

**CITATION:** *Foster v Stewart and Anor* [2018] QCAT 84

**PARTIES:** Kristen Trevor Foster  
(Applicant)  
v  
Adam Stewart and Isabella Stewart  
(Respondents)

**APPLICATION NUMBER:** BDL012-17

**MATTER TYPE:** Building matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Member Cranwell**

**DELIVERED ON:** 29 March 2018

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. Mrs Isabella Stewart is to pay to Mr Kristen Trevor Foster the sum of \$15,462.20, plus interest in the amount of \$1,998.13, within 28 days of the date of this decision.**
- 2. The application insofar as it relates to Mr Adam Stewart is dismissed.**
- 3. There is no order as to costs.**

**CATCHWORDS:** CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DAMAGES – OTHER MATTERS – whether builder entitled to payment for variation – whether builder entitled to progress claim – where builder entitled to interest

*Bankruptcy Act 1966 (Cth), s 58*  
*Building and Construction Industry Payments Act 2004 (Qld), s 12, s 17*  
*Queensland Building and Construction Commission Act 1991 (Qld), s 69*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 47*

**APPEARANCES:**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

**REASONS FOR DECISION**

- [1] On 22 March 2016, Mr Foster, as the Contractor, and Mr and Mrs Stewart, as the Owners, entered into a Residential Renovation Contract – Level 2 (the Contract). The works to be carried out included a new carport, new patio, new swimming pool, new gate house and internal fit out.
- [2] On 27 January 2017, Mr Foster lodged an application for domestic building disputes with the Tribunal. He is seeking payment of \$29,842.49, plus interest and costs, by Mr and Mrs Stewart. Payment is sought in respect of three tax invoices:
- a) tax invoice 15177 issued on 7 December 2016 in the amount of \$15,462.20;
  - b) tax invoice 15180 issued on 16 December 2016 in the amount of \$12,800.31; and
  - c) tax invoice 15182 issued on 19 December 2016 in the amount of \$1,579.98.
- [3] I will consider the claims against Mr and Mrs Stewart separately.

**Claims against Adam Stewart**

- [4] On 30 November 2017, the Tribunal was advised by the Official Trustee in Bankruptcy that Mr Stewart became bankrupt on 14 November 2017.
- [5] The Official Trustee drew the Tribunal's attention to s 58(3) of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act), which provides that a creditor may only commence a legal proceeding or, if proceedings were on foot when the bankruptcy occurred, take any fresh step against the bankrupt, with the leave of a court.
- [6] Mr Foster does not have a court order entitling him to commence or continue with the proceeding. Having regard to the provisions of the Bankruptcy Act, the proceedings cannot proceed against Mr Stewart.
- [7] Under s 47 of the QCAT Act, the Tribunal may dismiss a proceeding which is misconceived. In light of s 58(3) of the Bankruptcy Act, I am satisfied that the application is misconceived insofar as it relates to Mr Stewart. The application against him is dismissed.

**Claims against Isabella Stewart**

- [8] Clause 29.10 of the Contract provides:

***Joint and several liability***

If there is more than one person named as the **Owner** under this **Contract**, their obligations and liabilities are joint and several.

- [9] As a consequence, Mrs Stewart is liable for the full amount owing under the contract.
- [10] I will consider the amounts claimed under each tax invoice separately, as well as the claim for interest.

*Tax Invoice 15177*

- [11] On 9 February 2017, Mrs Stewart lodged a response and/or counter-application. In that document, she accepted the amount owing under tax invoice 15177, but disputed the amounts owing under tax invoices 15180 and 15182.
- [12] In these circumstances, I find that Mrs Stewart owes Mr Foster the amount of \$15,462.20 under tax invoice 15177.

*Tax Invoice 15180*

- [13] Tax invoice 1580 relates to what is described only as "Progress CLAIM: 8". No other details were provided.
- [14] A covering email was sent by Sherry Weston, Administration to Mr Stewart in the following terms:

Please find attached invoice for payment of claim 8, you will notice I have separated the claims to reflect the works that may or may not be completed before Christmas. Please forward to bank today as it will be due on the 23<sup>rd</sup> so will avoid hold ups.

- [15] Under item 21 of the Schedule to the Contract, progress claims are to be made using Method C. Under part D of the Appendix, progress claims are to be submitted fortnightly. Clause 11.6(b) of the Contract provides as follows:

if Method C is stated in Item 21 of the **Schedule**, on or after:

- (i) the **Day** in each period stated in Method C in Part D of the **Appendix**; and
- (ii) the **Date of Practical Completion**,

and for the unpaid value of that part of the **Works** carried out up to, and including, that **Day**, any unpaid adjustment to the **Contract Price** under this **Contract**, and any other amount due and payable by the **Owner** to the **Contractor** under this **Contract** otherwise.

[16] I note that the tax invoice contains the statement that “[t]his invoice is a payment claim made under the Building & Construction Industry Payment Act 2004”.

[17] Section 12 of the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA) provides that:

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

[18] Section 17(2) of the BCIPA sets out what must be contained in a payment claim as follows:

A payment claim—

- (a) must identify the construction work or related goods and services to which the progress payment relates; and
- (b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and
- (c) must state that it is made under this Act.

[19] The difficulty with the tax invoice under consideration is that it does not identify the construction work or related goods and services to which the progress claim relates.

[20] Putting aside any failure to comply with the BCIPA, Mr Foster is contractually entitled to claim only “unpaid value of that part of the **Works** carried out up to, and including, that **Day**”. Given the absence of details as to what work the claim relates to, I am unable to be satisfied that works to the value of the invoice were carried out such that Mr Foster was entitled to claim for them.

