

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

Not Restricted
Revised

Case No. CI-12-4329

ADAM WOOD GROUP PTY LTD (ACN 146 969 914)

Plaintiff

v

PROCON BUILDERS PTY LTD (ACN 114 835 282)

Defendant

JUDGE: HIS HONOUR JUDGE GINNANE

WHERE HELD: Melbourne

DATE OF HEARING: 16 November 2012

DATE OF JUDGMENT: 14 December 2012

CASE MAY BE CITED AS: Adam Wood Group Pty Ltd v Procon Builders Pty Ltd

MEDIUM NEUTRAL CITATION: [2012] VCC 2001

REASONS FOR JUDGMENT

BUILDING CASE – judgment for adjudicated amount – application to set aside judgment – whether a claimable variation – whether a method of resolving disputes under the contract – *Building and Construction Industry Security of Payment Act 2002 ss 9,14,28R*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J A F Twigg	Francis V Gallichio
For the Defendant	Mr B Reid	Brendan J Archer

HIS HONOUR:

1 On 10 September 2012, I ordered, pursuant to s28R of the *Building and Construction Industry Security of Payment Act 2002* (“the SOP Act”), that the defendant pay the plaintiff the sum of \$106,169.83 and \$1,638 for costs.

2 By summons dated 18 September 2012, the defendant, pursuant to s28(5) and (6) of the SOP Act, sought to set that judgment aside. It also sought orders that the adjudicator’s determination of 22 August 2012 was void and of no effect. Section 28R(5) states:

“If a person commences proceedings to have the judgment set aside, that person—

- (a) subject to subsection (6), is not, in those proceedings, entitled—
 - (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge an adjudication determination or a review determination; and
- (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.”

3 Section 28R(6) states:

“Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.”

4 The issue argued before me by the defendant was whether the adjudicator took into account a variation of the Construction Contract that was not a claimable variation.

5 The Construction Contract related to the design and construction of eight residential apartments in Malvern. This proceeding concerns the same Construction Contract as does proceeding CI-12-03757 between the same

parties, in which a judgement was also delivered this day relating to a summary judgement application in respect of a payment claim under the SOP Act.

6 The variations for which the plaintiff sought payment exceeded \$5 million and were, therefore, in accordance with s10A(3)(d)(ii), only claimable variations if:

“ ...the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).”

7 Section 10A(3)(c) sets out various matters about which the parties to a Construction Contract might not agree: eg whether the doing of the work constituted a variation, s10A(3)(c)(i).

8 Under s10B(1) and (2)(a), any variation, other than a claimable variation, is an excluded amount.

9 The parties accepted that the Court has jurisdiction to set aside the judgment if it was established that the adjudicator took into account a variation of the construction contract that was not a claimable variation: see s28R(6).

10 The issue therefore became whether the Construction Contract provided a method of resolving disputes under the contract. If it did not, then there was no ground for setting aside the judgment; if it did, then the judgment should be set aside.

11 The adjudicator's determination included \$16,849.16 for a scope of works claim and \$88,116.27 for variations, totalling \$104,965.43.¹

12 The adjudicator determined that clause 47.2:

“does not provide a definitive procedure or method of resolving disputes under the Contract including disputes in relation to the matters referred to in s10A(3)(c), as referred to in s 10A(3)(d)(ii).”²

13 The adjudicator referred to the following statement in the judgment of Judge

¹ The adjudicator was Mr M Heaton QC

² Adjudicator's determination [232]

Shelton in *A C Hall Air Conditioning Pty Ltd v Schiavello (Vic) Pty Ltd*³:

“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 States 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”

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

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 or 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.’

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

14 The clauses relevant to the parties’ argument are clauses 47 and 49 of the Construction Contract. They provide as follows:

“47. **DISPUTE RESOLUTION**

³ [2008] VCC 1490 at [31-33]

47.1 Notice of dispute

If a dispute or difference (hereafter called a “dispute”) between the Contractor and the Principal arises in connection with the contract or the subject matter thereof, including a dispute concerning –

- (a) the direction given by the Superintendent; or
- (b) a claim –
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment; or
 - (iv) for rectification or frustration,

then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract and, subject to Clause 44, the Contract shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

47.2 Further Steps Required Before Proceedings

Alternative 1

Within 14 days of service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

If the dispute has not been resolved within 28 days of service of the notice of dispute, either party may institute proceedings in an appropriate court or tribunal.

