SUPREME COURT OF QUEENSLAND

CITATION:	*Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd* [2018] QSC 149
PARTIES:	**GAMBARO PTY LTD AS TRUSTEE FOR THE GAMBARO HOLDINGS TRUST ABN 42 938 456 099 (plaintiff)** **v** **ROHRIG (QLD) PTY LTD ABN 67 093 753 970 (defendant)**
FILE NO:	SC No 8579 of 2014
DIVISION:	Trial
PROCEEDING:	Strike out application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2018
JUDGE:	Holmes CJ
ORDERS:	**Paragraphs 38 – 54 of the second amended statement of claim are struck out, with leave to re-plead them.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the defendant seeks an order that paragraphs 38 to 54 of the second amended statement of claim be struck out pursuant to r 171 of the Uniform Civil Procedure Rules 1999 (Qld) or the inherent jurisdiction of the Court – where those paragraphs advance a claim for restitution of payments said to be in excess of the defendant's contractual entitlement – where the defendant complains that those paragraphs disclose no cause of action – whether the claim for restitution is arguable – whether the application to strike out paragraphs 38 to 54 of the second amended statement of claim should be granted *Building and Construction Industry Payments Act* 2004 (Qld), s 100 *Barnes v Eastenders Cash & Carry PLC* [2014] UKSC 26, considered *Ceerose Pty Ltd v Building Products Australia Pty Ltd* [2015]

NSWSC 1886, cited
D O Ferguson & Associates v Sohl (1992) 62 BLR 95, considered
Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 Qd R 350, applied
John Holland Pty Ltd v Roads and Traffic Authority of New South Wales [2007] NSWCA 140, cited
John Holland Pty Ltd v Roads and Traffic Authority of New South Wales [2006] NSWSC 874, cited
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, applied
Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510, cited

COUNSEL: T Matthews QC with D D Keane for the plaintiff
P Dunning QC S-G with F Lubett for the defendant

SOLICITORS: N R Barbi Solicitor for the plaintiff
McCullough Robertson for the defendant

[1] This application to strike out part of the second amended statement of claim was before me on 15 June 2018. I reserved my decision in respect of one part of the application: whether paragraphs 38 to 54 of the pleading should be struck out as disclosing no cause of action, or alternatively as having a tendency to prejudice or delay the fair trial of the proceeding. In fact, the defendant's argument concerned only whether there was a viable cause of action; no aspect of prejudice or delay was addressed.

[2] The action is brought in respect of a standard form building contract between the plaintiff hotelier and the defendant construction company. The impugned paragraphs concern a claim for restitution of amounts paid in excess of what the plaintiff alleges is the defendant's contractual entitlement.

Relevant terms of the contract

[3] Clause 2.1 of the contract provides that the plaintiff is to pay the defendant the "cost of the works", which is defined as meaning the trade package lump sums and all contract sum adjustments together with a construction management fee (a percentage of the cost of the works) and another amount, not relevant here, if there are certain costs savings. According to the plaintiff's particulars, the amount of the trade package lump sums equates to the "guaranteed maximum price" which is a specified lump sum amount. Under cl 2.1, the plaintiff is not liable to pay the defendant any more than the "adjusted guaranteed maximum price", which is the guaranteed maximum price together with contract sum adjustments assessed by the superintendent.

[4] Under cl 37, the contractor is to make progress claims, detailing the cost of the works completed as at the date of the progress claim. Under cl 37.4, within 28 days after the expiry of the last defects liability period (a prescribed period from the date of practical completion), the defendant is to give the superintendent a final payment claim which is

a progress claim together with all other claims "whatsoever in connection with the subject matter of the contract". The superintendent is then to issue a final certificate evidencing the amount due and payable by the plaintiff to the defendant. Clause 39.10 of the contract provides that if it is terminated, the parties' remedies are the same as those under the law governing the contract had the defaulting party repudiated it and the other party elected to treat it as at an end and to recover damages.

The pleadings

[5] On the plaintiff's case, the contract was properly terminated for breach on 17 April 2015, almost a year after practical completion was certified and after the defendant had, allegedly, failed to rectify defects during the defects liability period. On the defendant's case, the termination was wrongful and amounted to a repudiation of the contract; it elected to affirm the contract. In October 2015, the defendant served a final payment claim, but not surprisingly, no final certificate issued.

