

# SUPREME COURT OF QUEENSLAND

CITATION: *National Vegetation Management Solutions P/L v Shekar Plant Hire P/L* [2010] QSC 3

PARTIES: **NATIONAL VEGETATION MANAGEMENT SOLUTIONS PTY LTD** ACN 1105 356 38  
(applicant)  
v  
**SHEKAR PLANT HIRE PTY LTD** ACN 1049 11 640  
(respondent)

FILE NO/S: BS 13808 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 January 2010

DELIVERED AT: Brisbane

HEARING DATE: 17 December 2009

JUDGE: Margaret Wilson J

ORDER: **Judgment for the applicant against the respondent for \$511,324.44.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where respondent was awarded a contract by Powerlink Queensland to carry out land clearing for a power transmission line – where respondent engaged applicant to carry out part of its contract – where applicant submitted invoice to respondent claiming \$511,324.44 – where applicant seeks orders that respondent pay it \$511,324.44, being a debt owing pursuant to *Building and Construction Industry Payments Act 1994* (Qld) – where by letter to applicant headed “Without Prejudice” respondent’s solicitor disputed amount claimed and offered to pay lesser amount – whether respondent’s solicitor’s letter a “payment schedule” within the meaning of s 18 of the *Building and Construction Industry Payments Act 1994* (Qld) – whether respondent liable to pay amount claimed – whether applicant entitled to recover amount claimed as a debt

EVIDENCE – ADMISSIONS AND DECLARATIONS – ADMISSIONS – LETTERS AND STATEMENTS

WITHOUT PREJUDICE – whether letter from respondent’s solicitor to applicant headed “Without Prejudice” is inadmissible as a privileged communication

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – LICENCES – whether applicant not entitled to progress payment because it did not have a licence under the *Queensland Building Services Authority Act 1992* (Qld) – whether applicant required to have a licence – whether work was “building work” within the meaning of that Act

*Building and Construction Industry Payments Act 1994* (Qld), s 7, s 8, s 10, s 15, s 17, s 18, s 19, s 20, s 100

*Queensland Building Services Authority Act 1992* (Qld), s 42(3)

*Uniform Civil Procedure Rules 1999* (Qld), r 10, r 11(a), r 12, r 13, r 14, r 292

*Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, considered

*Cant Contracting Pty Ltd v Casella* [\[2006\] QCA 538](#), referred to

*Field v Commissioner for Railways for NSW* (1957) 99 CLR 285, cited

*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [\[2007\] QSC 333](#), considered

*Ofulue v Bossert* [2009] 1 AC 990, cited

*Re Turf Enterprises Pty Ltd* [1975] Qd R 266, cited

*Roadtek, Department of Main Roads v Davenport & Ors* [\[2006\] QSC 47](#), considered

*Rush & Tompkins Ltd v Prudential Assurance Co of America* [1989] AC 1280, cited

*Tenstat Pty Ltd v Permanent Trustee Aust Ltd* (1992) 28 NSWLR 625, cited

*Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436, considered

*Walker v Wilsher* (1889) 23 QBD 335, cited

COUNSEL: T Matthews for the applicant  
G O’Driscoll for the respondent

SOLICITORS: Affinity Lawyers for the applicant  
Paul Loane Solicitor for the respondent

[1] **MARGARET WILSON J:** The applicant National Vegetation Management Solutions Pty Ltd seeks orders that the respondent Shekar Plant Hire Pty Ltd pay it \$511,324.44, being a debt owing pursuant to s 19(2)(a)(ii) [sic] of the *Building and Construction Industry Payments Act 1994* (Qld), together with interest on that sum at 8% per annum from 31 August 2009.

- [2] The applicant carries on the business of vegetation clearing. It is based at Yatala in south-east Queensland. The respondent is a civil construction company based at Biloela in central Queensland.
- [3] The two companies worked together from about May 2008. Some of the terms of the contractual relationship between them are contentious, but they do not need to be resolved on this application.
- [4] On or about 20 March 2009 the respondent was awarded a contract by Powerlink Queensland to carry out land clearing for a power transmission line described as "Strathmore/Bowen Part 1". The respondent engaged the applicant to carry out part of its contract with Powerlink.
- [5] Mobilisation commenced in late April 2009 when the respondent attended at the applicant's premises and transported mulching machines to Bowen. The applicant worked on the contract from late April or May 2009 until August 2009.

