SUPREME COURT OF QUEENSLAND

CITATION:	*AWX Constructions Pty Ltd v IDH Modular Pty Ltd & Anor* [2013] QSC 218
PARTIES:	**AWX CONSTRUCTIONS PTY LTD ACN 118 400 098 (applicant)** **v** **IDH MODULAR PTY LTD ACN 158 878 874 (first respondent)** **BM ALLIANCE COAL OPERATIONS PTY LTD ACN 096 412 752 (second respondent)**
FILE NO:	BS6137 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2013
JUDGE:	Mullins J
ORDER:	**1. The originating application is adjourned to a date to be fixed.** **2. The applicant must pay the first respondent's costs of and incidental to the hearing of the application summarily on 17 July 2013 to be assessed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS' CHARGES ACT (QLD) – where the first respondent was engaged as subcontractor for the supply of modular housing for the purpose of the head contract – where the respondent claimed a charge over money payable under the head contract pursuant to the *Subcontractors' Charges Act* 1974 (Qld) – where the applicant applies pursuant to s 21 of the Act for an order that the claim of charge be cancelled – whether the issues may be disposed of summarily CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the first respondent was engaged as sub-contractor for the supply of modular housing

for the purposes of the head contract – where s 42 of the *Queensland Building Services Authority Act* 1991 (Qld) prohibits undertaking to carry out building work without the appropriate licence – where the respondent was licensed – whether the subcontract required the respondent to engage in building work

Queensland Building Services Authority Act 1991, s 42
Subcontractors' Charges Act 1974, s 21

Dart Holdings Pty Ltd v Total Concept Group Pty Ltd [2012] QSC 158, considered
Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd [2005] 1 Qd R 610, considered
Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liq) [1999] QCA 306, considered

COUNSEL: J K Bond QC and M Jones for the applicant
M Williams for the first respondent

SOLICITORS: Thomsons Lawyers for the applicant
Lenz Moreton for the first respondent

[1] The applicant is the contractor under the head contract with the second respondent as the principal for the design and installation of modular housing at Barron Court and Utah Drive, Moranbah for the principal's employees. The first respondent (the respondent) entered into a subcontract as the subcontractor with the applicant for the supply of modular housing for the purposes of the head contract.

[2] On 26 June 2013 the respondent took steps pursuant to the *Subcontractors' Charges Act* 1974 (the Act) to claim a charge in the sum of $5.7m over money payable or to become payable to the applicant under the head contract.

[3] The applicant applies pursuant to s 21 of the Act for an order that the claim of charge be cancelled. As required by s 21(2) of the Act, the application was heard summarily on the basis of affidavits filed by the parties with no oral evidence.

[4] The basis on which the applicant applies for the cancellation of the charge is that by the subcontract the respondent undertook to carry out work which was building work within the meaning of the *Queensland Building Services Authority Act* 1991 (the QBSA Act) when it did not hold a contractor's licence of the appropriate class under the QBSA Act, thereby contravening s 42 of the QBSA Act, and was therefore not entitled to a charge under the Act, in reliance on *Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liq)* [1999] QCA 306 at [12] per de Jersey CJ and Davies JA. It is sufficient for the applicant to show that any part of the work which the respondent undertook to carry out was "building work" for which it should have been licensed under the QBSA Act: *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd* [2012] QSC 158 at [39].

[5] The respondent contends that the subcontract was for the supply of chattels and did not compel or require the respondent to carry out "building work" within the meaning of the QBSA Act. It is argued on behalf of the respondent that it is only

where the contract provides for the respondent to carry out its obligations in a specified way that falls within the definition of "building work" under the QBSA Act that the subcontract itself can be characterised as obliging the respondent to carry out building work. In other words, where it is possible for the respondent to fulfil any of its obligations under the subcontract in at least one way that would not be characterised as carrying out building work, the respondent has not undertaken to carry out building work.

[6] There is a factual dispute evident from the affidavits filed by the parties as to the precise manner by which the respondent performed the subcontract, so that the applicant endeavours to establish its entitlement to the cancellation of the charge solely on the basis of the proper construction of the subcontract as to what the respondent undertook to do.

