SUPREME COURT OF QUEENSLAND

CITATION:	*Cant Contracting P/L v Casella & Anor* [2006] QCA 538
PARTIES:	**CANT CONTRACTING PTY LTD** ACN 079 036 025 (plaintiff/respondent) **v** **CON CASELLA** (defendant/appellant) **MICHELLE LYNDSAY CASELLA** (defendant/appellant)
FILE NO/S:	Appeal No 8063 of 2006 SC No 5925 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2006
JUDGES:	Williams and Jerrard JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Appeal allowed** **2. The judgment of 1 September 2006 is set aside** **3. The application for summary judgment is dismissed with costs** **4. The respondent is to pay the appellants' costs of the appeal**
CATCHWORDS:	BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – where the respondent agreed to construct poultry sheds for the appellants – substantial work had been carried out before the Laidley Shire Council issued a stop work order – pursuant to the *Building and Construction Industry Payment Act 2004* (Qld) the respondent sought progress payments by way of a payment claim – the appellants did not serve a corresponding payment schedule on the respondent – summary judgment was awarded against the appellants – where the appellants had filed a defence and counter-claim against summary judgment arguing that the respondent did not hold an appropriate licence at the time construction was carried out –

whether the respondent was entitled to summary judgment, regardless of the fact that he may not have held an appropriate construction licence in contravention of s 42(1) *Queensland Building Services Authority Act 1991* (Qld)

Building & Construction Industry Payment Act 2004 (Qld), s 3, s 7, s 8, s 13, s 17, s 18, s 19, s 26
Home Building Act 1989 (NSW), s 10, s 94
Queensland Building Services Authority Act 1991 (Qld), s 42

Brodyn Pty Ltd v Davenport [2004] NSWCA 394; (2004) 61 NSWLR 421, distinguished
Lucas Stuart Pty Ltd v Council of the City of Sydney [2005] NSWSC 840; File No 50077 of 2005, 23 August 2005, distinguished

COUNSEL: J A Griffin QC, with T F Mylne, for the appellants
P L O'Shea SC, with M J F Burnett, for the respondent

SOLICITORS: Graham & Associates for the appellants
Holding Redlich for the respondent

[1] **WILLIAMS JA:** On 1 September 2006 the respondent (the plaintiff in the action) obtained summary judgment against the appellants (the defendants in the action) in the sum of $493,339.45 with interest and costs. The appellants have appealed against that decision. To appreciate the submissions on the hearing of the appeal it is necessary to set out the history of dealings between the parties.

[2] By contract made 1 November 2004 the respondent agreed to construct five poultry sheds for the appellants at a cost of $211,143 per shed. Substantial work was carried out by the respondent until the Laidley Shire Council issued a stop work order on 14 February 2005. By then the appellants had made payments totalling $522,578.95 pursuant to the agreement.

[3] The respondent then commenced proceedings in the Supreme Court on 21 July 2005 seeking to recover what it asserted was the balance due and owing. By the original statement of claim filed 21 July 2005 the respondent claimed the sum of $348,385.95 as being due and payable pursuant to the agreement. In the alternative, a claim was made on the basis of the reasonable cost of labour and material supplied; it was asserted that a total of $841,825.76 was payable on that basis and in consequence a claim was made for $318,556.47 as being due and owing.

[4] The appellants filed a defence and counter-claim on 29 August 2005. In paragraph [8] of that pleading it was alleged that the respondent was in breach of s 42(1) of the *Queensland Building Services Authority Act* 1991 (Qld) ("the Building Act") which provided that a person must not carry out building work unless the appropriate licence was held. The assertion was made that the respondent did not hold the appropriate licence and therefore contravened s 42(1). It was then asserted that the respondent's only remedy was pursuant to s 42(3) and s 42(4) of the Building Act. Again in the counter-claim (paragraph [11]) it was asserted that the respondent did not hold the requisite building licence to perform the work the subject of the agreement.

[5] In a reply filed 13 October 2005 the respondent effectively put in issue whether it held the appropriate licence at the material time.

