

SUPREME COURT OF QUEENSLAND

CITATION: *Robinson Civil Contractors P/L v McConnell Dowell Constructors (Aust) P/L & Anor* [2005] QCA 363

PARTIES: **ROBINSON CIVIL CONTRACTORS PTY LTD**
ACN 102 810 355
(plaintiff/applicant/applicant)
v
McCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD
ACN 002 929 017
(first defendant/respondent/respondent)
SIEMENS LTD
ACN 004 347 880
(second defendant)

FILE NO/S: Appeal No 4463 of 2005
DC No 248 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 30 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 15 August 2005

JUDGES: McMurdo P, Jerrard JA and Wilson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused with costs to be assessed**

CATCHWORDS: PROFESSIONS AND TRADES - BUILDERS - QUEENSLAND - OTHER CASES - respondent entered into sub-contract with applicant to perform building work on 4 September 2003 - under s 42 *Queensland Building Services Authority Act* 1991 (Qld) a person who carries out building work without a holding a contractor's licence under the Act is not entitled to monetary consideration unless it is performed as a subcontractor for a licensed trade contractor - amendments to the Act and *Queensland Building Services Authority Regulation* 2003 (Qld) came into operation on 1 September 2003 which significantly amended classes of licence to be held under the Act - prior to amendments respondent holder of "general building" licence - after

amendments respondent holder of "builder-open" licence - "licensed trade contractor" defined in s 42(12)(a) to mean a licensed contractor other than one who holds a licence for "general building" - applicant did not hold any licence under the Act at any time - applicant brought claim under sub-contract for monies owed - respondent pleaded in part in defence and counterclaim that applicant was not entitled to recover under claim as applicant did not hold a licence under the Act and that it was not a licensed trade contractor within the meaning of s 42 - applicant applied to strike out that part of defence and counterclaim contending that the work performed by it was within the scope of the building work allowed by the respondent's licence - primary judge observed the Act not amended harmoniously with the Regulation - construed s 42 as not operating by reference to the precise name of the licence in the Regulation but by reference to a licence meeting the general description of the licence in the Act - found respondent held a licence under s 42(12)(a) - application dismissed - whether any error in construction of s 42 by primary judge

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - WHEN APPEAL LIES - BY LEAVE OF COURT - INTERLOCUTORY ORDERS AND JUDGMENTS - applicant's application under *Uniform Civil Procedure Rules 1999 (Qld)* r 171 to strike out part of respondent's defence and counterclaim refused by primary judge - applicant applied for leave to appeal from dismissal of application - whether some reason to think the primary decision may be wrong - whether substantial injustice would result if leave were refused

Queensland Building Services Authority Act 1991 (Qld),
s 30, s 42

*Queensland Building Services Authority and Other
Legislation Amendment Act 2003 (Qld)*, Pt 2, s 16

*Queensland Building Services Authority Regulation 2003
(Qld)*, s 41, Sch 2 Pt 6

Uniform Civil Procedure Rules 1999 (Qld), r 171

Rigney v Littlehales & Ors [2005] QCA 252; Appeal No
11267 of 2004, 22 July 2005, applied

COUNSEL: K C Fleming QC for the applicant
R M Kelly for the respondent

SOLICITORS: Bennett & Philp, town agents for Connolly Suthers
(Townsville), for the applicant
Doyles Construction Lawyers for the respondent

[1] **McMURDO P:** On 4 May 2005 a District Court judge refused the applicant plaintiff's ("Robinson") application to strike out part of the respondent first defendant's ("McConnell") amended defence and counterclaim under *Uniform Civil*

Procedure Rules 1999 (Qld) ("UCPR") r 171. Robinson applies for leave to appeal from that interlocutory order under s 118(3) *District Court of Queensland Act 1967* (Qld). To succeed, it must establish that there is some reason to think that the primary decision may be wrong and that substantial injustice would result if leave were refused: see *Rigney v Littlehales & Ors.*¹

- [2] McConnell entered into a contract to perform building work for the second defendant, Siemens Ltd. In performing that head contract, McConnell entered into a sub-contract with Robinson on 4 September 2003. Robinson brought a claim against McConnell under that sub-contract. McConnell was licensed under the *Queensland Building Services Authority Act 1991* (Qld) ("the Act") whilst Robinson was not. McConnell pleaded in part in its defence and counterclaim that because Robinson was not licensed under the Act Robinson was not entitled to recover the amount of its claim under the sub-contract. Robinson's application under UCPR r 171 was to strike out that part of the defence and counterclaim.
- [3] The Act provides for classes of licences under s 30; s 30(4) provides that a regulation may specify a class of licence to be a class that may be held and renewed by a person who held that class immediately before the commencement of the regulation specifying the class. The *Queensland Building Services Authority Regulation 2003* ("the Regulation") significantly amended the classes of licence to be held under the Act. The Regulation, together with significant amendments to the Act,² became operational on 1 September 2003.
- [4] Under s 41 of the Regulation a person who held a general building licence immediately before the commencement of the Regulation on 1 September 2003 is taken to be a licensee for a "builder - open" licence for the purposes of the Regulation.³ McConnell held a general building licence prior to 1 September 2003.
- [5] At the heart of Robinson's application is s 42 of the Act which relevantly provides:
- "42 Unlawful carrying out of building work**
- (1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
- ...
- (3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
- ...
- (5) An unlicensed person who carries out, in the course of employment, building work for which that person's employer holds a licence of the appropriate class under this Act does not contravene this section.
- (5A) An unlicensed person who, as a subcontractor, carries out, or undertakes to carry out, building work for a licensed trade contractor, does not contravene this section if the work is within the scope of the building work allowed by the class of licence held by the contractor.