- [6] The applicant submitted invoices to the respondent as follows:

Date	Inv No	Particulars	Amount	GST	Total
31.05.09	NVM 1219	41.82 ha @ \$2900 per ha	\$ 121,278.00	\$ 12,127.80	\$133,405.80
30.06.09	NVM 1235	40.61020 ha @ \$2900 per ha	\$ 117,769.58	\$ 11,776.96	\$129,546.54
31.07.09	0000 1249	43.28760 ha @ \$2900 per ha	\$ 125,534.04	\$ 12,553.40	\$138,087.44

- [7] The respondent did not pay these invoices, disputing the rate of \$2900 per hectare. Correspondence ensued. At the request of the applicant, the respondent made two payments, each of \$50,000.
- [8] On 1 October 2009 the respondent received a letter from the applicant dated 16 September 2009 claiming \$301,039.78, described as "still outstanding". That amount was equal to the sum of the three invoices less the \$100,000 paid.
- [9] Also on 1 October 2009 the respondent received an invoice from the applicant dated 31 August 2009 (no 0000 1257) claiming \$511,324.44, made up as follows –

Particulars	Amount
For works ending 31.05.09 – 41.8 ha @ \$2900 per ha	\$ 121,278.00
For works ending 30.06.09 – 40.6 ha @ \$2900 per ha	\$ 117,769.00
For works ending 30.07.09 – 43.3 ha @ \$2900 per ha	\$ 125,532.30
For works ending 30.08.09 – 4.50 ha @ \$2900 per ha	\$ 13,050.00
Standby time – 12.25 days @ \$2908.75 per day	\$ 35,632.19
Safety observer – 89.75 hours @ \$56 per hour	\$ 5,026.00
Cleaning of heavy equipment – 2 machines @ \$1200 per machine	\$ 2,400.00
Cleaning of support vehicles – 3 vehicles @ \$350 per machine	\$ 1,050.00
Demobilisation – 2 machines @ \$2800 per unit	\$ 5,600.00
Loss associated with wrongful termination of contract – 295.2 ha @ \$435 per ha	\$ 128,412.00
	<u>\$ 555,749.49</u>
GST	<u>\$ 55,574.95</u>
Less paid	<u>\$ 100,000.00</u>
Balance Due	<u>\$ 511,324.44</u>

- [10] By letter dated 7 October 2009 and headed "Without Prejudice", the respondent's solicitor wrote to the applicant –

"I am Solicitor for Shekar Constructions. My instructions are from Karl and Shelley Sheedy.

I have been handed your Tax Invoice No. 1257 issued on 31<sup>st</sup> August, 2009, seeking payment of the sum of \$511,324.44.

My clients instruct it was never agreed that National Vegetation Management would be entitled to be paid for stand time, safety observer, cleaning of heavy equipment, cleaning of support of vehicles, demobilisation and loss occasioned by wrongful determination of contract. These are spurious claims and are rejected.

My clients instruct there was no specific remuneration per hectare agreed to. However, they acknowledge National Vegetation Management did perform work on behalf of Shekar Constructions for which National Vegetation Management is entitled to be remunerated.

Firstly, the area of hectares cleared the subject of Invoice No. NVM1219 was 21.94611 hectares not 41.8 hectares.

Secondly, I am instructed it was agreed between the parties that any payment due to National Vegetation Management would be reduced by the cost of its fuel paid for by my clients, the accommodation for three (3) persons employed by it and paid for by my clients and the cost to my clients of mobilisation of the equipment.

Particulars of the fuel paid by Shekar Constructions are as follows:

May-June 2009	6,741 Litres
July 2009	4,480 Litres
August 2009	<u>716 Litres</u>
Total	11,917 Litres

Cost of fuel to my clients was \$1.39 per litre for a total of \$16,564.63. I enclose copies of my client's fuel records for your information.

