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

Not Restricted

Case No. CI-05-04479

AGE OLD BUILDERS PTY LTD
(ACN 068 142 638) Plaintiff

V

JOHN ARVANITIS AND GEORGE ARVANITIS Defendant

JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	1st February 2006 and 6th June 2006
DATE OF JUDGMENT:	23rd June 2006
CASE MAY BE CITED AS:	Age Old Builders v John Arvanitis and George Arvanitis
MEDIUM NEUTRAL CITATION:	[2006] VCC 1827

REASONS FOR JUDGMENT

Catchwords: Summary Judgment Application – *Building and Construction Industry Security of Payment Act* 2002, sections 4, 9, 11 and 16 - *Nepean Engineering Pty Ltd v. Total Process Services Pty Ltd* [2005] NSWCA 409 - *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Baker	Bowlen Dunstan & Associates Pty Ltd
For the Defendant	Mr D Cafari	Davis Moloney

HIS HONOUR:

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 By a ABIC MW-1 2003 Contract dated 17 November 2003 ("the Contract"), the plaintiff agreed to construct for the defendants thirty-two apartments and two shops at 100-104 Union Road, Ascot Vale for the sum of $5.1 million dollars.

4 In this application, the plaintiff seeks summary judgment for the sum of $162,222.41. This is the sum claimed in a letter dated 2 November 2005 forwarded by the plaintiff to the defendants. It is headed "Payment Claim" – see sections 4 and 14 of the *Act*. The letter also states that the Payment Claim is made under the *Act* - see section 14(3) of the *Act*. The document states:

> "The construction work or related goods and services in respect of which this Payment Claim is made and the amount claimed for construction work or related goods and services are:
>
> (1) Statement of Account and attachments dated the 28th of October 2005.
>
> (2) Invoice No. 2810 dated the 28th of October 2005.

5 It is common ground that the defendants did not serve a Payment Schedule in accordance with section 15 of the *Act*.

6 The defendants oppose the Summary Judgment Application on a number of

grounds.

7 Firstly, Mr Cafari, who appeared for the defendants, submitted that the plaintiff had not complied with section 14(2) of the *Act* and that therefore the Payment Claim dated 2 November 2005 is not a valid Payment Claim under *the Act*. He referred firstly to a letter dated 17 August 2005 from the plaintiff to the defendants which enclosed a "reconciliation of the account" showing a balance due of $193,974.66. The letter stated:

> "We are happy to meet and review our account and consider any issues you may raise."

8 Attached documents setting out the manner in which the sum claimed was calculated refer to this claim as "Progress Claim 20". Neither the letter nor the accompanying documents state that they are a "Payment Claim" nor do they state that the claim is made under *the Act*. It is not in dispute that on 4 October 2005 the parties met to discuss the claim. Following this meeting, the plaintiff submitted a revised Progress Claim 20 to the defendants dated 6 October 2005 which claimed the sum of $177,970.43. The letter stated that it was in response to the queries raised at the meeting on 4 October 2005. Again, this letter was not stated as being a Payment Claim nor was it stated to be a claim made under *the Act*.

9 On 28 October 2005 the plaintiff forwarded to the defendants the documents referred to in the 2 November 2005 letter. The invoice referred to in that letter was stated to be Progress Claim No. 20.

10 Mr Cafari submitted that the plaintiff had served three Payment Claims in respect of a specific progress payment on 17 August 2005, 6 October 2005 and 2 November 2005, each in different amounts, in breach of section 14(2) of the *Act*. I do not accept this submission.

11 "Payment Claim" is defined in section 4 of the *Act* as meaning "a claim referred to in section 14". The Progress Claims of 17 August 2005 and 6

October 2005, do not state that they are made under the *Act* as required by section 14(3)(c) of *the Act*, nor do they purport to be Payment Claims under *the Act*. By contrast, the claim of 2 November 2005 states that it is a Payment Claim and that it is made under *the Act*.

