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

Not Restricted

Case No. CI-05-00375

BLUEVIEW CONSTRUCTIONS PTY LTD
(Trading as WRS CONSTRUCTIONS)
ACN 104 182 649

Plaintiff

v

VAIN LODGE HOLDINGS PTY LTD
(ACN 100 253 263)

Defendant

JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	25th and 28th October 2005
DATE OF JUDGMENT:	15 November 2005
CASE MAY BE CITED AS:	Blueview Constructions Pty Ltd v Vain Lodge Holdings Pty Ltd
MEDIUM NEUTRAL CITATION:	[2005] VCC 1325

REASONS FOR JUDGMENT

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Twigg	Holding Redlich
For the Defendant	Mr J Levine	Issac Brott & Co.

HIS HONOUR:

1 On 1 August 2005, I gave judgment for the plaintiff against the defendant in the sum of $195,371.16, together with costs. This judgment was given on the hearing of a summary judgment application pursuant to Rule 22.02. The defendant had not lodged any affidavit material in opposition to the application for summary judgment. Nor did it appear on the hearing of the application. I now have before me an application pursuant to Rule 22.15 to set aside the judgment of 1 August 2005.

2 Mr Twigg, who appeared for the plaintiff, submitted that there were a number of grounds on which I should not exercise my discretion to set aside the judgment, the major ground being that the defendant had no defence on the merits.

3 I turn, firstly, to consider whether the defendant has a defence on the merits.

4 Pursuant to a contract made between the plaintiff and the defendant on or about 9 March 2004, the plaintiff agreed to carry out construction works consisting of seventeen townhouses, garages, services and landscaping for the defendant at Mordialloc. ("the Contract"). The contract price was $3 million.

5 The application for summary judgment was based upon S.16(2)(a) of the *Building and Construction Industry Security of Payment Act* 2002 (the *"Act"*). The plaintiff relies upon the following three progress claims which total $195,371.16:

- Progress Claim No. 10 dated 11 October 2004 for the sum of $81,975.09
- Progress Claim No. 11 dated 26 October 2004 for the sum of $37,771.37
- Progress Claim No. 12 dated 10 November 2004 for the sum of $75,624.70.

6 It is not in issue that the defendant did not serve a payment schedule pursuant

to S.15 of the *Act* in respect of any of the claims, nor is it in issue that the defendant has not paid any of the monies claimed in the three progress claims. By virtue of S.15 and 16 of the *Act,* if the plaintiff has complied with S.14 of the *Act,* the defendant has no defence on the merits. It is thus necessary to consider whether the plaintiff in respect of each of the progress claims has complied with S.14 of the *Act*.

7 S.14 of the *Act* provides:

> "***Payment Claims***
>
> (1) A person who is entitled to a progress payment under a construction contract (the '**claimant**') may serve a payment claim on the person who under the contract is liable to make the payment.
>
> (2) A claimant may serve only one payment claim in respect of a specific progress payment.
>
> (3) A payment claim—
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the '**claimed amount'**);
>
> and
>
> (c) must state that it is made under this Act."

8 S.4 of the *Act* defines "progress payment" as meaning "a payment to which a person is entitled under section 9."

9 S.9 of the *Act* provides:

> "(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; or
>
> (b) . . .
>
> is entitled to a progress payment under this *Act*, calculated by reference to that date.
>
> (2) In this section, '**reference date'**, in relation to a construction

contract, means—

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

. . ."

10 Mr Levine submitted that it was necessary for the plaintiff to show in respect of each of the three progress claims that there was a progress payment due and payable in accordance with the terms of the Contract, that it had not done so and that therefore the defendant had an arguable defence on the merits. In *Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina* [2002] NSWSC 960, Macready A.J., in considering a similar provision to S.14(1) of the *Act* contained in S.13(1) of the NSW *Building and Construction Industry Security of Payment Act* (1999) ("the NSW Act") concluded that entitlement to a progress payment did not refer to a contractual entitlement. He stated:

"52 The defendant's submissions focused upon the provisions of s.13(1) of the Act to reach a conclusion that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act. In some writings on the Act and its Victorian equivalent, this view has been advanced. . . .

