

Catchwords: Summary Judgment Application -

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

JUDGMENT : His Honour Judge Shelton, in the County Court of Victoria at Melbourne. 30th March 2004.

- 1 This is an application for summary judgment pursuant to Order 22. The application is based upon S.16 of the Building and Construction Industry Security of Payment Act 2002 ('the Act'). There is similar legislation in force in New South Wales, the Building and Construction Industry Security of Payment Act 1999.
- 2 In *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited* [2003] NSW SC 1103, Einstein J, at paragraph 69, referred to "the series of cases spawned by this legislation". By contrast, I am told that this is the first occasion upon which the Act has come under judicial consideration in Victoria.
- 3 The purpose of the Act, which came into operation on 31 January 2003, (S.2(2)) is stated as follows in S.1
"The main purpose of this Act is to provide for entitlements to progress payments of persons who carry out construction work or who supply related goods and services under construction contracts."
- 4 The Act further provides in S.3
"Object of Act"
(1) *The object of this Act is to ensure that any person who carries out construction work or who supplies related goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
(2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in circumstances where the relevant construction contract fails to do so.*
(3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves-*
(a) *the making of a payment claim by the person claiming payment; and*
(b) *the provision of a payment schedule by the person by whom the payment is payable; and*
(c) *the referral of any disputed claim to an adjudicator for determination; and*
(d) *the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security for payment of the progress payment; and*
(e) *the recovery of the progress payment in the event of a failure to pay.*
(4) *It is intended -*
(a) *that this Act does not limit any other entitlement that a person may have under a construction contract, or any other remedy that a person may have for recovering that other entitlement; and*
(b) *in particular -*
(i) *that the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security does not prejudice any claim, counter-claim or defence that may be raised in proceedings (including arbitration proceedings or other dispute resolution proceedings) concerning the work or the supply of goods and services to which the payment claim relates; and*
(ii) *that the payment of the amount of the progress payment determined by the adjudicator is allowed for in any proceedings (including arbitration proceedings or other dispute resolution proceedings) brought under the construction contract concerning the work or the supply of goods and services to which the payment claim relates."*
- 5 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."*
- 6 In my view, in this proceeding there are questions to be tried which make it appropriate that the defendant should have leave to defend.
- 7 By standard SC6 Sub-Contract Agreement dated 11 June 2003, ("SC6") the plaintiff agreed to carry out in situ concrete works for the defendant builder at Mornington. In SC6 the plaintiff is named as "Concrete Panel Company Pty Ltd" and the defendant as "Advanced Storage Systems Pty Ltd". No issue was raised as to the slightly incorrect description of the parties in SC6. Surprisingly, affidavit material initially filed on behalf of the plaintiff alleged contractual arrangements between the parties based rather upon an exchange of letters and a telephone call and makes no reference to SC6. However, the plaintiff took no issue that SC6, which incorporated some of the correspondence between the parties in it, governed the contractual relationship between the parties.
- 8 The plaintiffs claim is for the sum of \$115,765.46, and is contained in an invoice dated 30 September 2003 (*"the second invoice"*). The second invoice sets out the original contract amount and then refers to variations, incomplete works, GST and amounts paid, leaving a balance outstanding of \$115,765.46. The claim is stated to be made under the Act as required by s.14 (3)(c). A party served with a claim under the Act can dispute the claim by providing "a payment schedule" (s.15). No such payment schedule was provided by the defendant within the time limited by S.14(4)(b). Section 15(4) provides, in effect, that in the absence of such a payment schedule the progress payment claimed is payable on the date due for payment under SC6. Section 16(2)(a) then provides that a party such as the claimant *"may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claim of, any competent jurisdiction"*.
- 9 The second invoice causes me concern.
- 10 It would appear to be a final claim rather than a progress claim. Although dated 30 September 2003, Michael Sydney Shone, a director of the plaintiff, deposes in his affidavit sworn 6 February 2004 that in fact it was not forwarded to the defendant until on or about 14 October 2003. It is very significant, in my view, that, on 14 October 2003, the defendant sent the plaintiff a letter which stated:
"We wish to confirm that there are no resources on site today to carry out your subcontract works."

