SUPREME COURT OF QUEENSLAND

CITATION:	*Walton Construction (Qld) P/L & Anor v Venture Management Resources International P/L & Anor* [2010] QSC 31
PARTIES:	**WALTON CONSTRUCTION (QLD) PTY LTD ACN 100 833 225** (first applicant) and **WALTON CONSTRUCTION PTY LTD ACN 060 900 218** (second applicant) **v** **VENTURE MANAGEMENT RESOURCES INTERNATIONAL PTY LTD ACN 090 569 869** (first respondent) and **P & W ENTERPRISES PTY LTD ACN 108 802 491** (second respondent)
FILE NO/S:	14117/09
DIVISION:	Trial Division
PROCEEDING:	Application for interlocutory injunction
DELIVERED ON:	10 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 December 2009
JUDGE:	Douglas J
ORDER:	**Application for interlocutory injunction to be granted pending the hearing of the originating application and subject to further submissions as to the form of the order including the provision of an undertaking as to damages and directions in respect of the further conduct of the application.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION OF FUNDS – where an application was made to restrain the second respondent from accessing funds secured by a bank

guarantee pursuant to a building contract between the first applicant and the second respondent – where the first respondent issued a payment certificate pursuant to cl 47.1 of the building contract stating an amount of payment due to be paid by the first applicant to the second respondent – whether the amount could be properly described as "otherwise due"

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – BALANCE OF CONVENIENCE – whether the calling in of bank guarantees would cause the applicants irreparable harm – whether there is a serious question to be tried

Queensland Building Services Authority Act 1992 (Qld), s 42

Austrak Pty Ltd v John Holland Pty Ltd [2006] QSC 103, applied
Daysea Pty Ltd v Watpac Australia Pty Ltd (2001) 17 BCL 434; [2001] QCA 49, cited
J. M. Kelly (Project Builders) v Toga Development No. 31 Pty Ltd [2006] QSC 365, cited
Merritt Cairns Construction Pty Ltd v Wulguru Heights Pty Ltd [1995] 2 Qd R 521; [1995] QCA 273, cited
Multiplex Limited v Qantas Airways Limited (2007) 23 BCL 130; [2006] QCA 337, cited
Prell v Burrell [1975] Tas SR 150, referred
Puerto Galera Pty Ltd v J.M. Kelly (Project Builders) Pty Ltd [2008] QSC 356, cited
Sutton v Zullo Enterprises Pty Ltd [2000] 2 Qd R 196; [1998] QCA 417, cited
Vos Construction & Joinery Qld Pty Ltd v Sanctuary Properties Pty Ltd [2007] QSC 332, considered

COUNSEL: P L O'Shea SC, with B E Codd, for the first and second applicants
P Dunning SC, with D Quayle, for the first and second respondents

SOLICITORS: Dibbs Barker for the first and second applicants
Clayton Utz for the first and second respondents

[1] **Douglas J:** The applicants have applied for an interlocutory injunction to restrain the second respondent, P & W Enterprises Pty Ltd, from accessing funds secured by a bank guarantee given by the second applicant, Walton Construction Pty Ltd, pursuant to a building contract between the first applicant, Walton Construction (Qld) Pty Ltd and P & W. The first respondent is the superintendent under the contract. On 11 December 2009 the first respondent issued a progress certificate certifying that $1,605,906.05 plus GST was due to be paid by the first applicant, Walton Construction (Qld), the contractor, to P & W, the principal.

Background

[2] In arriving at that figure of $1,605,906.05 plus GST the first respondent had deducted an amount of $1,318,770, as well as previous payments totalling $9,244,627.89, from the "Certified to Date Cost to Complete" amount of $8,957,491.84 excluding GST. The validity of that deduction of $1,318,770, said to be pursuant to cl 35.3 of the contract for defective materials or work, lies at the heart of the case made by the applicants for the relief they seek.

[3] Clause 47.1 of the contract sets out the circumstances in which payment claims may be made and certified under the contract. It provides:

> "**47. CERTIFICATES AND PAYMENTS**
>
> **47.1 Payment Claims, Certificates, Calculations and Time for Payment**
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> At the times for payment claims stated in the Annexure and within the time prescribed by Clause 42.6A and 47.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor including approved variations and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then approved by the Superintendent due to the Contractor arising out of or in connection with the Contract.
>
> Within 10 Business Days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal.
>
> The amount certified by the Superintendent as due to the Contractor shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract or for breach of Contract less –
>
> (a) amounts which the Principal is entitled to deduct under this clause or clause 42.3; and
>
> (b) amounts already paid or certified under the Contract.
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> The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 47.1 or any Final Certificate issued pursuant to Clause 47.8 or a Certificate issued pursuant to