47.3 Summary Relief

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract.

49 SPECIAL CONDITIONS

49.13 Building and Construction Industry Security of Payment Act 2002 (the Act)

49.13.1 The Role of the Superintendent under the Act

In receiving payment claims or issuing payment schedules pursuant to the Security of Payment Act, the Superintendent acts as agent of the Principal.

49.13.2 Payment Claim

For the purposes of the Act:

- (a) A claim for payment under Clause 42.1 is a payment claim;
- (b) The times prescribed in Clause 42.1 as the times for delivering payment claims is, the 'reference date'.

49.13.3 Payment Certificate

- (a) A payment certificate issued by the Superintendent under Clause 42.1 is a payment schedule for the purposes of the Act.
- (b) The amount (if any) set out in a payment certificate as the amount of payment which the Principal proposes to make to the Contractor, is the amount of the 'progress payment' (as defined in the Act) calculated in accordance with the Contract which the Contractor is entitled to be paid under the Contract.
- (c) Any failure by the Superintendent to include in a payment certificate an amount which the Principal is entitled to retain, deduct, withhold or set-off from the amount which would otherwise be payable to the Contractor by the Principal will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.

49.13.4 Nominating authority for adjudication

The authorised nominating authority for the purposes of an adjudication under the Act shall be the Institute of Arbitrators and Mediators Australia (Victorian Chapter).

49.13.5 Adjudication Determination

When issuing any adjudication determination the Adjudicator must include in the determination the reasons for the determination.

49.13.6 Subcontractors

If a subcontractor becomes entitled to suspend work under the Act or if the Principal becomes obliged to or entitled to make a payment to a subcontractor or other person engaged by the Contractor to perform work under the Contract, the Principal may (in its absolute discretion) pay the subcontractor or other person any money that is or may be

owing to the subcontract in respect of that work, and the Contract Sum shall be reduced by a sum equal to any amount paid by the Principal.

49.13.7 Indemnity on Subcontractor Suspension

The Contractor shall indemnify the Principal against all damage, expense (including legal costs), loss (including consequential and economic loss) or liability of any nature suffered or incurred by the Principal arising out of a suspension under the Act by a subcontractor of work which forms part of the Works

49.13.8 Lien

If any person becomes entitled to a lien over the Works or any part of the Works by reason of moneys said to be owed to that person by the Contractor, the Principal may in its absolute discretion pay to the subcontractor or person, the amount said to be owed.

The Contract Sum shall be reduced by an amount equal to the amount paid by the Principal together with costs incurred by the Principal in dealing with the lien.”

15 The solicitor for the defendant, Mr B Archer, in an affidavit set out aspects of its argument. The defendant submitted that the *Domestic Building Contracts Act* 1995 applied to the project. Section 14 of that Act provide under the heading “Arbitration clauses prohibited”:

“Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void.”

16 The defendant contended that because of s 14, a construction contract could never contain an arbitration clause of the kind required by the reasoning in *AC Hall Air Conditioning*. Accordingly, any claim to recover an amount due for a variation, regardless of the basis of the claim, would on the plaintiff’s argument, always be a claimable variation under domestic building contracts with a contract value in excess of \$5 million.

17 Mr Archer referred to his professional experience with contracts dealing with significant apartment development complexes with a value in excess of \$5 million. Because of s14 of the *Domestic Building Contracts Act*, he has amended the dispute resolution provisions contained in the standard contracts

for the apartment developments in a manner virtually identical with the amendments, which were made to clause 47 of the present Construction Contract. He did this because the standard dispute resolution provisions contained in those contracts, which required arbitration, were rendered void by s14.

