

SUPREME COURT OF QUEENSLAND

CITATION: *Casco Civil Construction Pty Ltd v Yeo & Co Pty Ltd (Administrators Appointed) & Ors* [2017] QSC 226

PARTIES: **CASCO CIVIL CONSTRUCTIONS PTY LTD ACN 103 558 774**
(applicant)
v
YEO & CO PTY LTD (ADMINISTRATORS APPOINTED) ACN 071 325 427
(first respondent)
CPB CONTRACTORS PTY LTD ACN 000 893 667
(second respondent)
F. K. GARDNER & SONS PTY LTD ACN 010 136 053
(third respondent)

FILE NO: BS 9228 of 2017

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 27 September 2017 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 27 September 2017

JUDGE: Atkinson J

ORDERS:

- 1. Pursuant to section 440D of the Corporations Act 2001 (Cth), the Applicant has leave *nunc pro tunc* to commence and proceed with District Court proceeding 2782/16 against the First Respondent in respect of its claimed debt and charge claimed under the Subcontractors' Charges Act 1974 (QLD).**
- 2. Pursuant to section 440D of the Corporations Act 2001 (Cth), the Applicant has leave *nunc pro tunc* to commence and proceed with Magistrate Court proceeding 0052825/16 against the First Respondent in respect of its claimed debt and charge claimed under the Subcontractors' Charges Act 1974 (QLD).**
- 3. Further to Orders 1 and 2, to the extent necessary the First Respondent has leave pursuant to s 444E(3)(c) of the Corporations Act 2001 (Cth).**
- 4. No order as to costs.**

CATCHWORDS: CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES – BUILDING ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS’ CHARGES ACT (QLD) – where the first respondent was a company under administration – where the applicant was a secured creditor by virtue of s 5 of the *Subcontractors’ Charges Act 1974* – where the applicant sought an order pursuant to s 440D of the *Corporations Act 2001* for leave, *nunc pro tunc*, to commence and proceed with District Court and Magistrates Court proceedings against the first respondent in respect of its claimed debt and charge claimed under the *Subcontractors’ Charges Act 1974* – whether leave should be granted

Corporations Act 2001 (Cth), s 440D, s 444B, s 444D, s 444E, s 444F

Subcontractors’ Charges Act 1974 (Qld), s 5, s 10, s 11

BBC Hardware Limited v GT Homes Pty Ltd [1997] 2 Qd R 123, cited

Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd [2005] VSC 24, cited

Ex Parte Pavex Constructions (1979) Qd R 318, cited

Foxcroft v The Ink Group Pty Ltd (1994) 15 ACSR 203, cited

Geoff Sharpe Pty Ltd v M&E Fitzgerald Holdings Pty Ltd (No. 2) [2010] QSC 231, cited

Modcol v National Buildplan Group [2013] NSWSC 380, cited

Re QMT Constructions Pty Ltd [2000] 1 Qd R 284, followed

Re Stockport (NQ) Pty Ltd [2003] 127 FCR 291, cited

Sun Engineering (Qld) Pty Ltd v Dynac Pty Ltd (in liq) [2000] QSC 213, cited

COUNSEL: E V Mastyuk (sol) for the applicant
P Jeffery for the respondents

SOLICITORS: Rostron Carlyle Lawyers for the applicant
JHK Legal for the respondents

- [1] This is a hearing of two matters. This judgment will deal with both matters, but will be published, of course, in each matter. The first involves Civcrush Pty Ltd (“Civcrush”), as applicant, the first respondent is Yeo & Co Pty Ltd (Administrators Appointed), and the second respondent is CPB Contractors Pty Ltd. In the second originating application, the applicant is Casco Civil Construction Pty Ltd (“Casco”), the first respondent Yeo & Co Pty Ltd (Administrators Appointed), the second respondent CPB Contractors Pty Ltd, and the third respondent is FK Gardiner & Sons Pty Ltd.
- [2] An application is made by the applicant in each matter under section 440D of the *Corporations Act 2001* for leave to proceed against the first respondent, Yeo & Co Pty Ltd (Administrators Appointed). During the hearing, it was suggested by the respondent that leave might need to be granted under section 444E and the applicants applied, should it be necessary, to amend their application to include the grant of leave

under that section. It is not suggested that there would be any prejudice to the first respondent by that application to amend being granted, and should it be necessary I give leave for the applicant to so amend its application. It is not suggested that any different matters would need to be considered.