> Clause 49.6, amounts paid under the Contract and **amounts otherwise due** from the Principal to the Contractor and/or due **from the Contractor to the Principal arising out of or in connection with the Contract** including but not limited to any amount due or to be credited under any provision of the Contract.
>
> If the Contractor fails to make a claim for payment under Clause 47.1, the Superintendent may nevertheless issue a payment certificate.
>
> Subject to the provisions of the Contract, within 15 Business Days after receipt by the Superintendent of a claim for payment or within 5 Business Days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or **the Contractor shall pay to the Principal**, as the case may be, **an amount not less than the amount shown in the Certificate as due to the** Contractor or to the **Principal** as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 52 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 52 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.
>
> Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 47.8." (Emphasis added.)

[4] In this case a claim for payment had been made by the builder, Walton Construction (Qld), for $2,024,528.40. Clause 47.1 requires the amount certified by the superintendent to be the value of the work carried out by the contractor in performance of the contract to that time less amounts which the principal is entitled to deduct including amounts otherwise due from the contractor to the principal arising out of or in connection with the contract.

[5] Subject to the provisions of the contract and within five business days of issue by the superintendent of a payment certificate the contractor shall pay to the principal an amount not less than the amount shown in the certificate as due to the principal. If that is not done cl 47.11 and cl 10.5 permit the principal to have access to monies held as security, in this case, pursuant to bank guarantees provided by the National Australia Bank Limited totalling $562,000.

Certification under cl 47.1 – strict compliance

[6] The applicants' case is that strict compliance is required for the certification process under cl 47.1 which extends to the calculations of amounts otherwise due from the contractor to the principal claimed, in this case, under cl 35.3; see *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49; (2001) 17 BCL 434, 438-439 at [19]-

[22]. That clause permits the superintendent to direct the contractor to correct material or work by a direction nominating times within which the contractor must commence and complete the corrective work. It goes on to provide:

> "If the Contractor fails to comply with a direction issued by the Superintendent pursuant to Clause 35.3 within the time specified by the Superintendent in the direction and provided the Superintendent has given the Contractor notice in writing that after the expiry of 7 days from the date on which the Contractor receives the notice the Principal intends to have the work carried out by other persons, the Superintendent may certify its estimate based on the lowest of 3 quotes from independent contractors (a copy of which quotes together with the material with which the Principal briefed the contractors shall be provided to the Contractor), of the cost of having that work carried out by the Principal and the Principal may have the work of removal, demolition, replacement or correction carried out by other persons **and the cost incurred by the Principal, or the cost the Superintendent has so certified will be incurred by the Principal, in having the work so carried out shall be a debt due from the Contractor to the Principal**." (Emphasis added.)

[7] The argument for the applicants was that if those requirements for the obtaining of quotations for rectification work were not met then the payments could not be described properly as a "debt due" from the contractor to the principal for the purpose of cl 47.1.

Procedure adopted by the superintendent under cl 35.3 – a "debt due"

[8] The procedure adopted by the superintendent under cl 35.3 was criticised on several bases by the applicants. They argued that no proper directions to correct the work had been given by the superintendent to the contractor with the possible exception of a direction in respect of tiling set out at p. 59 of the annexures to the Affidavit of Mr Willis filed 18 December 2009. They criticised the other directions as being complaints about work done without clear specification of what corrective work was needed to make them comply with the intention of cl 35.3.

[9] The applicants also argued that no seven day notice period was given for the correction of most of the work, that no quotations were obtained for the work to be done but rather estimates which could not themselves be the subject of acceptance so as to form a contract. They also argued that the work the superintendent may seek quotations for from other independent contractors must be the same as the corrective work identified by the superintendent's corrections to the contractor, which in this case was said not to be the case. They also submitted that there must be a close identity between the work directed to be done by the contractor and that for which quotations were sought from other independent contractors.

[10] The rationale for this approach to the construction of cl 35.3 was that it was designed to allow an estimate of costs the superintendent has certified will be incurred by the principal to be the basis of the quantification of the debt said to become due from the contractor to the principal. The focus of the submission was that the superintendent's estimate should be sufficiently precise as to justify it being the foundation of a "debt due". The argument was that the process required to

achieve that result could not be done simply by the solicitation of indicative estimates not properly capable of being accepted by the principal. In this context I was also referred to decisions dealing with the meaning of phrases such as "money due" or an "amount owed" under a contract as meaning something more than amounts which the principal asserts the contractor is liable to pay or which are claimed to be owing or certified as payable; see *Merritt Cairns Construction Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521, 522-523, 526 and *Multiplex Limited v Qantas Airways Limited* [2006] QCA 337 at [6].

