SUPREME COURT OF QUEENSLAND

CITATION:	*Re University of Queensland; Baulderstone Hornibrook Pty Ltd v Broen Australia Pty Ltd* [2003] QSC 158
PARTIES:	**BAULDERSTONE HORNIBROOK PTY LTD ACN 002 625 130** (applicant) v **BROEN AUSTRALIA PTY LTD ACN 090 384 259** (respondent)
FILE NO/S:	S1553 of 2003
DIVISION:	Trial Division
PROCEEDING:	Applications
DELIVERED ON:	29 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2003
JUDGE:	Mullins J
ORDER:	**1. The claim of Broen Australia Pty Ltd made in the notice of claim of charge dated 18 December 2002 given to the University of Queensland in the sum of $64,497.35 be cancelled pursuant to s 21 of the *Subcontractor's Charges Act* 1974.** **2. The amount of $64,497.35 paid into court by the University of Queensland be paid to Baulderstone Hornibrook Pty Ltd.** **3. The application filed on 26 February 2003 be dismissed.**
CATCHWORDS:	BUILDING AND ENGINEERING CONTRACTS – SUBCONTRACTOR'S CHARGE- *Subcontractors' Charges Act* 1974 (*Q*) – where subcontractor gave a notice of claim of charge to superior contractor and a subsequent notice of claim of charge to the employer based on the same claim for works undertaken by the subcontractor– where superior contractor sought a declaration that the second notice was invalid on the basis that the Act prevents a subcontractor from lodging more than one notice of charge in respect of the same claim – the Act permits a subcontractor to lodge two notices of claim of charge based on the one claim where each of the notices is given to a different contractor or employer – superior contractor not entitled to a declaration that the second notice of charge is invalid BUILDING AND ENGINEERING CONTRACTS –

SUBCONTRACTOR'S CHARGE – *Subcontractors' Charges Act* 1974 (*Q*) – where subcontractor gave a notice of claim of charge based on a claim for work already paid for by the superior contractor to the contractor which had engaged the subcontractor – where superior contractor prejudicially affected by the notice of claim of charge pursuant to s 21 (3) of the Act - subcontractor's claim cancelled

Subcontractors' Charges Act 1974
Subcontractors' Charges Amendment Act 2002

Hamilton Australia Pty Ltd v Milson Projects Pty Ltd [1997] 2 QdR 355
Hewitt Nominees Pty Ltd v The Commissioner for Railways [1978] QdR 256
Hewitt Nominees Pty Ltd v The Commissioner for Railways [1979] QdR 256
Re Radair Pty Ltd [1998] 2 QdR 539
Ronnor Pty Ltd v D&R Fabrications Pty Ltd [1983] 2 Qd R 455

COUNSEL: PJ Dunning for the applicant
BD O'Donnell QC for the respondent

SOLICITORS: Clayton Utz for the applicant
Dibbs Barker Gosling for the respondent

[1] **MULLINS J:** As a result of the University of Queensland ("the University") paying the amount of $64,497.35 into court, each of Baulderstone Hornibrook Pty Ltd ("Baulderstone") and Broen Australia Pty Ltd ("Broen") has brought an application seeking that the amount of $64,497.35 be paid to it.

[2] Baulderstone's application was filed on 21 February 2003 and seeks an order pursuant to s 21 of the *Subcontractors' Charges Act* 1974 ("the Act") cancelling the charge claimed by Broen on moneys payable by the University of Queensland ("the University") to Baulderstone or, alternatively, a declaration that the notices given by Broen to the University and to the applicant purportedly pursuant to the Act do not create a charge within the meaning of the Act. By application filed on 26 February 2003, Broen seeks a declaration that the work done by Broen, as specified in its notices of charge dated 28 November 2002 and 18 December 2002, was work as defined in s 3AA(3)(a) of the Act. On 4 March 2003 Broen served a notice of withdrawal of claim in respect of its notice of charge dated 28 November 2002 on Baulderstone and Hamilton. Broen's claim for relief is therefore based on its notice of charge dated 18 December 2002.

Facts

[3] The University owns the molecular bioscience centre at its St Lucia campus. The University entered into a contract with Baulderstone to construct the laboratories, office and car park facilities at the molecular bioscience building. Baulderstone engaged Hamilton Australia Pty Ltd ("Hamilton") to manufacture, supply and install fume cupboards at the site. Hamilton engaged Broen as sub-subcontractor to

manufacture and fabricate the specific tapware components for the fume cupboards at the site. That work was completed by Broen by 22 October 2002. The tapware components were then installed.

