

SUPREME COURT OF QUEENSLAND

CITATION: *F K Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] QSC 243

PARTIES: **FK GARDNER & SONS PTY LTD**
(applicant)
v
DIMIN PTY LTD (ACN 010 637 859)
(respondent)

FILE NO/S: BS 6605/06

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 1 September 2006

DELIVERED AT: Brisbane

HEARING DATE: 23 August 2006

JUDGE: Lyons J

ORDER: **Application dismissed with costs to be assessed**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – Whether applicant is a person to whom s 17 of the *Building and Construction Industry Payments Act* (Qld) (2004) applies

Building and Construction Industry Payments Act (Qld) (2004), s 7, s 8, s 10, s 12, s 17, s 18, s 19
Trade Practices Act 1974, s 52, s 87

Beckhaus v Brewarrina Council (2002) NSWSC 960
Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266

COUNSEL: R N Wensley QC for the applicant
S Couper QC for the respondent

SOLICITORS: Kym Flehr Legal Solutions for the applicant
Home Wilkinson Lowry for the respondent

LYONS J:**Background**

- [1] The applicant is the contractor under a written design and construct building contract and the respondent is the principal. The contract is dated 2 November 2004. The contract sum is \$11,495,000 and the works comprise an apartment block. Work began on 8 December 2004.
- [2] The contractual documents can be identified by an Agreement dated 2 November 2004 which agrees that a series of nine documents “shall together comprise the contract between the Parties.” The relevant documents included the Australian Standard Form of Formal Instrument of Agreement (AS 4902-2000), an Addendum to Contract AS 4902-2000 and a document titled Amendments to Standard Terms and Conditions of AS 4902-2000 (the Amendment document).
- [3] Standard clause 37 of the Australian Standard Form of Formal Instrument of Agreement, which provided for payment, was deleted and the Amendment document replaced it with a non standard payment clause. This replacement clause at 37.1 provided that “The contractor shall make progress claims or Payment Claims progressively in accordance with Item 33”. Item 33 then provides “Times for progress claims-28th day of each month for WUC done to the 28th day of that month”.
- [4] Essentially then the contract provided for a payment regime involving submission of claims by the contractor on the 28th day of the month, certification (by way of a payment schedule) by the contract superintendent, and payment by the principal.
- [5] Consequently during the course of the works, claims were made, Payment Schedules were issued and payments were made in accordance with the contract up until progress claim 15. This claim was lodged with the superintendent on 28 April 2006. A payment schedule was subsequently issued on 30 April 2006 and the approved amount of claim was duly paid.
- [6] No claim would appear to have been lodged in May 2006 but on or about 20 June 2006 the applicant issued its next payment claim No 16 and served it on the superintendent. The documentation comprised:
 - (a) a tax invoice No 2597 for progress claim 16 for the period May to June 2006, in the amount of \$1,073,849.01;
 - (b) a statutory declaration by Gary Gardner dated 20 June 2006;
 - (c) a 4 page spreadsheet entitled “Progress Claim No.16 June 2006”.

- [7] The superintendent received the claim on 22 June 2006. The superintendent then faxed an 11 page document titled “Payment Schedule for Claim no 16” to the applicant on 10 July 2006. The superintendent set out that the amount claimed was \$1,073,849.01, that the proposed payment was \$222,317.30 and attached a nine page Justification for Deduction and a Deductions Summary. Extensive further material in addition to this documentation was received by the applicant on 11 July 2006. No monies have been paid in relation to the claim.
- [8] The contract works are “construction work” within the meaning of s 10 of the *Building and Construction Industry Payments Act (Qld) (2004)* (“the Act”).
- [9] Section 7 of the *BCIPA* states that its object 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 under a construction contract”. Section 8 of the Act relevantly provides that the object is to be achieved by:
- (a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and
 - (b) establishing a procedure that involves—
 - (i) the making of a payment claim by the person claiming payment; and
 - (ii) the provision of a payment schedule by the person by whom the payment is payable; and
 - (iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and
 - (iv) the payment of the progress payment decided by the adjudicator.

The applicant’s submission

- [10] By application filed on 9 August 2006 the applicant seeks the following orders:
1. That the respondent pay to the applicant the sum of one million and seventy-three thousand eight hundred and forty-nine dollars and one cent (\$1,073,849.01) being a debt owing by the respondent to the plaintiff, pursuant to the provisions of s 19(2)(a)(i) of the *Building and Construction Industry Payments Act (Qld) 2004*;
 2. That the respondent pay to the applicant interest upon the said sum of \$1,073,849.01, calculated at the rate of 10 per cent per annum from and including 6 July 2006 until date of the order of this court;
 3. That the respondent pay the applicant’s cost of and incidental to the application; and
 4. Such further or other order as to this court may seem meet.
- [11] The applicant’s case essentially is that it lodged a valid payment claim; the response to the claim referred to above is not a payment schedule as required by *BCIPA*, accordingly no payment schedule was received and under s 18(5) of the Act the amount claimed is due and is recoverable under s 19(2) of the Act.

