

MAGISTRATES COURT OF SOUTH AUSTRALIA
(Civil)

**CLARK TIMBER SALES P/L V
INTERBUILD DIVISION P/L & ORS**

Judgment of Mr G.C. Gumpl S.M.

Friday, 1st August 2008

Plaintiff: CLARK TIMBER SALES P/L
Counsel: MR JENNER
Defendant: INTERBUILD DIVISION P/L AND ORS
Counsel: MR FENWICK ELLIOTT FOR 2ND DEFENDANT
Third Party: N/A

Hearing Date/s: 9/11/07, 26/3/08, 1/5/08, 20/5/08, 11/7/08
File No/s: AMCCI-05-6394

**CLARK TIMBER SALES V. INTERBUILD DIVISION P/L & ORS
[2008] SAMC**

**MR G.C. GUMPL S.M.
Civil Jurisdiction**

1 The plaintiff, Clark Timber Sales Pty Ltd, is a timber merchant who supplied timber to a building site. The plaintiff has sued the following four defendants in an effort to recover the cost of the timber - Interbuild Division Pty Ltd, the builder (D1); Sarah Vella, the owner of the development site (D2); Ciprino De Ieso (Chip) (D3), the managing director of D1; and Olinto De Ieso, D3's father (D4). The case before the court proceeded solely against D2 on the basis that D1 was in liquidation; D3 and D4 had either been bankrupted or were otherwise impecunious.

2 The plaintiff's claim has been amended on several occasions – most recently on the first day of trial, the latest instalment entitled 'Second Further Amended Claim'.

3 Sarah Vella (D2) entered into a contract with Interbuild Division Pty Ltd (D1) to build three units on her land at 100 Seaview Road, West Beach. The contract is dated 11th March 2004. Ciprino De Ieso, D3, (Chip), the managing director of D1 was recommended to build the project by his father (D4) who D2 originally approached to build the units because of previous family connections. The contract was for a price of \$600,000 and required D1 to pay all subcontractors out of D2's progress payments. One of the subcontractors was the plaintiff who was represented by the then director, Mr Harry Clark.

4 Mr Clark had been in the timber industry for 33 years and had known D4 for about 40 years. He previously had dealings with D2 and since Chip was D4's son, he had no misgivings about becoming a subcontractor to the project. When D1 failed to pay the plaintiff for timber supplied to the site, Clark approached Chip and was told to speak with Carmine Vella (D2's husband) about payment. Vella then advised Clark that payment under the head contract was up to date and he should pursue Chip on behalf of D1.

5 Mr Clark, managing director of the plaintiff, told the court that his dealings in regard to the supply of timber were almost exclusively with Carmine Vella. The plaintiff's claim is pleaded in the alternative – firstly it asserts that Carmine Vella had Sarah Vella's express actual authority to act as her agent in the ordering and procurement of the timber. In the alternative, Carmine Vella had his wife's ostensible authority to act as her agent by virtue of the fact that he informed Mr Clark that he was 'the builder and owner' and that he was 'now dealing directly with the suppliers of material... to the land'. Carmine Vella, it is asserted, would personally pay outstanding accounts due to the plaintiff and that this procedure was allowed to occur with D2's permission. In the further alternative, D2 ratified her husband's authority by her behaviour, ie., by being present during at least three meetings between Clark and Carmine Vella when payment and supply of timber were discussed.

6 The claim then asserts that as a result of a verbal contract between the plaintiff and D2 (through her agent Carmine), she would pay the plaintiff directly all monies that were originally owed by D1, and/or D3 and/or D4 under the head contract which (after the two \$5000 payments made by Carmine Vella – 12 July and 18 July 2005) stands at \$24,227.97. The plaintiff asserts that it is entitled to this amount as original subcontractor to Interbuild. It further asserts that it is entitled to a similar but different amount pursuant to its Worker's Lien, which appears to vary in the pleadings, but pursuant to para.25.3, appears to settle on the March invoices to Interbuild in the amount of \$22,302.49. The plaintiff seeks to enforce that charge and the lien. Further, in the alternative, the plaintiff claims damages in the amount of \$24,227.97, which remains the balance currently due to the plaintiff under the original subcontract.

