SUPREME COURT OF QUEENSLAND

CITATION:	*CMC Cairns Pty Ltd v Macrossan & Anor* [2003] QSC 249
PARTIES:	**CMC CAIRNS PTY LTD (ACN 040 851 379)** (plaintiff/applicant) v **TIM MACROSSAN** (first defendant/first respondent) **PAULA LENNON** (second defendant/second respondent)
FILE NO/S:	S67 of 2002
DIVISION:	Trial Division
PROCEEDING:	Civil Application
DELIVERED ON:	1 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 June, 25 July 2003
JUDGE:	McMurdo J
ORDER:	**The application be dismissed**
CATCHWORDS:	CONTRACT - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - PENALTIES AND LIQUIDATED DAMAGES - where the contract provided for the application of liquidated damages for delay in completion of the contracted works - whether a GST component is payable as part of the contract sum and is relevant for the determination of liquidated damages payable under the contract PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - Summary Judgment - where the plaintiff/applicant applied for summary judgment of part of its claim and for a determination pursuant to r 483 of the Uniform Civil Procedure Rules - whether in the circumstances summary judgment should be granted - whether r 483 determination should also be granted *A New Tax System (Goods & Services Tax) Act* 1999, s 9 and s 10 *Uniform Civil Procedures Rules*, r, 292 and r 483
COUNSEL:	D Savage SC for the plaintiff/applicant P Hackett for the defendants/respondents
SOLICITORS:	Morrow Petersen for the plaintiff/applicant

Crouch & Lyndon Solicitors for the defendants/respondents

[1] **McMURDO J:** The plaintiff is a builder who contracted with the defendants to construct twelve apartments upon their land at Port Douglas, by a written contract dated 20 December 1999. These proceedings were commenced by a claim filed on 16 May 2002. The plaintiff claims various sums as monies owing under the contract, or as damages for breach of contract, or in at least one case as what the claim describes as "equitable compensation by way of restitution for unjust enrichment". At its highest, the plaintiff's claim is for $325,836.26, together with interest. There is a counter claim for damages in the sum of $197,305.

[2] This is an application by the plaintiff for summary judgment upon part of its claim, relating to the unpaid balances of two progress certificates, totalling $101,968. The plaintiff also seeks the preliminary determination of certain issues pursuant to r 483. Broadly speaking, they are issues relevant to the summary judgment application.

[3] The contract is in the standard form JCC-D 1994. It provided for a lump sum of $1,519,515, payable in instalments according to the certification of progress claims. The certifying architect was one of the defendant proprietors, Mr Macrossan. The present application concerns progress certificates numbered 8 and 9, which he issued respectively in September and October 2000. Certificate No 8 was for $304,674, of which the plaintiff has been paid $228,161. Certificate No 9 is in the amount of $229,808, of which the plaintiff has been paid $204,353. The unpaid balances of these certificates total $101,968. After this application for judgment was made, the first defendant purported to issue progress certificates to correct what he says was an error in certificates 8 and 9, and he has also issued a final certificate. On the basis of these three further certificates, it is submitted that any right to payment upon certificates 8 and 9 has now been lost, which the plaintiff disputes.

[4] By clause 10.07 of the contract, the plaintiff is entitled to be paid the amount specified by a progress certificate within the time specified in the appendix to the contract, which was a period of five days. By clause 10.08, the plaintiff is entitled to interest at a specified rate upon the unpaid amount of any progress certificate. The unpaid balances of these progress certificates are amounts withheld as allegedly due by the builder as liquidated damages for delay. Clauses 10.14 and 10.15 of the contract provide as follows:

> "10.14 **LIQUIDATED AND ASCERTAINED DAMAGES**
>
> If the Builder shall fail to bring the Works to Practical Completion by the Date for Practical Completion:
>
> 10.14.01 The Architect may give notice in writing to the Builder and to the Proprietor that in his opinion the Works ought reasonably to have been brought to Practical Completion at some earlier date to be stated in that notice, not being earlier than the Date for Practical Completion.

