

DISTRICT COURT OF QUEENSLAND

CITATION: *Wolbers v Day & Co Pty Limited* [2007] QDC 103
PARTIES: **ROSS WOLBERS (trading as RAW CABINETS & JOINERY)**

Applicant/Plaintiff

V

DAY & CO PTY LIMITED ACN 105 791 697

Respondent/Defendant

AND BY COUNTERCLAIM

DAY & CO PTY LIMITED ACN 105 791 697

Plaintiff by Counterclaim

V

ROSS WOLBERS (trading as RAW CABINETS & JOINERY)

First Defendant by Counterclaim

And

BRUCE LYNTON PTY LTD ACN 009 926 738

Second Defendant by Counterclaim

FILE NO/S: SD 80/2007

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court of Queensland at Southport

DELIVERED ON: 7 June 2007

DELIVERED AT: Southport

HEARING DATE: 4 June 2007

JUDGE: Alan Wilson SC, DCJ

ORDER: **1 that the defendant's counterclaim be struck out; and**
2 that the defendant pay the costs of the plaintiff and the second defendant by counterclaim of and incidental to this application (including the costs of the second defendant associated with the preparation, filing and service of its defence to the counterclaim) on the standard

basis

CATCHWORDS: PRACTICE – PRACTICE AND PROCEDURE – STRIKING OUT COUNTER-CLAIM – CLAIMS UNDER *Building and Construction Industry Payments Act 2004* – defendant denying Act applies, and serving counterclaim – whether denial that Act applies negates its effect – whether counterclaim should be struck out

Building and Construction Industry Payments Act 2004, Part 3 Division 1

Uniform Civil Procedure Rules, r 171

Cases considered:

Blackbird Energy Pty Ltd v Van Beelen [2007] QCA 60

Cant Contracting Pty Ltd v Casella & Anor [2006] QCA 538

Impulse Electrical (Aust) Pty Ltd v Mother Natures

Chermside Pty Ltd [2007] QDC 023

Lucas Stuart Pty Ltd v Council of City of Sydney [2005]

NSWSC 840

Stubberfield v Lippiatt [2006] QSC 281

Vanbeelen v Blackbird Energy Pty Ltd [2006] QDC 285

COUNSEL: M Howe for applicant plaintiff
F G Forde for respondent defendant
I Bisson, solicitor, for second defendant by counterclaim

SOLICITORS: Mal Chalmers and Company for applicant plaintiff
McDonald Balanda & Associates for respondent defendant
Hynes Lawyers for second defendant by counterclaim

- [1] The *Building and Construction Industry Payments Act 2004* (*BACIP*) has the object of ensuring that those involved in building work are able to recover progress payments under a construction contract. As Brabazon QC, DCJ observed in *Vanbeelen v Blackbird Energy Pty Ltd* [2006] QDC 285¹ it advances principles formerly appearing in legislation concerning subcontractors' charges:

The idea is that progress payments should be recovered promptly, or any dispute about them should be resolved by a system of adjudication. The prompt recovery of a progress payment is, in the usual way, without prejudice to other rights the parties may have under the construction contract.

- [2] In the same vein, Philip McMurdo J said in *Cant Contracting Pty Ltd v Casella & Anor* [2006] QCA 538 at para [52]:

[52] *The expressed object of the Payments Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work or to supply related goods and services under a construction contract. That object is achieved by granting an entitlement to progress payments, whether or not the relevant contract provides for them, and establishing a procedure for their recovery.* That procedure involves the making of a payment claim, the possible provision of a response to

¹ An appeal against this decision was dismissed: *Blackbird Energy Pty Ltd v Van Beelen* [2007] QCA 60

that claim ('a payment schedule'), the referral of a disputed or unpaid claim to an adjudicator for decision and the payment in the amount decided by the adjudicator. (Emphasis added)

- [3] In this matter the plaintiff asserts, while the defendant denies, that *BACIP* applies. The defendant has, in fact, counterclaimed and added the second defendant by counterclaim *via* an assertion that any contract to which *BACIP* might apply was, in truth, between the plaintiff and that second defendant by counterclaim, Bruce Lynton Pty Ltd. *BACIP* prohibits a counterclaim of this kind in an action to which the legislation applies and the plaintiff applies to strike that counterclaim out. The question arising then is the application of *BACIP*, if at all, in those circumstances.
- [4] The statement of claim alleges that pursuant to an agreement which was partly oral and partly in writing and entered into in June 2006 the plaintiff, by and at the request of the defendant, undertook some construction works on a property at High Street, Southport; and, that this agreement was a 'construction contract' under *BACIP*. The work, it is further alleged, was completed by the end of September 2006 and the plaintiff sent an invoice for \$209,605. The defendant paid \$100,000 of this about a week later but has failed to pay the balance, for which the plaintiff sues.
- [5] The nature and effect of subsequent steps, and their relevance under *BACIP*, is also in dispute. Section 17 requires service of a 'payment claim' to enliven its provisions. This is a term which can fairly be ascribed to the invoice, sent to the defendant, on 24 September 2006. Section 18 then requires that a party served with a payment claim may reply to it by serving a 'payment schedule', stating the amount it intends to pay, but must do so within 10 days of receipt of the payment claim. That did not occur. Nor, again (if *BACIP* applies) has the defendant paid the balance of the payment claim, as required by s 15.
- [6] Section 19 then provides that an applicant is entitled to recover from the respondent the unpaid portion of the payment claim, as a debt due – i.e., what is sought by the plaintiff in this claim. If a proceeding of that kind is started by a claimant, s 19(4) prohibits a respondent from bringing any counterclaim against the claimant. The plaintiff's application to strike out the defendant's counterclaim against it and Bruce Lynton Pty Ltd is based on this subsection.
- [7] As the passages set out earlier indicate, *BACIP* is designed to ensure a speedy and efficient mechanism for payment under a contract. Under s 100, any contractual disputes can be litigated later, but the contractor is to be paid the sum referred to in the interim. In other words, a respondent to a claim under *BACIP* can institute separate proceedings to ventilate all issues, *and* recover back any moneys it is later found to have wrongly paid.
- [8] *BACIP* closely follows the *New South Wales Building and Construction Industry Security and Payment Act 1999* of which Einstein J said in *Lucas Stuart Pty Ltd v Council of City of Sydney* [2005] NSWSC 840:

This legislative scheme is concerned and concerned only with strict compliance by each party with every parameter of the letter of the legislation. Hodgson JA in *Brodyn Pty Ltd v Davenport* used the words 'The strong legal effect provided by the Act' (at [52]), also endorsing the proposition that 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 ... Hodgson JA also made the point that the procedures contemplated a minimum of opportunity for court involvement. (Emphasis added)

- [9] Section 3 of *BACIP* provides that it only applies to a ‘construction contract’, a term which is defined in Schedule 2 as a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party. All the other rights asserted by the plaintiff here under *BACIP* rest, as it were, on the bedrock for that allegation – which is, of course, denied by the defendant. Once the existence of a contract which attracts that definition is put in issue, the defendant says, *BACIP* does not apply. The argument appears to be novel.
- [10] *Cant Contracting Pty Ltd v Casella & Anor* involved a particular hurdle for the claimant: that it did not, at the time it claimed progress payments, hold a licence which permitted it, under Queensland law, to perform the work. All members of the court delivered separate reasons for judgment, while agreeing that the appeal should be allowed and the claimant’s application for summary judgment dismissed. In the course of his judgment Williams JA said, albeit *obiter*:
- [31] Counsel for the respondent relied heavily on the reference in section 17 of the Payment Act to a person ‘who is or claims to be entitled to a progress payment’; he submitted that in consequence a person could come within the section even though at the end of the day it was shown that his claim was unjustified. *The inclusion of the expression ‘claims to be entitled’ is intended, in my view, to meet the situation where a claim is made under the (BACIP) in the face of an ongoing dispute between the parties as to such entitlement ...* (emphasis added)
- [11] Section 17 appears in Part 3 Division 1 of *BACIP*. As Williams JA noted, s 17(1) refers to a person who *claims* to be entitled to a progress payment and gives that person the right to serve a payment claim. Section 18 then places an onus upon the recipient (the respondent) to reply with a payment schedule. Section 19 is headed ‘*Consequences of not paying claimant if no payment schedule*’ and refers, in subsection (1), to a liability which arises ‘... *because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section*’ and attaches to a party who fails to pay the whole or part of the claimed amount on or before the due date. Section 19(2) gives rise to an elective right, in the claimant, to recover the unpaid portion as a debt ‘... *in any court of competent jurisdiction*’.
- [12] The effect of the Division, relevantly here, is that a respondent in the defendant’s position faced with a claim brought in reliance upon *BACIP* remains entitled to deny, as this defendant does, that the legislation applies. That denial, and associated contrary pleas like a denial that an obligation to deliver a payment schedule under s 18 arose, may be litigated in this action; but, once *BACIP* is called up by a claimant who has started proceedings under s 19(2)(a)(i), subsection 19(4)(b)(i) prohibits a counterclaim.
- [13] This is not so draconian as it might, at first blush, appear. Section 19(4) provides that the plaintiff cannot have judgment ‘... *unless the court is satisfied of the existence of the circumstances referred to in subsection (1) ...*’ The recipient of a payment claim has a clear opportunity under s 18, if it chooses, to protect itself against the speedy, interim remedies *BACIP* can attach to a claim.

- [14] I was referred by Mr Bisson, appearing for the second defendant by counterclaim Bruce Lynton Pty Ltd, to the decision of Forde DCJ in *Impulse Electrical (Aust) Pty Ltd v Mother Natures Chermside Pty Ltd* [2007] QDC 023 in which his Honour said, at para [11]:

... a failure to serve a schedule under section 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.¹

¹ Per McGill QC, DCJ in *Smith v Coastline Construction Pty Ltd*, unreported, BD2504/2006 at pp 4-5.

- [15] It follows that if there is no construction contract and *BACIP* does not apply the plaintiff's claim will fail, and be dismissed. For the moment, however, the counterclaim cannot stand in the face of s 19(4). The plaintiff's application was brought under *UCPR* r 171, in reliance upon the various grounds for striking out pleadings which arise under that rule. Ultimately it makes little difference which of those heads is chosen but I think that in the face of legislation prohibiting a pleading, r 171(1)(e) ('an abuse of process of the court') is apt². For these reasons, I will order the defendant's counterclaim to be struck out.
- [16] The plaintiff also seeks indemnity costs. Affidavits from the plaintiff's solicitor show that as early as 23 March 2007 he wrote to the defendant's solicitors pointing out their client was not entitled to counterclaim, and inviting them to re-plead. Two subsequent letters were sent, seeking a response. On 3 May 2007 the defendant's solicitors did reply, asserting *BACIP* did not apply. Those assertions were debated in subsequent correspondence. The plaintiff has succeeded here but, as the reasons set out above show, the matter was not straightforward.
- [17] In the circumstances, the discretion as to costs is appropriately exercised if the defendant is ordered to pay the plaintiff's costs, and those of the second defendant by counterclaim, of and incidental to the application (including the costs of the second defendant by counterclaim associated with the preparation, filing and service of its defence to that pleading) on the standard basis.

² See the judgment of Philippides J in *Stubberfield v Lippiatt* [2006] QSC 281