7 Clark's arrangement concerning payment was unusual. Having been friends with D4, Clark allowed D3 and his company D1 to use D4's account. In fact, in evidence, Clark indicated that he had difficulty figuring out who he was contracting with - 'I can't answer whether I was contracting with Interbuild or not'.

8 In regard to the job itself, it was his belief that Carmine Vella was the sole authority on the job and was the builder. Whilst Clark made it plain that if he was not going to be paid he would repossess the timber and advised his truck driver to do so, he agreed in cross-examination that since there was no retention clause, once delivered, the plaintiff no longer had property in the goods and any threatened removal was probably illegal.

9 According to Clark, after he cancelled the truck that was to repossess the timber, Carmine Vella, who needed the timber to keep the carpenters going, promised to pay the plaintiff directly once the job was completed. Clark reiterated that at that time he was unaware that D2 had anything to do with the project.

10 On the one hand Clark said that under the contract, Carmine Vella became an agent for his wife and then almost immediately afterwards stated that he had no idea of D2's involvement and that at no stage did D2 tell the plaintiff that Carmine was her agent. It is obvious that Clark's testimony at times suffered from serious contradictions, probably due to his apparent need to reconstruct in order that his story fit the pleadings and surrounding facts. Interestingly, while the claim clearly refers to a single contract, the plaintiff gave evidence that he thought there were three contracts because he was supplying timber for three units. Although he was reminded that he issued one invoice, he maintained that there were three contracts.

11 One can sympathise with Clark who was running a business and merely wanted to be paid. However, his story was changeable and he reconstructed in a manner that made it unreliable.

12 D2 told the court that she had known D4 through family connections and approached him to be the builder of her project. Mr De Ieso Snr was about to go overseas and put the project in the hands of his son, Ciprino De Ieso, (D3). Thereafter, D2 entered into a written agreement with D3's building company Interbuild Pty Ltd (D1) and secured finance from her bank. The contract price was \$600,000. She told the court that after a Worker's Lien was placed on the property by

Bianco (one of the contractors), she suspected that Interbuild was having financial problems.

13 Early in June the plaintiff advised that he had not been paid and that a cheque from Interbuild had bounced. She stated that she was at the site every day as was her husband, although they were often not on site at the same time. At a meeting in June between the plaintiff, D2 and her husband, the plaintiff sought to be paid directly. D2 gave evidence that there was no promise to pay the plaintiff for the money already paid to D1 nor was there a reference to any meeting of the 16th of May. D2 then described the plaintiff's actions: - 'When he (the plaintiff) left he grabbed a piece of wood and banged it on the back of the ute saying 'This is Chip's (D3) head if I don't get paid'.

14 D2 told the court that the project cost in the vicinity of \$1.2 million instead of the \$600,000 as agreed. In cross-examination she told the court that she claimed and obtained \$240,000 in insurance, ie., \$80,000 per unit to compensate her for part of the cost blow out. D2 denied that D1 had ceased connection with the project in May 2005 as asserted by the plaintiff. D2, whilst refusing to pay the plaintiff for the amount that she had already paid the builder (the subject of these proceedings), did agree to make the \$10,000 payment to the plaintiff directly as a result of two invoices originally rendered to D1 but which remained unpaid. D2 told the court that in her view D3 was not capable of running the project and his incompetence led to the severe budget blow out.

15 Ms Vella was a credible witness whose evidence was not undermined in cross-examination. In my assessment, her testimony was more believable than that of Mr Clark on important issues, particularly as to how the meeting took place and what was discussed.