[4] Mr Matthew Joiner and Mr Gerald Collins of Jefferson Stevenson & Co were appointed joint administrators of Hamilton on 1 November 2002.

[5] The total amount claimed by Broen under the sub-subcontract was $161,412.35 of which $96,915 was paid by Hamilton, leaving a balance of $64,497.35 which Broen claimed was owing at the date of the appointment of the administrators to Hamilton.

[6] On or about 28 November 2002 Broen gave notice of claim of charge in form 1 to Baulderstone in respect of the balance claimed of $64,497.35 and a notice to contractor of claim of charge being given in form 2 to Hamilton.

[7] Broen's solicitors made a request to Baulderstone on 4 December 2002 pursuant to s 9A of the Act for information relating to the head contract. On 6 December 2002 Baulderstone informed Broen's solicitors that at that stage there were no retention moneys held and no moneys owing to Hamilton by Baulderstone in respect of the subcontract and that as Hamilton had defaulted under its contract, Baulderstone had engaged others to complete Hamilton's works. Baulderstone also advised that it had paid Hamilton for the items supplied by Broen. That has been sworn to by Baulderstone's project manager, Mr W E Styles, in his affidavit filed on 25 February 2003 and was not put in issue by Broen. By letter dated 9 December 2002 Baulderstone informed Broen's solicitors of the information requested in respect of the head contract.

[8] On 16 December 2002 Baulderstone received a facsimile from the solicitors for the administrators of Hamilton enclosing a contractor's notice in form 4 in which Hamilton disputed Broen's claim.

[9] On 18 December 2002 Broen gave a notice of claim of charge in form 1 which it describes as the "leapfrogging charge" to the University in respect of the same amount of $64,497.35 for the same works that were undertaken for Hamilton. That notice sought to charge moneys that were or would be payable by the University to Baulderstone. On or about the same day Broen gave notice to contractor of claim of charge being given in form 2 to Baulderstone in respect of the leapfrogging charge.

[10] On 23 December 2002 Broen issued proceeding D5007 of 2002 in the District Court of Brisbane to enforce the notices of charge.

[11] Hamilton was served with each of the applications, but did not appear on the hearing of the applications.

Issues

[12] The applications raised two issues:

(a) whether Broen was entitled to issue the notice of charge dated 18 December 2002 to the University, after having issued the notice of charge dated 28 November 2002 to Baulderstone; and

(b) if the second notice of charge is valid, whether the court should exercise the discretion pursuant to s 21 of the Act to cancel that charge.

Relevant legislation

[13] The entitlement to the charge is conferred by s 5 of the Act. Subsections (1) to (3) of s 5 provide:

> "(1) If an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor is entitled to—
>
> (a) a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract; and
>
> (b) subject to subsection (4), a charge on any security for the contractor's, or superior contractor's, contract or subcontract.
>
> (2) 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.
>
> (3) The total amount recoverable under the charges of subcontractors does not exceed the amount payable to the contractor or subcontractor under the contract or subcontract, as the case may be."

[14] The means for causing the charge to attach are set out in s 10 of the Act. Section 10(1) of the Act provides:

> "(1) A subcontractor who intends to claim a charge on money payable under the contract to the subcontractor's contractor or to a superior contractor—
>
> (a) must give notice to the employer or superior contractor by whom the money is payable, specifying the amount and particulars of the claim certified as 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; and
>
> (aa) if a person other than the employer or superior contractor holds a security for the contract—must give notice in the approved form of having made the claim to the person holding the security; and
>
> (b) must give notice of having made the claim to the contractor to whom the money is payable."

[15] The submissions of the parties raised the construction of ss 10(7) and (8) which were inserted by the *Subcontractors' Charges Amendment Act* 2002 ("the 2002 Act"). Subsections (7) and (8) of s 10 of the Act provide:

"(7) To remove any doubt, it is declared that a subcontractor may make 2 or more claims in relation to money payable or to become payable to the subcontractor for work done by the subcontractor under a subcontract.

(8) However—

(a) each claim must be about a separate and distinguishable item of the work done by the subcontractor under the subcontract; and
(b) there must not be more than 1 claim about any 1 item."

[16] Section 21 of the Act provides:

"21 Application to court by person prejudicially affected

(1) A person who alleges that the person is prejudicially affected by a claim of charge under this Act may at any time make application to the court for an order—

(a) that the claim be cancelled; or
(b) that the effect of the claim be modified.