. . .

60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See s.3(1), s.3(4)(a) and s.32. The parties cannot contract out of the Act (see s.34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s.12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words 'person who is entitled to a progress payment under a construction contract' in s.13(1) refers to a contractual entitlement.

61 The trigger that commences the process that leads to the statutory rights in s.15(2) is the service of the claim under s.13. That can only be done by a person who 'is entitled to a progress payment under a construction contract'. The words 'progress payment' are

> a defined term in the Act. It means a payment to which a person is entitled under s.8. That section fixes the time of the 'entitlement' given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. S.9 deals with the amount of such a statutory progress payment. Importantly, s.9 uses similar words to s.13 in that it refers to 'a progress payment to which a person is entitled in respect of a construction contract' and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.
>
> 62 S.11 then deals with the due date for payment in respect of 'a progress payment under a construction contract'. It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.
>
> 63 Thus s.13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:-
>
> > 'ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.'"
>
> 64 In my view the submissions of the defendant are simply not arguable."

(I do not pause to give all cross-references of the NSW Act in the *Act*, except to indicate that sections 8 and 9 of the NSW Act are similar to sections 9 and 10 respectively of the *Act*.)

11 S.3(1) of the *Act* states the object of the *Act* in virtually identical terms to those contained in paragraph 63 of *Beckhaus.*

12 This decision was followed by Nicholas J. in *Walter Construction Group Limited v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 (see particularly at

paragraphs 52 and 53) and in *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd* [2005] NSWSC 45 (see paragraph 46).

13 Mr Levine sought to rely upon the New South Wales Court of Appeal decision in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2003] NSWCA 4, which by a majority set aside the summary judgment entered by Macready A.J. at first instance. This decision was followed by the Court of Appeal in *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* (2004) VSCA 18. I note, however, that the majority in the New South Wales Court of Appeal in *Brewarrina Shire Council* made no reference to the comments of Macready A.J., which I have referred to above. Indeed, it made no reference at all to the provisions of the New South Wales Act. Further, in *Walter Construction*, Nicholas, J. stated, at paragraph 52, following the quotation of paragraphs 60 to 65 of Macready A.J.'s judgment in *Beckhaus):*

> "There was no challenge to these findings in the appeal from His Honour's order for summary judgment: *Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) NSWCA 4.*"

14 The contract in *Aquatec-Maxcon* was entered into in February 1997, well before the coming into operation of the *Act* on 31 January 2003. *Aquatec-Maxcon* makes no reference to the *Act.*

15 In my view, it is appropriate to follow the approach taken by Macready A.J. and Nicholas J. in the cases cited. Thus I conclude that the plaintiff was under no obligation pursuant to S.14(1) of the *Act* to show compliance with the provisions of the Contract.

16 Mr Levine further submitted that in respect of Progress Claim 11, there was no entitlement to a progress payment since the Contract provided in Special Condition N3.2:

> "The contractor may submit to the architect one claim for a progress claim in each month, on or after the date in each month shown in item 25 of schedule 1, unless a different date is agreed in writing between the contractor and the owner."

17 Item 25 originally provided for the last working day of each month as being the date for submitting Progress Claims. This has been deleted and replaced by the 10th and 25th days of each month as being the date for submitting the Progress Claims.

18 Progress Claim 10 dated 11 October 2004 was made on 26 October 2004 and Progress Claim 11 dated 26 October 2004 was also made on that date. I note, however, that Wayne Spooner, the sole director of the plaintiff company, deposes in his affidavit dated 18 July 2005, that prior to the completion of signing of the Contract documentation between the parties an agreement was made with Alan Burlock on behalf of the defendant that the dates for submitting progress payments would be the 10th and 25th days of each month in lieu of the last working day of each month and that Items 24 and 25 of Schedule 1 to the Contract were amended accordingly by hand to reflect this. He concluded, in paragraph 6:

> "Those amendments reflect the agreement between Alan Burlock and me."

