

SUPREME COURT OF QUEENSLAND

CITATION: *JAG Projects Qld Pty Ltd v Total Cool Pty Ltd & Anor*
[2015] QSC 229

PARTIES: **JAG PROJECTS QLD PTY LTD**

(applicant)

v

TOTAL COOL PTY LTD

(first respondent)

and

THOMAS JONES

(second respondent)

FILE NO/S: 4579 of 2015

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 14 July 2015

DELIVERED AT: Brisbane

HEARING DATE: 14 July 2015

JUDGE: Bond J

ORDER: **Delivered ex tempore on 14 July 2015:**

The order of the court is that:

- 1. The applicant's application is dismissed.**
- 2. The applicant is to pay the first respondent's costs of and incidental to this application on the standard basis.**
- 3. There is no order as to costs against the second respondent.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where an adjudicator's decision was made in favour of the first respondent – where the applicant seeks to challenge the adjudicator's decision

Building and Construction Industry Payments Act 2004
(Qld), s 17

Queensland Building and Construction Commission Act 1991
(Qld), s 42

Avopiling NSW Pty Ltd v Menard Bachy Pty Ltd [2012]
NSWSC 1466, considered
Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13, cited

COUNSEL: S J Hogg for the applicant
C E Taylor for the first respondent

SOLICITORS: Kelly Legal for the applicant
Grose Lawyers for the first respondent

HIS HONOUR: The first respondent, Total Cool Pty Ltd, is the beneficiary of a decision by an adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld) (“Payments Act”). The adjudicator’s decision required the applicant, JAG Projects Qld Pty Ltd, to pay to Total Cool the amount of \$88,000 including
5 GST. The due date for payment was 12 February 2015 and there was provision for interest. It appears that the amount the subject of the adjudication decision was not paid and Total Cool has issued a statutory demand, also unpaid, under the *Corporations Act 2001* (Cth).

10 The present application by JAG Projects is for a declaration that the adjudication decision is void for various reasons. And, on the basis of the outcome, it seeks, in relation to the adjudication decision, an order setting aside the statutory demand. It is common ground that if JAG Projects succeeded in establishing the adjudication decision was void, the statutory demand ought be set aside. Conversely, it is
15 common ground that if JAG Projects fails in its application in relation to the adjudication decision then it would also fail in relation to its application to set aside the statutory demand.

20 I am indebted to the parties for their comprehensive submissions focused upon the particular issues that arise on the application by JAG Projects. There were, essentially, four issues and I will deal with them seriatim.

25 The first issue contends for invalidity on the basis that Total Cool had made two payment claims for the same work and s 17(4) of the Payments Act provided that a claimant could not serve more than one payment claim for each reference date under the construction contract.

30 The argument was founded on the fact that there was an invoice from Total Cool dated 14 January 2015 claiming the amount of \$40,000 for work completed up to 12 January 2015. The payment claim upon which Total Cool had proceeded before the adjudicator was founded on invoice dated 31 December 2014 claiming the amount of \$80,000 plus GST, giving a total claim for \$88,000. It is common ground that the two invoices covered the same work. The difficulty with the argument by JAG
35 Projects was that only one of the invoices could properly be regarded as a payment claim under the Payments Act. That is so because the invoice dated 14 January 2015, which was the earlier invoice actually delivered, did not comply with s 17(2)(c) of the Payments Act, which requires that a payment claim must state that it is made under this Act.

40 That requirement is, in my view, a mandatory requirement conditioning the validity of a document constituting a payment claim, under the Payments Act. The invoice dated 31 December 2014, which Total Cool had proceeded under, had complied with s 17(2)(c) of the Act. It was a payment claim under the Act. Because there was only one payment claim, not two, it seemed to me that JAG Projects’ argument must fail.
45 I find it unnecessary to consider whether there would otherwise be merit in the argument if the invoice which is first in time had in fact been properly marked as a payment claim under s 17 of the Payments Act.

I move then to consider the second and third issues which may, conveniently, be considered together.

5 JAG Projects' second is that a consideration of the adjudicator's reasons reveals that there was, relevantly, a failure to give sufficient reasons such that I should form the view that there was a jurisdictional error by the adjudicator. The third issue is that a consideration of the adjudicator's reasons should persuade me that there was a relevant failure properly to consider the applicant's submissions, and that failure went to the jurisdiction of the adjudicator.