[6] Pursuant to r 378 of the UCPR the respondent amended its statement of claim on 5 July 2006. Those amendments introduced a claim pursuant to the *Building & Construction Industry Payment Act* 2004 (Qld) ("the Payment Act"). It was alleged that the Payment Act applied to the contract and that in terms of that Act the appellants were responsible for payment. It was then alleged that between 1 November 2004 and 4 April 2005 the respondent carried out work pursuant to the contract. It was then asserted that work to the value of $493,339.45 had been carried out and payment had not been received. It was asserted that pursuant to s 13 of the Payment Act the respondent was entitled to progress payments in that sum. Then it was alleged that on 31 March 2006 the respondent served a payment claim pursuant to s 17 of the Payment Act for the sum in question and that no payment schedule was served on the respondent by the appellants within the time limit prescribed by s 18(4) of that Act. Reference in the pleading was then made to other provisions found in s 18 and s 19 of the Payment Act, and the respondent claimed the sum of $493,339.45 as a debt due and owing pursuant to s 19(2)(a)(i) of the Payment Act.

[7] In paragraphs [8A], [8B] and [8C] of the amended defence and counterclaim of 19 July 2006, the appellants pleaded defences to the claim under the Payment Act. In essence it was asserted that nothing in the Payment Act derogated from the obligation of the respondent as a builder to comply with s 42 of the Building Act. It was then alleged that the respondent was not entitled to any benefits under the Payment Act, but was limited to a remedy pursuant to s 42(3) and s 42(4) of the Building Act.

[8] With the pleadings in that state the respondent applied for summary judgment by application filed 3 August 2006; the matter was heard on 24 August 2006 and judgment given for the respondent on 1 September 2006.

[9] Before considering the reasons for judgment of the Chief Justice it is necessary to refer to the relevant provisions of the statutes in question. The Building Act defines "building work" as including the "erection or construction of a building"; it was disputed that the construction of the poultry sheds in question constituted building work. Section 42(1) of that Act then provides:

> "A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence for the appropriate class under this Act."

Contravention of the section constitutes an offence; subsection (9). Relevantly then for present purposes subsection (3) thereof provides:

> "Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so."

[10] Subsection (4) then provides some amelioration for the builder who carries out work in contravention of the section. Such a person may claim "reasonable remuneration for carrying out building work" but only as calculated in accordance with the provisions of that subsection. The builder is not entitled to recover anything for his

own labour or any profit; the claim is limited to the actual cost of supplying other labour and materials.

[11] Leaving aside for the moment the provisions of the Payment Act, if it was held that the respondent did not hold the requisite licence for carrying out the building work in question, then it would not be entitled to recover the amounts claimed in the statement of claim as originally drawn. It would not be entitled to recover monies due under the contract or on the common law quantum meruit basis alleged in that statement of claim. It would be restricted to a claim quantified in accordance with s 42(4) of the Building Act.

[12] The long title of the Payment Act states that it is an "Act to imply terms in construction contracts, to provide for adjudication of payment disputes under construction contracts, and for other purposes." Section 3 relevantly provides that the Act applies to "construction contracts"; that expression is then defined in s 10(2) to include "building work" as defined in the Building Act.

[13] Sections 7 and 8 then deal with the objects of the Act. Section 7 provides that the "object of this Act is to ensure that a person is entitled to receive, and is able to receive, progress payments if the person - (a) undertakes to carry out construction work under a construction contract". That is provided for pursuant to s 8 by "granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments". The expression "reference date" is defined to mean either the date stated in a contract as the date on which a progress payment may be made or in the absence of such a provision the last day of the month in which the construction work was first carried out and the last day of each succeeding month. Relevantly s 12 then provides:

> "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 . . . under the contract".

It would appear from the definition of "progress payment" in Schedule 2 and section 13, that the claim under the Act could be for the whole of the contact price.

[14] That then leads to sections 17, 18 and 19 which are central to the resolution of the issues raised in this case; relevantly they provide:

> "17(1) 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).
>
> (2) A payment claim -
>
> (a) must identify the construction work . . . 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.

. . .

18(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

(2) A payment schedule -

(a) must identify the payment claim to which it relates; and

(b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).

(3) If the scheduled amount is less than the amount claimed, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

(4) Subsection (5) applies if -

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within . . . 10 business days after the payment claim is served.

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

19(1) This section applies if the respondent -

(a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the complainant within the time allowed by the section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) The claimant -

(a) may -

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction;

. . .

(4) If the claimant starts proceedings under subsection 2(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt -

(a) judgment in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled -

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract."

[15] It was not disputed in the present case that the appellants did not serve a payment schedule on the respondent in accordance with the provisions of the Payment Act. In support of the application for summary judgment the respondent relied on s 19(4)(b) of that Act.