19 There is no affidavit material filed by the defendant to suggest that the payment terms were otherwise. Mr Levine submitted that Special Condition N3.2 refers to only one claim for a Progress Payment, not 2 claims as provided for in the amended item 25, and that if there is any inconsistency Special Condition N3.2, being a special condition, should prevail. In my view, there is no substance in this submission, given the undisputed evidence by Spooner as to the amendment made to the Contract prior to execution. Further, in any event, Special Condition N3.2 is concerned with the making of Progress Claims to the architect, not with the making of Progress Claims by the plaintiff to the defendant.

20 Thus, I conclude that the plaintiff was "entitled to a progress payment under a construction contract" (S.14(1) of the *Act*) with respect to each Progress Claim.

21 Mr Levine next submitted that Progress Claim 11 infringed S.14(2) of the *Act*, in that a covering facsimile from the plaintiff to the defendant attaching the claim, stated:

> "Please find the attached revised invoice of claim 11.
>
> Please disregard previous fax. The claim had an error in it."

22 "Payment claim" is defined in S.4 of the *Act* as meaning a claim referred to in S.14. Thus "payment claim", as used in S.14(2) of the *Act*, means a claim which complies with S.14. There is no evidence before me to show that the previous Claim 11 complied with S.14. For example, it may not have stated that it was made under the *Act* as required by S.14(3)(c) of the *Act*. The onus is on the defendant to establish that the earlier Claim 11 complied with the *Act*. It has not done this. I reject the defendant's submission on this issue.

23 Mr Levine next submitted that S.14(3)(a) has not been complied with in respect to each of the claims.

24 S.13(2)(a) of the *NSW* Act is in virtually identical terms to S.14(3)(a) of the *Act*. It has been the subject of considerable judicial comment, to which I referred at some length in *AMD Formwork Pty Ltd v Yarraman Construction Group Pty Ltd* (3 August 2004). I concluded there, at paragraph 20:

> "As appears from these extracts, the more recent judicial approach is to move away from an overly strict interpretation of the S.13 of the NSW Act as suggested by Austin J. in *Jemzone* and adopt a more practical approach, recognising that progress claims are made in the course of a busy construction project and without the opportunity to descend to drafting niceties. It is sufficient if the payment claim tells the recipient enough to enable it to lodge a payment schedule in response, if thought appropriate. I adopt this approach to S.14."

25 Progress Claim 10 for the sum of $81,975.09 contains no detail of the construction work in relation to which the claim is brought, apart from the following:

> "Note:
>
> Variations Claim 7 of $36,558.31 plus GST to be included in this claim."

26 I note that there is no affidavit material filed on behalf of the defendant suggesting that the defendant was not aware of the manner in which Progress Claim 10 was calculated. Indeed, a facsimile from the defendant to the plaintiff dated 28 October 2004 suggests otherwise. It states:

> "Dear Wayne
>
> We have been examining your claims 9, 10 & 11, we require an explanation immediately in writing:
>
> 1 Why have you drawn $123,615.00 for plumbing this seems excessive in the extreme for the work done;
>
> a Please provide details of work done and payments made to plumbers;
>
> 2 Why have you drawn $110,832.00 for electrical this seems excessive in the extreme for the work done;
>
> a Please provide details of work done and payments made to electricians."

27 Still, I am of the view that some construction work must be identified in a progress claim for it to comply with S.14(3)(a) of the *Act*. In Progress Claim 10, the only construction work identified is that referred to in Variation claim no. 7 for $36,558.31 plus GST, i.e. $3,655.83, a total of $40,214.14. I am of the view that Progress Claim 10 only complies with S.14(3)(a) of the *Act* to the extent of the claim for this sum.

