SUPREME COURT OF QUEENSLAND

CITATION:	*Pingel v Leach P/L &Ors* [2003] QCA 247
PARTIES:	**DEREK CHARLES PINGEL AS LICENSEE FOR PINGEL HOMES** (respondent/appellant) **v** **R & R LEACH PTY LTD** ACN 081 599 813 (first appellant/first respondent) **JAMADON PTY LTD** ACN 064 531 022 (second appellant/second respondent) **ROBIN JEANNE LEACH** (third appellant/third respondent) **LESLIE RAYMOND LEACH** (fourth appellant/fourth respondent)
FILE NO/S:	CA No 2561 of 2003 DC No 5837 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 (3) DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2003
JUDGES:	McPherson and Williams JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed with costs to be assessed**
CATCHWORDS:	CONTRACTS - BUILDING CONTRACTS - CONSTRUCTION OF PARTICULAR CONTRACTS - VARIATIONS - contract item deleted - whether that work should be "deemed" to be completed - whether this would allow a builder to make a claim for work never done
COUNSEL:	M J Burnett for the appellants G Allan for the respondent
SOLICITORS:	Alroe & O'Sullivan for the appellants Hede Bynre & Hall for the respondent

McPHERSON JA: This is an application under section 118(3) of the District Court Act for leave to appeal against a decision of a District Court Judge reversing a decision of the Queensland Building Tribunal member on a matter of law.

The question of law is or involves the proper interpretation of what we are informed is a standard form of building contract in use by the Master Builders' Association of which Mr Pingel is a member. He was the applicant before the Tribunal and the successful appellant in the District Court, as well as being the respondent in this Court. The opposite party who is the applicant for leave in this Court is sufficiently described by referring to them, him or maybe it as Leach.

The contract between them was for construction of a large residential home. For reasons that will appear Pingel purported to terminate the contract for non-payment of the progress claim. Leach claimed that the termination was not justified and therefore amounted to contractual repudiation by Pingel, which Leach itself accepted. The question turns on the proper interpretation of clause or condition 19 in the standard contract. Although there were other issues between the parties this is the only question that this Court is now asked to determine.

The contract in its original form was for work to be done for a total price of over $400,000, however, it provided in clause

14(b) for progress payments to be made at the following stages and in the following amounts:

Deposit	$ 10,000
(1) Stage 1 - dwelling slab poured:	$ 55,000
(2) Stage 2 - steel framework erected:	$132,000
(3) Stage 3 - roof sheeting fixed:	$ 46,000
(4) External and internal cladding installed:	$110,000
(5) Pre-paint stage:	$ 67,000
(6) Practical completion	$ 28,000

Between stages 3 and 4 the parties agreed to delete the contract item for painting in an amount of $8,384. Pingel submitted an amended progress claim for work done that omitted all reference to the amounts so deleted. Because of that deletion, Leach refused to pay the progress claim and asserted it was justified in doing so in reliance on clause 19 of the contract. It is in the following terms:

> "The works under the contract may be varied in any of the following ways:
>
> **Variations by Agreement**
>
> Either party may give to the other written notice requesting a variation to the works by way of an increase, decrease or alteration. No variation to the works shall be made unless agreed to in writing and signed by the proprietor and the builder. The cost of any such variation together with a reasonable allowance for overheads and profit shall be adjusted against the contract sum and shall be incorporated in the next progress certificate following completion of such work."

The Tribunal member's decision was that clause 19 required Pingel to give credit in his progress claim for the amount of $8,384 being the paintwork deletion. The learned District

Court Judge took the opposite view of that clause and, in my view, his Honour was correct.

In Gilbert-Ash Northern Limited v. Modern Engineering Bristol Limited (1974) AC 689 at 699 Lord Morris explained the function and purpose of provisions for progress payments in building contracts. Apart from the presence of such provisions, a contract of that kind would ordinarily be an entire one meaning that until the work is completed the builder would not be entitled to any payment at all. The result, as Lord Morris pointed out, is that the builder would be paying out his own funds for wages and materials while receiving nothing for the work he had done in the meantime. This would in effect convert him into a financier of the building project as well as being the builder. It is with these considerations in mind that I turn to clause 19 in the present case.

It is the last sentence of the clause that is critical. It says that the costs of such variation and allowance for overheads and profit shall be adjusted against the contract sum. That is not a particularly apt way of describing the painting work in this case which has not been and never will be carried. However that may be it is plainly an inappropriate description of work that has been "completed" and never will be completed by the builder in this case. Having by agreement deleted that item of work, there never will be a stage in the future at which the price of that item

can be "incorporated in the next progress certificate following completion of such work".

For Leach it is submitted that clause 19 may refer to completion of the deleted item of work by someone other than the builder Pingel but who is employed for that purpose by the owner. But that person would not be bound by the building contract between Pingel and Leach and would have, indeed, no relevant connection with it. An alternative submission on behalf of Leach is that deletion of the paintwork item should be equated with, or deemed to be, "completion" within the meaning of clause 19. It is, however, quite artificial to say of something, which it has been agreed by the parties not to be carried out at all, that it has been "completed", and I reject that interpretation put forward by Leach.

On the face of it one of the consequences of accepting it would appear to be that Pingel would be entitled then to say he had completed work which he had never done and would then be entitled to claim for it.

The surprising and inconvenient consequences of adopting the interpretation contended for by Leach have been amply demonstrated before us in their written lines submitted by Mr Allan of counsel for Pingel on the appeal. For my part, it is enough to say here that I am persuaded that the Judge's decision in this case was correct.

It follows that there is no basis for granting leave to appeal in this case. The order of the District Court Judge that was made below should stand. I would, accordingly, dismiss the application for leave. Costs, Mr Allan?

MR ALLAN: Yes, thank you, your Honour.
McPHERSON JA: Can you resist that?
MR BURNETT: I can't resist it, no, your Honour.

McPHERSON JA: Dismiss the application for leave with costs to be assessed.

WILLIAMS JA: I agree.

FRYBERG J: I also agree.

McPHERSON JA: That will be the order of the Court.