[16] On the hearing of the application for summary judgment there was no dispute about the procedural regularity of what the respondent did relying on the Payment Act. The Chief Justice noted in his reasons that the contract between the parties entitled the respondent to "progress payments"; prima facie that brought the Payment Act into play.

[17] The Chief Justice then said that on the basis of the pleadings as originally drafted the respondent had to "confront the circumstance that . . . [it] did not, when it carried out the relevant work, hold a requisite contractor's licence". He noted that if that was eventually established the respondent "would be limited, in its recovery by s 42(4)" of the Building Act. But he then recorded the submission of counsel for the respondent that "that would be irrelevant to the claim added by amendment, founded on s 19" of the Payment Act.

[18] The issue raised by the appellants at first instance was that the Payment Act "should be read as subject to the qualified right of recovery limited by s 42" of the Building Act. Counsel for the respondent met that by saying that in order to rely on the absence of the requisite licence the issue had to be raised in a "payment schedule". Thus the Chief Justice was able to identify the issue before him as follows:

> "The issue is whether, the defendants having failed to deliver a payment schedule the defendants can resist the plaintiff's apparent right to judgment under s 19(2)(a) by subsequently raising the licensing issue; in other words, whether the ultimate operation of the mechanism established by the [Payment Act] is to be read as subject to a supervening qualification arising from s 42 of the [Building Act]."

[19] The Chief Justice referred to the absence of any express qualification giving effect to the condition of the appellants in s 19 and to the decisions of Einstein J in *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840 and the New

South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. The Payment Act appears to be based on the *Building & Construction Industry Security of Payment Act* 1999 (NSW) ("the NSW Act"). After referring to those matters the Chief Justice said he accepted the submissions of counsel for the respondent and granted summary judgment.

[20] The principal submission on behalf of the appellants in this Court is that the Payment Act does not overrule s 42 of the Building Act, and that when the Payment Act refers to a "construction contract" it must be referring to a lawful contract. Further, the use of the word "entitled" in sections 7, 12 and 17 must mean lawfully entitled.

[21] Counsel for the respondent in a very careful argument contended that the Payment Act was designed to ensure that a contractor received progress payments on an interim basis, with the parties having the right at a later point of time to litigate all issues arising under the construction contract (cf s 100 of the Payment Act and *Roadtek, Department of Main Roads v Davenport and Anor* [2006] QSC 47). On that approach the failure to raise the illegality in a "payment schedule" precluded the appellants from relying on that illegality on the summary judgment application (s 19(4)(b)(ii) of the Payment Act).

[22] Because the judgment at first instance and the submissions on appeal on behalf of the respondent relied heavily on the reasoning in the New South Wales decisions referred to, it is necessary to consider the relevant New South Wales legislation and the reasoning in those cases.

[23] Section 15 of the NSW Act is in the same terms as s 19 of the Payment Act. Einstein J in *Lucas Stuart* was concerned with a claim for summary judgment in circumstances where the principal failed to serve a payment schedule. On the hearing of the summary judgment application the principal sought to rely on a defence of equitable estoppel and defences under the *Trade Practices Act*. Summary judgment was granted. The reasoning emphasised that the legislation provided for a determination on "an interim basis" which was "subject [to] a final hearing in the fullness of time". There was no basis for "moving outside of this scheme" and in consequence it was held that the principal was not entitled, given the terms of the section, to rely on the matters sought to be raised by way of defence. Significantly for present purposes, there was no question in that case of the contract founding the claim for progress payments being illegal or unenforceable.

[24] The Court of Appeal in *Brodyn* had to consider a somewhat similar question to that which arises in the instant case, but it arose in different circumstances. The contractor delivered a payment claim and the principal responded with a payment schedule. The matter then went to adjudication, and there was a finding in favour of the contractor. The contractor then filed that decision in the court and it became enforceable as a judgment debt (the NSW equivalent of s 31 of the Payment Act). The principal then applied to the Supreme Court for relief in the nature of certiorari. That relief was refused at first instance and an appeal was lodged. Between the lodging of the notice of appeal and it coming on for hearing the principal became aware for the first time that the contractor did not have at relevant times a licence under the *Home Building Act* 1989 (NSW). So far as is relevant s 10 of that Act provided:

"(1) A person who contracts to do any residential building work, or any specialist work, and who so contracts:

(i) in contravention of s 4 (Unlicensed Contracting), or

(ii) . . .

(i) is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, and the contract is unenforceable by the person who contracted to do the work. However, the person is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person."

