JUDGMENT : MULLINS J: Supreme Court of Queensland. Brisbane. 3rd May 2007

[1] The plaintiff carries on business as a plumbing contractor. The first defendant carries on business as a building contractor and entered into a contract with the second defendant as principal for the construction of apartments at Burleigh Heads ("the subject site"). The first defendant entered into a subcontract with the plaintiff on or about 1 July 2004 for the performance of hydraulic services at the subject site.

[2] In this proceeding the plaintiff claims the sum of $1,435,237.30 from the first defendant as moneys due and payable under the subcontract or, alternatively, as payment for work completed. The plaintiff as subcontractor also seeks in the proceeding to enforce a charge on money payable by the second defendant as employer to the first defendant as contractor under the Subcontractors' Charges Act 1974 ("the Act") in the sum of $1,435,237.30.

[3] The first defendant denies that the plaintiff is owed any moneys under the subcontract or otherwise as alleged by the plaintiff.

[4] The plaintiff alleges that on or about 22 May 2006 it gave notice of claim of charge to the second defendant in accordance with the Act and gave notice of having made the claim to the first defendant in accordance with the Act. The second defendant paid the sum of $1,435,234.30 into court on 20 July 2006.

[5] The first defendant applies for summary judgment in respect of that part of the plaintiff s claim that depends on its entitlement to a charge under the Act on money payable by the second defendant to the first defendant and that was paid into court by the second defendant on 20 July 2006. The first defendant also served the second defendant with its application for summary judgment, but the second defendant did not appear on the application. It was not expected that the second defendant would appear in view of the payment into court made by the second defendant.

Relevant facts

[6] Under cover of its solicitors' letter dated 18 May 2006 the plaintiff sent by post to the second defendant a document entitled "Notice of Claim of Charge" ("the notice to principal") in form 1 version 1 which was the approved form. The notice to principal was received by the second defendant on 19 May 2006. The name and address of the second defendant as the employer were appropriately completed, as were the details of the plaintiff as the claimant and the first defendant as the contractor and claimant's contractor. The contract and the dates between which the work was carried out were identified. The amount claimed was shown in the notice as:

"$1,435,237.30 (incl. GST) calculated in accordance with the statement of account annexed and marked `A'."

The particulars of claim were shown in the notice as:

"The installation of Hydraulic Services as per the subcontract dated 1 July 2004."

[7] The notice to principal was supported by a statutory declaration as to the correctness of the information in the claim which was made by Mr ETJ Ahern on behalf of the plaintiff. The certificate of qualified person section of the notice to principal was completed and signed by licensed plumber and drainer Mr GJ Hamilton.

[8] The statement of account that was referred to in that part of the notice to principal that required details of the amount claimed was not annexed when it was sent to the second defendant, although it was annexed at the time that Mr Ahern signed the statutory declaration.

[9] The plaintiff's solicitors sent a letter dated 19 May 2006 to the first defendant that was received on 22 May 2006 enclosing "Notice to Contractor of Claim of Charge Being Given" ("the notice to contractor") in form 2 version 1 which accorded with the approved form. In the section of the notice to contractor that required insertion of the amount claimed, the plaintiff had again set out:

"$1,435,237.30 (incl. GST) calculated in accordance with the statement of account annexed and marked `A',"

but in this instance the statement of account was included as annexure "A" to the notice to contractor.

[10] By letter dated 24 May 2006 and sent by facsimile on that date the second defendant's solicitors informed the solicitors for the plaintiff that annexure "A" was not attached to the notice to principal and asserted that the notice to principal was invalid. By letter dated 25 May 2006 and sent by facsimile on that date the plaintiffs solicitors advised the second defendant's solicitors that they disagreed with the assertion that the notice to principal was invalid. A copy of annexure "A" was forwarded with that letter for the information of the second defendant. The plaintiff s solicitors also informed the second defendant's solicitors in that letter that a further copy of the notice to principal (including the annexure) would be sent by express post to the second defendant in order to remove any doubts that they had about the matter. The plaintiff's solicitors also expressed in that letter their view that s 10(5) of the Act applied.

[11] A complete photocopy of the notice to principal including annexure "A" was posted by the plaintiff to the second defendant on 25 May 2006 and received by the second defendant on 29 May 2006.

