IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
BUILDING CASES

Not Restricted

Case No. CI-08-02630

AC HALL AIRCONDITIONING PTY LTD
(ACN 091 308 637) Plaintiff

v

SCHIAVELLO (VIC) PTY LTD
(ACN 006 778 641) Defendant

JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	30 September 2008 and 1 October 2008
DATE OF JUDGMENT:	26 November 2008
CASE MAY BE CITED AS:	AC Hall Airconditioning Pty Ltd v Schiavello (Vic) Pty Ltd (No. 2)
MEDIUM NEUTRAL CITATION:	[2008] VCC 1490

REASONS FOR JUDGMENT

Catchwords: Summary judgment application – *Building and Construction Industry Security of Payment Act* 2002 – S.10A, 10B – *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87; *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332; *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425; *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391; *Age Old Builders Pty Ltd v John Arvanitis and George Arvanitis* [2006] VCC 1827; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003) NSWSC 266; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (in liq) (2005) 64 NSWLR 462; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248; *Falgat Constructions v Masterform* [2005] NSWSC 525; *Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr B Reid	Pilley McKellar Pty Ltd
For the Defendant	Mr B Dosser	Bradley Colin Dosser

HIS HONOUR:

1 This is an application for summary judgment pursuant to Order 22 of the *County Court Rules*. The application is based upon s.16(2)(a)(i) 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 To similar effect is the statement of Herring CJ and Lowe J in *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332, at 334, that "where there is a real case to be investigated either in fact or law, leave to defend should be given".

4 It is agreed between the parties that on or about 18 September 2007, the plaintiff and the defendant entered into a construction contract pursuant to which the plaintiff was to perform air conditioning/mechanical services work for the defendant at Monash University, Caulfield, for the sum of $594,000 ("the Contract").

5 It is further agreed that the Contract was a contract to which the *Act* applied. Given the date on which the Contract was entered into, the *Act,* as amended by the *Building and Construction Industry Security of Payment (Amendment) Act* 2006, applies.

6 On 14 December 2007, the plaintiff made Payment Claim 1584B for the sum of $152,240. The defendant paid $66,000 to the plaintiff in part payment of that claim on 28 February 2008, leaving a balance of $86,240.

7 On 25 March 2008, the plaintiff made Payment Claim 1584C for the sum of

$240,274.05. This sum included the amount of $86,240 unpaid under Payment Claim 1584B. This does not cause a problem: see s.14(9) of the *Act*.

8 On 3 June 2008, the sum of $44,254.04 was paid in part payment of Payment Claim 1584C, leaving a balance outstanding of $196,020.01. It is this sum for which summary judgment is sought.

9 It is not in issue that Payment Claims 1584B and 1584C were made in accordance with the *Act* and that the defendant did not provide a payment schedule in response to either Payment Claim. On 21 April 2008 and 3 June 2008, the defendant purportedly provided payment schedules pursuant to s.18(2)(b) of the *Act*. These payment schedules were not provided within the period required by s.15(4) of the *Act*. Mr Dosser, who appeared for the defendant, did not submit that these were payment schedules that satisfied s.15 of the *Act*. I conclude that these two payment schedules are not payment schedules for the purposes of s.15 of the *Act*. Thus, s.15(4) and s.16(1) of the *Act* apply.

10 The defendant opposed the application on several grounds and I now turn to consider these.

11 Firstly, the defendant submitted that the contracting party was not A C Hall Airconditioning Pty Ltd but A C Hall Airconditioning Contracting Pty Ltd and therefore the claim had been brought by the plaintiff in an incorrect name. Wisely, the defendant did not pursue this and consented to the name of the plaintiff in the Writ and Statement of Claim being amended to "A C Hall Airconditioning Contracting Pty Ltd".

