DISTRICT COURT OF QUEENSLAND

CITATION:	*T&M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QDC 60
PARTIES:	**T&M BUCKLEY PTY LTD t/as SHAILER CONSTRUCTIONS** **(ABN 66 010 052 043)** Plaintiff/Applicant v **57 MOSS RD PTY LTD** **(ABN 41 125 428 444)** Defendant/Respondent
FILE NO:	No. 27270/09
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2010
JUDGE:	Samios DCJ
ORDER:	**Judgment for the plaintiff against the defendant for $19,100.74**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY – Where applicant entered into a construction contract with the respondent – where the applicant made a payment claim against the respondent – where the applicant applies for judgment against the respondent pursuant to s 19(2)(a)(i) of the *Building and Construction Industry Payments Act 2004 (Queensland)* – whether the payment claim was valid under the *Building and Construction Industry Payments Act 2004 (Queensland)* *The Building and Construction Industry Payments Act 2004 (Queensland)* s 17(1), s 17(2), s 18(4), s 18(5), s 19(2)(a)(i), s 19(4)(b)(ii) *Baxbex Pty Ltd v Bickell* [2009] QSC 194 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 *Clarence Street Pty Ltd v Isis Projects Pty* 2005] NSWCA 391 *Co-ordinated Construction Co Pty Ltd v Climatech*

(Canberra) Pty Ltd (2005) NSWCA 391
Co-ordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd and others (2005) NSWCA 228
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) NSWCA 409
Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited [2009] QSC 376
Protectavale Pty Ltd v K2K Pty Ltd [2008] FCA 1248
Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd [2010] QSC 7

COUNSEL: Ms Moody for the applicant
Mr Garlick for the respondent

SOLICITORS: Mills Oakley Lawyers for the applicant
Derek Dwyer Lawyers for the respondent

[1] The plaintiff (applicant) and the defendant (respondent) entered into a written contract for the construction by the applicant of the "Seaforth at Manly" project at 57 Moss Road, Wakerley in Queensland.

[2] This is an application for judgment by the applicant against the respondent pursuant to s 19(2)(a)(i) of the *Building and Construction Industry Payments Act 2004* (*BCIPA*). The sum claimed is $95,742.00 and interest and costs.

[3] The applicant claims it served on the respondent a payment claim (the claim) in accordance with the *BCIPA*. There is no dispute the respondent did not serve on the applicant a payment schedule as provided for by the *BCIPA*.

[4] However, the respondent claims:

(a) the claim is not a valid payment claim for the *BCIPA* because the claim did not identify the construction work to which the claim related.

(b) the applicant is not entitled to suspension of works as it was not the respondent who suspended the works but rather it was government authorities who suspended the works because of the applicant's acts or omissions.

(c) the applicant has been overpaid by the respondent to the date of the claim and the respondent is entitled to a set off against the sum claimed in the claim;

(d) the applicant has been paid by the respondent $28,429.72 for interest claimed by the applicant in the claim;

(e) because of delay on the part of the applicant in bringing the application for summary judgment the application ought to be dismissed;

[5] The claim is comprised of four documents:

(a) A document titled "Seaforth at Manly units – payment claim no. 12 – for work carried out up to and including 15 May 2009" and states that the amount of the payment claim is for $95,472.00 made up of:

(i) $2,772.00 for sediment control;
(ii) $73,635.00 for suspension costs;
(iii) $16,871.00 for interest on late payments;
(iv) $1,156.00 for retentions incorrectly held on interest charged previously.

(b) A document titled "Seaforth at Manly – claim no. 30 – sediment control costs".

(c) A document titled "Seaforth at Manly – claim no. 31 – interest on late payment"

(d) A document titled "Seaforth at Manly – claim no. 33 – suspension of time costs".

[6] For the hearing of the application the respondent filed an affidavit by its sole director and a third amended defence. The applicant objected to both documents.

[7] It is true the respondent's third amended defence withdraws an admission for which leave has not been granted. That is, the respondent initially admitted it had not paid the $95,472 claimed but now says it has paid $28,429.72 of the payment claim. As this is a summary judgment application the respondent's claim to have paid $28,429.72 should be considered by me when considering whether the respondent has an arguable case. There are other deficiencies in the pleading of the third amended defence. However, these should also be put to one side when considering whether the respondent has an arguable case.

[8] The applicant also objects to the respondent's affidavit being served the day before the hearing. Clearly that is a result of the eight days notice of the application having been given by the applicant to the respondent. I am prepared to receive the respondent's affidavit notwithstanding it was served on the day before the return date of the application for summary judgment.

[9] Section 17(1) of the *BCIPA* provides that a person mentioned in s 12 who is or who claims to be entitled to a progress payment (the claim) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

[10] Section 17(2) of the *BCIPA* provides that 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);

(c) must state that it is made under this Act.

[11] There is no dispute (b) and (c) of section 17(2) have been complied with. It is (a) that is in issue.

[12] Sub-sections 4 and 5 of s 18 of the *BCIPA* provide:

> "(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 the earlier of -
>
> (i) the time required by the relevant construction contract; or
>
> (ii) 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".

[13] Sub section 2(a)(i) of s 19 of the *BCIPA* provides:

> "(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."

[14] There is no dispute for the purposes of the *BCIPA* the contract between the parties was a construction contract, the work under the contract was construction work and the reference date in the contract required progress claims to be submitted to the Superintendent on the 15th day of each month for work under the contract or if submitted earlier would be deemed as received on the reference date.

[15] There are a number of authorities that have discussed what is required for a valid claim under the *BCIPA* and similar legislation in other jurisdictions.