[12] The second defendant advised the first defendant by letter dated 26 May 2006 that it had paid the first defendant's outstanding invoice on that date less the amount referred to in the notice to principal. The second defendant received from the first defendant the contractor's notice dated 6 June 2006 pursuant to s 11(3) of the Act in which the second defendant was given notice that the first defendant disputes the plaintiffs claim which is the subject of the notice to principal.

[13] This proceeding which was intended to comply with s 15(1)(b) of the Act was commenced on 21 June 2006.

Statutory framework

[14] Section 5(1)(a) of the Act provides for a charge on the money payable to a contractor for the performance of work on or in respect of land or a building by an employer (who contracts with the contractor for the performance of that work) in favour of a subcontractor of the contractor. In order for the charge to attach, the subcontractor must give the notices in compliance with s 10 of the Act. The effect of a charge was described by McPherson JA in ***Abigroup Contractors Pty Ltd v Multiplex Constructions Pty Ltd*** [2004] 1 Qd R 470, 476 [11] ("Abigroup") in the following terms:

"Constituting a charge in accordance with the Act has the effect of limiting the contractor's freedom to dispose of money payable under the subcontract and of making the claimant subcontractor a secured creditor in the insolvency of the contractor..."

[15] The subsections of s 10 of the Act which are relevant for the purpose of this matter provide:

"(1) A subcontractor who intends to claim a charge on money payable under the contract to the subcontractor's contractor or to a superior contractor

(a) must give notice to the employer or superior contractor by whom the money is payable, specifying the amount and particulars of the claim certified as prescribed by a qualified person and stating that the subcontractor requires the employer or superior contractor, as the case may be, to take the necessary steps to see that it is paid or secured to the subcontractor; and

(aa) if a person other than the employer or superior contractor holds a security for the contract-must give notice in the approved form of having made the claim to the person holding the security; and must give notice of having made the claim to the contractor to whom the money is payable.

(4) If notice is not given pursuant to this section, the charge does not attach.

(5) A notice of claim of charge may be in the approved form, but the validity of the notice is not affected by any inaccuracy or want of form if the money sought to be charged and the amount of the claim can be ascertained with reasonable certainty from the notice.

(7) To remove any doubt, it is declared that a subcontractor may make 2 or more claims in relation to money payable or to become payable to the subcontractor for work done by the subcontractor under a subcontract.

(8) However

(a) each claim must be about a separate and distinguishable item of the work done by the subcontractor under the subcontract; and

(b) there must not be more than 1 claim about any 1 item."

[16] Before paragraph (aa) was inserted in s 10(1) of the Act, it was held that the word "notice" in s 10(4) of the Act refers to both notices required by s 10(1) of the Act: ***Ex parte Austco Pty*** Ltd [1985] 2 Qd R 1, 3 ("Austco"). (As paragraph (aa) does not apply in this matter, it is not necessary to consider it further.) It has been held that the time periods specified in subsections (2) and (3) of s 10 of the Act for the giving of a notice of claim of charge apply only to the notice which is given under s 10(1)(a) of the Act and that the Act is silent as to the time by which the notice of having made the claim must be given to the contractor: Austco at p 3. It was accepted by Thomas J in Austco that the provision in the Acts Interpretation Act 1954 dealing with the reckoning of time where no time is provided for doing something should apply to the giving of the notice of having made the claim to the contractor. At the time of the decision in Austco, the relevant provision required notice to be given *"with all convenient speed"*. The equivalent provision is now found in s 38(4) of the Acts Interpretation Act 1954:

"If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens."

[17] Section 11 of the Act specifies the consequences of the giving of a notice of claim of charge pursuant to s 10 of the Act. Under s 11(8) of the Act a subcontractor may at any time withdraw, wholly or partly, a notice of claim of charge given pursuant to s 10 of the Act by giving a notice of withdrawal in the approved form, relevantly, to the employer by whom the money is payable and to the contractor to whom the money is payable.

[18] Section 15 of the Act provides:

"(1) A proceeding in respect of a charge under this Act

(a) in the case of a claim of charge in respect of retention money only-must be commenced within 4 months after such retention money or the balance thereof is payable and no later; and

(b) in all other cases-must be commenced within 1 month after notice of claim of charge has been given pursuant to section 10 and no later; and

(c) must be brought by way of action.

