DISTRICT COURT OF QUEENSLAND

CITATION:	*J Hutchinson Pty Ltd v Thunder Investments Pty Ltd* [2009] QDC 90
PARTIES:	**J HUTCHINSON PTY LTD (ACN 009 778 330)** *Applicant* **V** **THUNDER INVESTMENTS PTY LTD (ACN 989 988 130)** *Respondent*
FILE NO/S:	BD 806/09
DIVISION:	Civil Applications
PROCEEDING:	Application for judgment
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	17 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2009
JUDGE:	**Judge Alan Wilson SC**
ORDER:	**Judgment for applicant for $217,674.15**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – whether applicant had an entitlement to make a progress claim under s 12 of the *Building and Construction Industry Payments Act* 2004 (Qld) – whether applicant made a valid payment claim under the Act – whether applicant estopped from relying upon and asserting rights under the Act *Building and Construction Industry Payments Act* 2004 (Qld) s 12, s 18 and s 19 Cases considered: *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] QSC 1 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Anor* (2004) 62 NSWLR 421; (2005) 21 BCL 289; [2004] NSWCA 394 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1

Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) 64 NSWLR 448; [2005] NSWCA 391
Coordinated Construction Co. Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229
Energetech Australia Pty Ltd v Sides Engineering Pty Ltd [2005] NSWSC 801
Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd (2006) 22 BCL 31; [2005] NSWSC 705
Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) [2007] QSC 333
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) NSWLR 462; [2005] NSWCA 409
Pacific General Securities Ltd and Anor v Soliman & Sons Pty Ltd and Ors (2006) 196 FLR 388; (2006) 22 BCL 359; [2006] NSWSC 13
Tailored Projects Pty Ltd v Jedfire Pty Ltd [2009] QSC 32
Vanbeelen t/a H and K Concreting and Construction v Blackbird Energy Pty Ltd [2006] QDC 285

COUNSEL: *M D Ambrose* for the applicant
A Lyons for the respondent

SOLICITORS: *Holding Redlich Lawyers* for the applicant
Wonderley & Hall Solicitors for the respondent

[1] In November 2007 J Hutchinson Pty Ltd and Thunder Investments Pty Ltd entered into an oral agreement under which Hutchinson was to construct the 'High Court Café' at the corner of Margaret and Neil Streets in Toowoomba. Under the agreement Thunder Investments would provide designs and specifications and Hutchinson would be remunerated for the cost of construction, plus a profit margin of 10 per cent. Hutchinson says it is still owed $217,674.15 – the last, it says, of a series of progress claims to which it is entitled under the contract.

[2] Hutchinson's claims in this proceeding rely, and are founded upon, the provisions of the *Building and Construction Industry Payments Act* 2004 (Qld). Hutchinson says that on 12 February 2009 it properly served what the Act calls a 'payment claim' upon Thunder Investments and because the latter did not, within ten days, respond with a 'payment schedule' Hutchinson is now entitled to judgment for that sum as a statutory debt, under s 17 of the Act.

[3] The purpose of the Act is to enable those who carry out construction work under a construction contract (or supply goods and services) to recover progress payments[1]. This purpose is to be achieved, the Act says, by granting a statutory entitlement to progress payments under a procedure that involves the making of a claim, by the claimant; and, then, an opportunity for the recipient to respond with a payment schedule. If the schedule shows that some or all of the claim is in dispute, the claim and schedule are then referred to an adjudicator for a decision[2].

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1 *Building and Construction Industry Payments Act* 2004 (Qld), s 7.
2 *Building and Construction Industry Payments Act* 2004 (Qld), s 8.

[4] It is not in issue that the work undertaken by Hutchinson was 'construction work' under s 10(1) of the Act, nor that their agreement was a 'construction contract' as that term is specified in sch 2. In the course of the contract, the evidence shows, Hutchinson had delivered progress claims between 19 March and 27 November 2008 in the total sum of $795,154.15, and they had been paid.