12 Secondly, the defendant relied upon the fact that in the Summons for Summary Judgment dated 21 July 2008, the plaintiff seeks summary judgment "for the amount claimed in the endorsement of claim on the Writ". In

its Amended Statement of Claim dated 2 July 2008, the plaintiff claims under the *Act* or, alternatively, under the Contract. The defendant submits that it therefore has available to it contractual defences in opposing the summary judgment application so far as it is based on the *Act*. In my view, there is no merit in this submission. The plaintiff is only pursuing its summary judgment application in respect of its claim under the *Act*, which it is entitled to do. S.16(4)(b) of the *Act* applies to such claim. The defendant is not barred from pursuing its contractual remedies elsewhere: see s.47 of the *Act*. It cannot do so, however, in opposing a summary judgment application under the *Act*.

13 Thirdly, the defendant argued that Payment Claim 1584C superseded Payment Claim 1584B. Mr Dosser particularly relied upon comments of Habersberger J in *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425, at paragraphs 79-81. The decision in *Abigroup* was based upon the unamended *Act* and s.14(9) now applies. In my view, there is no substance in this submission.

14 Fourthly, the defendant contended that Payment Claim 1584B was sent to the defendant on the second last working day of 2007 just prior to the Christmas shutdown period. The defendant was not in a position to respond to such claim and the sending of the Payment Claim represented an act of bad faith on the part of the plaintiff. Sensibly, the plaintiff did not pursue this submission.

15 Fifthly, the defendant submitted that Payment Claims 1584B and 1584C did were not made in accordance with the provisions of the Contract, did not comply with s.14 of the *Act* and were not sufficiently particularised to enable the defendant to properly assess them.

16 I note that two earlier progress claims were made in the same format as Payment Claims 1584B and 1584C and were paid in full, which suggests that there was a sufficient degree of particularisation in Payment Claims 1584B

and 1584C – see *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, at paragraph 33, per Mason P, referring to paragraph 38 of McDougall J's judgment at first instance. I further note that there was no evidence before me that the defendant complained within the period within which it was required to provide a payment schedule, that Payment Claims 1584B and 1584C were not sufficiently particularised.

17 In any event, I have set out my views on these matters previously in *Age Old Builders Pty Ltd v John Arvanitis and George Arvanitis* [2006] VCC 1827 (23 June 2006) as follows:

> "[17] In any event, I am of the view that there was no obligation upon the plaintiff to show compliance with the provisions of the Contract for making progress claims prior to making a Payment Claim. I have set out my reasons for so concluding in *Blueview Constructions Pty Ltd (trading as WRS Constructions) v Vain Lodge Holdings Pty Ltd* (2005) VCC 1325, a judgment delivered on 15 November 2005. In brief, section 4 defines 'progress payment' as a 'payment to which a person is entitled under section 9'. Section 9 then provides that:
>
> '(1) On and from each reference date under a construction contract, a person –
>
> (a) who has undertaken to carry out construction work under the contract . . .
>
> . . . is entitled to a progress payment under this *Act*, calculated by reference to that date.'
>
> [18] It will be noted that the wording 'entitled to a progress payment' is then picked up in section 14(1).
>
> Section 9(2)(a)(1) defines 'reference date' for the purposes of sub-section (1) as 'a date on which a claim for a progress payment may be made' … In coming to the conclusion in *Blueview Constructions* that there was no obligation upon the plaintiff to show compliance with the terms of the Contract in relation to the making of a progress claim, I relied upon comments made in *Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina* (2002) NSWSC 960 at paragraphs 52 and 60 – 64 per Macready A.J., which were followed in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003) NSWSC 266, particularly at paragraphs 52 and 53 per Nicholas J., and *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* (2005) NSWSC 45 at paragraph 46, again per Nicholas J."

18 I appreciate that the *Act* has been amended but that is of no relevance to my

comments above.

19 I further stated:

> "[23] … in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (in liq) (2005) 64 NSWLR 462, a decision of the New South Wales Court of Appeal delivered on 10 November 2005, Ipp JA. Stated at p 484:
>
> > 'Provided that a payment claim is made in good faith and purported to comply with s.13(2) of the *Act*, the merits of that claim, including the question whether the claim complies with s.13(2), is a matter for adjudication under s.17 and not a ground for resisting summary judgment in proceedings under s.15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by a way of a payment schedule leading to adjudication.'
>
> [24] Section 13(2) of the New South Wales Act broadly corresponds with section 14(3) of *the Act*.
>
> [25] Similarly, in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, Palmer J., stated at paragraph 41:
>
> > '... if the respondent does not serve a payment schedule within the time limit under the Act and the claimant ultimately seeks the entry of judgment under s.15(4), the respondent may not resist summary judgment on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s.13: the respondent has only one chance to take that objection, namely, in a timeously served payment schedule.'"

