PIPELINE PROPERTIES PTY LIMITED V LEICHHARDT DEVELOPMENT COMPANY PTY LIMITED

Supreme Court of the Northern Territory of Australia

Kearney J.

27, 28 and 31 January 1989, at Darwin

STATUTORY INTERPRETATION - Meaning and effect of provisions - The Workmen's Liens Act, 1893 (S.A.), ss.10(1), (2) and (4).

STATUTORY INTERPRETATION - Whether provisions inter-dependent - The Workmen's Liens Act, 1893 (S.A.), ss.10(1) and (2).

STATUTORY INTERPRETATION _ When statutory lien comes into existence - when lien becomes enforceable - The Workmen's Liens Act, 1893 (S.A.), ss.5 and 10.

STATUTORY INTERPRETATION _ Whether registration of lien under s.10(1) may precede demand under s.10(2) - The Workmen's Liens Act 1893 (S.A.), ss.10(1) and (2).

WORKMEN'S LIENS - Interpretation of statutory provisions - The Workmen's Liens Act, 1893 (S.A.), ss.10(1), (2) and (4).

Cases followed:

Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (1986) 42 NTR 1
Parob Pty Ltd v Pipeline properties Ltd and Leichhardt Development Company Pty Ltd (unreported, Maurice J, 8 November 1988)

Cases referred to:

Miller's Lime Ltd v Royal Agricultural and Horticultural Society of South Australia (1936) SASR 306
Advanced Civil Engineering Pty Ltd v Wyara Pty Ltd (1986) 1 NTJ 715
Albert del Fabbro Pty Ltd v Wilckens and Burnside Pty Ltd (1971) SASR 121

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No.844 of 1988

BETWEEN:

PIPELINE PROPERTIES PTY LIMITED

Plaintiff

AND:

LEICHHARDT DEVELOPMENT COMPANY PTY LIMITED

Defendant

CORAM: Kearney J.

REASONS FOR DECISION

(delivered 31 January 1989)

On 19 January 1989 the defendant applied under s.32 of The Workmen's Liens Act 1893 (S.A.) (herein "the Act"), in force in the Territory, to cancel the registration of Lien No.209920 registered on the titles to certain of its lands. I heard the application on 27 and 28 January and rule on it today.

In general terms, it appears that the plaintiff and a company Universal Waldeck Ltd (herein "Waldeck") had entered into a form of joint venture to develop and subdivide lands

in the Alice Springs region - Lot 7716 Town of Alice Springs and Portion 3433 - of which the defendant is the Crown lessee. It appears that the defendant was the vehicle used by the 2 companies for their joint venture.

The plaintiff claims that it has carried out certain work on these lands of the defendant, with the defendant's assent, for the purposes of the subdivision, and pursuant to an agreement with Waldeck that Waldeck would pay the plaintiff for that work. The plaintiff claims that Waldeck has failed to pay it for the work; it has issued proceedings against Waldeck in the Supreme Court of Western Australia claiming the sum of $1,750,776 for the work.

The defendant moves on the affidavit of Mr Salotti of 18 January 1989. It is clear from the affidavit in reply of Mr Mullally of 27 January 1989 that there are serious factual disputes between the parties on various matters relevant to the defendant's application. Those disputes are not capable of being resolved on this application. Accordingly the defendant puts its case for cancellation of the lien on a narrow basis as to which no factual disputes arise.

There is no dispute as to the following facts. On 4 November 1988 the plaintiff registered Notice of Lien No.209920 on the titles to the defendant's lands, in respect

of its claim against Waldeck for $1,750,776. On 11 November 1988, that is, 7 days after it had registered its lien, the plaintiff served on Waldeck a demand for payment of that sum. On 17 November 1988, that is, 13 days after registering its lien and 6 days after making its demand for payment, the plaintiff instituted this action to enforce the lien.

The provisions of the Act relevant to this application are:-

> "5. A contractor or sub-contractor shall have a lien for the contract price, as far as accrued due, on the estate or interest in land of any owner or occupier in each of the following cases -
>
> (a) Where the work is done, with the assent, express or implied, of the owner or occupier to the land ..."

> "10 (1) A lien under this Act with regard to land shall be available only if registered before the expiration of twenty-eight days after the ... contract price in respect of which such lien has arisen shall for the purposes of this section have become due.
>
> (2) Any ... contract price shall for the purposes of this section be deemed to have become due -
>
> (a) if unpaid for 7 days after the same (being payable) shall have been demanded by notice in writing ...
>
> (4) A lien may be registered after the wages or contract price have become payable, although the 7 days mentioned in sub-section (2) shall not have commenced to run."

"15. Every lien under this Act upon the estate or interest of any owner or occupier shall cease unless an action shall be brought against the owner or occupier for enforcement of the lien within 14 days from the registration thereof."

As will later appear, the central question on this application is the meaning and effect of the various subsections of s.10 set out above. The obscurity of the Act in that respect is manifest; I refer to my general observations in the Newsletter of the Law Society of the Northern Territory (December 1988, pp.11-13), and the "chorus of judicial protest about the ambiguities and uncertainties attending so many aspects of this legislation", referred to by Maurice J in Parob Pty Ltd v Pipeline Properties Pty Ltd and anor (unreported, 8 November 1988, at p.14).

