IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST
BUILDING CASES DIVISION

Case No. CI-12-00352

DRAKK CONSTRUCTIONS PTY LTD (ACN 124 703 457) — Plaintiff
v
SANDOWN ROAD INVESTMENTS PTY LTD (ACN 128 468 968) — Defendant

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JUDGE:	HIS HONOUR JUDGE GINNANE
WHERE HELD:	Melbourne
DATE OF HEARING:	14 March 2012
DATE OF JUDGMENT:	27 March 2012 (revised)
CASE MAY BE CITED AS:	Drakk Constructions Pty Ltd v Sandown Road Investments Pty Ltd
MEDIUM NEUTRAL CITATION:	[2012] VCC 307

REASONS FOR JUDGMENT

Catchwords: Building and Construction Industry – security of payment – progress payment claim- service on bank's quantity surveyor – whether agent of superintendent – whether valid payment schedules - *Building and Construction Industry Security of Payment Act* 2002 ss 14, 15, 16 and 17

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J F Richardson	Oldham Naidoo Lawyers
For the Defendant	Mr J A F Twigg	Melbourne Legal Chambers

HIS HONOUR:

1 The plaintiff seeks summary judgment, principally pursuant to s.17(2)(a)(i) of the *Building and Construction Industry Security of Payment Act* 2002 (the Act) when read in combination with s.16 in the sum of $292,697.03 plus interest and costs under contract. The summons relies on Order 22 of the *County Court Civil Procedure Rules* 2008. The test for summary judgment in s.61 of the *Civil Procedure Act* 2010 is whether the plaintiff has established that the defendant's defence has no real prospects of success. In applying the provisions of the Act, the authorities suggest that the Court should not adopt a technical approach but look at the purpose for which the legislation was enacted.

2 The evidence establishes that there was a construction contract between the plaintiff and the defendant made on or about 29 October 2010 to construct 11 apartments at Ascot Vale. The plaintiff's claim deals with two payment claims, the first of which is pleaded to have been served on the superintendent under the contract and is dated 25 November 2011 in the amount of $537,920 excluding GST. The superintendent issued a payment schedule, so the pleading alleges, in respect of the first payment claim in the amount of $469,908.83 which, when GST is included, equates to $516,899.71 on 6 December 2011. The defendant paid the plaintiff the amount of $346,414 on 20 December 2011. The plaintiff claims the balance of the first scheduled amount as it is pleaded of $170,485.71 including GST.

3 The plaintiff then served a second payment claim on 19 or 20 December 2011 for the amount of $320,465.97 including GST. The superintendent, so it is pleaded, issued a payment schedule in respect of the second payment claim in the amount of $111,101.20 excluding GST on 22 December 2011, which equates to the sum of $122,211.32. The defendant has not paid the plaintiff any of the second payment claim.

4 The plaintiff also claims interest at 18 per cent and has made a claim for work and labour done, but that is not a matter to be determined at this stage of the proceeding.

5 Mr K Drakopoulos, a director of the plaintiff, swears in a supporting affidavit that in April 2011 he attended a meeting of the defendant's unit holders, including Mr Abate. He swears that as a result of that discussion, the parties adopted a process whereby the plaintiff company would serve progress claims on Napier & Blakely, which is a firm of quantity surveyors, engaged by the Commonwealth Bank, which in turn was providing finance to the defendant. The process also involved Napier & Blakeley assessing the particular claim in the manner of a superintendent and issuing an assessment certificate in response. The plaintiff would then issue a tax invoice for the sum certified by Napier & Blakeley. The defendant, would make payments in accordance with the tax invoice.

6 Mr Drakopoulos swore an affidavit in reply explaining the background to the adoption of the process. He learned that the Commonwealth Bank had engaged Napier & Blakeley to assess each progress claim served by the plaintiff on the defendant and that the Commonwealth Bank would only release funds on behalf of the defendant to the plaintiff in accordance with Napier & Blakeley certificates. He therefore suggested that the process be adopted. He swears that the process was followed on seven occasions between April 2011 and November 2011, and payment was made for and on behalf of the defendant on each of those seven occasions. On each of those seven occasions, it appears that the plaintiff, after having received the assessment certificate from Napier & Blakeley, served tax invoices for the amounts assessed on Mr Abate by email.

7 Mr Drakopoulos swears that both of the payment claims the subject of this proceeding were issued to Lindsay Henderson of Napier & Blakeley who then

issued schedules or certificates envisaged by the process.

8 In respect of the first payment claim, the defendant electronically transferred $346,414 to the plaintiff's account on 20 December 2011, which according to the plaintiff, was part payment of the first payment claim.

