SUPREME COURT OF QUEENSLAND

CITATION:	*T & T Building Pty Ltd v GMW Group Pty Ltd & Ors* [2010] QSC 211
PARTIES:	**T & T BUILDING PTY LTD ACN 054 531 690** (applicant) **v** **GMW GROUP PTY LTD ACN 103 796 881** (first respondent) AND **MICHAEL SAADIE** (second respondent) AND **JOSE GUERREIRO** (third respondent) AND **JOSE MARTIN** (fourth respondent) AND **JOE TOUMA** (fifth respondent)
FILE NO:	BS13855 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25-26 March 2010
JUDGE:	Martin J
ORDER:	**THE APPLICANT IS TO BRING IN MINUTES OF ORDER**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the Applicant was to submit monthly progress claims to the First

Respondent – whether the Applicant and First Respondent varied the contract to allow the Applicant to issue progress claims every two weeks – whether post-agreement conduct can be used to determine the terms of a contract

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the First Respondent argued there was 'double dipping' in the Applicant's payment claims – whether this is an issue under the construction contract – whether the First Respondent can raise 'double dipping' as a defence

ATCO Controls Pty Ltd (in liq) v Newtronics Pty Ltd (Rec and Mgrs apptd) (in liq) [2009] VSCA 238
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363
Brookhollow Pty Ltd v R&R Consultants Pty Ltd & Anor [2006] NSWSC 1
FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd [1993] 2 VR 343
Hawkins v Clayton (1988) 164 CLR 539
Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd [2007] QSC 333

Building and Construction Industry Payments Act 2004 (Qld), ss 12, 17, 18, 19, 20

Cheshire & Fifoot, *Law of Contract* (2008)

COUNSEL: R N Wensley QC and L D Bowden for the applicant
M Sahadie for the respondents

SOLICITORS: Nicholas Radich Solicitors for the applicant
Melville McGregor Lawyers for the respondents

[1] On 2 January 2008 the applicant ("T & T") and the first respondent ("GMW") entered into a contract for the construction by T & T of a building for GMW. The contract was subject to the provisions of the *Building and Construction Industry Payments Act* 2004 ("the Act").

[2] The contract provided for T & T to submit monthly progress claims. Work began in March 2008 and, from 31 March 2008 to 19 August 2009, nineteen claims were submitted and paid.

[3] T & T alleges that, in July 2009, there was a meeting at which Mr Younan (a director of T & T) and Mr Saadie (a director of GMW) had a discussion and that the parties agreed to vary the contract so that T & T could issue its progress claims every two weeks.

[4] Progress claims were then made every two weeks. Progress claims 20 to 25 were submitted during the period 2 September 2009 to 11 November 2009 for a total

amount of about $6.5 million. Of that sum about $1.5 million has been paid. T & T relies upon section 19(2) of the Act and seeks judgment for $4,890,018.16 with interest.

[5] GMW:

(a) denies that there was any variation of the contract;
(b) says that the claims the subject of the application were either invalid or had been the subject of a valid payment schedule; and
(c) says that the amount claimed is inflated due to "double dipping".

The Act

[6] Section 12 of the Act provides:

> "**12 Rights to progress payments**
> 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."

[7] A 'reference date' is defined in schedule 2 of the Act as follows:

> "***reference date***, under a construction contract, means—
> (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."

[8] Section 17 of the Act operated to allow T & T to serve a payment claim on GMW. Section 17 provides:

> "**17 Payment claims**
> (1) 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***).
> (2) A payment claim—
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
> (b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and
> (c) must state that it is made under this Act.

(3) The claimed amount may include any amount—
  (a) that the respondent is liable to pay the claimant under section 33(3); or
  (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within the later of—
  (a) the period worked out under the construction contract; or
  (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

[9] Upon being served with a payment claim, GMW was entitled to reply with a payment schedule under section 18. That section states:

"**18 Payment schedules**

(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 claimed amount, 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 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."

[10] In the absence of a payment schedule, the consequences of not paying T & T are provided for in section 19:

"**19 Consequences of not paying claimant if no payment schedule**

(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

(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."

