

# SUPREME COURT OF QUEENSLAND

CITATION: *Re: Marveldale Pty Ltd* [2015] QSC 208

PARTIES: **MARVELDALE PTY LTD**  
ACN 050 411 366  
(applicant)  
v  
**GLENZEIL PTY LTD (LIQUIDATORS APPOINTED)**  
ACN 010 465 166  
(first defendant/not a party to the application)

**AND**

**THE PLAZA SOUTH BRISBANE PTY LTD**  
ACN 153 271 400  
(second defendant/not a party to the application)

**DIAMOND DRILLING AND CUTTING PTY LTD**  
ACN 138 311 556  
(plaintiff/not a party to the application)

FILE NO: BS9831 of 2014

DIVISION: Trial Division

PROCEEDING: Application on the papers without oral hearing

DELIVERED ON: 23 July 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers.

JUDGE: Peter Lyons J

ORDER: **1. Pursuant to s 500(2) of the *Corporations Act 2001*, leave is granted to the applicant to commence proceedings against the first defendant in liquidation, subject to the condition that the applicant is prevented from enforcing against the assets of the first defendant, any monetary judgment, without the leave of the Court.**

**2. The applicant be joined as a plaintiff to proceeding 9831 of 2014.**

**3. The costs of the application are reserved.**

CATCHWORDS: BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS’ CHARGES ACT – where the applicant carried out work on a project pursuant to a subcontract with the first defendant – where the second defendant was the first defendant’s employer – where the first defendant was placed into voluntary liquidation on 8 September 2014 – where, on 23 September 2014, the applicant issued a Notice of Claim of Charge to the first defendant under s 10 of the *Subcontractors’ Charges Act* – where another subcontractor commenced proceedings against

the defendants on 17 October 2014 without obtaining leave under s 500 of the *Corporations Act* – where the second defendant has paid into court a sum of money otherwise payable to the first defendant to satisfy claims under the *Subcontractors' Charges Act* – whether the applicant should be granted leave to commence proceedings against the first defendant under s 500 of the *Corporations Act* – whether the applicant has given a Notice of Claim of Charge pursuant to s 10 of the *Subcontractors' Charges Act*, within one month of the action of the other subcontractor being commenced – whether the applicant's charge has been extinguished under s 15 of the *Subcontractors' Charges Act* – whether 'notice' in s 12(3A) of the *Subcontractors' Charges Act* refers to a notice to an employer or a contractor

*Corporations Act* 2001 (Cth), s 500

*Subcontractors' Charges Act* 1974 (Qld), s 5, s 10, s 11, s 12, s 15

*Ed Ahern Plumbing (Gold Coast) Pty Ltd v JM Kelly (Project Builders) Pty Ltd* [2007] QCA 452; [2008] 2 Qd R 123, cited *Ex parte Austco Pty Ltd* [1985] 2 Qd R 1, cited.

*Re Bird* [1993] 2 Qd R 130, cited.

*State of Queensland v Walter Construction Group & Ors* [2005] QSC 241; [2006] 1 Qd R 130, followed.

SOLICITORS: Gadens Lawyers for the applicant

- [1] **PETER LYONS J:** Marveldale Pty Ltd has applied for leave under s 500(2) of the *Corporations Act* 2001 to commence proceedings against Glenzeil Pty Ltd.
- [2] Marveldale brings the application on the basis that it carried out work at the Plaza South Brisbane Project (*the project*) for Glenzeil, with the second defendant, The Plaza South Brisbane Pty Ltd, being the principal (or employer for the purposes of the *Subcontractors' Charges Act* (1974) (Qld) (*SC Act*)). The Plaza South Brisbane Pty Ltd is the second defendant in an action brought by Diamond Drilling and Cutting Pty Ltd against it, and against Glenzeil as first defendant.
- [3] Marveldale makes its application on the basis that, on or about 25 February 2013, it entered into a written subcontract with Glenzeil, to supply, pump and place concrete and to supply and place steel reinforcement fixing for the project.
- [4] On 8 September 2014 Glenzeil was placed under voluntary liquidation by a resolution of its creditors. On 23 September 2014 a Notice of Claim of Charge under the *SC Act* was issued on behalf of Marveldale to the second defendant. On about 23 September 2014, a Notice to Contractor of Claim of Charge Being Given was served on Glenzeil on behalf of Marveldale.
- [5] Diamond Drilling commenced its proceedings against Glenzeil and the second defendant by claim filed on 17 October 2014. Its Statement of Claim alleges that it, too, was engaged by Glenzeil to perform work for the project, its work being concrete drilling and cutting; that it delivered a Notice of Claim of Charge to the second defendant and a Notice to Contractor of Claim of Charge Being Given to

Glenzeil, both under the SC Act, on 23 September 2014; and that it is entitled to a charge on money payable by the second defendant to Glenzeil.

