

Catchwords: Summary Judgment Application

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

JUDGMENT : His Honour Judge Shelton, in the County Court of Victoria, at Melbourne. 3rd August 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) 154CLR 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 On 3 September 2003, the plaintiff and defendant entered into a written agreement pursuant to which the plaintiff agreed to carry out construction work for the defendant at 72 - 76 High Street, Windsor for the sum of \$436,363 plus GST ("the agreement"). The works to be performed were described in the agreement as "Concrete"; Stage 1, Basement to Floor Level".
- 4 There was no dispute that clause 14(a) of the agreement, although inelegantly worded, entitled the plaintiff to submit a claim for a progress payment on the 15th day of the month and at the end of each month and to receive payment within 14 days.
- 5 On 15th October 2003, the plaintiff delivered by hand to the defendant a document dated 14 October 2003, headed "Claim No. 6". This claim relevantly stated:

Tax Invoice

To: Yarraman

Att: Alan Anderson

Contract: Yarraman Const. Group P/L

Contract Date: Sept. 3rd 2003

From: Sean McGovern

Claim No. 6

Fax: 9529 2459

Project: 72 High St. Prahran

Date: October 14th, 2003

THIS IS A CLAIM UNDER THE VICTORIAN BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002

Re: 6th Progress claim for the Period October 1st to October 15th and including claims 4 & 5

1. Balance of Transfer slab	\$ 8,083.00 + G.S.T.
2. Add Claim no. 4	\$188,790.00 + G.S.T.
4. Add Claim no. 5	\$ 98,700.00 + G.S.T.
Total Claimed	\$295,573.00 + G.S.T.

- 6 Clause 14(d) of the agreement stated: "As part of the Builder's payment obligation the following wording should be noted the progress claims, "This is a payment claim under the Building and Construction Industry Security of Payment Act 2002".
Section 14(3)(c) of the Act also requires that a claim made under the Act must state that it is made under the Act.
- 7 Claim No. 6 refers to Claims No. 4 and 5. Claim No. 4 dated 15th September 2003 relevantly stated:
Re: 4th Progress claim against contract.
 1. 2nd stage ground slab - (not including ramp).
 2. Completion of formwork to 1st stage of transfer slab - Approx. 500m² this claim.
 3. 52 tonne steel reinforcements supplied and fixed to 1st stage of transfer Slab.
 4. Concrete to same.

Total claim no. 4	\$188,790.00
Total Payable	\$188,790.00 (Excl. G.S.T.)
- 8 Claim No. 5 dated October 2nd 2003, relevantly stated:
Re: 5th Progress claim against contract. 1. 2nd stage of ground floor suspended slab.

Total claim no. 5	\$ 98,700.00
Total Payable	\$98,700.00 (Excl. G.S.T.)
- 9 Neither Claims 4 nor 5 stated that they were made under the Act. In response to Claim No. 6, the plaintiff did not receive a "payment schedule" pursuant to s.15 of the Act within the time limited by that section. The plaintiff thus claims that on or about 29th October 2003, pursuant to s.15(4) of the Act, the defendant became liable to pay it the sum claimed in Claim No. 6 - \$295,573.00 plus G.S.T., namely \$325,130.30.
- 10 On 30 October 2003, the defendant paid the plaintiff the sum of \$45,000 and on 10 November, the sum of \$65,000, leaving a balance claimed by the plaintiff of \$215,130.30. The plaintiff abandons the excess of \$15,130.30 and claims the sum of \$200,000 pursuant to s.16 of the Act.

THE LAW

- 11 Legal submissions by both parties focused upon the meaning and application of s.14 of the Act. This section states:

14. Payment claims

 - (1) A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is liable to make the payment.
 - (2) A claimant may serve only one payment claim in respect of a specific progress payment.
 - (3) A payment claim -
 - (a) must identify the construction work or related goods and services to which the progress payment relates, and
 - (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and
 - (c) must state that it is made under this Act.

