

SUPREME COURT OF QUEENSLAND

CITATION: *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor* [2019] QCA 229

PARTIES: **CHAPEL OF ANGELS PTY LTD**
ACN 154 237 867
(applicant)
v
HENNESSY BUILDING PTY LTD ACN 117 587 998 IN ITS OWN CAPACITY AND AS TRUSTEE FOR THE HENNESSEY FAMILY TRUST
ABN 45 515 151 376
(first respondent)
JOHN PAUL HENNESSY
(second respondent)

FILE NO/S: Appeal No 4767 of 2019
DC No 4124 of 2014

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 218 (Porter QC DCJ)

DELIVERED ON: 25 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 17 October 2019

JUDGE: Morrison JA

ORDERS: **Upon the first respondent, by its Counsel, undertaking that any amounts recovered by the first respondent pursuant to execution of a judgment for costs will be held in the trust account of Axia Litigation Lawyers pending further order of the Court of Appeal:**

- 1. The application is dismissed.**
- 2. The applicant is to pay the first respondent’s costs of the application.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF ORDERS – where the parties fell into dispute about various aspects of a building contract between them – where proceedings in the District Court resulted in orders being made which included the payment of the respondents’ costs of the proceedings – where the applicant has brought an application for the stay of an order for the applicant to pay 75 per cent of the respondents’ costs of the proceedings, including reserved costs, to be assessed

on the standard basis for costs incurred up to 23 May 2018 and thereafter on the indemnity basis – whether the appeal has a reasonable chance of success – whether the allowing of a stay would be prejudicial to either of the parties if granted

COUNSEL: M J Ohlson (*sol*) for the applicant
P A Travis for the respondent

SOLICITORS: Ohlsons Lawyers and Barristers for the applicant
Axia Litigation Lawyers for the respondent

- [1] **MORRISON JA:** In December 2012 Chapel of Angels Pty Ltd entered into a building contract with Hennessy Building Pty Ltd for the construction of a building constituting a chapel and a storeroom, and other associated works.
- [2] The parties fell into dispute about various aspects and Chapel of Angels retook possession of the site and refused to pay any further sums. It initiated proceedings in the District Court seeking relief, including restitution of all the monies paid under the contract, based on the fact that Hennessy Building did not hold the necessary contractor’s licence under the *Queensland Building Services Authority Act* 1991 (Qld) and the *Queensland Building Services Authority Regulation* 2003 (Qld)¹ to construct the chapel, that being a Class 9(b) Type B building, namely one with a rise of two storeys.
- [3] Hennessy Building contested the licence issue on grounds that do not presently matter, but also counterclaimed for reasonable remuneration under s 42(4) of the *QBSA Act* or alternatively on the basis of a *quantum meruit*.
- [4] On 12 November 2018 the trial judge found that:²
- (a) Hennessy Building did not hold the requisite licence to build the chapel and surrounding works, which was done in contravention of s 42(1) of the *QBSA Act*;³
 - (b) therefore Chapel of Angels was entitled to recover all payments made under the building contract;⁴
 - (c) however, Hennessy Building nonetheless held a “Carpentry” licence and a “Builder – low rise” licence;⁵
 - (d) Hennessy Building was entitled to recover reasonable remuneration for work done: (i) if that was within the scope of any licence held by it, without being limited by s 42(4) of the *QBSA Act*; and (ii) if that was unlicensed work limited under s 42(4) of the *QBSA Act*;⁶

¹ To which I shall refer as the *QBSA Act* and *QBSA Regulation*, respectively.

² *Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd & Anor* [2018] QDC 218. I note that the name in the reasons below and the reported case is incorrect; the company is Hennessy **Building** Pty Ltd.

³ Reasons below at [111]. Nor did the principal of Hennessy Building.

⁴ Reasons below at [127].

⁵ Under Part 4, ss 1 and 2(2) (Builder – low rise), and Part 16, ss 1 and 2 (Carpentry) of the *QBSA Regulations*.

⁶ Reasons below at [133](a) and [134]. In this respect his Honour relied upon *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd* [2012] QSC 158 at [40].

