



CONSTRUCTION LAW UPDATE NO. 803

Worker's Liens and Unlicensed Builders

Introduction

In April 2008 the District Court of South Australia handed down a decision in relation to the validity of a lien registered over land on which building work was performed by an unlicensed builder (*Cubelic and Others v Civil Works* [2008] SADC 41).

Worker's Liens

Since its proclamation in 1893, the *Worker's Liens Act* has saved the day for many builders and subcontractors who have had difficulty obtaining payments from their principals and find themselves in a dispute over the project. The use of the word "Worker" in the title might give the impression that the Act is limited to claims for wages, but it has also been the vehicle for large contractual claims arising from domestic and commercial building disputes.

Contractors or subcontractors who are contractually entitled to payment for work carried out on land are entitled to register a lien at the Land Titles Office on the title of the land on which they performed the work. When subcontractors register liens, the land owner is likely to apply pressure to the head contractor to resolve the dispute.

The effect of a lien

Once the lien is registered and until it is removed, it prevents the registration on the land title of any subsequent dealing with the land, including sale, mortgage or lease. A lien is particularly powerful where a building is constructed for sale on completion, such as a speculative development by an owner. In such cases, the registration of a lien often leads to the early resolution of the dispute. To remove the lien without making full payment to the claimant, the owner will be required to pay the full amount of the lien into a trust fund to await the outcome of the dispute.

If the owner is in no rush to register any further dealings on the title, the owner may be content

to leave the lien in place until the dispute is resolved. However, most owners are reluctant to allow liens to linger.

Once a lien is registered, the claimant must within 14 days issue proceedings in Court to support the lien, otherwise it will lapse.

Background

In the *Civil Works* matter, there were three separate disputes between the parties, all of which had similar facts. Civil Works had entered into contracts with the owners for the completion of building works. It was not disputed that Civil did not hold the relevant licence for the purposes of the building work. From the reasons of the Court, it is apparent that the various parties had formerly enjoyed a close business relationship but had fallen out during the progress of the works.

No licence – no payment under the contract

The *Building Work Contractors Act 1995* states that an unlicensed builder is not entitled under a building contract to claim a fee for work performed under the contract. However, various past decisions of the Courts, including the High Court in *Pavey v Matthews* and the Full Court of the Supreme Court of South Australia in *Nunkuwarrin Yunti v A L Seeley Constructions Pty Ltd*, have held that unlicensed builders are entitled in restitution to payment for the work that they have performed.

Payment in restitution effectively means that the builder will be paid fair compensation for the benefit that has been accepted by the owner. In commercial terms, this may well be a lesser amount than would have been negotiated under a contract and is usually derived from an analysis of the cost of materials and labour supplied or fair market value.

While it may be considered unusual for a builder to carry out works without a licence, it is possibly more common for builders to carry

out works for a value in excess of the monetary restrictions imposed by their licence. It may also be more common for builders to carry out works that are outside of the scope of their licence. In either case, under the provisions of the *Building Work Contractors Act* there is no contractual obligation on the owner to pay for the work performed where that Act applies.

Civil Works had registered liens on three properties seeking a total of approximately \$0.75 million. In view of it having performed the works while unlicensed, Civil made an alternative claim in restitution for fair compensation for the value of the work done and materials supplied, being a lesser amount than the agreed contractual sums but equating to the benefit accepted by the owner.

Worker's Liens Act 1893

The *Worker's Liens Act* requires strict compliance with its terms to ensure that a lien registered under the Act extends to the amount sought. A lien is limited to "that portion of the contract price payable". If a lien is registered for an amount that is not "payable", then the lien will not stand and is subject to challenge by the owner of the land.

Counsel for Civil Works referred to the definition of "contract price" in the Act:

"contract price" means the money payable to any contractor or sub-contractor for any work, or materials furnished or to be furnished in connection with work, under any contract, and whether such price has been fixed by express agreement or not

Counsel submitted that, in light of the previous decisions of the Courts (referred to above), builders were entitled to some payment even if they were unlicensed, money was "payable ... in connection with [the] work" – even though it was not payable under the contract.

Counsel for the owners said that because Civil Works was unlicensed, there was no money "payable under the contract" as required by the *Worker's Liens Act* and therefore the liens should be removed.

The *Worker's Liens Act* provides for a person prejudicially affected by a lien to apply to the court to have the lien cancelled. The various owners who were the subject of the liens registered by Civil Works made such an application to the Court, claiming that the prohibition of any sale or mortgage of their

properties by the registration of the liens was prejudicial to their interests.

The Court's decision

The Court agreed with the owners. The Court found that a claim by an unlicensed builder for compensation for work done on land does not support a lien registered under the *Worker's Liens Act*.

The Court ordered that the liens were to be cancelled and removed from the three land titles.

Conclusion

Builders who perform building work without the relevant licence are not entitled to a lien over the land on which they performed the work.

In the Civil Works case, the underlying dispute remains unresolved notwithstanding the legal costs of the battle over the validity of the liens.

Contributor: Tom Grace

Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction fields and specialises in the resolution of commercial disputes.

Contact Details

Tom Grace – Partner
Direct: (08) 8110 8004
tom.grace@feg.com.au

June 2008

This publication is not legal advice. It is for general interest. You should not rely on it without obtaining legal advice.

Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

Office: Level 10, Optus Centre
431 King William Street
ADELAIDE SA 5000

Ph: (08) 8110 8000
Fax: (08) 8231 2922
Web: feg.com.au

If you would like to receive our legal publications by email, please contact Eunie de Bruyn on (08) 8110 8000 or by email at eunie.debruyn@feg.com.au.