[21] The only relevant evidence before me is a covering email which refers to claims having been separated to reflect works that “may or may not be completed before Christmas”. If works were in fact undertaken, Mr Foster has not placed sufficient evidence of that before me.

[22] In these circumstances, I am not satisfied that Mr Foster is entitled to the amount claimed under this invoice.

#### *Tax Invoice 15182*

[23] Tax invoice 15182 relates to “extra concrete for the pool to underpin foundations of house”, “2<sup>nd</sup> visit for pool fence non-compliance” and “rubbish removal of personal items not builders waste”. These matters are described on the invoice as a variation.

[24] Variations are dealt with in clause 12 of the Contract as follows:

### **12.3 Agreement to vary works**

The parties may agree to vary the **Works** by adding work to, or omitting work from, the **Works**. The **Contractor** must ensure that any agreement to vary the **Works** is put in writing in a variation document, and a copy given to the **Owner**, within five (5) **Business Days** from the date of the agreement, and before any work the subject of the variation is started.

...

### **12.5 Owner's written notice agreeing to variation**

The **Owner** must give to the **Contractor** a written notice agreeing to the variation within five (5) **Business Days** after receiving the variation work document provided by the **Contractor** under clause **12.3**.

### **12.6 No work before receipt of Owner's notice**

The **Contractor** must not start to carry out any **Work** the subject of a variation until the **Contractor** receives the written notice from the **Owner** under Clause **12.5** agreeing to the variation.

- [25] There is no evidence before me that either Mr or Mrs Stewart gave Mr Foster a written notice under clause 12.5 of the Contract agreeing to the work described in tax invoice 15182.
- [26] In these circumstances, I am not satisfied that Mr Foster is entitled to the amount claimed under this invoice.

### *Interest*

- [27] Clause 11.9 of the Contract provides as follows:

If the **Owner** fails to make any payment to the **Contractor** within the times for payment under this **Contact**:

- (a) the **Contractor** is entitled to interest on the outstanding amount at the rate stated in Item 19 of the **Schedule**, payable from the **Day** after the date that payment was due until the date of payment; and
- (b) the **Owner** must pay to the **Contractor** any debt collection costs, including any legal costs on a full indemnity basis, associated with recovering, or the attempted recovery of, the outstanding amount.

- [28] Item 19 of the Schedule to the Contract specifies an interest rate of 10%.
- [29] I have found that Mrs Stewart owes Mr Foster the amount of \$15,462.20 under tax invoice 15177. The tax invoice indicates that payment was due within 5 days. As the tax invoice was issued on 7 December 2016, payment was due by 12 December 2016.
- [30] It follows that Mr Foster is entitled to the payment of interest at the rate of 10% from 13 December 2016 until the date of this decision. I calculate this is  $472/365.25 \times 0.1 \times \$15,462.20 = \$1,998.13$ .

## **Additional matters**

[31] I note that Mr Foster has also sought termination of the contract for significant breaches, and cancellation of the home warranty insurance.

### *Termination of Contract*

[32] Termination by the Contractor is relevantly dealt with in cl 21 of the Contract as follows:

#### **21.1 Contractor's right to give notice of intention to terminate Contract**

If the **Owner**:

...

(e) fails to remedy any **Substantial Breach** of this **Contract** set out in a suspension notice given in accordance with Clause **16.2** within ten (10) **Business Days** of receiving that notice ...

the **Contractor** may give a written notice to the **Owner**:

(g) describing the relevant breach or breaches of this **Contract** by the **Owner**; and

(h) stating the **Contractor's** intention to terminate this **Contract** unless the **Owner** remedies the breach or breaches within ten (10) **Business Days** after receiving the **Contractor's** notice.

#### **21.2 If Owner fails to remedy breach, Contractor may terminate Contract**

If the **Owner** fails to remedy the **Owner's** breach or breaches of this **Contract** set out in a notice given to the **Owner** by the **Contractor** in accordance with Clause **21.1** within the time stated in that notice, the **Contractor** may, without prejudice to any other rights and remedies, terminate this **Contract** by further written notice to the **Owner**.

[33] While Mr Foster gave a notice to Mr and Mrs Stewart suspending works on 11 January 2017, and a further notice relating to substantial breaches on 18 January 2017, there is no evidence before me that he has followed the steps set out in cl 21 of the Contract. These are steps that are within Mr Foster's power to take to terminate the Contract.

### *Cancellation of home warranty insurance*

[34] Given that the construction work has commenced, there is no basis under s 69 of the *Queensland Building and Construction Commission Act 1991* (Qld) for cancelling cover under the statutory insurance scheme.

**Costs**

[35] Mr Foster has also sought his costs of the proceeding in accordance with cl 11.9(b) of the Contract.

[36] I note that, under s 100 and s 102 of the QCAT Act, each party to a proceeding is to bear their own costs unless the Tribunal considers it in the interests of justice to make a costs order. I see no reason to depart from the usual position in this case. Mr Foster has only recovered the amount accepted by Mrs Stewart under tax invoice 15177, and has not recovered any of the disputed amounts. In these circumstances, I do not consider that it would be in the interests of justice to order costs against Mrs Stewart.

**Conclusion**

[37] In conclusion, I order:

- a) Mrs Isabella Stewart is to pay to Mr Kristen Trevor Foster the sum of \$15,462.20, plus interest in the amount of \$1,998.13, within 28 days of the date of this decision.
- b) The application insofar as it relates to Mr Adam Stewart is dismissed.
- c) There is no order as to costs.