

SUPREME COURT OF QUEENSLAND

CITATION: *Eco Steel Homes Pty Ltd v Hippo's Concreting Pty Ltd & Ors*
[2014] QSC 135

PARTIES: **ECO STEEL HOMES PTY LTD**
ACN 146 871 195
(applicant)
v
HIPPO'S CONCRETING PTY LTD
ACN 130 068 772
(first respondent)
and
JENNIFER WYATT
(second respondent)
and
AUSTRALIAN BUILDING & CONSTRUCTION
DISPUTE RESOLUTION SERVICE PTY LTD
ACN 165 369 077
(third respondent)

FILE NO: 3664 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 27 August 2014

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2014

JUDGE: Daubney J

ORDERS:

- 1. The originating application filed 16 April 2014 is dismissed;**
- 2. The applicant shall pay the respondents' costs of and incidental to the application on the standard basis.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant seeks a declaration that the adjudicator's decision is void for jurisdictional error – where the applicant contends that the payment claims did not comply with s 17 of the *Building and Construction Industry Payments Act 2004* (Qld)

(“*BCIPA*”) – where the applicant contends that prior proceedings instituted by the first respondent in the Magistrates Court prevent the first respondent from having recourse to the adjudication process under *BCIPA* – where the applicant contends that it did not enter into contractual agreement with the first respondent – whether for these reasons the adjudicator’s decision is void for jurisdictional error

Building and Construction Industry Payments Act 2004 (Qld), ss 5, 17 and 100

Beckhaus Civil Pty Ltd v Brewarrina Council [2002] NSWSC 960

Paynter Dickson Constructions Pty Ltd v JF & CG Tilston Pty Ltd [2003] NSWSC 869, cited

Walter Construction Group v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266, cited

COUNSEL: C Upton for the applicant
 The first respondent appeared on his own behalf
 No appearance for the second respondent
 No appearance for the third respondent

SOLICITORS: PPCS Lawyers for the applicant
 The first respondent appeared on his own behalf with E K Wildon assisting
 No appearance for the second respondent
 No appearance for the third respondent

- [1] This is an application to have an adjudication decision made by the second respondent pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) (“*BCIPA*”) declared void, and for consequential relief.
- [2] It is not in issue that, between July and October 2013, the first respondent, Hippo’s Concreting Pty Ltd (“Hippo’s”) performed construction works for the benefit of the applicant, Eco Steel Homes Pty Ltd (“Eco Steel”) on projects at South Pine, Dakabin and Urangan. The works comprised, in the majority, concreting and block work. Hippo’s rendered tax invoices to Eco Steel. Eco Steel did not, however, pay all those tax invoices. It disputed that it had a contract with Hippo’s for the performance of the works. The basis for the contention that there was no relevant contract between Eco Steel and Hippo’s is opaque. Hippo’s was retained to undertake these works by one Brendon Corrie, who was described as the ‘construction manager’ for ‘Eco Steel Homes’ in email and other correspondence, and who utilised what appears to be Eco Steel’s logo in his correspondence. There is no suggestion that, at the time Hippo’s performed the works, Eco Steel disputed Mr Corrie’s authority to retain Hippo’s. On the contrary, as was properly conceded before me by counsel for Eco Steel, Eco Steel retained the benefit of the works performed by Hippo’s on Eco Steel’s projects. It was also the case, as was conceded by Eco Steel’s counsel, that Eco Steel in fact paid at least for part of the works performed by Hippo’s at the request of Brendon Corrie.