[12] This submission is therefore based on the applicant’s submission that progress claim 16 is a “payment claim” as referred to in s 17(1) of the Act and it was served in accordance with the Act.

[13] Section 17 of the Act provides that:

- (1) A person mentioned in section 12¹³ who is or who 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*).
- (2) A payment claim—
 - (a) must identify the construction work or related goods and services to which the progress payment relates; and
 - (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
 - (c) must state that it is made under this Act.
- (3) The claimed amount may include any amount—
 - (a) that the respondent is liable to pay the claimant under section 33(3);¹⁴ or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) 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 or the related goods and services to which the claim relates were last supplied.
- (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[14] Section 17 refers to a “person mentioned in s 12 who is or claims to be entitled to a progress payment”. Relevantly s 12 then provides that “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 ...”.

[15] The applicant also submits that because clause 37.1 provides that the contractor shall “make progress claims or payment claims” that this is an attempt to both refer

to the statutory regime, because “payment claim” is the expression used in s 17, and to compare and contrast that regime with the contractual regime which is for progress claims.¹ The applicant also refers to the replacement clause 37 which further provides that “If the superintendent has received a progress claim, which is not a Payment Claim from the contractor and the Superintendent does not issue the Payment Schedule within 14 days of receiving the progress claim in accordance with sub clause 37.1, that progress claim shall be the relevant Payment Schedule.”

[16] The applicant submits therefore that the contractual obligation was for the contractor to make one progress claim per month on the 28th day of the month for work calculated to that day but that in addition to the contractual rights 12 of the Act creates an extra right over and above the contract to a progress payment² (as distinct from a payment claim) *from* the “reference date”. The reference date in this case is the 28th day of the month.

[17] Whilst progress claim 16 is not a contractual claim the applicant submits that the claim, which was served on 22 June 2006, is a payment claim under the Act because the applicant claims to be entitled to a progress payment and it meets the requirements of s 17(2) in that it identified the construction work to which the progress payment relates, it stated the amount of the progress payment and it was served within the later of the periods mentioned in s 17(4).

[18] For the purpose of s 17(4) the applicant states that in the current case those periods are:

- (a) The month up to and including June 28 2006; (the period worked out under the construction contract); and
- (b) The 12 month period commencing 20 June 2006 (the period 12 months after the construction work to which the claim relates was last carried out).

Put another way the basis of this claim would seem to be that the applicant did not lodge any payment claim in May 2006 but then did lodge a claim on 22 June 2006 and that pursuant to s 17(4) of the Act this payment claim may be served.

[19] The applicant submits that in this case the claim was made in respect of work carried out subsequent to 28 April and prior to 20 June and was made within 12 months, (i.e. delivered to the superintendent on 22 June) of such work being done and therefore satisfies section 17(4). The applicant also submits that it is irrelevant that the progress payment under the contract was submitted late (if it was due on 28 May) or early (if it was due on 28 June) because whilst that may have been a technical breach of the contract it does not affect the operation of the Act.

¹ See Transcript of Proceedings at page 8, line 52

² See Transcript of Proceedings at page 10 line 20

[20] Having made a payment claim the applicant submits that pursuant to s 18(4) of the Act the superintendent was required to serve a payment schedule within the *earlier* of firstly of:

- (i) the time required by the relevant contract (which is ten calendar days); or
- (ii) ten business days after the payment claim is served.

The earlier time, it is submitted is ten calendar days and it follows from this that the payment schedule was required to be served on their calculations by 6 July 2006. The superintendent served its payment schedule on 11 July.

[21] It is on this basis that the applicant submits that s 19 of the Act allows it, in the absence of a payment schedule within the time allowed, to recover the underpaid portion of the claimed amount from the respondent as a debt owing to the claimant in any court of competent jurisdiction.

