IN THE COUNTY COURT OF VICTORIA

Revised
(Not) Restricted

AT MELBOURNE
COMMERCIAL LIST
BUILDING CASES DIVISION

Case No. CI-14-04020

BEST BALUSTRADES PTY LTD — Plaintiff

v.

APM GROUP (AUST) PTY LTD — Defendant

JUDGE:	His Honour Judge Anderson
WHERE HELD:	Melbourne
DATE OF HEARING:	3 October 2014
DATE OF JUDGMENT:	8 October 2014
CASE MAY BE CITED AS:	Best Balustrades Pty Ltd v. APM Group (Aust) Pty Ltd
MEDIUM NEUTRAL CITATION:	[2014] VCC 1659

REASONS FOR JUDGMENT

Catchwords: Building contract – Progress claims – Whether a single claim was made in respect of sums arising under separate contracts – Whether a claim was made under a "*construction contract*" – Whether there was an "*arrangement under which [the plaintiff] undertakes to carry out construction work*" – Building and Construction Industry (Security of Payments) Act 2002 (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J.A.F. Twigg	HWL Ebsworth
For the Defendant	Mr B. Reid	Thomson Geer

HIS HONOUR:

1 The plaintiff seeks summary judgment from the defendant for $293,482.87 pursuant to the *Building and Construction Industry (Security of Payments) Act 2002* (Vic) ("*the Act*").

2 The plaintiff is a sub-contractor and performed work on two construction projects for the defendant. The claim relates to:

a. a progress claim made on 12 November 2013 for $21,219 (including GST) for work on the Hawthorn Town Hall Gallery project;

b. two progress claims arising from a project in Langhorne Street Dandenong as follows:

i. $10,000 unpaid from a progress claim, although admitted as owing by the defendant in a payment schedule served on 12 November 2013;

ii. $262,263.87 as a progress claim served on 27 November 2013.

1. Hawthorn progress claim - $21,219

3 The defendant submits that the progress claim cannot be enforced under the Act because the claim includes payments owing under more than one contract.

4 It was not disputed by plaintiff's counsel, Mr Twigg, that if a single progress claim includes amounts due under separate contracts, the claim cannot be enforced under s.14 of the Act.

5 The issue for determination is whether the claims included in the plaintiff's invoice dated 23 October 2013 arose from separate contracts. The invoice includes seven items:

a. $9,660 for "*West Ramp Balustrade (Purchase Order No. 4500)*";

b. $2,5002 for "*no.14 Kicker panels*";

c. $3,630 for "*Level One North Balcony Balustrade (Purchase Order No. 4426)*";

d. $1,500 for "*Posts and 2 panels glass*";

e. $980 for "*Stainless Guards*";

f. Two amounts of $10 each for a "*modification*"

6 Defendant's counsel, Mr Reid, relied upon a description by the defendant's Commercial Manager, Mr Stephen Baker, of the arrangement between the parties as an engagement "*on an 'as need basis' by the issuing of discreet described Purchase Orders for minor works*". He submitted that there was no single enforceable construction contract or "*other arrangement*" by which the work was undertaken (to use the words in the definition of "*construction contract*" in s.4 of the Act).

7 If this argument were correct, it would mean that in relation to the plaintiff's invoice, in order for proper claims to be made under the Act, the plaintiff would need to issue separate invoices for at least the first 5 items listed on the invoice.

8 Mr Reid relied upon 3 decisions:

a. in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6, McDougall J held that the equivalent provision in the New South Wales Act only permitted "*one payment per reference date per construction contract*";

b. in *Class Electrical Services v Go Electrical* [2013] NSWSC 363, McDougall J considered that the relationship between the parties in that case was founded on a "*multiplicity of contracts*", rather than an enforceable agreement being spelt out by an "*application for commercial credit*". As McDougall J said at paragraph 13, "*There was nothing in the application for commercial credit to suggest that credit was sought in any particular contracts or subcontracts that [the claimant] proposed to undertake*";

c. in *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, Douglas J considered a "*period sub-contract*" by which the claimant agreed to perform unspecified rectification works to buildings for a lump sum where the respondent issued "*written work orders for certain projects*" which the claimant was entitled to accept or refuse. The claimant was issued nine work orders and was directed to undertake rectification works on five further buildings on a "*do and charge*" basis. Douglas J held that the claim in respect of this work was not made under a single contract or arrangement because the work was

divisible into the work done pursuant to the subcontract and the do and charge work pursuant to a different regime.

9 In the present case, I am satisfied that the claim was made in respect of a single construction contract. The "*arrangement*" between the parties can be distinguished from the different facts in the authorities Mr Reid relied upon:

a. there was a single worksite, the Town Hall Gallery project which was given the job code "*1189*" in the defendant's work orders;

b. work was requested by written purchase order with a stated cost (item (a) in paragraph 5 above), by written order with no stated cost (item (c)), and by email exchange confirming oral agreements (items (b) and (e));

c. the confined period of the work – the orders were discussed between 8 and 23 August, the latter date being the date upon which the invoice was issued.