The contract

[11] The contract provides, in clause 37, for progress claims:

"37.1 Progress claims
The contractor shall claim payment progressively in accordance with item 33.
An early progress claim shall be deemed to have been made on the date for making that claim.
Each progress claim shall be given in writing to the superintendent and shall include details of the value of the WUC done and may include details of other moneys then due to the contractor pursuant to

> the provisions of the contract." ("WUC" means work done under the contract.)

[12] Item 33 of the contract provided that the time for progress claimants was monthly.

Was there a variation?

[13] T & T alleges in its Amended Statement of Claim that the contract was varied so that "the applicant was entitled to submit progress claims every 14 days the first of such claims to be made on a date to be chosen by the applicant".

[14] This variation, it was submitted, arose out of a conversation between Mr Younan and Mr Saadie in early July 2009. Mr Younan's account of the relevant part of the conversation is set out in his affidavit (filed 18 December 2009):

> "3. In about July 2009, I had a meeting in Sydney at the offices of the first respondent. Present were myself and the second respondent only. I said to the first respondent words to this effect, 'you're not paying the claims as submitted'. Mr Saadie responded by saying that he wanted the job sped up. I replied, 'That's fine but we need to get all the money that we are claiming'. Mr Saadie then said to me words to the effect that, 'we could have fortnightly progress payments'.
> 4. I told Mr Saadie that I agreed with that and the agreement was confirmed on the spot."

[15] Mr Saadie's version of the conversation is set out in his affidavit (filed 21 December 2009):

> "4. Sometime in July 2009, Anthony Younan came to my office at 1 Victoria Rd, Parramatta NSW and we had a conversation to the following effect:
> I said: 'This job should have been finished by now.'
> He said: 'We are short on cash flow.'
> I said: 'What does that mean, what can I do?'
> He said: 'What if we send two invoices a month instead of one?'
> I said: 'Well I am happy to look at anything you send me so long as it does not change any condition of the contract. We will still only be legally liable for one payment a month.'
> He said: 'Well if you can look at them, that would be very helpful. The job will fly.'"

[16] The alleged variation is in two parts. The first, relating to a change from monthly to fortnightly payments, is said to be express. The second, concerning the commencement of these fortnightly progress claims, was not the subject of discussion and is said to be implied.

[17] Evidence was received about the conduct of both parties following the conversation of early July. Such evidence is generally regarded as not admissible to assist in the construction of a contract (see Cheshire & Fifoot, *Law of Contract* (2008), [10.16]) but is admissible to assist in determining whether a contract was formed (*ATCO*

Controls Pty Ltd (in liq) v Newtronics Pty Ltd (Rec and Mgrs apptd) (in liq) [2009] VSCA 238 at [45]). That purpose also applies to the question of whether a contract has been varied.

[18] On 27 July 2009, Joe Touma (the superintendent engaged by GMW for the building project) caused an email to be sent to an employee of T & T in the following terms:

> "I have discussed the fortnightly claims with Michael [Saadie] and he has advised the following:
> 1. We will not be held liable to pay the full claim if the Certificate is not available in 14 days."

[19] Mr Younan, in cross-examination, said that the email confirmed his conversation with Mr Saadie in every respect and that he had "no problem with every word in this email". He also said that he did not think it was worth responding to the email to correct it in any way because "we had an agreement".

[20] Mr Touma, in his affidavit filed 21 December 2009, said that the email was sent following a conversation he had with Mr Saadie in which Mr Saadie told him that he had had a conversation with Mr Younan and that Mr Younan had asked if he could submit two invoices a month instead of one. Mr Saadie said that he told Mr Younan that "we would look at anything he sent us but without changing any term in the contract so that we would still only be legally liable for one a month". In his affidavit Mr Touma said that he sent the email to document that fact.

[21] In cross-examination, Mr Touma said the contrary. He said that the email was just trying to keep the paperwork tidy but he agreed that the change was an important one for the contractual regime and that the purpose of the email was to record and communicate back to T & T what the new arrangements were. He also said that Mr Saadie had communicated to him that the arrangement had been changed to make payments every two weeks.

