Rights Of Unlicensed Queensland Contractors

- **Stephen Pyman, Partner,**
Barwicks Wisewoulds Lawyers, Brisbane.

In the recent decision of the Court of Appeal, Supreme Court of Queensland, in *John Edward Marshall v No Limit Pty Ltd* (unreported, CA, Supreme Court of Queensland, 28 October 1997):

1. the Court held that an owner is not obliged to pay an unlicensed contractor in accordance with any contractual obligation to do so;
2. the Court held that in circumstances where moneys have been paid to an unlicensed builder under a contract, then those moneys must be repaid;
3. McPherson JA indicated by way of obiter that an unlicensed contractor would not be entitled to payment even upon a quantum meruit basis.

McPherson JA also said:

"section 42 is thus the third attempt by the legislature to make its meaning clear. On this occasion, it may be credited with having intended to cast the net as widely as possible."

Strike one

The repealed *Builders Registration and Homeowners' Protection Act* 1979 (Qld) provided as follows:

"53(2)(e) a person who is not a registered builder shall not be entitled to recover by action in a Court a fee or charge under a contract to perform building construction for another."

In *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 QdR 413, McPherson J (as he then was) held that this section did not preclude an unlicensed builder from recovering any damages as his claim is not for a *"fee or charge"* under the contract, nor did the section prejudice payment, or recovery out of Court (such as by arbitration proceedings) of the amount in question and there was no compelling reason for giving the statutory provision a wider meaning or scope than is justified by a reading of its terms.

As His Honour also indicated (page 4) in the *Marshall* case, the section as it then stood also did not prevent recovery, as a debt due and owing, for money for work done as restitution for unjust enrichment: *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 QdR 54.

Strike two

Subsequently that section was amended and relevantly provided that a person who was not a registered builder shall not:

"53(2)(d) be entitled to claim, sue for or otherwise recover, by any process in a court, by arbitration or otherwise, any fee, charge, damages or other award of whatever nature in respect of the building construction performed or agreed to be performed."

In *Mostia Constructions Pty Ltd v Cox* [1994] 2 QdR 55, White J held that, even in that form, the section did not specifically preclude recovery of the amount of the builder's outlays on labour and materials, the benefit of which had been accepted by the parties having requested them. Accordingly, whilst an unlicensed builder could not claim moneys under a contract or, in the alternative, the value of work performed on a quantum meruit, a claim for the recovery of outlays was not precluded.

Strike three

In the *Queensland Building Services Authority Act* 1992 (as amended) section 42(3) provides:

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

Section 42(1) of the *Act* provides that it is an offence to carry out, or to undertake to carry out building work unless a person holds a contractor's licence of the appropriate class under the *Act*.

Previous decisions of:

- the Tribunal held that this section does not preclude the builder from recovering on a quantum meruit for the value of work carried out along with the cost of materials on a quantum meruit or unjust enrichment basis: see, for instance, *Midpacific Constructions (Aust) Pty Ltd v Bromley Investments Pty Ltd* (QBT, 14 February 1996);
- the District Court also held that an unlicensed contractor was entitled to recover on a quantum meruit basis: *Marshall v Marshall & No Limit Pty Ltd* (unreported, District Court, Southport, 6 August 1996); per Hall DCJ.

In the *Marshall* decision when examining the various sections of the *Act* including section 30 which provides for the issue of a licence authorising the licensee to carry out various classes of building work, McPherson JA:

1. said by way of obiter, that:
   (a) without more, the combined effect of legislation in penalising and expressly prohibiting the making of a contract, or an ingredient of its formation such as a tender or offer, ordinarily is, according to traditional notions, to render the ensuing contract illegal and hence unenforceable;
   (b) in addition, the effect of the prohibition in section 42(1) against carrying out building work is, again according to the orthodox views, to render a claim for the price or value of that work unenforceable at the suit of the party responsible for the contravention;
   (c) the fact that both the making of and carrying out of a contract are an offence under the *Act* strongly suggests that neither the contract or its performance are capable of conferring enforceable rights on an unlicensed builder;
2. held that:
   (a) the effect of section 42(3) was to prevent an unlicensed builder, in proceedings of any kind, from recovering the price or any part if payable under a contract for building work carried out in contravention of the section;
   (b) there is no identifiable basis on which an unlicensed contractor can, as against the person who paid it, claimed to keep or retain the money paid or its equivalent;
   (c) if an unlicensed contractor is not entitled to any monetary consideration for carrying out building work in contravention of the *Act*, then that person is not entitled to retain any payment made for doing the work.

Pincus JA and de Jersey J held that:

1. On any reasonable construction of section 42(3) an owner is not obliged to pay an unlicensed contractor in accordance with an apparent contractual obligation.
2. An owner's mistake, as to an obligation to pay, excludes the owner from any obligation to pay an unlicensed contractor under the contract.