- [3] In the matter where the applicant is Civcrush, an order was sought that, pursuant to section 440D of the *Corporations Act*, the applicant have leave, *nunc pro tunc*, to commence and proceed with District Court proceeding 2781 of 2016 against the first and second respondents in respect of its claimed debt and charge claimed under the *Subcontractors' Charges Act 1974*. It should be noted that no leave is required for the applicant to proceed against the second respondent. It is not in liquidation or administration and the applicant is entitled to proceed against it without leave.
- [4] In the matter where Casco is the applicant, the orders sought are that:
- (1) pursuant to section 440D of the *Corporations Act 2001*, the applicant have leave, *nunc pro tunc*, to commence and proceed with District Court proceeding 2782 of 2016 against the first and second respondents, in respect of its claimed debt and charge claimed under the *Subcontractors' Charges Act 1974*; and
 - (2) pursuant to section 440D of the *Corporations Act 2001*, the applicant have leave, *nunc pro tunc*, to commence and proceed with Magistrates Court proceeding 0052825 of 2016 against the first and third respondents in respect of its claimed debt and charge claimed under the *Subcontractors' Charges Act*.
- [5] Again, I note that it is not necessary for leave to be granted with regard to the applicant proceeding in those proceedings against the second and third respondents. So the only question is whether or not leave should be granted to proceed against the first respondent.
- [6] When a company is under administration, as is the first respondent, the ordinary rule is that creditors' rights, particularly those of unsecured creditors, are dealt with under the administration. There is also some effect on certain types of other third parties who have property rights. Those matters are set out in sections 444D and 440B of the *Corporations Act*. Subsection 444D(2) of the *Corporations Act* provides that subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security interest except so far as:
- (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because which the company executed the deed; or
 - (b) the Court orders under subsection 444F(2).
- [7] Section 444F provides that when a company is under administration, the Court may order a creditor of the company not to realise or otherwise deal with the security interest except as permitted by the order. There are certain matters to which a Court must have regard if it is to limit the rights of the secured creditor. No application has been made to limit the rights of the secured creditor, so I need not consider that section any further.

- [8] The matters referred to in subsection 444D(2)(a) were dealt with in the deed in this way: the applicant, who is a secured creditor by virtue of the *Subcontractors' Charges Act*, did not attend the meeting, did not vote and so was governed by clause 5.5 of the deed which provides, under subsection (a), subclause (a):

Nothing in this deed shall affect, in any way, the rights of secured creditors who did not vote in favour of the resolution to execute the deed in relation to the enforcement of their securities during the deed period or their interest in the assets of the company over which they have security.

- [9] It appears there are only two other secured creditors of the company, the first respondent, are banks or entities associated with banks.
- [10] The applicants are secured creditors by virtue of statute. The statute involved is the *Subcontractors' Charges Act 1974*, a Queensland Act which in common with similar but not exactly the same legislative provisions in other States and jurisdictions is said by its long title to make better provision for securing the payment of money payable to subcontractors and for other purposes. It is notorious that in the building industry, prior to that Act, subcontractors were often left as the persons to whom moneys were owed and who could not secure payment, particularly when the contractor, as is the case here, went into administration or liquidation.
- [11] The *Subcontractors' Charges Act* gives a right to a subcontractor to make a claim against what is therein referred to as the employer, that is, the person above the contractor who had contracted with the contractor for the performance of work in respect of land or a building. Subsection 5(1) of the *Subcontractors' Charges Act* provides in those circumstances:

Every subcontractor of the contractor is entitled to a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract.

