

SUPREME COURT OF QUEENSLAND

CITATION: *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd*
[2012] QSC 214

PARTIES: **BHW SOLUTIONS PTY LTD**
ACN 148 187 400
(applicant)
v
ALTITUDE CONSTRUCTIONS PTY LTD
ACN 121 441 861
(respondent)

FILE NO/S: BS 6396 of 2012

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 16 August 2012

DELIVERED AT: Brisbane

HEARING DATE: 6 August 2012

JUDGE: Mullins J

ORDER: **1. Pursuant to s 19 of the *Building and Construction Industry Payments Act 2004* judgment is entered for the applicant against the respondent in the amount of \$1,400,136.38 (inclusive of interest of \$37,855.93).**
2. The respondent must pay the applicant's costs of the application to be assessed.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where subcontractor served payment claims on the contractor for the purpose of s 17 *Building and Construction Industry Payments Act 2004* (Qld) – where the respondent did not serve payment schedules in response to the payment claims – where the contractual provision required a progress claim to be accompanied by a statutory declaration as a precondition to payment – whether absence of declaration invalidated payment claims

Building and Construction Industry Payments Act 2004, s 12, s 13, s 17, s 18, s 19, s 99, s 100

John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited [2012] QCA 150, followed

Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd [2011] 1 Qd R 28, considered
Spankie v James Trowse Constructions Pty Limited [2010] QCA 355, considered
Vis Constructions Ltd v Cockburn [2006] QSC 416, considered

COUNSEL: MH Hindman for the applicant
 FG Forde for the respondent

SOLICITORS: Schweikert Harris for the applicant
 JHK Legal for the respondent

- [1] The applicant applies for judgment against the respondent in the amount of \$1,362,280.45 pursuant to s 19 of the *Building and Construction Industry Payments Act* 2004 (the Act). The respondent opposes the application on the basis that the applicant failed to fulfil the contractual condition precedent to any entitlement to payment and was therefore entitled neither to any progress payment under the contracts nor to serve a payment claim on the respondent.
- [2] It is common ground that there are two construction contracts between the parties for the supply of temporary accommodation units, described as the Moranbah project contract and the Glenden project contract. The applicant served on the respondent what it claims to be a payment claim for the purpose of s 17 of the Act in relation to each contract. The respondent did not serve payment schedules in response to either payment claim. Under s 18(5) of the Act the respondent is liable to pay the claimed amount to the applicant for the progress payments to which the payment claims relate. That is why to resist summary judgment based on s 19 of the Act the respondent submits the payment claims are invalid.

The Act

- [3] There are many factual disputes between the parties, but this application proceeds on the basis that, irrespective of the resolution of those factual disputes, the applicant seeks to show that, if the construction contracts incorporated the standard terms and conditions which the respondent claims applied, the applicant is entitled under the Act to receive payment of the progress payments that are the subject of the payment claims.
- [4] The nature of the scheme under the Act is relevantly described in *Spankie v James Trowse Constructions Pty Limited* [2010] QCA 355 at [9]-[12]. As s 100 of the Act makes clear, progress payments recovered under the statutory entitlement conferred by the Act are provisional in the sense that recovery of those progress payments does not affect any civil proceedings arising under the construction contract.
- [5] Section 12 of the Act provides:
 “12. From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.”

- [6] The definition of “reference date” is found in schedule 2 to the Act:
 “**reference date**, under a construction contract, means-
- (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
 - (b) if the contract does not provide for the matter—
 - (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each later named month.”
- [7] Section 17 of the Act relevantly provides:
“17 Payment claims
- (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).
 - (2) A payment claim—
 - (a) must identify the construction work or related goods and services to which the progress payment relates; and
 - (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
 - (c) must state that it is made under this Act.”

The construction contracts

- [8] Clause 7 of the respondent’s standard terms and conditions deals with payment and permits the subcontractor to claim payment progressively on the 25th day of each month which is described in the clause as a “progress claim.” The respondent relies on clause 7(d) of its standard terms and conditions:
- “(d) A progress claim, including a final progress claim, shall:
- (i) contain details of the actual cost of work carried out by the Subcontractor up to and including the date the Subcontractor submits its claim;
 - (ii) provide copies of tax invoices for any outlays claimed; and
 - (iii) a declaration in the form in Schedule Three, each of which shall be a precondition to payment and if not provided or incomplete or false the Contractor may withhold payment until received.”
- [9] Although clause 7(d) is described as nonsensical by the applicant, it is clear enough that the progress claim must comply with each of the requirements in subparagraphs (i), (ii) and (iii), with the words at the conclusion of subparagraph (iii) intended to

apply to each of the requirements. To comply with subparagraph (iii), the progress claim must be accompanied by the specified declaration. The declaration in what appears to be schedule 3 incorporates a statement to the effect that all employees, workers, subcontractors and suppliers who at any time have carried out work or supplied goods under the subcontract have been paid in full all that is owed to them by the applicant up to the date of the submission by the applicant of the relevant payment claim. It is common ground that when the applicant made the payment claim under each of the contracts, it was not accompanied by the declaration referred to in clause 7(d)(iii).