9 The plaintiff also filed affidavits of Mr J Tamowicz, a project manager employed by the plaintiff, who is responsible for managing the Ascot Vale project, and Ms R Cascone, accounts manager, who set out the details of the earlier progress claims and swore as to the service of copies of tax invoices on Mr Abate.

10 The defendant raises four points of defence, each of which I need to consider. The first point is that, contrary to the provisions of clause 37 of the contract and s.14(1) of the *Act*, the plaintiff did not serve the progress payment claims on the superintendent/defendant. Clause 37.1 of the contract states in part:

> "Each progress claim shall be given in writing to the *Superintendent* and shall include details of the value of the *WUC* and may include details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract*."

Clause 7 of the Contract deems the notice to have been given and received if addressed or delivered to the relevant address in the Contract, or last communicated in writing to the person giving the notice.

11 Section 14(1) of the Act provides that:

> a person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on a person who, under the construction contract concerned, is or may be liable to make the payment.

12 The first point relied on by the defendant was that the payment claims had not been properly served on the superintendent of the project. The superintendent initially was the defendant. The relevant paragraphs in the statement of claim plead that progress claims could be made on the 25th of each month. Progress certificates would be issued by the superintendent

within 14 days of receipt of progress claims.

13 According to the affidavit of Mr C Abate, a director of the defendant, he initially was appointed the representative of the superintendent and thereafter a Mr S Torre of the project architects, was appointed the superintendent's representative.

14 The plaintiff disputes that Mr Torre was ever validly appointed. The payment claims the subject of the claim were served by the plaintiff on Napier & Blakeley.

15 Most of the payments made to the plaintiff as part of that process were paid directly by the Commonwealth Bank, but not all of them. Some appear to have been paid directly by the defendant.

16 The defendant asserted that no agreement in the terms sworn to by Mr Drakopoulos had been made and that Napier & Blakeley did not purport to act on its behalf or represent its interests. The defendant relied on a plaintiff's solicitor's letter of 22 December 2010 to point to a different version of the process than that which Mr Drakopoulos has sworn to. However, I do not consider that any discrepancies between the two versions of the process are material for present purposes.

17 Mr Abate swears that the Bank appointed as its agents the quantity surveyors, Napier & Blakeley Pty Ltd, for the purposes of assessing on its behalf the quality and value of the completed construction works under the contract prior to the Bank paying the relevant progress claims. Napier & Blakeley has at all times acted, and continues to act, as agent on behalf of the Bank and on its instructions. It has never acted for the defendant. Mr Abate exhibited documents to demonstrate that Napier & Blakeley was performing services for the Bank. In paragraph 16 of his affidavit, Mr Abate denies the statements made in paragraph 9 of Mr Drakopoulos's affidavit, which I interpose related to

the establishment of the process, and says that: (a) the defendant did not adopt the alleged process, and (b) the defendant was not served with any progress claims. Mr Abate states that no progress claim has ever been served by the plaintiff on the defendant as alleged. He did not receive the progress claims the subject of this litigation until 31 January 2012 when he requested the Bank to provide him with a copy of each of the reports prepared by Napier & Blakeley. It does appear from the plaintiff's affidavits that in most instances, the tax invoice that the plaintiff issued following the Napier & Blakeley certificates were served on the defendant.

18 The defendant referred to a side deed made between the plaintiff, the defendant and the Bank under which the plaintiff:

> (a) acknowledged that Sandown's estate and interest in the Contract is mortgaged to the Bank;
>
> (b) consented to the Contract being subject to the Bank's facility agreement with Sandown on the terms and conditions set out in the Deed,
>
> …
>
> (f) agreed that notwithstanding any contrary provision contained in the Contract,
>
> > (i) progress claims are to be paid by the Bank 15 business days after written requests for payment
> >
> > (ii) it will not, otherwise waive, amend or vary the terms and conditions of the Contract or change the scope, nature or sequence of the works without the prior written consent of the Bank.

19 The defendant relied on the fact that the statement of claim pleaded that service had occurred on the superintendent and, argued that service on Napier & Blakeley was not service on the superintendent. Therefore, the payment claim had not been served in accordance with s.14 of the Act. However, in my opinion, if the plaintiff's case otherwise provided proof at the level required to obtain summary judgment, that Napier & Blakeley was the agent of the superintendent, the pleading point raised by the defendant would

not provide an answer. It is not uncommon in summary judgment applications for the supporting affidavits to act as particularisation of a generally worded statement of claim.

20 The defendant also argued that the process alleged by the plaintiff contemplated service of the progress claims on both Napier & Blakeley and the defendant. It was argued that there was no room to imply a term of service on Napier & Blakeley as substitution for service on the superintendent and that clause 43 of the contract prohibited any variation other than in writing.

