

## Construction Alert

# Recovering payment under the BCIPA for unlicensed building work in Queensland – significant developments

July 2012

### Introduction

We recently provided a Construction Alert in respect of the District Court of Queensland decision of *Christie v Seventh Day Adventist Schools (South Queensland) Limited* [2012] QDC 32 [[click here](#)], in which it was held that a contractor who performed unlicensed building work, was able to utilise the Building and Construction Industry Payments Act 2004 (Qld) (**BCIP Act**) to sever, and receive payment for, legitimately performed works claimed. The contract was held to be enforceable despite the performance of unlicensed building work.

However, in a recent decision, the Supreme Court of Queensland has taken a different view, and a strict interpretation of the statutory prohibition against undertaking to perform unlicensed building work has resulted in a claimant being prevented from retaining any contractual right to payment. The decision in *Dart Holdings Pty Ltd t/as A Dart & Co v Total Concept Group Pty Ltd & Ors* [2012] QSC 158 effectively reverses the decision in *Christie*, and prevents claimants from using the BCIP Act to claim payment for legitimately performed work if performed alongside unlicensed work.

### Facts

Dart Holdings Pty Ltd trading as A Dart & Co (**Dart**) was engaged to perform some work in the construction of a significant building in Brisbane's CBD. Pursuant to a subcontract agreement, Dart engaged Total Concept Group Pty Ltd (**TCG**) for the purpose of supplying and

installing specific items, including glass. The subcontract stipulated that the price for performance was a lump sum amount of \$1,377,410.

TCG submitted a payment claim under the BCIP Act in the amount of \$208,767.74 and proceeded to adjudication in respect of that claim. The adjudicator determined that Dart was liable to pay TCG the amount of \$141,174.44.

Dart applied to the Supreme Court for a declaration that the decision was void on the grounds that the subcontract was not enforceable as TCG had performed work under it for which it was not duly licensed under the *Queensland Building Services Authority Act 1991* (Qld) (**QBSA Act**). TCG held two licenses under the QBSA Act; 'Building-low Rise' and 'Carpentry'.

Section 42 of the QBSA Act prohibits a contractor from carrying out building work for which it is not appropriately licensed, and further prohibits a contractor from receiving any payment for the works carried out under the contract.

Dart argued that some of the works required by the subcontract, and within variations claimed by TCG, were outside the scope of TCG's Carpentry licence, and were rather within the scope of a 'Glass, Glazing and Aluminium' licence, which TCG did not hold.

TCG argued that the term of the subcontract, which required the unlicensed portion of the works to be performed, should be severed from the subcontract, and that the remainder of the subcontract was enforceable. This argument was mounted in reliance on a term of the subcontract which provided that any provision that was

voidable or unenforceable would be severed and the rest of the subcontract would remain in full force.

## Decision

Justice Philip McMurdo held that where section 42 of the QBSA Act is engaged, the entire subcontract is affected, not simply the promise to undertake a portion of the works which would be unlicensed building work. His Honour stated that due to the inability to distinguish the price of the unlicensed work from the rest of the contract price, nothing could be recovered pursuant to the subcontract without enforcing that term which required a payment to be made for work which included unlicensed work.

Justice McMurdo held that the contract was an entire contract, incapable of apportionment, and as such complete performance was a condition precedent to payment. Therefore, section 42 of the QBSA Act had the effect of rendering the whole subcontract unenforceable; TCG had no contractual entitlement to be paid. As a result, it was held that TCG was not entitled to have made a payment claim under the BCIP Act, and the adjudication process was not open to it.

## Ramifications

The decision of the Supreme Court effectively reverses the position in respect of this issue, recently decided upon in the lower courts in *Christie v Seventh Day Adventist Schools (South Queensland) Limited* [2012] QDC 32. In that case, Justice McGill found section 42 of the QBSA Act did not invalidate a contract under which a contractor undertook to perform unlicensed building work. Despite section 42 prohibiting the contractor from obtaining remuneration in respect of the unlicensed work, the contractor in that case was entitled to recover payment for the balance of the works performed. In other words, the adjudication process under the BCIP Act appeared to be still available to the contractor.

Interestingly, the decision of Queensland District Court in *Christie* was not considered by the Supreme Court in *Dart Holdings*. As a result, the better view in Queensland now is that the performance of work, for which a contractor is not appropriately licensed, in breach of section 42 of the QBSA Act, renders the entirety of the contract unenforceable, and the contractor has no contractual right

to recover payment for any works performed under it, whether licensed to do so or not. A contractor would be able to claim a statutory quantum meruit under section

42(4) of the QBSA Act but would not be able to utilise the BCIP Act to agitate claims.

## Advice for Principals

The decision in *Dart Holdings* has significantly strengthened the position for principals who dispute a payment claim on grounds that the contractor was not appropriately licensed. This is particularly the case where the payment under the contract is a lump sum payment.

## Advice for Claimants

Conversely, the position in terms of recovering payment for unlicensed contractors is now much more difficult following the Supreme Court's strict interpretation of section 42 of the QBSA Act. Contractors must carefully review the scope of work under a proposed construction contract to ensure that an appropriate licence is held. Contractors should seek legal advice if there is a concern as to whether a currently-held licence captures the scope of works under the contract.

Another strategy for increasing a claimant's chances of recovering payment is to apportion the works and corresponding prices under the contract. In doing so, it is more likely that the 'entire contract' interpretation can be avoided, and a claimant may retain some rights under the contract to recover payment for work which has been lawfully completed.

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## Team Update

We would like to update you on a number of recent promotions that have taken place within the Construction team at Thomsons Lawyers, Brisbane.

Our focus is very much about recognising and rewarding the pool of talent we have within the firm and these appointments reinforce our commitment to sustainable organic growth. Following is a short summary of the skills and experience these lawyers bring to our clients.

### Andrew Kelly

Partner

#### Senior Associates



**Matthew King**

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Matt advises clients in relation to front and back end construction, and has extensive experience in drafting and negotiating contractual documentation as well as handling disputes for a wide range of clients.

Matt commenced working in the Construction team in 2005 and has previously been on secondment to John Holland, Thiess and Sandvik.

Construction has been in Matt's blood being the son of well known construction programmer, Gerard King of King Planning.



**Clare Kenny**

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Clare has significant experience in all aspects of the adjudication process under the Building and Construction Industry Payments Act 2004 being involved in two of the largest adjudication claims under the Act. Further, Clare has been on secondments to Golding Contractors, Thiess, John Holland and on the Airport Link project.

Clare was previously an associate to Justice Muir in the Queensland Court of Appeal.

#### Associates



**Laurie Malone**

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Laurie has considerable experience in the mining, building and construction sectors, having worked throughout Queensland as a bulldozer, scraper and excavator operator.

Since 2009 Laurie has applied his practical skill set exclusively to the areas of building and construction law. He specialises in building and construction disputes and has extensive experience in the security of payment legislation throughout Queensland, New South Wales and Victoria.

Laurie is currently on secondment on the Airport Link project which is in its final stages.

Thomsons Lawyers has a large construction law team in Brisbane, consisting of 11 solicitors and clerks. It is widely regarded as one of the pre-eminent construction practices in Queensland.

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