12 Secondly, Mr Cafari submitted that the lodging of the three claims in close succession created confusion in the mind of the defendants. Mr Cafari submitted that the confusion was compounded by the fact that the plaintiff was well aware that there were disputes between the parties regarding monies claimed, defective works and incomplete works. In my view, there is no substance in this submission. As indicated, only the claim of 2 November 2005 purports to be made under section 14 of the *Act.* This claim is for the same amount and based on the same documents as the claim of a few days earlier on 28 October 2005. There was no point in the plaintiff's forwarding this claim to the defendants unless it had a special status. The plaintiff was quite entitled to bring matters in dispute to a head, as it did, by serving a Payment Claim under section 14 of the *Act*. Any dispute between the parties could then quickly be brought before an adjudicator by the lodging of a Payment Schedule by the defendants.

13 Thirdly, Mr Cafari submitted that the claim of 2 November 2005 was not a valid Payment Claim under section 14 since it was not a "stand alone" document but referred to other documents which had to be referred to for an understanding of the Payment Claim. Again, in my view, there is no substance in this submission. In *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, Mason P., with whom Giles and Santow JJ. agreed, stated, at paragraph 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."

14 The claim of 2 November 2005, in my view, clearly identifies the manner in

which the sum claimed is calculated. Further, there is no evidence before me that the defendants did not understand the manner in which the claim was calculated.

15 Fourthly, Mr Cafari submitted that the claim of 2 November 2005 was not made in accordance with the provisions of the Contract and therefore was not a valid claim under section 14(1) of *the Act*. I am by no means convinced that this is so. When the Contract was executed, it was amended to state that it was to be administered not by an architect but by a designer, CCD Drafting Services. Paul Norrie, a director of the plaintiff, deposes in an affidavit sworn 13 December 2005, that during the course of the works the defendants directed the plaintiff to submit progress claims to their financier who arranged for a quantity surveyor to assess the claims. Then, at the end of July 2005, the defendants changed financiers. The letter of 17 August 2005 from the plaintiff to the defendants commences:

> "We were not paid fully by Donovan Oates Hannaford for our building Contract Works. We assume you have a facility to pay for this through your new financier, the National Bank."

16 There appears to have been confusion as to precisely what the contractual requirements were for claiming progress payments. Mr Cafari submitted that at the time of serving Progress Claim 20 the plaintiff was aware that the previous procedure of submitting claims to the defendants' financier who engaged a quantity surveyor to assess the claim could not be followed. Therefore, he submitted, the procedure for claiming a progress payment reverted to that set out in the Contract which required submission of Progress Claims to the architect. I am far from satisfied that this is so.

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).

19 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". Under the terms of the Contract this is the 15th day of each month. 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.

20 I also note that section 14(1) of *the Act* requires service of a Payment Claim on "the person who under the contract is liable to make the payment", here the defendants. This provision does not require service of the Payment Claim on the person upon whom Progress Claims are to be served.

21 Fifthly, Mr Cafari submitted that the plaintiff is in breach of section 11 of the *Act* in that it failed to value the construction work in accordance with the terms

of the Contract, particularly when it was aware of defective or incomplete works alleged by the defendants. The short answer to this submission, in my view, is that if the defendants were of the view that the construction work under the Contract had not been properly valued, it could have lodged a Payment Schedule under section 15.

22 In my view, the plaintiff has complied with section 14 of the *Act*. No payment schedule has been lodged under section 15 and thus the plaintiff is entitled under section 16 to summary judgment.

23 That would be sufficient to dispose of the application. However, I further note that in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (in liquidation) [2005] NSWCA 409, a decision of the New South Wales Court of Appeal delivered on 10 November 2005, Ipp JA. stated, at paragraph 76:

> "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."

26 Mr Cafari submitted that the plaintiff's claim of 2 November 2005 was not made in good faith since the plaintiff was aware that the defendants were

alleging defects and incomplete work on the part of the plaintiff and in fact on 3 November 2005 allowed a building consultant engaged by the defendants on site to report on these matters. In my view the plaintiff cannot be said to show a lack of good faith by merely using the procedures open to it under *the Act* to bring matters to a head in an effort to resolve the dispute between the parties.

27 In my view, there is no real question to be tried.

28 There will be judgment for the plaintiff in the sum of $162,222.41. I will hear from the parties on the question of interest and costs and give any further directions necessary.