

SUPREME COURT OF QUEENSLAND

CITATION: *Waterford PPG Pty Ltd v Civil Constructors (Aust) Pty Ltd*
[2020] QSC 8

PARTIES: **WATERFORD PPG PTY LTD (ABN 73 615 440 081)**
(applicant)
v
**CIVIL CONSTRUCTORS (AUST) PTY LTD (ABN 56
169 588 194)**
(first respondent)

and

HELEN DURHAM (ADJUDICATOR NO J1105410)
(second respondent)

FILE NO/S: No 12705 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 12 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 12 December 2019

JUDGE: Boddice J

ORDER: **1. The originating application filed 14 November 2019
be dismissed.**

**2. I will hear the parties as to costs and any other
orders.**

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 and first respondent entered into a contract for the
construction of roadworks, drainage, sewerage reticulation,
water supply, conduits and stormwater quality in respect of a
development – where the works undertaken pursuant to the
contract included the installation of waste tanks and the
installation of a boundary kit and lateral to connect to the
proposed development lots – where the first respondent
served a payment claim on the applicant for works
undertaken – where the applicant disputed the payment claim
– where an adjudication application was lodged in respect to

the disputed payment claim – where the second respondent decided the amount outstanding in respect of the payment claim was \$603,767.27 – where the applicant contends the work is building work – where the applicant contends the first respondent contravened s 42(1) of the *Queensland Building and Construction Commission Act 1991* (Qld) by undertaking to carry out the works – where the applicant seeks declaratory relief that the adjudication decision is void by reason of jurisdictional error – whether the first respondent breached s 42(1) of the *Queensland Building and Construction Commission Act 1991* (Qld) – whether the adjudication decision should be void

Building and Construction Industry Payments Act 2004 (Qld)
Queensland Building and Construction Commission Act 1991 (Qld), s 42, Schedule 2
Queensland Building and Construction Commission Regulation 2018 (Qld), Schedule 1

Low v MCC Pty Ltd & Ors [2018] QSC 6
Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525
Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd [2015] 1 Qd R 311
Theiss Pty Ltd v Warren Brother Earthmoving Pty Ltd [2013] 2 Qd R 75
The Trustee for Hardev Property (Dev 10) Unit Trust v Palmgrove Holdings Pty Ltd & Ors [2019] QSC 208
Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65

COUNSEL: P Hastie QC with SB Whitten for the Applicant
M O Jones for the First Respondent

SOLICITORS: CDI Lawyers for the Applicant
HWL Ebsworth for the First Respondent

- [1] On 11 April 2019, the second respondent delivered a decision in respect of an adjudication application made under the *Building and Construction Industry Payments Act 2004* (Qld) (**the Act**).
- [2] The adjudication application related to a payment claim in respect of work said to have been undertaken pursuant to a contract entered into between the applicant as principal and the first respondent as contractor on 22 November 2017.

- [3] By originating application filed on 14 November 2019, the applicant seeks declaratory relief in respect of that decision. The applicant contends the decision is void by reason of jurisdictional error.
- [4] The question for determination is whether the first respondent breached section 42(1) of the *Building and Construction Commission Act 1991 (QBCC Act)* by carrying out or undertaking to carry out building work without holding the appropriate licence.

Background

- [5] The applicant and first respondent entered into a contract for the construction of roadworks, drainage, sewerage reticulation, water supply, conduits and stormwater quality in respect of the development of a 51 lot subdivision at Ellen Grove in the State of Queensland. The contract was for a lump sum price.
- [6] Among the works undertaken by the first respondent, pursuant to that contract, was the installation of collectional waste tanks; the installation of a boundary kit value box and lateral to connect the proposed lot to the pressure main; and the installation of the pressure sewer mains in the three proposed streets within the site.
- [7] On 6 November 2018, the first respondent served on the applicant a payment claim in the amount of \$1,178,519 (including GST) for works undertaken pursuant to the contract.
- [8] On 21 November 2018, the applicant served on the first respondent a payment schedule, scheduling an amount of \$516,268.28 (including GST).
- [9] On 29 November 2018, the applicant paid the first respondent the amount specified in its payment schedule, leaving in dispute an amount of \$662,250.72.
- [10] On 4 December 2018, an adjudication application in respect of the disputed payment claim was lodged under the Act.
- [11] On 11 April 2018, the second respondent decided that the amount of the payment due was \$1,061,764.44 (including GST). After having regard to interest and costs, the

amount determined to be left outstanding in respect of the disputed payment claim was \$603,767.27. That amount was paid on 24 April 2019.

