

Catchwords: Summary Judgment Application -

Legislation Building and Construction Industry Security of Payment Act 2002, S.9, S.14 and S.16

JUDGMENT : His Honour Judge Shelton, in the County of Victoria at Melbourne. Business List. Building Cases Division. 16th December 2004

1. This is an application for summary judgment pursuant to Order 22 of the Rules. The application is based upon s.16 of the Building and Construction Industry Security of Payment Act 2002 ("the Act").
2. The approach to be taken to a summary judgment application is stated by the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 89 as follows: "The power to order summary or final judgment is one that should be exercised with great care. It should never be exercised unless it is clear that there is no real question to be tried."

The Facts

3. The plaintiff is an earthmoving and excavation contractor. On 30 January 2004, it gave a quotation for the sum of \$106,802.00 to the defendant ("the quotation") to carry out work at 1 Anne Street, Creswick in relation to the erection of a microwave plant for the Melbourne University School of Forestry. The quoted sum was the total of the prices shown against ten items set out in the quotation. The quotation stated, under the heading "**Standard Conditions**": "Changes to the job will incur additional costs. . . . Terms: Payment is due 30 days from date of invoice."
4. The defendant accepted the quotation, verbally it seems, and work commenced on site on 24 March 2003, after the defendant made a payment in advance to the plaintiff of \$9,133.91.
5. Between 23 April 2004 and 19 May 2004, the plaintiff rendered five invoices for the works to the defendant totalling \$97,546.30, as follows
Invoice 2095 dated 23 April 2004 for \$4,499.00
Invoice 3096 dated 29 April 2004 for \$3,240.24
Invoice 3101 dated 13 May 2004 for \$60,497.01
Invoice 2611 dated 14 May 2004 for \$20,451.75
Invoice 3444 dated 19 May 2004 for \$8,858.30
6. Each of the five invoices contained a notation: "This is a payment Claim/Invoice made under the Building and Construction Industry Security of Payments Act 2002 and is required to be paid in accordance with this Act."
7. Each invoice also stated:
"TERMS: Net 30".
8. Shortly after the rendering of these invoices, it became apparent that there had been an overcharge, and on 30 May 2004, the plaintiff issued a credit note to the defendant for the sum of \$3,938.00. There was thus an adjusted sum then claimed of \$93,608.30.
9. On 19 July 2004, the plaintiff sent an email to the defendant which read as follows "As per your telephone conversation last week, we have not yet received any notification from you of when we are going to receive a payments. As advised I have suppliers to pay and the payment is well and truly overdue.
Can you give us the courtesy of a phone call to advise when we will receive payment of overdue invoices."
10. The defendant forwarded an email in reply the same day, which read as follows "\$40,000 will be sent by cheque today and the balance owing will be paid at the end of August."
11. On 20 July 2004, the plaintiff received a cheque for \$40,000, leaving a balance claimed of \$53,608.30. It is this sum for which the plaintiff seeks summary judgment.

S.9 of the Act

12. S.9 of the Act provides
"Rights to progress payments
(1) On and from each reference date under a construction contract, a person-
(a) who has undertaken to carry out construction work under the contract;
..... is entitled to a progress payment under this Act, calculated by reference to that date.
(2) In this section, "reference date", in relation to a construction contract, means -
(a) a date determined by or in accordance with the terms of the contract as -
(i) a date on which a claim for a progress payment may be made; or
(ii) a date by reference to which the amount of a progress payment is to be calculated -
in relation to work carried out or to be carried out ... ;
or
(b) if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after -
(i) construction work was first carried out under the contract;
13. The quotation contains no reference to "a date on which a claim for a progress payment may be made" or "a date by reference to which the amount of a progress payment is to be calculated". Nor indeed is there any reference to progress payments. The only reference to payment at all in the quotation is that payment is due 30 days from the date of invoice. Clearly this relates to when payment is due after a claim for payment is made.
14. Mr Reid, who appeared on behalf of the plaintiff, submitted that s.9(2)(a)(ii) of the Act applied, given the itemised nature of the quotation and that the reference date was the date upon which the plaintiff issued an invoice upon completion of the relevant work component and, further, that this was the manner in which the contract was administered. Upon a portion of the work being completed, the plaintiff would bill for those items completed, calculating the amount due in accordance with the

itemised quotation, together with any variations if relevant. The defendant did not take any objection it seems to this procedure. While the defendant might have accepted this procedure, the fact remains that there is no express provision in the quotation with respect to progress payments. I reject the plaintiffs submission that s.9(2)(a)(ii) applies. It appears clear to me that s.9(2)(b) applies here since there is no express provision made in the quotation with respect to the matter.

- 15 Applying s.9(2)(b), the first reference date would be 20 business days after the construction work commenced on 24 March 2004. 20 business days from 24 March 2004, allowing for the Easter break, is, according to my calculations, 23 April 2004.

The plaintiff was entitled to a progress payment on that date. In fact it made a claim for a progress payment on that date, for which it has received payment. Pursuant to s.9(2)(b), the next business day would be 21 May 2004. Thus there would be no entitlement to a progress payment until this date. It follows that there was no entitlement to the last four progress payments claimed. As there was no entitlement to the last four progress payments, the plaintiff was not authorised to serve a payment claim pursuant to s.14 of the Act. As a consequence, s.15 and s.16 of the Act are not enlivened.

Summary

- 16 Clearly there is a real question to be tried here. I will give directions with respect to the further hearing of this proceeding.

Mr B Reid For the Plaintiff instructed by Minter Ellison

Mr A Larkin For the Defendant instructed by Nicholas W J Rolfe & Associates