Comparison with other jurisdictions

In other states, when construing similar sections, the Courts have held that an unlicensed contractor is still entitled to recover on quantum meruit and, that this is so, notwithstanding the entry into a contract by an unlicensed builder renders the contract illegal.

South Australia

In construing the equivalent section in the *Builders' Licensing Act* of South Australia 1966, Bollen J held that an unlicensed contractor was not precluded from recovery on a quantum meruit claim, but that this section was merely a statutory bar to enforcement by the builder of his entitlement to a fair consideration under the contract. His Honour went on to say:

> *"Fee or other consideration are words of contract. They mean quite simply the entitlement of the builder for his reward under his contract. It would be a strained meaning of those words to embrace restitution which is now clearly the basis for a quantum meruit claim."*

See: *Teatree Gully Builders Co Pty Ltd v Mattin & Martin* (1992) 165 LSJS 409.

Western Australia

In *Steel Homes (1985) Pty Ltd v Hutts* (1993) 9 SR (WA) 143, Heenan DCJ, (after referring to the *Mermaid Waters'* decision) and whilst apparently accepting that a contract entered into in contravention of the equivalent section in the Western Australian *Act* was illegal, held that this did not prevent a claim in quantum meruit.

In that case, His Honour followed an earlier decision of White J in *Nugent Investments Pty Ltd v Seeney* (unreported, District Court of Western Australia, 20 October 1987), where it was also held that the equivalent section in the Western Australian *Act* did not preclude a claim in quantum meruit. In that decision, White J also found that a contract entered into by an unregistered builder was an illegal contract.

New South Wales

There is also support for the proposition in New South Wales that the acceptance by the owner of the benefit of an unlicensed builder's work leads to the result that the owner has an obligation to pay for the work, notwithstanding the absence of any right on the part of the builder to damages under the building contract or to any other remedy in respect of any breach of that contract. See the decision of Brownie J in *Lee Gleeson Pty Ltd v Stirling Estates Pty Ltd* (1991) 23 NSWLR 571, and more

recently Rolfe J in *O'Connor v Leaw Pty Ltd* (unreported, Supreme Court of New South Wales, 1 August 1997).

Recovery on quantum meruit under the Queensland Act

In the *Marshall* decision, the District Court (on appeal from the Tribunal), deducted a sum for the true value of the work from the advance paid by the owner to the unlicensed contractor. The deduction was (apparently) made on the basis that section 42 did not exclude an unlicensed contractor's entitlement to recover on a quantum meruit. This approach was not challenged in the appeal to the Court of Appeal.

Although the question of the entitlement of an unlicensed contractor's right to recover on a quantum meruit was not expressly decided in the appeal, the strong dicta of McPherson supports the view that an unlicensed contractor would not be entitled to payment on any basis even on a quantum meruit.

At page 8 of the decision, McPherson JA said as follows:

> *"Because the prohibition in section 42 was enacted for the benefit of a class of person for whom (the homeowner) is one, she is entitled to recover the payments she made to (the builder).* ***On that footing, it may be that she would have been entitled to recover the whole of the sum paid by her****: but at the trial, and on appeal, she was prepared to allow (the builder) the value of the work which in effect involves reducing the amount of $51,000 by the cost of rectifying the defects or deficiencies in the work done by him."* (Emphasis added.)

Warning to unlicensed contractors and licensed contractors who trade in the name of an unlicensed trading company

The *Marshall* decision should sound a serious warning to:

1. unlicensed contractors (including trade contractors whose trade requires a licence) who enter into contracts to carry out building work in breach of the *Act*;
2. licensed contractors and trade contractors who lend their licence to unlicensed contractors who subsequently enter into a contract and carry out building work;
3. licensed contractors who trade in the name of a trading entity in circumstances where:
   (a) the trading entity is not a licensed corporate entity;
   (b) the individual is not the registered supervisor of the corporate trading company as required by section 31(2) of the *Act*.

There have been a number of cases in the Tribunal (and the Courts) where it is clear that individually licensed contractors do not understand the separate legal identities of their trading companies. The usual scenario is that the individual is a licensed builder who carries on business in the name of the company in circumstances where the company is not a licensed builder and the individual has never been a registered nominee or supervisor of the company.

Again, a frequent scenario is that the name of the builder on the contract reads '*John Smith trading as John Smith Builders Pty Ltd*".

In those circumstances where:

1. the offer to build and preliminary negotiations are on the letterhead of the company;
2. specifications are issued on the letterhead of the company;
3. invoices are issued by and payments made to the company,

then there is a real risk that the contract is with the unlicensed company (see for instance *Aitken Transport Pty Ltd v Voysey* [1990] 1 QdR 510) and the owner will be able to rely on the drastic consequences of the *Marshall* decision to:

(a) refuse to pay any moneys under the contract; and
(b) demand a refund of any moneys paid under the contract.

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