[7] The onus is on the applicant to show that the respondent has "no arguable, or fairly arguable" claim to a charge or "that the basis of the charge claimed was untenable": *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] 1 Qd R 610 at [6]. The respondent's submission, that it did not undertake to carry out building work under the subcontract, if it could fulfil an obligation imposed under the subcontract in a way that did not amount to carrying on building work, is a fairly arguable approach to the construction of the subcontract for the purpose of determining whether the respondent undertook to carry out building work. In light of the onus that the applicant bears on the application, that is the approach that I will take to the construction of the provisions imposing an obligation on the respondent that are relied upon by the applicant on this application.

The definition of "building work"

[8] The definition of "building work" is found in schedule 2 to the QBSA Act and relevantly means:

> "(a) the erection or construction of a building; or
> …
> (c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or
> (e) any site work (including the construction of retaining structures) related to work of a kind referred to above; or
> (f) the preparation of plans or specifications for the performance of building work; or
> … ."

[9] The definition of "building" in schedule 2 to the QBSA Act includes "any fixed structure". There is no definition of "site work", but the use of "site work" in paragraph (e) in the definition of "building work" to describe work related to work of a kind referred to in the preceding paragraphs of the definition relevantly links the site to the place where the erection or construction of the building in the sense of creating a fixed structure occurs.

[10] The definition of "carry out" is also in schedule 2:

> "***carry out,*** for building work (other than for part 4A) means any of the following-
> (a) carry out the work personally;

(b) directly or indirectly cause the work to be carried out;
(c) provide building work services for the work."

[11] The definition of "building work services" is set out in schedule 2 as:

"***building work services*** means 1 or more of the following for building work-
(a) administration services;
(b) advisory services;
(c) management services;
(d) supervisory services."

[12] The definition of "administration services" for building work is in schedule 2 and includes:

"(d) arranging for certificates, including certificates from a local government, to be issued;"

[13] The definition in schedule 2 of "advisory services" for building work relevantly includes "the provision of advice or a report about building work."

The subcontract

[14] The subcontract is based on AS4912-2002 general conditions of contract for supply of goods (incorporating amendment No 1), as amended by the parties (the general conditions). It includes Annexures Parts A to E to AS4912-2002, deeds of parent company guarantee, Annexure 1 Scope of Works (the Scope of Works), Annexure 2 Programme, Annexure 3 Quotations, Annexure 4 Drawing Transmittals, Annexure 5 Acceptance Testing and Defects Forms and Annexure 6 Claim for Payment Templates.

[15] Clause 3.0 of the Scope of Works sets out the precedence of documents (in order of ranking) for the subcontract as:

"Lightwave architectural specification;
Lightwave architectural drawings;
BMA specification;
Nerantec Group structural drawings;
Hydraulic Design Solutions hydraulic drawings;
Special conditions of contract;
Contract conditions;
Head contract conditions;
Scope of works (this document);
Annexures not otherwise described above."

[16] The central obligations of the parties are set out in clause 2.1 of the general conditions:

"In accordance with the requirements of the *Contract:*
(a) the *Supplier* shall manufacture, supply and *deliver* the *goods* by not later than the *date for delivery*; and
(b) the *Purchaser* shall accept the *goods* and pay the *contract sum* to the *Supplier* in the manner set out in this *Contract.*"

[17] The *contract sum* is defined in clause 1 to mean $21,045,785 excluding GST and any additions or deductions which may be required to be made under the contract.

[18] The central obligation of the respondent as the supplier of goods in the subcontract reflects the quotations incorporated in Annexure 3 for the manufacture of the modular dwellings and transport to site with installation not included. As to be expected of the general conditions in AS4912-2002, they are directed at a supply of goods, incorporating warranties in clause 9.2 such as the goods will upon delivery be suitable for the purpose stated in item 5 (for use as residential dwellings for the principal's Moranbah accommodation project), of merchantable quality, free of design defects and new. Clause 19.1 specifies the applicant as the party responsible for unloading the goods at the delivery place. Clause 21 concerns acceptance or rejection of goods and the defects liability provision (Clause 22) contemplates that the goods will still be goods for the purpose of the carrying out of rectification.

[19] Clause 34 is an amendment to the general conditions that incorporates a special condition of supply that expresses that the applicant cannot reduce the scope of the separable portion relating to the Barron Court stage unless the respondent is failing to perform against the programme, but the Utah Drive stage is expressed to be subject to the reduction of the scope relating to particular types of dwellings to the maximum reduction of 24 dwellings. The clause then states:

> "AWX will issue IDH with invoices for payment for any back charges or negative variations resulting, except in the instance where the scope of works is reduced. This will be a negative variation reducing the contract value, but will not be offset against a progress claim. Invoices issued to IDH must be paid in compliance with the Building and Construction Industry Payments Act."

