

**JUDGMENT : HIS HONOUR JUDGE SHELTON** : In the County Court of Victoria at Melbourne Building Cases Division, 16<sup>th</sup> February 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 Pursuant to an agreement dated 30 January 2004, the plaintiff agreed to undertake building works for the defendant at 55 O'Herns Road, Epping, being alterations and additions to the Casa D'Abruzzo Club, for the sum of \$3,364,878.00 ("the Agreement").

4 The plaintiff seeks summary judgment for the sum of \$183,968.06. This sum is calculated as follows:

Balance unpaid on Payment Claim Number 14	\$67,861.22
Amount claimed in Payment Claim Number 15	\$116,106.84
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	\$183,968.06
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5 I turn to consider each of these payment claims.

**Payment Claim No. 14**

6 This payment claim dated 24 May 2005, is for the sum of \$111,410.22. Attached to it was Progress Payment Certificate Number 14 dated 24 May 2005 issued by the architect nominated under the Agreement, Robert Fleming ("the Architect") for the sum of \$111,410.22. The payment claim itemises amounts claimed under seven headings to show how this sum is calculated. On 20 June 2005, the defendant made a part payment on Payment Claim

Number 14 of \$43,549.00, leaving a balance outstanding of \$67,861.22. This strongly suggests that the defendant was fully aware of how the sum claimed in Payment Claim Number 14 was calculated. There is no affidavit material from the defendant to suggest that it was not aware of the manner in which Payment Claim Number 14 was calculated. In my view, the defendant had sufficient information regarding Payment Claim Number 14 to enable it to lodge a payment schedule under s.15 of the Act if it thought appropriate. The defendant was, in my view, to use the words of Santow, J.A. in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liquidation)* [2005] NSWCA 409, at paragraph 48: ". . . in a position to determine in meaningful fashion whether to make payment, or else dispute it with reasons so as in that case to permit adjudication of the dispute, utilising the summary of procedures under the Act."

7 Payment Claim Number 14 states that it is a payment claim under the Act. Payment Claim Number 14 clearly complies with s.14 of the Act.

8 The defendant's solicitors forwarded a letter to the plaintiff dated 17 August 2005, and then a letter in virtually identical terms dated 25 August 2005, each of which stated: "We are instructed that a payment claim has been made to our client for the sum of \$111,410.22. Our client disputes the amount of your claim."

Details are then given in each letter as to the basis upon which the payment claim is disputed. The sum of \$111,410.22 of course is the sum claimed in Payment Claim Number 14.

9 These letters clearly do not comply with the time requirements stipulated in s.15(4) of the Act to constitute a payment schedule with respect to Payment Claim Number 14. The defendant does not rely on any other documentation as constituting a payment schedule.

10 I further note that recent New South Wales cases have held that if a party upon whom a payment claim is served does not provide a payment schedule within the time limited, it cannot oppose a summary judgment application on the basis that the payment claim was not a valid claim – see *Nepean Engineering* (supra) at paragraph 76, per Ipp, J.A. and *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 at para. 41, per Palmer, J.

11 The defendant further seeks to rely upon alleged breaches by the plaintiff under the Agreement as a defence to the claim under the Act for \$67,861.22. This, however, is no defence to a claim under the Act. Had the defendant wished to dispute Payment Claim Number 14, it could have lodged a payment schedule pursuant to s.15 of the Act. The defendant's contractual rights are preserved pursuant to s.47 of the Act.

12 There is, in my view, no real question to be tried with respect to Payment Claim Number 14.

**Payment Claim Number 15**

13 This payment claim dated 11 August 2005, is for the sum of \$116,106.84, none of which has been paid. The payment claim has attached to it Progress Payment Certificate Number 15 dated 10 August 2005, issued by the Architect for the sum of \$116,106.84. The only detail of the sum claimed in the payment claim is that it is for variations. However, on 2 August 2005, the plaintiff lodged a progress claim for the sum of \$273,121.51 with the Architect, as agent for the defendant, which itemised in considerable detail the manner in which this sum was calculated. Then by letter dated 10 August 2005, the Architect forwarded to the plaintiff Progress Payment Certificate Number 15 and explained how the amount of the certificate, \$116,106.84, had been calculated and a reduction made from \$273,121.51. Importantly, a copy of this letter was forwarded to the defendant.

- 14 I note the comment of Mason P., with whom Giles JA. and Santow JA. agreed in **Clarence Street Pty Ltd v Isis Projects Pty Ltd** [2005] NSWCA 391, at para 40: "Construction work for which a claim is made may be identified by reference to earlier documents such as variation claims and other documents capable of being identified by reference to the contract or the earlier dealings of the parties."
- 15 Again I note that there is no affidavit material from the defendant suggesting that it was not aware of the manner in which the sum of \$116,106.84 was calculated.
- 16 There is clearly, in my view, sufficient identification of the construction work or related goods and services to which the payment claim relates.
- 17 The defendant in opposing the claim for \$116,106.84 seeks to rely upon the letters of 17 August 2005 and 25 August 2005 referred to above as constituting a payment schedule under s.15 of the Act.
- 18 I note, however, that s.15(2)(a) provides that the payment schedule "must identify the payment claim to which it relates." The sum of \$111,410.22 is in fact the amount claimed in Payment Claim Number 14. It thus cannot be a payment schedule with respect to Payment Claim Number 15. The defendant does not rely on any other documentation as constituting a payment schedule.
- 19 I again refer to the two New South Wales cases to which I have referred in paragraph 10 above.
- 20 As with Payment Claim Number 14, in my view, there is no real question to be tried with respect to Payment Claim Number 15.

**Alternative Basis for Seeking Summary Judgment**

- 21 In a written document headed "Outline of Argument of the Plaintiff" handed to me on the hearing of the application, Mr Oliver, who appeared for the plaintiff, also stated that summary judgment was sought alternatively upon the basis of the two unpaid progress certificates. Such an application would be similar to that which was before Gillard, J. in **Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd** [1998] VSC 205 with respect to the standard form general conditions AS 2124-1992. Mr Oliver, however, did not pursue this potential alternative basis for the plaintiff's claim further in the Outline nor in oral submissions before me.

**Conclusion**

- 22 There will be summary judgment for the plaintiff in the sum of \$183,968.06. I will hear from the parties on the question of interest and costs.

Mr K Oliver for the plaintiff instructed by Rigby Cook Lawyers  
Mr D Carlile for the defendant instructed by Anthony's Solicitors