[5] Although it is unclear precisely when the works were completed, affidavits filed on behalf of both parties indicate that happened, relevantly for purposes discussed later, at some time before 31 January 2009 (subject, perhaps, to some rectification of defects, and the like). In particular the affidavits filed by one of Thunder Investments directors, Mr Hofstee, show that from about October 2008 he had been seeking further information and documents to support Hutchinson's claims and he refers, in his affidavit sworn 2 April 2009 and filed by leave at the hearing, to a meeting in 14 October 2008 in which he raised '*… a number of items of work which needed to be rectified*'. In context, the reference to rectification implies the work was largely complete around that time.

[6] On 12 February 2009 Hutchinson sent a document described on its face as 'PROGRESS CLAIM NO. 8 (30th January 2009)' and 'FINAL CLAIM' together with an invoice for the subject amount bearing the words '*Building and Construction Industry Payments Act 2004 (Qld) or to the Building and Construction Industry Payments Act 2002 (Vic), whichever is applicable to the site'*. The document was sent by mail, facsimile and email. Mr Hofstee swears that the copy mailed to the premises did not contain the 'tax invoice' page; but it is not alleged that Thunder Investments did not receive the version sent by email and facsimile. I did not understand it to be suggested that service by the means described was insufficient. Section 103 of the Act does not, in any event, prescribe a mandatory method of service[3].

[7] Section 17(2) provides that a payment claim must identify the construction work (or related goods and services) to which the progress payment relates; state the amount that the claimant claims to be payable; and, shows on its face that it is made under the Act ('*…state(s) that it is made under this Act*'). Hutchinson's documents of 12 February 2009 identified the construction work to which the progress claim purported to relate by specific reference to the project name and number and to a document called the CHEOPS report which had allegedly been provided to Thunder Investments in December 2008, and which was said to provide an identification and accounting of the works claimed and the calculation of the amount. The documents also, of course, state the amount claimed and contain the necessary reference to the Act. A reference, in the payments claim, to other documents is permissible: *Coordinated Construction Co. Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [42], per Basten JA.

[8] If Thunder Investments wished to dispute its obligation to pay the sum claimed in the payment claim, or any part of it it could have resisted payment by responding, within ten days, with a 'payment schedule' which complied with s 18. Under that provision if the recipient proposes to pay something less than (or none of) the amount claimed in the payment claim, it must state the amount it proposes to pay, and why that amount is less and, if it is less because the recipient is withholding

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[3] See *Pacific General Securities Ltd and Anor v Soliman & Sons Pty Ltd and Ors* [2006] NSWSC 13 at [58], per Brereton J.

payment for any reason, the reason for the withholdings[4]. Under the balance of the section if the respondent does not serve a payment schedule within (here) ten business days after the payment claim is served, it becomes liable to pay that claim.

[9] Section 19 provides for the consequences which are attracted if the recipient does not deliver a payment schedule, and does not pay the claim. The respondent immediately becomes liable to pay the claimed amount, which the claimant may recover as a debt. Importantly, under s 19(4) if the claimant brings proceedings the respondent is not entitled to raise any defence in relation to matters '*... arising under the construction contract*'.

[10] Thunder Investments raised three grounds which, it said, prevented Hutchinson from obtaining the summary judgment it seeks. The first involved the question about the time when the payment claim was made and whether Hutchinson had an entitlement to make the claim at that date in terms of the Act. The second asserted the payment claim was not valid because it failed to properly identify the construction work or related goods and services to which the claim related[5]. The third involved an allegation that because of a course of dealings between the parties Hutchinson was now estopped from relying upon the absence of a payment schedule. For reasons which follow I am not persuaded any of these grounds are sufficient to refuse Hutchinson its judgment.

[11] As to the first, s 12 has already been mentioned. Pursuant to the definition of 'reference date' in the Act, Hutchinson was entitled to deliver progress claims on the last day of the month in which construction work was first carried out, and the last day of each subsequent month. Under s 17(4) the payment claim must, also, be served within 12 months after the construction work was last carried out. Whether the construction work finished in late 2008 or, even, as late as some time in January 2009, a payment claim delivered on 12 February 2009 was on any view rendered after the last day of the relevant month – and, of course, within 12 months.