18 The defendant submitted that the words “disputes under the contract” should be given their plain meaning. They incorporated disputes under the SOP Act. Section 14 of the *Domestic Building Contracts Act* was concerned with disputes under the contract pertaining to domestic building and not with the application of, or adherence to the SOP Act. An arbitration clause in a domestic building contract dealing with the SOP Act is not rendered void by operation of s 14 of the *Domestic Building Contract Act*. The SOPA provides separate rights which are capable of being referred to arbitration under clauses 49.13.4 and 49.13.5 of the Construction Contract. Those clauses provided a method for resolving disputes under the contract for disputes relating to the SOP Act. The disputes concerning claimable variations and payment claims were capable of being referred to arbitration by the operation of clause 49.13, even if by reason of s 14 of the *Domestic Building Contracts Act* there could be no operable dispute resolution clause.

19 The rights conferred by the SOP Act and the contractual rights of the parties provided a dual track and the contractual rights operated in addition to those contained in the SOP Act.

20 The defendant submitted that because of the terms of clause 49.13, *prima facie* matters relating to the SOP Act and its application were within the contract and were disputes under the contract. There was therefore a method for resolving disputes under the contract within the meaning of s10A(3)(d)(ii) of the SOP Act. Those disputes were enforceable by arbitration. The adjudicator erred in finding that there was no method for resolving disputes

under the contract of disputes relating to the SOP Act.

21 The plaintiff argued that the expression “method of resolving disputes under the contract” meant a method for resolving contractual disputes and not statutory disputes. Parliament had provided a statutory regime under the SOP Act for the adjudication and review of statutory disputes.

22 Clauses 49.13.4 and 49.13.5 do not contain a dispute resolution method and simply refer to matters relevant to the operation of the SOP Act.

23 The plaintiff argued that a domestic building contract could contain a provision that satisfied the requirements of s10A (3)(d)(ii) of the SOP Act, that would not be rendered void by s 14 of the *Domestic Building Contracts Act*. An example of this was a binding expert determination clause.

Consideration of submissions

24 I prefer the plaintiff's submissions on the issue of whether there is a provision in the Construction Contract of the form required by s10A(3)(b)(ii) of the SOP Act the following reasons.

25 First, I do not consider that clause 47.2 provides a method of resolving disputes under the Construction Contract and I apply the reasoning in *AC Hall v Schiavello*.⁴

26 Secondly, s10A(3)(d)(ii) of the SOP Act refers to a method of resolving all disputes under the contract and not just disputes connected with the operation of the SOP Act. Applying standard principles of statutory interpretation, the word “disputes” should be given its ordinary meaning of referring to all disputes under the contract, whether they relate to the SOP Act or do not.

27 Section 10A (3)(d)(ii) is not to be read as referring just to disputes that may be within the ambit of the SOP Act. It refers to all disputes arising under the

⁴ (Supra)

contract, including those that do not concern the operation of, or procedures of the SOP Act. It is unlikely that the SOP Act was intended to refer only to disputes that fall within that Act itself.

28 The defendant's argument is somewhat circular. It argues that the Construction Contract meets the requirement of the SOP Act by adopting the procedures of the Act itself. However, the procedures of the SOP Act only apply to particular disputes, principally relating to payments under a construction contract and not to all disputes under such contracts.

29 Thirdly, clauses 49.13.4 and 49.13.5 of the Construction Contract supplement procedures under the SOP Act. They supplement the provisions of the Act by naming the authorised nominating authority and requiring the adjudicator to provide reasons in the case of disputes under the Act. They do not provide a dispute mechanism themselves.

30 Fourthly, so far as s 14 of the *Domestic Buildings Contracts Act* is concerned, I accept the plaintiff's submission that there are forms of binding dispute resolution, other than arbitration, that could be contained in a domestic building contract eg an expert determination.⁵ Such determinations would not be rendered void by s14 of the *Domestic Building Contracts Act*.

31 I dismiss the defendant's summons dated 18 September 2012.

⁵ As to the differences between expert determinations and arbitration see the authorities discussed by Croft J in *Bioscience Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249