PROCEEDING: Applications for summary judgment

ORDER:

1. The application filed on 14 November 2006 is dismissed.
2. It is declared that the letter dated 22 September 2006 from the plaintiff to the defendant is not a valid payment claim pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004.
3. It is declared that the contract between the plaintiff and the defendant dated 5 November 2004 is unenforceable by reason of s 55(3) of the *Domestic Building Contracts Act* 2000.

CATCHWORDS: Building, Engineering & Related Contracts – Remuneration – Statutory Regulation of entitlement to and recovery of progress payments - where builder and owner entered into a written cost plus contract for renovation works to house property – where payment claim served by builder under *Building and Construction Industry Payments Act* 2004 (Qld) – where owner did not serve payment schedule – where no fair and reasonable estimate of total amount builder was likely to receive under the contract was given to owner pursuant to s 55 *Domestic Building Contracts Act* 2000 (Qld) – whether contract that is unenforceable under s 55(3) *Domestic Building Contracts Act* 2000 (Qld) is a contract to which *Building and Construction Industry Payments Act* 2004 (Qld) applies

Legislation **:**
Building and Construction Industry Payments Act 2004, s 7, s 12, s 17, s 18, s 19, s 20, s 26, s 99, s 100
Commercial and Consumer Tribunal Act 2003, s 40
Domestic Building Contracts Act 2000, s 55
Queensland Building Services Authority Act 1999, s 42

Cases :
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, considered
Cant Contracting Pty Ltd v Casella [2006] QSC 242, considered
Cant Contracting Pty Ltd v Casella [2006] QCA 538, followed
Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) 64 NSWLR 448, considered
Lucas Stuart Pty Ltd v Council of the City of Sydney [2005] NSWSC 840, considered
Sutton v Zullo Enterprises Pty Ltd [2000] 2 QdR 196, considered

JUDGMENT : Mullins J : SUPREME COURT OF QUEENSLAND . Trial Division. Brisbane. 13th February 2007.

[1] The plaintiff is a building contractor who on 5 November 2004 entered into a written building contract in the QMBA Cost Plus (Residential) Standard Form ("the contract") with the defendant which owns a house property at Alexandra Road, Ascot for interior renovations to the house property. The plaintiff performed building works for the defendant relating to the renovation of that house property.

[2] On 22 September 2006 the plaintiff issued and submitted to the defendant a claim for payment ("claim for payment") in the amount of $348,030.18 pursuant to clause 11.6 of the contract in respect of works undertaken under the contract up to 22 September 2006. As at the date the plaintiff commenced this proceeding, the defendant had failed to pay that sum to the plaintiff or to serve a payment schedule within the meaning provided for in s 18 of the *Building and Construction Industry Payments Act* 2004 ("*BCIPA*"). The plaintiff has therefore claimed in the proceeding the sum of $348,030.18 as a debt owing to the plaintiff by the defendant pursuant to s 19 of the *BCIPA*. It is the only claim made in the proceeding the defendant has filed a defence and counterclaim. The defendant denies that the *BCIPA* applies to the contract on the basis that the contract was entered into by the plaintiff in contravention of ss 55(1) and (2) of the *Domestic Building Contracts Act* 2000 ("*DBCA*") and that, as a result, the contract is unenforceable by the plaintiff against the defendant. The defendant has counterclaimed for declarations in the following terms:

1. That the letter dated 22 September 2006 from the plaintiff to the defendant is not a valid payment claim pursuant to s 17 of the *BCIPA*.
2. That the contract between the plaintiff and the defendant is unenforceable by reason of s 55(3) of the *DBCA* 2000.

[3] Each of the plaintiff and the defendant has filed an application seeking summary judgment. The plaintiff applies for judgment against the defendant in the sum of $348,030.18 and interest and for an order that the defendant's counterclaim be dismissed. The defendant applies for judgment against the plaintiff on the counterclaim and that declarations be made in the terms sought in the counterclaim and that the plaintiff's claim be dismissed.

Relevant legislation

[4] The *BCIPA* was modelled on the New South Wales *Building and Construction Industry Security of Payment Act* 1999 ("the NSW Act").

[5] The object of the *BCIPA* is set out in s 7:

"Object of Act
The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person
(a) undertakes to carry out construction work under a construction contract; or
(b) undertakes to supply related goods and services under a construction contract."

