

SUPREME COURT OF QUEENSLAND

CITATION: *Walton Construction (Qld) P/L v Plumber by Trade P/L & Ors* [2012] QSC 264

PARTIES: **WALTON CONSTRUCTION (QLD) PTY LTD ABN 60 100 833 225**
(applicant)
v
PLUMBER BY TRADE PTY LTD AS TRUSTEE FOR THE LESLIE FAMILY TRUST AND FRANJAMEN PTY LTD AS TRUSTEE FOR THE MARTIN FAMILY TRUST TRADING AS PLUMBING BY TRADE ABN 71 253 682 564
(first respondent)
and
ADJUDICATE TODAY PTY LTD ABN 39 109 605 021
(second respondent)
and
ANDREW BRUCE WALLACE ADJUDICATION REGISTRATION J47895
(third respondent)
and
FRANJAMEN PTY LTD AS TRUSTEE FOR THE MARTIN FAMILY TRUST ABN 20 119 364 816
(fourth respondent)
and
PLUMBER BY TRADE PTY LTD AS TRUSTEE FOR THE LESLIE FAMILY TRUST ABN 43 869 406 768
(fifth respondent)

FILE NO: BS2887/12

DIVISION: Trial

PROCEEDING: Originating application

DELIVERED ON: 12 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 17 August 2012

JUDGE: Margaret Wilson J

ORDER:

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where applicant sought declaration that payment claim under the *Building and Construction Industry Payments Act 2004* and/or adjudication decision on it were void for jurisdictional error – where applicant contended that payment claim was invalid and that adjudicator lacked jurisdiction to

adjudicate upon it because the claimant was not licensed under the *Queensland Building Services Authority Act 1991* – whether an enforceable contract within the meaning of *BCIPA* existed between the applicant and first respondent – where the first respondent was not licensed under the *QBSA Act* – whether the adjudication decision was void

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 17, s 31, schedule 2
Queensland Building Services Authority Act 1991 (Qld), s 31A, s 42, s 56, s 67E, s 67G

Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13, cited.

COUNSEL: B E Codd for the applicant
 T A Houghton for the first, fourth and fifth respondents

SOLICITORS: DibbsBarker for the applicant
 Ramsden Lawyers for the first, fourth and fifth respondents

- [1] **MARGARET WILSON J:** This is an application for a declaration that a payment claim under the *Building and Construction Industry Payments Act 2004* (“*BCIPA*”) and/or the adjudication decision on it are void or invalid for jurisdictional error; in the alternative for an order quashing the adjudication decision.
- [2] The applicant’s principal contention was that the payment claim was invalid and the adjudicator lacked jurisdiction to adjudicate upon it because the claimant was not licensed under the *Queensland Building Services Authority Act 1991* (“*QBSA Act*”).

Dramatis personae

- [3] At all material times Plumber by Trade Pty Ltd was the trustee of the Leslie Family Trust and Franjamen Pty Ltd was the trustee of the Martin Family Trust.
- [4] Neither company held a licence pursuant to the *QBSA Act* and *Regulation* at any material time.
- [5] Plumber by Trade Pty Ltd was incorporated on 25 August 1998.
- [6] Michael George Leslie was at all material times the sole director and a shareholder of Plumber by Trade Pty Ltd and a beneficiary of the Leslie Family Trust. That trust was established in 1998. At all material times he held a QBSA licence of the appropriate class.
- [7] Franjamen Pty Ltd was incorporated on 9 February 2009.
- [8] Clayton Danjal Martin was at all material times the sole director and sole shareholder of Franjamen Pty Ltd and a beneficiary of the Martin Family Trust, which was established in February 2009. On 31 January 2005 he became bankrupt, and was accordingly an “excluded individual” disqualified from holding a QBSA licence for five years. He obtained a licence on 5 March 2010.