Accommodation costs totalled \$6,300.00, calculated as follows:

$$\begin{aligned} & \$35.00 \text{ per night} \times 3 \text{ persons} \times 60 \text{ days} \\ & = \$6,300.00 \end{aligned}$$

Mobilisation costs are calculated as follows:

$$\begin{aligned} & 3,215 \text{ km} @ \$5.00 \text{ per km} \\ & = \$16,075.00 \end{aligned}$$

The total of these expenses: \$42,834.00 (\$38,939.50 plus \$3,894.00 GST).

My clients have already paid National Vegetation Management \$100,000.00 as part payment for the work performed. My clients

offer to pay a further sum of \$153,575.72 inclusive of GST in full satisfaction of the National Vegetation Management claim. The GST included in this payment is \$23,052.34 (\$230,523.38 plus \$23,053.34 less \$100,000.00).

The payment of the sum of \$253,573.72 inclusive of GST plus the expenses incurred by my clients of \$42,834.00 equates to \$2,674.00 per hectare.

Acceptance of this offer must be by letter to be received at this office within seven (7) days of today's date. Upon receipt of the letter of acceptance I will prepare a Release of Discharge to be executed by National Vegetation Management in exchange for payment of \$153,575.72."

### ***Building and Construction Industry Payments Act***

- [11] The Act provides for progress payments to contractors whether or not the relevant contract makes provision for progress payments, and establishes a procedure for the making and recovery of such claims and their speedy adjudication where they are disputed.<sup>1</sup> However, a party may "claw back" progress payments recovered from it under the Act in subsequent civil proceedings.<sup>2</sup>
- [12] The invoice of 31 August 2009 was a "payment claim" within the meaning of s 17 of the Act. Sections 18 and 19 provide –

#### **"18 Payment schedules**

- (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
- (2) A payment schedule—
  - (a) must identify the payment claim to which it relates; and
  - (b) must state the amount of the payment, if any, that the respondent proposes to make (the *scheduled amount*).
- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
- (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

<sup>1</sup> *Building and Construction Industry Payments Act 1994 (Qld)*, ss 7, 8.

<sup>2</sup> *Building and Construction Industry Payments Act 1994 (Qld)*, s 100.

- (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.

### **19 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) judgement 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.”

[13] The principal issue for determination on this application is whether the respondent’s solicitor’s letter of 7 October 2009 was a “payment schedule” within the meaning of s 18. If it was not a payment schedule, then the respondent became liable to pay the amount claimed,<sup>3</sup> and on its failing to do so, the applicant became entitled to recover the amount claimed as a debt.<sup>4</sup>

<sup>3</sup> *Building and Construction Industry Payments Act 1994 (Qld)*, s 18(5).

<sup>4</sup> *Building and Construction Industry Payments Act 1994 (Qld)*, s 19(2)(a)(i).

- [14] In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*<sup>5</sup> Chesterman J considered whether a particular email was a payment schedule. His Honour said –

“[17] Before considering the first question, I think, it necessary to remember the purpose of the Act because that purpose will influence the approach one takes to the construction of the 14 December email. As Hodgson JA said in *Brodyn Pty Ltd T/as Time Cost and Quality v Davenport*:<sup>6</sup>

‘The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise...The procedure contemplates a minimum of opportunity for court involvement...’

- [18] Mackenzie J noted in *Roadtek, Department of Main Roads v Davenport & Ors*:<sup>7</sup>

‘... the Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information...Unless the parties extend time, the decision must be given within 10 days of receipt of the respondent’s response or from the time one could have been received. Further, written submissions may be asked for by the adjudicator...The adjudicator may call a conference of the parties...and make an inspection...Any conference called must be held informally. Legal representation is excluded...The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection.’

- [19] In *Brodyn Pty Ltd t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors*<sup>8</sup> Einstein J referred to the legislation as:

‘...a fast track interim progress payment adjudication vehicle.’

- [20] The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description. To constitute a payment schedule the applicant’s email of 14 December had to:

- (i) identify the payment claim to which it related, and
- (ii) state any amount which the recipient of the payment claim proposed to make in response to it.

<sup>5</sup> [2007] QSC 333.

<sup>6</sup> (2004) 61 NSWLR 421 at 440-1.

<sup>7</sup> [2006] QSC 47 at para 16.

<sup>8</sup> [2003] NSWSC 1019.

- (iii) Importantly, if that amount is less than the amount claimed the payment schedule it must state why it is less.

[21] If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter.”

