

CIVIL JURISDICTION

BEFORE MR. JUSTICE McPHERSON

BRISBANE, 9 MARCH 1988

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authority of the Chief Court Reporter, Court Reporting
Bureau.)

IN THE MATTER of the Subcontractors' Charges Act of 1974-
1976

-and-

IN THE MATTER of Notice of Claim of Charge under the said
Act given by JENNIS LE BLANC COMMUNICATIONS PTY. LTD.,
JAMES DOUGLAS CRICHTON and EVELYN EDITH CRICHTON, trading
as CRICHTON FABRICATING COMPANY, ANTHONY JOHN HUISMAN and
VICKI LEE HUISMAN, trading as A.J. & V.L. HUISMAN, IAN NOEL
ROBERTSON and JEAN MARION ROBERTSON, trading as I.N. & J.M.
ROBERTSON, STANLEY WILLIAM FARQUHARSON and JUNE JOSEPHINE
FARQUHARSON, trading as GAP ELECTRICAL SERVICE, and RONALD
MARK MURRAY and DENNISE GERTRUDE MURRAY.

JUDGMENT

HIS HONOUR: The application for payment of moneys out
of court is refused with costs.

I will instead make a declaration that the charge, if
any, claimed by the applicants in their notice dated 19
August 1986 has been extinguished.

I publish my reasons.

Before Mr Justice B.H. McPherson

IN THE MATTER of the Subcontractors' Charges Act of 1974-1976

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IN THE MATTER of Notice of Claim of Charge under the said Act given by JENNIS LE BLANC COMMUNICATIONS PTY. LTD., JAMES DOUGLAS CRICHTON and EVELYN EDITH CRICHTON, trading as CRICHTON FABRICATING COMPANY, ANTHONY JOHN HUISMAN and VICKI LEE HUISMAN, trading as A. J. & V. L. HUISMAN, IAN NOEL ROBERTSON and JEAN MARION ROBERTSON, trading as I. N. & J. M. ROBERTSON, STANLEY WILLIAM FARQUHARSON and JUNE JOSEPHINE FARQUHARSON, trading as GAP ELECTRICAL SERVICE and RONALD MARK MURRAY and DENNISE GERTRUDE MURRAY

JUDGMENT McPHERSON J.

Delivered the Ninth day of March, 1988.

CATCHWORDS:

Building and engineering contracts - Subcontractor's charge - Notice of claim of charge given - Money paid into court - No proceedings commenced - Whether charge extinguished - Subcontractors' Charges Act 1974-1979, ss. 12(1), 15(3).

Counsel: Mr. K. Boulton for Applicant
Mr. J. K. Bond for Respondent
Solicitors: Ellison Moschella & Co. for Applicant
McCullough & Robertson for Respondent
Power & Power for Respondent
Crown Solicitor for Commissioner of Railways

Hearing date: 15 February, 1988

IN THE SUPREME COURT OF QUEENSLAND No. O.S. 1086 of 1987

IN THE MATTER of the Subcontractors' Charges Act of 1974-1976

- and -

IN THE MATTER of Notice of Claim of Charge under the said Act given by JENNIS LE BLANC COMMUNICATIONS PTY. LTD., JAMES DOUGLAS CRICHTON and EVELYN EDITH CRICHTON, trading as CRICHTON FABRICATING COMPANY, ANTHONY JOHN HUISMAN and VICKI LEE HUISMAN, trading as A. J. & V. L. HUISMAN, IAN NOEL ROBERTSON and JEAN MARION ROBERTSON, trading as I. N. & J. M. ROBERTSON, STANLEY WILLIAM FARQUHARSON and JUNE JOSEPHINE FARQUHARSON, trading as GAP ELECTRICAL SERVICE and RONALD MARK MURRAY and DENNISE GERTRUDE MURRAY

JUDGMENT - McPHERSON J.

Delivered the Ninth day of March, 1988.

In 1985 Catco Developments Pty Ltd ("the head contractor"), entered into a contract with the Commissioner for Railways as principal for the construction of microwave repeater buildings and towers at various locations in Queensland. The head contractor failed to perform the contract according to its terms and in 1986 the Commissioner took over the work and completed it. After deducting costs and entitlements involved in doing so, the Commissioner gave notice dated 31 August, 1987 of payment into court of a balance of \$86,128.50 pursuant to s. 11(5) of the Subcontractors' Charges Act 1974-1979.

In the meantime, several subcontractors, including the applicants herein for whom Mr Boulton of counsel appears, and two respondents for whom Mr Bond of counsel and solicitors respectively appear, had given notices of claims of charge under s. 10 of the Act. The application before me, which seeks an order for payment out of court in favour of the applicants, is opposed by those respondents essentially on the ground that the Act requires, as a condition of obtaining or maintaining a valid charge under its provisions, that proceedings be commenced by the claimant to enforce the charge.