I should mention that the extract from *Brookhollow* commences with the words:

> ". . . In the case of a payment claim which purports reasonably on its face to comply with s.13(2)." [s.14(2) in the *Act*].

20 Mr Dosser relied heavily upon the recent decision of Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248. So far as it is inconsistent with *Nepean Engineering (supra)* which was followed in *Brookhollow (supra)*, it is appropriate that I should follow *Nepean Engineering*, a decision of the New South Wales Court of Appeal.

21 Mr Dosser sought to rely upon the decision of Macready J in *Falgat Constructions v Masterform* [2005] NSWSC 525, at paragraph 26, where His

Honour stated:

> "For some years there has been a series of cases in which Courts in this Division have allowed offsetting claims against amounts due or said to be due under provisions of the Act. I dealt with the matter in detail in *Max Cooper v Booth* [2003] NSWSC 929 where I allowed a contractual offsetting claim to be used to set aside the demand. That decision has been followed in *M&D Demir Pty Ltd v Graf Plumbing Pty Ltd* Campbell J [2004] NSWSC 553. This decision was followed in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186."

22 There His Honour was dealing with a statutory demand under the *Corporations Law*. In any event, Macready's J decision is inconsistent with *Nepean Engineering.*

23 Sixthly, while it is not in issue that s.16(4)(a)(i) of the *Act* has been complied with, it is in issue as to whether s.16(4)(a)(ii) of the *Act* has been complied with, that is as to whether the claimed amount includes any excluded amount.

24 S.4 of the *Act* provides:

> "*Excluded amount* has the meaning given in s.10B."

25 S.10B of the *Act* provides:

> "**10B Excluded amounts**
>
> (1) This section sets out the classes of amounts (**excluded amounts**) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
>
> (2) The excluded amounts are –
>
> (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
>
> (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –
>
> (i) latent conditions; and
>
> (ii) time-related costs; and
>
> (iii) changes in regulatory requirements;
>
> (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising

under or in connection with the contract.

. . . ”

26 S.10 provides:

“(2) Despite . . . anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(3) … an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.”

27 S.10A provides:

“10A Claimable variations

(1) This section sets out the classes of variation to a constructions contract (the **claimable variations**) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree –

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where –

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following –

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payment in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into –

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to '$5 000 000' were a reference to '$150 000'."

[Example not reproduced]

28 There are no variations claimed in Payment Claim 1584B. Variations totalling $116,530.95 are claimed in Payment Claim 1584C and the issue is whether these are claimable variations. If not, by virtue of s.10 and s.10B, they cannot be the subject of a payment claim, and by virtue of s.16(4)(a)(ii), cannot be claimed in the proceeding, and in particular by way of summary judgment.

29 Mr Dosser, who appeared for the defendant, indicated that all the variations were in dispute. Therefore, s.10A(2) is inapplicable and the variations are only claimable variations if they fall into the second class of variation outlined in s.10A(3) of the *Act*.

30 Central to the determination of this issue are s.10A(3)(d) and s.10A(4) of the

Act. So far as s.10A(4) is concerned, the total amount of claims, $116,530.95, exceeds ten per cent of the consideration under the construction contract at the time the Contract was entered into, $594,000. Therefore, in sub-s.(3)(d), "$5,000,000" is to be read as "$150,000". Clearly paragraph (i) is inapplicable. Whether paragraph (ii) is applicable depends on whether "the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c))".

31 The Contract contains the following clause:

> "**15. Arbitration**
>
> 15(a) Where a dispute or difference arises in respect of any aspect of the Works during or after completion of the Works then such dispute or difference shall be resolved by a court of competent jurisdiction in the State where the Works are performed.
>
> 15(b) Subject to the foregoing, the parties may agree in writing to refer part or all of such dispute or difference to arbitration according to the laws relating to arbitration in force in the State in which the Works are performed."