- [9] Australian Business Number 71 253 682 564 was registered on 9 February 2009 as that of “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust”. The historical details recorded in the Australian Business Register describe the “entity type” as a partnership and its trading name as “Plumbing by Trade”.
- [10] At all material times “Plumbing by Trade” was a registered business name. According to a Business Names search, it was registered in October 2009, and the persons carrying on business under that name were Mr Leslie and Mr Martin.
- [11] The applicant was the principal contractor for the construction of the State Equestrian Centre.
- [12] By a subcontract agreement dated 4 October 2010 between the applicant and “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust – trading as Plumbing by Trade” (“the Subcontractor”) numbered 3236/2101, the Subcontractor was engaged to provide plumbing and drainage services, being “building work” within the meaning of the *QBSA Act*. The subcontract was executed by the Subcontractor in the following way –

“Signed for [The Trustee For the Leslie Family Trust & The Trustee for the Martin Family Trust]

ABN 71 253 682 564
 QBSA No. 1080326
 By an authorised person

C. Martin
 Signature

In the presence of:

(indecipherable)
 Signature”

The Payment Claim and the Adjudication Decision

- [13] On or about 21 December 2011 a payment claim was made on the applicant. It was headed –

“SUB-CONTRACT NO: 3236/2101
 HYDRAULIC WORKS – STATE EQUESTRIAN CENTRE
 PAYMENT CLAIM IN RELATION TO REFERENCE DATE 21 DECEMBER
 2011”

and expressed to be made under *BCIPA*. It was on letterhead –

“PLUMBING BY TRADE
 Domestic – Commercial – Industrial
 ABN 71 253 682 564”

It was signed –

“Yours faithfully,

Clayton Martin

Partner
 On behalf of Plumbing By Trade”.

Counsel for the applicant submitted that Mr Martin executed the payment claim in the manner he could have been expected to as the director of the corporate trustee of The Martin Family Trust, one of the partners. That may be so, although he might also have inserted “The Trustee of the Martin Family Trust” or “Franjamen Pty Ltd” before “Partner”.

- [14] On 11 January 2012 the applicant responded by a payment schedule addressed to Plumbing by Trade which began “Dear Clayton.”
- [15] An adjudication application was made in the name of “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust – trading as Plumbing by Trade.” The application and other documents including submissions were sent to the second respondent under cover of a letter signed as follows –

“*C. Martin*

Clayton Martin

Partner on behalf of Plumbing By Trade.”

In the submissions the claimant was described as “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust t/a Plumbing by Trade.”

- [16] In its adjudication response the applicant referred to the claimant as “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust trading as Plumbing by Trade ABN: 71 253 682 564.”
- [17] The adjudicator referred to the claimant as “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust – t/a Plumbing by Trade ABN: 71 253 682 564.”

The issues in this application

- [18] The applicant contends that the adjudication decision is void for jurisdictional error for the following reasons:
- (a) No enforceable “construction contract” within the meaning of *BCIPA* existed between the applicant and the first respondent by reason that:
 - (i) The first respondent was not a person which held a licence of the appropriate class under the *QBSA Act*;
 - (ii) The first respondent otherwise entered into the subcontract in breach of ss 56 and 67G of the *QBSA Act*.
 - (b) No payment claim within the meaning of *BCIPA* was made by the first respondent because no person who claimed to be entitled to a progress payment under *BCIPA* served the payment claim.
 - (c) The adjudication decision was not in favour of an identifiable claimant because –

- (i) The adjudication decision does not identify a person who is entitled to payment;
- (ii) The adjudication decision cannot be entered as a judgment because the applicant for judgment cannot be identified from the decision.

The first respondent was not licensed under the *QBSA Act*

[19] The operation of *BCIPA* depends upon the existence of a “construction contract” to which the Act applies.¹ That expression is defined in Schedule 2 to the Act as –

“*construction contract* means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”

[20] Sections 12 and 17 of *BCIPA* provide –

“12 Rights to progress payments

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.”

...

“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.
- (3) The claimed amount may include any amount -
 - (a) that the respondent is liable to pay the claimant under section 33(3); or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within the later of—
 - (a) the period worked out under the construction contract; or

¹ *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235 at [7] per PD McMurdo J.