10 In relation to the invoice, Mr Paul Howard, the Managing Director of the defendant, wrote to the plaintiff by email on 10 December 2013 informing the plaintiff that the invoice "*has been approved for all completed works and will be paid end of this month*". The invoice was not paid. No payment schedule was served by the defendant. Accordingly, the plaintiff is entitled to judgment on this claim and interest.

2. Dandenong payment schedule - $10,000

11 The plaintiff served on the defendant a progress claim dated 24 October 2013 for $71,798.87. On 31 October 2013, the defendant served a payment schedule noting that "*the Total Certified for your claim is $10,000*".

12 The defendant has not yet paid the sum of $10,000. Mr Reid conceded that there was no defence to the claim. Pursuant to s.17(2)(a)(i) of the Act, the plaintiff is entitled to judgment on this claim and interest.

3. Dandenong progress claim - $262,263.87

13 On 27 November 2013, the plaintiff served a progress claim. Mr Reid submitted that the claim could not be made under the Act because:

a. the plaintiff had not established the Act's jurisdiction because it had not

adequately articulated the "*construction contract*" pursuant to which the claim was made;

b. the progress claim did not sufficiently "*identify the construction work*" as required by s.14(2)(c) of the Act.

14 Mr Reid relied upon the following key "*facts*":

a. the only "*construction contract*" relied upon by the plaintiff was a "*letter of intent*" dated 5 August 2013 which authorised the plaintiff to undertake "*shop drawings*" "*capped*" at a cost of $20,000, and the plaintiff was "*not authorised to expend over this amount or undertake any works [apart from the shop drawings]*";

b. around 22 October 2013, the defendant had engaged Riband, another structural steel manufacturer, to "*undertake work that was within [the plaintiff's] original scope of work*". This was identified as "*Stage 1 Grid Lines 1-10*";

c. the plaintiff "did *not start works on site at the Dandenong Project until 26 November 2013*";

d. a "*subcontract works order dated 28 November 2013*" was forwarded by the defendant to the plaintiff that day requiring the plaintiff to perform "*structural steel works*" as set out in the Scope of Works for a price of $968,000.

15 It is clear that the construction work the subject of the plaintiff's claim served 27 November 2013, was not performed pursuant to a construction contract constituted by the letter of intent dated 5 August 2013. However, the letter did signal the defendant's intention to engage the defendant to undertake the structural steel work for the project.

16 The plaintiff submitted that between the date of the letter of intent on 5 August and the date of the subcontract works order dated 28 November 2013, the parties had a "*construction contract*" as defined by the Act, being an "*arrangement under which [the plaintiff] undertakes to carry out construction work*" for the defendant.

17 Pursuant to s.9(1) of the Act the plaintiff was therefore "*entitled to a progress claim*" under the Act "*on and from each reference date*". In the absence of an express

provision for payment in the arrangement between the parties, Mr Twigg submitted that the "*reference date*" for the progress claim served 27 November 2013 was "*20 business days after the previous reference date*".

18 The plaintiff made its first progress claim by the invoice dated 24 October 2013 for $71,798.89. This was the invoice to which the defendant responded with a payment schedule served on 31 October 2013 certifying the plaintiff's claim at $10,000, i.e. the second claim made by the plaintiff in this proceeding.

19 The payment schedule noted that the sum of $10,000 "*is the figure to subtract from your next claims total*". The schedule then contained the statement, "*Remember – all progress claims must be received at Head Office on the 25th of each month*".

20 The relevant invoice constituting the next disputed progress claim is dated 25 November 2013, apparently served on the defendant on 27 November. No payment schedule was served by the defendant and the invoice has not been paid.

21 The two invoices, dated 24 October and 25 November 2013 are very similar. Both claim for the same type of work – "*supply, fabrication and delivery*" for the following areas:

	24/10/13 invoice	**25/11/13 invoice**
Basement level	$38,406.00	$28,406.00
Ground to 1st level	$20,350.00	$203,500.00
1st level to Roof	$6,515.70	$6,515.70
	$65,271.70	$238,421.70
	GST $6,527.17	GST $23,842.17
TOTAL	**$71,798.87**	**$262,263.87**

22 Although it is not clear, it appears that the defendant's payment schedule served 31 October 2013 allowed $10,000 in respect of the basement level. The invoice dated 25 November 2013 claims the balance for that area, as well as the amount previously claimed for the other two areas and a substantial further claim for the "*Ground to 1st level*".

23 Each invoice was supported by a second page containing the calculation of the claims in respect of each of the three areas. This included the total tonnage for each

area, the rate per tonne and the percentage claimed to be complete. In my view, this information was sufficient for the defendant to determine whether there was a proper basis for the claims and to assess what sum, if any, was properly due to the plaintiff. This is precisely what the defendant did in respect of the first invoice dated 24 October 2013 and what it neglected to do in respect of the second.