Agency

16 Much of the factual background is not in dispute. D2 contracted with D1 to build three townhouses on her property. The plaintiff agreed to supply timber to the project, and entered into a sub-contractual relationship with D1 based largely on the fact that he had known D4 for many years. It became clear that D1 was unable to properly manage the works and pay subcontractors on time, evidenced by several Worker's Liens being issued over the property. It is not seriously disputed and I find that D2 did pay D1 for timber in the amount of \$23,000. A pivotal question for the court is whether there was a contract between the plaintiff and D2 whereby D2 promised to pay the plaintiff all outstanding accounts for the timber supplied in consideration for the promise to continue to supply timber following D1's failure to pay for the initial lot of timber already supplied. The plaintiff contends that the oral agreement consisted of an exchange of promises which occurred on 16 May and confirmed subsequently between Carmine Vella as agent for D2 and the plaintiff. The plaintiff asserts that Carmine Vella had actual authority, or in the alternative had ostensible authority to bind D2.

17 The plaintiff's contention that D2 had given her husband express authority has never seriously been prosecuted. The pleadings contain no particulars and the

contention is at odds with Mr Clark's evidence that he believed he was dealing with Carmine Vella without any knowledge of D2's involvement. The plaintiff must fail on its assertion that an express agency existed.

Ostensible Authority

18 In regard to the claim that there was apparent or ostensible authority, the plaintiff needs to establish that a representation was made by D2 to Clark which authorised Carmine Vella to act on her behalf. Such a representation is often established by the principal's behaviour in allowing the agent to act in a way consistent with the conduct of the principal's business with other people. The representation must induce the plaintiff to rely upon it. Again, the difficulty here is that Clark's evidence in large part was that he did not even know of Sarah's involvement in the project, at least at the time of the alleged meeting on 16 May. I agree with defence counsel that the agency notion is likely to have been an afterthought with little factual basis to support it. There is no useful evidence before me that supports an implied or ostensible authority argument; the mere fact that D2 and Carmine Vella are married to one another, in the absence of anything more cogent cannot further the argument.

Ratification

19 The plaintiff further argues that by her behaviour, D2 ratified Carmine Vella's actions. The plaintiff relies on Clark's assertion that three meetings took place between he and Carmine Vella at which she was present. The plaintiff pleads at 3(d)(2) in the claim that D2 caused or permitted Carmine Vella to provide Clark with the two cheques each for \$5,000.

20 Unfortunately for the plaintiff, I reject the evidence of Clark where it conflicts with D2 regarding the 'meetings'. I find that there was one meeting and that meeting did not involve the promise alleged by Clark to pay all outstanding accounts, but rather a promise to make direct payments in the future in order to secure on-going supply. Further, 'the clear and unequivocal acts such that they are not open to any other interpretation' referred to in *Halsbury* on ratification, have not been established by the evidence. Whilst it is true that silence on the part of the principal can be sufficient to adopt a transaction, the evidence in this case does not support the plaintiff's contention. Again, the weakness in the plaintiff's case is its need to reconstruct a set of circumstances that fit the legal arguments, but do not accord with the state of the evidence; ratification is not available in cases that involve undisclosed principals.

Failure to call Carmine Vella

21 The plaintiff contends that the failure of D2 to call her husband to give evidence is an important consideration for the court and has referred me to the case of *Payne v Parker* 1976 NSWLR 191 which summarises the propositions relevant to such a failure. I was also referred to *Pope v Flinders Management Pty Ltd* where our full court considered the question and noted that 'the unexplained failure by a party to call a witness, may, in appropriate circumstances lead to an inference that the uncalled

evidence would not have assisted that party's case. The rule in *James v Durkel* permits the drawing of such an inference.'