[25] It is also necessary to have regard to s 94 of that Act; relevantly it provided:

"If a contract of insurance required by s 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contract (the uninsured work), the contractor who did the work:

(a) is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, in relation to that work, and

(b) is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit)."

[26] Against that background Hodgson JA, with the concurrence of Mason P and Giles JA, concluded at 449;

"It was submitted for Brodyn that, because Dasein did not have a licence under the *Home Building Act*, the subcontract was illegal (s 4) and unenforceable (s 10). Accordingly, Dasein was not entitled to any progress payment.

In my opinion, the civil consequences for an unlicensed contractor for its breach of s 4 are those set out in s 10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s 94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless the Court considers it just and equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the *Home Building Act*.

Accordingly, in my opinion Dasein's failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination."

[27] It will be immediately obvious that s 94 of the *Home Building Act* is substantially similar to s 42(3) and (4) of the *Building Act*; that distinguishes the present case from *Brodyn*. Clearly the New South Wales Court of Appeal would have reached a different conclusion in *Brodyn* if s 94 and not s 10 applied.

[28] Further, s 10 of the *Home Building Act* only disentitles the unlicensed contractor to damages or other remedy in respect of a breach of contract committed by the principal, where s 42(3) of the *Building Act* disentitles an unlicensed contractor to any monetary consideration for work done pursuant to the contract. Hodgson JA may well have been right in concluding that, under the legislation in question in *Brodyn*, a claim for a progress payment was not "enforcement of the contract"; but it is not necessary to consider that aspect further because of the different statutory provision in question here. The words "any monetary or other consideration" are of very wide import and must be given full effect.

[29] It follows that the conclusion in *Brodyn* is of no assistance when considering the present appeal. Insofar as the Chief Justice relied on *Brodyn* in support of his conclusion he was, in my respectful opinion, wrong. On careful consideration the reasoning of Hodgson JA, if anything, supports the submission of the appellant in this case.

[30] Because s 42(3) of the *Building Act* provides that an unlicensed contractor "is not entitled to any monetary or other consideration" for doing work pursuant to the contract, such a contractor cannot be said to have an entitlement to progress payments pursuant to ss 7, 12 and 17 of the *Payment Act*.

[31] Counsel for the respondent relied heavily on the reference in s 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 *Payment Act* in the face of an ongoing dispute between the parties as to such entitlement. But that does not meet the present situation where, given the provisions of the *Building Act*, the respondent has no legal entitlement to any monetary consideration for work done pursuant to the contract.

[32] Counsel for the respondent sought to obtain comfort from the reference in s 26(2) of the *Payment Act* to the *Building Act*. Section 26(2) is concerned with the matters an adjudicator must consider in arriving at his decision. Subparagraph (a) not surprisingly obliges the adjudicator to have regard to "the provisions of this Act" and then it goes on to say regard must also be had to the provisions of the *Building Act* Pt 4A to the extent they are relevant. Relevantly Pt 4A of the *Building Act* deals with issues such as set-off under building contracts, retention amounts, and late progress payments. The reference in s 26 of the *Payment Act* to Pt 4A of the *Building Act* is not surprising because the latter is concerned with the calculation of the amount owing under a building contract.

[33] Counsel for the respondent contended that because there was such a specific reference to Pt 4A, and no specific reference to s 42, the legislature must have intended that s 42 of the *Building Act* was not a relevant consideration when considering a claim under the *Payment Act*. Such a submission must be rejected.

Parliament could not have intended that pursuant to the *Payment Act* an unlicensed contractor could immediately recover the whole of the contract price for doing the work, in the face of the statutory prohibition in the *Building Act* on such a contractor recovering any monetary consideration, other than as specified in s 42(4) for doing work under the contract. It is not a sufficient answer to say that the principal might subsequently obtain a judgment entitling it to "claw back" that whole of the contract price.

[34] As already noted the respondent commenced proceedings in the Supreme Court not relying on the provisions of the *Payment Act*. In those proceedings the question whether or not the money claimed was recoverable in the face of s 42 of the *Building Act* was squarely raised. The Supreme Court was initially seized of the issue as to the legality of the contract and, if the respondent's contentions on the appeal are successful, it would effectively mean that the Court's jurisdiction to determine that issue was ousted. There are sound reasons, it seems to me, for concluding that if the parties have joined issue in Supreme Court proceedings on a particular question, the jurisdiction of the Court to adjudicate upon that issue cannot be ousted by subsequent reliance on provisions of the *Payment Act*. But it is not necessary for the determination of this appeal to express a concluded opinion on that point.