[6] Part 2 of the *BCIPA* confers rights to progress payments under a construction contract and provides for the calculation of the amount of the progress payment and the date for payment. Section 12 of the *BCIPA* provides:

"Rights to progress payments
From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

[7] Part 3 of the *BCIPA* governs the procedure for recovering progress payment. Under s 17(1) of the *BCIPA* a person mentioned in s 12 of the *BCIPA* "who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent)". There are provisions within s 17 of the *BCIPA* for the content and service of the payment claim. Section 18(1) of the *BCIPA* provides for a respondent served with a payment claim to reply to the claim by serving a payment schedule on the claimant. There are provisions within s 18 of the *BCIPA* that deal with the content and service of the payment schedule.

[8] Section 19 of the *BCIPA* provides for the consequences of not paying the claimant if the respondent does not serve a payment schedule on the claimant within the time allowed under s 18 of the *BCIPA*. Section 20 of the *BCIPA* deals with the consequences where the respondent serves a payment schedule within time which states a scheduled amount that the respondent proposes to pay to the claimant. As it was common ground on the hearing of this application that no payment schedule was served by the defendant, s 19 of the *BCIPA* is relevant:

"19 Consequences of not paying claimant if no payment schedule
(1) This section applies if the respondent—
(a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) The claimant—
(a) may—
(i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or
(ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

(3) A notice under subsection (2)(b) must state that it is made under this Act.

(4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
(a) judgment in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
(b) the respondent is not, in those proceedings, entitled—
(i) to bring any counterclaim against the claimant; or
(ii) to raise any defence in relation to matters arising under the construction contract."

[9] Division 2 of Part 3 of the *BCIPA* provides for the adjudication of disputes which allows a person who is registered as an adjudicator under the *BCIPA* to decide the amount of the progress payment (if any) to be paid by the respondent to the claimant in an expeditious and informal way. Under s 26(2) of the *BCIPA* the adjudicator is limited to considering the matters set out in that provision in deciding an adjudication application.

[10] Section 99 of the *BCIPA* prevents parties to a construction contract endeavouring to contract out of the provisions of the *BCIPA*. Section 100 of the *BCIPA* makes it clear that nothing in Part 3 of the *BCIPA* affects any right that a party to a construction contract may have under or in relation to that contract and that nothing done under or for Part 3 of the *BCIPA* affects any civil proceedings arising under a construction contract (except to take into account any payment made under Part 3).

[11] It was common ground that the contract in this proceeding is a domestic building contract under the *DBCA*. For the purpose of the *DBCA*, "*cost plus contract*" is defined in schedule 2 to that Act as meaning "*a domestic building contract under which the amount the building contractor is to receive under the contract can not be calculated when the contract is entered into, even if prime cost items and provisional sums are ignored*". Section 55 of the *DBCA* provides:

"55 Cost plus contracts
(1) A building contractor must not enter into a cost plus contract that would be a regulated contract unless—
(a) the contract is included in a class of contracts prescribed under a regulation; or
(b) the cost of a substantial part of the subject work can not reasonably be calculated without some of the work being carried out.
Maximum penalty—100 penalty units.

(2) A building contractor must not enter into a cost plus contract that would be a regulated contract unless the contract contains a fair and reasonable estimate by the building contractor of the total amount the building contractor is likely to receive under the contract.
Maximum penalty—100 penalty units.

(3) If a building contractor enters into a cost plus contract in contravention of this section, the building contractor can not enforce the contract against the building owner.

(4) However, the tribunal may, on an application made to the tribunal by the building contractor, award the building contractor the cost of providing the contracted services plus a reasonable profit if the tribunal considers it would not be unfair to the building owner to make the award."

[12] Section 92 of the *DBCA* provides:

*"**92 Effect of failure by building contractor to comply with requirement***
Unless the contrary intention appears in this Act, a failure by a building contractor to comply with a requirement under this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable."