- (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
- (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.”
- [21] “Progress payment” and “reference date” are relevantly defined in schedule 2 as –
- “*progress payment* means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section—
- (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
- ...”
- “*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;
- ...”
- [22] The applicant’s primary contention is that there was no enforceable construction contract because the first respondent was not relevantly licensed pursuant to the *QBSA Act*.
- [23] Section 42(1) of the *QBSA Act* provides that 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 the Act. By s 42(3) a person who carries out building work in contravention of this prohibition is not entitled to recover any monetary or other consideration for doing so, except as allowed under s 42(4). Under s 42(4) he is effectively limited to recovering his costs – except if the costs are greater than the agreed price, when he is limited to the contract price.
- [24] A licence under the *QBSA Act* may be issued to an individual (that is, a natural person) or a company. In order to be licensed, a company must have a licensed nominee (an individual who holds a licence in his own right).²
- [25] In *Cant Contracting Pty Ltd v Casella Williams* JA said -³

“[33] ... Parliament could not have intended that pursuant to the *Payments Act* an unlicensed contractor could immediately recover the whole of the contract price for doing the work, in the face of the statutory prohibition in

² *QBSA Act* and/or the adjudication decision on it s 31. See also ss 30A and 32.

³ [2007] 2 Qd R 13 at [33]

the *Building Act* on such a contractor recovering any monetary consideration, other than as specified in s 42(4) for doing work under the contract. It is not a sufficient answer to say that the principal might subsequently obtain a judgment entitling it to ‘claw back’ that whole of the contract price.”

Jerrard JA said –⁴

“[44] ... The respondent was not entitled under ss 12 or 13 of the 2004 Act to a progress payment for any building work it had carried out, because s 42(3) of the 1991 Act says so. The progress payment it claimed was a monetary consideration for the building work carried out. ...”

PD McMurdo J said -⁵

“[55] This is a difficulty in the operation of the *Payment Act* in the case of an unlicensed builder, because that builder is not entitled to enforce its contract and, in particular, to recover its contract price. The builder is limited effectively to recovering its costs, according to s 42(4) of the *Building Act*, except that if its costs are greater than the agreed price, the builder is limited to the price: s 42(4)(c). The respondent does not suggest that an unlicensed builder’s ultimate entitlement (or disentitlement) is not according to s 42. It argues only that an unlicensed builder is entitled to progress payments as if s 42 had no operation, although in the final accounting, s 42 applies, and a builder could be ordered to make restitution pursuant to s 100(3) of the *Payments Act*.

...

[61] ... This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder’s entitlement being according to its contract. The long title of the *Payments Act* describes it as an ‘Act to imply terms in construction contracts ...’. It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the *Payments Act* was intended to override the disentitlement according to s 42; the contrary appears. In my view, the *Payments Act* operates only when there is a construction contract of which the terms as to payment are enforceable by the builder.”

[26] In the present case the work the subject of the payment claim was “building work” for which either a “Plumbing and Drainage” or a “Drainage” class licence under the *QBSA Act* and *Regulation* was required. Neither of the corporate trustees held such a licence. The payment provisions in the subcontract were thus not enforceable by the first respondent.

[27] Accordingly, if the claimant was a partnership consisting of the two corporate trustees, neither of which was licensed, it could not avail itself of *BCIPA*.

The applicant’s knowledge

⁴ [2007] 2 Qd R 13 at [44]

⁵ [2007] 2 Qd R 13 at [55], [61].

- [28] One of the attachments to the subcontract was a record of a Tender Interview. It concluded as follows –

“We agreed the above record of interview is an accurate record of the responsibility of both parties for the Works tendered on. This is not formal approval the Subcontractor has been successful on the tendered project.

Signature of Subcontractor	<i>C. Martin</i>
Printed Name of Subcontractor	<i>Clayton MARTIN</i>
Company Name:	<i>Plumbing by trade</i>
Date:	<i>30/9/2010</i>

Signature of Project Manager	<i>BE</i>
Printed Name of Project Manager	<i>Bob Ellis</i>
Company Name:	Walton Constructions (Qld) Pty Ltd
Date:	<i>5.10.10</i>

- [29] At about the time the subcontract was executed, the applicant conducted a searches of the business name “Plumbing by Trade” and ABN 71 253 682 564. It did not know that the companies were the trustees of the trusts.
- [30] At least from December 2011, when Mr David Scott became involved in the administration of the subcontract on its behalf, it administered it on the basis Mr Martin was the trustee of both trusts.

A partnership involving Mr Martin?