(2) The court must hear and determine summarily an application made pursuant to this section and may make such order as it thinks fit.
(3) Without limiting the circumstances in which a person may be prejudicially affected for subsection (1), a person (the **"affected person"**) is taken to be prejudicially affected by the claim of charge of a subcontractor (the **"claiming subcontractor"**) if—

(a) because of the claim of charge—

(i) the payment of any amount to which the affected person is entitled is delayed or otherwise affected; or

(ii) the release of a security for a contract or subcontract given by or for the affected person is delayed or otherwise affected; and

(b) the affected person is a superior contractor in relation to the claiming subcontractor; and

(c) the affected person has already paid, to a person who is a contractor or superior contractor in relation to the claiming subcontractor, an amount for work the subject of the claim of charge."

Entitlement to lodge a "leapfrogging charge"

[17] The issue of whether a subcontractor was entitled to lodge a charge under the Act in respect of moneys payable to a contractor higher up the chain with whom that

subcontractor had no contractural relationship arose in *Hewitt Nominees Pty Ltd v The Commissioner for Railways* [1978] QdR 256 ("*Hewitt Nominees No 1*"). It was held by Dunn J at 267 that the Act gives to a subcontractor an entitlement to one charge only and the charge attaches to money due under one contract only. That decision was the subject of an appeal which was allowed in *Hewitt Nominees Pty Ltd v The Commissioner for Railways* [1979] QdR 256 ("*Hewitt Nominees No 2*"). Although the wording of the Act now differs slightly from the wording of the relevant provisions as they stood at the time of the decisions in *Hewitt Nominees No 1* and *Hewitt Nominees No 2*, the substance of the provisions considered in those cases remains the same.

[18] W B Campbell J (as he then was) (with whom the other members of the court agreed) stated in *Hewitt Nominees No 2* at 262 – 263:

> " The expression "superior contractor" is not defined although it appears many times in the Act. His Honour took the view, as I have mentioned, that "superior contractor" means a person with whom a claimant subcontractor has a contract. But it seems to me that a "superior contractor" must mean one who is further up the line than the subcontractor with whom a claimant subcontractor lower down the lines has a contract. As I have said, the "contractor", where that word is lastly used in s 5(1), as regards a subcontractor lower down the line than the subcontractor who contracts directly with the head contractor, should be read as the person with whom the claimant subcontractor has a contract. If one reads s 5(1) with full regard to the definition of "employer" "in relation to a subcontractor" together with the definition of "contractor as regards a subcontractor" and the definition of "subcontractor," it does not seem to me to affect the clear meaning of the words "superior contractor" in the subsection. The phrase "as the case may be" does not appear in subsec (1) although it is present in subsec (3) where it applies to limit the total amount recoverable under charges to the amount payable to the contractor or to the subcontractor, "as the case may be." In my opinion, s 5(1) grants to a subcontractor an entitlement to a charge on money payable to the person with whom he contracts and a charge on money payable to a superior contractor. I am unable to see anything in the legislation which would prevent a "superior contractor" from being the person who is also the head or first contractor."

[19] The Court of Appeal was asked to overrule *Hewitt Nominees No 2* in *Hamilton Australia Pty Ltd v Milson Projects Pty Ltd* [1997] 2 QdR 355. The Court of Appeal refused to do so. The facts in that case were that the appellant had contracted with the University for the performance by the appellant of construction work. The appellant then subcontracted part of that work to M & H Industries Pty Ltd ("MHI") which in turn subcontracted part of its work to the respondent. The respondent gave a notice of claim of charge pursuant to s 10 of the Act in respect of moneys payable to it by MHI, but the claim was made on moneys payable by the University to the appellant. When the notice was given, money was owing by the University to the appellant, but the appellant did not owe money to MHI. Davies JA and Mackenzie J in their joint judgment at 360 referred to the fact that the decision in *Hewitt Nominees No 2* had stood for nearly 18 years and that during that

time the Legislature had amended the Act on several occasions, but did not choose to amend s 5 which it could have done, if it had thought that the construction adopted by the court in *Hewitt Nominees No 2* did not reflect the legislative intent. It followed that s 5(1) of the Act permitted a charge by a subcontractor upon money payable to a contractor superior to the contractor which owes the subcontractor money. Pincus JA in a separate judgment considered that the construction of s 5(1) adopted in *Hewitt Nominees No 2* was correct.

[20] The validity of a leapfrogging charge was also confirmed by the Court of Appeal in *Re Radair Pty Ltd* [1998] 2 Qd R 539, 540 and 544. Dowsett J summarised the effect of the decision in *Hewitt Nominees No 2* at 544:

> "The effect of that decision is that a person who can bring himself within the definition of "subcontractor" is entitled to the benefit of a charge pursuant to s 5 against moneys payable to the head contractor or to any other subcontractor standing between the employer and the claiming subcontractor in the chain of contract and subcontracts, assuming that the other requirements of the Act are satisfied. That proposition was not challenged in these proceedings. The so-called "chain" is the sequence of contract and subcontracts linking the employer at the "top" to the claiming subcontractor at the "bottom".