10 It is necessary to identify the relevant aspects of the material which was before the adjudicator before identifying the nature of the adjudicator's reasons, and what I think about JAG Projects' argument under these two issues.

15 Total Cool had addressed the value of its payment claim in a number of areas. In s 3 of its adjudication application it identified that JAG Projects had based its contest as to the value claim by reference to an assertion that the total value was the amount referred to in the first tax invoice, namely \$40,000. The applicant, Total Cool, submitted that it was entitled to the payment in the amount identified in the second
20 invoice, namely the payment claim in the amount of \$88,000. There was evidence before the adjudicator addressing the value asserted in the second invoice, which was the payment claim. That was in a statutory declaration by a Mr Statham, who was a director of Total Cool.

25 At paragraphs 10 through to 16 of his statutory declaration, Mr Statham makes the following points, in summary:

(a) An estimate by a Mr Glasby that about 60% to 70% of the works had been completed was a reasonable assessment of the works completed.

30 (b) Consequent upon an inspection, which Mr Statham had made of the subject work, he had reviewed Total Cool's books and records to assess the value of the claim, which Total Cool should make for the work which it had done and that the detail set out in an exhibited spreadsheet showed a breakdown of the value of those works to a total of \$83,286.

35 (c) He caused the payment claim to be issued, claiming the amount of \$88,000, which is based on a value of \$80,000 plus GST.

40 (d) He then, based on his experience in the industry, deposed to his belief that Total Cool was entitled to the full amount claimed.

The only remaining thing that's necessary to note about that evidence is that the expression of agreement with the assessment of 60% to 70% of the works having
45 been completed does carry with it information concerning valuation, because the contract price valued the whole of the works at \$151,000, and, mathematically, 60% of that value amounts to \$90,600.

There was no contradictory evidence put before the adjudicator by the respondent, except that the respondent had put before the adjudicator, and relied on, the earlier invoice in the amount of \$40,000 that had been issued by Total Cool and asserted the correctness of that invoice.

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Against that background, the adjudicator's reasons made the following points:

- 10 (a) Total Cool had performed work pursuant to the contract between September and December 2014;
- 15 (b) an invoice had issued on 14 January 2014 for \$40,000, which sought particularised work for which a progress payment was sought as works completed to 12 January;
- 20 (c) the claimant had submitted that the amount claimed in that invoice was not an accurate valuation of the work completed under the construction contract;
- (d) Mr Statham had expressed agreement with the representation or the opinion expressed that 60% to 70% of the project works had been completed.
(I interpolate that this can only be a reference to relevant paragraphs of Mr Statham's statutory declaration)
- 25 (e) that JAG Projects had submitted an entitlement to set off for monies which it would have to incur based upon having to get a new contractor to carry on the work that was left undone by Total Cool when it ceased performing the work;
- 30 (f) that the adjudicator "[preferred] the claimant's evidence as to the amount of the contract work that was completed by January 2015" and was "satisfied that the 14 January tax invoice does not accurately reflect the value of the work performed by the claimant as at January 2015";

The adjudicator went on to say:

35 I accept Mr. Statham's evidence that Mr. Glasby expressed the view that the contract work was "60% to 70%" complete on 15 January 2015. It was open to the respondent to adduce evidence addressing this representation attributed to Mr. Glasby, but it has not done so. I have carefully considered the evidence in the adjudication application and I am satisfied that the value of the work completed by the claimant is \$88,000 including GST.

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In paragraph 6 of his reasons, the adjudicator dealt with the setoff, concluding that because the respondent had not adduced any quotation or invoice from a third party contractor to prove the claim setoff, he was not satisfied that the amount claimed was reasonable in the circumstance. He concluded:

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I do not propose to speculate as to what a reasonable set off would be in these circumstances. On the evidence before me, I am not satisfied that the respondent is entitled to set off any amount against the progress payment due to the claimant.

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The adjudicator then decided that the claimant, Total Cool, was entitled to a progress payment in the amount of \$88,000 including GST.

5 There was no dispute before me as to the principles which governed the determination of the second and third issues raised by JAG Projects. In appropriate circumstances, absence of sufficient reasons may be regarded as a jurisdictional error, and, similarly, in appropriate circumstances, demonstrated failure to consider relevant arguments can also amount to jurisdictional error.

