SUPREME COURT OF QUEENSLAND

CITATION:	*Mansouri & Anor v Aquamist P/L* [2010] QCA 209
PARTIES:	**PARVINDOKHT MANSOURI** (first respondent/first appellant) **SHAHABOLLAH MANSOURI** (second respondent/second appellant) **v** **AQUAMIST PTY LTD** ACN 117 493 115 (applicant/respondent)
FILE NO/S:	Appeal No 2574 of 2010 DC No 259 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	6 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2010
JUDGES:	Chief Justice and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal, set aside the judgment in the District Court, and order the respondent to pay the appellants' costs of the appeal, to be assessed on the standard basis.** **2. Order that:** **(a) The originating application filed by the respondent on 28 October 2009 proceed as if started by claim.** **(b) The respondent file and serve its statement of claim within 14 days.** **(c) The appellants file and serve their notice of intention to defend and defence within 14 days from the date of service of the respondent's statement of claim.** **(d) The parties have liberty to apply in the trial division in relation to those directions and generally.** **(e) The costs of and incidental to the respondent's originating application and the appellants' cross application be reserved to the trial judge.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PROGRESS PAYMENTS – where the appellants were the registered owners of the land on which the respondent carried out work – where the respondent alleged that the appellants were liable for progress payments under the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*") – where the primary judge gave summary judgment in favour of the respondent for a progress payment under s 19(2)(a)(i) *BCIPA* – where the appellants argued that the primary judge erred as there was a factual dispute about the existence of a construction contract – where the respondent conceded that the primary judge's analysis could not be sustained but argued that direct agreements and arrangements demonstrated that the appellants were liable pursuant to s 17(1) *BCIPA* – whether the primary judge erred in giving summary judgment on the ground that the appellants were persons who were liable to make a progress payment under *BCIPA* – whether summary judgment was suitable given the lack of clarity on the evidence of the identities of the parties to the arrangement for construction work

Building and Construction Industry Payments Act 2004 (Qld) s 3(3)(c)(ii), s 7, s 8, s 12, s 17(1), s 18(1), s 18(4), s 18(5), s 19(2)(a)(i)

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, followed
Beckhaus v Brewarrina Council [2002] NSWSC 960, cited
Brodyn Pty Ltd t/as Time Cist and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, considered
Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13; [2006] QCA 538, applied
Levadetes Pty Ltd v Iberian Artisans Pty Ltd [2009] NSWSC 641, cited
Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd [2005] NSWSC 45, cited
Olbourne v Excell Building Corp Pty Ltd [2009] NSWSC 349, cited
Rich v CGU Insurance Ltd (2005) 79 ALJR 856; [2005] HCA 16, cited
State of Qld v Nixon & Ors [2002] QSC 296, cited
Walton Construction (Qld) Pty Ltd v Robert Salce & Ors [2008] QSC 235, cited

COUNSEL: S Kelly (sol) for the appellants
M Black for the respondent

SOLICITORS: Boulton Cleary & Kern Lawyers for the appellants
B T Lawyers for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **FRASER JA:** Mr and Mrs Mansouri have appealed against a judgment summarily given against them in the District Court in favour of Aquamist Pty Ltd for a progress payment of $75,878.27 as a liquidated debt under the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*").

Background

[3] Section 7 of *BCIPA* provides that the object to that Act is to ensure that a person who undertakes to carry out construction work, or to supply related goods and services, under a "construction contract" is entitled to receive, and is able to recover, progress payments. Section 8 explains how the object is to be achieved. The first part of that object, the statutory entitlement to receive progress payments, is achieved by s 12, which confers an entitlement to progress payments upon a person who has undertaken to carry out construction work, or supply related goods and services, under a "construction contract". *BCIPA* defines that term as meaning "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".

[4] The second part of the statutory object is achieved, in part, by the procedure for recovering progress payments in Part 3 of *BCIPA*. Subsection 17(1) provides that a person mentioned in s 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)." Section 18(1) entitles a respondent who is served with a payment claim to reply to the claim by serving a payment schedule. It must identify the payment claim to which it relates, state the amount of the payment, if any, that the respondent proposes to make ("the scheduled amount"). If the scheduled amount is less than the claimed amount the payment schedule must state why. If it is less because the respondent is withholding payment for any reason, the payment schedule must state the respondent's reasons for that withholding. Subsection 18(4) provides that s 18(5) applies if a claimant serves a payment claim on a respondent and the respondent does not serve a payment schedule on the claimant within the earlier of the time required by the relevant construction contract or 10 business days after the payment claim is served. Subsection 18(5) provides that 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.

[5] The judgment against Mr and Mrs Mansouri was given under s 19(2)(a)(i). Section 19 provides:

> "(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 claimant within the time allowed by the section; and
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> (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; or

(ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

(3) A notice under subsection (2)(b) must state that it is made under this Act.

