

**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. 10<sup>th</sup> March 2006.

- 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."
- 3 The parties entered an agreement dated 22 February 2005 ("the contract"), pursuant to which the plaintiff agreed to perform construction work for the defendant at St Andrews Beach at Fingal.
- 4 On 8 September 2005, the plaintiff submitted to the defendant Progress Claim No. 6 for the sum of \$135,413.96. On its face, this Claim appears to comply with s.14 of the Act. At the end of the Progress Claim, reference is made to monies outstanding from two other projects, and a total sum is claimed of \$353,210.32. The addition of these further claims is not, in my view, relevant to whether Progress Claim No. 6 is a payment claim complying with s.14 of the Act.
- 5 It is not in dispute that the defendant did not serve a payment claim as required by s.15 of the Act.
- 6 Mr Andrew, who appeared for the defendant, submitted that Progress Claim No. 6 was a final claim, not a progress claim, and therefore s.14 of the Act did not apply to it – see *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395, at para 37, per Austin J. and the second reading speech on the bill to introduce the Act (Hansard, 23 April 2002, p.1049). He relied upon an affidavit sworn by John Crozier, a director of the defendant, in which he deposes that prior to entry into the contract, he had discussions with Greg Fowler, a director of the plaintiff, by which it was agreed that the plaintiff would accept payment for twenty-five percent of monies owing to it pursuant to the contract and in respect of other works already carried out and to be carried out by the plaintiff for the defendant by way of an interest in an apartment to be built at St Andrews Beach in the name of Fowler. Crozier further deposes that after receipt of Progress Claim No. 6, he had a number of discussions with Fowler, in the course of which Fowler indicated that he did not wish to proceed with the arrangement to have twenty-five percent of the plaintiff's fees paid by way of an interest in the apartment, and that the plaintiff did not wish to undertake any further works at St Andrews Beach. He stated that as a result of these discussions, it was agreed between the plaintiff and the defendant that:
  - (a) *The plaintiff would finish all work currently being undertaken at St Andrews Beach, including installation of storm water grates, concrete benching to storm water pit bases and the supply of the appropriate certificates of compliance required pursuant to the Building Act.*
  - (b) *The plaintiff's amended payment claim number 6 would be submitted to Rider Hunt for approval. [Rider Hunt was the quantity surveyor for the defendant's financiers].*
  - (c) *The road works required pursuant to the contract would be completed by Sandridge Roads Pty Ltd ("Sandridge") and electrical work required pursuant to the contract would be completed by Shiplec Pty Ltd ("Shiplec") and that these works would be undertaken by Sandridge and Shiplec as contractors for the defendant, not as sub-contractors to the plaintiff and the plaintiff would be relieved of its obligation to carry out the road works and electrical works to be completed by Sandridge and Shiplec and these works were removed from the scope of works under the contract.*
  - (d) *A schedule of payments in respect of monies owed to the plaintiff for work it had undertaken at St Andrews Beach, Narre Warren and Bass Coast Resort at San Remo. The works undertaken at St Andrews Beach were additional works outside the scope of the Contract.*
- 7 In my view, there is no substance in the defendant's submission that Progress Claim No. 6 should be regarded as a final claim.
- 8 Firstly, Progress Claim No. 6 should, in my view, be characterised at the time it was served. On Crozier's own admission, negotiations regarding the variation of the contract, which resulted in its variation, were only entered into after the delivery of Progress Claim No. 6.
- 9 Secondly, as indicated in paragraph (a) above, further works were to be carried out by the plaintiff.
- 10 Thirdly, a letter dated 21 September 2005, from Crozier to Fowler, which was countersigned on behalf of the plaintiff as evidencing a variation of the contract, set out a payment schedule for outstanding monies and then stated: "Please note that Claim No. 6 (August) is in addition to these monies. Rider Hunt are expected to process this claim next week, with payment available shortly thereafter."

This indicates that the defendant was not intending to change the nature of Progress Claim No. 6.
- 11 Fourthly, Progress Claim No. 6A dated 8 September 2005, but not served until mid-October, was in identical form to Progress Claim No. 6, except that the two extra sums for other projects were not referred to on it.
- 12 In my view, there is no real question to be tried.
- 13 There will be judgment for the plaintiff in the sum of \$135,430.96.

Mr J A Twigg For the Plaintiff instructed by Giannakopoulos Solicitors  
Mr R Andrew Aitken For the Defendant instructed by Walker & Strachan