

# SUPREME COURT OF QUEENSLAND

CITATION: *Baxbex Pty Ltd v Bickle* [2009] QSC 194

PARTIES: **BAXBEX PTY LTD**  
(applicant)  
v  
**BICKLE**  
(respondent)

FILE NO: 5471 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 28 July 2009

DELIVERED AT: Brisbane

HEARING DATE: 17 June 2009

JUDGE: Daubney J

ORDER: **1. The application be dismissed;**  
**2. The payment claim dated 27 April 2009 be set aside; and**  
**3. The applicant pay the respondent's costs of and incidental to the application, to be assessed.**

CATCHWORDS: CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACT – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant served on the respondent a payment claim pursuant to s17 of the *Building and Construction Payments Act 2004* – where the respondent did not file a payment schedule within 10 days of receiving the payment claim or at all – where applicant claimed in those circumstances the respondent became liable to pay the amount claimed – whether there was a valid payment claim – whether part of the payment claim was not for construction work or for related goods or services.

*Building and Construction Industry Payments Act 2004* (Qld)

*Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd*  
[2009] QSC 1, applied  
*Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*  
(2004) 61 NSWLR 421, applied

*F.K. Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] 1 Qd R 10, applied  
*Isis Projects v Clarence Street* [2004] NSWSC 714, considered  
*Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (In Liq) (2005) 64 NSWLR 462, considered

COUNSEL: M D Martin for the applicant  
 C J Carrigan for the respondent

SOLICITORS: R B Lawyers for the applicant  
 Quinlan Miller & Treston for the respondent

- [1] On 23 April 2007, the applicant and the respondent entered into a commercial building contract for the construction by the applicant of two 3 storey buildings. It was a “cost plus 10%” contract, with invoices to be sent for progress claims on Friday of each week.
- [2] By letter dated 27 April 2009 the applicant served on the respondent a payment claim pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004 (Qld) (“*BCIPA*”), claiming the sum of \$148,819.10. In this claim it was said:
- “In accordance with s 17 of the Act we advise:-
- (a) the construction work and/or goods and services to which our client’s progress claim relates is as particularised in the schedule hereto;
  - (b) the amount of the progress claim that the Plaintiff claims to be payable is \$148,819.10; and
  - (c) the claim is made in accordance with the Act.”
- [3] The respondent did not file a payment schedule within 10 days of receiving the payment claim or at all. It was submitted by the applicant that in those circumstances the respondent became liable to pay the amount claimed.<sup>1</sup> Accordingly, the applicant has applied for judgment in the sum of \$148,819.10 pursuant to s 19 of the *BCIPA*.

### **Issues for determination**

- [4] The issues raised by the respondent in opposing the application for judgment were:
1. whether the applicant’s letter dated 27 April 2009 satisfies the description of a “payment claim” in s 17(2) of the *BCIPA*; and
  2. whether part of the payment claim is not for “construction work” or for “related goods or services” as defined in the *BCIPA* and accordingly the applicant has no entitlement under s 12 of the *BCIPA* to the progress claim.

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<sup>1</sup> Section 18(5) *Building and Construction Industry Payments Act* 2004 (Qld).

### **The statutory regime under the *BCIPA***

- [5] By s 7 of the *BCIPA*, 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 (or undertakes to supply related goods and services) under a construction contract. This objective is achieved:
- (a) by granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and
  - (b) by establishing a procedure that involves the making of a payment claim, the provision of a payment schedule in response, the referral of a disputed or unpaid claim to an adjudicator for decision and the payment of the progress payment decided by the adjudicator.<sup>2</sup>
- [6] Part 2 of the *BCIPA* confers rights to progress payments. Section 12 provides that from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment.
- [7] The procedure for recovering progress payments is set out in Part 3 of the *BCIPA*. Under s 17 a person who is entitled to a progress payment under Part 2 may serve a payment claim on the person who is liable to make the payment. The formal requirements specified in s 17 compel the person making the payment claim to:
- (a) identify the construction work or related goods and services to which the progress payment relates;
  - (b) state the amount payable;
  - (c) state that the payment claim is made under the *BCIPA*.
- [8] Section 18 enables the respondent to reply to the claim by providing a payment schedule to the claimant. Details of the content and service of the payment schedule are also dealt with in s 18. If the respondent does not serve a payment schedule on the claimant within the prescribed time, “the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the progress claim relates”.<sup>3</sup>