Relevant authorities

[13] Both parties referred to the decision at first instance ***in Cant Contracting Pty Ltd v Casella*** [2006] QSC 242 ("*Cant*") on the hearing of these applications. On 15 December 2006 the Court of Appeal allowed an appeal from that decision in ***Cant Contracting Pty Ltd v Casella*** [2006] QCA 538. The plaintiff and the defendant made further written submissions in light of the judgment of the Court of Appeal in ***Cant.***

[14] In ***Cant*** the builder sued the owner for amounts claimed to be owing under a construction contract relating to poultry sheds or, alternatively, for the reasonable cost of labour and material supplied. The owners defended the claim on the basis that the builder was in breach of s 42(1) of the *Queensland Building Services Authority Act* 1991 ("*Building Act*") on the basis that the builder did not hold the appropriate licence. It was in issue in the proceeding whether the builder held the appropriate licence at the material time. The builder then amended its statement of claim to make a claim based on s 19 of the *BCIPA*. It was alleged that the builder had served a payment claim pursuant to s 17 of the *BCIPA* and that no payment schedule was served by the owners within the time limit prescribed by s 18(4) of the *BCIPA*. The builder made an application for summary judgment in respect of the claim under s 19 of the *BCIPA* which was determined in its favour in reliance on ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 ("***Brodyn"***).

[15] The owners argued on the appeal in ***Cant*** that the *BCIPA* did not overrule s 42 of the *Building Act*. They argued that the reference to a "*construction contract*" in the *BCIPA* must be to a lawful contract and the use of the word "*entitled*" in ss 7, 12 and 17 of the *BCIPA* must mean lawfully entitled: see the Court of Appeal judgment in *Cant* at paragraph [20]. The essence of the argument of the builder on the appeal in *Cant* was that a person would come within s 17 of the *BCIPA* as a person "*who is or claims to be entitled to a progress payment*", even if in proceedings between the builder and owners it was ultimately determined that the builder's claim was unjustified; that the *BCIPA* was designed to ensure that a contractor received progress payments on an interim basis with the parties having the right at a later point of time to litigate all issues arising under the construction contract; and that the failure to raise the illegality of the contract in a payment schedule precluded the owners from relying on that illegality on the summary judgment application: see the Court of Appeal judgment in *Cant* at paragraphs [21], [45] and [56].

[16] Each of the members of the Court of Appeal in *Cant* delivered separate reasons. Williams JA relied on *dicta* of Hodgson JA in ***Brodyn*** on s 94 of the *Home Building Act* 1989 (NSW) ("*Home Building Act*"), which was similar to ss 42(3) and (4) of the *Building Act*, as distinguishing the matter in *Cant* from the result in ***Brodyn.*** Williams JA concluded at paragraph [30]:

"Because s 42(3) of the Building Act provides that an unlicensed contractor "is not entitled to any monetary or other consideration" for doing work pursuant to the contract, such a contractor cannot be said to have an entitlement to progress payments pursuant to ss 7, 12 and 17 of the Payment Act."

Williams JA considered (at paragraph [31]) that the inclusion of the expression "*claims to be entitled*" in s 17 of the *BCIPA* was intended to meet the situation where a claim is made under the *BCIPA* in the face of an ongoing dispute between the parties as to such entitlement, but does not meet the situation where the builder has no legal entitlement under the provisions of the *Building Act* to any monetary consideration for work done pursuant to the contract. As the proceeding in *Cant* had raised the issue as to the legality of the construction contract, before the amendment was made by the builder to rely on s 19 of the *BCIPA* giving rise to a triable issue as to the builder's entitlement to recover anything under the construction contract, Williams JA concluded (at paragraph [35]) that s 19(4)(b)(ii) of the *BCIPA* did not (in the circumstances then existing) preclude the owners from relying on s 42 of the *Building Act*. Williams JA proposed that the setting aside of the judgment and dismissal of the application for summary judgment would enable the matter to proceed to trial where factual issues relating to the licensing of the builder would be determined.

[17] Jerrard JA also found that there was no sign in the *BCIPA* of an intent for that Act to override the requirement in the *Building Act* that builders be appropriately licensed and concluded that the builder was not entitled under ss 12 or 13 of the *BCIPA* to a progress payment for any building work it had carried out because of the application of s 42(3) of the *Building Act* (at paragraph [44]). Jerrard JA considered (at paragraph [48]) that the effect of the owners' pleading that the builder was not entitled to benefits under the *BCIPA* by reason of not holding the appropriate class of licence would have the result, if upheld, that neither ss 17, 18 or 19 of the *BCIPA* could be availed of by the builder and that summary judgment in favour of the builder should be set aside.