(2) For the purposes of a proceeding under this section, it is sufficient if the subcontractor proves that the charge in respect of which the proceeding is brought attached to money payable or a security in existence on any date prior to the date of hearing.

Every charge is deemed to be extinguished unless the subcontractor duly commences a proceeding under this section to enforce it."

Issues

[19] Although the first defendant disputes the plaintiffs claim which is the subject of the charge, there is no dispute between the parties as to the entitlement of the plaintiff to rely on the charge provided for by the Act, subject to compliance with s 10 of the Act.

[20] It is common ground between the parties that this proceeding was not commenced within the time specified by s 15(1)(b) of the Act if the notice to principal that was sent by the plaintiff under cover of its solicitors' letter dated 18 May 2006 (without annexure "A") and received by the second defendant on 19 May 2006 was a valid notice.

[21] The issues that arise on this application therefore are:

(a) was the notice to principal as served on the second defendant on 19 May 2006 a valid notice under s I 0(1)(a) of the Act?

(b) if the notice to principal as served on the second defendant on 19 May 2006 was not a valid notice, did the charge attach either as a result of the provision of annexure "A" on 25 May 2006 or as a result of the notice to principal as served on the second defendant on 29 May 2006?

(c) if there is no valid charge, should the moneys paid into court by the second defendant be paid out to the first defendant?

Validity of notice to principal served on 19 May 2006

[22] The first defendant submits that the notice to principal as served on 19 May 2006 was a valid notice.

[23] The plaintiff submits that the notice to principal, as executed, comprised the notice to principal as served on 19 May 2006 together with annexure "A" which was not served until sent by facsimile on 25 May 2006. The plaintiff therefore submits that service of the notice to principal did not take place until at least all the parts of the notice had been served on 25 May 2006.

[24] The plaintiff therefore argues that it is irrelevant whether the notice to principal as served on 19 May 2006 could itself constitute a valid notice under the Act, as the intention of the plaintiff was to incorporate annexure "A" as part of the notice to principal, the annexure unambiguously formed part of the notice to principal and all parts of the notice had to be served, before it could be said that the notice was given.

[25] On the plaintiff's argument, the plaintiffs intention as to what was to comprise the notice of claim of charge was critical to determining whether the notice to principal as served on 19 May 2006 was the notice for the purpose of s 10(1)(a) of the Act.

[26] The charge that a subcontractor is entitled to the benefit of under the Act is statutory. The service of the notices under s 10(1) of the Act is the means by which the charge is given effect. Although those notices must incorporate the signature of the subcontractor, it is the service of the notices in compliance with the requirements of s 10(1) of the Act that has the consequences that are provided for by the Act. Counsel for the plaintiff seeks to treat the signing of the notice of the claim of charge as determinative of what comprises the notice. In view of the terms of s 10(1)(a) of the Act, the signing of the notice is one of the steps in the process of giving effect to the charge and there is no warrant for giving it a separate operation from the balance of the steps required to be undertaken in respect of that notice in order for the charge to be given effect. The timing of the service of the notice of claim of charge is the basis for the time limit for commencing the proceeding to enforce the charge under s 15(1) of the Act. Service of the notice under s 10(1)(a) is the step which brings the charge to the notice of the party who is holding the moneys to which the charge attaches and is the event to which the notice under s 10(1)(b) relates.

[27] What is relevant is the notice that purports to be served under s 10(1)(a) of the Act and not any intention of the subcontractor that has not been reflected in the notice as served. Despite the intention of the plaintiff to attach annexure "A" to the notice to principal as served on 19 May 2006, it is appropriate to consider the validity of the notice to principal as served on the second defendant on 19 May 2006.

[28] On the issue of whether the notice to principal as served on 19 May 2006 was a valid notice, the plaintiff relies on the judgment of Muir J in ***Walter Construction Group Ltd v J & L Schmider Investments Pty Ltd*** [2001] QSC 124 ("Walter Construction") to submit that the notice to principal as served on 19 May 2006 did not adequately particularise the claim as required by s 10(1) of the Act and therefore was not a valid notice of claim of charge. The first defendant submits that Walter Construction should not be followed.