- [31] Counsel for the first, fourth and fifth respondents submitted that the two companies Franjamen Pty Ltd and Plumber by Trade Pty Ltd entered into the subcontract as agents for a partnership that consisted of Mr Leslie, Mr Martin and the two companies under the firm name of “Plumbing by Trade”.⁶
- [32] By s 42(7) an unlicensed person who carries out or undertakes to carry out building work in partnership with a person who is relevantly licensed does not contravene s 42.
- [33] Mr Leslie and Mr Martin swore that in January 2009 they made an oral agreement to go into a plumbing business together, splitting any losses and profits on a 50/50 basis and using Plumber by Trade Pty Ltd as the trading entity. Mr Leslie said he knew “that having a BSA licence of the appropriate kind was integral to the operation of the Business and required by law,” and he knew that Mr Martin could not hold such a licence because of his bankruptcy in 2005, and that on that basis they decided to use his licence.
- [34] At Mr Leslie’s suggestion, Mr Martin consulted an accountant, who set up the Martin Family Trust, using a structure similar to the trust of which Plumber by Trade Pty Ltd was trustee. On 9 February 2009 they registered ABN 71 253 682 564 in the name of “The Trustee for the Leslie Family Trust & The Trustee for the Martin Family Trust.”

⁶ First, Fourth and Fifth Respondents’ Outline of Argument at [24] – [25].

- [35] According to Mr Leslie and Mr Martin, from 9 February 2009 to 20 October 2009 they carried on business in partnership. They used ABN 71 253 682 564, used Mr Leslie's QBSA licence, traded "as and through" Plumber by Trade Pty Ltd, and "split the profits 50/50".
- [36] On or about 21 October 2009 they registered the business name "Plumbing by Trade" in their personal names for their use in respect of their business "so that [Mr Martin] could evidence [his] interest in the business."
- [37] They were apparently unaware of s 56, by which a licensed contractor might carry on business under the licence in partnership with an unlicensed person - but only subject to certain conditions, including that no contract to carry out building work or offer or tender to do so be entered on behalf of the partnership except by the licensed contractor, that any such contract, offer or tender be signed by the licensed contractor and be endorsed with the names of the other members of the partnership, and that the unlicensed person not be an excluded individual. Similarly, they were apparently unaware of s 31A, by which a person (whether an individual or a company) was not entitled to a licence if he or it carried on or intended to carry on business under the licence in partnership with an excluded person.
- [38] On 5 March 2010 Mr Martin obtained a licence, and from then they used his licence on all contracts and documentation.
- [39] On or about 1 July 2010 a bank account in the name of "The Martin Family Trust & The Leslie Family Trust T/A Plumbing by Trade" was opened with Suncorp Bank (account no 601857940). The costs of the business were paid primarily from that bank account, with Mr Martin paying some from his personal credit account and being reimbursed out of that account.⁷
- [40] Partnership tax returns were filed by "The Leslie Family Trust & The Martin Family Trust t/a Plumbing by Trade" for the years ended 30 June 2009 and 30 June 2010. They showed the partners as being the two trusts, and that the profits were shared by the two trusts equally. Trust tax returns and financial statements and personal tax returns of Mr Leslie and Mr Martin for the same tax years showed that the income of the two companies was not divided equally between Mr Leslie and Mr Martin, but distributed to a wider number of beneficiaries.
- [41] Invoices for assets purchased on behalf of the business were variously addressed, and are of little probative value in identifying the partners at any particular time.
- [42] That Mr Leslie and Mr Martin were recorded as carrying on business as "Plumbing by Trade" on the Business Names Register is inconclusive as to who was in fact carrying on business under that name.
- [43] Counsel for the first, fourth and fifth respondents submitted that the partnership of the two individuals "merged" into a partnership of the two individuals and the two companies "once the trusts had been set up". But he was unable to give an exact date on which the partnership of four came into being. When challenged as to why the proper conclusion was not that the partnership of the two individuals was replaced by a partnership of the two companies (as trustees for their respective

⁷ The adjudicator's fees were paid out of that account.

trusts), he responded that the companies could not have operated the business because neither of them was licensed. But, of course, a partnership of the two individuals could not have operated the business lawfully while one of them was an excluded person within the meaning of the *QBSA Act*.⁸