[35] It is sufficient for present purposes to say that at the time the application for summary judgment was made there was clearly a triable issue as to the respondent's entitlement to recover anything under the contract and s 19(4)(b)(ii) did not in the circumstances then existing preclude the appellant from relying on s 42 of the *Building Act*. It follows that summary judgment ought not to have been granted. The appeal should be allowed, the judgment of 1 September 2006 should be set aside, the application for summary judgment should be dismissed with costs, and the respondent should pay the appellant's costs of the appeal. That would enable the matter to proceed to trial where factual issues relating to the licensing of the respondent would be determined.

[36] **JERRARD JA**: In this appeal I have read the judgments of Williams JA and McMurdo J, and agree with their Honours' reasons and the orders proposed by Williams JA. I add the following reason of my own, which adopt the relevant facts described by Williams JA.

[37] The *Queensland Building Services Authority Act 1991* (Qld) ("the 1991 Act") provides in s 42 that a person must not carry out or undertake to carry out building work unless that person holds a contractor's licence of the appropriate class under the 1991 Act. In s 42(3) it provides that "subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so." Section 42(4) allows such a person to claim as reasonable remuneration the amount paid by that person in supplying materials and labour, but not any amount for the person's own labour, for profit, or for costs incurred in supplying materials and labour if not reasonably incurred. Section 42(9) provides that a person who contravenes s 42 commits an offence.

[38] The *Building and Construction Industry Payments Act 2004* (Qld) ("the 2004 Act") provides a regime for prompt payment of sums claimed as owing under construction contracts. Those are defined in schedule 2 of the 2004 Act to mean 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. Section 10(2) declares that construction work includes building work within the meaning of the 1991 Act.

[39] Section 12 of the 2004 Act 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, or supply related goods and services, under the contract."

A progress payment is defined in schedule 2 to mean a payment to which a person is entitled under s 12, and includes, without affecting any entitlement under the section:

> "(a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
>
> (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or
>
> (c) a payment that is based on an event or date, known in the building and construction industry as a 'milestone payment'."

[40] Schedule 2 defines a reference date under a construction contract to mean:

> (a) 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 carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
>
> (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; and
>
> (ii) the last day of each later named month.

[41] Section 13 provides for the amount of the progress payment. It reads:

> "The amount of a progress payment to which a person is entitled in relation to a construction contract is –
>
> (a) The amount calculated under the contract; or
>
> (b) If the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract."

[42] It seems obvious that the 2004 Act has attempted to catch all varieties of construction contracts, in the expansive definitions of progress payment, reference date, and in the provisions as to the amount of progress payment. Progress payments include final payments, single or one off payments, milestone payments; reference dates, if not provided for, are the last day of each month; the amount of the progress payment, if not provided for, is the value of the work carried out. The 2004 Act applies to situations where a contract makes no provision for progress payments at all. But there is no sign of an intent to outflank or override the requirements in the 1991 Act, that builders be appropriately licensed.

[43] In this matter the appellant defendants pleaded in their original defence that the respondent plaintiff did not hold the classes of licence required to perform the building work the subject of the building agreement between the plaintiff and the defendants, and that accordingly the plaintiff's only remedy was pursuant to s 42(3) and (4) of the 1991 Act. Subsequent to that pleading the plaintiff responded by amending to add a claim under the 2004 Act. The plaintiff's amended claim under the 2004 Act was for construction work it had carried out, to a claimed value of $493,339.45. In paragraph 21 of its amended claim, it pleaded an entitlement, pursuant to s 13 (of the 2004 Act), to progress payments in that sum under the contract.

[44] Its counsel on this appeal submitted that, although it was pleaded and not denied that the respondent plaintiff was an unlicensed builder prohibited from carrying out or undertaking to carry out that building work, and although it committed an offence under the 1991 Act by undertaking to carry out that construction work, and although it was not entitled to any monetary or other consideration for any building work that it carried out in contravention of s 42, and although by reason of that Act it could recover only the cost of labour and material supplied, it was nevertheless "entitled" to a progress payment in terms of s 12 of the 2004 Act for the work it had carried out or undertaken to carry out. Respectfully, I disagree. The respondent was not entitled under ss 12 or 13 of the 2004 Act to a progress payment for any building work it had carried out, because s 42(3) of the 1991 Act says so. The progress payment it claimed was a monetary consideration for the building work carried out. The amended defence pleaded in paragraph 8A(b) that the plaintiff was not entitled to any benefits under the 2004 Act.