### **Compliance with s 17(2) of the Act?**

- [9] The first issue is whether the applicant’s letter dated 27 April 2009 satisfied the description of a “payment claim” in s 17(2) of the Act.
- [10] The respondent contended that the applicant needed to provide a valid payment claim before any such payment schedule under s 18 of the Act, was required. It was submitted that the requirements of s 17(2)(a) had not been satisfied or addressed by the applicant’s letter.
- [11] Section 17(2)(a) provides that a payment claim:

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<sup>2</sup> Section 8 *Building and Construction Industry Payments Act 2004* (Qld).  
<sup>3</sup> Section 18(5).

“must identify the construction work or related goods and services to which the progress payment relates.”

- [12] The terms “construction” work and “related goods and services” are defined in s 10 and s 11 of the *BCIPA* respectively.
- [13] Relevantly, the schedule attached to the applicant’s letter, referred to various invoices (commencing with Invoice No. 1146 and concluding with Invoice No. 1183). These invoices were, however, not attached to the schedule. The information provided in the schedule for each invoice number was limited to the invoice date and balance owing. Importantly, the schedule did not provide any information which would identify the “construction work” as defined in s 10 of the *BCIPA*. Nor did the schedule identify any of the “goods” of the kind defined in s 11(1)(a) nor any of the kind of “services” defined in s 11(1)(b) or (c).
- [14] In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)*<sup>4</sup> Hodgson J, referring to a similar provision in the *Building and Construction Industry Payment Act 1999 (NSW)*, stated, “I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.”
- [15] The schedule in this case was, on its face, not compliant. It did not identify the construction work, nor did it identify any related goods or services that had been supplied. It merely invoked invoices by invoice number and amount.
- [16] Whilst the objective of the *BCIPA* is to “entitle certain persons who carry out the construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply,” this is achieved through “establishing a *procedure* for securing progress payments to which a person becomes entitled” under the Act (emphasis added).<sup>5</sup>
- [17] In *F.K. Gardner & Sons Pty Lt v Dimin Pty Ltd* [2006] 1 Qd R 10 A Lyons J, after referring to s17 of the *BCIPA*, said, “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 the time of the unpaid portion of the claim becomes a debt. Such a statutory regime depends on *strict* compliance with the provisions in the Act”<sup>6</sup> (my emphasis added).
- [18] In this case, there has not been strict compliance with the provisions of the *BCIPA*. It cannot be said, as was argued by the applicant, that prior receipt of the invoices by the respondent amounted to sufficient identification for the purposes of s 17. The letter which was relied on as constituting the “payment claim” did not comply with s 17 of the *BCIPA* as neither the construction work nor related goods or services were identified *within* the payment claim itself. As was postulated by McDougall J in *Isis Projects v Clarence Street*,<sup>7</sup> quoting Palmer J in *Multiplex*

<sup>4</sup> (2005) 64 NSWLR 462.

<sup>5</sup> Explanatory Memorandum to the *Building and Construction Industry Payments Bill 2004*.

<sup>6</sup> At [24].

<sup>7</sup> [2004] NSWSC 714 at [36].

*Constructions Pty Ltd v Luikens & Anor*<sup>8</sup> in relation to a payment claim, “precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.”

- [19] It would have been possible for the applicant to have sent copies of the invoices as part of, or annexed to, the schedule but this was not done. The present case is therefore quite different from the circumstances considered in *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd*<sup>9</sup> where the invoices and supporting documentation were attached to the payment claim. While making no comment on whether or not on its proper construction it is necessary to separately identify construction work and related goods and services, Dutney J in that case found that the payment claim, including the attached invoices and supporting documentation, identified sufficiently for the purposes of s 17 of the *BCIPA*, the nature of each item claimed.
- [20] I conclude, therefore, that the letter dated 27 April 2009 was not a “payment claim” under s 17 (2).