### **Without prejudice communication**

- [15] Counsel for the applicant submitted that the respondent’s solicitor’s letter of 7 October 2009 was inadmissible because it was a communication made “without prejudice”. However, neither counsel made full submissions on the application of the rule against the admission of “without prejudice” communications.
- [16] The privilege attaching to “without prejudice” communications is, in part at least, “founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish”.<sup>9</sup> A letter expressed to be “without prejudice” initiating negotiations may attract the privilege.<sup>10</sup>
- [17] The privilege is a joint one, and can be waived only with the consent of both parties.<sup>11</sup>
- [18] The privilege is directed against the admission in evidence of express or implied admissions.<sup>12</sup> In *Unilever plc v The Proctor & Gamble Co* Robert Walker LJ stressed that it is subject to numerous exceptions, and listed eight of the most common instances where evidence of what one or both parties said or wrote in the course of “without prejudice” negotiations is admissible.<sup>13</sup> Relevantly for present purposes, it does not preclude the proof of communications or statements relied on, not as an express or implied admission, but as an objective fact having legal consequences.<sup>14</sup>
- [19] A “without prejudice” communication might conceivably be admissible as a payment schedule under the *Building and Construction Industry Payments Act 1994* if it satisfied the three criteria identified by Chesterman J in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*.<sup>15</sup> In the absence of full

<sup>9</sup> *Rush & Tompkins Ltd v Prudential Assurance Co of America* [1989] AC 1280 at 1299 per Lord Griffiths. In *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 at 2422 Robert Walker LJ considered that there may be a further basis for the privilege, namely the implementation of the express or implied agreement of the parties that the communications not be admissible. See more recently *Ofulue v Bossert* [2009] 1 AC 990 at 1020.

<sup>10</sup> See Foskett *The Law and Practice of Compromise* (6th ed) at [27-07] – [27-12].

<sup>11</sup> *Re Turf Enterprises Pty Ltd* [1975] QdR 266 at 267; *Walker v Wilsher* (1889) 23 QBD 335 at 337 – 338.

<sup>12</sup> See *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285 at 291 per Dixon CJ, Webb, Kitto and Taylor JJ.

<sup>13</sup> [2000] 1 WLR 2436 at 2444 – 2445.

<sup>14</sup> *Tenstat Pty Ltd v Permanent Trustee Aust Ltd* (1992) 28 NSWLR 625 at 633 per McLelland J.

<sup>15</sup> [2007] QSC 333 at para 20.

argument, I decline to express a concluded opinion on the point. But, assuming it could, the letter of 7 October 2009 failed to satisfy the second of those criteria, as I shall explain.

### **Not a payment schedule**

- [20] By s 18(2)(b) a payment schedule must state the “scheduled amount” – that is, the amount of the payment, if any, that the respondent proposes to make. Under s 20, if a respondent does not pay the scheduled amount, the applicant may recover it as a debt, which the respondent may ultimately be able to claw back in civil proceedings.<sup>16</sup>
- [21] While I respectfully agree with Chesterman J that what matters is the content rather than the form of the response to a payment claim, there is a fundamental difference between a proposal to make a payment within the meaning of s 18 (that is, a payment on an interim basis) and an offer, open for acceptance within 7 days, to make a payment in full satisfaction of the applicant’s claim. In the latter case, the liability to pay the amount offered depends on the applicant’s acceptance of the offer, and there is no scope for the respondent’s later clawing it back.
- [22] In my view, then, the letter of 7 October 2009 was not a payment schedule.

### **Recovery of amount claimed**

- [23] Not having served a payment schedule within 10 days of the service of the payment claim, the respondent became liable to pay the amount of the payment claim (\$511,324.44) on the due date for the progress payment to which the payment claim related.<sup>17</sup>
- [24] The due date was probably 10 business days after service of the payment claim,<sup>18</sup> or at most 14 days.<sup>19</sup> At any rate, no part of the amount claimed has been paid.
- [25] The amount claimed is recoverable as a debt.<sup>20</sup> Ordinarily a proceeding to recover a debt should be brought by claim and statement of claim, and the plaintiff may make an application for summary judgment at any time after the defendant files a notice of intention to defend.<sup>21</sup> Under r 11(a) of the *UCPR*, a proceeding may be commenced by originating application if the only or main issue in the proceeding is an issue of law and a dispute of fact is unlikely. Of course, if a proceeding is commenced in an incorrect way, the Court may order that it continue as if

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<sup>16</sup> *Building and Construction Industry Payments Act 1994* (Qld), s 100.