10.14.02 If such notice is given the Builder shall pay or allow to the Proprietor a sum calculated and certified by the Architect at the rate stated in Item O of the Appendix as liquidated and ascertained damages for the period (commencing from the date so stated) during which the Works shall remain or have remained not brought to Practical Completion.

10.14.03 In the event of no further moneys being payable to the Builder or in the event of the sum calculated in accordance with paragraph 10.14.02 exceeding the amount remaining payable by the Proprietor to the Builder, the Proprietor shall be entitled to recover the same, or any such excess, as a debt due to the Proprietor by the Builder.

10.15 **PROVISIONAL WITHHOLDING OF DAMAGES**

Should the Date for Practical Completion have passed without the Works having been brought to Practical Completion then prior to giving notice under the provisions of paragraph 10.14.01 the Architect may notify in writing the Builder and the Proprietor accordingly. Thereafter, when issuing any progress certificate, the Architect may issue with it a provisional assessment in writing of the amount then provisionally due by way of liquidated and ascertained damages and the Proprietor may, provided he shall have given to the Builder at least five (5) working days written notice of his intention so to do, deduct such amount from the Amount certified in the particular progress certificate. Any amount so deducted shall be taken in partial satisfaction of the indebtedness of the Builder to the Proprietor for the amount subsequently certified under paragraph 10.14.02."

[5] The agreed date for practical completion was 20 June 2000. The applicant's submissions appear to accept that there is at least a triable issue as to whether the delay entitled the architect to assess amounts as due by way of liquidated damages. But the applicant contends that the architect's purported assessment is inconsistent with the contract upon its proper interpretation, with the consequence that the defendants were not entitled to deduct the amounts so assessed from the amounts of the progress certificates.

[6] Clause 10.14.02 provides for payment of such damages "at the rate stated in Item 0 of the Appendix", which is in these terms:

"$3,250 per week + GST due to builders failure to complete"

[7] The Specification to the contract is also relevant in its reference to liquidated damages in these terms:

"14. Liquidated Damages

Upon failure of the Contractor to complete the Works on the Ultimate Practical Completion Date as accepted by the Proprietor, the Contractor shall pay to the Proprietor, Liquidated Damages in the total sums, listed below, per week until such time as Works have been completed to the satisfaction of the Proprietor:

: $3,250.00
: Contractor to pay any GST payable on uncompleted works under the contract after 30 June 2000 that are incomplete due to causes directly attributable to the builder."

Clause 2.01 of the contract requires the Specification to be read as part of the contract although clause 2.02 provides that any discrepancy or inconsistency between the Specification and the conditions of contract shall be resolved by giving precedence to the conditions.

[8] The contract thereby provided for the assessment of liquidated damages for delay by reference to two components. One is an amount calculated at the rate of $3,250 per week. The other component is calculated in some way by reference to some amount "due" or "payable" for GST. The present controversy relates to this component. The plaintiff contends that Mr Macrossan calculated the GST component inconsistently with the contract, with the result that his assessment of liquidated damages, even insofar as it included the component of $3,250 per week for a certain number of weeks, is of no effect and the defendants were not entitled to deduct any of the amounts assessed from what was otherwise due under the progress certificates. The amount in question ($101,968) was calculated in a way indicated by the first defendant's fax to the plaintiff of 15 September 2000, where the following appears:

"Current T.B.H. date of 18 October as the projected completion date:

Incomplete work as at 30 June 2000	=	$751,799 (Note 1)
Less work than should have been performed in July	=	$ 89,616 (Note 2)
∴ Work to be performed between 1 Aug and Prac.Comp.		$ 662,183
10% GST on the above	=	$ 66,218
Plus 11 weeks @ $3,250/week	=	$ 35,750
∴ Total Prov. Liquidated Damages	=	$101,968"

