JUDGMENT : HIS HONOUR JUDGE SHELTON County Court of Victoria. Melbourne Buisiness List. Building Cases Division. 15th December 2006

1 This is an application for summary judgment pursuant to Order 22 of the Rules. The application is based upon s.16(2)(a) 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."*

3 The plaintiffs claim arises out of works carried out by the plaintiff for the defendant at Lot 2513 Caroline Springs Boulevard, Caroline Springs. The plaintiff in this application is claiming the sum of $68,123.00, being the total of $13,860.00 claimed on an invoice dated 9 June 2006, and $54,263.00 claimed on six invoices, all dated 21 June 2006. The plaintiff relied upon these seven invoices as payment claims, complying with s.14 of the Act. It was common ground that no payment schedules had been served by the defendant pursuant to s.15 of the Act.

4 Mr Franzese, who appeared for the defendant, opposed the summary judgment application on three grounds.

5 Firstly, each of the six invoices stated: *"This is a payment claim made under Building and Construction Industry Security of Payment Act 2003."*

6 Mr Franzese submitted that these invoices did not comply with S.14(3)(c) of the Act, which requires a payment claim to state that it was made under the Act, and that reference to the Act had not been properly made, since "2002" should have been used and not "2003". He relied upon s.10(1) of the Interpretation of Legislation Act 1984, which sets out the manner of citation of an Act of Parliament, which had not been followed here. Given the draconian provisions of the Act, he submitted that strict compliance with its terms was required. He contended that the error in citation of the Act was not trivial, particularly given that there was similar legislation in force in other states, and that at the time the invoices were served in June 2006, the Building and Construction Industry Security of Payment (Amendment) Act 2006 Bill was before Parliament.

7 Mr Shaw, who appeared for the plaintiff, relied upon comments made by Windeyer J, in ***Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** [2001] NSWSC 815, where payment claims contained the incorrect contract number and abbreviated the name of the Act under which the claim was made to "*Building Construction Ind. Security of Payments Act 1999*." His Honour stated, at paragraph 8: *". . . while the contract number may have been wrong in some cases, the claims did identify the work done. The second argument was that because the payment claims abbreviated the name of the Act, they did not fulfil the statutory requirement to name the Act. This argument might have had some weight in 1800. In 2001, an argument based on the absence of the word `and' and the letters 'ustry' has no merit. It should not have been put."*

8 Mr Shaw also relied upon a comment of Nicholas J, in ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266, at paragraph 82: *"Section 13(2)(c) requires the payment claim 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."*

9 Mr Shaw pointed out that only the reference to the year of the Act was incorrect that the works were carried out in Victoria and that there was no danger of confusing the legislation with similar legislation in force in other states. He also made the point that at the time the payment claims were served, the Act was the only Act in force in Victoria in the building and construction industry with respect to security of payment.

10 There was no affidavit material before me to suggest that the defendant has been prejudiced or was in any way misled by the incorrect description of the Act.

11 Mr Shaw's submissions, in my view, set out the correct approach to the misdescription of the Act, and I am fortified in this view by the absence of any affidavit material suggesting that the defendant was prejudiced or misled.

12 Secondly, Mr Franzese opposed the summary judgment application on the basis that the five invoices were claims for variations which had not been agreed to in accordance with the contractual arrangements between the parties. He argued that there was no "entitlement" to a progress payment and that therefore the plaintiff had not complied with s.14(1) of the Act.

13 I have previously concluded that there was no obligation upon a party to show compliance with the provisions of a contract for making progress claims prior to making a payment claim pursuant to the Act. I have set out my reasons for so concluding in ***Blueview Constructions Pty Ltd (Trading as WRS Constructions) v Vain Lodge Holdings Pty Ltd*** (15 November 2005) and ***Age Old Builders Pty Ltd v Arvanitis*** (23 June 2006), and adopt my reasoning there set out. In **Age Old Builders**, I also referred to the cases of ***Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liquidation)*** [2005] NSWCA 409 and **Brookhollow Pty Ltd v R & R Consultants Pty Ltd** [2006] NSWSC 1. These two cases state that a summary judgment application may not be resisted on the basis that there has not been compliance with s.14 of the Act. Any objection to such non-compliance must be made in a payment schedule.

14 Therefore I also reject this ground of opposition to the summary judgment application.

15 Thirdly, the plaintiff relied upon the affidavit of Robert Ugrinovski, a director of the defendant, claiming that the defendant had a set off and/or counterclaim for liquidated damages, incomplete and defective works and a credit for works not done. Mr Shaw properly submitted that such matters were irrelevant to the plaintiff's statutory entitlement under the Act, and that s.47 of the Act preserved the defendant's rights to pursue such claims. Mr Franzese sensibly did not pursue this ground of objection.

16 In my view, there is no real question to be tried.

17 There will be judgment for the plaintiff in the sum of $68,123.00.

18 I will hear from the parties on the question of interest, costs and give directions for the further hearing of this matter.

For the Plaintiff Mr J M Shaw instructed by Brand Partners
For the Defendant Mr P Franzese instructed by Franzese & Associates