- [6] Diamond Drilling has not obtained leave under the *Corporations Act* to proceed against Glenzeil.
- [7] The second defendant has retained \$402,954.90 from monies payable to Glenzeil for the purposes of satisfying claims made under s 11(1) of the SC Act, and has instructed its solicitors to pay that money into Court pursuant to Notices of Claims of Charge under the SC Act, and the provisions of that Act.
- [8] In addition to the application for leave under s 500(2) of the *Corporations Act*, Marveldale seeks to be joined as a plaintiff to the proceedings commenced by Diamond Drilling. It also seeks leave to serve a Statement of Claim in those proceedings. Diamond Drilling, the liquidators, and the second defendant have all indicated through their solicitors that they consent to the making of the orders sought by Marveldale.
- [9] Although much rehearsed, it is convenient to identify some features of the scheme established by the SC Act. In doing so, and generally throughout these reasons, I shall only refer to a case involving an employer, a contractor and a subcontractor, and not make specific reference to provisions relating to a superior contractor.
- [10] Section 5 gives a subcontractor an entitlement to a charge on money payable to the contractor under a contract with an employer for certain types of work, including work upon or in respect of land or a building. That charge secures payment in accordance with the subcontract of all money payable to the subcontractor for work done by it under the subcontract. Under s 10, a subcontractor intending to claim a charge on money payable to the contractor, must give notice to the employer of the claim; and must give notice to the contractor of having made the claim. Failure to do so has the consequence that the charge does not attach<sup>1</sup>. If a notice is given under s 10 to the employer, the employer must retain sufficient of the money which it owes to the contractor to satisfy the claim; though, the employer may pay into Court the amount the employer would otherwise be required to retain under the SC Act. Under s 12, claims and all other matters arising under the SC Act between a person claiming a charge and any other person alleged to be interested in money that may be affected by a Charge or Claim of Charge, and between persons or classes of persons claiming a charge, may be heard in a Court of competent civil jurisdiction, and in any event in this Court. An action to enforce a charge under this Act may be brought by or on behalf of any number of subcontractors claiming charges. Every action brought by a subcontractor to enforce a charge is deemed to be brought on behalf also of every other subcontractor who has given Notice of Claim of Charge under s 10, whose charge has not been extinguished under s 15, and who becomes a party to the action. Subject to any rules of court, a subcontractor may become a party to the action at any time before the date appointed for the hearing, by filing in the Court and serving on all of the parties, a Statement of Claim endorsed with a request that the subcontractor be joined as a party in the proceeding.
- [11] Under s 15 of the SC Act, a proceeding in respect of a charge (except in respect of a charge over retention monies only) must be commenced within one month after

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<sup>1</sup> See s 10(4) of the SC Act.

Notice of Claim of a Charge has been given pursuant to s 10. Every charge is deemed to be extinguished, unless the subcontractor “duly commences a proceeding” under s 15, to enforce it.

- [12] The applicant submits that, a fund having been paid into Court, it was proper to grant leave under s 500 of the *Corporations Act* by reference to the judgment of Margaret Wilson J in *State of Queensland v Walter Construction Group Ltd*<sup>2</sup> (*Walter Construction*). It submits that s 12(3A) and (3B) of the SC Act permit it to become a party to the proceedings commenced by Diamond Drilling. That was because Diamond Drilling commenced its proceedings within one month after Marveldale gave its Notice of Claim of Charge to the second defendant<sup>3</sup>. It submits that Diamond Drilling’s proceedings commenced when its claim was filed; and that Diamond Drilling could be granted leave *nunc pro tunc* to proceed with its claim against Glenzeil. It would be unjust to refuse Marveldale’s application as it would then lose the advantage of its claimed charge, which was not intended by the SC Act.
- [13] I am conscious that other parties have sought to claim a charge against the funds paid into Court on behalf of the second defendant, and accordingly they have an interest in the taking of steps by Marveldale, necessary for the validity of the charge which it asserts. They are not parties to this application. Accordingly, it seems to me that in dealing with it, I should be careful not to make determinations which may be regarded as having some degree of finality, adverse to their interests. If that is not possible for the resolution of the application, it may be necessary to take steps to enable such parties to be identified and heard.
- [14] It seems to me therefore I should first consider whether Marveldale has shown sufficient prospects of success in establishing its charge as to warrant granting it any of the orders which it seeks. If I am satisfied that it has done so, then it seems to me I should consider what orders should be made without giving any other potentially interested parties the opportunity to be heard.
- [15] As mentioned, under s 15(3) of the SC Act, Marveldale’s charge is deemed to be extinguished, unless it duly commences a proceeding under s 15 to enforce the charge. That section requires such a proceeding to be brought by way of action, within one month “after notice of claim of charge has been given pursuant to section 10 and no later”.
- [16] In *Re Bird*<sup>4</sup> (discussed in *Walter Construction*), the Court concluded that s 15 did not extinguish a charge where an action had been commenced by another subcontractor, which, by virtue of s 12(3) was deemed to be brought on behalf of every other subcontractor who had given Notice of Claim of Charge pursuant to s 10, and the subcontractor later applied to become a party to the action thus commenced. Subsequently, as Margaret Wilson J discussed in *Walter Construction*, s 12(3) was amended. The critical part of the amendments is now found in s 12(3A). That provision includes an additional qualification on the provision deeming an action brought by another subcontractor to be brought also on behalf of other subcontractors, namely, that the charge of the other subcontractor “has not been extinguished under section 15”. Her Honour held that s 12, as amended,