[6] The disputed paragraphs plead that on account progress payments, totalling approximately $13,800,000, were made to the defendant between 30 November 2012 and 9 May 2014; that there was then a claim by the defendant under the *Building and Construction Industry Payments Act* 2004 ("*BCIPA*") in respect of which the plaintiff paid some $52,500 (exclusive of GST); and that there was then a further amount of $830,000 determined by an adjudicator on the defendant's *BCIPA* claim, which the plaintiff also paid. (My figures are approximate; the precise sums are irrelevant to the argument.) The plaintiff pleads the cost of the works as consisting of the guaranteed maximum price under the contract (some $13,000,000) plus a contract sum adjustment, a provisional sum adjustment and trade package adjustments at a further $1,000,000, leading to a total cost of the works of approximately $14,000,000.

[7] The difference between the amounts paid by way of interim payments, the initial *BCIPA* payment and the adjudicated amount (which add up to some $14,700,000) and the costs of the work at approximately $14,000,000 is, the plaintiff alleges, a payment in excess of the defendant's entitlement under the contract, which the plaintiff was not obliged to pay, and it would not be compatible with equity and good conscience for the defendant to retain it. It seeks the excess payment back by way of restitution, as money had and received by the defendant to the use of the plaintiff or pursuant to s 100 of *BCIPA* (which permits the court in any proceedings relating to a matter under the construction contract to order restitution of amounts paid as a result of an adjudication).

Submissions

[8] The defendant argued that it was not possible to say that the sums paid to it exceeded its true contractual entitlement because, on the plaintiff's own case, by termination it had precluded any final determination, by way of the superintendent's final certificate, of the defendant's contractual entitlement to payment of the cost of the works. If, instead, the defendant's position was correct and the contract remained on foot, the result was no different; no final certificate had been issued. Effectively, the plaintiff was seeking to sue on a contract which on its case no longer existed. Its proper remedy was to seek damages for the difference between the contract price and the cost of completing the building, allowing in that process for payments already made.

[9] In a supplementary outline of submissions, the defendant made further arguments (although the leave granted was in order to clarify its existing arguments, not to add some). It now submits that the plaintiff cannot recover the excess payments as money had and received unless there has been a total failure of consideration. The contract was an entire contract; the defendant's consideration by way of its performance of its obligations was thus not severable; since on any view it had performed at least in part, there was not a total failure of consideration. In addition, it is argued that to demonstrate an unjust benefit it was necessary for the plaintiff to plead that it was unjust for the defendant to retain the excess payment by reference to the work it actually did, rather than the amount for which the contact provided.

[10] In its supplementary submissions, the plaintiff shifted its claim slightly from what was pleaded, in that it now places emphasis on the adjusted guaranteed maximum price as opposed to the cost of the works, on which its pleading turns. There is a difference between the two terms in that the cost of the works denotes what the plaintiff is obliged to pay, whereas the adjusted guaranteed maximum price sets the limit of that obligation. It says, in effect, that it had an accrued right under the contract to pay no more than that amount. In seeking to recover the excess payment, it is not seeking any further performance of the contract.

Consideration

[11] The defendant's argument that by terminating the contract, the plaintiff has rendered it impossible to calculate its (the defendant's) final contractual entitlement is not, in my view, correct. The adjusted guaranteed maximum price, which sets the defendant's maximum contractual entitlement, is ascertainable. The plaintiff pleads one figure, the defendant another, the difference turning on whether various claims for payment for variations and work carried out under direction giving rise to provisional sums should be allowed. Neither the adjusted guaranteed maximum price figure nor the cost of the works depend for their calculation on the issuing of the final payment certificate, which has an evidentiary role. And contrary to the defendant's submission, the amount paid in excess of that figure is not recoverable as damages, because the overpayment does not flow from any breach of the contract by the defendant but is the result of the plaintiff's statutory liability to make progress payments under *BCIPA*.