[20] The definition of "Scope of Works" in clause 1 of the general conditions incorporates the Scope of Works which gives content to and modifies the application of the general conditions. Clause 1.0 of the Scope of Works specifies that the Scope of Works document "should be read in conjunction with the other parts of this *AWX-IDH AS4912-2002 Contract For Supply Of Goods*." Following the precedence given to the general conditions over the Scope of Works by clause 3.0 of the Scope of Works (which would usually be taken into account to resolve any ambiguities between them) would not give effect to the clear purpose of the Scope of Works. The issue that is raised by the application is, in effect, whether the provisions of the Scope of Works modify what was otherwise clearly a subcontract for the supply of goods, so as to make it a contract pursuant to which the respondent undertook building work within the meaning of s 42 of the QBSA Act.

The applicant's four arguments

[21] The applicant developed four arguments by reference to specific parts of the subcontract to advance its contention that the respondent undertook to carry out "building work" as defined. In summary, these arguments are the respondent undertook to:

(a) carry out building work within subparagraph (e) of the definition of "building work", because it undertook to carry out "site work … related to work of a kind referred to above [in subparagraphs (a) and (c) of the definition]";

(b) provide "building work services" for building work in the form of "advisory services" by agreeing to provide advice about building work;

(c) provide "building work services" for building work in the form of "administrative services"; and

(d) carry out building work within subparagraph (f) of the definition of "building work", because it undertook "the preparation of plans or specifications for the performance of building work."

Did the respondent undertake to carry out site work?

[22] The description of goods to be supplied under the subcontract is specified in clause 1.1 of the Scope of Works as 107 prefabricated modular dwellings (of seven different types) constructed within the approved premises of the respondent (at Murwillumbah) and delivered to the site at Moranbah. Although each modular dwelling takes on a different character when affixed to land, the modular dwelling in its manufactured state is simply a large chattel.

[23] For the first argument, the applicant pointed to a number of specific provisions in the subcontract by which it submitted the respondent undertook to carry out site work.

[24] The argument commenced with a reference to the opening paragraph of the Scope of Works:

> "The supplier shall supply and assist with the installation of dwellings supplied by IDH Modular at the abovementioned project over the two nominated sites at Moranbah, Queensland. The scope of works shall include but is not limited to the following items."

[25] By itself, that paragraph does not advance the argument, as it is the balance of the document that needs to be considered to ascertain whether there were any requirements for assisting with the installation of dwellings supplied by the respondent that amounted to building work.

[26] In contrast to the applicant's approach of analysing specific provisions in the subcontract, the respondent considered the overall effect of the Scope of Works in conjunction with the general conditions in the course of analysing those obligations of the respondent that were highlighted by the applicant for the purpose of this argument. The respondent's conclusion taking this approach was that the parties excised from the respondent's obligations those which would be categorised as building work. The respondent acknowledges that there are some indications to the contrary in specific provisions, but contends the construction of those provisions is at least ambiguous in the light of the clear overriding intent of the parties that the respondent was supplying goods only to the applicant at the Moranbah site. In order to deal with both parties' submissions, it is necessary to consider those specific provisions that are relied on by the applicant.

[27] Clause 1.3 of the Scope of Works expands on "acceptance testing" provided for in clause 18 of the general conditions. Clause 1.3 of the Scope of Works provides for acceptance testing to be undertaken by representatives of the principal and the respondent at six specified stages. The applicant focuses on stage 6 which is the delivery stage inspection which lists out the items to be covered for that inspection that must be ticked off by the principal, the respondent and the applicant on the form that applies to that inspection. The applicant argues that any work undertaken by the respondent on the Moranbah site, even if it is inspecting the modular dwellings before they have been unloaded from the truck or "tutelage" given by employees of the respondent to facilitate the unloading must be characterised as doing work on site. The respondent submits that "site work" is not defined in the

QBSA Act and that it is arguable that inspection of the chattels on the truck for defects while they remain in the state of being chattels is not site work. I accept that this is arguable.