- [12] That charge, of course, created security which gives the subcontractor a secured interest. Section 5(2) provides that:

The charge of a subcontractor secures payment in accordance with the subcontract of all money that is payable or is to become payable to the subcontractor for work done by the subcontractor under the subcontract.

- [13] Various means of enforcing such a secured interest or charge are set out in the *Subcontractors' Charges Act*. Section 10 provides that:

A subcontractor who intends to claim a charge on money payable under the contract to the subcontractor's contractor, or to a superior contractor, must give notice to the employer or superior subcontractor by whom the money is payable specifying the amount and particulars that the claim certified, prescribed by a qualified person and stating that the subcontractor requires the employer, or superior contractor, as the case may be, to take the necessary steps to see that it is paid or secured to the subcontractor.

- [14] This section, gives rights to the subcontractor against an employer with whom it is not itself in a contractual relationship. The consequences of notice of a claim of charge are set out in section 11. It provides that:

If a notice of claim of charge is given pursuant to section 10, the person to whom it is given must retain, until the Court in which the claim is heard directs to whom and in what manner the same is to be paid, a sufficient part of the money that is or is to become payable by the person under a contract to satisfy the claim.

- [15] Subsection 11(3) provides that within 14 days after the notice of the claim of charge is given to the contractor to whom the money is payable, the contractor must give to the employer or superior subcontractor by whom the money is payable, and to the subcontractor giving notice of the claim of charge, a notice in the approved form that the contractor either accepts liability to pay the amount claimed; or disputes the claim; or accepts liability to pay the amount stated in the contractor's notice, but otherwise disputes the claim.
- [16] No such notice has been given by the contractor in this case, although I was informed in Court that the contractor does wish to dispute all or part of the claim made by the subcontractor and, indeed, may well counterclaim.
- [17] Subsections 11(5) and (6) provide that:

(5) An employer or superior contractor may, at any time after notice of claim of charge has been given to the employer or superior contractor, pay into Court the amount that the employer or superior contractor is required to retain under this section.

(6) A payment made pursuant to this section discharges the employer or superior contractor, as the case may be, of all further liability in respect of the amount paid and of the costs of any proceeding in relation to the amount paid.

- [18] Importantly, under subsection 11(7), money paid into Court under section 11 may be paid out only under an order of the Court.
- [19] That is important in this case because proceedings have, in fact, been started in the District Court, those proceedings for which leave is now sought *nunc pro tunc*, and all the moneys, said to be owing, have been paid into Court by the employer or superior contractor, except with regard to the Magistrates Court case. Accordingly, those moneys may only be paid out of Court under an order of the Court. Importantly, also, under section 15 of the Subcontractors' Charges Act, a person, such as the applicant in the case, who has made a claim of charge, must commence proceedings after a notice of claim of charge has been given. If it does not, the claim is extinguished.
- [20] So important rights are given to subcontractors by the *Subcontractors' Charges Act* 1974, which makes a subcontractor, if they make an appropriate claim, a secured creditor who is obliged to bring proceedings to maintain that security. As I have said, the applicant may proceed against all of the current defendants in the District Court and Magistrate Court proceedings without leave, apart from the first defendant in those proceedings, the company under administration, for which leave is now sought.