[29] Walter Construction was concerned with the application of the Act, before the amendments made by the Subcontractors' Charges Amendment Act 2002 which commenced on 1 July 2002. At the same time the forms that had been approved under the Act were replaced by the current forms which were approved for commencement on 1 July 2002.

[30] The subcontractor in Walter Construction had given a notice of claim of charge that referred to the type of work that was done under the contract and the date and the parties to the contract and claimed as payable from the contractor an amount of $2,034,035.48. That amount was shown in a schedule "A" attached to the notice as the difference between the total costs incurred by the subcontractor and the total payments made by the contractor. There were summaries of additional costs, actual costs and contract values attached to that schedule. Muir J observed that it *"could not be argued seriously that the schedule, or any part of it, particularises the claim for $2,034,035*" and noted that was accepted by counsel for the subcontractor. Muir J concluded that the notice did

not specify the particulars of the claim as required by s 10(1) of the Act and was not a valid notice under the Act. Muir J stated:

"I do not wish to suggest that a failure to fully particularise a claim will necessarily result in the relevant notice not being recognisable as a notice of claim of charge. But here the lack of particularity is such that it is quite impossible to detect from the claim how it is made up, the basis of the claim and whether it is capable of being a claim for money that is payable or is to become payable to the respondent's subcontractor for work done under that contract. The deficiency is such that the notice does not meet the description in s 10(1)."

[31] Although s 10(1)(a) at the time the notice was served in Walter Construction was in the same terms as it is now, the terms of the approved form ("the pre-2002 form") were different to the current approved form.

[32] A significant difference between the pre-2002 form and the current approved form is that the current approved notice of claim of charge must be supported by a statutory declaration in the approved form of the subcontractor (or an officer of the corporation if the subcontractor is a corporation) about the correctness of the claim and the correctness of the amount of the claim: ss 10(113) and (1C) of the Act. The observation was made in Abigroup by McPherson JA at 476 [13] that a purpose of the amendments to s 10 of the Act was to limit the potential for abuse by subcontractors in view of the widening of the scope for claims for payment for which a statutory charge could be made as a result of the amendments made in 2002.

[33] The pre-2002 form required the insertion of a description of the nature of the work done and for which the charge was claimed, specification of the amount that the subcontractor claimed as payable for the work done and for the notice to show how that amount was calculated. The exact words used in the pre-2002 form in relation to the amount claimed were: *"The amount that I claim as payable (or to become payable) for the work done by me is $, which is calculated as follows:"*

[34] In contrast, the current approved form for the notice of claim of charge recites: *"The claim of charge is for the Amount Claimed and concerning Particulars of Claim for work done by the Claimant in respect of the Contract, which work was done by the Claimant under a subcontract with the Claimant's Contractor between the dates set out in this Notice."*

The current approved form contains a box which requires completion which has the heading *"Amount Claimed"* and another box for completion which has the heading "Particulars of Claim" and is followed by the instruction *"Give particulars of work done by Claimant"*. The approved form then incorporates the statutory declaration made by or on behalf of the subcontractor to the effect that "the information in this claim including the amount of the claim is correct".

[35] Another significant difference therefore between the pre-2002 form and the current approved form for the notice of claim of charge is that the current approved form does not require the notice to incorporate a calculation of the amount claimed.

[36] Counsel for the first defendant relies on the differences between the pre-2002 form and the current approved form to distinguish the decision in Walter Construction. In addition, counsel for the first defendant relies on the fact that counsel for the subcontractor in Walter Construction had conceded that the relevant notice did not particularise the claim and that the decision does not indicate that the effect of s 10(5) of the Act was argued. One of the vices of the notice of claim of charge in Walter Construction that Muir J was concerned with was the difficulty in discerning from the notice whether the claim was a claim for money that was payable or was to become payable. The relevance of that distinction was also diminished by the 2002 amendments to the Act which clarified the extent of the claims that could fall under the description of *"money that is or is to become payable to a subcontractor"*: ***Abigroup*** at p 475 [8]-[10]. For the reasons advanced on behalf of the first defendant, I am satisfied that the decision in Walter Construction is not applicable to this matter.