[22] Mr Touma was recalled on the second day of the hearing for the purpose of being cross-examined on two documents which had been produced on the evening of the first day. The first document was an email from GMW to a person at WT Partnership (the quantity surveyors). That email said:

> "Please be advised that we will be assessing claims every [two] weeks from now on.
> The reason for this is that the job is progressing quickly with lots of trades on site.
> Please advise what needs to be done by us to enable this to happen."

[23] The other document was the response from WT Partnership setting out what needed to be done. Mr Touma accepted that he asked for that email to be sent because GMW was changing the payments to once every two weeks and he wanted a notification sent to the quantity surveyor to indicate that.

[24] Later in his cross-examination Mr Touma attempted to move away from that by saying that the monthly payments were never changed and that GMW was only trying to help T & T in facilitating more frequent payments. He repeatedly said that while the payments were changed the contract was not.

[25] The latter concept – that the payments were changed, but the contract was not – was something also relied upon by Mr Saadie in his evidence.

[26] English is not Mr Saadie's first language and he candidly admitted that he left written communication to Mr Touma for that reason. In cross examination he was wont to give, or attempt to give, rambling answers which were frequently unresponsive and sometimes argumentative. His evidence about the arrangement with Mr Younan was equivocal. He was asked (T1-50 line 50 – T1-51 line 10):

> "Both you and Mr Younan agree that your meeting about two payments a month or fortnightly payments was in about July 2009, don't you?-- Yes, two payments every month, yes, that's correct.
>
> "Right?-- And because I don't want to jeopardise our whole - the whole project, I accept, you know, to help him out and pay him twice to speed the project because this what he told me. He said, "Look, if you split the payment and pay me, you know, bit - the money bit earlier, like two payment every month, the job will fly", and I was - you know, I was happy to help him to do that. I have to pay two times for QS to go up there every month and I was happy to cope with that cost just to help him out.
>
> "Okay?-- And I think I've done the right thing when I said, "Yes, I'm happy to, you know, pay you two times every month." But I repeat myself three times, "That won't affect the conditions of the contract?" He said, "No, no, no, no, this is nothing to do with the contract. That just helping us out to speed the project."

[27] I prefer the evidence of Mr Younan as to the contents of his discussion with Mr Saadie. It was internally consistent and was a rational step which the parties to such a contract might take which would be to their mutual benefit. Mr Saadie's evidence (including the manner in which he gave it) was not convincing and, taken at its highest, was to the effect that the parties had agreed to change the way in which part of the contract was to be performed, but that the contract was not to be changed accordingly. The weight of the evidence is clearly in favour of a finding that there was an agreement between the parties to vary the contract. It was to GMW's benefit to have the contract continue to be performed and it was to T & T's benefit to have its cash flow improved. The conduct of the parties following the discussion was consistent with an agreement to vary the terms of the contract. I accept Mr Younan's evidence with respect to the terms of the agreement concerning the making of progress claims and I find that such a variation occurred. It is not, though, possible to use post-agreement conduct to determine the terms of a contract and that includes an implied term (*FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343).

[28] Whether or not a term will be implied is subject to certain recognised rules. As to whether it is necessary, in a case such as this where there is an informal variation to a contract, for the elements expressed in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376 to be satisfied; or whether those strict requirements are not as rigidly enforced in informal contracts (*Hawkins v Clayton* (1988) 164 CLR 539), I find that the conditions expressed in *BP Refinery* are necessarily satisfied here. In order for the agreement to be workable, it was necessary for a start date to be provided and, as T & T was the entity responsible for

providing the progress claims, it was appropriate for it to do so with respect to the new regime. In drawing the implication which I do in the terms pleaded by T & T, I do so on the basis that:

(a) it was reasonable for such a term to be implied – there needed to be a clear delineation between the former regime and the new one and that could be done by the issuing of the first fortnightly progress claim;
(b) without such a term the contract would not be effective – the parties had to be able to have appropriate certificates issued in order that payment could be made and a start date for the first of such certificates was needed;
(c) the requirement for a start date is obvious – the period between payment claims is important for other parts of the payment regime and requirements;
(d) it can be expressed in the clear manner alleged by T & T; and
(e) it does not in the light of the other part of the agreement contradict any express term of the contract.

[29] I find, therefore, that the contract was varied in the terms alleged by T & T.