It is conceded that no such proceedings have ever been commenced by the applicants. Mr Boulton nevertheless submits that proceedings are not necessary in a case where, as here, the head contractor has at all relevant times expressly admitted both the existence and the quantum of the debt in respect of which notice of claim of charge was given by the subcontractor. I am, however, unable to accept that submission and will briefly state my reasons for that opinion.

Section 10(1) requires a subcontractor who intends to claim a charge on money payable to his contractor to give the notices referred to by that subsection with respect to "the claim" which he makes. The subsection requires that the claim shall be in respect of money payable to him at the date of the notice. The charge does not attach if notice is not given under the section: see s. 10(4). Upon receipt of notice under s. 10 the recipient (who I will assume is the principal) is required by s. 11(1) to retain contract moneys sufficient to satisfy the claim. Having done so, he may pursuant to s. 11(5) pay the money into court, in which case he is discharged from liability: s. 11(6).

Section 12(1) of the Act provides as follows:—

"12(1) Where the person to whom notice of claim of charge has been given does not pay or make satisfactory arrangements for paying to the claimant the amount claimed, the subcontractor may recover the amount of the charge from the person by whom the money subject to the charge is payable."

Section 12(2) provides that "claims...may be heard determined, and enforced by proceedings pursuant to this Act...". By s. 12(3)(a) it is provided that an action "to enforce a charge under this Act" may be brought by or on behalf of a number of subcontractors claiming charges. There is provision in s. 12(3)(b) by which a subcontractor may "in accordance with Rules of Court and this Act" become a party to an action brought by another contractor to

enforce a charge, in which event the action enures for his benefit. It is not suggested that this procedure has been followed by the applicants in the present case.

Section 15 is a critical provision in the resolution of the question here. It provides:-

- "15(1) A proceeding in respect of a charge under this Act-
- (a) in the case of a claim of charge in respect of retention money only, shall be commenced within four months after such retention money or the balance thereof is payable and no later;
 - (b) in all other cases, shall be commenced within two months after notice of claim of charge has been given pursuant to section 10 and no later;
 - (c) shall be brought by way of action.
- (2) For the purposes of a proceeding under this section, it shall be sufficient if the subcontractor proves that the charge in respect of which the proceeding is brought attached to money payable on any date prior to the date of hearing.
- (3) Every charge shall be deemed to be extinguished unless the subcontractor duly commences a proceeding under this section to enforce it."

On behalf of the respondents, it is submitted that, having failed to commence a proceeding under s. 15 to enforce the charge, the applicants' charge is extinguished by force of s. 15(3). Mr Boulton's submission is that s. 15(3) operates to extinguish a charge only if the person, in this case the Commissioner as principal, does under s. 12(1) "not pay or make satisfactory arrangements for paying to the claimant the amount claimed". The Commissioner here did not pay the applicants; but it is said that, by making payment into court on 31 August, 1987 of the sum of \$86,128.50 and giving notice thereof, the Commissioner made "satisfactory arrangements for paying the claimant the amount claimed" within the meaning of s. 12(1).

I am unable to accept that submission. The Commissioner's payment into court was not an "arrangement" at all. It was a step taken by the Commissioner in order to gain for himself the benefit of the discharge conferred by s. 11(6), and it cannot be unilaterally converted into an "arrangement" by the expedient of declaring that the applicants or their solicitors are "satisfied" with it. On the face of it, there was nothing they could do to prevent it.

The submission does, in any event, ignore the distinction, drawn by Mr Bond in his submission, between paying the debt or claim, and securing or taking steps to secure it pursuant to the Act. What the Act does is to confer a charge or security over contract money due to the head contractor, provided that the statutory requirements are fulfilled. If they are fulfilled, the claimant will in due course be paid, either in full or rateably with other claimants similarly placed; but that is a consequence of the provisions of the Act and not of any "arrangements" made with the principal for payment of the claimant.

Commencing proceedings in accordance with s. 15 of the Act is, in my opinion, an essential step in the process of establishing the claimant subcontractor's charge or security, and is not dispensed with simply because the head contractor chooses not to contest the claim or its amount. Section 15(3) affirmatively declares that the charge is extinguished unless the requisite proceedings are commenced, and I see nothing in the other provisions of the Act which qualifies that requirement in any relevant respect. That conclusion is consistent with the approach of the Full Court in Stumann v. Spansteel Engineering Pty. Ltd. [1986] 2 Qd.R. 471, to which Mr Bond referred me. If Mr Boulton's submission here were correct it would have afforded a simple answer to the question considered and decided by the Court in that case.

It follows that the application should be refused. I will instead make the declaration sought by Mr Bond, which

is that the charge, if any, claimed by the applicants in their notice dated 19 August, 1986 has been extinguished.