- [21] Essentially, the argument put against leave being granted is that when a company is under administration, all debts should be dealt with by the administrator and frozen while the administrator does his or her job to try to get the company back on foot. The protection of the company's property, when it is under external administration, is provided for under the *Corporations Act*.
- [22] However, this case has some rather different qualities. In this case, the applicant is required to commence proceedings to protect its secured rights and it would be a severe curtailment of a subcontractor's rights, given to it by legislation, to prevent it from doing so or not allow it to do so and, therefore, to turn what was a secured interest into an unsecured interest and make it an unsecured creditor, which would be completely contrary to the purposes of the *Subcontractors' Charges Act*.
- [23] Further, the moneys in dispute have been paid into Court by the employer. The company under administration has no access to those moneys, so it is not as if the applicant is not given leave, those moneys would go to the first respondent, those moneys are either, at present, available for the applicant subcontractor or they belong to the employer and only by Court order can those moneys be paid out of Court. In my view, the orderly administration of the company under administration requires, and, indeed, so much was, in effect, conceded by the company, that it be a party to the proceedings in the District Court and the Magistrates Court so that it can put its case as to why those moneys, that have been paid into Court, should or should not be paid to the applicant and, so far as the Magistrates Court is concerned, why the employer or head contractor should not pay moneys to the subcontractor rather than to the contractor.
- [24] I am fortified in that view by a number of cases under Queensland legislation. There are some cases under interstate legislation which might suggest a different result but that legislation is different and I prefer to be guided by the cases which have previously been decided in Queensland, which are all one way. I refer, in particular, to a decision of Wilson J in *Re QMT Constructions Pty Ltd* [2000] 1 Qd R 284 where her Honour dealt with an application for leave, *nunc pro tunc*, for a subcontractor to bring proceedings against a company that was subject to a deed of company arrangement. In that decision, her Honour followed a decision of this Court, *Ex Parte Pavex Constructions* (1979) Qd R 318, the only distinction being that in the earlier case the company was in liquidation, but in *QMT Constructions*, as in this case, the company was under administration.
- [25] I see no reason at all to distinguish the decision reached by Wilson J in *QMT Constructions* and intend to follow it. It should be noted that it was followed by Mansfield J in the Federal Court in *Re Stockport (NQ) Pty Ltd* [2003] 127 FCR 291 where his Honour was considering the Queensland legislation. It is also consistent with the decision of Wilson J in *Geoff Sharpe Pty Ltd v M&E Fitzgerald Holdings Pty Ltd (No. 2)* [2010] QSC 231 where, again, the first defendant was placed in voluntary administration. In that case, her Honour referred to a decision of Thomas J, as his Honour then was, in *BBC Hardware Limited v GT Homes Pty Ltd* [1997] 2 Qd R 123 at 126 to 127 where his Honour acknowledged that different considerations apply according to whether the plaintiff is a secured or an unsecured creditor. He said that in circumstances where the plaintiff is an unsecured creditor in most cases leave would tend to interfere with the orderly disposition and control of unsecured creditors. But,

conversely, when the plaintiff is a secured creditor the rights of the plaintiff generally stand outside those to be administered with respect to the unsecured creditors.

[26] It is not necessary for me to refer to other cases, but I note also the decision of Holmes J, as her Honour then was, in *Sun Engineering (Qld) Pty Ltd v Dynac Pty Ltd (in liq)* [2000] QSC 213.

[27] I have had careful regard to the decisions, to which I was referred by the respondent. In particular, the ex tempore judgment of McDougall J in *Modcol v National Buildplan Group* [2013] NSWSC 380, but it can be seen from the body of that judgment that it was dealing with legislation that is demonstrably different from the *Subcontractors' Charges Act*, which I have had to consider. It is significant that his Honour said at paragraph 42:

Clearly, a payment which would have the effect of giving a significant advantage to one unsecured creditor over others would not be consistent with the scheme of the Act for winding-up on insolvency.

[28] That is true, but it does not apply to this case. I have also had regard to the decision in the Victorian Supreme Court of Byrne J in *Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd* [2005] VSC 24 but, again, that is under a Victorian Act which apparently was based on the New South Wales Act and is not decisive in this case.

[29] In *Foxcroft v The Ink Group Pty Ltd* (1994) 15 ACSR 203, Young J propounded what might be considered – or what had been considered in later cases – controversial views about administration. About which it is not necessary for me to form a considered view. He may well be right. But that case dealt with unsecured creditors and not as we are dealing with here, a subcontractor who has become a secured creditor because of a statute passed for the purpose of protecting interests of subcontractors by making them secured creditors but requiring them to commence litigation to protect their interests, as the applicant has done in these cases.

[30] Accordingly, having regard to all of the circumstances, I grant leave for the applicant in each case to commence and continue proceedings against the first respondent pursuant to section 440D of the *Corporations Act 2001* and, to the extent necessary, pursuant to section 444E.