[28] Mr Reynolds, in paragraph 22 of his affidavit filed on 11 July 2013, states that "Tutelage is the detailed instruction of tutorial on how to undertake a function or activity, for example, the lifting and complexing of a modular building". There is no demur from the respondent's deponents as to that meaning of tutelage. The tutelage is in relation to each new type of dwelling and in the context where the obligation to unload the truck is imposed on the applicant. The contract does not specify where the tutelage is to take place and on that basis it is arguable that it is not site work. Even if the tutelage took place on the site, it is arguable that it relates to the unloading of the chattel and no more. It is not sufficiently clear from the subcontract that this provision required the respondent to carry out site work within the meaning of paragraph (e) of the definition of "building work" to resolve the issue summarily in the applicant's favour.

[29] Clause 1.6.16 provides:

> "IDH will provide a business representative upon delivery of each new building type to provide knowledge transfer and assistance in the unloading and complexing process."

[30] First, clause 1.6.16 does not say where the business representative of the respondent provides the "knowledge transfer" and "assistance". Second, to the extent that knowledge transfer and assistance are provided in the unloading and complexing of each new building type, it is provided on delivery and that is arguably undertaken in relation to the modular dwelling in its state as a chattel, and not as site work even though the applicant may then have used it for the complexing process.

[31] It is common ground the term "complexing" has acquired an industry meaning. Mr Reynolds on behalf of the applicant explains in paragraph 12 of his affidavit filed on 11 July 2013:

> "The term 'complexing' is a term used in relation to modular building construction and installation. It is a reference to the site based process of preparing the site and foundation systems and services in readiness for the installation of a number of independent building modules fabricated in a factory, and then configuring and connecting them together into their final and permanent location to create the finished building or buildings suitable for its/their intended functional purpose."

[32] The meaning of "complexing" suggested by Mr Brooks on behalf of the respondent in paragraph 7 of his affidavit filed on 16 July 2013 is similar:

> "In my experience, 'complexing is a modular/transportable industry term used to describe the supervision or the physical installation and finishing off of the modules on-site to form a building/dwelling which could be considered ready for habitation. This act could be considered building works dependant (*sic*) on your level of involvement in the scope and the cost associated to 'complex' the modules."

[33] There is an overlap between clause 1.6.16 and clause 1.6.51. To the extent that the applicant relies on the argument it promotes for clause 1.6.51 in connection with clause 1.6.16, I will deal with that argument in relation to clause 1.6.51.

[34] In relation to clause 1.6.19 of the Scope of Works which deals with remedying defects, the applicant relies particularly on defects identified and recorded during delivery stage inspection on the back of the truck prior to unloading in clause 1.6.19.2. In conjunction with clause 22 of the general conditions requiring the respondent to carry out defect rectification within a time period which inevitably meant that it was an obligation to carry out defect rectification on site, the applicant argues that this was site work on the chattels that related to the installation of the chattels as a building on the site. The parties were obviously alert to this potential, as clause 1.6.19.2 also provides:

> "IDH may opt for the repairs to be undertaken by AWX and back charged to IDH."

[35] The point made by the respondent is that on the construction of clauses 22 and 34 of the general conditions and the option that was expressly conferred by clause 1.6.19.2 of the Scope of Works, there were other means for the respondent to deal with defects which did not oblige it to carry out site work of a kind that was within the definition of building work under the QBSA Act. Again, this is an arguable position against the construction urged by the applicant.

[36] The critical provisions of the Scope of Works are:

> "1.6.51 IDH will supply labour for knowledge transfer upon commencement of site complexing works. The only provision by AWX whilst IDH labour is in Moranbah will be basic share accommodation. That includes a total labour supply in Moranbah and all other associated costs for 25 men for four weeks (or other arrangement) 4250 man hours in total. IDH and AWX will coordinate the timing and volume of labour prior to site delivery commencing. A separate subcontract agreement must be entered into relating to the onsite works, this will be for a nil value, with the labour allowance included within this supply contract.
>
> 1.6.52 Given the outlined labour allowance any site visits requested by AWX to Moranbah for assistance or defects rectification are deemed to be included as per the above clause."

