

Construction Alert

Unlicensed contractors and Queensland Security of Payment legislation – recovery now available?

March 2012

Introduction

It is a common battleground in adjudications taking place in Queensland under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) that issues relating to the licensing status of those that perform building work and the type or character of that work included within a payment claim are played out.

The guiding principle has been the Queensland Court of Appeal decision in *Cant Contracting Pty Ltd v Casella* [2006] QCA 538 which held that unlicensed contractors in Queensland (that is, builders who do not hold a relevant licence for building work under the *Queensland Building Services Authority Act 1991* (Qld) (**QBSAA**)) cannot utilise the BCIPA to obtain payment of unpaid progress claims.

A recent District Court of Queensland decision has provided an interesting qualification to that overarching position. In *Christie v Seventh Day Adventist Schools (South Queensland) Limited* [2012] QDC 32 (decision of DCJ McGill, delivered 24 February 2012), an unlicensed contractor was able to recover an amount through the BCIPA but only in relation to that part of the payment claim that related to 'non-building work'.

Facts

In *Christie*, the contractor entered into a contract with the School to do work, which included the removal of asbestos and the safe disposal of asbestos at premises owned by the School. The contract additionally provided for the contractor to replace the asbestos material with functionally equivalent material and do further things by way of making good, such as painting the new material.

Issues arose between the parties in relation to payment and a payment claim under the BCIPA was issued by the

contractor with no payment schedule being provided in response by the School. Accordingly, the contractor pursued summary judgment against the School under the BCIPA in respect of the amount of the progress claim.

At the hearing, the School's answer to the contractor's application was that the contractor was not licensed to perform building work at the relevant time and pursuant to section 42 of the QBSAA and the principles set out in *Cant*, he was not entitled to any monetary or other consideration for carrying out building work. It became clear that the work performed by the contractor in relation to the removal of asbestos was expressly excluded from the province of the QBSAA, however the work done in terms of putting in new sheeting panelling to replace asbestos sheeting, painting and fixing the premises was building work under the QBSAA.

Decision

Building work

Justice McGill found that insofar as the work that the contractor had undertaken to perform was building work (as defined under the QBSAA), the contractor had undertaken to carry out such work in breach of section 42(1) of the QBSAA. Accordingly, Justice McGill referred to the decision in *Cant* and held that because section 42 of the QBSAA provides that there is no entitlement for payment under the contract (there is only a statutory entitlement to certain remuneration under section 42(4)), there cannot be a valid claim for the purposes of sections 12 and 17 of the BCIPA in respect of such work. Accordingly, although section 42 does not invalidate the contract, it does prevent an unlicensed contractor from obtaining any form of remuneration under it in respect of building work.

Non-building work

However, Justice McGill found that where a contractor had performed work which was not 'building work' (as defined in the QBSAA) pursuant to the contract, the contractor is still entitled to remuneration for it under the contract.

Interestingly, Justice McGill held that in circumstances where the contract did not differentiate, in terms of entitlement to remuneration, between the work which was building work and work which was not building work, there cannot be a valid progress claim for the purposes of the BCIPA and that this appeared to be the case here.

Justice McGill stated:

"In so far as the applicant has done work which was not building work pursuant to the contract he is still entitled to remuneration for it under the contract. Unfortunately for him, the contract did not differentiate, in terms of entitlement to remuneration, between the work which is building work for which he was required but did not have a licence and work which was not building work, and, therefore, work he was entitled to be paid for.

In those circumstances it seems to me that, in so far as a claim for payment could relate, even in part, to a claim for remuneration for building work, then it cannot be a valid progress claim for the purposes of the Payments Act. This, I think, follows from the terms of s42 and what was said about the matter in Cant, as I discussed."

Despite this, and the finding that you could not distinguish between building and non-building work under the contract, Justice McGill considered the invoices that comprised the payment claim of which part related specifically to asbestos removal. In relation to this, the School advanced an argument that the effect of the inclusion of the payment claim of the matters which could not validly be the subject of a payment claim meant that the claim was invalid as a whole. Justice McGill disputed

this and formed the view that *Cant* does not go this far and it seemed consistent with the reasoning in that decision and the terms of the legislation, insofar as a particular payment claim can be clearly identified as being specific to non-building work in respect of which the contract remained enforceable, then the obligations under the BCIPA are activated in those circumstances. As a consequence, the contractor was entitled to summary judgment for that portion of work that related to asbestos removal for which a building licence was not required under the QBSAA.

Ramifications

Although *Cant* stands for the proposition that builders who do not hold a relevant building licence cannot utilise the BCIPA, it appears that unlicensed builders can use the BCIPA in relation to work which is non-building work.

It is suggested that where a contract does not differentiate between work that is building work and non-building work, a claim for payment even for the non-building work may not be a valid progress claim under the BCIPA.

Despite this, where non-building work is clearly identifiable within a payment claim, it appears possible for a contractor to use the BCIPA to agitate the claim. Accordingly, unlicensed contractors who claim for non-building work should be able to progress claims through adjudication.

Written by:

Andrew Kelly

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

For further information, please contact:

Luke Aiken

Partner

+61 2 9020 5706

laiken@thomsonslawyers.com.au

Neil Hannan

Partner

+61 3 8080 3589

nhannan@thomsonslawyers.com.au

Andrew Kelly

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

Geoff Brennan

Partner

+61 8 8236 1301

gbrennan@thomsonslawyers.com.au

www.thomsonslawyers.com.au