- [3] Be that as it may, in November 2013, Hippo's commenced proceedings in the Magistrates Court at Caboolture seeking recovery of the monies it claimed were owed to it by Eco Steel. Eco Steel filed a defence and counterclaim on 17 January 2014, and also issued a third party notice and statement of claim. Hippo's filed a reply and answer on 13 January 2014.
- [4] On 12 February 2014, Hippo's resorted to the processes permitted under *BCIPA* by serving on Eco Steel a payment claim for a progress payment of \$33,491.29, including GST. The payment claim was in the form of three emails with attached invoices. These emails sought payment of works done at Lot 1, 2, 3 Pulgul Street, Urangan, 12 Braxlaw Crescent, Dakabin and Lot 2, South Pine Road, Everton Park. The due date for the progress payment was 26 February 2014. On 5 March 2014, Hippo's served Eco Steel with a notice of intention of adjudication, under *BCIPA*. On 12 March 2014, Eco Steel served a payment schedule, pursuant to s 18 of *BCIPA*, by which it detailed its reasons for not paying Hippo's invoices.
- [5] On 25 March 2014, Hippo's lodged an adjudication application with the third respondent. The application was referred to the second respondent ("the adjudicator") on 26 March 2014. Acceptance of the adjudication application was served on Hippo's and Eco Steel on that same day. The adjudicator was provided with an adjudication response by Eco Steel on 28 March 2014. Both parties provided further submissions at the request of the adjudicator, within the time specified.
- [6] On 11 April 2014, the adjudicator made an adjudication decision in favour of Hippo's for payment of the sum of \$29,689.84. Eco Steel now contends that the adjudicator's decision ought be declared void for jurisdictional error.
- [7] The first argument advanced on behalf of Eco Steel attacked the payment claims delivered by Hippo's and contended that the claims did not comply with the requirements of s 17 of *BCIPA* in that:
- (a) contrary to s 17(2)(c) they did not 'state that [the payment claim] is made under [*BCIPA*]';
 - (b) the payment claim referenced INV-0011 dated 10 July 2013 in the sum of \$8,129.84 had not previously issued or been served on Eco Steel;
 - (c) contrary to s 17(5) Hippo's served more than one payment claim on the applicant in relation to a reference date.
- [8] As to the first of these arguments, each of the payment claims was, in fact, endorsed with the words, 'This is a payment claim made under the Building and Construction Building Act 2004'. Eco Steel's argument was that the misdescription of the name of the legislation meant that the payment claims failed to comply with the requirements of s 17(2)(c). The purpose of that subsection is clear – it is to ensure that notice is given on the face of a payment claim that the claimant is invoking the procedure for recovering progress payments contained in Part 3 of *BCIPA*. Despite the misnomer, I consider that the notification contained on each of the payment

claims was sufficient to achieve that statutory purpose, and ought be regarded as substantial compliance with the requirements of the subsection.¹

[9] In relation to the second point, there was no issue that Hippo's had served on Eco Steel a payment claim referenced INV-0011, but the document which was served was for a greater amount, namely \$13,499.84. It appears that, between the time that original version was issued and the payment schedule was prepared for the purposes of the adjudication, Eco Steel in fact paid part of the monies owing under that invoice and that, by an automatic operation of the accounting software used by Hippo's, the amount on the invoice was reduced to the net amount owing of \$8,129.84. I should note that I am not completely satisfied on the material before me that Eco Steel had not, in fact, been served with the version of INV-0011 in the sum of \$8,129.84 before the adjudication process was invoked. But even if that were not the case, it is clear that the version of INV-0011 with which Eco Steel undoubtedly was served, did contain the detail relating to the amount ultimately ordered to be recovered, namely \$8,129.84. The payment claim originally served on Eco Steel correctly stated the amount of the progress payment which Hippo's claimed to be payable. The fact that the quantum was subsequently reduced by reason of an interim payment by Eco Steel does not detract from the veracity of the payment claim.

[10] As to the third argument, s 17(5) provides that:

“A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.”

In this matter one of the payment claims was served three times on the same day. Thus there were multiple servings of the same payment claim. There were not multiple servings of different payment claims in relation to the same reference date. The repeated serving of the same payment claim did not contravene s 17(5).

[11] In short, there is nothing in any of the points raised by Eco Steel under s 17 of *BCIPA* to found a jurisdictional error by the adjudicator.

[12] The second argument advanced on behalf of Eco Steel was that Hippo's resort to the processes permitted under *BCIPA* was an abuse of process due to Hippo's previous institution of proceedings in the Magistrates Court. It was said that Hippo's ought be 'held to its election' to pursue its claim for monies owing in the Magistrates Court. Alternatively, it was said that Hippo's was estopped from pursuing the process under *BCIPA*.

[13] The central proposition which underpinned these submissions on behalf of Eco Steel, was that Hippo's had made an irrevocable election to pursue its claim by the proceedings in the Magistrates Court, and that, by instituting those proceedings, it had given away what was described as an 'inconsistent right' to resort to the processes provided for under *BCIPA*.

[14] These arguments fail *in limine*. The right to access the statutory procedures provided for under *BCIPA* and the right to pursue curial remedies are not inconsistent. Counsel for Eco Steel could point me to no authority for the proposition that the rights conferred under *BCIPA* and the rights to redress through

¹ See, for comparison, *South East Civil & Drainage Contractors Pty Ltd v AMGW Pty Ltd* [2013] 2 Qd R 189.

the courts are inconsistent in the manner alleged. This is not surprising, particularly in view of the express wording of s 5 of *BCIPA*, which provides:

“A claimant’s entitlements and remedies under this Act do not limit –

- (a) another entitlement a claimant may have under a construction contract; or
- (b) any remedy a claimant may have for recovering the other entitlement.”