(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) 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."

[6] Mr and Mrs Mansouri were the registered owners as joint tenants of land upon which Aquamist carried out excavation and earthworks as part of a project for the construction of multiple residential dwellings. Aquamist alleged that they were liable for progress payments under *BCIPA*. On 12 August 2009 Aquamist served upon Mr and Mrs Mansouri a payment claim in the appropriate form under *BCIPA* for a progress payment of $75,878.27. Mr and Mrs Mansouri did not serve any payment schedule in response.

[7] Aquamist's director, Mr Cox, affirmed two affidavits in support of its application for judgment. He deposed that on 19 November 2007 Aquamist entered into a partly written and partly oral construction contract with Mr and Mrs Mansouri ("the Arrangement") to conduct construction work on their land ("the Property"), the terms of which included that Aquamist was engaged to install and develop utilities and services for Mr and Mrs Mansouri including excavation and earthworks, Mr and Mrs Mansouri's "representative Pedro Mansouri" would issue directions to Aquamist for the work, and Mr and Mrs Mansouri would pay for Aquamist's services on a "cost plus" basis "as per invoices issued" by the respondent. Mr Cox deposed that he carried out construction work pursuant to that construction contract and he referred to and exhibited various invoices to and communications with Pedro Mansouri, the appellant Mr Mansouri and "Mansouri Family Trust".

[8] Mr and Mrs Mansouri and Pedro Mansouri swore affidavits in response. They accepted that Aquamist had carried out work on Mr and Mrs Mansouri's land under a construction contract but they deposed that it was Pedro Mansouri, rather than Mr or Mrs Mansouri, who was party to Aquamist's contract. They denied on oath that Mr and Mrs Mansouri had made any contract or agreement with Aquamist.

[9] The primary judge accepted Aquamist's argument that the dispute about the construction contract was irrelevant because s 18(5) of *BCIPA* rendered Mr and Mrs Mansouri liable to make the claimed progress payment as persons who at least "may be liable to make the payment" in terms of s 17(1).

The requirement for proof of a "construction contract"

[10] Mr and Mrs Mansouri argued that the primary judge erred in giving judgment summarily on Aquamist's originating application because there was an unresolved factual dispute about the existence of the alleged construction contract. They argued that the primary judge instead should have acceded to Mr and Mrs Mansouri's cross application for an order that Aquamist's originating application continue as if started by claim so that the dispute could be resolved at a trial.

[11] At the hearing of the appeal counsel for Aquamist, who had not appeared in the District Court, conceded that the primary judge's analysis could not be sustained. Contrary to Aquamist's argument at first instance, Mr and Mrs Mansouri were entitled to oppose the application for summary judgment by contending that there was no "construction contract" under which Aquamist undertook to carry out construction work for Mr and Mrs Mansouri.

[12] That concession was appropriate. In *Brodyn Pty Ltd v Davenport*[1] Hodgson JA, with whose reasons Mason P and Giles JA agreed, held that under the similar New South Wales legislation (the *Building and Construction Industry Security of Payment Act* 1999 (NSW)) the "basic and essential requirements" laid down for an adjudicator's determination included the existence of a construction contract between the claimant and the respondent. In *Cant Contracting Pty Ltd v Casella*,[2] McMurdo J (with whose reasons Jerrard JA agreed) held that Hodgson JA's conclusion should be applied in the context of the Queensland legislation. I respectfully agree.

[13] Read in light of the definition of "construction contract", s 12 of *BCIPA* gives the statutory right to a progress payment only to a person who "undertakes to carry out construction work for", or to supply related goods and services to, another party under a contract, agreement or other arrangement. The provisions in Part 3 were designed to facilitate the enforcement of that statutory right, not to broaden it. Such a right is not established by proof only that a payment claim was served on a person who "may" be a party for whom the claimant undertook to perform construction work or to whom the claimant undertook to supply related goods and services. Rather, the effect of the expression in s 17(1) "under the construction contract concerned", again read in light of the definition of "construction contract", is that a payment claim may validly be served only on a person who is a party for whom the claimant undertook to perform construction work, or to whom the claimant undertook to supply related goods and services.

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1 (2004) 61 NSWLR 421 at [53]; [2004] NSWCA 394.

2 [2007] 2 Qd R 13 at 29, [52] - [53].