[11] In that context it was submitted that the evidence showed that none of the proposed independent contractors who had quoted had inspected the work to be done properly, nor had that work been identified clearly to them to allow them to do anything more than submit estimates, which was the language used in respect of two of the quotations and was the effect of the third quotation which was relied upon by the superintendent to permit the reduction of $1,318,770 allegedly pursuant to cl 35.3 in its progress certificate no. 14. I was taken to several documents that were provided to the proposed independent contractors which illustrated that the scope of the work to be rectified by them was described in only very general terms. It was also submitted that some of that work referred to carpentry and painting which had not been the subject of a direction by the superintendent to the contractor. Those items totalled $200,320 in the quotation that was accepted.

[12] Other information provided to the independent contractors was criticised for its generality, including a report obtained on 7 December 2009 from a firm called Property Technologies Pty Ltd in respect of air conditioning and ventilation systems. The rectification work described in that document was described in rather general terms.

[13] The submission was made that the information provided to the independent contractors provided no basis for a proper estimation of the cost of rectification and had not been the subject of directions to rectify from the superintendent in all cases and could not lead to the provision of a quotation which should properly then be able to be treated as a debt due from the contractor to the principal.

[14] Certainly there was no evidence that any of the independent contractors was willing to perform the work referred to in their quotations for the amounts quoted. Some of the information given to them was also not available to the contractor, notably the letter of 7 December 2009 from Property Technologies.

[15] There were other bases on which the applicants relied to argue that there was a prima facie case entitling them to the grant of an interlocutory injunction. They argued that there had been some double counting apparent from the assessment of progress claim no. 14 in item 25 on p. 38 of the annexures to the Mr Willis' affidavit where the superintendent appears to have allowed $216,050 for mechanical work, less than the expected amount, apparently on the basis that ventilation systems had been designed and installed to incorrect codes previously paid, while rectification work for those ventilation systems was also included in the quotation accepted shown at p. 484 of the annexures to the same affidavit.

[16] A third basis on which they claimed relief was from an inference they submitted I should draw that some claims for liquidated damages may have been made impermissibly at this stage of the contract because of an apparent discrepancy

between the amount shown as the calculated value of the work done pursuant to the superintendent's calculation on p. 38 of the affidavit of Mr Willis filed 16 December 2009 $9,064,988 and his certification of 11 December 2009 that the value of the work to date was $8,957,491.84.

[17] There is a reference to liquidated damages which will be due as a debt to the principal as $270,000 at the foot of the first page of that document at p. 20 of the exhibits to Mr Willis's affidavit. The respondents argue that it is clear that that amount has not been taken into account in the calculations. That is not an issue I can resolve one way or the other in respect to whether or not there is a prima facie case on the evidence available to me.

Challenge to the superintendent's certification under cl 62

[18] Another basis on which the applicants say there is a prima facie case is because it has invoked a process under cl 62 of the contract to challenge the superintendent's certification by a review by an expert. That process had not been completed when the application was heard and the applicants' argument is therefore, that the obvious commercial purpose or business common sense of that process was to prevent recourse to the security where the contractor was in the process of disputing the owner's rights. The submission was made by parity of reasoning with a decision by me in *Vos Construction & Joinery Qld Pty Ltd v Sanctuary Properties Pty Ltd* [2007] QSC 332 at [11]. There may be some strength in that argument.

Illegality of the superintendent's performance of its obligations

[19] There was a final argument which the applicants did not develop in detail orally that the superintendent was not authorised under the relevant Queensland legislation to act in that role so that the process was flawed irremediably. The parties have since filed written submissions dealing with that issue. The applicants contend that the superintendent was not appropriately licensed pursuant to s 42 of the *Queensland Building Services Authority Act* 1992 with the effect that its certification process under this contract has not been performed lawfully either under that Act or pursuant to the proper construction of the contract. They seek to distinguish the decision of Chesterman J in *Puerto Galera Pty Ltd v J.M. Kelly (Project Builders) Pty Ltd* [2008] QSC 356 that illegal performance by the superintendent under a building contract did not vitiate the rights of the parties by arguing that the legislation has since changed and by arguing that his Honour's decision is contrary to and decided in apparent ignorance of the earlier Court of Appeal decision in *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd R 196, 202-204. As to the argument that the same result follows on the proper construction of the contract, they rely on the decision in *Prell v Burrell* [1975] Tas SR 150.