The defendant's case for the cancellation of the registration of the lien is along the following lines. Only a valid lien can be enforced by action under s.15. (I interpose that I think that that is clear). The effect of s.10(2)(a) of the Act is that the contract price is deemed to have "become due" for the purposes of s.10(1) only when it remained unpaid at the expiration of 7 days after it has been demanded. On the facts in this case, $1,750,776 was deemed to have "become due" when it remained unpaid at the expiration of 7 days after the demand of 11 November 1988 - and not until then. That is, the sum was not deemed to have

become due until midnight on 18 November 1988. The action to enforce the lien in respect of that sum, required by s.15 of the Act, was instituted on 17 November 1988. That is, it was instituted before the contract price became due. Accordingly, at the time it issued its Writ on 17 November the plaintiff had no valid cause of action, because no sum was then due to it. The action is therefore a nullity. Since no other action was brought within 14 days from the registration of the lien as required by s.15, by virtue of that provision the lien has ceased. Accordingly its registration should be cancelled.

The submission thus far is simple and clear. Central to it is the connexion between s.10(1) and s.10(2)(a) of the Act. I turn aside to deal with that.

In Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (1986) 42 NTR 1 at pp.12-13, I stated that I considered that a contract price would "become due" in terms of s.10(1) only if either paras (a) or (b) of s.10(2) were complied with. This appeared to accord with the views of Murray CJ in Miller's Lime Ltd v Royal Agricultural and Horticultural Society of South Australia (1936) SASR 306 at p.314. It differed from the view of Asche J (as he then was) in Advanced Civil Engineering Pty Ltd v Wyara Pty Ltd (1986) 1 NTJ 715 at pp.746-7. His Honour considered that s.10(1) was independent of s.10(2)(a), in the sense that the

contract price could "become due" for the purposes s.10(1) in ways other than those set out in s.10(2). His Honour noted that Bray CJ in Albert Del Fabbro Pty Ltd v Wilckens and Burnside Pty Ltd (1971) SASR 121 at p.127 had expressed "grave doubts" as to the view of Murray CJ in Miller's Lime (supra) that the making of a demand under s.10(2) is necessary. As later appears, I respectfully agree with Bray CJ. In Parob Pty Ltd v Pipeline Properties Ltd and Leichhardt Development Company Pty Ltd (supra) Maurice J considered the question and favoured the view that s.10(1) and s.10(2) were interdependent. I am persuaded by the reasoning of Maurice J and the authorities which he cites that I should adhere to that view, which accords with the approach I adopted in Jennings Construction Ltd (supra).

I note here that I accept the defendant's submission that a lien under the Act comes into existence only after work has been done and the contract price or a part of it has "accrued due", in terms of s.5. I also accept its submission that the fact that a statutory lien is brought into existence by the Act does not mean that it is thereby enforceable; it becomes enforceable only upon registration under s.10 of the Act.

It will be recalled that Lien No.209920 was registered on 4 November 1988, prior to the demand being made under s.10(2)(a) on 11 November. I consider that s.10(1) read

with s.10(2) requires that registration of the lien take place after the demand under s.10(2)(a). That is to say, a plaintiff in an action under s.15 to enforce a lien under s.10(1), relying on a notice of demand under s.10(2)(a), must show that the demand was made prior to the lien being registered. As that did not occur here, I consider that the plaintiff's action under s.15 must fail unless it can rely on some other provision of the Act.

This leads directly to a consideration of the meaning and effect of s.10(4) of the Act, a provision enshrouded in the fuliginous obscurity typical of the Act. The defendant submitted that s.10(4) could be construed in one of two ways.

First it could mean that once the contract price had "become payable", a lien could then be registered before a demand was made under s.10(2)(a). The demand under s.10(2)(a) still had to be made, and if not made within 7 days after registration the practical consequence would be that the amount would not have "become due" at the time the Writ had to issue under s.15 of the Act. On the facts, the amount had not become due when the Writ issued on 17 November, 6 days after the demand was made.

Second, s.10(4) might connote that while a demand under s.10(2)(a) had still first to be made, the lien could

then be registered without waiting for the 7 days mentioned in s.10(2)(a) to expire. I consider that this view is not open, because of the words "shall not have commenced to run" in s.10(4).

I also reject the first view. I agree with Maurice J, for the reasons his Honour states in Parob Pty Ltd (supra), that the effect of s.10(4) is that once the contract price has "become payable" a lien can be registered without any demand being made under s.10(2)(a). I consider, with great diffidence, that the better view of s.10 is that it provides for the registration of a lien in respect of the contract price following a notice of demand (s.10(1) and (2)), and also for the registration of the lien without any such notice of demand provided the contract price has "become payable" (s.10(4)).

It is not possible to determine on this application whether the contract price has "become payable"; that would involve factual matters which are clearly in dispute. Accordingly, that question must remain open and the consequence is that the application by the defendant of 19 January for the relief mentioned, and for the further or alternative relief then sought, must be dismissed with costs.