22 In view of D2's defence i.e. that she never gave her husband authority actual or inferred, it was not necessary for her to call her husband – in fact on this issue his evidence would have been superfluous. I am not permitted to infer that the uncalled evidence of Carmine Vella would have been damaging to D2 *Pope v Flinders* [at para.49] and any failure to call a witness cannot be employed to fill gaps in the evidence. As already indicated, I prefer D2's version of events over that of Mr Clark and I draw no negative inference from D2's failure to call her husband; indeed it was open to the plaintiff to either join Carmine Vella as a defendant or call him as a witness and if it chose not to for tactical reasons then it cannot now hope to draw some benefit from the absence of his evidence.

Worker's Lien

23 It is clear that the building contract between D1 and D2 (which is contained in the defendant's bundle of documents) is for one contract price of \$600,000.

24 Pursuant to the Office of Consumer & Business Affairs Public Register under the heading 'Endorsements and Conditions on Contractors Licence' the following notation appears:

'The value of any contract is not to exceed \$200,000 – Residential Building Work'.

25 Accordingly, it is submitted by D2 that D1 was not licensed to perform the work undertaken.

26 Pursuant to Section 6 Building Work Contractors Act 1995 –

'(2) A person required by the Act to be licensed as a building work contractor is not entitled to any fee, other consideration or compensation under or in relation to a contract with another on whose behalf the person performed work as a building work contractor unless –

(a) The person was authorised to perform the work under the licence.'

27 D2 argues that D1 was not authorised to perform the work since it exceeded the maximum contract price permitted by its licence.

28 In regard to the alleged breach of the builder's licence, Mr Jenner submits that the terms of the licence 'do not preclude the builder from undertaking multiple projects of residential building work for contracts up to \$200,000' (para. 28).

29 Since it was always clear that there would be three discrete dwellings built then, notwithstanding the gross sum of \$600,000 being nominated in the contract, the plaintiff submits that the actual building works undertaken in respect of each dwelling did not exceed \$200,000 and therefore did not breach the licence.

30 In regard to the plaintiff's contention that D1 was permitted to build three units, each at \$200,000, thus not exceeding his licence limit, D2 submits that the plaintiff has always pleaded the existence of only one contract (para.6 of the claim) and the contract itself only refers to 'the contract price' of \$600,000. In other words, there was only ever one contract for the amount of \$600,000 and any argument to the contrary is a reconstructed attempt at avoiding the consequences of the Office of Consumer & Business Affairs condition referred to above.

31 To highlight the absurdity of the plaintiff's argument, Mr Fenwick Elliott poses the following question –

'Suppose Chip (on behalf of D1) had signed a contract for a development for 300 houses, at \$60 million. Could it be said that his \$200,000 licence would cover that hypothetical contract? Obviously not; the licence imposes a limit on the size of contracts, not units'. (p.5, para.9).

32 In my view Mr Fenwick Elliott's approach must be correct which renders the builder to have been unlicensed at all relevant times. Thus there is no contract price due for the work performed by Interbuild, the work being unauthorised under the licence. It follows pursuant to Section 6 of the Worker's Liens Act 1893 that the Act 'does not extend at all to cases where there is no such contract binding the owner or occupier to pay a contract price.' Therefore the worker's lien claim has nothing to attach itself to and has to fail.

Quantum Meruit

33 The plaintiff argues that even if the builder is not licensed that does not preclude the builder from having a cause of action pursuant to a quantum meruit against the owner and ipso facto if such an owner takes a benefit provided by a subcontractor that subcontractor has a quantum meruit claim against the owner. It is conceded by the plaintiff that this aspect of the claim has never been pleaded (even though the plaintiff has had numerous attempts at amending its pleadings) but it submits that a benefit has been provided by the plaintiff as subcontractor and accepted by the owner and it would be unjust for D2 to be advantaged in this way and should be called upon to make good under a quantum meruit.

