

MALADY ENTERPRISES PTY LTD v COLSTAR PTY LTD & ORS

Supreme Court of the Northern Territory of Australia

Gray A/J

27 February & 5 March 1991 at Darwin

CONTRACT - work, labour and material - contract price fixed by agreement - no express provision for payment - implied term - payment made when work completed and party given reasonable opportunity to inspect work.

PRACTICE AND PROCEDURE - action to enforce lien - application by plaintiff for judgment under Order 22 - Supreme Court Rules - Order 22.

STATUTORY INTERPRETATION - meaning and effect of provisions - Workmen's Lien Act - registration of lien - time limit fixed by s.10(1) runs from date other than date fixed by expiry of a s.10(2)(a) notice - Workmen's Lien Act (SA) 1893 - s.10(1),(2),(4).

WORKMEN'S LIEN - notice of lien - not mandatory to fix time contract price due for purposes of s.10(1) - effect of s.10(2) and (4) and s.5 Workmen's Lien Act (SA) 1893.

WORKMEN'S LIEN - contractor's lien - non-compliance with s.10(1) - lien not registered within twenty eight days of contract price being payable - not cured by subsequent s.10(2)(a) notice - time runs from date contract price payable - Workmen's Lien Act (SA) 1893 - s.10(1),(2) and s.5.

Case referred to:

Leichardt Development Co Ltd v Pipeline Properties Pty Ltd (1989) 62 NTR1

Counsel for the Plaintiff: C.S.E. Ford

Solicitor for the Plaintiff: Cridlands

Counsel for the Defendant: G.J. Stirk

Solicitor for the Defendant: G.J. Stirk

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 312 of 1990

BETWEEN:

MALADY ENTERPRISES
PTY. LTD.

and

COLSTAR PTY LTD
WILLIAM JAMES HORNER
PAMELA LYNDA HORNER
COL CORDINGLEY

CORAM: GRAY J.

REASONS FOR JUDGMENT

(Delivered 5 March 1991)

This is the return of a summons in which the plaintiff seeks:-

- (i) judgment against the first defendant for \$29,585.00 under a contract for work and labour done
- (ii) an order enforcing a lien over the first defendant's land in respect of the amount due under the said contract.

Mr Stirk, who appeared for the first defendant, conceded that there was no defence to the money claim. Judgment was entered accordingly.

The substantial issue debated before me was whether the plaintiff had an enforceable lien over the first defendant's land.

The evidence shows that the plaintiff performed work for the first defendant on the first defendant's land in Darwin upon which 4 residential units were being constructed. The work was done pursuant to two oral agreements made during February 1990 which required the plaintiff to do certain steelwork for an agreed total price of \$29,585.00. The work appears to have been completed by early April. An invoice was given to the first defendant on 5 April 1990.

On 17 May 1990 a Notice of Lien over the first defendant's land was lodged at the Registry of the Land Titles Office. The lien was described as a "Workmen's Lien."

On 23 May 1990 a Notice of Demand was served upon the second defendant. The notice required the first defendant to pay the sum of \$29,585.00 "owing by you to the Creditor for goods supplied and delivered and services rendered". The Notice purported to be given pursuant to the Workmen's Liens Act 1893 ("the Act").

On 30 May 1990, the writ in the present proceeding was issued. The Statement of Claim included a claim for a declaration as to the existence of a lien and an order for the enforcement thereof.

In order to understand the arguments put forward by counsel it is necessary to make reference to some of the relevant provisions of this much discussed Act.

Section 5 provides that a contractor shall have a lien for the contract price, so far as accrued due, on the land of the owner where the work is done to the owner's land and with the owner's assent. Section 10 should be set out in full.

"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 wages or contract

price in respect of which such lien has arisen shall for the purposes of this section have become due.

(2) Any wages or contract price shall for the purposes of this section be deemed to have become due -

- (a) If unpaid for seven days after the same (being payable) shall have been demanded by notice in writing, signed by the person claiming the same and given to the person liable to pay the same, or posted in registered letter addressed to him at his usual or last known place of abode in South Australia;
- (b) If either before or after the same shall have become payable, the person liable to pay the same shall have called a meeting of his creditors, or committed an act of insolvency or executed a deed of assignment within the meaning of "The Insolvent Act 1886" or any other Insolvency Act or shall have taken or attempted to take the benefit of any law relating to insolvent debtors, or shall have suffered his goods to be taken in execution or seized under legal process or distress for rent.

(3) A lien shall be registered by the person claiming the same lodging in the General Registry Office a notice in the prescribed form or in a form to a similar effect, which notice shall be signed by such person and attested.

(4) A lien may be registered after the wages or contract price have become payable, although the seven days mentioned in subsection (2) shall not have commenced to run.

(5) Notices of lien under this Act shall state the Court in which action will be brought to enforce the same, and any person to whom notice is given may deposit the amount claimed in such Court to abide the event of such action, and thereupon the lien shall be deemed to cease."