Legislative scheme

- [12] The Act provides a scheme for the prompt adjudication of disputes in respect of payment claims made in relation to building and construction work contracts.¹
- [13] The scheme pertains to enforceable construction contracts in respect of which construction work has been carried out and a valid payment claim has been made in relation to that construction work.
- [14] An essential element of the scheme is the provision of a procedure by which an independent adjudicator may make determinations in respect of applications for adjudication of a disputed payment claim.
- [15] An adjudicator's decision is subject to review and may be declared invalid and void for jurisdictional error.² Relevant jurisdictional error includes misapplication of the relevant law and the failure to take into account relevant considerations.³

Applicant's submissions

- [16] The applicant submits the contract entered into between the applicant as principal and the first respondent as contractor is not an enforceable construction contract as the first respondent, in undertaking the construction work, breached section 42(1) of the QBCC Act by carrying out the requisite work without being the holder of an appropriate licence.
- [17] The applicant submits that a consequence of the breach of section 42(1) of the QBCC Act is that the contract is unenforceable. Accordingly, the first respondent had no entitlement to make a claim under the contract pursuant to the Act. At best, the first

¹ *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at 546-550 [52-66].

² *Low v MCC Pty Ltd & Ors* [2018] QSC 6 at [8]; *Thiess Pty Ltd v Warren Brother Earthmoving Pty Ltd* [2013] 2 Qd R 75 at [77].

³ *Wakins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65 at [50].

respondent had an entitlement to remuneration limited to that set out in section 42(4) of the QBCC Act.

- [18] The applicant submits the QBCC Act defines building work to include the erection or construction of a building. The term “building” is defined as including any fixed structure such as a water tank connected to the stormwater system for a building. Further, “building work” includes other works such as the provision of sewerage or drainage in connection with a building.
- [19] The works undertaken by the first respondent pursuant to the contract included the installation of a sewerage pump chamber in each private lot; the supply of the branch connections from that pump chamber to the trunk infrastructure and the connection of the sewerage pump chamber to the trunk infrastructure. Such work constitutes a fixed structure and, therefore, a “building” within the meaning of the QBCC Act.
- [20] The applicant submits the exceptions to licence requirements, contained in clause 11 of Schedule 1 of the regulations to the QBCC Act do not apply to the works undertaken by the first respondent. The first respondent undertook to connect the waste tank to the pressure sewer mains.
- [21] The applicant submits the decision in *The Trustee for Hardev Property (Dev 10) Unit Trust v Palmgrove Holdings Pty Ltd & Ors*⁴ is distinguishable. It concerned meter connections, not a tank, which is a structure within the definition of “building” under the QBCC Act. No argument was made in *Hardev* that the relevant work was a structure. Further, the construction of stormwater drainage, sewer and water reticulation falls within the definition of a fixed structure.⁵
- [22] As the first respondent only held a QBCC licence restricted to structural landscaping, its licence limited it to the construction of structures similar to that of a retaining wall or structures required for landscaping. Its licence did not entitle the first respondent to perform the work carried out pursuant to the contract, which was the subject of the disputed payment claim.

⁴ [2019] QSC 208 (**Hardev**).

⁵ *Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd* [2015] 1 Qd R 311 (**Ooralea**) at [33].

- [23] The applicant submits that, as the first respondent had no enforceable entitlement under the contract, there was no basis to issue a payment claim under the Act and no jurisdiction to ground the adjudication application. The adjudication decision is, therefore, void and must be set aside and the moneys paid under it repaid to the applicant.