[14] The expression "may be liable" does not qualify that requirement. It serves a different purpose. Progress payments under *BCIPA* are made on account of a liability which may or may not ultimately be established. That is so under conventional building contracts and s 100 makes it clear that the same is true under *BCIPA*. It was therefore necessary for s 17(1) of *BCIPA* to include a person "who claims to be entitled" to a progress payment within the description of persons entitled to serve a payment claim and correspondingly to include a person who "may be liable" within the description of persons upon whom a payment claim might be served.[3] Neither expression suggests any liberalisation of the requirement that "the respondent" must be a person for whom the claimant undertook to carry out construction work or to whom the claimant undertook to supply related goods and services. The entitlement to serve a payment schedule under s 18 is conferred only upon such a person and the remedies in s 19(2) are given only against such a person. So much is consistent also with s 19(4)(a), which requires the court to be satisfied that "the respondent" has become liable under s 18, and with s 19(4)(b)(ii), which operates to preclude defences which "the construction contract" otherwise might have provided to "the respondent".

[15] One question debated in this appeal was whether a claimant is entitled to recover a progress payment only where the construction contract renders the person sued as "the respondent" liable to the claimant. I accept the submission for Aquamist that there is no such requirement. The expression "liable to make the payment" in s 17(1) relates to the statutory entitlement to progress payments, an entitlement which exists whether or not the respondent has any contractual liability to the claimant.[4] It follows that judgment may be given under s 19(2)(a)(i) if, and only if, the court is satisfied that there was a relevant "construction contract", that is, a contract, agreement or other arrangement under which the claimant undertook to carry out construction work for, or to supply related goods and services to, the person sued as "the respondent".

[16] The primary judge therefore erred in giving judgment on the ground that Mr and Mrs Mansouri were persons who "may be liable to make the payment".

Aquamist's argument in the appeal

[17] Aquamist's counsel argued that the judgment was nevertheless rightly given on the ground that the evidence of various communications and payments referred to in the affidavits demonstrated that there was an arrangement under which Aquamist undertook to carry out construction work for Mr and Mrs Mansouri.

[18] Mr and Mrs Mansouri objected that Aquamist had advanced a different case in the District Court. In response, Aquamist's counsel drew the Court's attention to a passage in its written submission in the District Court which set out the definition of "construction contract". Aquamist there contended that it had proved direct "agreements" and "arrangements" which demonstrated that Mr and Mrs Mansouri were liable and that they had acknowledged that by requesting that invoices be directed to their address and by making part payments. However, those contentions were put in the midst of repeated references to the argument that Mr and

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3 See *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13 at [31] per Williams JA.

4 See *BCIPA*, ss 8(a), 12; and see *Beckhaus Civil Pty Ltd v Brewarrina Council* [2002] NSWSC 960 at [60] - [63] per Macready AJ; and *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 at [38] - [55] per Nicholas J.

Mrs Mansouri "were or might be liable" in terms of s 17(1). In the oral argument for Aquamist in the District Court its counsel did not advert to the definition of "construction contract" and made it clear that Aquamist's only argument was referable to the 19 November 2007 construction contract alleged by Mr Cox and the effect of s 17(1). Counsel said of that argument that it was "the whole point". Mr and Mrs Mansouri's solicitor responded, as Aquamist now accepts, that the existence of the relevant "construction contract" was a condition of the validity of Aquamist's payment claim. In reply, Aquamist's counsel argued only that Mr and Mrs Mansouri's argument failed to address the concept of "may be liable". That was the contest in the District Court. It explains why the primary judge decided the application without any reference to the argument Aquamist's counsel developed in this appeal.

[19] In objecting to Aquamist's change of tack in this Court Mr and Mrs Mansouri's solicitor referred to the possibility of an argument that, if Mr and Mrs Mansouri had undertaken any liability for payment it was as guarantors, so that s 3(3)(c)(ii) of *BCIPA* excluded its application in this case. That seems unlikely on the present evidence, which suggests that if Mr and Mrs Mansouri are liable at all, they are liable as primary obligors for whom work was done. However, I have found it unnecessary to decide whether Aquamist should be permitted to advance its new argument for the first time on appeal. This was in any event not a proper case for summary judgment.

[20] I will first summarise the evidence upon which Aquamist relied. Aquamist's first invoice was dated 19 November 2007 and addressed to "Pedro". By an email dated 30 November Mr Mansouri told Mr Cox that he was Pedro's father and asked for the invoice to be sent to him for payment. On 1 December 2007 Mr Cox replied, attaching an invoice in a very similar form but addressed to "Mansouri Family Trust". Mr Cox deposed that Mr and Mrs Mansouri subsequently made two separate payments of $2,500 on 4 and 5 December 2007 by electronic transfer. He gave similar evidence in relation to subsequent invoices. In relation to one such invoice Mr Cox deposed that when he asked Pedro what was happening with payment Pedro said that he would need to speak to his father; Pedro later said that his parents would transfer $5,000 per day until a cheque could be drawn for the balance; they paid only the first $5,000; after Mr Cox sent an email to Mr and Mrs Mansouri's email address he received a reply referring to a cheque that had been sent; and Mr Cox exhibited a cheque which he had received from Mr and Mrs Mansouri and was drawn by them as trustees.