- (e) Hennessy Building's carpentry licence authorised a substantial part of the chapel works;⁷
- (f) the car park and external works were within Hennessy Building's licence, and the contrary was not put by Chapel of Angels;⁸
- (g) his Honour accepted the expert report of Mr Carey⁹ as to the costs of the construction as no objection was made to its admission, no competing expert evidence was adduced, and his Honour rejected such attacks as were made on Mr Carey's credibility and his report;¹⁰
- (h) based on Mr Carey's report the reasonable remuneration for work that came under the licences was \$636,462.67 (ex GST);¹¹
- (i) the GST inclusive sum for the licensed work was \$700,108.20;¹²
- (j) based on Mr Carey's report the reasonable remuneration for the unlicensed work, calculated under s 42(4) of the *QBSA Act*, was \$27,635.46 (ex GST);¹³ under s 42(4)(a) and (c) that sum could only be recovered if it was not more than the amount paid by Hennessy Building in carrying that work out, and not more than any amount agreed for that work; as neither of those things had been proven, no amount could be recovered for the unlicensed work;¹⁴ and
- (k) the net sum payable to Hennessy Building was the difference between \$700,108.20 and the \$632,615.32 paid under the contract, which was recovered; the net was \$67,492.88.¹⁵

[5] Having made all relevant findings in the first decision, the learned trial judge heard the parties as to the form of orders and pronounced those orders on 11 December 2018.¹⁶ Order No. 2 was that Chapel of Angels pay \$85,989.86 to Hennessy Building, being the sum referred to in paragraph [4](k) above with interest added. Order No. 6 ordered Chapel of Angels to pay 75 per cent of Hennessy Building's costs of the proceedings, including reserved costs, to be assessed on the standard basis for costs incurred up to 23 May 2018 and thereafter on the indemnity basis.

[6] The stay sought on this application is only in respect of Order No. 6, the judgment sum under Order No. 2 having already been paid to Hennessy Building.

Legal principles

- [7] In order to succeed in the grant of a stay the applicant must show that the circumstances indicate that the grant is an appropriate one. That involves a consideration of:¹⁷
- (a) whether there is a good arguable case on the appeal; in other words, the likelihood of success in the appeal;

⁷ Reasons below at [156](a).

⁸ Reasons below at [156](b).

⁹ A quantity surveyor.

¹⁰ Reasons below at [140]-[154], [157].

¹¹ Reasons below at [158]-[160].

¹² Reasons below at [166].

¹³ Reasons below at [161]-[162].

¹⁴ Reasons below at [164]-[165].

¹⁵ Reasons below at [171]-[172].

¹⁶ *Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd & Anor* [2018] QDC 248.

¹⁷ *Elphick v MMI General Insurance Ltd* [2002] QCA 347 at [4] and [8].

- (b) the prejudice to the applicant if the stay is not ordered; and
- (c) any competing prejudice to the respondents in the event that a stay is granted.

[8] A stay should not be granted unless the applicant establishes a sufficient basis to outweigh the considerations that the judgment should not be treated as merely provisional, and courts generally should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending an appeal is to ensure that the orders which might ultimately be made by the courts are fully effective. Where the court is able to make a preliminary assessment of the strength of the case, the prospects of success on appeal might be significant and would favour refusal of a stay if they were not.¹⁸

Discussion

[9] Before turning to the merits of the grounds urged by Chapel of Angels two preliminary matters need to be explored.

[10] First, the application for leave to appeal was filed on 3 May 2019, four months outside the time limited for appeal.¹⁹ Consequently, Chapel of Angels needs an extension of time within which to bring the application for leave to appeal. There are real difficulties about that.

[11] The evidence from Chapel of Angels is that:²⁰

- (a) before the orders were made, on 4 December 2018 it was given legal advice by its lawyers at the trial²¹ that it should not appeal, as an appeal posed too much of a risk, it made no financial sense; however, if Chapel of Angels wished to pursue an appeal the lawyers would assist; further, it should pursue the former lawyers for negligence;²²
- (b) Chapel of Angels debated the advice, stipulating grounds why it was not 100 per cent confident it should not appeal, and seeking further advice so that it could “make an informed decision as [to] whether to appeal or not”;²³
- (c) the lawyers responded with reasons why there should be no appeal: (i) the findings of credit would not assist Chapel of Angels; (ii) appeal courts are loathe to interfere unless there is a significant error in law or fact; (iii) Counsel felt there were “some prospects” but that the risk may be too high; (iv) even though s 42(4) “curbs the amount that can be claimed from an unlicensed builder, the *quantum meruit* doctrine is a common law principal (sic), which allows some discession (sic) by the trial judge”; (v) even if the judge found some facts in your favour, the amount would have to be quantified and weighed up against the cost; (vi) there was a risk that the result may be a retrial; (vii) there were “some prospects” but the risk “is just too great”; and (viii) if Chapel of Angels decided to appeal the lawyers would “fight tooth and nail to secure the best possible outcome”;²⁴ and

¹⁸ *Cook’s Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453.