The claims

[30] I turn now to the various claims the subject of this action. With respect to each of them, GMW has pleaded or argued that there was no variation to the contract and, so, there was an invalidity of some sort with respect to each of the claims. Those invalidities relate to whether or not the claims were properly associated with a reference date and whether or not a later claim was affected by an earlier claim and so on. In the light of my finding on the variation to the contract I will not deal with that part of GMW's case.

Claim 20

[31] This claim was served on 2 September 2009 for the sum of $413,820. It is alleged that no payment schedule was served but that a part payment of $361,812 was made leaving the sum of $52,008 owing.

[32] GMW pleaded that it had actually paid $576,140 – being the amount of $361,812 paid to T & T and $214,328 paid, at the direction of T & T, to its subcontractors or suppliers. It is also pleaded that a payment schedule was served on 28 September 2009.

[33] As to the latter point, T & T submits that that plea should not be accepted. In its original defence, GMW admitted that it had not served a payment schedule with respect to this claim. In an amended defence that admission, and others, were withdrawn and other assertions made. Leave was neither sought nor granted for the withdrawal of that and other admissions. For the purposes of this claim I do not need to resolve this complaint. GMW has pleaded that it served a "payment schedule" on 28 September 2009. Such a document is ineffective because it was served more than 10 business days after the service of the claim and thus comes within s 18(4) and, therefore, enlivens s 18(5).

[34] It follows that GMW became liable under s 18(5) to pay the claimed amount. Section 19 (upon which T & T relies in this case) applies where a respondent fails to pay the whole or any part of a claimed amount. It is recognised by T & T that part of the claim was paid. There is, though, the allegation by GMW that it paid $214,328 to subcontractors and suppliers at the direction of T & T. That such a sum, or a sum like it, was paid to subcontractors or suppliers is supported by a document entitled "Summary Progress Claim 20 Rev A". It is also supported by the letter from T & T to GMW of 29 September 2009 where T & T sought reimbursement of sums paid to those subcontractors or suppliers in an amount of approximately $190,000. This letter was part of a chain of correspondence in September and October 2009 about this and other matters.

[35] In his evidence, Mr Saadie asserted that Mr Younan had on a number of occasions asked or authorised to make direct payments to subcontractors. That evidence is inconsistent with the letter from GMW to T & T of 2 October 2009 in which it is not said that payments were made by direction. Rather, GMW asserts in that letter that T & T was in breach of a contract by not having paid the subcontractors and that the payment by GMW "was and is a reasonable rectification of the substantial breach of contract by the contractor in this respect". I do not accept the evidence of Mr Saadie that he was asked by Mr Younan to make these payments. The letter to which I have referred was signed by Mr Touma who, I find, was more heavily engaged and more aware of the intricacies of the contract and the payments which had to be made. I find that the payments which were made to the subcontractors were made at the direction of T & T. It follows, then, that for the purposes of the Act, there was a failure to pay the sum of $52,008. It is therefore an amount which T & T is entitled to recover under s 19(2) of the Act.

Claim 21

[36] Claim 21 was served on GMW on 16 September 2009. The amount claimed was $1,145,538.41. On that claim, GMW paid $650,070. T & T says that it is owed the balance of $495,468.41. GMW relies upon a payment schedule served on 9 October 2009. That document, like the one with respect to claim number 20, was served outside the time provided for in s 18(4). Therefore, s 18(5) applies and the amount of $495,468.41 is a debt owing under s 19(2) of the Act.

Claim 22

[37] This claim was served on 30 September 2009 and sought the sum of $1,073,946.50. Of that amount $531,333 was paid, leaving a balance of $542,613.50.

[38] GMW relies upon a document served on 14 October 2009 as a payment schedule within the Act.

[39] The document upon which reliance is placed is an email sent by Mr Touma to an employee of T & T. The subject line of the email is "Crown – progress claim 22". It therefore satisfies the first requirement of a payment schedule in s 18(2)(a), namely, that it identify the payment claim to which it relates. The relevant text of the email reads: "We do not agree with the above claim as the variations schedule is incorrect."