First respondent's submissions

- [24] The first respondent submits the sewerage work undertaken by it pursuant to the contract was not building work for the purposes of section 42 of the QBCC Act. The exception, contained in clause 11 of Schedule 1 of the QBCC Act, excludes sewerage systems from the definition of building work for the purposes of section 42 of that Act, other than for works connecting a particular building or proposed building.
- [25] The works undertaken by the first respondent did not involve connection of a sewer system to any particular building or proposed building. The lots which might one day be connected to the sewerage infrastructure only came into existence after the sewerage works were completed and connection of the sewerage system to any building will require additional work by others.
- [26] The first respondent submits the decision of *Hardev* is not distinguishable. The decision of *Ooralea* is distinguishable. That decision pertained to a provision which was subsequently amended. Further, *Ooralea* predated the introduction of the exception in clause 11 of Schedule 1 of the Regulations.

Consideration

- [27] Section 42(1) of the QBCC Act prohibits a person from undertaking to carry out and from carrying out "building work" unless that person holds a contractor's licence of the appropriate class under the Act at the time when the building work is carried out.
- [28] Schedule 2 of the QBCC Act defines "carry out" for building work to include directly or indirectly causing the work to be carried out or providing the building work services for the work, as well as carrying out the work personally. That same schedule defines

“undertake to carry out” to mean entering into a contract, submitting a tender or making an offer to carry out that work.

- [29] “Building work” is defined in the QBCC Act to include the erection or construction of a building. Schedule 2 of the Act defines “building” as including any fixed structure. The schedule provides examples of a fixed structure, including “a water tank connected to the stormwater system for a building”.
- [30] The definition of building works under the QBCC Act includes “the provision of ... sewerage or drainage in connection with a building; and any site work (including construction of retaining structures) related to work of that kind”.
- [31] The requirement for a licence in respect of building work is, however, subject to exceptions. Schedule 1 of the Regulations sets out work that is not building work. Relevantly, clause 11 of Schedule 1 provides:-
- “11 Work for water reticulation systems, sewerage systems or stormwater drains**
- (1) Construction, extension, repair or replacement of a water reticulation system, sewerage system or stormwater drain, other than works connecting a particular building to a main of the system or drain.
- (2) In this section – **building** includes a proposed building.”
- [32] The work the first respondent undertook pursuant to the contract, the performance of which was the subject of the disputed payment claim and the adjudication decision, involved, relevantly, the installation and connection of waste tanks to the pressure sewer mains in proposed streets within the proposed subdivision. Those works included the installation of the pressure sewer mains and the installation of a boundary kit, valve box and lateral to connect the proposed lot to the pressure main in the proposed street.
- [33] Whilst an appropriate inference in respect of a development project involving the creation of lots in a subdivision is that those lots will ultimately contain buildings, the works undertaken by the first respondent pursuant to the contract fell within the exception contained in clause 11 of Schedule 1 of the Regulations.

- [34] The work undertaken by the first respondent in respect of the sewerage system involved the construction of the sewerage system, but did not involve works connecting a particular building or proposed building to a main of that system.
- [35] First, the works did not connect any proposed building to the relevant main. The waste tanks were part of the sewerage system. They do not, themselves, constitute a structure which amounts to connecting a building to a main of that system. They fall within the construction of the sewerage system. That system required additional works yet to be undertaken to connect any building or proposed building to a main of the system.
- [36] Second, at the time the work was undertaken it could not be properly contended there was a proposed building. At the time the work was undertaken, there was not even in existence the proposed subdivided lots.
- [37] This latter factor renders apposite the observations of Lyons SJA in *Hardev*, namely, that “at the time of the contract between the parties, no proposed building was identified and accordingly it cannot be said that the respondent undertook to do works to connect a particular proposed building to a main”.⁶
- [38] Third, clause 11 of Schedule 1 to the Regulations evidences a legislative intent to exclude particular works from the definition of building work. To hold that the undertaking of work associated with a proposed subdivision involving the construction of a sewerage system, including the installation of waste tanks and connections to pressure mains, constitutes “building work” within the meaning of the QBCC Act would specifically defeat the express wording of the exception in clause 11 of Schedule 1.

Conclusions

- [39] In undertaking the relevant work pursuant to the contract, the first respondent did not contravene section 42(1) of the QBCC Act.

⁶ *Hardev* at [30].

[40] The works undertaken by the first respondent were undertaken pursuant to the contract and the first respondent was entitled to issue the disputed payment claim.

[41] The adjudication application was properly made and the second respondent had jurisdiction to make the adjudication decision.

Orders

[42] The originating application is dismissed.

[43] I shall hear the parties as to costs and any other orders.