- 12 Section 13 of the New South Wales Building and Construction Industry Security of Payment Act 1999 is in substantially identical terms to s.14. It states:
- "(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim:
- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
- (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and
- (c) must state that it is made under this Act.
- 13 This section has been the subject of considerable judicial comment. A useful starting point is **Jemzone Pty Ltd v Trytan Pty Ltd** [2002] NSWSC 395 (7 May 2002) where Austin J. stated, at paragraphs 43 and 44:
- [43] S.13(2)(a) requires the payment claim to identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to "**motel construction for Jemzone Pty Ltd**": That falls well short of satisfying the requirement of s.13(2)(a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.
- [44] S.13(2)(b) requires that the progress claim must indicate the amount of the progress payment that the claimant claims to be due for the construction work done. This requirement is also not satisfied by the document in question. Since the document fails to identify the construction work to which the progress payment relates, it cannot, and does not, indicate the amount of the progress payment said to be due for that construction work. It merely identifies an overall balance owing and makes some adjustments to that balance. "
- 14 Two days later, in **Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd** [2002] NSWCA136. Davies A.J.A., with whom Handley J.A. and Stein J.A. agreed, stated at paragraph 20. "However, subs (2) of s.13 of the Act should not be approached in an unduly technical manner.... As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner. "
- 15 In **Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd** [2003] NSWSC 266, (9 April 2003) Nicholas J. stated, at paragraph 82: "Section 13(2)(c) requires the payment to state that it is made under the Act. It must be clear on the face of the document that it purports to be a payment claim under the Act. The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning. "
- 16 In **Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited**, [2003] NSWSC 1103, (3 December 2003) Einstein J. stated at paragraphs 52: "I would respectfully agree with the view taken by Nicholas J. in *Walter* at [65] that a purpose of the Section 13(2)(a) requirement is that a respondent served with a payment claim be provided with adequate information to enable it to provide a payment schedule under section 14. "
- 17 Then in paragraph 54 he stated that he was in agreement with the comments of Davies A.J.A. in **Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd** at paragraph 20. He continued in paragraph 55: "To the extent that the authorities disclose a difference of approach in this regard, my view is that the analyses and expressions of opinion by Nicholas J. in both **Walter Construction Group Ltd v CPL (Surry Hills) Pt Ltd 2003** [NSWSC 266 (9 April 2003) ("*Walter*"), paragraphs 63-66 and 81-85, and in **Parist Holdings Ltd v WT Partnership Australia Pty Ltd** [2003] NSWSC 365 ("*Parist*"), paragraphs 27-29 adopted by Bergin J. in **Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd** [2003] NS WSC869, paragraphs 30-34, should be preferred to the views expressed as obiter by Austin J. in **Jemzone Pty Ltd v Trytan Pty Ltd** [2002] NSWSC 395 ("*Jemzone*"), generally for the reasons set out above."
- 18 On the next day, in **Multiplex Constructions Pty Ltd v Luikens and Anor** [2003] NSWSC 1140, Palmer J. stated, at paragraph 76: "A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim, a payment claim and a payment schedule must be produced quickly, much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute."
- 19 In **John Holland Pty Ltd v Cardno MBK (NSW) Pty Limited** [2004] NSWSC 258 (20 April 2004), Einstein J., at paragraph 14, quoted with approval, the comment of Palmer J. in **Multiplex Constructions v Lukins** at paragraph 76. He further stated:
17. A difficulty which arises concerns the fact that section 13 of the Act does not, at least expressly, require the payment claim to include reasons for the claimed entitlement to a particular progress payment....
18.The whole notion of a payment claim, it seems to me, requires as an essential condition thereof that the document by which the payment claim is put forward, include, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is.
19. There is a powerful argument that this effectively means that the statutory regime requires that the claim to be valid must be comprehensible by the respondent....
20. However, as earlier observed, there are no words within section 13(1) which require the claimant to do otherwise than:
- to identify the subject construction work to which the progress payment relates [subsection (1) (a)],
 - to indicate the amount of the progress payment that the claimant claims to be due [subsection (1)(b)],
 - to state that the claim is made under the Act [subsection (1) (c)].
21. Ultimately it seems to me that the accepted principles of statutory construction simply do not permit the Court to take the further step of holding that in order to be valid, a payment claim must be comprehensible by the respondent in terms of its supporting materials. "

- 20 As appears from these extracts, the more recent judicial approach is to move away from an overly strict interpretation of the s.13 of the NSW Act as suggested by Austin J. in *Jemzone* and adopt a more practical approach, recognising that progress claims are made in the course of a busy construction project and without the opportunity to descend to drafting niceties. It is sufficient if the payment claim tells the recipient enough to enable it to lodge a payment schedule in response, if thought appropriate. I adopt this approach to s.14.