The calculation appears to accept that the date for practical completion was extended to 1 August 2000, and it thereby included a component of $3,250 per week for 11 weeks through to the projected completion date of 18 October. The other component was calculated as "10% GST" on the work unperformed as at 1 August. By its reference to "incomplete work as at 30 June 2000", it is a calculation in apparent reliance upon the terms of the Specification, as another part of the fax makes clear. The date of 30 June 2000 was significant for the builder in relation to GST: it was obliged to pay GST for goods and services supplied under this contract from 1 July 2000 although the contract itself was made in December 1999. The liability for GST in relation to the performance of the contract works

was that of the builder. The assessment of liquidated damages appears to be premised on some GST related consequence for the defendants of the work being performed after 30 June 2000, and the assessment seems designed to relieve the defendants of a perceived burden for the amount of GST to be paid on the performance of the uncompleted works. It appears to accept that the defendants would otherwise bear the ultimate burden of that GST liability, presumably by having to add it to the contract sum. The assessment of liquidated damages in this way was apparently designed to result in the burden of the builder's GST liability remaining upon the builder, whose default had resulted in the works being performed after the introduction of the tax.

[9] For the plaintiff, it is submitted that this assessment of liquidated damages is inconsistent with the proper interpretation of Item O of the Schedule. Its submissions pay no regard to the terms of the Specification, presumably because it is contended that they should give way to what is said to be the unambiguous meaning of Item O. According to the plaintiff's submissions, the effect of Item O is that liquidated damages should be assessed, in effect, at $3,250 per week plus 10% on that sum. In other words, they should be assessed by reference to a weekly sum of "$3,250 per week + GST". Upon this interpretation, the GST is that payable on what is said to be a supply *by* the defendants *to* the plaintiff, for which the plaintiff builder makes the agreed (damages) payment of $3,250 per week. The supply is said to be the defendants' release of their claim against the plaintiff.[1] This interpretation of the words against Item O would seem to give no particular effect to the words "due to builders failure to complete" which appear after "GST" in Item O. If Item O was capable only of the interpretation for which the plaintiff argues, there would be a discrepancy between it and the relevant provision in the Specification. But in my view, Item O is able to be read consistently with the Specification. In particular, the "GST" referred to in Item O can be read as a reference to such GST which results from the "builder's failure to complete", so that Item O, like the Specification, would refer to the GST payable by the builder for works performed after 30 June 2000, where that has resulted from his failure to achieve practical completion by the required date (as originally agreed or extended). If the defendants would otherwise have to bear the burden of that GST liability, by effectively adding it to their payments to the builder, the liquidated damages provisions would provide a logical and apparently fair reallocation of the burden. The plaintiff says that such an interpretation must be rejected, because it now disclaims any entitlement to add to the contract sum any amount for GST. It says that as it was not entitled to add GST to the price, it is nonsensical and unfair for its payments to be reduced by the amount of its own GST burden.

[10] The conditions of contract are inconsistent with any entitlement of the plaintiff to be paid an additional sum representing its liability for GST. The absence of such an entitlement would certainly be relevant to the interpretation of these provisions for the assessment of liquidated damages, although it would not require Item O of the contract to be interpreted as the plaintiff contends. However, by its statement of claim, the plaintiff pleads that it is entitled to add a GST component to the contract sum. The alternative bases for this claim are pleaded in paragraphs 94 through 100. One of those is an alleged variation of the terms of the original contract "to provide that any GST payable by (the plaintiff) in respect of work done under the Contract

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1 A 'supply' is defined to include a 'surrender of any right' in s 9 to s 10 of the *A New Tax System (Goods & Services Tax) Act* 1999.