The Concrete Panel Co P/L v Advanced Storage Systems (VIC) P/L [2004] Adj.L.R. 03/30

Further to our letter dated 13 October 2003, the remaining concrete works i.e. 2 nos. building slabs for Buildings "G" and "H", all driveways slabs and curbs will be deleted from your subcontract in accordance with Clause 8 of the subcontract conditions. In addition, all defect rectifications works carried out by us on your behalf will be back charged to you."

- 11 Clause 8 of SC6 is entitled "Defaults by Sub-Contractor". The works stated in the letter of 14 October 2003, to be deleted are the works referred to in the second invoice as "incomplete works". The second invoice appears to be a claim for a final payment which envisages that no further works will be carried out under the subcontract, rather than a claim for a progress payment. Paul Damiani, construction manager of the plaintiff, in an affidavit sworn 23 February 2004, appears to admit as much. The second invoice is to be contrasted with an invoice also dated 30 September 2003 ("the first invoice") which the plaintiff sent to the defendant and which Jeremy Lai, general manager of the defendant, in an affidavit sworn 19 February 2004, referred to as a progress payment claim "made" on or about 30 September 2004. The first invoice, which is stated to be "Claim #C4" is for the sum of \$32,627.43, is based upon a percentage of works completed and allows for a retention sum. In his affidavit of 23 February 2004, Damiani refers to the first invoice as the fourth progress claim under the contract and refers to the second invoice for \$115,765.46 as a "progress claim under the Act". (I do not pause to consider whether the plaintiff was entitled to forward to the defendant two payment claims, each dated 30 September 2003).
- 12 There is a real issue as to whether the Act applies to a final claim such as the second invoice would appear to be. Sections 1 and 3 quoted above refer to progress payments, as do other provisions of the Act which suggest that the Act is concerned with progress rather than final claims and payments. The definition section of the Act, s.4, is of little assistance in that it defines "progress payment" as meaning "a payment to which a person is entitled under s.9". Part 2 of the Act is entitled "Rights to Progress Payments" and Part 3 is entitled "Procedure for Recovering Progress Payments".
- 13 In **Jemzone v Trytan** (2002) NSWSC 395, Austin J, at paragraph 37, stated
"The definition of 'progress payment' is unhelpful, because s.8 confers an entitlement to payment only for a 'progress payment', without further defining or explaining those words. In my opinion the words 'progress payment' when used in s.8 and other parts of the Act should therefore be given the meaning that they have under the construction contract ...
If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only 'specified progress payments'."
- 14 I note that in her second reading speech on the Bill to introduce the Act, the Minister states that the Bill is modelled on the New South Wales Building and Construction Industry Security of Payment Act 1999 (Hansard, 23 April 2002, T1049). This gives added weight to the comments of Austin J., so far as the Act is concerned.
- 15 Jeremy Lai deposes that the defendant has a set-off to the plaintiffs claim and a counterclaim based upon delays in performing the works and defects in the works carried out. The plaintiff disputes the defendant's contentions. It may well be appropriate for the defendant to have the right to raise these issues at the end of the contract in an endeavour to defeat a claim for payment by the plaintiff.
- 16 There is a further issue. In **Jemzone**, Austin J. stated, at paragraph 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 ... At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim."
- 17 S.14(3)(a) of the Act is in similar terms to S.13(2)(a) of the New South Wales Act. The second invoice clearly does not comply with the requirements stated by Austin J.
- 18 There are real questions to be tried here.
- 19 The defendant is given leave to defend. I will make appropriate directions for the further conduct of this matter.

Mr J A Twigg For the Plaintiff instructed by Giannakopoulos
Mr D G Henshall For the Defendant instructed by Aughtersons