THE DEFENDANT'S SUBMISSIONS

- 21 Mr Pennell submitted that claims no.4 and 5 were defective in that they did not state that they were made under the Act as required by s.14 (3)(c). Mr Pennell submitted that this defect cannot be cured by incorporating these claims in claim no. 6 which complies with s.14(3)(c). I agree with the plaintiffs submission that it is sufficient for claims no. 4 and 5 to be incorporated in claim no. 6 which complies with s.14(3)(c) of the Act for it to form part of the payment claim upon which the plaintiff relies. The purpose of s.14(3)(c) is presumably to alert the recipient to the fact that the claim has been made under the Act which may have far reaching consequences for it if it does not avail itself of procedures available to it under the Act. This purpose was achieved by claim no.6.
- 22 Mr Pennell further submitted that the description of the works in claim no-6 was not a sufficient identification of the works in respect of which the claim was made as required by s.14(3)(a), even given a non technical practical approach to s.14 of the Act. As mentioned by Einstein J. in *Leighton Contractors* at paragraph 52, a requirement of a payment claim is that it identifies the works in respect of which it is made to a sufficient degree to enable the recipient, if it wishes, to dispute the claim and provide a payment schedule under s.15 of the Act. In this application, Lazaros Tsakiridis, a director of the defendant, has sworn an affidavit dated 5 July 2004. In it he has no difficulty in disputing in detail the claim made in progress claim nos. 4, 5, and 6. He has not stated in the affidavit that progress claims no. 4, 5 and 6 were unintelligible to him nor has he stated why no payment schedule was lodged. In an affidavit sworn 15 July 2004 and filed on behalf of the plaintiff, Greg Dzuma deposes that he was engaged by the plaintiff to provide project management and administration services for the project at 72 - 76 High Street, Windsor. He states that claims 4, 5, and 6 relate almost totally to the ground floor transfer slab and that prior to the commencement of works in respect of this item he was asked by a representative of the defendant to provide a separate costing of that work to assist in the assessment of claims. In response, he provided the information requested by letter dated August 22, 2003, which he deposes was hand delivered to a representative of the defendant. In the circumstances, it is not surprising that the defendant was able to comprehend claims nos. 4, 5 and 6.
- 23 Thirdly, Mr Pennell contends that the affidavit of Tsakiridis shows that there is a genuine dispute in relation to the amount claimed by the plaintiff and particularly refers to payments made by the defendant, directly to subcontractors of the plaintiff, a procedure for which there was no provision in the agreement. He relies upon s.47 of the Act which preserves the rights of a party to a construction contract covered by the Act. The short answer to this submission is that if the defendant wished to dispute the plaintiff's payment claim no.6, it could have done so by providing a payment schedule pursuant to s.15 of the Act and then have the matter adjudicated upon pursuant to the Act. The defendant's rights are preserved in that it can raise the matters referred to in Tsakiridis' affidavit in later arbitration or court proceedings. It cannot rely on such matters to defeat the present claim. I note that the Explanatory Memorandum accompanying the Bill introducing the Act states: "*The recovery procedures in the Act are not intended to affect any other rights that parties may have under a construction contract.*" The Explanatory Memorandum further states with respect to s.47: "*This section is intended to ensure that the Act does not limit any other entitlements that a person may have under a construction contract or any other remedy that a person may have for recovering that other entitlement.*"
- 24 Mr Pennell sought to rely upon Order 13.14 of the Rules. In my view, given the purpose and wording of the Act and my comments in paragraph 23, the defendant cannot do so - see generally *L.U. Simon Builders Pty Ltd v H. D. Fowles* [1992] 2 V.R.189, particularly at 195.
- 25 Mr Pennell further sought to rely upon the decision of Master Macready in *Tooma Constructions Pty Ltd v Eaton and Sons Pty Ltd* [2002] NSWSC 514. That was an application under s.459G of the Corporations Act to set aside a statutory demand. There a payment schedule had not been provided in response to a payment claim. That decision can be distinguished in that it was not a claim brought, as here, under the equivalent New South Wales provision to s.16 of the Act, but rather concerned the interpretation of s.459G of the Corporations Act.

SUMMARY

- 26 In the circumstances, I am satisfied that payment claim no. 6 complied with s.14 of the Act. No payment schedule having been lodged by the defendant pursuant to s.15 of the Act, the plaintiff is, pursuant to s.16 of the Act, entitled to recover the sum of \$200,000 from the defendant. There will be judgment for the plaintiff in the sum of \$200,000. I will hear from the parties on the question of interest, costs and the hearing of the plaintiff's stay application with respect to the defendant's counterclaim.

Mr M Roberts for the claimants instructed by Deacons
Mr J Pennell for the defendants instructed by Eggleston Whelan