[37] Counsel for the first defendant also submits that any shortcomings in the particulars of the work done for which the amount is claimed in the notice to principal as served on 19 May 2006 have no effect on the validity of the notice because of the express terms of s 10(5) of the Act. There is little authority on the application of s 10(5) of the Act. One of the few decisions is ***Paks Contractors Pty Ltd v Maruko Inc*** [1993] 1 Qd R 119 which was concerned with an inaccuracy, rather than want of form. There is no relevant inaccuracy suggested in respect of the notice to principal as served on 19 May 2006. It is a question whether the lack of particulars of the work done amounts to a want of form. The approved form requires insertion of particulars of the work done for which the amount of the charge is claimed. The particulars that have been provided in this case are brief and general and do not fulfil the description of particulars. I am satisfied that is a "want of form".

[38] The money sought to be charged by the plaintiff and the amount of the plaintiff's claim can be ascertained with reasonable certainty from the notice to principal as served on 19 May 2006 (even without recourse to annexure "A"), because the notice to principal identifies the money sought to be charged as that which is payable by the second defendant to the first defendant under the contract to which they are parties and the exact amount claimed by the first defendant is specified. Despite the lack of particulars of the work done for which the amount of the charge is claimed, the saving provision in s 10(5) of the Act applies to the notice to principal as served on 19 May 2006.

[39] I therefore conclude that the notice to principal as served on 19 May 2006 was a valid notice. As it was not withdrawn, the plaintiff was not at liberty to serve the notice again, because of the restriction in s 10(8) of the

Act. This proceeding was therefore not commenced within the time period specified by s 15(1)(b) of the Act and the charge is deemed to be extinguished pursuant to s 15(3) of the Act.

[40] It is therefore unnecessary to deal with the second issue which depended on the notice to principal as served on 19 May 2006 not being a valid notice. The second issue raised the interesting question of whether a notice to contractor which was served for the purpose of s 10(1)(b) of the Act was compliant with that provision, if it were served before the notice under s 10(1)(a) of the Act.

[41] On the basis that the notice to principal as served on 19 May 2006 was invalid, the parties made submissions on the assumption either that the notice to principal was served when annexure "A" was forwarded to the second defendant's solicitors on 25 May 2006 or when the copy of the notice to principal including annexure "A" was served on the second defendant on 29 May 2006. The submission of the first defendant is simply that the notice to contractor was served on 22 May 2006 and for the charge to attach the notice to principal must be served before the notice to contractor.

[42] Counsel for the plaintiff points to a number of decisions where the notices under s 10(1)(a) and (b) of the Act were served at the same time such as ***K.G.K. Constructions Pty Ltd v Tabray Pty Ltd*** [1985] 2 Qd R 173, 174 and there was no suggestion that resulted in non-compliance with s 10(1). The submission is made on behalf of the plaintiff that if it were permissible for the notices to be served simultaneously, it is inconsistent to treat the service of the notice under s 10(1)(b) before the service of the notice under s 10(1)(a) as non-compliance with s 10(1).

[43] Following ***Austco,*** the service of the notice to contractor of claim of charge being given must be "as soon as possible" after the service of the notice of claim of charge. Although both notices have to be served for the charge to attach, the service of the notice of claim of charge is the one that is critical for determining the date the charge attached. Upon the service of the notice of claim of charge, the charge attaches, although it will cease to attach if the notice under s 10(1)(b) is not served as soon as possible after the service of the notice of claim of charge. The effect of the service of the notice under s 10(1)(a) is therefore conditional on the service of the notice under s 10(1)(b). Arguably, if the notice under s 10(1)(b) were served at the same time, or even before, the service of the notice under s 10(1)(a), that condition would be satisfied at the time of service of the notice under s 10(1)(a). There are authorities in other contexts in which service of the document or the taking of a step which is required after another specified event is satisfied by service of the document or the taking of the step before the specified event. cf ***Bock v DonRex Furniture*** (Qld) [1981] Qd R 326, 329-330 and ***R v Inland Revenue Commissioners, ex parte Knigh***t [1973] 3 All ER 721, 727-728.

[44] It is not necessary to express a final view on this argument in this matter about the order of service of the notices under s 10(1) in order to ensure compliance with that provision. I make the observation, however, that it would not detract from the integrity of the means of causing the charge to attach that is provided for in s 10(1), if the notice under s 10(1)(b) were served at the same time as or in close proximity to, but before, the notice under s 10(1)(a).

