

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Queensland Building and Construction Commission v Perry's Prestige Properties Pty Ltd & Anor* [2023] QMC 7

PARTIES: **Queensland Building and Construction Commission**  
(Plaintiff)

V

**Perry's Prestige Properties Pty Ltd ACN 618290047**  
(First Defendant)

&

**Lee Alan Perry**  
(Second Defendant)

FILE NO/S: 1629/21

DIVISION: Magistrates Courts

PROCEEDING: Application

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 29/06/2023

DELIVERED AT: Brisbane

HEARING DATE: 24/03/2023

MAGISTRATE: J. Pinder

ORDER: **(1) The plaintiff's application for summary judgement is dismissed**

**(2) I will hear the parties as to costs**

CATCHWORDS: PROCEDURE – RULES OF COURT – APPLICATION FOR SUMMARY JUDGEMENT ON CLAIM AND COUNTER CLAIM

*Uniform Civil Procedure Rules 1999 (QLD) r 292 and r 293*

*Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227

*Qld Building Services Authority v Orenshaw & Anor* [2012] ASC 241

*Jessup v Lawyers Private Mortgages Ltd & Ors* [2006]

*Agar v Hyde* [2000] 201 CLR 552

*Queensland Pork Pty Ltd v Lott* [2003] QCA 271

*Samini & Anors v the Queensland Building and Construction Commission* [2015] QCA 106

COUNSEL: Mr M. Robinson (solicitor) for Plaintiff  
Ms K. Boomer for first and second Defendants

SOLICITORS: Robinson Locke Litigation Lawyers for Plaintiff  
Patane Lawyers for first and second Defendants

### **Introduction**

- [1] The plaintiff brings suit claiming \$30,369.02 as a liquidated debt owing by the first defendant (pursuant to s.71(1) of the *Queensland Building and Construction Commission Act 1991* (QBCC Act)) and the second defendant pursuant to s.11C(6) QBCC Act in respect of liability arising as payments “on a claim under the insurance scheme” created by the QBCC Act. The first and second defendants (the defendants) defend the claim contending that the sums are not properly recoverable because the amount claimed are not payments “on a claim under the insurance scheme”

### **The party’s material**

- [2] The plaintiff relies on the following material

| <b>No.</b> | <b>Description</b>                                 | <b>Date Filed</b> |
|------------|--|-------------------|
| 1.         | Application  | 3 March 2023      |
| 2.         | Affidavit of Chris Sia                             | 2 June 2022       |
| 3.         | Affidavit of Chris Sia                             | 3 March 2023      |
| 4.         | Affidavit of Chris Sia                             | 17 March 2023     |
| 5.         | Claim and Statement of Claim                       | 29 July 2021      |
| 6.         | Further Amended Statement of Claim (“FASOC”)       | 14 February 2023  |
| 7.         | Further & Better Particulars of Statement of Claim | 5 July 2022       |
| 8.         | Amended Defence                                    | 31 May 2022       |
| 9.         | Reply  | 14 February       |

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[3] The defendant relies on the following material

| Item | Document   | Date       |
|------|--|------------|
| 1.   | Further Amended Statement of Claim                               | 14.02.2023 |
| 2.   | Amended Defence to Amended Statement of Claim                    | 19.08.2022 |
| 3.   | Reply  | 14.02.2023 |
| 4.   | Affidavit of Lee Perry   | 30.05.2022 |
| 5.   | Plaintiff's outline of argument on default judgement application | 03.06.2022 |
| 6.   | Affidavit of Kim Kaulkman (L.t.r.f.)                             | 23.03.2023 |

[4] The plaintiff and defendants' counsel both conveniently provided comprehensive written outlines of argument to assist the court.