[12] As to the second point Chesterman J (as his Honour then was) has observed that the Act emphasizes speed and informality, and the question whether a document satisfies the description of a payment schedule, or a payment claim, should not be approached from an unduly critical view point. No particular form is required and the only question is whether the content of the documents satisfies the statutory description[6]. A series of decisions of the New South Wales Supreme Court (and Court of Appeal) support the proposition[7].

[13] Submissions for Thunder Investments focussed on two matters: the alleged absence of the CHEOPS report referred to in the payment claim and, secondly, a document attached to the payment claim which contained figures differing from those appearing in it.

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4 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(3).

5 *Building and Construction Industry Payments Act* 2004 (Qld), s 17(2)(a).

6 *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20].

7 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Anor* (2004) 62 NSWLR 421; (2005) 21 BCL 289; [2004] NSWCA 394; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) NSWLR 462*; [2005] NSWCA 409; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801; *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* (2006) 22 BCL 31; [2005] NSWSC 705; *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391.

[14] Of the documents said to comprise the payment claim, the first, the tax invoice simply sets out a figure, and refers to the Act. The second bears the words 'Final Claim' and also a claim for 'Costs as per CHEOPS report'. Mr Nielsen, construction manager for Hutchinson, avers that he sent the CHEOPS report to Mr Hofstee on 10 December 2008. Mr Hofstee denies this and it is true, as counsel for Thunder Investments pointed out, that the copy of the report attached to Mr Nielsen's first affidavit appears (it is a little unclear) to refer to dates after 10 December 2008.

[15] On the other hand, the payment claim clearly refers to the report and amounts claimed and the subtotals which appear in the progress claim plainly originate from page 30 of the copy of the report exhibited to Mr Nielsen's first affidavit filed on 26 March 2009; none of the communications between the parties' representatives shortly before, or in the period after 12 February 2009 (exhibited to one of Mr Hofstee's affidavits) refers to, or seeks a copy of, the report; and, rather, the emails from Thunder Investments refer to time sheets and pay advices.

[16] Neither deponent was required for cross-examination. Under s 19 of the Act, in the absence of a 'payment schedule' from the respondent, judgment may be given to the claimant if its payment claim satisfies s 17; under s 19(2) the unpaid claim may be recovered '*as a debt…in any court of competent jurisdiction*'.

[17] On its face, Hutchinson's claim for judgment is brought under r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*), which empowers the court to make any order, including judgment '… *that the nature of the case requires*'.

[18] No submissions were directed to this aspect of the matter but it might reasonably be ventured that the tests surrounding the question whether judgment ought be given under this rule are different from those arising under the summary judgment provisions of the *UCPR*[8]. When the legislation leading to the claim for judgment provides a ready mechanism for avoiding the immediate consequences of an unanswered payment claim it might be thought that a mere denial of part of the claimant's evidence, without more, falls short of setting up a satisfactory shield against judgment.

[19] I am satisfied, however, that even if an issue of credit surrounding the delivery of the CHEOPS report was resolved in the respondent's favour that would not extinguish Hutchinson's payment claim. The question remains whether or not what was delivered satisfies s 17(2). Without the CHEOPS report the documents are relatively terse but, in terms of the contract between the parties and the history of their past dealings, sufficient to identify the construction work (or related goods and services) to which the progress claim relates – they make specific reference to the project name, and the project number; they state the amount claimed; and, contain a sufficient reference to the Act. That, it seems to me, is enough to meet the Act's requirements.

[20] The respondent's concerns about any discrepancy between documents it has received and the calculations shown in the payment claim and the amount of that claim are properly matters to be raised by it in a payment schedule[9]. Here, the

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8 See *Uniform Civil Procedure Rules* 1999 (Qld), ch 9 Pt 2.