¹⁹ Taking that to be from when the orders were made on 11 December 2018.

²⁰ Affidavit of Ms Peek, paragraphs 3-11.

²¹ Three solicitors and Counsel.

²² Exhibit SP3 to Ms Peek’s affidavit.

²³ Exhibit SP4 to Ms Peek’s affidavit.

²⁴ Exhibit SP5 to Ms Peek’s affidavit.

- (d) based on what it had been advised, that understood as being that the prospects on appeal were poor, on 6 December 2018 Chapel of Angels decided not to appeal.²⁵
- [12] The fact that a deliberate decision not to appeal has been made on legal advice presents a very significant obstacle to the grant of an extension of time within which to apply for leave to appeal.²⁶ Where such a deliberate decision has been made “an extension of time to allow an appeal would only be granted where it was demonstrably necessary to prevent a substantial injustice”.²⁷
- [13] Secondly, as was conceded on behalf of Chapel of Angels during argument, a number of matters now sought to be raised on the proposed appeal were not agitated at the trial. That presents a significant hurdle to a grant of leave to appeal.
- [14] The main points to be urged in the proposed appeal are that:
- (a) the work was unlicensed because Hennessy Building did not work under the guidance of a builder holding a licence for that class of building, i.e Class 9(b) Type B;
 - (b) Hennessy Building’s carpenter licence was not an appropriate licence to carry out most of the works and surrounds;
 - (c) Mr Carey’s report quantifies the building work on a *quantum meruit* basis, and not under s 42(4); and
 - (d) the reasonable remuneration awarded at the trial was based on a *quantum meruit* instead of an assessment under s 42(4) of the *QBSA Act*.
- [15] The licence point contends that the carpenter and builder-low rise licences do not authorise Hennessy Building to build the chapel (a Class 9(b) Type B building) and therefore Hennessy Building’s work had to be done under the guidance of another appropriately licensed builder. This was said to flow from s 42(1) of the *QBSA Act* when read in conjunction with the definitions of “building work” and “building” in Schedule 2 of the *QBSA Act*.
- [16] The first thing to observe, as was accepted by the solicitor for Chapel of Angels, is this is a point not raised below. Assuming it is a straight point of law,²⁸ it is not obvious to me that it is correct.
- [17] Section 42 of the *QBSA Act* provides as follows:
- “(1) 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 this Act.”
- [18] The definitions of “building” and “building work” do not, in my view, add anything relevant. Nothing in s 42(1) compels the construction that underlies the contention. It provides that a builder who carries out building work must **hold** an appropriate

²⁵ Affidavit of Ms Peek, paragraph 10.

²⁶ *Baguley v Lifestyle Homes Mackay Pty Ltd* [2015] QCA 75 at [14]-[16].

²⁷ *Spencer v Hutson* [2007] QCA 178 at [31].

²⁸ If it a question dependant on facts then there is an even greater hurdle to overcome before the point can be raised: see *Water Board v Moustakis* (1988) 180 CLR 491 at 497-498.

contractor's licence. That focuses on the licence held by the person who carries the work. It says nothing as to a requirement that there be an overarching licensed builder.

- [19] No matter how the contention was expressed during the hearing it always came back to the simple proposition that Hennessy Building was not licensed to construct the chapel. At the trial Chapel of Angels succeeded on that issue.²⁹ Having contravened s 42(1) of the *QBSA Act*, the question was whether Hennessy Building could recover anything, and if so, what. That is where s 42(4) is relevant, as it governs what can be recovered when s 42(1) is contravened.
- [20] Chapel of Angels accepts that the construction adopted in *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd* is correct.³⁰ That means its contentions are advanced on the basis that “the limitations as to the amount which can be claimed, consistently with s 42(4), applies only to the building work for which the contractor did not have the appropriate licence ... [and] would not affect the defendant's entitlement to be paid, upon a restitutionary basis, for the work which it lawfully performed under its licence.”
- [21] Hennessy Building's Builder-low rise licence included class 9 buildings but excluded Type B buildings from its scope of works.³¹ The carpentry licence covered the following scope of work:³²

“2 Scope of work

- (1) Construct and erect timber and steel wall framing and roof structures.
- (2) Construct and erect non-load bearing internal partition walls.
- (3) Install windows and doors including framing.
- (4) Erect ceiling and subfloor framing.
- (5) Install timber and sheet flooring.
- (6) Install exterior cladding, fascias and soffits.
- (7) Install metal roofing.
- (8) Construct timber stairs.
- (9) Fix internal linings, panelling and mouldings.
- (10) Install door and window locks and furniture.
- (11) Restore and renovate doors, windows and frames.
- (12) Install fitments.
- (13) Concreting to simple forms, including install formwork, reinforcement and concrete.
- (14) Erect and strip formwork, including slip form and jump form formwork.

