

Shelford Engineering and Construction Pty Ltd v Rescom Constructions Pty Ltd [2005] VCC 361

Catchwords: Summary Judgment Application

Legislation: *Building and Construction Industry Security of Payment Act 2002*, s.18, 26 and 27.

JUDGMENT : His Honour Judge Shelton, in the County Court of Victoria at Melbourne, Civil Division (Building Cases Division), Business List, 8th July 2005.

1 This is an application for summary judgment pursuant to Order 22 of the Rules. The application is based upon s.27(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 such as this is stated by the High Court in *Fancourt v Mercantile Credits* (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 By determination dated 16 February 2005, an adjudicator determined that the defendant owed the plaintiff the sum of \$47,830.75. The sum of \$16,079.80 was subsequently paid, leaving a balance of \$31,750.95. It is for this sum, together with half the adjudicator's fee of \$1,375.00, a total sum of \$33,125.95, that the plaintiff seeks summary judgment.

4 The defendant opposes the application on a number of grounds. One of these is that s.18(3) of the Act was not complied with by the plaintiff when making an adjudication application pursuant to s.18(1) of the Act. S.18(3) states:

"An adjudication application—

(a) must be made—

(i) to an adjudicator chosen by agreement between the claimant and the respondent; or

(ii) if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent; or

(iii) if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant; and

(b) must be made within 5 business days after the claimant receives the payment schedule."

5 It is not in issue that:

- the plaintiff served a payment claim on 25 January 2005, although the defendant contends that this did not comply with s.14 of the Act;
- the defendant provided a payment schedule to the plaintiff on the same date indicating that no monies were payable by it to the plaintiff;
- the plaintiff made what it regarded as an adjudication application to Australian Solutions Centre Pty Ltd, an authorised nominating authority, on 1 February 2005;
- prior to making this application, the plaintiff did not seek the agreement of the defendant to the appointment of an adjudicator, nor did it seek the defendant's agreement to an authorised nominating authority.

6 The plaintiff contends that it was not required to seek agreement under s.18(3)(a)(i) or (ii) and that it was entitled to make an application directly under s.18(3)(a)(iii). The defendant contends that it was necessary for the plaintiff to seek agreement under s.18(3)(a)(i), failing that, s.18(3)(a)(ii), prior to making an adjudication application under s.18(3)(a)(iii).

7 In my view, the defendant's contentions are certainly arguable. S.18(4) seems to envisage that the parties will endeavour to agree upon an adjudicator after the provision of a payment schedule.

8 If the plaintiff's approach were correct there would be no need for the introductory words in s.18(3)(a)(ii): "if no adjudicator is agreed on" or the introductory words in s.18(3)(a)(iii): "if no nominating authority is agreed on". They would be mere surplusage.

9 Further, I accept the submission of Mr Andrew, who appeared for the defendant, that a three-tiered approach in s.18(3)(a) is consistent with there being an ongoing harmonious contractual relationship between the parties and it is desirable that, if possible, the adjudicator be appointed by agreement as to the actual adjudicator or nominating authority. S.18(3)(b) requires the claimant to take one of the three steps referred to in s.18(3)(a) within five business days after receiving a payment schedule. This time frame, though tight, could easily be complied with by a claimant.

10 The plaintiff submitted that if the plaintiff was required to request agreement from the defendant, then s.18(3)(a) would be worded differently, such as in the equivalent New Zealand legislative provision, s.33 of the *Construction and Contracts Act 2002*. Whatever construction might be put on this New Zealand provision, my task is to construe the meaning of s.18(3) of the Act.

11 The plaintiff further relies upon comments made by Hodgson JA in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, at paragraphs 53-55 on the "basic and essential requirements" of an adjudicator's determination under the comparable New South Wales legislation, the *Building and Construction Industry Security of Payment Act 1999*. In paragraph 53, His Honour stated that one of the "basic and essential requirements" was "the making of an adjudication application by the claimant to an authorised nominating authority (s.17)". At paragraph 55, His Honour indicated that there should be compliance with the basic requirements, together with "a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power . . .". The consideration by the adjudicator of the submission by the defendant that he had not been properly appointed under s.18 of the Act was, submitted the plaintiff, a bona fide attempt by the adjudicator to exercise the power. S.17 of the New South Wales Act, however, is worded differently to s.18 of the Act, and specifically does not provide for the possibility of agreement upon an adjudicator or a nominating authority as provided in s.18(3)(a)(ii) and (iii) of the Act.

12 The plaintiff further contends that any challenge to the adjudicator's determination should have been by way of judicial review pursuant to Order 56 of the Supreme Court (General Civil Procedure) Rules 1996. Mr Stapleton sought to rely upon s.26(5) of the Act, which refers to a determination becoming final when the right of appeal or review expires, which under Rule 56.02 is 60 days. This provision, however, only applies where court or arbitration proceedings have been commenced against a claimant in relation to a dispute under the construction contract between them and security for payment has been given pending determination of these proceedings. S.26(5) is, in my view, of no assistance.

- 13 Mr Andrew submitted that while application to the Supreme Court under Order 56 might be an option open to the defendant, although I note that in *Brodyn*, at paragraph 58, Hodgson JA stated that relief in the nature of certiorari is not available with respect to an adjudicator's determination, it was alternatively open to the defendant to oppose the application to enforce the adjudicator's determination in this Court on the basis that the plaintiff had not proven all the necessary elements giving rise to the statutory cause of action under the Act. Again, in my view, it is certainly arguable that the defendant has this means of contesting the validity of the adjudicator's determination.
- 14 There are real questions to be tried. The summary judgment application is dismissed. I will give directions with respect to the further hearing of this proceeding.

Mr A Stapleton For the Plaintiff instructed by Information Law
Mr R Andrew For the Defendant instructed by Noble Lawyers