

DISTRICT COURT OF QUEENSLAND

CITATION: *Somerset Civil Pty Ltd v Eaglerise Developments Pty Ltd; Eaglerise Developments Pty Ltd v Somerset Civil Pty Ltd* [2021] QDC 70

PARTIES: **SOMERSET CIVIL PTY LTD ACN 123 944 178**
(plaintiff)
v
EAGLERISE DEVELOPMENTS PTY LTD ACN 618 087 577
(defendant)
BD705/21

EAGLERISE DEVELOPMENTS PTY LTD ACN 618 087 577
(plaintiff)
v
SOMERSET CIVIL PTY LTD ACN 123 944 178
(defendant)
BD348/21

FILE NO/S: 705/21; 348/21

DIVISION: Civil

PROCEEDING: Application filed by the plaintiff on 25 March 2021 in 705/21; Application filed by the defendant on 25 March 2021 in 348/21

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 15 April 2021 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2021

JUDGE: Porter QC DCJ

ORDER:

- 1. Both proceedings be placed on the Commercial List.**
- 2. The trial of proceeding 348/21 be heard after the trial of proceeding 705/21.**
- 3. Proceeding 705/21 be listed for a three-day hearing commencing 12 July 2021.**
- 4. The balance of the plaintiff's application filed 19 February 2021 in proceeding 348/21 be dismissed.**
- 5. Costs of the applications be costs in the proceeding.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND

RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where plaintiff and defendant in 705/21 entered into a contract for townhouse development civil works – where contract was terminated – where plaintiff seeks to recover unpaid amount under s 100 of the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) – where plaintiff asserts defendant’s payment schedule signed by superintendent was not valid – where defendant asserts that contract is unenforceable pursuant to s 42 of the *Queensland Building and Construction Commission Act* 1991 (Qld) because the plaintiff did not hold any relevant licence – where defendant commenced proceeding 348/21 replicating issues in 705/21 and adding other issues – whether the two proceedings should be heard together

LEGISLATION	<i>Building Industry Fairness (Security of Payment) Act</i> 2017 (Qld), ss 76-78, 100, 101 <i>Queensland Building and Construction Commission Act</i> 1991 (Qld), s 42 <i>Uniform Civil Procedure Rules</i> 1999 (Qld), r 79
CASES	<i>Wan & Anor v Merlot Gordon & Ors; Merlot Gordon & Ors v Olsen Lawyers</i> [2019] QSC 142
COUNSEL:	Mr B. Reading for the plaintiff in 348/21 and the defendant in 705/21 Ms M. Hindman QC and Mr M. Walker for the defendant in 348/21 and the plaintiff in 705/21
SOLICITORS:	Merlehan Group for the plaintiff in 348/21 and the defendant in 705/21 Thynne & Macartney for the defendant in 348/21 and the plaintiff in 705/21

- [1] I have before me two sets of proceedings between the same parties: one party, Somerset Civil, is a earthworks contractor; the other party, Eaglerise Developments, is a principal and developer of a subdivision that required earthworks. It seems uncontentious that Eaglerise retained Somerset by written contract to do civil works to facilitate a townhouse development somewhere and that Somerset and Eaglerise entered into a contract for that work. The contract price was of the order of \$800,000.

- [2] About half of that work, in broad terms, seems to have been done before the parties fell into dispute. Somerset served a payment claim purportedly (and I say that for reasons that will become obvious) under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the **BIF Act**). That payment claim was served in about the end of August last year, claiming \$160,000 as a progress payment under the contract. Again, it appears uncontentious – at least for the purpose of this application – that a person who was also the superintendent under the contract purported to deliver a payment schedule on behalf of the principal, and the scheduled amount was about \$60,000, leaving about \$100,000 to be claimed but not scheduled. The principal paid the scheduled amount and disputed an obligation to pay the balance.
- [3] The contractor, in broad terms, seemed to suspend work because of the non-payment of the payment claim, the contractor asserting that it was entitled to the balance of the payment claim because the payment schedule was not a payment schedule given under the Act because the person who delivered the payment schedule (who was also the superintendent under the contract) did not have authority to deliver a payment schedule in accordance with the BIF Act because a superintendent cannot deliver a payment schedule as agent for a principal (or perhaps did not have authority to do it in this particular case).
- [4] That contention might strike one as improbable, but it is not for me to decide that issue on these applications. The result of the contested suspension (because the developer, I infer, did not accept that he had not delivered a payment schedule) was that the contract was terminated and presumably another contractor was engaged to complete the earthworks. At that stage, something like \$500,000-worth of the \$800,000 work had been done.
- [5] By proceedings that began in the Magistrates Court and are now in this Court (being proceedings 705/21, which were commenced in November last year), the contractor brought proceedings under s 100 of the BIF Act to recover an unpaid amount from the principal. That section applies where an unpaid amount is being sought in respect of a failure to deliver a payment schedule (as is evident from ss 76 to 78 of the BIF Act). Section 100 relevantly provides:

100 Proceedings to recover unpaid amount as debt

- (1) This section applies if a claimant starts proceedings in a court under section 78(2)(a) to recover an unpaid amount from a respondent as a debt owing to the claimant.
- (2) Judgment in favour of the claimant is not to be given by a court unless the court is satisfied that—
 - (a) the respondent did not pay the amount to the claimant on or before the due date for the progress payment to which the payment claim relates; and
 - (b) if the respondent's liability to pay the amount arises because of a failure to give a payment schedule—the respondent did not give the claimant a payment schedule within the time required to do so under this Act.
- (3) The respondent is not, in those proceedings, entitled—
 - (a) to bring any counterclaim against the claimant; or
 - (b) to raise any defence in relation to matters arising under the construction contract.

- [6] Accordingly, the Somerset proceedings are properly characterised as proceedings under the Act for an amount claimed under a valid payment claim and not answered by a valid payment schedule. They are proceedings for a payment on account, as is well-known and, in any event, as is evident from s 101 of the BIF Act.
- [7] There are two main issues that arise in that proceeding.
- [8] **First**, the defendant principal disputes that any payment claim could be given because there was no building contract enforceable by Somerset in existence which could sustain a payment claim. The argument advanced by the principal is that the document which is the building contract is unenforceable because it undertakes to carry out building work without a proper licence in breach of s 42 *Queensland Building and Construction Commission Act 1991* (Qld). That argument is advanced because Somerset is said not to hold any relevant licence.
- [9] As the pleadings play out, as I understand it, Somerset replies on the basis that, even though it did not have a licence at the time for the works undertaken to be done, it was entitled to carry out the work under the exemption that permits someone to undertake to carry out work if they obtain a person with a licence to do the work. Whether it is pleaded or not precisely in this way, Eaglerise disputes that some or all of the work was in fact carried out within the scope of that exemption.
- [10] **Second**, Somerset contends that no payment schedule was delivered. Eaglerise contends that the person who was also the superintendent was able to deliver a payment schedule under the Act. As I have said, Somerset's contention strikes me as improbable but who knows?
- [11] Proceeding 705/21 was commenced in November 2020. Subsequently, but not long after obviously, Eaglerise commenced its own proceeding: 348/21.
- [12] The issues that arise in the Somerset proceeding are repeated in the Eaglerise proceeding. However, the Eaglerise proceeding adds a number of other issues, some of which flow from the issues in the Somerset proceeding, and some of which do not.
- [13] For the purpose of these applications, it is the issues which do not which are of most relevance, because even if Somerset succeeds, there is still a claim by Eaglerise for defects and a claim for unlawful repudiation which is related to the validity of the payment claim and the payment schedule, but in some residual respects goes beyond it. Although I understand the way that residual aspect of the termination case advanced by Eaglerise is said to be distinct from the issues in the Somerset proceeding, I cannot help suspecting that if the payment claim issue is resolved in favour of Somerset, that breach claim may not be persisted with. But, anyway, that is more a suspicion than anything.
- [14] I understand the submission that it is distinct. If the Somerset proceeding is successful, the residual issues will remain in the Eaglerise proceedings of defects and the residual breach of contract case. There is also a small counter-claim made, or to be made by the builder, for a wrongful termination.