subsequent to 30 June, 2000, would be added to the Contract Sum and to be payable by the defendants" (para 97). The plaintiff's present submission, which disclaims any entitlement to add anything for GST, is in defiance of its own pleading, which it does not seek to amend. Moreover, it is inconsistent with its conduct in claiming to add GST in progress claims for work performed after 1 July 2000. It is common ground upon the pleadings that it has claimed amounts for GST within progress claims numbered 7, 8 and 9, and that in turn, those amounts have been allowed in full within progress certificates 7, 8 and 9. The amounts total $71,404, which appears as a component for GST allowed in favour of the builder in the calculations set out in progress certificate No 9. Similarly, the amounts claimed for GST within claims 7 and 8, totalling $50,513, were added in the calculation for the amount due under progress certificate No 8. This is an application for judgment for the unpaid balances of progress certificates 8 and 9. Therefore, if the plaintiff is given judgment upon this application, it will have succeeded in adding at least some of its GST burden to the contract sum, consistently with its pleaded case. However, for the purposes of the present application, it says that the contractual provisions for liquidated damages for delay should be interpreted upon the basis that there has never been an entitlement to add GST to the contract sum.

[11] There is also some inconsistency in the defendants' position because, although Mr Macrossan has acknowledged the builder's entitlement to add GST by his progress certificates, the defendants' pleading puts in issue the plaintiff's allegations of such an entitlement. Nevertheless, upon the present state of the pleadings, there are issues to be tried as to whether the plaintiff was entitled to add GST for its work after 30 June. The conduct of the parties indicates at least a substantial prospect that they agreed to vary the contract to this effect. Upon this application for summary judgment, the contract in its provisions for liquidated damages for delay ought not to be interpreted upon the premise that the parties have agreed that the burden of GST was to remain upon the builder. This means that an important basis for the plaintiff's submissions as to the interpretation of Item O is not established.

[12] The contract must be interpreted as a whole, and the proper interpretation of the provisions relating to the liquidated damages for delay could be affected by other terms, including terms resulting from a variation of the original terms. This demonstrates the undesirability of endeavouring to interpret part of the contract, in advance of the determination of what was the content of the other relevant terms. If this contract ultimately contained terms by which GST was to be added to the contract sum, the interpretation upon which the first defendant, as certifying architect, has assessed liquidated damages would be correct in my view. But if, as the plaintiff within his application contends, the plaintiff had no entitlement to add GST, then the defendants' interpretation is not as compelling, although neither is that for which the plaintiff argues. Its submission requires the terms of the Specification to be disregarded, and it credits the parties with a relatively unlikely apprehension, as at December 1999, of a GST liability upon the weekly sum of $3,250. The apparently more likely intention attributable to the parties is that should for any reason the burden of GST otherwise fall upon the defendants, the plaintiff would pay such part of it which would have been avoided by its performance of the contract.

[13] In my view the determination of the proper interpretation of the liquidated damages terms should not be undertaken within this application. The outcome could be affected by whether, as the plaintiff has pleaded and the defendants at least by Mr

Macrossan's certificates have accepted, the contract was or became one under which GST was to be added to the contract sum. There should be a trial as to that issue, so that the relevant terms of the contract can first be identified before these terms, and in particular Item O of the Appendix, are interpreted. Under r 292, a more robust approach is required than under previous rules providing for summary judgment. In the present case, however, the defendants have at least real prospects of successfully defending this part of the claim and further, there is a need for a trial for the determination of other issues relevant to the determination of this part of the claim, being specifically whether the contract ultimately contained other relevant terms as to GST.

[14] It follows that the application for summary judgment should be dismissed, and it is unnecessary to consider the impact or otherwise of the first defendant's attempts to affect matters by issuing new progress certificates and a final certificate. The plaintiff's alternative application here is under r 483 for the determination of certain questions in advance of the trial. In essence, those questions concern or are affected by the proper interpretation of the terms for liquidated damages, and accordingly should not be decided now.

[15] The application filed on 13 June 2003 should be dismissed. I will hear the parties as to costs.