21 The questions whether service of progress claims or, responses to progress claims by way of payment schedules, can be served on an agent of a defendant or an agent of the superintendent were considered by Vickery J in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*[1]. His Honour stated that a payment claim may be served upon any person who, under the contract concerned, is or may be liable to make the payment or has the actual or ostensible authority of such a person to accept service[2].

22 The issue therefore is whether the plaintiff has established, at the level of proof required for a summary judgment application, that Napier & Blakeley or its employee, Mr Henderson, had the actual or ostensible authority of the defendant to accept service of progress claims or to serve payment schedules. Related to this issue is the question whether Napier & Blakeley was acting as agent of the superintendent, or was it acting in some other capacity, perhaps as the person stating or recommending the amount of money that the Bank was willing to provide.

23 The defendant's material does not explain why it has approved, or not opposed, the course by which the previous seven payments were made. It

1 [2010] VSC 199
2 Supra at [142] and [156]- [157]

also does not explain how it was that the payment of $346,414 towards the first progress claim was made.

24 I am prepared to assume for present purposes that a Bank's quantity surveyor could be an agent of the superintendent if the necessary facts were established to identify their actual or ostensible authority.

25 Much of the evidence indicates that a process of the kind described by Mr Drakopoulos was in place. The course of previous payments is a significant consideration. However it is not decisive at this stage of the proceeding.

26 The question whether a person is an agent requires consideration of all the evidence about the arrangement. While there is much to support the plaintiff's case, in my opinion, the conflict in affidavits and a consideration of all the material does not establish to the requisite level that Napier & Blakeley or Mr Henderson were acting as agent for the superintendent. I express no concluded opinion about the matter. The evidence presented at trial may require a different conclusion. All I can determine is whether the plaintiff's claim has been established to the level required by a summary judgment application. I do not consider that it has been so established.

27 I then consider the three other points raised by the defendant.

28 The second defence was that the Napier & Blakeley certificates were not payment schedules as required by s 15 (1) of the Act. If I had considered that Napier & Blakeley was shown to be the agent of the defendant or the superintendent , I would have considered that in the case of the first payment claim this second defence had no real prospects of success. In my opinion, the Napier & Blakeley certificate in respect of the first payment claim responded in terms that were capable of being understood by the parties and they in fact acted on it.

29 The position is different in respect of the Napier & Blakeley document said to be the certificate and payment schedule in respect of the second payment claim. In that case the defendant relied on the accompanying email from Napier & Blakeley which commences with the words:

> "I have had a quick look through the claim and have a few queries which I think we will need to discuss in the New Year".

30 It is unclear from the whole of that correspondence whether the Napier & Blakeley document in respect of the second payment claim was intended to be a definitive estimate or statement of the amounts that Napier & Blakely was indicating were appropriate to be paid.

31 The plaintiff for this additional reason has not established that the defendant's defence to the second claim has no real prospects of success.

32 Counsel for the plaintiff contended in reply that if, the second Napier & Blakeley document did not satisfy the statutory and contractual requirements, then summary judgment could be obtained for the amount of the second payment claim under s.16. I do not accept that submission. The summary judgment application to be determined relies on proof that the process referred to by Mr Drakopoulos has been followed and not on an argument that a payment schedule has not been provided.

33 The third defence was that, contrary to s.14(2) of the Act, the payment claims did not describe the work performed. Section 14(2) contains the requirements of a payment claim. The issue does the payment claim purport reasonably on its face to state what s.14(2) requires. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor*[3], Vickery J stated that the requirements of s.14 should not be approached in an overly technical manner. I consider that the payment claims do adequately describe the work performed.

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3 [2009] VSC 156 at [53]

34 The fourth defence was that the second payment claim was premature and should only have been issued on 25 December 2011 and therefore the progress claim dated 20 December was served prematurely. The payment claim was a prospective claim and was ineffective when the certificate or schedule was given under the contract and the Act. I accept that argument but, in my opinion, once the certification had occurred, the payment claim became valid. That was the approach of Vickery J in the *Metacorp* case[4]. A claim can be delivered prematurely if, on the face of the progress claim, it was a genuine claim to a progress payment. It then becomes valid from the date that the payment was due under the contract.

35 The argument whether a premature payment schedule responding to the service of a premature payment claim is valid has not been considered in any authority to which I was referred. Although it is a technical argument I consider that it cannot be said to have no real prospects of success. I would therefore, for that additional reason, have not granted summary judgment in respect of the second claim.

36 Finally, there were a number of other issues raided in Mr Abate's affidavit about defects in the work and counter claims. These matters were not pressed in oral submissions and I express no view upon them.

37 For those reasons, I dismiss the plaintiff's summons seeking summary judgment.

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4 Supra at [107]