34 On the other hand the defendant submits that there is no obligation to pay in quantum meruit – those submissions proceed as follows:

'6 (a) Interbuild is not entitled to any recovery by way of implied contract, because that route was shut down by *Pavey and Mathews*. Its only entitlement would be in the equitable doctrine of unjust enrichment which does not entail any implied contract at all, and

6 (b) Even if Interbuild were able to circumvent the *Pavey & Mathews* ruling, and claim on the old basis of implied contract, any claim for payment under such an implied contract would fall full square within Section 6(2) of the Building Work Contractors Act.'

35 My attention has been drawn to the recent case of *Lumbers v W Cook Builders Pty Ltd* 2008 HCA 27 which was decided after the evidence was completed in the case at bar. It seems to me that that case simply fortifies the defendant's position that a quantum meruit is not available to the plaintiff on the facts of the case before the court. In any event the plaintiff's reasoning that D2 has received an unfair advantage is not sustainable on the evidence and it would be quite improper for the court to penalize D2 by forcing her to pay twice for the timber merely because the plaintiff is out of pocket due to the builder not paying the subcontractor.

36 D2 has not benefited from any transaction and has not been unjustly enriched.

37 The plaintiff's claim in regard to quantum meruit is misconceived and shall be dismissed.

38 Based on my finding that no enforceable contract existed between D1 and D2 due to the combined operation of the endorsement on the licence and Section 6 of the Building Work Contractors Act I need not consider the issue raised in *Trademark Homes (Aust) Pty Ltd* (1996) 67SASR 107 i.e. that a lien is only available if the owner or occupier is in default of their obligations to a contractor. It is sufficient to say that, even if there was a contract between D2 and D1 as envisaged under the Worker's Liens Act, that Act requires a failure on the part of the owner to pay the head contractor (builder) before a lien can arise which is not what happened in this case. The plaintiff's argument on point would therefore fail in any event.

Inadvertence

39 The defendant also submits that the plaintiff cannot rely on the 'inadvertence' provision of Section 6(2)(b) of the Building Work Contract Act – inadvertence has never been pleaded or particularised. In my view, there was no evidence presented that could support any such argument.

Summary of Findings

40 D2 paid D1 for the timber which is the subject of these proceedings. It was then for D1 as the builder to pay the contractor, Clark Timber Sales Pty Ltd. D1 failed to pay several contractors, including the plaintiff, whereupon it (the plaintiff) then asserts that it extracted a promise from D2 to make payment for that same timber directly in exchange for a promise to keep supplying timber to the building site. The evidence does not support the plaintiff's contention. I am satisfied that at no stage did D2 promise to pay the plaintiff to cover timber for which she had already paid the builder.

41 No agency has been proved, since as a matter of fact no express authority has been established – neither has the plaintiff satisfied the court that ostensible authority existed. Mr Clark did not believe he was dealing with D2 and did not know of her involvement at any relevant time. Thus, it is impossible for him to have relied on any representation made by the principal, D2, either by words or by conduct.

42 Since ratification has no place in cases involving undisclosed principals and the facts do not support an agency of any other nature, the ratification argument must also fail.

43 D1 could not contract with D2 due to a clear licence breach and therefore the
plaintiff was not permitted to utilise the relief sought pursuant to Section 6 of the
Worker's Liens Act.

44 D2 has not been unjustly enriched and in any event the plaintiff cannot
substantiate a quantum meruit.

45 The plaintiff has the burden of proof in regard to all aspects of its claim and has
failed to discharge its onus. None of the important issues relied upon by the plaintiff,
i.e., meetings purported to have precipitated an agreement that would have D2 pay
twice for timber supplied, were evidenced in writing or reduced to some written note
to back up its claim. Notwithstanding the plaintiff's numerous attempts to settle on a
set of pleadings, the quality of the evidence to support its claim has been unclear and
unpersuasive; it suffered from velleity rather than reliability and strength. On balance,
the plaintiff has failed to prove any of its case.

46 The plaintiff's claim is dismissed in toto. Costs in favour of the defendant to be
agreed or taxed.