10 So far as sufficiency of reasons is concerned, regard needs only be had to the reasons of Sackar J in *Avopiling NSW Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466 at [34], [37] and [38].

15 Having regard to that law, counsel for Total Cool conceded that the reasons of the adjudicator in this case were comparatively sparse, but submitted that they were all that were needed in this case. Counsel for JAG Projects submitted, effectively, the contrary and focused attention on the inadequacy, in his submission, of the last sentence in paragraph 5 of the adjudicator's reasons that the adjudicator had simply stated that he had carefully considered the evidence and expressed his satisfaction as
20 to the value of the work.

25 Whilst I accept that in an appropriate case, a mere indication by an adjudicator of having read the material and expressing a conclusion as to satisfaction as to appropriate value might be inadequate reasons, I do not think that's a fair categorisation of the reasons in this case. I think the reasons, taken as a whole, demonstrate that the adjudicator was aware of the disputes which had been raised by the parties in the material before him, that he had considered the material and expressed a conclusion in favour of the claimant Total Cool. I am not satisfied that
30 there is any validity in the complaint which JAG Projects make in the second and third submissions. I reject that attack on the adjudicator's reasons.

The fourth issue may be separately considered. It was common ground that the relevant timeline and facts were as follows:

- 35 (a) both Mr Statham and Mr Mark Rassadi had been appointed directors of the first respondent, Total Cool, on 21 December 2004;
- (b) Total Cool held the relevant licence under the *Queensland Building and Construction Commission Act 1991* ("QBCC Act") between the period 24
40 January 2010 to 8 January 2015, when the licence was cancelled at Total Cool's request;
- (c) the director, Mr Rassadi, was the appointed nominee under the QBCC Act from 15 August 2012 until the licence was cancelled;
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- (d) the contract between the parties was entered into in June 2014;

- (e) Mr Rassadi ceased to be a director of Total Cool on 8 January 2015; and
- (f) the relevant payment claim for work performed to 31 December 2014 was served on 5 February 2015.

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Under the QBCC Act there is one relevant prohibition and one articulation of the consequence of a failure to comply with the prohibition.

Section 42 relevantly states that:

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(1) a person must not carry out, or undertake to carry out, building work unless the person holds a [relevant licence].

...

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(3) ... a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.

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Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13 and like cases establish the proposition that if a building contractor is, consequent upon failing to have the requisite licence, prohibited from being entitled to monetary or other consideration for having carried out building work, that another consequence for such a builder is that the builder is not entitled to embark upon the process provided for by the Payments Act.

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The critical consideration is that advanced in the reasons of McMurdo J in *Cant Contracting Pty Ltd v Casella* at [61], where his Honour stated:

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The purpose of a scheme of progress payments is to permit a builder to be paid the agreed consideration for the works progressively, by a part payment which is commensurate with that part of the works performed to that point. This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder's entitlement being according to its contract. The long title of the Payments Act described it as an "Act to imply terms in construction contracts..." It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the Payments Act was intended to override the disentitlement according to s 42; the contrary appears. In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder.

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In this case, JAG Projects concedes that Total Cool held the relevant licence at the time it both undertook to carry out work and, in fact, carried out work. It concedes that the disentitling effect of s 42(3) does not actually apply to Total Cool in relation to the work which is the subject of Total Cool's payment claim. It nevertheless submits that because Total Cool was no longer licensed at the time it made its payment claim, somehow it was prohibited from embarking upon the regime provided for in the Payments Act.

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I reject that contention. In my view, it is obvious that the reasoning that found favour with McMurdo J in *Cant Contracting Pty Ltd v Casella* does not apply in these circumstances. The concession that the disentitling effect of s 42(3) of the QBCC Act does not apply to Total Cool, in my view, is the death knell for this argument. I reject it.

It follows that the applicant, JAG Projects, has failed on each of the four bases on which it sought to contend the adjudicator's decision should be set aside.

5 It seems to me that the appropriate order is that the application by JAG Projects in relation to the adjudication decision ought to be dismissed and the JAG Projects separate application to set aside the statutory demand ought also be dismissed.

I will make an order as per the draft initialled by me and placed with the papers.

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