9 *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] QSC 1 at [45] per Dutney J.

papers were at least sufficient to leave the respondent in no doubt that what was being claimed was the difference between amounts previously claimed and those said to be yet outstanding.

[21] The test was, with respect, identified by Brabazon QC, DCJ in *Vanbeelen v Blackbird Energy Pty Ltd* [2006] QDC 285 in which his Honour referred to the judgment of the New South Wales Court of Appeal in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448 and in particular the decision of Santow JA at [48]:

> 'I consider that there must be sufficient specificity in the payment claim for its recipient actually to be able to identify a 'payment claim' for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any (the respondent) needs to be in a position to determine in a meaningful fashion whether to make a payment, or else dispute it with reasons so as in that case to permit adjudication of the dispute, utilizing the summary procedures under the Act. Those requirements…are satisfied in my view by a relatively undemanding test, though still one with some content…an objective not subjective test, taking into account the background knowledge each of the parties derive from their past dealings and exchange of documentation…'

[22] The past dealings between these parties, considered in the context of the scheme arising under the Act mean that, here, if Thunder Investments believed that it lacked sufficient information to decide whether or not to pay some or all of the claim it need simply have raised that matter in a payment schedule. Ultimately, then, the strength and weaknesses of each party's claims could have been determined under the adjudication process provided in Pt 3, Div 2. For the reasons already set out I am, however, satisfied that Hutchinson's papers constituted a sufficient payment claim.

[23] Thunder Investments' third point relies upon evidence about communications between the parties both before and after the payment claim was delivered. It was said, firstly, that in October 2008 the parties had agreed that Thunder Investments need not pay Hutchinson's claims until the latter had substantiated its costs. Immediately after 12 February 2009 there were communications in which Thunder Investments sought further information necessary, it said, to substantiate the payment claim. These communications reasonably led, it is said, to an expectation on the respondent's part that Hutchinson would not rely upon the passing of the necessary ten days after the delivery of the payment claim, and the absence of a payment schedule from Thunder Investments in that time, in the present proceedings or proceedings of similar ilk.

[24] Nowhere in that material is it suggested, however, that there was any representation on Hutchinson's behalf that it would not rely upon the Act – nor, for the sake of completeness, anything to suggest that Thunder Investments sought something of that kind. The material touches upon the provision of some further accounts, a possible meeting and the examination of accounts by the respondent's accountant or auditor, and similar matters. It is silent about the legal implications of the payment claim, with reference to the Act.

[25] In *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32 it was suggested by Douglas J that an estoppel of this kind would not, in any event, found a defence but, rather, give rise to a matter which might later be litigated under s 100 of the Act. The remarks are, however, plainly *obiter dicta* and as Mr Lyons, for Thunder

Investments, pointed out do not address the possibility of detriment flowing from an estoppel.

[26] While it is true (as Mr Lyons also submitted) that at no point in the communications immediately after delivery of the payment claim did Hutchinson say that in the absence of a payment schedule it might proceed to exercise its rights under the Act, the respondent's difficulty is that nothing in its evidence suggests the converse. It is not asserted that Hutchinson made, or Thunder Investments sought, any offer or representation about that aspect of the matter at all.

[27] It is clear that some representations or conduct can vitiate a payment claim but, here, there is nothing of the kind which confronted Dutney J in *Austruct Qld Pty Ltd v Independent Pub Group* [2009] QSC 1 in which a representation made by the claimant to the respondent was found to be knowingly and materially false and to constitute misleading conduct under s 52 of the *Trade Practices Act* 1974 (Qld), as a result of which the respondent did not deliver a payment schedule within the statutory time frame.

[28] Nothing of that kind could be asserted here: a payment claim was, I am satisfied, properly delivered and, in its dealings with Thunder Investments after delivery, Hutchinson did nothing which might be construed as a waiver of its rights under the Act, or a representation that it would not exercise them.

[29] It follows the applicant is entitled to summary judgment in the amount it seeks, and that will be ordered.