28 Progress Claim 11 for $37,771.37 had attached to it a sheet showing the amount claimed for ten items totalling $38,152.90. After deducting 10% retention from this sum and adding 10% GST, a net figure results of $37,771.37, the amount of the claim. A similar procedure was followed with respect to Progress Claim 12 for the sum of $75,624.70 where the sum claimed for ten items was detailed. In the absence of any affidavit material from the defendant suggesting that the information provided was not sufficient for it to be able to assess the claim and given the facsimile of 28 October 2004 from the defendant to the plaintiff, so far as Progress Claim No. 11 is concerned, I am satisfied that S.14(3)(a) of the *Act* has been complied with in respect of Progress Claims 11 and 12.

29 It is not in dispute that the three payment claims complied with S.14(3)(c) of the *Act*.

30 I thus conclude that there has been compliance with S.14 of the *Act* with respect to the three claims, apart from the sum of $41,760.95, being the difference between the sum of $81,975.09 claimed in Progress Claim No. 10 and the value of the variations, including GST, included in Progress Claim No. 10. To put it another way, the defendant, in my view, only has an arguable defence on the merits for the sum of $41,760.95.

31 I turn to consider other matters relevant to the exercise of my discretion to set aside the summary judgment.

32 The only explanation given by the defendant for non-appearance on the hearing of the summary judgment application on 1 August last is contained in paragraph 8 of an affidavit of Alan Burlock, a director of the defendant, sworn 21 September 2005. This paragraph states:

> "The Plaintiff failed to attend the hearing on 1 August 2005 and is applying to set aside the default judgment, due to the fact that I was in the Supreme Court in another matter and, due to the stress and pressure that the other hearing was causing me to suffer in relation to dangerously high sugar levels caused by type 2 diabetes, I was unable to properly attend to all my matters and I must have inadvertently forgotten about this matter. I also believed, that the Plaintiff's application could not possibly have been proceeded with, when they had not properly complied with court orders regarding the provision of further and better particulars of the Statement of Claim. Now produced and shown to me and marked Exhibit "ADB 9" is a copy of the orders dated 3 May 2005. Now produced and shown to me and marked Exhibit "ADB 10" is a copy of the Request for Further and Better Particulars and the Answers thereto."

33 It is of real concern that there is no affidavit material before me from the defendant's solicitors on the record stating the reason for their non-attendance on 1 August 2005. Further, in any event, Rule 1.17 provides that a corporation can only appear by its solicitor, and thus the explanation given by Alan Burlock for his non-attendance appears somewhat irrelevant. No satisfactory explanation has been given, in my view, for the non appearance

of the defendant on 1 August 2005.

34 Mr Twigg, who appeared on behalf of the plaintiff, stated that the judgment entered on 1 August 2005 was brought to the defendant's attention on 16 August 2005. Mr Levine, who appeared for the defendant, did not suggest otherwise. The application to set aside the judgment was made only approximately five weeks later, on 21 September 2005. A prompter application might have been expected.

35 So far as prejudice to the plaintiff is concerned, Mr Twigg stated from the bar table without objection that a Magistrates' Court judgment in the sum of $27,800.00 has been obtained against the defendant, subsequent to 1 August 2005, and that unless the plaintiff's judgment is enforced shortly, any payments ultimately received by the plaintiff may be regarded as a preferential payment.

36 A further relevant consideration is that pursuant to s.47 of the *Act*, the defendant is not precluded from pursuing its claims for breach of the Contract alleged in Alan Burlock's affidavit of 21 September 2005.

37 In all the circumstances, despite the matters just canvassed in paragraphs 33 to 37, I am prepared to allow the defendant leave to defend the proceeding in the sum of $41,760.95, the amount for which, in my view, there is an arguable defence on the merits. I set aside the judgment entered on 1 August 2005 in part to reflect this so that there will now be judgment for the plaintiff in the sum of $153,610.21, together with costs to be taxed on Scale "D". I will hear from the parties with respect to costs of this application and any further directions necessary.