- [15] Further to the issues already joined in both proceedings, Eaglerise's pleading either already asserts, or intends to assert, a restitutionary entitlement to funds paid under the contract because of the alleged unlawful work. If that is the situation in respect of the licensing position, Somerset foreshadows that it would be bringing its own proceeding in that proceeding for various measures of restitutionary relief. That is enough said about that for the moment.
- [16] We have the Somerset proceedings which are proceedings under the Act for an interim payment, and the Eaglerise proceedings which cover the same issues, but seek to finally resolve the rights under the contract, and which will be somewhat more extensive if the work was unlicensed (because of the cross-restitutionary claims), and much more confined if it was not.
- [17] In those circumstances, each party applies under rule 79 of the *Uniform Civil Procedure Rules* 1999 (Qld). Somerset seeks to have its matter heard and determined before the Eaglerise proceedings. Eaglerise seeks to have both matters heard together.
- [18] From the summary I have given, one would imagine the obvious thing to do in a case like this is to consolidate them and to distill out a couple of preliminary points, if that seems advisable, by reference to the factors that inform such orders. That cannot be done because of the effect of the statute, it seems to me, and no counsel before me disagreed with that. In particular, s 100(3) of the BIF Act stands in the way of consolidation because it expressly prohibits the principal from bringing any counter-claim against the builder or any defence against the builder in relation to matters arising under the contract.
- [19] In those circumstances, I think it is correct that it would be contrary to the BIF Act for me to consolidate the proceedings. That makes what is happening here a little bit artificial, but artificial in a way which I think is one strong signpost to the way I should resolve this. Mr Reading for Eaglerise advanced a persuasive argument as to why, looking just at the factors which have been non-exhaustively identified as relevant to the exercise of the discretion under rule 79, one would want these proceedings heard together, whether consolidated or not.
- [20] He refers to the list of factors adopted and approved by Justice Crow in *Wan v Merlot Gordon Pty Ltd* [2019] QSC 142 at paragraphs [24] to [33]. The factors are not ones which would surprise a commercial lawyer. His Honour identified the factors as including whether the proceedings are broadly of a similar nature, whether there are common issues of law and fact, whether witnesses will have to appear in both proceedings, whether there is a risk of multiple appeals to delay the substantive proceedings, whether there will be substantial saving of time, whether an order for the proceedings create difficulties for trial management and whether one proceeding is more advanced than the other.
- [21] Mr Reading addressed these matters, and although I disagree that there is a particular difficulty arising from issue estoppels, Anshun estoppels or other issues of complexity in hearing one matter before the other, for the reasons I covered in

argument, there were good points made by Mr Reading in respect of these factors favouring hearing the matters together. However, his Honour's judgment does not (and I am sure his Honour did not say it did) confine the scope and character of the matters that inform the exercise of the discretion to those he identified. The words of the rule do not do so, and neither can a judgment, recognising that those factors identified by his Honour are ordinarily relevant.

- [22] Ms Hindman QC, who appeared with Mr Walker for Somerset, frankly conceded that in the absence of the circumstance that this is a claim to recover a BIF Act payment claim, there would be a pretty compelling argument in favour of Mr Reading's arguments, and I agree. However, the elephant in the room is that it *is* a BIF Act claim and Parliament plainly intends that those kinds of claims be recovered promptly and that there is a public interest in progress claims being recovered promptly.
- [23] That policy is defeasible a little in this case, where the relationship is at an end, where any payment that would be made under a judgment in the Somerset proceedings would itself be immediately caught up in subsequent account proceedings and the other proceedings that would not be resolved by that proceeding, and that there is some complexity in the first point advanced by Mr Reading, which is whether the work was licensed.
- [24] Again, Ms Hindman disarmingly accepted that some of those matters meant the policy I had identified was not quite as compelling in this case, but she maintained it remained sufficiently compelling to sustain ordering the determination of the Somerset proceedings first.
- [25] She pointed out, for example, the unpaid amount of \$100,000 (which is 20 percent of the value of the work done and one-eighth of the total amount) is not *de minimis* and the District Court, in particular, is well-aware that amounts that might seem small in the Supreme Court are often very important to commercial parties in this Court.
- [26] She also submitted that it is contemplated by the statute that this question of whether there is a contract is something which can arise in proceedings to recover unpaid amounts as debts and in proceedings in Court, whether arising out of adjudications or alleged failures to deliver a payment schedule. The Act contemplates that that is not a reason to slow down the interim process contemplated by the statute. There is another factor as well, notwithstanding the points that Mr Reading helpfully made, and that is that if this proceeding succeeds, as I have said, a great deal of the disputes and potential disputes in the Eaglerise proceedings will also be resolved.
- [27] Even if Somerset fails, however, and restitutionary claims and cross-claims arise, they will, in my view, be complex and expensive things to resolve, and I consider, just based on my own experience, that there is much to be said for resolving the question of whether the work was licensed or not on a preliminary basis, even quite apart from the policy considerations, and even bearing in mind the points Mr Reading made.

- [28] Reasonable minds can differ about these things, but in my view, on balance, taking into account all the points that were made, this is an appropriate case for me to make the orders sought by Somerset for their proceedings to be heard first.
- [29] I was fortified in reaching that view because both parties considered that they could be ready by the end of June. I made that early July so that Eaglerise could continue to brief their capable counsel.
- [30] For those reasons, I have made orders placing both matters on the commercial list. I order that Somerset proceedings (705/21) be heard and determined prior to the hearing and determination of proceedings 348/21. I otherwise dismiss Eaglerise's application in 348/21.