[18] Philip McMurdo J agreed with Williams JA that it was s 94 of the *Home Building Act* that was in similar terms to s 42 of the *Building Act*, so that Hodgson JA's judgment in *Brodyn* could be relied on for distinguishing the decision in ***Brodyn*** (which concerned s 10 of the *Home Building Act*) because of the different terms of s 42 of the *Building Act* (at paragraph [51]). McMurdo J therefore formulated the question for decision on the appeal in ***Cant*** as whether the *BCIPA* was intended to override the disentitlement to any payment resulting from s 42 of the *Building Act* (at paragraph [51]). It was noted that it was an "*unattractive proposition*" that the builder's case in *Cant* depended on the commission of an offence as an essential step to the builder becoming entitled to the beneficial operation of the scheme under the *BCIPA* (at paragraph [53]). McMurdo J described as a further obstacle that the valuation of the construction work for the purpose of making the progress payment derived from the contract which was unenforceable under s 42 of the *Building Act* which limited the builder to recovering costs according to s 42(2) of the *Building Act* (at paragraphs [54] and [55]). McMurdo J also considered the provisions for adjudication of a payment claim and the limitation of the matters that could be considered by the adjudicator pursuant to s 26(2) of the *BCIPA*. As it would have the result that in the case of an unlicensed builder's claim, the adjudicator could not consider s 42 of the *Building Act*, it was noted (at paragraph [58]) that on the builder's argument that would have the result *"that the regime of adjudication would often result in something higher than the commensurate share of the builder's ultimate entitlement, and, therefore in an overpayment."* McMurdo J concluded at paragraph [61]:

" The purpose of a scheme of progress payments is to permit a builder to be paid the agreed consideration for the works progressively, by a part payment which is commensurate with that part of the works performed to that point. This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder's entitlement being according to its contract. The long title of the Payments Act describes it as an "Act to imply terms in construction contracts …" It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the Payments Act was intended to override the disentitlement according to s 42; the contrary appears. In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder."

[19] In ***Brodyn*** the owner had entered into a contract with one Dasein for concreting work for townhouses. The owner alleged that Dasein had repudiated the contract and purported to accept that repudiation. Dasein served a payment claim under the NSW Act on the owner to which the owner responded with a payment schedule disputing the claim in full. Dasein made an adjudication application under the NSW Act and the adjudicator's determination was substantially in favour of Dasein. Dasein filed the adjudication certificate in the Court which resulted in it taking effect as a judgment in accordance with the NSW Act. The owner sought to restrain Dasein from enforcing that judgment and commenced other related proceedings. The owner then became aware that Dasein did not have, at the relevant times, a licence under the *Home Building Act* and sought to rely on that in proceedings to quash the adjudicator's determination. Hodgson JA, with whom the other members of the Court agreed, set out his conclusions on this argument as follows:

"[82] In my opinion, the civil consequences for an unlicensed contractor for its breach of s 4 are those set out in s 10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s 94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the Home Building Act.

[83] Accordingly, in my opinion Dasein's failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination."

Facts

[20] For the purposes of the applications, the plaintiff accepted that it is a "building contractor" within the meaning of s 55 of the *DBCA* and that the contract is "a cost plus contract that would be a regulated contract" to which s 55 of the *DBCA* applies.

[21] The contract is in the QMBA Residential Cost Plus Contract standard form (5 July 2000). Item 6 of the contract required insertion of the estimated total costs of the works in accordance with clause 30.14 of the general conditions. The words have been inserted under that item "*Not Applicable*". For the purpose of the applications the plaintiff does not concede that the contract did not contain the *"fair and reasonable estimate"* required by s 55(2) of the *DBCA*. In view of the fact, however, that item 6 has not been completed and, in fact, has expressly been noted as *"Not Applicable",* for the purpose of these applications it is appropriate to proceed on the basis (and I find) that, at the least, the defendant can show that the contract was entered into by the plaintiff in breach of s 55(2) of the *DBCA*. The parties had completed item 9 of the contract to show 15% of the actual cost of the works as the fee to be paid to the plaintiff.