[21] Dowsett J identified a possible problem in the operation of the Act at 549:

> "A subcontractor who has given a notice of claim to another party is entitled to a charge as against the amount payable by that party. The source of the funds from which such payment is to be made is not relevant. As I have previously observed, I can see no justification for the view that the Act assumes that each contractor or subcontractor is to be paid only from such amounts as are ultimately payable by the employer at the top of the chain for the whole of the project. Intermediate contractors may well find that they have to pay more to their own subcontractors than they are to receive".

[22] The version of the Act which is applicable to the subject charge is that which incorporates the amendments made by the 2002 Act. One of the matters which the 2002 Act was intended to address was leapfrogging. The Hon R E Schwarten, the Minister for Public Works and Housing, in moving that the relevant Bill be read a second time stated:

> "A further issue addressed by the Bill is the difficulty in the current interpretation of "leapfrogging".
>
> Leapfrogging in relation to subcontractors' charges occurs when subcontractors or contractors lodge a charge against those persons two or more steps higher up the contractual chain.
>
> The Subcontractors' Charges Amendment Bill 2001 clarifies that "leapfrogging" will be allowed to continue to the extent that a superior contractor is not be *(sic)* prejudicially affected through having to make double payments for work the subject of the claim of the charge, or having payments to them delayed when they have met their contractual commitments." (Hansard 27 November 2001 at p 3806)

[23] The parties' submissions differed on how the 2002 Act had achieved this intention in respect of leapfrogging. Mr Dunning of counsel on behalf of Baulderstone submitted that the insertion of ss 10(7) and (8) into the Act by the 2002 Act was intended to prevent a subcontractor from lodging more than one notice of charge, as "make claims" must be read as giving notices of charge, on the basis that a subcontractor can make a claim only by giving a notice of charge. It was therefore submitted that ss10(7) and (8) of the Act had the effect of limiting a subcontractor to one notice or charge based on a claim for specified work and that if the subcontractor had lodged a notice in respect of the moneys payable to the contractor with whom he contracted, the subcontractor could not also lodge a leapfrogging charge in respect of the same claim.

[24] Mr O'Donnell of Queen's Counsel on behalf of Broen relies on the choice by the Legislature of the word "claims" in ss 10(7) and (8) of the Act rather than the word "charges". He points out that the Act distinguishes between "claim", "notice of claim of charge" and "charge" (which is clear as a matter of construction of the Act and has been authoritatively recognised such as in *Ronnor Pty Ltd v D & R Fabrications Pty Ltd* [1983] 2 Qd R 455, 458) and that the expression "claims" in ss 10(7) and (8) of the Act should continue to be given the same meaning which it has in the balance of the Act.

[25] The expression "claim" can be described as referring to an asserted entitlement to be paid under the subcontract for specified work performed by the subcontractor under the subcontract, upon which a notice of claim of charge given under s10(1) of the Act is based, in order to obtain the entitlement of the charge which arises by operation of s5(1) of the Act.

[26] It is submitted on behalf of Broen that there was only one claim in this matter which supported the two notices of claim of charge and that ss 10(7) and (8) have no application. That is clearly correct.

[27] Baulderstone also sought to limit Broen to its first notice of charge dated 28 November 2002 on the basis that *Hewitt Nominees No 1* remained good authority for restricting a subcontractor to giving one notice of claim of charge, even though *Hewitt Nominees No 2* allowed the appeal from the decision in *Hewitt Nominees No 1*.

[28] The construction of the Act which was the basis of the decision in *Hewitt Nominees No 1* was rejected in *Hewitt Nominees No 2*. In view of the context in which the statement of Dunn J in *Hewitt Nominees No 1* was made about entitlement to issue only one charge, that statement cannot be transposed to the circumstances where a leapfrogging charge is also recognised as permissible under the Act.

[29] There is nothing in the Act to preclude a subcontractor lodging two notices of claim of charge based on the one claim where each of the notices is given to a different contractor or employer. The extent to which the claim is satisfied under one charge must affect the amount of the claim which can be pursued under the other charge. This is facilitated by the process provided for in s 21(1)(b) of the Act. No such problem arises in this case as there was no money to which the charge could attach upon giving the notice of claim of charge dated 28 November 2002 to Hamilton. In any case that charge has now been withdrawn. The Act permitted Broen to give the notice of claim of charge to the University dated 18 December 2002.