24 In my view, the inescapable conclusions from these two invoices and the defendant's payment schedule in respect of the first invoice, are that:

a. after the letter of intent dated 5 August 2013, and before the plaintiff served the first invoice on 24 October 2013, the parties had entered into an arrangement under which the plaintiff undertook to carry our construction work for the defendant;

b. the plaintiff had first carried out work under the construction contract at least 20 business days before the first invoice dated 24 October 2013;

c. the parties had sufficiently agreed the basis for determining the value of the works claimed by the plaintiff in the first invoice or, alternatively, if that had not been done, the plaintiff was entitled to the value of the construction work it carried out.

25 These conclusions are supported by statements made by the defendant's deponent Mr Baker and in contemporaneous documents exhibited to the affidavit material, as follows:

a. Mr Baker said that the defendant "*engaged Riband, another structural steel manufacturer, to produce approximately 38.2 tonnes of steel on the plaintiff's behalf. [The defendant] employed Riband around 22 October 2013 who manufactured and delivered steel to site prior to…26 November 2013*". It is noted that the calculation sheet attached to each of the progress claims lists the following quantities of steel for each area:

Basement level	10.38 tonnes
Ground to 1st level	55.00 tonnes
1st level to Roof	17.61 tonnes

b. on 22 October 2013, in response to an email from the defendant dated 18 October 2013, Riband Steel quoted $158,594 to carry out the "*supply, fabrication and delivery only*" of structural steel work at the Dandenong project

"as *shown on shop drawings only*";

c. Mr Baker said that the plaintiff's "*first steel delivery…was originally scheduled for the 30 October 2013, however [the] delivery truck broke down*";

d. on 6 November 2013, the defendant by email requested the plaintiff to "*provide the credit for both the supply & install for the area*" comprising "*grids 1-12 A-O*";

e. Mr Baker said that on 19 November 2013, the plaintiff issued the defendant with "*its steel erection sequence*". This was reviewed by the defendant and approved on 20 November 2013, provided the plaintiff allowed for temporary bracing;

f. on 21 November 2013, the defendant by electronic message, informed the plaintiff that it was "*pouring the remainder of the Ground Floor on Monday 25th of November 2013*". The defendant asked the plaintiff to "*ensure that you can set out and start erection on Tuesday, 26th of November 2013*". There is no evidence, however, as to when the steel for the basement level was erected and when concrete pours occurred in that area, when the first part of the ground floor slab was poured and when the steel for these areas and for the first level upwards was fabricated and delivered to site.

26 In these circumstances, it seems clear that an arrangement was in place between the parties well prior to 24 October 2013, under which the plaintiff undertook to carry out the construction work relating to at least a substantial and defined part of the structural steel work to all levels of the project.

27 That it was at least a substantial part, is clear by contrasting the amount of the Riband quotation dated 22 October 2013 for $158,594 (excluding GST) and the contract value of the subcontract works order for the plaintiff dated 28 November 2013 for $880,000 (excluding GST). The plaintiff's subcontract works order notes as item 54 of the scope of works, "*Ground Floor Steel supply and erection by others Grid 1-12 & A-O*".

28 I consider that the defendant has not shown that it has any real prospect of succeeding in its defence of this aspect of the plaintiff's claim on the basis that either there was no "*construction contract*" upon which the claim was based or that the claim did not adequately identify the construction work undertaken.

29 Even if I were satisfied that there was some substance to the defendant's arguments, I consider that the defendant's failure to serve a payment schedule in respect of the second claim would prevent it from raising these matters at this stage.

30 Section 16(4)(b)(ii) provides that a respondent to a claim who has not served a payment schedule is not entitled in a proceeding commenced by a claimant for an unpaid portion of a progress claim "*to raise any defence in relation to matters arising under the construction contract*".

31 In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq.)* [2005] NSWCA 409, Hodgson JA at paragraph 38 made statements with which Santow JA "*generally*" agreed (paragraph 63) and Ipp JA made comments to similar effect (paragraph 78), as follows:

> *If a payment claim which thus purports to identify the work in respect of which the claim is made is sufficient to support a valid determination…it would in my opinion be wholly inconsistent with the scheme of the Act if it was not also sufficient to support a cause of action under s.15 of the Act in a case where no payment schedule is served. Otherwise, a respondent could avoid the effect of the Act by not serving a payment schedule, and defending the s.15 proceedings by raising a question as to identification, which could be as to just one of many items in a claim and could be such as to depend upon a very detailed examination of all the circumstances of the contract.*

32 Accordingly, the plaintiff is entitled to judgment in respect of this progress claim for $262,263.87. The total sum in respect of which judgment for the plaintiff will be entered is $293,482.87.

33 I will hear further from the parties on the questions of interest and costs.

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Certificate

I certify that the preceding 8 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 8 October 2014.

Dated: 8 October 2014

Catherine Kusiak
Associate to His Honour Judge Anderson