**Was the progress claim for “construction work” or “related goods or services”?**

- [21] My conclusion on the first issue disposes of the matter, but for completeness I will deal with the second issue raised.
- [22] There must be a valid statutory entitlement to a progress payment before a payment claim can be made. Pursuant to s 12 of the *BCIPA* “... 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.”
- [23] Section 17(1) provides the mechanism for making a claim as a precondition to enforcing the right, providing that “a person mentioned in section 12 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).”
- [24] It was submitted by the respondent that a substantial part of the applicant’s claim fell outside the definition of “construction work” or “related goods and services.” The respondent pointed to two claims included in the \$148,819.10:

1. Claims for “administration” at \$30.00 per hour plus 10% plus G.S.T. in:-

<u>Invoice No.</u>	<u>Date</u>	<u>Amount</u>
1146	12.06.08	\$1,125.30
1152	30.06.08	\$438.60
1159	31.07.08	\$435.60
1161	31.08.08	\$290.40
1165	30.09.08	\$90.75
1169	31.10.08	\$72.60
1172	05.01.09	\$290.40

<sup>8</sup> [2003] NSWSC 1140 at [76].

<sup>9</sup> [2009] QSC 1.

2. A claim for “supervisory costs” for David Marshall not including hours spent on rectification work at \$70.00 per hour plus 10% plus G.S.T as follows:-

<u>Invoice No.</u>	<u>Date</u>	<u>Amount</u>
1173	05.01.09	\$32,609.50

- [25] The total for these “administration” and “supervisory costs” was \$35,353.15. The respondent claims that this amount does not come within the applicant’s entitlement to a progress claim as provided for in s 12 of the *BCIPA*.
- [26] Whether or not “administration” and “supervisory costs” can be considered “construction work” and/or “related goods and services” under the *BCIPA* does not appear to have been judicially considered.
- [27] Counsel for the applicant emphasised the wording of s 17, in particular “that a person mentioned in section 12 who is *or claims to be* entitled to a progress payment” (emphasis added) may serve a payment claim. It was argued that an assertion to an entitlement to a progress payment was a sufficient basis for the service of a payment claim. This would have the effect that a payment claim for “administration” or “supervisory work” could be served where it is asserted that there is an entitlement to a progress claim for such items. It was submitted by the applicant that if the claim for such work fell outside the ambit of the contract or outside the ambit of “construction work” and/or “related goods and services,” then this should have been raised by the respondent in a payment schedule.
- [28] On this reading, as was said by A. Lyons J in *F.K. Gardner & Sons Pty Lt v Dimin Pty Ltd* at [29], “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.” Her Honour concluded at [33] that, it cannot have been intended that a later provision (s 17) found in Part 3 regarding procedure for recovering progress payments would override the provisions in Part 2 pertaining to the rights to progress payments (s 12).
- [29] I was also taken by the applicant to the *Austruct* case. The issue in that case raised by the respondent was whether all of the claims by the applicant fell within the terms of that contract. Dutney J at [51] held that whether they did or not was “properly a matter for an adjudication under the *BCIPA* and not for this court at this time.”
- [30] The present respondent however argued that this statement by Dutney J should be viewed in the context of the application of that case, which was going to be dismissed in any event and was to be determined at a later date.
- [31] The language of s 12 is instrumental in determining this point. Pursuant to s 12 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* (emphasis added). The applicant’s entitlement to payment is dependant upon the proper construction of the contract and the legal entitlements of the parties under the contract. I agree with Justice Dutney that whether or not administration and supervision can be considered “construction work” or “supply related goods and services” pursuant to the contract is properly a matter for adjudication. In reaching

this conclusion I refer again to the objectives of the *BCIPA*. The *BCIPA* provides a mechanism by which persons who carry out construction work (or who supply related goods or services) can receive *timely* payment for the work they carry out and the goods and services they provide.<sup>10</sup> The *BCIPA* contemplates that expeditious means of decision making for the purposes of progressing building projects, lies in the hands of an independent adjudicator with the relevant expertise. As was said by Hodgson JA in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, when referring to the NSW ACT at [441], “the procedure contemplates a minimum of opportunity for court involvement.”

- [32] The second issue raised by the respondent on this Application is therefore one which should have been subject of a payment schedule in reply, pursuant to s 18, which would then have provided the basis for the applicant to make an adjudication application under s 21.

### **Findings**

- [33] On view of my finding that the applicant did not comply with s 17(2), I would therefore order that:
1. the Application be dismissed;
  2. the payment claim dated 27 April 2009 be set aside;
  3. the applicant pay the respondent’s costs of and incidental to the application, to be assessed.

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<sup>10</sup> Explanatory Memorandum to the *Building and Construction Industry Payments Bill* 2004.