[40] In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333, Chesterman J (as he then was) had to consider a payment schedule which was significantly longer than the one under consideration here but which, in his Honour's view, made it clear that the respondent in that case did not intend to pay any money. In this case, though, GMW did pay money with respect to claim 22. In "Summary Progress Claim 22" (a document generated by GMW) a payment of $531,333 is shown to have been made. The email from Mr Touma referred to above is the subject of a lengthy explanation in his affidavit of 21 December 2009. In paragraph 20 he sets out a series of matters which, to him, demonstrated that there was an error in the variation schedule. He said it was impossible to assess any part of the payment claim. He said that he sent the email and "expected a revised or corrected payment claim to be forwarded to me immediately". He further stated: "The applicant was very experienced and would have known exactly what was wrong when I sent my email. Because it was so obvious, I didn't think I needed to say any more in the email as it would be like teaching them to 'suck eggs'".

[41] In the light of the part payment which was made, the claim by Mr Touma loses significant weight. As was pointed out by Chesterman J in *Minimax*:

> "[27] … The whole purpose of [a payment schedule] is to identify what amounts are in dispute and why. The delivery of a payment claim and a payment schedule is meant to identify, at an early stage, the parameters of a dispute about payment for the quick and informal adjudication process for which the Act provides. If a [principal] wishes to take advantage of the Act to dispute the claim it must comply with its provisions and must, relevantly, take the trouble to respond to a payment claim in the manner required by the Act. The process is not difficult. The applicant was required to identify those parts of the claim which it objected to paying and to say what the grounds of its objection were."

[42] The terms of the email from Mr Touma do not satisfy the requirements of the Act as outlined by Chesterman J. The payment of an amount in response to the payment claim makes it clear that there was not an objection to the entire amount and that therefore s 18(3) applied. The email failed to comply with the requirements of that subsection and therefore the document was not a payment schedule within the meaning of the Act. The amount of $542,613.50 is, therefore, a debt owing to T & T within the meaning of s 19(2) of the Act.

Claim 23

[43] The payment claim was served on 14 October 2009 in the sum of $1,030,155.78.

[44] GMW asserts that a payment schedule was served on 11 November 2009. A document was emailed on that date but, as it was sent more than 10 business days after service of the payment claim it does not come within the Act. It does, though, refer to a payment of $3,746 which Mr Jamieson, in his affidavit, says was not received. Therefore the amount claimed is owing as a debt within the meaning of s 19(2) of the Act.

Claim 24

[45] This claim was served on 28 October 2009 seeking the sum of $1,011,560. It is not alleged by GMW that it served a payment schedule but, in Mr Touma's affidavit, a payment schedule is exhibited bearing the date 12 November 2009.

[46] In the amended defence this claim is met with the response that it is invalid because it was made contrary to s 17(5) of the Act in that it constituted a second or further payment claim in relation to a reference date for which a payment claim had already been made. That pleading, though, relies upon the contract not having been varied to provide for fortnightly payments. There is, though, a question as to whether or not there is double dipping involved here. I will return to that later. Subject to that, the amount of this claim is a debt owing within the meaning of s 19(2) of the Act.

Claim 25

[47] This claim was served on 12 November 2009 in the sum of $1,758,212.50. No payment schedule was served at all. It follows, subject to the question of "double dipping", that this amount is a debt owing within the meaning of s 19(2) of the Act.

"Double dipping"

[48] It was argued by GMW that the total amount owing under the payment claims included some double counting on the basis that, when some or all of a progress claim was unpaid, the unpaid amount was included in the next progress claim.

[49] I was not taken by Mr Sahade through the various progress claims in a manner which would establish his claim of "double dipping". Mr Jameson, who was called for T & T, was the person most likely to be able to deal with this issue, however he was only cross examined with respect to some alleged inconsistencies between variation notices and progress claims.

[50] It may be that there are some instances of "double dipping" but, if there are, then they are matters which arise under the construction contract; that is, they go to the extent to which GMW is indebted to T & T under the contract. As such GMW is prohibited by s 20(4)(b)(ii) from arguing this point (see *Brookhollow Pty Ltd v R&R Consultants Pty Ltd & Anor* [2006] NSWSC 1 at [48]).

Order

[51] T & T is entitled to an order in its favour on its application for the amount claimed. It is to bring in appropriate minutes of order. I will hear the parties on costs.