[37] Although the applicant concedes that the parties contemplated that a separate subcontract agreement would be entered into relating to onsite works required to be performed by the respondent's employees, the labour allowance for that onsite work and defects rectification is patently included in the contract price for the subcontract. It is a significant labour component for which provision has been made. This indicates that the parties agreed to inflate the subcontract price for the supply of the goods by the value apportioned by them to the labour allowance for works to be provided under a separate contract. The parties were free to calculate the contract price of their subcontract for the supply of goods in whatever manner they agreed upon. It is arguable that they have evinced an intention to excise from the subcontract any works that would be characterised as building work by the express terms of clause 1.6.51 and the other provisions relied on by the respondent

(such as clauses 1.6.49 and 1.6.50) which show that the parties were intent to avoid infringing s 42 of the QBSA Act.

[38] Clauses 1.6.51 and 1.6.52 of the Scope of Works are unusual provisions and to the extent that it is arguable that there is some ambiguity about their operation, it is not appropriate to reach a conclusion on their construction or about their effect on the construction of other provisions of the subcontract on a summary basis. The applicant fails to discharge its onus on its first argument in view of the existence of these clauses.

Did the respondent undertake to provide advisory services?

[39] The applicant adopts the position that any provision under the subcontract by which the respondent had to give advice (such as clause 1.6.16) falls within the definition of "advisory services", as the respondent agreed to provide advice about building work. It is equally arguable that the advice was about the modular dwellings as chattels. The applicant's reliance on clause 1.6.51 of the Scope of Works in relation to this second argument raises the same issue that applies to the first argument that it is equally arguable that clause 1.6.51 acknowledges that the supply of labour for providing advice was to be undertaken under a different subcontract.

[40] It is arguable that the obligation of the respondent to provide a written summary of its preferred practice in relation to "safe and damage free lifting of the modules into final installation locations" is caught within those functions that clause 1.6.51 anticipates will be supplied under a different subcontract. Clause 1.6.17 also deals with provision of advice by the respondent, but in relation to a generic description of the respondent's preferred method of installing the dwellings "on a hypothetical site". This is another provision that does not relate to the particular building work, but is arguably also indicative of the intention of the parties to avoid s 42 of the QBSA Act.

[41] Clause 1.6.26 of the Scope of Works is another provision that can arguably be treated as concerning the supply of labour by the respondent that will be covered by a different subcontract as acknowledged by clause 1.6.51. The applicant fails to discharge its onus on the basis of the second argument.

Did the respondent undertake to provide administration services?

[42] Under clause 1.6.49 of the Scope of Works, the respondent was required to procure the Form 16 approval for the "prefabricated construction" and under clause 1.6.50 the applicant was to procure the Forms 15 and 16 approvals for the works required to be undertaken or completed on site. It is arguable that even though the Form 16 approval relates to a building, the parties have acknowledged by these separate provisions that the respondent's obligation was in respect of obtaining that form for the modular dwelling when it was still a chattel, in contrast to the applicant's obligations when the modular dwellings were transformed on site. The applicant fails to discharge its onus by reference to the third argument.

Did the respondent undertake to prepare plans or specifications?

[43] Although clause 1.6.10 of the Scope of Works required the respondent to provide detailed shop drawings and as constructed drawings "to facilitate set out and installation of foundations and columns", the drawings provided were in respect of

the modular dwellings as chattels which was what the respondent was contracted to supply. The applicant's fourth argument does not assist in the discharge of its onus.

Orders

[44] The applicant has failed to discharge the onus to show on a summary basis that there is no arguable claim to a charge. The procedure for seeking a summary determination of a case for cancellation of a charge under s 21 of the Act is generally used by an affected party in a case that is appropriate for summary determination. The material filed by the parties shows that there is still an issue to be determined by reference to evidence of whether the respondent performed building work under the subcontract by the manner in which it performed its obligations under the subcontract. In addition, I have not finally determined all the construction arguments put forward by the applicant, as there are ambiguities in the provisions of the subcontract that may permit recourse to evidence to assist in finally determining the issue of construction. Although the respondent has been successful in resisting the determination of the cancellation of the charge on a summary basis, the application for cancellation of the charge should remain extant to enable resolution after a full hearing involving all relevant evidence.

[45] At the conclusion of the summary hearing, the parties agreed that costs should follow the event. The respondent was successful in resisting the summary cancellation of its charge. Even though the formal order in relation to the application is that it will be adjourned, the success of the respondent should be reflected in an order for costs in its favour. I therefore make the following orders:

1. The originating application is adjourned to a date to be fixed;

2. The applicant must pay the first respondent's costs of and incidental to the hearing of the application summarily on 17 July 2013 to be assessed.