¹ [2005] QCA 252; Appeal No 11267 of 2004, 22 July 2005, [15].

² See *Queensland Building Services Authority and Other Legislation Amendment Act 2003* (Qld), Pt 2, especially s 16.

³ See the Regulation, s 41, Table, item 5 and Sch 2, Pt 6.

...

(9) A person who contravenes this section commits an offence.

...

(12) In this section -

licensed trade contractor means a licensed contractor other than a licensed contractor who holds a contractor's licence for the following -

- (a) general building;
- (b) house building;
- (c) a class of building work prescribed by regulation."

- [6] Robinson contends that because McConnell held a "builder - open" licence under the Regulation, rather than one of the licences specified in s 42(12)(a) - (c), McConnell was not excluded under s 42(12)(a) - (c) of the Act from being a licensed trade contractor so that, under s 42(5A) of the Act, Robinson was not contravening s 42 by performing work without a licence under the sub-contract which work was within the scope of the building work allowed by McConnell's "builder - open" licence.
- [7] The learned primary judge observed that the Act did not appear to have been amended harmoniously with the Regulation in that the description of licences in s 42(12) was not consistent with the terms used for classes of licence in the Regulation. His Honour considered that s 42(12) of the Act must in these circumstances be interpreted as operating not by reference to the precise name of the licence set out in the Regulation but by reference to a licence which meets the general description of the licence in the Act. Adopting that approach, his Honour considered that McConnell held a licence under s 42(12)(a) of the Act. It followed that under s 42(12) of the Act it was not a licensed contractor for the purposes of s 42 of the Act so that McConnell's defence and counterclaim relying on s 42(3) of the Act was not excluded by s 42(5A) of the Act. That part of McConnell's defence and counterclaim to which Robinson objected was certainly not so untenable as to justify its striking out; on the contrary, it appeared to provide a good defence to Robinson's claim.
- [8] Whilst the learned primary judge in his reasons construed the meaning of s 42 of the Act, his Honour recognised that he was doing so only in determining an application under UCPR r 171. Robinson has not persuaded me that the learned primary judge's construction of s 42 was wrong. It seems likely that his Honour's construction is sound: s 42(12)(a) - (c) of the Act seems to refer to classes of building work rather than classes of licence so that the "builder - open"⁴ licence held by McConnell seems to be a licence for general building work under s 42(12)(a) of the Act. But in any case, because of the interlocutory nature of the ruling, Robinson is not precluded from arguing its construction of s 42 of the Act at trial when the trial judge will have the additional benefit of having heard all the evidence. In those circumstances Robinson does not suffer any substantial injustice by the refusal of leave to appeal. It follows that Robinson has not demonstrated any proper ground for the granting of leave to appeal from this interlocutory order. The application for leave to appeal should be refused with costs to be assessed.

⁴ See the Regulation, Sch 2, Pt 6.

- [9] **JERRARD JA:** In this application I agree with the reasons for judgment of the President and the order Her Honour proposes.
- [10] As the President observes, under s 41 of the Regulation a person who held a general building licence immediately before the commencement of the Regulation on 1 September 2003 is taken to be a licensee for a “builder – open” licence for the purposes of the Regulation. Likewise, a person who held a contractor’s licence for house building immediately before the commencement of the Regulation is taken by Item 1 in the table provided in s 42 of the Regulation to hold that licence for two years after 1 September 2003, and is entitled to elect to become the holder of a “builder – medium rise” licence, if that builder has demonstrated sufficient experience as prescribed in the Regulation and Part 5 of Schedule 2 to that Regulation.
- [11] Part 5 of Schedule 2 to the Regulation provides for a licence for a “builder – medium rise”, and Part 6 for a “builder – open” licence. It appears that by reason of an oversight, the reference in s 42(12) of the Act to contractor’s licences for general building or house building were not amended as from 1 September 2003 to conform with the provisions in the Regulation for “builder – open” and “builder – medium rise” licences, despite the fact that the Regulation expressly provided in s 41 and 42 thereof for the transition of the licences described in s 42(12) into the new classes of licence.
- [12] That oversight might benefit the applicant, because of the definition of “trade contractor’s licence” in Schedule 3 to the Regulation. That Regulation defines such a licence to mean “a licence of class mentioned in Schedule 2, Parts 1 to 3 and 11 to 56”. The omission of Parts 4 – 10 inclusive from that definition may have significance for the applicant because Parts 5 and 6 deal with those varieties of licence which replace previously held contractor’s licences for general building or house building. The applicant’s senior counsel submitted in argument on the appeal that a trade contractor’s licence was the licence held by a person who was a licensed trade contractor. If so, it may follow that the specific omission of the licences mentioned in Part 5 and 6 of Schedule 2 from the definition of a trade contractor’s licence means that the holder of a “building – open” licence, or a “builder – medium rise” licence, *is* a licensed contractor other than a licensed contractor who holds a contractor’s licence for either general building, house building, or a class of building work prescribed by regulation. That argument may give the applicant something to say at a trial, but the argument is by no means strong enough to justify allowing this application and overturning the decision refusing to strike out the defence.
- [13] **WILSON J:** I agree with the reasons for judgment of the President and with the orders Her Honour proposes.