- [44] Looked at objectively, the mere fact that they may have erroneously thought that if the partnership of two individuals were replaced by a partnership of the two individuals and the two companies it would not be necessary to obtain a further licence is an insufficient basis from which to infer that it was the intention of the four to operate in partnership. It is more likely that the partnership between the two individuals who had previously been trading in partnership, one of them with a licence, was replaced by a partnership between the two companies, without anyone turning his mind to the need for at least one of the companies to obtain a licence.
- [45] I am satisfied that a partnership consisting only of the two companies as trustees of the respective family trusts was carrying on business under that name at the time the subcontract was executed.
- [46] The evidence is inconsistent with the two companies having entered into the subcontract as agents for a four-way partnership consisting of Mr Leslie, Mr Martin and the two companies under the firm name of “Plumbing by Trade”.
- [47] I find that the subcontractor was the partnership consisting of the two companies as trustees of the respective family trusts.
- [48] It is not necessary for me to consider whether, if the subcontract had been entered into by the two companies as agents for a four-way partnership, non-compliance with s 56 of the *QBSA Act* would have rendered it unlawful and unenforceable by the subcontractor.⁹

The failure to identify the corporate trustees by name

- [49] On its face the subcontract was between the applicant and two trustees. Did the failure to identify the trustees by name invalidate the subcontract?
- [50] By s 31 of *BCIPA* an adjudication certificate may be filed in a court of competent jurisdiction as a judgment debt and enforced as such. To invoke the jurisdiction of a court in this way, it may well be necessary to identify the trustees by name. But that does not, in my view, bear on the validity of the subcontract, the payment claim or the adjudication decision in which the trustees were described by their office rather than by name.
- [51] The following provisions were in part 4A of the *QBSA Act* –

“67G Building contracts to be in writing

- (3) A building contractor commits an offence if—

⁸ By the time the subcontract was executed Mr Martin was no longer an excluded person and he had obtained a licence.

⁹ See *Yango Pastoral Company Pty Limited v First Chicago Australia Limited* (1978) 139 CLR 410.

- (a) the building contractor enters into a building contract, whether as the contracting party or the contracted party for the contract; and
- (b) the building contract is put into writing; and
- (c) the building contract, in writing, does not comply with the formal requirements for a building contract stated in subsection (4).

Maximum penalty—80 penalty units.

- (4) A building contract in writing complies with the formal requirements for a building contract if the contract states the following—

...

- (e) the name of the building contractor who is the contracted party for the building contract;
- (f) the licence number of the building contractor mentioned in paragraph (e), as it appears on the building contractor’s licence card;”

...

“67E Operation of pt 4A

- (1) Subject to any provision of this part that expressly provides that a building contract, or a provision of a building contract, is void, this part does not have effect to make void or voidable a building contract, or a provision of a building contract, even if—
 - (a) in entering into the building contract, or the building contract containing the provision, a party to the building contract commits an offence against this part; or
 - (b) the building contract or the provision of the building contract is inconsistent with a condition to which the building contract is subject under this part.
- (2) However, if a building contract, or a provision of a building contract, is inconsistent with a provision (the *Act provision*) of this part applying to the building contract, the building contract, or the provision of the building contract, has effect only to the extent it is not inconsistent with the Act provision.”

[52] It is not necessary for me to determine whether the identification of the two companies by their office as trustees, but not by their names, was sufficient to satisfy s 67G(4)(e), although arguably it was.¹⁰ As neither of the companies had a licence, s 67G(4)(f) could not be satisfied.

¹⁰ *Simmons v Woodward* [1892] AC 100 at 105; *Australian Commonwealth Shipping Board v Federated Seaman’s Union of Australia* (1925) 35 CLR 462; *Commonwealth v Melbourne Trust Commissioners* (1922) 31 CLR 1.

- [53] Nor is it necessary for me to determine whether non-compliance with the requirements of s 67G(4) rendered the subcontract unlawful and unenforceable by the subcontractor.
- [54] This application relates to the validity of the payment claim and the adjudication decision. The subcontractor was a partnership of the two corporate trustees, neither of which was licensed. The Court of Appeal's decision in *Cant Contracting Pty Ltd v Casella* is directly on point, with the result that the payment claim and the adjudication decision were both void.

Discretion

- [55] Counsel for the first, fourth and fifth respondents submitted that if Mr Martin were entitled to make a payment claim in any event, I should exercise my discretion not to grant the relief sought. Having regard to my factual findings, it is not necessary to consider this argument.

Disposition

- [56] There should be an order declaring the payment claim and the adjudication decision void. I will hear the parties on the form of the order and on costs.