[45] The respondent accepted on the appeal that it was not a person "entitled" to a progress payment within the meaning of s 17(1) of the 2004 Act, although arguing it was "entitled" under s 12. Section 17(1) reads:

> "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***)."

However, the respondent contended it was a person who "claims to be entitled" to a progress payment, albeit not a person who was entitled. Mr O'Shea submitted for the respondent that "entitled" in s 17 meant entitled both in a "section 12" sense, and in all senses; thus excluding contractors who did not hold the appropriate contractor's licence. Mr O'Shea argued however that contractors without licence could "claim to be entitled", and that respondents to s 17 payment claims from unlicensed contractors could raise the lack of the appropriate licence in the payment schedule served in response under s 18 of the 2004 Act. He argued that any

adjudicator to whom the matter was then referred would be obliged to consider the absence of a licence, by reason of s 26(2)(d) of the 2004 Act, because the point would be raised in the payment schedule.

[46] Mr O'Shea submitted that the decision in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421[1] established, for relevantly similar New South Wales legislation,[2] the essential requirements for a valid adjudicator's determination. Those included the existence of a construction contract, but did not include that the contract be with a builder holding the appropriate contractor's licence. He submitted that the reason an unlicensed builder could claim to be entitled to a progress payment under s 17 was simply because the 2004 Act clearly provided for claims to be made, and for payment ordered in respect of them, even if those claims were later shown to be unjustified. The purpose of the legislation was to provide for a system of quick payments, with s 100 of the 2004 Act providing for later correction in subsequent civil proceedings, including orders for restitution of any amount paid.

[47] Assuming the New South Wales Court of Appeal is correct in *Brodyn Pty Ltd v Davenport* as to the essential requirements for a valid adjudicator's determination, and accepting that the 2004 Act has as its object ensuring that a person entitled to receive progress payments is able to recover them if the person undertakes to carry out construction work, the respondent plaintiff was not entitled in relation to the construction contract, under s 13, to an amount calculated on the basis of the value of the construction work the plaintiff had carried out. Section 42(3) of the 1991 Act prevented his being entitled. Mr O'Shea conceded the 1991 Act had the effect that the plaintiff was not entitled under s 17 to a progress payment. In my opinion the plaintiff could not claim to be entitled to those payments. It pleaded an entitlement pursuant to s 13 which it did not have, and pleaded that only after pleadings in this Court had raised the issue of its being unlicensed. If it was unlicensed, no investigation (prompt or slow) could advance its s 13 claim to entitlement to a progress payment.

[48] The appellants' pleading, if accurate, revealed that the respondent had no proper claim to be entitled to a progress payment, and accordingly the respondent was not entitled to serve a payment claim for progress payments on the appellants. It was appropriate for the appellants to plead, as they did, that the plaintiff was not entitled to any benefits under the 2004 Act, and although perhaps unnecessary, they could have sought a declaration to that effect, or an order setting aside service of that s 17 payment claim. Their current pleading, that the plaintiff was not entitled to any benefits under the 2004 Act by reason of it not holding the appropriate class of licence, if upheld, has the result that neither ss 17, 18, or 19 of the 2004 Act could be availed of by the plaintiff. It follows that summary judgment for the plaintiff in the amount of $493,339.45 should be set aside.

[49] **PHILIP McMURDO J:** Section 42 of the *Queensland Building Services Authority Act 1991* (Qld) ("the Building Act") prohibits a person from carrying out, or undertaking to carry out, building work unless that person holds a licence which is appropriate for that work. A person who contravenes s 42 commits an offence: s 42(9).

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1 [2004] NSWCA 394; Appeal No 40296 of 2004, 3 November 2004.

2 (2004) 61 NSWLR 421 at 441.

[50] Section 42(3) provides that a person who carries out building work whilst unlicensed "is not entitled to any monetary or other consideration for doing so", except on the limited bases allowed by s 42(4). Yet in the present case, the respondent builder, which for present purposes had to be treated as unlicensed, was held entitled to a monetary consideration for doing the work, and without purporting to limit his claim according to s 42(4). The respondent's argument, which the Chief Justice as the primary judge accepted, was that a builder's entitlement to a progress payment by the operation of the *Building and Construction Industry Payments Act 2004* (Qld) ("the Payments Act*")* was not affected by s 42. The Payments Act does not expressly provide that a builder's entitlement to a progress payment is outside the disentitling provisions of s 42 of the Building Act. And s 42(3) is in the widest terms: it refers to "any monetary or other consideration", which on any view would include a payment for (part of) the work.