[12] The more difficult question, though, is whether the plaintiff can rely on the terms of the contract in mounting a claim in restitution, and in particular whether cl 2.1 has survived the termination of the contract. In *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd*,[1] the Court of Appeal held that a contractual limit on a sub-contractor's right of recovery could have no relevance to its quantum meruit claim, which was independent of the contract. McPherson JA observed that where contractual provisions survived termination, it was because:

> "it is apparent from the terms of the agreement itself and the particular provision in question that it is intended to continue governing the relations of the parties even after the rest of the contract is gone".[2]

Otherwise,

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1 [1995] 2 Qd R 350.

2 At 361.

> "Once the contract is gone, it is the law that must determine whether payment should be made for the work done, and not the terms of an agreement that the parties have by their words and conduct finally put aside and discarded."[3]

[13] I do not think in the present case that the plaintiff has any real prospect of demonstrating that cl 2.1 has survived termination so that the cost of the works or the adjusted guaranteed maximum price can provide the basis for determination of its claim in restitution, although those figures might operate as a guide to the worth of the work done.[4] There is nothing about the clause which suggests that it was intended to have effect if the contract came to an end. It follows that for the plaintiff to make out its claim consistently with its case that the contract is at an end, it would, as the defendant contends, be necessary for it to plead that it would be unjust for the defendant to retain the benefit by reason of its exceeding the value of the work done.

[14] It seems to me, however, that the plaintiff is also entitled to make its existing claim for restitution on an alternative premise to its primary case; that is to say, on the premise of a finding that the contract was not terminated. It would be anomalous were the defendant to succeed in its case that the contract remained on foot, but the plaintiff be left with no means of recovering any excess in its payments over what might be found to be the defendant's contractual entitlements.

[15] As to the basis of the plaintiff's restitutionary claim, it is doubtful that it can rely on s 100 of *BCIPA* as giving it some independent restitutionary right, if that is intended.[5] On the other hand, the provision enables the Court in a proceeding for money had and received to order restitution of any amount paid pursuant to adjudication.[6] That leads to the next question, whether the plaintiff has an arguable action for money had and received. The defendant says that the plaintiff cannot demonstrate a total failure of consideration, because on any view the defendant had performed building work.

[16] In *D O Ferguson & Associates v Sohl,*[7] a decision of the English Court of Appeal, the building owner and contractor fell out, with the result that the contract works were not completed. The trial judge found that the value of the work done was £22,000 but the amount paid was about £27,000. As it turned out, the owner was able to complete the work for less than the contract price, with the result that his damages for breach of contract were assessed at £1. He succeeded in an additional claim for the overpayment as money had and received, despite the builder's argument that there was no total failure of consideration, most of the building work having been done. The Court of Appeal accepted that the amount was properly awarded in restitution for the work not done; for that sum there was no consideration and it did not matter that "at some stage or other [it] formed part of a larger instalment". That case was cited with apparent approval in *Barnes v Eastenders Cash & Carry PLC*.[8]

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3 At 362.

4 *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510.

5 *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140 at [45]-[46].

6 *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2006] NSWSC 874; *Ceerose Pty Ltd v Building Products Australia Pty Ltd* [2015] NSWSC 1886.

7 (1992) 62 BLR 95.

8 [2014] UKSC 26.

[17] I have not, however, been able to find any Australian case referring to *D O Ferguson & Associates v Sohl,* much less applying it. But the plaintiff here may be on stronger ground, given the basis of the alleged overpayment; that overpayment being, in effect, that part of the *BCIPA* payment (on the plaintiff's case, most of it) exceeding the defendant's entitlement. There is an argument that it was made pursuant to a statutory obligation and for that reason, may be treated as separate from the consideration payable under the contract; it was not made in exchange for the performance by the defendant of its obligations under the contract and the work done by the latter provides no consideration for it.

[18] Moreover, failure of consideration is not limited to non-performance of a contractual obligation; it extends to a

> "payment for a purpose which has failed as, for example, where…a contemplated state of affairs has disappeared"

or

> "the failure to sustain itself of the state of affairs contemplated as a basis for the payments, the [payers] seek to recover". [9]

I think it is arguable that the state of affairs pursuant to which the plaintiff made the relevant payment, being a statutory obligation to make payment on account in circumstances where the actual contractual entitlement can now be determined, has ended; as *BCIPA* contemplates in s 100.

Conclusion

[19] In light of the above, I will strike out paragraphs 38 to 54 of the second amended statement of claim but give leave to re-plead them.

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9 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [16] and [104].