[22] The contract provided for progress claims for costs to be made monthly and to be submitted by the 15th day of each month. It appears that the plaintiff commenced works on site at or around the time when the contract was entered into, as the plaintiff's Claim No 1 for materials and work carried out pursuant to the contract was dated 9 December 2004. Claim Nos 1 to 15 were made between December 2004 and March 2006 and were paid by the defendant. At some time after the construction works had commenced, the defendant prepared a contract in

the QMBA Cost Plus Contract standard form (5 June 2005) for the construction by the plaintiff for the defendant of a pool house/garage as drawn by Kevin Hayes Architects at the same site. That form of contract was signed on behalf of the plaintiff and submitted to the defendant, but it does not appear to have been signed by the defendant. There is conflicting evidence about the circumstances of the preparation of and the purpose of this second contract. That form of contract also provided for the plaintiff to be paid 15% of the actual cost of the works.

[23] Mr Holt, who is a director of the plaintiff, acknowledged in his affidavit sworn on 24 November 2006 and filed by leave on the hearing of the applications that, at least from Claim No 5 (which was submitted by the plaintiff to the defendant on or about 15 April 2005), the plaintiff's progress claims under the contract included costs of work undertaken by the plaintiff with respect to the construction of the pool house/garage, but that all claims were made on the basis of costs incurred in undertaking the work plus a margin of 15%. Mr Holt deposed to an "*understanding*" based on the terms of the contract and conversations he had with Mr Batt, the director of the defendant, that all work undertaken by the plaintiff for the defendant at the site at the direction of the defendant was to be invoiced to the defendant on the basis of costs incurred in undertaking the work plus a margin of 15%. It is incongruous that the claim for payment identified the relevant contract merely as that entered into between the parties on 5 November 2004.

[24] The plaintiff served Claim Nos 16, 17 and 18 on the defendant between 4 May and 5 September 2006. These three claims were superseded by the plaintiff's claim for payment which is a tax invoice to the defendant dated 22 September 2006 for the amount of $348,030.18 and is endorsed with the description that it is a payment claim made under the *BCIPA*.

[25] Mr Spencer who has acted as the defendant's agent in relation to the construction since mid November 2004 offers as the explanation for the failure of the defendant to serve a payment schedule under the *BCIPA* that it was not possible for him on behalf of the defendant to prepare a payment schedule within the time allowed by the *BCIPA* due to "the lack of detailed breakdown" and the large number of invoices included in the claim for payment. Mr Spencer states that he was unable to cross-reference the tax invoices included in the claim for payment with those which had previously been paid in Claim Nos 1 to 15 or to establish whether the work had been undertaken pursuant to the contract.

Plaintiff's submissions

[26] The plaintiff relies on descriptions of the operation of the NSW Act that support its submissions that a purely mechanical operation should be given to the *BCIPA*. These include the statement by Einstein J in ***Lucas Stuart Pty Ltd v Council of the City of Sydney*** [2005] NSWSC 840 at paragraph [13]:

"*… the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract to access to a 'fast track' adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures … .*"

Reference was also made to the description by Mason P in ***Clarence Street Pty Ltd v Isis Projects Pty Ltd*** (2005) 64 NSWLR 448, 449 [2] of the rights enforceable to judgment under the NSW Act as "free-standing statutory rights".

[27] The plaintiff argues that the Court of Appeal decision in *Cant* is distinguishable from this matter, primarily because of the differences between s 42 of the *Building Act* and s 55 of the *DBCA*. The plaintiff points to the prohibition in s 42(1) of the *Building Act* against an unlicensed builder from carrying out building work, regardless of whether there is a contract in existence and that there is no equivalent prohibition in s 55 of the *DBCA*. The plaintiff construes s 55 of the *DBCA* as not limiting a building owner, where s 55(1) or (2) has been breached, to the remedy provided for in s 55(4), arguing that s 55 does not contain an express prohibition sufficiently broad to preclude the exercise of the statutory rights conferred by the *BCIPA* and that the reference to the Tribunal in s 55(4) merely recognises that the Tribunal enjoys jurisdiction in respect of the domestic building contracts which are subject to s 55, without any special statutory right being created by s 55(4). The plaintiff argues that the remuneration allowed to an unlicensed contractor on an application under s 42(4) of the *Building Act* is limited and prevents the recovery of any element of profit, whereas the remedy allowed for under s 55(4) of the *DBCA* allows for the builder to recover what is, in any effect, a *quantum meruit*. The plaintiff also argues that, if the Legislature intended to preclude the application of the *BCIPA* where a contract was entered into in contravention of s 55 of the *DBCA*, the qualification of the application of the *BCIPA* would have been expressly dealt with in the *DBCA*.