[15] Moreover, s 100 of *BCIPA* provides:

“Effect of pt 3 on civil proceedings

- (1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract –
 - (a) may have under the contract; or
 - (b) may have under part 2 in relation to the contract; or
 - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.
- (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal –
 - (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
 - (b) may make the orders in considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.”

[16] In *Paynter Dickson Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869, Bergin J succinctly stated as follows:

“The claims, responses and adjudication process under *the Act* do not affect any rights that a party to a construction contract may have under the contract and do not affect any civil proceedings arising under such a contract; except that a court or tribunal must allow for any amount paid pursuant to a claim or an adjudication determination under *the Act* and may make orders for restitution of any amount so paid or any other orders considered to be appropriate (s. 32).”²

[17] *BCIPA* does not affect parties’ contractual rights, or the remedies which parties have recourse to in order to enforce or vindicate those rights. The contractual rights and statutory rights conferred by *BCIPA* co-exist in a dual system which is expressly contemplated by the legislation. As has been said: “The framework of the Act is to create a statutory system alongside any contractual regime.”³

² At [26].

³ *Beckhaus Civil Pty Ltd v Brewarrina Council* [2002] NSWSC 960, per Macready AJ at [60], note that there was no challenge to these findings in the appeal from Macready AJ’s order for summary

- [18] Accordingly, Eco Steel has not, by its second argument, identified any jurisdictional error by the adjudicator.
- [19] The third argument advanced by Eco Steel relied on its assertion that it had not contracted with Hippo's. It reprised the contention that Brendon Corrie had somehow acted in breach of, or beyond his authority as agent for Eco Steel in retaining Hippo's. I have referred above to the conceded factors which render this argument less than attractive. Be that as it may, the adjudicator dealt with this question as follows:

"No Agreement

33. The respondent in the response asserted it did not retain the services of the claimant and goes on to assert that at best, the claimant was engaged by a third party in his own capacity, in breach and beyond his authority as agent to act on behalf of the respondent.
34. Because the respondent merely referred to the court proceedings in the payment schedule but did not include them, it would seem that this objection was not specifically raised in the payment schedule by the respondent. However, as the existence of a construction contract is a critical to my jurisdiction to decide the adjudication, I consider that I am obliged to consider it. To afford the claimant the opportunity to make submissions for reasons of according procedural fairness and natural justice to the claimant I requested further submissions therefore giving the opportunity for the claimant to respond (Request 2). Both parties made a response to my request in accordance with the timeframes set by me.
35. The claimant in its response to my request says Brendon Corrie, Supervisor of the respondent *'initially did the contract and gave direction for us to commence works for the respondent'* and provides and refers to an email contained in the application.
36. The respondent says in its response to the claimant's response that Mr Corrie sent emails from (sic) his own email address and not the respondent's. The respondent also says the claimant should seek action against Mr Corrie for misrepresentation.¹⁰
37. The Act in Schedule 2 defines construction contract in terms as follows:
"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".
38. On the basis of the information provided to me, I am satisfied for the purposes of the adjudication that a construction contract or other arrangement existed because:
- a. I am permitted to consider only those matters set out in section 26(2) of the Act and accordingly, am not permitted to make a decision based on alleged misrepresentation, or any purported breach of another contract concerning the contract between Mr Corrie and the respondent;

- b. The respondent does not dispute that the work was carried out but only that Mr Corrie was acting outside his authority in asking for it to be carried out by the claimant;
- c. Clearly, the respondent has had the benefit of the construction work carried out and claimed in the payment claim;
- d. The respondent has made some payment for the work¹¹.
- e. The claimant has provided some evidence to support acceptance and a direction to proceed (refer paragraph 29).

39. I reject the respondent's challenge to my jurisdiction on the basis that there was no agreement between the parties for the work to be carried out."

[20] The findings made by the adjudicator were clearly open on the material before her. Eco Steel has not identified any error of approach made by the adjudicator in determining the question of whether Eco Steel had contracted with Hippo's. Beyond, in effect, complaining that the adjudicator should not have reached the conclusion that she did, Eco Steel has not identified any jurisdictional error by the adjudicator.

[21] None of the arguments advanced on behalf of Eco Steel have persuaded me that the adjudication decision was infected by jurisdictional error. Accordingly, there will be the following orders:

1. The originating application filed 16 April 2014 is dismissed;
2. The applicant shall pay the respondents' costs of and incidental to the application on the standard basis.