<sup>17</sup> *Building and Construction Industry Payments Act 1994* (Qld), s 18(5).

<sup>18</sup> *Building and Construction Industry Payments Act 1994* (Qld), s 15(1)(b).

<sup>19</sup> *Building and Construction Industry Payments Act 1994* (Qld), s 15(1)(a); Terms expressed as “14 days EOM”.

<sup>20</sup> *Building and Construction Industry Payments Act 1994* (Qld), s 19(2)(a)(i).

<sup>21</sup> *Uniform Civil Procedure Rules 1999* (Qld), rr 10, 292.

commenced in the correct way and give any necessary directions.<sup>22</sup> No point was taken about the commencement of this proceeding by originating application. In the circumstances my determination of the substantive issues raised on the application should not be taken as approval or disapproval of the form of originating process used in this case.

- [26] In proceedings to recover the interim payment, it is not open to the respondent to raise any defence in relation to matters arising under the construction contract or to bring any counterclaim.<sup>23</sup>

### **No licence under *QBSA Act***

- [27] In *Cant Contracting Pty Ltd v Casella*<sup>24</sup> the Court of Appeal held that a builder who was required by the *Queensland Building Services Authority Act 1992 (Qld)* (“the *QBSA Act*”) to hold a licence relevant to the type of work undertaken but who did not do so was not entitled to progress payments pursuant to the *Building and Construction Industry Payment Act*.<sup>25</sup>
- [28] Counsel for the respondent referred to this case in his written submissions without any elaboration as to its relevance to the present case. Counsel for the applicant acknowledged that his client did not hold a licence under the *QBSA Act*, but submitted that it was not required to do so, because the work was not “building work” within the meaning of that Act, and there was no applicable category of licence. When asked which category of licence he contended the applicant ought to have held, counsel for the respondent was unable to nominate one.
- [29] The work undertaken by the applicant is within the definition of “construction work” in s 10 of the *Building and Construction Industry Payment Act*, which is wider than the definition of “building work” in schedule 2 to the *QBSA Act*. Under the latter –

“**building** includes any fixed structure.

*Examples of a fixed structure—*

- a fence other than a temporary fence
- a water tank connected to the stormwater system for a building
- an inground swimming pool or an aboveground pool fixed to the ground

...

**building work** means—

- (a) the erection or construction of a building; or
- (b) the renovation, alteration, extension, improvement or repair of a building; or

<sup>22</sup> *Uniform Civil Procedure Rules 1999 (Qld)*, rr 13, 14.

<sup>23</sup> *Building and Construction Industry Payments Act 1994 (Qld)*, s 19(4)(b).

<sup>24</sup> [2006] QCA 538.

<sup>25</sup> *Queensland Building Services Authority Act 1992 (Qld)*, s 42(3).

- (c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or
- (e) any site work (including the construction of retaining structures) related to work of a kind referred to above; or
- (f) the preparation of plans or specifications for the performance of building work; or
- (fa) contract administration carried out by a person in relation to the construction of a building designed by the person; or
- (g) fire protection work; or
- (h) carrying out site testing and classification in preparation for the erection or construction of a building on the site; or
- (i) carrying out a completed building inspection; or
- (j) the inspection or investigation of a building, and the provision of advice or a report, for the following—
  - (i) termite management systems for the building;
  - (ii) termite infestation in the building;
 but does not include work of a kind excluded by regulation from the ambit of this definition.”

Thus, site works are “building work” only if they are related to work on a “building”. I doubt that power lines are “buildings” as defined there, but the matter was not fully argued.

- [30] Citing a decision without any argument as to its applicability is to be deprecated. Given counsel for the respondent’s failure to nominate a category of licence which the applicant ought to have held, I have taken him to have abandoned any argument upon the applicability of the decision in *Cant* to the facts of this case.

### **Conclusion**

- [31] The applicant is entitled to judgment against the respondent for \$511,324.44. I will hear counsel on interest and costs.