[51] The Payments Act closely corresponds with the terms of the *Building and Construction Industry Security of Payment Act 1999* (NSW). The operation of that Act, in the context of a claim by a builder which was not licensed as required by the *Home Building Act 1989* (NSW), was examined by the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. There is no relevant distinction between the terms of the Payments Act and that corresponding statute in New South Wales. But, there is a difference between s 42 of the Building Act and s 10 of the *Home Building Act* of New South Wales, which is, in these terms:

"**10 Enforceability of contracts and other rights**

(1) A person who contracts to do any residential building work, or any specialist work, and who so contracts:

(a) in contravention of section 4 (Unlicensed contracting), or

(b) under a contract to which the requirements of section 7 apply that is not in writing or that does not have sufficient description of the work to which it relates (not being a contract entered into in the circumstances described in section 6 (2)), or

(c) in contravention of any other provision of this Act or the regulations that is prescribed for the purposes of this paragraph.

is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, and the contract is unenforceable by the person who contracted to do the work. However, the person is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.

(2), (3) (Repealed)

(4) This section does not affect the liability of the person for an offence against a provision of or made under this or any other Act."

In *Brodyn,* the conclusion of Hodgson JA, with whom Mason P and Giles JA agreed, was that the builder's entitlement to a progress payment was a statutory entitlement which was outside the operation of s 10 because it was neither a remedy

by way of "damages" nor a "remedy in respect of breach of contract".[3] Hodgson JA compared s 10 with s 94 of the same Act, which provides for the effect of a builder's doing work without the insurance as required by that Act. In that circumstance, the uninsured contractor:

> "(a) is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract in relation to that work, and
>
> (b) is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit)"[4]

Hodgson JA said that his opinion as to the limited scope of s 10 was confirmed by the different terms of s 94.[5] The difference is that s 94 also contains the wide expression: "money in respect of that work". As Williams JA has said, that expression in s 94 seems much the same as that in s 42 of the Building Act, so that Hodgson JA's judgment in *Brodyn* indicates the difference between the provision which was relied upon there, s 10 of the *Home Building Act* and the wider terms of s 42 of the Payments Act. In *Brodyn*, the alleged entitlement to a progress payment was simply outside the terms of the statutory limitation upon recovery by unlicensed builders. In Queensland, that alleged entitlement is apparently within the terms of s 42. The present question, for which *Brodyn* does not indicate an answer, is whether the Payments Act was intended to override the disentitlement to any payment resulting from s 42.

[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.[6] 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.[7] That procedure involves the making of a payment claim, the possible provision of a response to that claim ("a payment schedule"), the referral of a disputed or unpaid claim to an adjudicator for decision and the payment of the amount decided by the adjudicator.[8]

[53] Section 12 creates an entitlement to a progress payment where a person has undertaken, under a construction contract, to carry out construction work or supply related goods and services. As Hodgson JA held in *Brodyn*, one essential prerequisite for the operation of this statute is the existence of a construction contract to which the Act applies. So in the present case, the respondent's entitlement, if any, to a progress payment and to the benefit of this scheme for its recovery, must derive from its having undertaken to carry out construction work. Yet, assuming that the respondent was then an unlicensed builder, it committed an offence in undertaking to carry out that work. The respondent's case therefore proceeds from the unattractive proposition that its committing an offence was an essential step to its becoming entitled to the beneficial operation of this scheme.

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3 [2004] 61 NSWLR 421, 449.

4 Subject to an allowance on a quantum meruit basis if a Court or Tribunal considers it just and equitable: s 94(1A).

5 [2004] 61 NSWLR 421, 449.

6 s 7.

7 s 8.

8 s 8.

[54] The respondent's argument meets a further obstacle in the provisions by which a progress payment is to be quantified. Section 13 provides that the amount of a progress payment to which a person is entitled is either the amount calculated under the contract, or, if the contract does not provide for the matter, then an amount calculated on the basis of the value of the construction work carried out or undertaken to be carried out. Section 14 provides for how that value is to be assessed, as follows:

> "(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued -
>
> (a) under the contract; or
>
> (b) if the contract does not provide for the matter, having regard to –
>
> (i) the contract price for the work; and
>
> (ii) any other rates or prices stated in the contract; and
>
> (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
>
> (iv) if any of the work is defective, the estimated cost of rectifying the defect."