[16] In Queensland White J in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited* [2009] QSC 376 referred to these authorities. Her Honour referred to what Hodgson JA said in *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) NSWCA 391 where he said "in my opinion, the relevant construction work … must be identified sufficiently to enable the respondent to understand the basis of the claim."

[17] Her Honour also referred to what Basten JA said in the same case regarding the expression "identified". He said the expression "should be given a purposive construction: what must be done must be sufficient to draw the attention of the principal to the fact that an entitlement to a payment is asserted, arising under the contract to which both the contractor and the principal are parties. In that sense the claim to be valid must be reasonably comprehensible to the other party."

[18] Her Honour also referred to *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*(2005) NSWCA 409 where Hodgson JA said "That is, 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."

[19] At paragraph 25 and following of her Honour's judgment her Honour states:-

> "Similarly Santow JA observed that the requirements underlying s 13(3)(a) are satisfied by 'a relatively undemanding test' although, as his Honour added, 'still one with some content' and that it is an objective and not subjective test as to whether the payment claim sufficiently identifies the construction work the subject of the claim. The evaluation of the sufficiency of the identification takes into account the background knowledge of each of the parties derived from their past dealings and exchanges of documentation.
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> [26] In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 Palmer J summarised how a claimant might comply with the New South Wales equivalent of s 17 of the *Payments Act*. His Honour said, relevantly, that:
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> > '… a payment claim which does not, on its face, purport in a reasonable way to:
> > - identify the construction work to which the claim relates; or
> > - indicate the amount claimed; or
> > - state that it is made under the Act
> >
> > fails to comply with an essential and mandatory requirement [of the Act] so that it is a nullity for the purposes of the Act".
>
> His Honour observed:
>
> > "A payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defence it is to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.
> >
> > If it purports reasonably on its face to state what section 13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.'

[27] Mr Drysdale referred to *Clarence street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391 where Mason P set out a passage from the trial judge:

> '[37] In principle, I think, the requirement in section 13(2)() that the payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where,
>
> (1) the payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;
> (2) that reference is supplemented by a single line description of the work;
> (3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;
> (4) There is a summary that pulls all the details together and states the amount claimed.'

[28] In *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 a decision under the *Building and Construction Industry Security of Payment Act* 2002 (VIC), s 14(3) of which is the same as s 17, Finkelstein J observed:

> '… a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule. … That is not an unreasonable price to pay to obtain the benefits of the statute.'

The invoice under consideration in that case indicated the amount claimed to be due by taking the contract sum and making a number of adjustments. Whilst certain items were set out in sufficient detail, his Honour concluded that what was noticeably absent was:

> '… any identification of the work previously completed and paid for and the work (apart from the variations) to which the invoice relates.
>
> … The only information provided is that the amount is referable to the "Contract Sum' and 'Payments Received'"".

[20] Her Honour concluded by reference to the judgment of his Honour Daubney J in *Baxbex Pty Ltd v Bickle* [2009] QSC 194 where his Honour said "precision and particularity must be required to a degree reasonably sufficient to apprize the parties of the real issues in the dispute."

[21] In the matter before me, the claim for $2,772.00 for sediment control costs refers to claim no. 30. In that document there are items referred to "as attached breakdown sheet" and "as QCIG breakdown attached". There is no dispute these documents were not in fact attached. In my opinion following Daubney J in *Baxbex Pty Ltd v Bickle*, those documents should have been attached for the claim to be a valid claim. That is, unless the documents have already been supplied to the respondent as to which there was no evidence before me.

[22] Further, in my opinion the claim for preliminary suspension costs lacks identification. No basis is set out for the claim for variable preliminary value of $618,533.00 nor the 36 weeks period for the calculation relied upon to claim these costs over 30 days at $2,454.50 per day. That is, how is that value and number of weeks arrived at.

[23] However, as to the respondent's claim the suspension costs were not under the contract, the respondent's director did not swear to the relevant circumstances in his affidavit. I consider this is a point the respondent cannot rely upon to oppose summary judgment.

[24] The claim for interest on late payments of $16,871 is in my opinion identified in the schedule attached to the claim. To this extent the claim is valid. Interest and "delay charges" can be for construction work (*Co-ordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and others* (2005) NSWCA 228. As to the claim by the respondent that it has paid the interest that was also not sworn to.

[25] In my opinion the claim for "retentions incorrectly held and interest charged previously" in the sum of $1,156.00 is not identified for the purposes of the *BCIPA* and is not a valid claim.

[26] In the circumstances it is my opinion except for the sum of $16,871.00 the balance of the payment claim in this case does not have the precision and particularity to a degree reasonably sufficient to apprize the parties of the real issues in the dispute (per Daubney J). Further, the inclusion of an invalid sum in the claim is not enough to render the claim invalid (*Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7 per Fryberg J at p 6).

[27] As far as the respondent's claim to rely upon a set-off I consider s 19(4)(b)(ii) of the *BCIPA* prohibits reliance upon a set off. That section provides:

> "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) a judgement 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."

[28] As far as the delay is concerned in bringing the application for summary judgment it is correct the claim and statement of claim was filed on 23 September 2009. However, I do not consider the respondent has suffered any prejudice in the time it has taken for the applicant to bring the application for summary judgment. The circumstances have remained the same in that time. I do not consider the delay ought to go against the applicant. It is not a basis on which I would refuse the application for summary judgment.

[29] In my opinion the respondent has a real prospect of successfully defending some of the claim and there is a need for a trial of that part of the claim.

[30] Therefore I give judgment for the plaintiff against the defendant for $19,100.74 being the sum of $16,871.00 and interest thereon at the rate of 18 per cent per annum from 10 June 2009 to 5 March 2010, a sum of $2,229.74.

[31] I will hear the parties on the question of costs.