Whether each payment claim is invalid

- [10] The only aspect of each of the payment claims relied on by the respondent to assert they are invalid is the failure of the applicant to provide the declaration required by clause 7(d)(iii) of the respondent's terms and conditions.
- [11] The respondent relies on the summary of Jones J of the components of the statutory scheme set out in *Vis Constructions Pty Ltd v Cockburn* [2006] QSC 416 at [30]:
 “Firstly, there must be a **contract for construction work** (as defined by s 10 of BCIPA) or for the supply of related goods. Secondly, the claimant must be entitled to a progress payment **under the contract**. Thirdly, the payment claim must be made on a person who is or may be liable to make payment under the **same construction contract**.”
- [12] The respondent submits that the second requirement set out in the above quote has not been met as, in the absence of a declaration, the applicant has no entitlement to a progress payment under the contract. (Although the respondent submits that support for that interpretation is found in s 13 of the Act which specifies that the amount of a progress payment to which a person is entitled in relation to a construction contract is the amount calculated under the contract or, if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out under the contract, s 13 is concerned with calculation of the amount of the progress payment rather than entitlement.) The respondent submits that nothing in the Act overrides the contractual provisions: *Reed Construction (Qld) Pty Ltd v Martinek Holdings Pty Ltd* [2011] 1 Qd R 28 at [24].
- [13] The applicant relies on the approach in *John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited* [2012] QCA 150 where the issue was the effect of clauses in the subcontract requiring a statutory declaration to be included in the payment claim as to payments having been made to subcontractors and employed workers and providing for a warranty by the subcontractor that, if the payment claim did not comply with the conditions (including the provision of the statutory declaration), the payment claim was void and the reference date for the purposes of the Act would become the same day on the following month. The subcontractor had not provided the relevant statutory declaration with the payment claim. The contractor sought to rely on the subcontractor's warranty to withhold payment on the basis there was no reference date for the payment claim.

- [14] Fraser JA who delivered the leading judgment in *John Holland* explained the nature of the statutory entitlement to progress claims conferred by s 12 of the Act at [18]:
- “Section 12 confers upon a person who has undertaken to carry out construction work a statutory entitlement to recover a progress payment from each “reference date under a construction contract”, which is defined to mean, so far as is presently relevant, “a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, ...under the contract...”. Accordingly, the contractual provisions to which reference may be made for the purpose of ascertaining the “reference date” are those which state, or provide for the working out of, the date on which a progress payment claim “may be made”. The latter expression refers to an entitlement to make a progress claim. It does not comprehend reference to warranties which concern the form and content of progress claims or the consequences of breaching warranties about the form and content of progress claims.”
- [15] Fraser JA concluded at [21] that if the impugned clauses operated to defer what would have been the subcontractor’s statutory entitlement to a progress payment from the reference date ascertained in accordance with the Act, they would be void under s 99 of the Act. It is also relevant to refer to the statement made by Fraser JA at [19]:
- Bearing in mind the statutory object and the role of s 12 and the definition of “reference date” in giving effect to that object, those provisions are incapable of justifying an implication that the date upon which the statutory entitlement to a progress payment accrues may be qualified by contractual provisions other than those captured by the unambiguous terms of the definition of “reference date”.
- [16] The analysis of the operation of the provisions of the Act in conferring the statutory entitlement to a progress payment in *John Holland* shows that the words of s 12 of the Act are important. The summary of the effect of s 12 in *Vis* for the purpose of that case should not be used to put a gloss on the words and meaning of s 12 for the purpose of determining in other cases the relationship between the statutory entitlement and relevant contractual provisions.
- [17] Clause 7(d) of the respondent’s standard terms and conditions is concerned with how to make a “progress claim” under the contract, and is not concerned with regulating a payment claim under the Act. Section 17 of the Act regulates the form of a payment claim under the Act for the purpose of pursuing the statutory entitlement to a progress payment from each reference date under the construction contract where the claimant has carried out construction work under the contract. There is no requirement in the Act for payment claims to be accompanied by such a declaration. The applicant’s payment claims in this matter are therefore not invalid in the absence of a declaration under clause 7(d)(iii).

Orders

[18] There is no impediment to summary judgment for debt being given for the applicant against the respondent for the outstanding amount under the payment claims of \$1,362,380.45 in accordance with s 19 of the Act. Interest was calculated in the schedule attached to the applicant's submissions up to 6 August 2012. at 10 per cent per annum. I will extend the calculation of interest to the date of giving judgment. That results in a total amount of interest of \$37,855.93.

[19] The orders which I make are:

1. Pursuant to s 19 of the *Building and Construction Industry Payments Act* 2004 judgment is entered for the applicant against the respondent in the amount of \$1,400,136.38 (inclusive of interest of \$37,855.93).
2. The respondent must pay the applicant's costs of the application to be assessed.