32 Sub-clause 15(a) is otiose in my view. All it does is to restate the parties' existing rights to have the matter litigated.

33 Sub-clause 15(b), despite the heading of the clause, is not an arbitration agreement as defined in s.4 of the *Commercial Arbitration Act* 1984. By using the word "may", all it does is to suggest the possibility of arbitration should a dispute on difference arise. What is required by sub-s.(3)(d)(ii), in my view, is a binding dispute resolution mechanism separate from the Court system. I am fortified in my approach by comments of Kaye J, in *Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452. There His Honour was considering whether pursuant to s.25(2) of the *Act* prior to its amendment a party had "commenced proceedings (including arbitration proceedings or other dispute resolution proceedings)" by the commencement of a conciliation process. He stated, at paragraph 23:

> "I accept that that is so, and that it may be that a number of those processes may constitute "other dispute resolution proceedings",

> notwithstanding that they lack the trappings and procedures which one would otherwise normally expect. Nonetheless in order to conform with the term "proceeding" under s 25(2) of the Act it is, in my view, essential that, whatever process is adopted, that process must involve the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of procedural fairness. In other words, there must be a process the purpose of which is that some person or persons, independent to the parties to the dispute, decides that dispute by an impartial consideration of the competing merits of both sides of the dispute."
>
> (*Emphasis added*)

34 I conclude that the Contract does not provide a method of resolving disputes under it and therefore sub-s.(3)(d)(ii) is applicable.

35 It is not in issue that s.10A(3)(a) is applicable, as is s.10A(3)(c) in that the parties do not agree upon one or more of the matters set out there. I turn to consider whether s.10A(3)(b) has been complied with. This provision requires a request or direction to the plaintiff from the defendant or a person acting on its behalf to the plaintiff to carry out the work or to supply goods and services for which a variation is claimed. Desmond John Robert Platten, the contracts manager of the plaintiff, in Attachment 1 to his affidavit sworn on an unstated dated in July 2008, provides details of each of the Variations claimed. For Variations 4, 7 and 8, an architect's instruction is relied upon. For Variation 15, the plaintiff relies upon an instruction from Simpson Cotzman. For Variations 17 and 21, the plaintiff relies on a direction from the defendant. The defendant does not deny that these instructions or directions were given but claims that the works were not approved as a variation in accordance with the terms of the Contract. A typical response is:

> ". . . These works were never approved as a variation pursuant to the Contract between the parties and so the Claim has no legitimate claim for these Works as such."

36 However, there was no need for the plaintiff to establish that a variation has been claimed in accordance with the Contract for it to be a claimable variation – see the introductory wording of Clause 10(2) of the *Act*. Attachment 1 does not indicate compliance with s.10A(3)(b) of the *Act* for the remaining variations in issue, namely variations 14, 20, 22, 23 and 24. They are not claimable

variations. The following variations are claimable variations:

Variation 4	$702.00
Variation 7	$3,450.00
Variation 8	$11,298.75
Variation 15	$8,107.00
Variation 17	$5,807.50
Variation 21	$9,980.00
Total	**$39,345.25**

37 Mr Dosser submitted that "the *Act* does not make any provision in s.16(4) for the principle of proportionality enabling the Court to grant such a judgment only 'to the extent' that it does not constitute an 'excluded amount'." In my view, this is a strained reading of s.16(4)(a)(ii) of the *Act*. In my opinion it is appropriate to simply deduct the arguably excluded amounts from the sum claimed. These arguably excluded amounts total $77,185.70, being the difference between the variations claimed totalling $116,530.95 and the variations allowed as claimable variations totalling $39,345.25.

Conclusion

38 In my view, there is no real question to be tried with respect to the claim for $118,834.31, being the sum of $196,020.01 less the arguably excluded amounts totalling $77,185.70.

39 There will be judgment for the plaintiff in the sum of $118,834.31.

40 I will hear from the parties on the question of interest, costs and further directions.

41 As foreshadowed, I also order that the name of the plaintiff in the Writ and Statement of Claim be amended to "A C Hall Airconditioning Contracting Pty Ltd".