Leaving aside the case of defective work, it can be seen that construction work is to be valued according only to what the parties had agreed, because the valuation of the work, which quantifies the progress payment, must derive from the contract price, from rates or prices stated in the contract or from any agreed variation to those things.

[55] This is a difficulty in the operation of the Payments Act in the case of an unlicensed builder, because that builder is not entitled to enforce its contract and, in particular, to recover its contract price. The builder is limited effectively to recovering its costs, according to s 42(4) of the Building Act, except that if its costs are greater than the agreed price, the builder is limited to the price: s 42(4)(c). The respondent does not suggest that an unlicensed builder's *ultimate* entitlement (or disentitlement) is not according to s 42. It argues only that an unlicensed builder is entitled to progress payments as if s 42 had no operation, although in the final accounting, s 42 applies, and a builder could be ordered to make restitution pursuant to s 100(3) of the Payments Act.

[56] Accordingly, the respondent's argument is that the Payments Act is intended to facilitate the recovery of a progress payment or payments, which in at least many cases, would be more than the cost of performing the work to that point, although ultimately the builder would be entitled to no more than its costs. Had the Payments Act provided for some progressive recovery by progress claims quantified by reference to an unlicensed builder's limited entitlement under s 42(4), it would have an evident policy. But there is no evident reason in policy why an unlicensed

builder should be given a right to part payments, which must be quantified not according to its ultimate entitlement for the whole works, but in higher sums according to terms of a contract which the builder cannot enforce.

[57] Section 21 provides that a claimant may apply for adjudication of a payment claim if the respondent to its claim has duly disputed the claim or failed to pay such of the claim which is not disputed. By s 26, an adjudicator is to decide the amount of the progress payment, if any, to be paid.[9] Section 26(2) provides that the adjudicator is to consider only these matters:

> "(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
>
> (b) the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
>
> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

Section 42 of the Building Act is not within Part 4A of that Act. Therefore, in the case of an unlicensed builder's claim, the adjudicator could not consider s 42. The adjudicator would be obliged to value the work according to s 14. And, by s 27, in a subsequent adjudication, the adjudicator would have to adopt "the same value as that previously decided unless (satisfied) that the value of the work … has changed since the previous decision".

[58] Accordingly, another unattractive aspect of the respondent's argument is that the regime of adjudication would often result in something higher than the commensurate share of the builder's ultimate entitlement, and, therefore, in an overpayment.

[59] In some cases, which the arguments agree is the case here, there could be a genuine question as to whether the builder is relevantly unlicensed. In particular, there could be questions of fact going to the classification of the work for the purposes of the licensing requirements, which cast doubt on whether the builder held the licence appropriate for the agreed work. But, that is not a matter which could be investigated by the adjudicator, who would be confined to a consideration of the matters listed in s 26(2). Nor could the respondent to a payment claim, dispute the claim on that basis, within its "payment schedule" given under s 18, because if this

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[9] As well as the date for payment and the rate of interest payable on any amount: s 26(1)(b) and s 26(1)(c).

regime applies to unlicensed builders then the absence of a licence would have no relevance in the valuation of the progress claim.

[60] In these ways, the operation of the Payments Act in the case of an unlicensed builder would lead to a result in at least many cases which is unjust, judged by the policy of the licensing provisions of the Building Act. The operation of this scheme by the overpayment of unlicensed builders pending a final reconciliation, is likely to have effects which cannot be cured by an order under s 100. There is no sensible explanation for the Payments Act to have an operation of that kind.

[61] The purpose of a scheme of progress payments is to permit a builder to be paid the agreed consideration for the works progressively, by a part payment which is commensurate with that part of the works performed to that point. This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder's entitlement being according to its contract. The long title of the Payments Act describes it as an "Act to imply terms in construction contracts …" It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the Payments Act was intended to override the disentitlement according to s 42; the contrary appears. In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder.

[62] The respondent's claim in these proceedings, even when given its new appearance as a purported progress claim, is precluded by s 42 if the respondent did not hold the relevant licence. As there is at least an issue to be tried on that matter, the respondent should not have been given summary judgment. I agree with the orders proposed by Williams JA.