Unlicensed Builders/Subcontractors – Entitlement To Payment In Queensland

- *Zullo Enterprises Pty Ltd & Ors v John Sutton,*
  Court of Appeal, Supreme Court of Queensland, 15 December 1998.

On 15 December 1998, the Court of Appeal, Supreme Court of Queensland, handed down its decision in *Zullo Enterprises Pty Ltd & Ors v John Sutton.* In this decision the Court:

1. clarified obiter comments by McPherson JA in *Marshall*; and
2. confirmed that an unlicensed contractor is not entitled to any monetary or other consideration for carrying out building work either under the contract or by way of restitution.

In the *Marshall* decision (28 October 1997):

1. the Court of Appeal held that an owner was not obliged to pay an unlicensed contractor in accordance with any contractual obligation to do so;
2. the Court held that in circumstances where monies had been paid to an unlicensed contractor pursuant to a mistake of fact (that there was an appropriate licence), then those monies must be repaid; and
3. McPherson JA indicated by way of obiter that an unlicensed contractor would not be entitled to payment on any basis.

In *Loftus v Caladonia Constructions Pty Ltd,* unreported, Queensland Building Tribunal, 24 December 1997, Tribunal Member Lohrisch was of the view that McPherson JA in the *Marshall* decision indicated that section 42 of the *Queensland Building Services Authority Act* ("the *Act*") disentitles an unlicensed builder to any remuneration for work performed. The Tribunal member went on to find that the *Marshall* decision leaves little doubt that section 42 precludes **any recovery** of remuneration by an unlicensed contractor whether by way of quantum meruit or otherwise.

Subsequent to the *Marshall* decision the Supreme Court, and District Court have also held that an unlicensed builder/subcontractor is entitled to reasonable remuneration for work carried out on the basis of unjust enrichment, in circumstances where the other party has accepted the benefit of the work.

In *Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd*, unreported, Supreme Court of Queensland, No. 1987 of 1997, 28 August 1998, White J held that section 42(3) of the *Act* did not have the effect of precluding a subcontractor who has carried out building work without holding a contractor's licence of the appropriate class from recovering from the head contractor reasonable remuneration for the work carried out on the basis of unjust enrichment, in circumstances where the head contractor has accepted the benefit of that work.

In *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd*, unreported, Supreme Court of Queensland, No. 14619 of 1997, 2 June 1998, Derrington J held that whilst section 42(1) of the *Act* does prohibit a person from carrying out building work without a licence, subsection (3) sets out the consequences of that breach, namely, that such a person is not entitled to any monetary or other consideration for doing so. The expression of such a specific consequence may well have the effect of excluding any further consequence to the contract in the event of breach.

The *Sutton* decision involved the question of whether a builder (and it is submitted that the same principles apply to a subcontractor) may recover a fair price for work done in contravention of section 42(1) of the *Act*. Under that subsection there is a prohibition on carrying out building work or undertaking to carry out building work without the appropriate licence. Under section 42(3) of the *Act* a person in breach is "*not entitled to any monetary or other consideration*" for carrying out the work.

The builder in *Sutton* had a house building licence but not a general building licence and the work in question involved the construction of a childcare centre. Wensley QC ADCJ held, in effect, that the word "*consideration*" and the expression "*any monetary or other consideration*" in section 42(3) of the *Act* should be read as meaning the agreed price under a contract; so that any action other than for such an agreed price may, consistently with the statute, be brought – for example, an action for damages for breach of contract.

In the Court of Appeal:

1. Jones J agreed with the reasons of Pincus JA and McPherson JA;
2. Pincus JA:
   i. said there should be a broad construction of section 42(3) and in particular the word "*consideration*" because of the history of the provision and the strangeness of the result achieved by narrow construction;

ii. said that it strained credulity to accept that the legislature should, after the decision of *Pavey & Matthews* not only accept the position that an unlicensed builder may recover for a quantum meruit for the work done, but to add to that a right to bring certain actions on the contract itself;

iii. distinguished *Pavey & Matthews* on the basis that in the *Sutton* case the restitutionary suit was one to recover a price for work, the performance of which was prohibited by statute, done under a promise, the making of which was prohibited by statute. Whereas in the *Pavey & Matthews* the suit on a contract was not available for want of formality;

iv. held that the word "*consideration*" in section 42(3) should be given a construction covering a price recovered in a quantum meruit claim;

3. McPherson JA:

a. said that when parliament prohibits the very process or formation of a contract, it scarcely lies with the courts to ignore that prohibition to enforce the contract despite the express legislative embargo on its being made at all;

b. said that because of the terms in section 42(1) expressly prohibiting the formation of the contract itself the result was that the contract was unenforceable at least at the instance of the person who is not appropriately licensed;

c. held that section 42(3) prevents a person in breach of section 42(1) from recovering damages for breach of contract or to recover the market value of services under an agreement to pay whatever the work was worth. Equally, there is no entitlement to recovery outside the contract as a restitutionary compensation for the work done. In whatever form the claim is framed the amount in question is "*monetary consideration*" for doing or having done the work and so falls within the exclusion in section 42(3);

d. held, that as a result of not being appropriately licensed, the builder was not entitled to the unpaid balance of what was claimed still to be owing.

Although the *Sutton* decision dealt with licensed contractors, it is submitted that a similar conclusion will apply to trade contractors who do not hold the appropriate licence under the *Act*. In the *Riteway* decision, White J was dealing with an unlicensed subcontractor who had carried out building work without the appropriate trade licence. In *Sutton*, McPherson JA disagreed with Her Honour's conclusion in *Riteway* and Pincus JA indicated that he preferred the interpretation of McPherson JA.

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

1. unlicensed contractors (including trade contractors) who enter into contracts to carry out building work or undertake to carry out building work in breach of the *Act*;
2. licensed contractors and trade contractors who lend their licence to unlicensed contractors;
3. licensed contractors who trade in the name of a corporate trading entity in circumstances where:
   a. the trading entity is not licensed; and
   b. the individual is not the registered supervisor of the corporate trading company under the *Act*.

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