[28] The plaintiff argues that s 55 of the *DBCA* is more closely analogous to s 10 of the *Home Building Act*, than it is to s 94 of that Act and that ***Brodyn*** is therefore not distinguishable, as it was in ***Cant***, and that ***Brodyn*** should be followed.

Defendant's submissions

[29] It is submitted on behalf of the defendant that the decision of the Court of Appeal in ***Cant*** should be applied in this matter as:

(a) the conduct of the plaintiff was prohibited by 55 of the *DBCA*;

(b) the conduct of the plaintiff resulted in the commission of an offence under s 55 of the *DBCA*;

(c) by reason of the conduct of the plaintiff the contract was rendered unenforceable by s 55 of the *DBCA*;

(d) by reason of the conduct of the plaintiff and the effect of s 55 of the *DBCA*, there was, relevantly, no enforceable contract pursuant to which the plaintiff was lawfully entitled to a progress payment;

(e) by reason of the conduct of the plaintiff (and the absence of a dispute that s 55 of the *DBCA* was not contravened) and the effect of s 55 of the *DBCA*, the plaintiff cannot properly "claim" to be lawfully entitled to a progress claim;

(f) under s 55(4) of the *DBCA* the intervention of the Tribunal is required before the plaintiff can recover the cost of providing the contracted services plus a reasonable profit if the Tribunal considers it would not be unfair to the plaintiff to make the award which makes s 55(4) of the *DBCA* analogous to s 94 of the *Home Building Act*.

The rights of a builder who has breached s 55 *DBCA*

[30] Although both parties argued that the matter would be decided by determining whether s 55 of the *DBCA* is analogous to either s 10 or s 94 of the *Home Building Act*, the issue that is raised by these applications is better expressed as whether a domestic building contract to which ss 55(3) and (4) of the *DBCA* applies is a contract to which the provisions of the *BCIPA* giving statutory rights to progress payments also applies.

[31] The statutory provisions that were the immediate predecessors of those found in the *DBCA* had been incorporated in the *Building Act*. Those provisions were amended substantially and re-enacted in the *DBCA* in 2000 at the same time as the enactment of the *Queensland Building Tribunal Act* 2000 ("*QBTA*"). The *QBTA* also removed from the *Building Act* the provisions in that Act that had dealt with the constitution, operation and jurisdiction of the Queensland Building Tribunal ("QBT"). Reference to the Explanatory Notes for the bills that resulted in the enactment of the *DBCA* and *QBTA* shows that those Acts arose from a process of review of existing building industry regulatory arrangements and the operation of the QBT which had commenced in 1992.

[32] The jurisdiction of the QBT was considerably extended by the *QBTA*. In particular, the QBT was given jurisdiction in building disputes, apart from domestic building disputes. A major commercial building dispute (as defined in the *QBTA*) could be decided by the QBT only if the QBT were satisfied that all parties to the dispute consented to it doing so: s 94 *QBTA*. Section 117 of the *QBTA* dealt with the transfer of proceedings between the QBT and the courts. The effect of that provision was that if a domestic building dispute proceeding were brought in a court for which jurisdiction was conferred on the QBT, the court was bound, on the application of a party, to order that the proceeding be removed to the QBT. The QBT was subsumed by the Commercial and Consumer Tribunal ("the Tribunal") that was established by the *Commercial and Consumer Tribunal Act* 2003 and given the same jurisdiction in relation to building disputes that had been conferred on the QBT. In relation to domestic building disputes, s 40 of the *Commercial and Consumer Tribunal Act* 2003 governs transfer of proceedings between the Tribunal and the courts. The effect of s 40(1) is to strengthen the jurisdiction of the Tribunal in relation to domestic building disputes, as a proceeding commenced in a court relating to a domestic building dispute that could be heard by the Tribunal must be the subject of an order by the court that the entity who started the proceeding start the proceeding again before the Tribunal. The exercise of this power is not contingent upon the making of an application by a party to the court. Although it cannot be concluded that there is exclusive jurisdiction conferred on the Tribunal in relation to all domestic building disputes, the effect of s 40 of the *Commercial and Consumer Tribunal Act* 2003 is to severely limit the circumstances in which a dispute concerning a domestic building contract could be heard in a court.