**The relevant rule**

[5] The UCPR empowers this court to grant summary judgement in respect of the plaintiff's claim against the defendant

[6] Rule 292 provides:

*(1) The plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgement against the defendant.*

*(2) If the court is satisfied that -*

*(a) The defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and there is no need for a trial of the claim or the part of the claim;*

*The court may give judgement for the plaintiff against the defendant for all or part of the plaintiff's claim and may make any other order the court considers appropriate.*

### The relevant legal principles

- [7] In determining applications for summary judgement (pursuant to Rule 292 and Rule 293) this court is bound by the statements of principal contained in *Deputy Commissioner of Taxation v Salcedo*<sup>1</sup> where it was held:

*“Summary judgement will not be obtained as a matter of course and the Judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect at succeeding at trial, if that is established then the matter must go to trial.”*

- [8] At paragraph 44 of the judgement Atkinson J stated:

*“In the case of an application by the Plaintiff, the court must consider if it is satisfied that:*

- a) The Defendant has no real prospect of successfully defending all or part of the Plaintiff’s claim; and,*
- b) There is no need for a trial of the claim or part of the claim.*

*“If the court is satisfied of those circumstances then it has the discretion to give judgement for the Plaintiff and make any other order that it considers appropriate. Similar criteria apply to an application by a defendant pursuant to rule 293.”*

- [9] Her Honour continued at paragraph 47 and further held:

*“... the court must consider whether there exists a real, as opposed to fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim and there is no need for a trial, then ordinarily the other party is entitled to judgement.”*

- [10] In *Queensland Building Services Authority v Orenshaw and Anor*<sup>2</sup> Henry J said in respect of the relevant test:

*“The words ‘no real prospect of proceeding’ mean what they say. They are to be applied in conjunction with required satisfaction that there is no need for a trial, so as to ensure before any summary intervention that there is a*

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<sup>1</sup> [2005] QCA 227

<sup>2</sup> [2012] QSC 241

*high degree of certainty about what the ultimate outcome of the proceeding would be if it were allowed to go to trial in the ordinary way.”*

[11] Whilst those authorities require the court to apply the rule giving the words their usual and ordinary meanings and without further amplification, their practical application to particular circumstances was considered comprehensively by Chesterman J in *Jessop v Lawyers Private Mortgages Limited & Ors*<sup>3</sup>.

[12] His Honour at paragraphs 18 and 19 of the decision considered the earlier authorities and the proposition that the wording of the rule ought to be given its “plain and unambiguous meaning”. His Honour adopted a convenient and practical approach to the application of the rule and held at paragraph 20:

*“If summary judgement is not to work on an injustice it must be limited to those cases where it can be seen that a plaintiff or defendant, as the case may be, could not succeed at a trial of the action. It is only where a trial can be seen to be pointless that judgement should be entered summarily. Whatever form of words one uses the reality must be that it will only be just to deprive a party of its right to prosecute its claim or defence at trial where it can be seen that the claim or defence cannot succeed. If it might succeed, if there is a possibility of success, it cannot be just (though it might be expeditious) to enter summary judgement.”*

[13] His Honour continued at paragraph 21:

*“In practical terms I suspect the rule means (as the old rules meant) that summary judgement should not be given where the facts upon which the parties respective rights depend are disputed, or where the respondent to the application for summary judgement adduces evidence as to the existence of facts, which if proved, would establish a defence or right to relief. In other words it is only where all the facts are known and/or are establish beyond controversy that the court should embark upon determining whether to give summary judgement. Where relevant facts are converted, or where it appears that facts may exist which would effect a right of action or defence, there should be a trial to determine the facts...”*

[14] In approaching the disposition of the present application I proceed adopting the test enunciated by Chesterman J at paragraph 23 of *Jessop v Lawyers Private Mortgages Limited & Ors*<sup>5</sup> that is I approach the plaintiff’s application on the basis that I should give judgement only if satisfied that there are uncontroverted facts proved by the material read in the application which show an entitlement in law to the relief claimed by the plaintiff, and that there is no evidence to suggest the existence of additional facts which, if proved would controvert those facts.