Section 15 requires that an action to enforce a lien must be commenced within fourteen days of the registration thereof. This was done in this case.

After hearing the argument of counsel it became apparent that the live issue was whether the plaintiff had complied with the requirements of Section 10(1) so as to make the lien "available". More particularly, the question is whether registration occurred before the expiration of twenty-eight days after the contract price "shall for the purposes of this Section have become due."

Although a number of different views about these sections have been offered by judges in the past, an examination of those cases is unnecessary. This is so because the relevant provisions have been recently considered by the Court of Appeal in Leichhardt Development Co. Ltd v Pipeline Properties Pty. Ltd. (1989) 62 NTR 1.

The majority judgments of the Court of Appeal in Leichhardt's case are authority for the proposition that a Section 10(2)(a) notice is not mandatory to fix the time when the contract price has "become due" for the purposes of Section 10.

That being so, it follows that the time limit for registration of the lien fixed by Section 10(1) must be capable of running from a date other than a date fixed by the expiry of seven days from a Section 10(2)(a) notice.

In a case where the relevant contract fixes the time when the contract price becomes presently payable, that time, when reached, presents an obvious starting point for the running of time under Section 10(1).

That is the point in time when the lien arises under Section 5 and it is to be expected that the Act will require registration within a stipulated time of that event.

In such a case, where registration has not occurred within twenty-eight days of the price having become presently payable, the subsequent giving of notice under Section 10(2)(a) does not, in my view, affect the earlier non-compliance with Section 10(1).

It was submitted that the giving of a Section 10(2)(a) notice, whenever it is done, fixes the starting point for the Section 10(1) time limit. Thus, it was contended that the registration on 17 May was within the time prescribed by Section 10(1) because that time did not start to run until the expiry of the Section 10(2)(a) notice given later on 23 May.

This submission means that, in a case where a lien has arisen under Section 5, its registration may be delayed for an indefinite period. The only limit which Mr Ford was able to suggest was the operation of the Limitation of Actions Act.

In my view, the Court should only reach such a commercially unacceptable construction of the Act if compelled to do so by the clearest language. It is the registration of the lien which gives it legal effect and brings it to the notice of the person whose land is to be encumbered. The difficulty which may be created by a long delayed registration is obvious.

In Leichhardt's case, Angel J, who delivered one of the majority judgments, said at page 12:

"In my opinion s10(2)(a) lays down no mandatory procedure to be observed in every case but rather is a facilitative section providing a method whereby a creditor can convert moneys payable in futuro to moneys payable in praesenti for the purposes of s5. Section 10(2)(b) automatically achieves that object in the events therein enumerated. Section 10(1) of the Act lays down a time limit that commences either from the time moneys become payable in praesenti as a consequence of the contractual arrangements between an owner or occupier and the head contractor, or arrangements between an owner or occupier and the head contractor, or from the expiry of seven days after a s10(2)(a) notice if that procedure is employed, or on the happening of one of the events enumerated in s10(2)(b)."

In my view, it is implicit in what his Honour said, that, in a case where the contract price has become presently payable under the contract, the time for registration under Section 10(1) runs from that moment. A further implication from his Honour's remarks is that, in such a case, the giving of a notice under Section 10(2)(a) does not affect the former position.

In a case where a notice under Section 10(2)(a) has been given, it will always be open to a defendant to contend and prove that the registration is out of time because it has not been effected within 28 days of the date upon which the price became payable under the contract, that being the date upon which the lien arose under Section 5.

In short, it is my opinion that the Act is concerned to require that a lien is registered within 28 days of its birth. The Section 10(2)(a) procedure is provided to deal with situations where the lien has not yet arisen or where uncertainty exists. Section 10(2)(b) is designed to deal with the special circumstances therein specified.

Although I consider that the above analysis follows clearly enough from the judgment in Leichhardt's case, it must be conceded that there is some difficulty in fitting together the various parts of Section 10. In particular, the words "being payable" which appear in parenthesis in Section 10(2)(a) may suggest that Angel J's view as to the intended utility of the Section 10(2)(a) procedure is too restricted. But this does not detract from the authority of his Honour's judgment on the critical point.

Given the alternative constructions of Section 10 with which I am presented, I have a marked preference for the view I have already expressed.

The present contract was for work and labour done and material provided. The contract price was fixed by the agreement but there was no express provision regarding time for payment. In such circumstances, there is an implied term that payment must be made when the work is completed and the other party has been given a reasonable opportunity to inspect the work. See Chitty on Contracts 25 Edn. p789. In this case, it was conceded by Mr Ford that the date of the invoice, namely 5 April 1990, could be taken as the date upon which the contract price was payable.

It follows that I am satisfied that the purported registration is ineffective by reason of the non-compliance with Section 10(1) and has not been cured by the subsequent Section 10(2)(a) notice.

In the result, the summons is dismissed so far as it seeks an order enforcing the lien. In accordance with the discussion with counsel at the close of the argument, there will be no order as to costs.