²⁹ Reasons below at [111].

³⁰ [2012] QSC 158 at [40]; Transcript T 1-64 line 28.

³¹ *QBSA Regulation*, Part 4, s 2.

³² *QBSA Regulation*, Part 16, s 2.

(15) Incidental work of another class.”

- [22] Mr Carey’s report dealt with the issue of what was within the carpenter licence, and what was not.³³ Having set out the scope of works above, he opined that “... on the chapel the only work he was not entitled to undertake was the structural steel and blockwork”. No contrary expert report was tendered at the trial, and, as the learned trial judge noted, no evidence was led by Chapel of Angels as to the correct restitutionary measure.³⁴
- [23] In the course of cross-examination it was revealed that: (i) Mr Carey’s experience as an expert in building cases spanned some 10 years; (ii) he had particular expertise working over 10 years for a builder that specialised in churches; and (iii) he had inspected the chapel itself.³⁵ The cross-examination did not challenge his expertise, nor his opinion as to what was within and outside the licence,³⁶ nor his verification of the reasonableness of all the invoices. As indicated above, the learned trial judge specifically rejected the five grounds of criticism levelled at Mr Carey’s evidence.³⁷
- [24] More particularly, there was no challenge to: (i) the correctness of including the car park, and external works; (ii) the implicit assumption in Mr Carey’s report that the car park and external works did not constitute unlicensed work under s 42(1) of the *QBSA Act*; in fact, as his Honour found, there was no submission to the contrary below;³⁸ (iii) the costs of those works, and the reasonableness of them, or (iv) that they were done by subcontractors to Hennessy Building.
- [25] Those matters suggest that the prospects of successfully challenging the learned trial judge’s calculation of the reasonable remuneration are not compelling. When combined with the fact that the delay in seeking leave to appeal was the product of a deliberate decision based on legal advice, the prospects of success on the appeal do not look promising.
- [26] However, even if that were not right, there are compelling discretionary reasons to refuse a stay.
- [27] First, the only order sought to be stayed is that relating to the costs ordered to be paid by Chapel of Angels. A costs statement has been given and Chapel of Angels has delivered the requisite notice disputing the costs. Consequently the process of assessment has to be undertaken before the costs can be certified, and before they can be enforced. Both sides agree that no assessor has been appointed, and that the process will not be finalised by the date set for the hearing of the appeal. Even if, as seems unlikely, the entire process is closer to finalisation by the appeal, the question of a stay can be agitated then.
- [28] Secondly, Mr Travis of Counsel, appearing for Hennessy Building, proffered an undertaking to the Court to the effect that if anything is recovered in respect of the costs ordered, that money will be placed in the solicitor’s trust account pending

³³ Report, section 3, pages 5-6.

³⁴ Reasons below at [140].

³⁵ Trial transcript T 8-45, 46, 47, 59.

³⁶ There was a finding below that the carpentry licence authorised “a substantial part of the Chapel works”: [156](b). It was accepted on this hearing that it had not been put to Mr Carey that he was wrong about the split between licensed and unlicensed work: Transcript T 1-48 lines 10-22.

³⁷ Reasons below at [142]-[154].

³⁸ Reasons below at [156](a).

further order of the Court. Thus the money would be preserved for recovery in the event the appeal is successful.

- [29] For all these reasons, upon the undertaking proffered by Mr Travis on his client's behalf, the application for a stay should be refused. In the circumstances there is no reason to refuse an order that the costs of the application be paid by Chapel of Angels. I therefore order:

Upon the first respondent, by its Counsel, undertaking that any amounts recovered by the first respondent pursuant to execution of a judgment for costs will be held in the trust account of Axia Litigation Lawyers pending further order of the Court of Appeal:

1. The application is dismissed.
2. The applicant is to pay the first respondent's costs of the application.