### **Summary judgement application – the test**

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<sup>3</sup> [2006] QSC 3

- [15] In an application for summary judgement brought pursuant to r. 292 UCPR the first question is whether the defendants have no real prospect of succeeding in defending all or part of the plaintiff's claim. In *Deputy Commissioner of Taxation v Salcedo* the court said that means no real prospects as opposed to fanciful prospects<sup>4</sup> (see paragraphs 11-13 - *Deputy Commissioner of Taxation v Salcedo*). The plaintiff satisfies that only if I consider that there is a high degree of certainty about the ultimate outcome of the proceeding if it were to go to trial in the ordinary way. (see *Agar v Hyde*).<sup>5</sup>
- [16] The second question under r. 292 is whether there is no need for a trial of the relevant claim. That is, despite a defendant having no prospect of success, based on the evidence available at the hearing of the summary judgement application there may be reasons for the court to consider that there should be a trial in any event.
- [17] The plaintiff must satisfy the court that both of those tests are met to succeed in the application.
- [18] Both of those tests must be satisfied for the plaintiff to succeed in the application. The application should be refused if the court is satisfied that there are circumstances that ought to be investigated, notwithstanding that the defendants cannot identify a specific issue which ought to be tried. The onus is on the plaintiff to satisfy the court of those two requirements, and only when a *prima facie* entitlement to summary judgement has been established does the evidentiary burden shift to the defendants. (see *Queensland Pork Pty Ltd v Lott*).<sup>6</sup>
- [19] The power to order a summary judgement must be exercised with great care and only if it is clear that there is no real question to be tried (see *Agar v Hyde* *ibid* at paragraph 57).<sup>7</sup>

### **The pleadings**

- [20] The party's pleadings have both been significantly amended since the proceedings were initially commenced. The plaintiff pleads its claim upon the basis of
- Building work at 48 Monmouth Street, Morningside (the first property)
  - Building work at 1/48 Monmouth Street, Morningside (the second property)

### **Claim – the first property**

- [21] The plaintiff pleads that the body corporate for 48 Monmouth Community Titles Scheme is a subsequent homeowner pursuant to part 5 of the QBCC Act and that allegedly incomplete or defective work by the defendants in respect of the first property give rise to a claim under the insurance scheme with the plaintiff in respect of which payments were made and the first defendant is liable to the plaintiff for those payments pursuant to s.71 of the QBCC Act.

### **Claim – the second property**

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<sup>4</sup> *Deputy Commissioner of Taxation v Salcedo*

<sup>5</sup> *Agar v Hyde* [2000] 201 CLR 552

<sup>6</sup> *Queensland Pork Pty Ltd v Lott* [2003] QCA 271

<sup>7</sup> *Agar v Hyde* paragraph 57

[22] In respect of the second property the plaintiff contends that Wendy Schwarzenecker became the homeowner of the second property and likewise in respect of incomplete or defective work, the plaintiff made a payment for the second property on a claim under the insurance scheme and similarly the first defendant became liable to the plaintiff pursuant to s.71 and the second defendant became liable pursuant to s. 11C(6) of the QBCC Act.

[23] The amended defence of the first and second defendants in pleading to those allegations in the amended statement of claim contend that: -

- The first property claim was not made by an eligible claimant under the insurance scheme (the body corporate for 48 Monmouth Community Titles Scheme)
- The first and second property claims were made out of time.

**The first property claim was not made by an eligible claimant.**

[24] The defence pleads that the body corporate is not an eligible claimant because it is not a “consumer of residential construction work or a subsequent owner in respect of the works.”