[33] A comparison of the *DBCA* with the provisions that had been in the *Building Act* regulating domestic building contracts (prior to the enactment of the *DBCA*) show that domestic building contracts are closely and comprehensively regulated by the *DBCA* and to a degree which is significantly greater than under the *Building Act*. This is reflected by the purpose of the *DBCA* that is set out in s 3 of the *DBCA* which in relation to domestic building contracts is to achieve a reasonable balance between the interests of building contractors and building owners and to maintain appropriate standards of conduct in the building industry.

[34] Sections 55(1) and (2) of the *DBCA* facilitate the protection of the interests of a building owner and specify the standard of conduct of the building contractor when a project is to proceed on a cost plus basis. The *DBCA* was enacted after the decision of the Court of Appeal in ***Sutton v Zullo Enterprises Pty Ltd*** [2000] 2 QdR 196 which resulted in the amendment of s 42 of the *Building Act* to incorporate the provision that is now designated s 42(4): see Explanatory Notes for the *Queensland Building Services Authority Amendment Bill* 1999, cl 20. As contemplated by s 92 of the DBCA, s 55(3) of the *DBCA* specifies the consequence of a breach of ss 55(1) or (2) which is that the contract is then not enforceable. That consequence is ameliorated by the provision then made in s 55(4). The use of the word "However" to open s 54(4) suggests that it provides the extent to which the building contractor is relieved of the consequence set out in the immediately preceding provision contained in s 55(3).

[35] It is true that s 55(4) of the *DBCA* confers greater rights of recovery on a builder who breaches s 55, than that conferred by s 42(4) of the *Building Act* on a builder who is unlicensed. That no doubt reflects the implementation of policy by the Legislature and makes sense when the comparative grossness of the breaches provided by the respective provisions is considered. That comparison, however, could not be determinative of the construction of s 55 of the *DBCA* and whether the Legislature has evinced an intention to prescribe exhaustively the remedy for a building contractor where the contract is unenforceable pursuant to s 55(3) of the *DBCA*. As a matter of construction of s 55 of the *DBCA* within the context of that Act, the Legislature has restricted a builder who breaches ss 55(1) or (2) of the *DBCA* to recovering costs for the work undertaken pursuant to that contract to the

extent provided in s 55(4). Effectively a builder will not recover costs unless the builder is able to obtain an award from the Tribunal pursuant to s 55(4) of the *DBCA*, which will depend on the Tribunal concluding that "it would not be unfair to the building owner to make the award". It cannot be concluded that in addition to s 55(4), a builder who breached s 55 of the *DBCA* would be able to make a claim based on a *quantum meruit*.

[36] It is difficult to reconcile how the scheme under the *BCIPA* which seeks to facilitate progress payments under a construction contract could apply to facilitate a progress payment in respect of an amount that may be awarded under s 55(4) of the *DBCA* where the domestic building contract has been made unenforceable pursuant to s 55(3) of the *DBCA*. As a matter of construction of the *BCIPA,* the *BCIPA* does not apply to the plaintiff's claim under the contract, as the plaintiff is prohibited by s 55(3) from enforcing the contract and therefore cannot claim to be entitled to a progress payment under the contract. This conclusion is supported by the reasoning of the Court of Appeal in ***Cant*** and the *dicta* of Hodgson JA in ***Brodyn*** at paragraph [82]. The construction of s 55 of the *DBCA* shows that it is analogous to s 94 of the *Home Building Act*.

Conclusion

[37] There is no impediment to granting the defendant's application for summary judgment. It follows that the orders which should be made on both applications are those that were sought by the defendant. The orders will therefore be:

1. The application filed on 14 November 2006 is dismissed.
2. It is declared that the letter dated 22 September 2006 from the plaintiff to the defendant is not a valid payment claim pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004.
3. It is declared that the contract between the plaintiff and the defendant dated 5 November 2004 is unenforceable by reason of s 55(3) of the *Domestic Building Contracts Act* 2000.

[38] On the question of costs, the defendant in its application sought an order that the plaintiff pay the defendant's costs of the proceeding on an indemnity basis or, alternatively, on a standard basis. The plaintiff should pay the defendant's costs of both applications and the proceeding. Subject to hearing submissions on the question, I do not consider that the circumstances warrant making a costs order on an indemnity basis.

GI Thomson for the plaintiff instructed by Ebsworth & Ebsworth
MD Ambrose for the defendant instructed by Praeger Batt