Baulderstone is not entitled to a declaration that the notice of charge dated 18 December 2002 is invalid.

Cancellation of the charge

[30] Both parties accept that the insertion of s 21(3) into the Act was to effectuate the reforms intended to be achieved by the Legislature in respect of leapfrogging, although the parties differ on how s 21(3) should be applied. This reform does not reverse the effect of *Hewitt Nominees No 2* in recognising the validity of a leapfrogging charge.

[31] It is common ground that Baulderstone is a person "prejudicially affected" by Broen's notice of claim of charge dated 18 December 2002 by virtue of s 21(3) of the Act.

[32] Baulderstone argues that, as it has already paid for the supply and installation of the fume cabinets, including the tapware, by having paid Hamilton all moneys owing in respect of those works, if the charge were not cancelled, Baulderstone would, in effect, pay twice for this aspect of the work subcontracted to Hamilton. This is because the funds paid into court by the University would otherwise have been paid to Baulderstone under its contract with the University. If those funds are used to pay Broen, Baulderstone misses out on payment from the University to the extent of that amount.

[33] The Explanatory Notes for the *Subcontractors' Charges Amendment* Bill 2001 confirms that the reform intended by the Legislature in respect of leapfrogging is found in ss (3) of s 21 of the Act:

> "*Clause 16* inserts subsection 21(3) to provide for specific instances in subsection 21(1) where a person may be prejudicially affected by a claim of charge. If, because of a claim of charge, the payment or release of security to a person (the affected person) higher up the contractual chain than the subcontractor is delayed or otherwise affected and the affected person has made payment to a person who is a contractor or superior contractor of the claiming subcontractor, the affected person is prejudicially affected within the meaning of subsection 21(1). This provision effectively limits the circumstances in which a subcontractor may successfully claim a "leap frog" charge. The court can then determine whether a claim of charge should be either cancelled or its effect modified."

[34] The Legislature has endeavoured to remove the problem which can result with an intermediate contractor in substance paying twice for the same work done by a subcontractor. This has been done by giving the court the power to cancel the leapfrogging charge which is otherwise valid or to modify it to avoid the intermediate contractor having to pay again for work which is the subject of the leapfrogging charge for which the intermediate contractor has already paid.

[35] It is argued on behalf of Broen that all that s 21(3) of the Act does is to enable a superior contractor to have standing to cancel the charge for any of the accepted bases on which the charge may be cancelled, but that it does not entitle Baulderstone to cancellation of an otherwise valid charge. Broen relies on the history of the Act and the fact that it has long represented a choice by the Legislature that if a loss is to fall on one of two innocent parties, it will fall on a

superior contractor, rather than the subcontractor. It is therefore submitted that in the exercise of the discretion conferred by s 21 of the Act, the court should refuse to cancel Broen's charge.

[36] The court retains a discretion under s 21 of the Act as to whether or not to make an order cancelling a claim or modifying the effect of the claim, even when satisfied that a person has been prejudicially affected by a claim of charge under the Act. The purpose of s 21 of the Act is to allow summary determination of the application for cancellation or modification of the claim, with the consequent savings for all parties.

[37] The fact that the Legislature has expressly chosen to deem a person in the position of Baulderstone in relation to Broen's notice of claim of charge dated 18 December 2002 to be prejudicially affected by that notice of claim of charge is a particularly significant consideration as to whether the discretion conferred by s 21(2) of the Act is exercised. The Legislature has introduced a departure from the approach of protecting the subcontractor in preference to the superior contractor, when the superior contractor has already paid for the work done by the subcontractor which is the subject of the leapfrogging charge. The material filed in respect of these applications does not suggest that there are any other matters relevant to the exercise of that discretion which could be placed before me. There is no reason in the circumstances of this matter not to give effect in a summary way to the intention of the Legislature reflected by s 21(3) of the Act. Broen's claim should be cancelled.

Orders

[38] It follows that the orders which should be made are:

> 1. The claim of Broen Australia Pty Ltd made in the notice of claim of charge dated 18 December 2002 given to the University of Queensland in the sum of $64,497.35 be cancelled pursuant to s 21 of the *Subcontractors' Charges Act* 1974.
>
> 2. The amount of $64,497.35 paid into court by the University of Queensland be paid to Baulderstone Hornibrook Pty Ltd.
>
> 3. The application filed on 26 February 2003 be dismissed.

[39] It will be necessary to hear submissions from the parties in respect of the costs of each of the applications.