The respondent's submission

[22] The respondent submits that the application is in effect an application for summary judgment in respect of a statutory debt. The respondent submits that the application should be dismissed on the following grounds:

- (a) The applicant's purported payment claim is not a valid claim pursuant to the Act. There is no entitlement to make a payment claim prior to the contractual reference date which is 28 June 2006 and this view is supported by the decisions of *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*³ and *Beckhaus v Brewarrina Council*.⁴ Accordingly the machinery under the Act for the payment of the claim stops;
- (b) Alternatively, if the payment claim is in part valid, there are issues of fact to be determined regard that part which is valid; and
- (c) If the payment claim is in any respect valid, the respondent has a counterclaim for orders pursuant to s 87 of the *Trade Practices Act 1974* in respect of a breach by the applicant of s 52 of the *Trade Practices Act*.

Does the claim come within s 17 of BCIPA?

[23] Progress claim 16, which was dated 20 June and submitted on 22 June, clearly sets out that it is for work done in June 2006. It is not a claim for work done before 28 May 2006, which could have been claimed on that date. Under the contract no claim could have been made for this work until 28 June 2006 and it has not been submitted that there was any agreement between the parties to change this date. It is

³ [2003] NSWSC 266

⁴ [2002] NSWSC 960

clear then that the claim for the progress payment is not made pursuant to the contract but is reliant on the statutory scheme.

- [24] The Act sets up a statutory regime for the recovery of progress claims and it is dependent on a series of steps being completed. There must be a valid statutory entitlement to a progress payment before a payment claim can be made and then if a payment schedule does not issue within time the unpaid portion of the claim becomes a debt. Such a statutory regime depends on strict compliance with the provisions in the Act.⁵
- [25] What therefore does the scheme require? Section 12 of the Act is headed “Rights to progress payments” and states “*From each reference date* under the construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work.....” (emphasis added).
- [26] “Reference date” is defined in Schedule 2 as “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...”. It was conceded by both parties that by clause 37.1 of the construction contract and item 33 of the schedule, progress claims can only be made on the 28th day of the month for work done to the 28th day of the month.
- [27] Accordingly the Act sets up a regime whereby from a reference date there is a statutory right to a progress payment. Section 17 then sets up the machinery for making a claim as a precondition to enforcing the right. It states that a person entitled to a progress payment (or who claims to be entitled) may serve a payment claim. Section 17 also sets out that the payment claim must identify the construction work to which the progress claim relates and must also state the amount claimed. Section 17 also sets out when the claim may be served.
- [28] Counsel for the applicant points to the importance of the words of s 17(1) which relevantly state “A person mentioned in section 12 who is *or claims to be* entitled to a progress payment” (emphasis added) may serve a payment claim. He submits that there need not be an enquiry as to actual entitlement but simply an assertion of entitlement by a claim and this then extends to who may make a payment claim. Counsel submits because these words were not part of the NSW statute that the decision in *Walter constructions* is distinguishable from the facts in the present case.
- [29] Essentially the argument would seem to be that by reading s 17 with s 12 this expands the category of a person who may make a payment claim to include not just a person actually entitled to a progress claim under s 12, because they have a right under the contract, but to also include a person who *claims to be entitled* even if under the Act no statutory entitlement could have arisen.
- [30] The applicant then submits that s 17(4) states when a claim may be served and states it is “within” the later of the two periods mentioned. It submits that it is not a

⁵ See *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [59]

requirement that a claim be served on a particular day but is rather a provision which permits a payment claim being served “within” those two periods and the entitlement springs from whichever period is the later.

- [31] The applicant agrees that Progress Claim No 16 was contractually due on 28 June but says it has a right to make a payment claim outside its contractual right because s 12 and s 17 of the Act read together give it a statutory right over and above such a right.
- [32] The question is whether the Act sets up an entitlement to make a payment claim prior to the contractual reference date, which in this case is 28 June 2006. This claim would essentially be in relation to the work done prior to June 20 2006. The applicant submits the claim dated 20 June 2006 is for work done prior to that date and runs for 12 months and qualifies under s 17(4).
- [33] I am not satisfied that this is the intention of s 17(1). Section 12 is in Part 2 of the Act, entitled “Rights to progress payments” and s 17 is in Part 3 entitled “Procedure for Recovering Progress Payments”. It cannot have been intended to completely override what s 12 says about a right to a progress payment by a later provision in a section designed to deal with the procedure for payment.
- [34] Section 17 confers a right to serve a payment claim. This right is conferred on a person mentioned in s 12 who is or who claims to be entitled to a progress payment. That is a reference to a person who is entitled under s 12 to a progress payment or claims an entitlement under s 12. On 20 June 2006 the applicant was not entitled to the progress payment claimed, nor could it on that date claim such an entitlement. Accordingly the applicant is not a person to whom s 17 applied and the claim does not come within that section.
- [35] The application should be dismissed.