

# SUPREME COURT OF QUEENSLAND

CITATION: *McCarthy v State of Queensland* [2013] QCA 313

PARTIES: **PATRICK JOHN McCARTHY trading as  
P J McCARTHY COMMERCIAL AND RESIDENTIAL  
BUILDERS**  
(applicant)  
v  
**THE STATE OF QUEENSLAND through the  
DIRECTOR GENERAL, DEPARTMENT OF HOUSING  
AND PUBLIC WORKS**  
(respondent)

FILE NO/S: Appeal No 4784 of 2013  
DC No 75 of 2012

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil) – Further Order

ORIGINATING COURT: District Court at Toowoomba

DELIVERED ON: 18 October 2013

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Muir, Gotterson and Morrison JJA  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Paragraph [4] of the orders made by this Court on  
20 September 2013 be varied to provide that the  
respondent pay the applicant \$307,690.55 being \$272,987  
plus interest thereon of \$34,703.55.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND  
RELATED CONTRACTS – REMUNERATION –  
STATUTORY REGULATION OF ENTITLEMENT TO  
AND RECOVERY OF PROGRESS PAYMENTS –  
PAYMENT CLAIMS – where the applicant served a  
payment claim on the respondent pursuant to s 17 of the  
*Building and Construction Industry Payments Act 2004* (Qld)  
(the Act) – where the respondent failed to serve a payment  
schedule on the applicant under s 18 of the Act – where, in  
accordance with s 19 of the Act, the respondent was ordered  
to pay the applicant \$272,987, being the unpaid portion of the  
amount claimed – where the parties were given liberty to file  
and serve written submissions in relation to the award of  
interest – where, in reliance upon s 15 of the Act, the

applicant seeks interest of \$34,703.55, calculated by reference to the rate specified in the contract for overdue payments – where s 17 to s 20 of the Act do not contemplate the recovery of interest on the amount claimed in a payment claim, unless the interest is part of the progress payment claimed – whether summary judgment should have been granted in respect of interest as well as principal

*Building and Construction Industry Payments Act 2004* (Qld), s 15, s 17, s 18(5), s 19

COUNSEL: No appearance by the applicant, the applicant’s submissions were heard on the papers  
No appearance for the respondent

SOLICITORS: Flehr Law for the applicant  
No appearance for the respondent

- [1] **MUIR JA:** When reasons were published in this matter on 20 September 2013, the parties were given liberty to file and serve written submissions in relation to the award of interest within five days. Such submissions were filed only by the applicant. In his submissions, the applicant sought interest of \$34,703.55 in respect of the period between 11 October 2012 and 20 September 2013; 11 October 2012 being the date after the due date for payment claim 17. The interest was calculated at the rate specified in the contract in respect of overdue payments.
- [2] Section 15 of the *Building and Construction Industry Payments Act 2004* (Qld) (the Act) relevantly provides that interest is payable on “the unpaid amount of a progress payment that has become payable at the greater of ... the rate prescribed under the *Civil Proceedings Act 2011*, section 59(3) for a money order debt ... [or] the rate specified under the contract”. The applicant sued to recover the amount of a progress payment by way of enforcing the rights conferred on him by s 17 and s 19 of the Act, having served a payment claim on the respondent pursuant to s 17 of the Act. The respondent failed to serve a payment schedule on the applicant and, in consequence, the respondent became liable to pay the applicant the amount claimed “on the due date for the progress payment to which the payment claim relates”.<sup>1</sup>
- [3] Under s 19, the applicant was entitled to recover the unpaid portion of the amount claimed from the respondent as a debt.<sup>2</sup> Sections 17 to 20 inclusive do not contemplate the recovery of interest on the amount claimed in a payment claim, unless that interest is part of the progress payment in respect of which a payment claim is made. However, the applicant’s statement of claim sought interest on the outstanding amount of the progress payment pursuant to the terms of the contract. The application for summary judgment was broad enough to cover the interest claim and interest was sought on the hearing of the summary judgment application.
- [4] On the hearing of the summary judgment application, and on appeal, the only defences raised by the respondent concerned the validity of the subject payment claim. The respondent failed in that regard on appeal. There would thus appear to be no valid reason why summary judgment should not have been granted in respect

<sup>1</sup> *Building and Construction Industry Payments Act 2004* (Qld), s 18(5).

<sup>2</sup> *Building and Construction Industry Payments Act 2004* (Qld), s 19(2)(a)(i).

of interest as well as principal. There is no debate about the quantification of the applicant's interest claim. Accordingly, it is ordered that paragraph [4] of the orders made by this Court on 20 September 2013 be varied to provide that the respondent pay the applicant \$307,690.55 being \$272,987 plus interest thereon of \$34,703.55.

- [5] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.
- [6] **MORRISON JA:** I agree with the reasons of Muir JA and the order he proposes.