Whether moneys should be paid out of court

[45] The plaintiff advances an alternate argument in anticipation of a conclusion that its charge was deemed to be extinguished or had failed to attach. The plaintiff argues that, even in the absence of a charge in its favour under the Act, the moneys paid into court by the second defendant should remain in court until the true entitlement between the plaintiff and the first defendant to those moneys is determined. The plaintiff relies on ***Goodacre v Romtra Pty Ltd*** [2000] 2 Qd R 494 ("Goodacre").

[46] In Goodacre the employer had paid about $179,000 into court after receiving the notice of claim of charge from the relevant subcontractor. The subcontractor obtained a court order for payment out of the sum of $109,000 which it accepted as its full entitlement in respect of the charge There remained, however, a dispute between the contractor and the employer, each of which claimed to be entitled to money from the other and therefore each sought the sum of about $70,000 that was left in court. At the time the employer had paid the sum into court, the employer admitted in its defence that certificates had issued in favour of the contractor for sums in excess of the amount. Subsequent events including termination of the contract by the employer for breach by the contractor gave rise to a claim that the employer was pursuing against the contactor and the employer opposed the contractor's application for payment of the moneys remaining in court. The matter therefore was concerned with competing rights between an employer and a contactor, after the subcontractor's charge had been satisfied. Because of the disputed entitlements of each of the employer and the contactor to the money left in court, it was held that it was not appropriate that the money be paid out and that it be left in court until the final rights of the employer and contractor to those funds were established.

[47] The issue in Goodacre was therefore very different to the issue that arises on this application where it has been found that the plaintiff's charge was extinguished under s 15(3) of the Act.

[4s] The second defendant does not raise any claim to the funds paid by it into court. But for the plaintiff's service of the notice to principal, the funds would have been paid by the second defendant to the first defendant. The plaintiff seeks to rely on a number of other discretionary factors including the delay by the first defendant in bringing this application and that the first defendant has in proceedings against the second defendant sought to recover amounts that correspond to those claimed by the plaintiff in this proceeding against the first defendant. The plaintiff also seeks to rely on s 15(2) of the Act, but that is not relevant where the charge has been extinguished.

[49] As the plaintiff's charge under the Act has been extinguished, it needs to show that there is material akin to that which would support a Mareva injunction in order to prevent the payment out to the first defendant of the moneys which would otherwise have been paid to it by the second defendant, but for the service of the notice to principal. The material relied on by the plaintiff falls far short of the material which would justify the preclusion of the payment of the moneys to the first defendant at this stage of the proceeding. The first defendant is therefore entitled to the order which it seeks of payment out of court of the money paid in by the second defendant in this proceeding on 20 July 2006.

Orders

[50] The orders which should be made are:

1. Judgment for the first defendant against the plaintiff in respect of the plaintiff's claim that the plaintiff was entitled to a charge pursuant to the Subcontractors' Charges Act 1974 on the money paid by the second defendant into court in this proceeding on 20 July 2006.
2. The sum of $1,435,234.30 paid into court in this proceeding by the second defendant on 20 July 2006 together with accretions be paid out of court to the first defendant.

[51] The first defendant also seeks an order for costs against the plaintiff of its application for summary judgment. I am disposed to make that order, but will give the parties an opportunity to make submissions on costs, before making any costs order.

[52] At the same time that I heard this application for summary judgment, I also heard the plaintiff's application filed on 3 April 2007 seeking consolidation of this proceeding with Brisbane District Court proceeding 2638 of 2006. The plaintiff also sought directions in relation to the further conduct of the proceeding. I invite further submissions from the parties on the appropriate orders to be made on this application, in light of the first defendant's success in obtaining summary judgment in respect of the part of the plaintiff's claim in this proceeding made in reliance on the Act.

Postscript

[53] After publishing the reasons on 2 May 2007 the first defendant filed further affidavits on the issue of whether all the money paid into court by the second defendant should be paid out to the first defendant. I adjourned the matter to allow the second defendant to be given an opportunity to make submissions. There was no appearance by the second defendant on 3 May 2007 and I made orders 1 and 2 as set out above in paragraph [50].

PR Franco for the plaintiff/respondent instructed by Shand Taylor
JK Bond SC and TP Sullivan for the first defendant/applicant instructed by Hopgood Ganim