[20] The respondents' submission in this context is that, properly understood, the approach adopted by Chesterman J in *Puerto Galera* remains valid under the legislation in its present form and that *Sutton v Zullo Enterprises Pty Ltd*, also properly understood, supports their arguments. Those submissions may well have substance but, in my view, a serious question to be tried has been shown in respect of this issue. It is not a debate that should be resolved without a fuller hearing of the application.

Balance of convenience

[21] There was also evidence on which the applicants rely that the calling in of the bank guarantees would cause them irreparable harm in respect of their reputation in the building industry, going beyond that which may be cured by an order as to damages. Chesterman J expressed some scepticism about such evidence in *Austrak Pty Ltd v John Holland Pty Ltd* [2006] QSC 103 at [29]-[34] but followed earlier expressions of views by other judges experienced in the litigation of building contracts that those concerns were real. It seems to me that I should also take such an approach. On that basis the applicants argued that the balance of convenience was squarely tilted in their favour pending the trial of the action.

Discussion

[22] The respondents argued that the considerations relevant to cl 35.3 did not go to the obligation of the contractor to pay on progress certificate no. 14 as the enquiry as to, for example, the sufficiency of the quotations relied upon by the superintendent, was not a matter properly to be considered in determining whether the progress certificate itself must be paid by the applicants. They relied on the provisional nature of payments made pursuant to a certification process under contracts of this type, allowing the question of what the parties' proper entitlements were to be determined at the conclusion of the contract; see cl 52 of this contract which is referred to explicitly in cl 47.1. In that context they pointed, with some justification, to the undesirability of litigating issues such as these before the conclusion of the contract and argued that that was the basis on which the parties had agreed and that they should be held to that bargain.

[23] They referred, in particular, to a decision of Robin AJ in *J. M. Kelly (Project Builders) v Toga Development No. 31 Pty Ltd* [2006] QSC 365 that payment should be made pursuant to securities such as these unless something can be shown to be definitely wrong about such a superintendent's certificate. They also argued that the question of whether there had been an infringement of the contractual process of seeking the quotations pursuant to cl 35.3 did not amount to conduct which amounted to a breach of a negative stipulation in the contract so as to warrant this Court intervening.

[24] It seems to me to be arguable, however, that the negative stipulation arises from the construction of cl 10.5 and that its content would be that the party may not have recourse to the cash security unless it has become entitled to exercise a right under the contract in respect of that security and that, applying cl 47.1, the amount claimed in the certificate would not be an amount otherwise due from the contractor to the principal in the absence of proper performance of the requirements of cl 35.3. In my view there are clearly arguable factual bases for submitting that the requirements of that clause have not been met so that the applicants have established a prima facie case that there has been a breach of a negative stipulation of the contract. The authorities relied on for the argument that there should be strict compliance with the certification process are significant in this context.

[25] On a more limited basis, as to the period of any injunction at least, the considerations relating to the process of expert review in cl 62 may also justify the grant of an injunction at least until that process had been concluded. The arguments

that the superintendent's role was performed illegally also raise a prima facie case that should be determined at a trial of the action.

Conclusion and orders

[26] The arguments against the grant of the injunction sought relied upon the traditional focus on permitting ready access to securities of this nature subject to the enquiry as to whether the conduct of the principal contravenes the implied negative stipulation in the contract that it will not have recourse to the securities except where it has become entitled to exercise a right under the contract in respect of them; see the decisions to which I referred in *Vos Construction & Joinery Qld Pty Ltd v Sanctuary Properties Pty Ltd* at [8]-[9].

[27] It seems to me, however, that the points raised on behalf of the applicants which I have identified in respect of the proper performance of cl 35.3 and the process envisaged by cl 62 and the argument that the superintendent's performance of its role was affected by illegality raise serious questions to be tried and which I should not resolve on an interlocutory basis. The balance of convenience in a case like this is influenced by the possibility of awarding damages by way of interest in the event that no final injunction is granted; see *Austrak Pty Ltd v John Holland Pty Ltd* at [11]. There was no suggestion that the applicants would be unable to pay such a sum after a hearing of the matter and they have offered the usual undertaking as to damages. The respondents wished to make further submissions as to the form of the undertaking as to damages were I to grant the injunction.

[28] Accordingly I propose to grant the injunction sought pending the hearing of the originating application subject to the provision of the usual undertaking as to damages. I also invite the parties to make submissions as to the form of the order and any directions as to the future conduct of the matter.