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<sup>2</sup> [2006] 1 Qd R 376 at [23].

<sup>3</sup> Relying on *Walter Construction* at [26].

<sup>4</sup> [1993] 2 Qd R 130.

meant that an action brought by another subcontractor is deemed to have been brought on behalf of the subcontractor seeking to maintain a charge, if the latter had given Notice of Claim of Charge within one month prior to the commencement of the action<sup>5</sup>. For present purposes, attention must therefore be directed to the question whether Marveldale has given a Notice of Claim of Charge pursuant to s 10, and, on the reading of s 12 adopted by her Honour<sup>6</sup>, has done so within one month before the action by Diamond Drilling was commenced; and also to the question whether Marveldale's charge has been extinguished under s 15, again on her Honour's reading, by the time of the commencement of Diamond Drilling's action.

- [17] I have not been referred to any authority which would help me to determine what is the meaning of the expression "notice of claim of charge pursuant to section 10" given by another subcontractor, as used in s 12(3A) of the SC Act. That section refers to two notices, the notice to the employer, and the notice to the contractor. The former requires the specification of the amount and particulars of the claim, and a statement that the subcontractor requires the employer to take steps to see that it is paid or secured to the subcontractor. The latter is a notice "of having made the claim". That language suggests that the notice to the contractor is not itself the Notice of the Claim of Charge. The requirement found in s 10(1B) that a "notice of claim of charge" is to be supported by a statutory declaration about the correctness of the claim, tends to support the view that the expression relates to a notice to the employer, though that support does not seem to me to be particularly strong.
- [18] However, s 11(1) requires the person to whom a "notice of claim of charge is given pursuant to section 10" to retain sufficient money to satisfy the claim. A person who fails to retain that amount becomes personally liable for it to the subcontractor. In s 11, it seems to me to be clear that the expression "notice of claim of charge ... pursuant to section 10" is a reference to the notice to the employer, and not the contractor.
- [19] On the other hand, in s 11(3), there is reference to the "notice of claim of charge mentioned in subsection (1)" being "given under section 10(1)(b) to the contractor". That might mean that the notice to the contractor is itself a Notice of Claim of Charge; but in the context of the other provisions discussed, it seems to me more likely to refer to a notice to the contractor that a Notice of Claim of Charge had been given to the employer. Moreover, in s 11(5), the expression "Notice of Claim of Charge" is clearly a reference to a notice to the employer.
- [20] In *ex parte Austco Pty Ltd*<sup>7</sup> Thomas J had to consider the provisions of s 10 of the SC Act as they then stood. Section 10(4) provided that "if notice is not given pursuant to this section, the charge shall not attach". At that time, s 10(1) required the subcontractor to give a notice to the employer, in language quite similar to that at present found in s 10(1)(a); and s 10(1)(b) required a notice "of having made the claim" to be given to the contractor. The section referred elsewhere to a "notice of claim of charge". His Honour said<sup>8</sup>

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<sup>5</sup> See *Walter Construction*, particularly at [26]-[27].

<sup>6</sup> See *Walter Construction* at [26].

<sup>7</sup> [1985] 2 Qd R 1.

<sup>8</sup> At p 2.

“... it is tolerably clear that the phrase ‘notice of claim of charge’ refers to the notice that is required to be given to the employer or superior contractor under s. 10(1)(a)”.

- [21] In *Ed Ahern Plumbing (Gold Coast) Pty Ltd v JM Kelly (Project Builders) Pty Ltd*<sup>9</sup> Muir JA said

“Section 10(1)(a) sets out how a notice of claim of charge must be made: by the giving of notice to the employer or superior contractor. Section 10(1)(b) requires the claimant to ‘give notice of having made the claim’. The natural meaning of those words is that the claimant must give notice of the fact that notice of claim of charge has been given to the employer or superior contractor.”

- [22] In the same case, Holmes JA said<sup>10</sup>

“Subsection 10(1) is not capable of any reading other than that the events must occur in order: that notice of claim of charge must be given to the employer before notice of having made the claim is given to the contractor.”

