

DISTRICT COURT

CIVIL JURISDICTION

JUDGE RACKEMANN

No 1472 of 2007

DEVELOPMENT DYNAMICS (QUEENSLAND)
PTY LTD (ACN 107 302 196)

Applicant

and

DAVIES PROJECTS PTY LTD
(ACN 111 240 503)

Respondent

BRISBANE

..DATE 08/06/2007

JUDGMENT

HIS HONOUR: This is an application that the applicant be at liberty to enter judgment against the respondent in the amount of \$132,399.36, plus interest.

That relief is sought by reason of the provisions of the Building and Construction Industry Payments Act 2004. In particular, it is made on the basis that a payment claim was made pursuant to Section 17 of that Act, that the respondent failed to serve a payment of schedule on the claimant within the time allowed by Section 18, and accordingly, pursuant to Section 19, sub-section 2, sub-section A, (1), the claimant is entitled to recover the unpaid portion of the amount claimed as a debt in a Court of competent jurisdiction, which this Court is.

The respondent concedes that it failed to serve a payment schedule, but resists relief on the grounds that the claimant was not entitled to make a payment claim under Section 17 because it did not have a right under Section 12 to a progress payment.

Section 17, sub-section 1, provides as follows: "A person mentioned in Section 12, who is, or claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent)."

Section 12 provides as follows: "From each reference date, under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out

construction work, or supply related goods and services, under the contract."

The respondent says that the payment claim purportedly made by the applicant was made prior to the reference date under the construction contract, such that there was no entitlement to make a claim.

It may be noted that Section 17, sub-section 1, refers to a person who, "is, or who claims to be" entitled to a progress payment. In *F K Gardner and Sons Pty Ltd v Dimmon Pty Ltd*, 2006 QSC 243, Lyons J considered whether by reason of those words, it was open to a respondent to challenge the entitlement to relief on the basis that the claimant was not a person mentioned in Section 12. At paragraph 33 of her Honour's reasons, she concluded, "it cannot have been intended to completely over-ride what Section 12 says about a right to a progress payment by later provision in a section designed to deal with the procedure for payment." The solicitor for the claimant did not cavil with that approach and conceded that the respondent ought be successful in resisting relief if her client indeed had delivered the claim prior to the reference date, such that the client was not a person mentioned in Section 12.

The expression, "reference date" is defined in Schedule 2 of the Act, as follows:

"Reference date, under a construction contract, means -

(a) date stated in, or worked out, under, the contract as a date on which a claim for progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied, or undertaken to be supplied, under the contract;

(b) If the contract does not provide for the matter -

(i) The last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract;

(ii) The last day of each later named month.

The payment claim, in this case, was dated the 13th of February 2007 and related to the value of work to the 9th of February 2007. It was common ground that the claim was delivered prior to the reference date, if the reference date is ascertained by reference to sub-paragraph (b). If that part of the definition applied, then the claim ought to have been made from the last day of the month, rather than the middle of the month.

Attention focused on sub-paragraph (a) of the definition of reference date. The contract contains provisions which require the sub-contractor to make assessment claims as well as payment claims. Insofar as payment claims are concerned, Clause 42.2 provides, in part, as follows:

- (a) On the date specified in this sub-contract as the time for making payment claims, the sub-contractor shall deliver a payment claim to Davies Projects;
- (b) A payment claim delivered prior to the specified date will be taken as being delivered on the date specified in the sub-contract as a time for making payment of claims...
- (g) No amount shall be or become available by Davies Projects to the sub-contractor until the sub-contractor delivers today's projects, both an assessment claim and a payment claim in accordance with the sub-contractor".

The specification in the contract of the date for the making of payment claims is, at best, inelegantly expressed. It appears in Schedule C to the contract which reads as follows:

"Times for payment claims, the fifth day from the payment claim being made."

Obviously, that form of words cannot be literally applied in the context of the contract. In the context of Clause 42.2(a), for example, it would require the sub-contractor to deliver a payment claim to Davies Projects on the fifth day from the payment claim being made.

If, because of the difficulties with the specification of the times for payment, the contract is regarded as being one which

does not state, or does not provide, for the working out of the reference date, then the reference date will be dealt with under sub-paragraph (b), and the applicant will be unsuccessful.

The solicitor for the applicant contended that when one reads the contract as a whole, that the provision, in context, contains an obvious typographical error. It was suggested that the provision should be interpreted such that the specified time for payment claims is to be calculated by reference to the fifth day from the assessment claim being made. That, of course, does not assist the claimant, because it is common ground that no assessment claim was in fact made.

The solicitor for the claimant pointed to the fact that the Building and Construction Industry Payments Act contains provisions which prevent the parties from contracting out of the provisions of the Act (see Section 99), and which provide that the Act does not affect the rights of a party to a contract (see Section 100).

She pointed out that the Act does not require an assessment claim process. But again, I do not see how that can assist. The assessment claim process is simply being referred to in this case because, on the claimant's construction of the contract, it is the event by reference to which the contract allows the parties to work out the date on which a progress payment may be made.

I do not accept the submission that the written contract should be interpreted as one which permits a progress payment to be made on any day in a month in which the construction work has occurred. The contract, in so far as it allows a date to be worked out, refers to a certain number of days from a particular event.

Accordingly, it seems to me, that if the written contract is read in the way contended for on behalf of the applicant, that is, that the time for payment claims was the fifth day from the assessment claim being made, then the claim was lodged before such a reference date had arisen. And if the contract is regarded as being one which does not state or which does not permit the date the progress payment is to be worked out, then the claim was also premature because it was made prior to the date referred to in subparagraph (b) of the definition of "reference date". But in either case, the claimant must fail, since it was not a person with an entitlement, under section 12.

In order to avoid that conclusion, the solicitor for the applicant sought to rely upon an affidavit of the Manager of the applicant who deposed that:

"In about April or May 2006, when the applicant first began contracting with the respondent, John Davies of the respondent, said to me that the applicant may make a claim for a progress payment to the respondent at any point in a month and the respondent would pay the amount of the claim within 14 days thereafter."

That passage is not particularly illuminating in relation to the context in which those words were alleged to have been said. It was conceded from the bar table, by the solicitor for the applicant, that the conversation occurred months before the subject contract was entered into and at a time when the applicant and respondent were, "contracting", in respect of other projects.

I should note that in the affidavit of the Director of the respondent, it is denied that such a conversation ever took place and I would not be in a position to resolve that question of fact on an application dealt with in a summary way. However, in any event, even if I accepted that there was a statement made to that effect months earlier, in the context of a contract with respect to other projects, it would not, of itself, lead to the conclusion that any such term ought be implied into the subject contract, which was entered into at a later time in respect of a different project.

The solicitor for the applicant was unable to direct my attention to any authority which would suggest a contrary conclusion should be reached.

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The solicitor for the applicant also drew my attention to part of the affidavit of the Manager for the applicant, to the affect that this point had not been raised with respect to other progress payments. Again, by itself, the fact that the respondent did not insist on its rights on other occasions, would not, without more, lead to the conclusion that it was prevented from doing so on this occasion or prevent it from raising the issue at this time.

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For those reasons, the applicant has failed to satisfy me that it was a person who, at the relevant time, was entitled to make a payment claim and accordingly I dismiss the application.

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HIS HONOUR: I order the applicant to pay the respondent's costs of the proceedings.

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