedule 2.

²⁵ Section 17(1).

²⁶ Section 26.

²⁷ Sections 7 and 8.

²⁸ Sections 7, 8, 17 – 20, 26, 29 – 31.

²⁹ At paragraphs 39 and 40.

- [30] In this case the respondent chose not to respond to the 7 May 2009 letter and documents or the 21 May 2009 letter and documents.
- [31] In the circumstances I do not think the respondent's first two submissions are correct.

In *Doolan* there were two identical claims referable to the same reference date, the first dated 15 November 2006. It became the subject of an attempted adjudication which failed and was treated as a nullity. The second was issued on 16 February 2007 and was identical including the date with the words "Reissued 16th February 2006" (2006 may be a mistype) written underneath. This latter claim went to adjudication. His Honour held in the circumstances that claim was contrary to the express provisions of section 17(5) of the Act and was not capable of founding the jurisdiction of the adjudicator.

The present case differs. The payment claim of 7 May 2009 was made with respect to a non-existent reference date.

In *Tailored Products* two claims were made after practical completion. The second, in a much larger sum dated 31 July 2008, was the claim relied upon. The first was dated 26 May 2008. Practical completion occurred on 12 May 2008. His Honour held that the later claim was the second one made with respect to the reference date for practical completion under the contract.

In the present case, as I attempted to explain above, when the purported claim of 7 May 2009 was made, the reference date of practical completion had not arrived.

- [32] Nor do I think the third submission is supportable. It may be accepted for the purpose of what follows that in the opinion of the respondent's building inspector Mr McDonald, there were defects and omissions in the construction when he inspected it on 7 May 2009 and 21 May 2009. However, clause 25 of the contract makes provision for the step to be taken by both the builder and the owner when in the opinion of the builder practical completion has been reached. The applicant did that which was required. The respondent did not respond in terms of clause 25. Nor did he respond with an appropriate payment schedule in response to either purported payment claim.
- [33] I am satisfied that the respondent has become liable to pay the sum of \$50,636, being the sum of the payment claims of 21 May 2009 to the applicant because he failed to serve a payment schedule in response at all. I am conscious that the payment schedule for practical completion slightly exceeds the amount for practical completion set out in schedule 2 part A of the contract.
- [34] The UCPR requires a proceeding such as this for recovery of a debt be started by claim,³⁰ although such a proceeding may be started by application if the only or main issue in the proceeding is an issue of law and a substantial dispute of

³⁰ Rule 9.

fact is unlikely.³¹ Had the matter been started by claim and an application under rule 292 for summary judgment been made it seems to me the applicant would discharge its onus of satisfying the court the defendant had no real prospect of defending the applicant's claim. In light of the terms of the Act there would be no dispute about any relevant factual matter. There would be no need for a trial of the claim.

- [35] There will be judgment for the applicant against the respondent for \$50,636 together with interest at the default interest rate under the contract³² from 9 June 2009 to judgment.

³¹ Rule 11(a).

³² Section 15(2) of the Act, clause 38 of the contract.