[21] The exhibited cheque in fact appears to have been signed only by Mr Mansouri. It was drawn upon an account styled "S, P & P Mansouri as trustees for the Mansouri Family Trust". That is consistent with Pedro Mansouri's evidence that payments were made by the Mansouri Family Trust. According to Pedro Mansouri, he and his parents were the trustees and potential beneficiaries of the trust and the land was not a trust asset. Pedro Mansouri deposed that it was he who obtained an estimate from Mr Cox, he authorised the work, he did not mention the trust or say anything that could cause Mr Cox to think that Aquamist was entering into an agreement to do works with anyone but him, and payments made by the trust were made on his behalf under an arrangement he had with his parents. That evidence conflicted with Mr Cox's statements of his conclusions that the work was done at the request of Mr and Mrs Mansouri as the registered owners of the Property and that Pedro Mansouri acted for or on behalf his parents. Those conclusions were not supported

by direct, admissible evidence, although there was no objection on that ground. Pedro Mansouri's evidence to the effect that the work was done for him alone found arguable support in Mr Cox's evidence that Pedro Mansouri issued directions and instructions directly to Aquamist, oversaw the performance of the construction work, and "made arrangements for the payment of invoices".

[22] On that evidence there were material factual disputes which require resolution at a trial. Mr and Mrs Mansouri's liability under BCIPA ultimately depends upon a conclusion that Aquamist undertook to carry out construction work "for" them rather than exclusively "for" Pedro Mansouri. The parties made submissions about the scope of that requirement, but this appeal is not the occasion for a discussion of the relevant authorities. None of the decisions cited to this Court justifies the view that a builder who contracted with one person to carry out work is entitled to recover progress payments under *BCIPA* from a third party merely upon proof that the third party owned the land upon which the work was done.[5] Aquamist relied upon additional matters but the material circumstances were in dispute on the affidavits. In particular, there were factual disputes about the identity of the parties to the arrangement allegedly made with Aquamist on 19 November 2007 and about the significance to be attributed to payments made by Mr and Mrs Mansouri and Pedro Mansouri as trustees. Mr Mansouri did not acknowledge in any communication that he was a party to any arrangement with Aquamist and the Court was not taken to any communication from Mrs Mansouri to Aquamist. Aquamist's case necessarily depended upon the Court drawing an inference from the whole of the evidence that Aquamist undertook to carry out construction work for Mr and Mrs Mansouri, but whether or not that inference should be drawn might well be influenced by findings about the disputed facts, particularly the content of conversations between Mr Cox and Pedro Mansouri.

[23] Summary judgment should only be given where there is a high degree of certainty about the ultimate outcome if the matter were allowed to go to trial in the ordinary way.[6] On the affidavit evidence there was such a lack of clarity about the identity of the parties to the arrangement for the construction work as to render this case unsuitable for summary judgment. There should instead be directions for a speedy trial of that issue.

Proposed orders

[24] Mr and Mrs Mansouri are entitled to succeed in the appeal. They should have their costs accordingly. They also sought costs of their defence of the summary judgment application. I consider that it is appropriate instead to reserve those costs to the trial judge.[7] In view of the narrow scope of the issue to be tried, I would allow shorter periods for pleading than were suggested in the orders sought by the appellants but the parties should have liberty to apply in the trial division in that respect and generally.

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5 See in particular *Levadetes Pty Ltd v Iberian Artisans Pty Ltd* [2009] NSWSC 641 at [46] - [50] per McDougall J; *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349 at [26] per Rein J; and *Walton Construction (Qld) Pty Ltd v Robert Salce & Ors* [2008] QSC 235 at [13] - [14] per McMurdo J.

6 *Agar v Hyde* (2000) 201 CLR 552 at 575-576, [57], per Gaudron, McHugh, Gummow and Hayne JJ; *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856 at 859, [18], per Gleeson CJ, McHugh and Gummow JJ.

7 C.f. *State of Qld v Nixon & Ors* [2002] QSC 296.

[25] In my opinion the appropriate orders are:

1. Allow the appeal, set aside the judgment in the District Court, and order the respondent to pay the appellants' costs of the appeal, to be assessed on the standard basis.

2. Order that:

   (a) The originating application filed by the respondent on 28 October 2009 proceed as if started by claim.

   (b) The respondent file and serve its statement of claim within 14 days.

   (c) The appellants file and serve their notice of intention to defend and defence within 14 days from the date of service of the respondent's statement of claim.

   (d) The parties have liberty to apply in the trial division in relation to those directions and generally.

   (e) The costs of and incidental to the respondent's originating application and the appellants' cross application be reserved to the trial judge.

[26] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with those reasons and the orders which he proposes.