[25] In particular, paragraph 4 of the defence pleads

- The body corporate was expressly excluded from claiming pursuant to s. 68(2), s.68(3), and s.68(4) of the QBCC Act.
- The body corporate was an associate of the building contractor and therefore was similarly excluded for claiming assistance pursuant to regulation 32
- The body corporate was not an owner or subsequent owner of the first property

**The claims under the scheme are out of time**

[26] The defendants similarly plead both in respect of the first property claim and the second property claim that no claim was made within the time prescribed pursuant to s. 16(3) of the QBCC Act

**The defences are not justiciable**

[27] The plaintiff’s outline to a large extent contends effectively that the defences are not justiciable upon the basis that there are a number of authorities that in respect of claims pursuant to s.71(1) and s.11C of the QBCC Act supporting the proposition that challenges to acceptance or assessment of claims were effectively precluded.

[28] The plaintiff argues that payments made in accordance with the insurance policy are “a payment on a claim under the insurance scheme and consequently the plaintiff has a right to recover against the first and second defendants.” The entitlement of the defendants to raise challenge in the defence in these proceedings to the claims, the plaintiff asserts, is lost and ought properly have been the subject of a review under the relevant statutory framework of the QBCC Act.

- [29] The defendants contend that the defences pleaded are justiciable in these proceedings and rely on the decision in *Samini & Anors v the Queensland Building and Construction Commission (2015) QCA 106* where Boddice J (with whose reasons the president and Morrison JA agreed) said

*[30] The Act contains a number of mechanisms for merit reviews of decisions made by the respondent in its administration of the statutory scheme. Those review rights are wide ranging and extensive. It is unsurprising, against that background, that s 71(1) of the Act has been interpreted as providing the respondent with a right of recovery, as a debt, of payments made by it on a claim under the insurance scheme which is not dependent upon the respondent establishing the legal correctness of a determination made by it to make that payment or any anterior step taken by it that has led to the decision to pay. It is also not enough to avoid liability for a builder to point to a mere error of fact connected with the claim process.*

*[31] However, it does not follow that no factual error can be the subject of a proper defence to a claim for recovery made pursuant to s 71(1) of the Act. The inclusion of the words “on a claim under the insurance scheme”, in s 71(1) of the Act, indicate a legislative intention to require the right of recovery to pertain to payments made “on” claims under the insurance scheme. The use of those words connotes a requirement the payment made be within the policy. If that were not so, the legislature could simply have provided that the respondent could recover under s 71(1) of the Act any payment it had made pursuant to the insurance scheme.*

..

*[38] Contrary to the respondent’s submission, the consideration of whether a payment sought to be recovered under s 71(1) of the Act was a valid payment under the scheme does not merely raise an element of the respondent’s administrative processes anterior to that payment. That issue raises whether the payment was made “on a claim under the insurance scheme”, a condition for recovery of the payment under s 71(1) of the Act.*

- [30] That decision is authority for the proposition where, as the defendants plead in their amended defence, there are issues raised as to whether the payments were made “on a claim under the insurance scheme” the issues are justiciable in these proceedings.

### **Has the plaintiff satisfied the *prima facie* entitlement to summary judgement**

- [31] As r. 292 and the authorities provide the plaintiff must satisfy the court that
- a) The defendant has no real prospect of successfully defending all or part of the plaintiffs’ claim
  - b) There is no need for a trial of the claim or part of the claim.
- [32] The defence pleads a number of issues which on their plain face controvert the plaintiff’s pleaded allegations in respect of
- The eligibility of the claimant (the body corporate) in the first property claim
  - The issue as to whether the first and second property claims were made out of time.

- [33] Notwithstanding the plaintiff's contentions that having received the claims and determined them and allegedly made payments "on a claim under the insurance scheme" the proof of those facts is disputed and justiciable in these proceedings.
- [34] In those circumstances the facts are not established beyond controversy and as Chesterman J said in *Jessop v Lawyers Private Mortgages Limited & Ors* "where relevant facts are controverted or where it appears that facts may exist which would effect a right of action or defence, there should be a trial to determine the facts..." This is such a case and the plaintiff has not established on the material the threshold questions under r. 292. The application for summary judgement should therefore be dismissed.

### **Disposition**

- [35] The plaintiff's application for summary judgement is dismissed.
- [36] I will hear further submissions from the parties in respect of costs.