- [23] While their Honours were not considering the question raised by s 12(3A) in the present case, nevertheless, their discussion of these provisions supports the view that the Notice of Claim of Charge is the notice given to the employer.

- [24] Finally, it might be observed that the time within which a proceeding must be brought under s 15(1)(b) is a period “after notice of claim of charge has been given pursuant to section 10”. The language in this provision is notably different from that in s 10(4) which provides that the charge does not attach unless “notice is ... given pursuant to this section”.

- [25] These considerations, it seems to me provide a strong basis for thinking that the reference in s 12(3A) to a subcontractor “who has given notice of claim of charge pursuant to section 10” is a reference to a subcontractor who has given notice to the employer, and not necessarily to the contractor. There may be some awkwardness in taking this view as it would mean the action has been brought on behalf of a person whose charge has not attached, by reason of s 10(4); and it may mean that a charge might be deemed to be extinguished, under s 15, before it has attached. However, awkwardness is not unknown in this Act; and as Holmes JA observed in *Ed Ahern*<sup>11</sup> the notice to the contractor “must be given as soon as possible” (though no consequence for non-compliance, other than perhaps through the operation of s 10(4), is specified in the SC Act).

- [26] While there is some support for the contrary view, particularly in s 11(3), it seems to me that there is a reasonable prospect that Marveldale would establish that it is a subcontractor “who has given notice of claim of charge pursuant to section 10” for the purposes of s12(3).

- [27] On the material before me, less than a month had passed after the Notice of Claim of Charge was given on behalf of Marveldale to the second defendant, when

<sup>9</sup> [2008] 2 Qd R 123 at [72].

<sup>10</sup> *Ed Ahern* at [44]; see also [47].

<sup>11</sup> At [46].

Diamond Drilling commenced its proceeding, subject to the fact that Diamond Drilling had not obtained leave when it commenced this action. Subject to that qualification, therefore, it seems to me that Marveldale has shown that it has a realisable prospect of successfully establishing that it is a subcontractor whose charge has not been extinguished under s 15, for the purposes of s 12(3A) under the SC Act.

- [28] However, Diamond Drilling has not yet sought leave to proceed against Glenzeil, under s 500 of the *Corporations Act*. In *Walter Construction*, leave was granted to commence the proceedings, which a number of other subcontractors contended were deemed to have been commenced on behalf of each of them<sup>12</sup>. That has not happened in the present case.
- [29] It is apparent that, in *Walter Construction*, Margaret Wilson J considered that an action commenced within one month after a Notice of Claim of Charge was given to the employer might be relied upon by a subcontractor, notwithstanding that at the time the action was commenced, leave had not been granted to proceed against the contractor (a company being wound up), and leave was not granted until some months later<sup>13</sup>. The relevant subcontractors were given leave to be joined “in the existing proceedings”<sup>14</sup>. The fact that leave may be grant *nunc pro tunc* after a limitation period has expired<sup>15</sup> suggests that proceedings commenced against a company in the course of winding up, without a grant of leave, are nevertheless not a nullity. In any event, Diamond Drilling commenced its proceedings both against Glenzeil and the second defendant. It seems to me to be at least fairly arguable that the proceedings were validly commenced against the second defendant in the absence of leave, and are sufficient to amount to an “action brought by a subcontractor to enforce a charge”.
- [30] Given the fact that a sum of money has been paid into Court to meet claims based on charges created under the SC Act, there seems to me to be no reason to refuse Marveldale’s application for leave to proceed under s 500 of the *Corporations Act*, and I propose to grant it.
- [31] Marveldale does not submit that it may, by reason of s 12(3B) of the SC Act, be joined as a plaintiff simply by filing a statement of claim. That being so, I do not propose to decide whether an order is required, but will simply deal with the merits of the application.
- [32] It seems to me that Marveldale has established a sufficient basis for its application to be joined as a plaintiff in Diamond Drilling’s action. In reaching that conclusion, I wish to make it plain that I have not determined the validity of its charge; nor whether Diamond Drilling’s action is, under s 12(3A), deemed to be brought on behalf of Marveldale, with the consequence that its charge has not been extinguished. Indeed, its proposed Statement of Claim alleges the existence of a charge and seeks a declaration in support of it. Those matters inevitably are open to contest in the action by any other subcontractor. It follows that it should also be permitted to file and serve its Statement of Claim. However, it is not demonstrated that leave is necessary to do so.

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<sup>12</sup> See *Walter Construction* at [23].

<sup>13</sup> See the reliance on BS 3026 of 2005 in *Walter Construction* at [9], [24], [28] and [29].

<sup>14</sup> *Walter Construction* at [29].

<sup>15</sup> *McPherson’s Law of Company Liquidation* Westlaw AU Digital Service at [7.1020].

[33] Accordingly, I make orders as indicated in these reasons.