

IN THE COUNTY COURT OF VICTORIA

Not Restricted  
Revised

AT MELBOURNE  
CIVIL DIVISION  
COMMERCIAL LIST  
BUILDING CASES DIVISION

Case No. CI-12-03757

ADAM WOOD GROUP PTY LTD (ACN 146 969 914)

Plaintiff

v

PROCON BUILDERS PTY LTD (ACN 114 835 282)

Defendant

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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 2002

**REASONS FOR JUDGMENT**

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BUILDING CONTRACT- payment claim - whether plaintiff is or claims to be entitled to a progress payment - contractual requirement for statutory declaration - payment schedule - summary judgment granted- *Building and Construction Industry Security of Payment Act 2002* ss 14,15 and 17

<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 The plaintiff seeks summary judgment in the sum of \$16,905.22 under s17(2)(a)(i) of the *Building and Construction Industry Security of Payment Act* 2002 ( the SOP Act).

2 The plaintiff's claim is supported by an affidavit of Mr M Cafasso, who is a director of the plaintiff. The plaintiff carried out the design and construction of eight residential apartments in Malvern pursuant to a written agreement made on 1 November 2010. The formal instrument of agreement attached AS4300-1995 general conditions of contract for design and construct.

3 This proceeding concerns the same Construction Contract as does proceeding C-12-4329 between the same parties in which a judgment was also delivered this day relating to an application to set aside a judgment given under s28R of the SOP Act.

4 The supporting affidavit of Mr Cafasso states that on 28 May 2012 under the Construction Contract, he, on behalf of the plaintiff emailed the defendant's Superintendent Progress Payment Claim No.19 for \$950,243.53 for payment of construction works completed to that time.

5 On 11 June 2012, the defendant's Superintendent emailed a payment certificate to the plaintiff being Progress Valuation No.19, in response to Progress Claim No.19. The Superintendent's accompanying letter dated 11 June 2012, stated in part:

“Please find attached a copy of the nineteenth valuation.

Payment after retention: \$16,905.22.”

6 The Progress Valuation contained calculations showing how the sum of \$16,905.22 was reached.

7 The defendant relied on the defence that the plaintiff did not serve a statutory

declaration as required by the Contract. Clause 43.2 of the Contract stated:

**“PAYMENT OF SUBCONTRACTORS**

With each claim for payment under Clause 42.1, the Contractor shall give to the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of work under the Contract.”

Clause 42.1 deals with payment claims, certificates, calculations and time for payment.

8 To obtain summary judgment, the plaintiff has to establish that the defence relied on by the defendant has no real prospects of success: see s62 of the *Civil Procedure Act 2010*.

9 Section 14 (1) of the SOP Act states under the heading “Payment Claims”:

“ 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 the person who, under the construction contract concerned, is or may be liable to make the payment.”

10 The plaintiff contended that the words, “entitled to a progress payment” in s14(1) of the SOP Act did not require satisfaction of any contractual precondition to payment before an entitlement to serve a payment claim arose. The plaintiff referred to New South Wales authority that “entitled to a progress payment” meant entitled under the SOP Act and did not require satisfaction of any contractual precondition to payment before that entitlement arose eg by provision of a Superintendent’s certificate.<sup>1</sup>

11 The defendant contended that it was necessary for the plaintiff to provide a statutory declaration in accordance with clause 43.2 and that the plaintiff could not have a *bona fide* belief in an entitlement to a progress payment unless it had done so. The provision of a statutory declaration was a prerequisite to issuing a payment claim. In any event, the determination of what clause 43.2

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<sup>1</sup> *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 [55]

required was a matter for trial.

12 The effect of s 14 (1) of the SOP Act was discussed by Vickery J in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*<sup>2</sup> and *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd*.<sup>3</sup>

13 In *Metacorp Australia*, Vickery J stated:

“In contrast under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons ‘who claim to be entitled’ to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.”<sup>4</sup>

14 In the second decision, *470 St Kilda Road*, Vickery J stated:

“There is no implied precondition to the making of a valid payment claim under s14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.”<sup>5</sup>

15 The defendant also relied on the decision of the Victorian Court of Appeal in *Aquatec Maxcon Pty Ltd v Minson Nacap Pty Ltd*<sup>6</sup> that the provision of sufficient information or evidence to support a payment claim was a condition precedent to the issue of a payment certificate by the Superintendent.

16 The affidavit by the solicitor for the defendant, Mr B Archer, stated that on 30 September 2011 the plaintiff, the defendant and Alice Road Investments Pty Ltd, which was a related corporation to the defendant, entered into an agreement with the Australian New Zealand Banking Group Ltd, as the financier of the project, pursuant to a Tripartite Agreement. The affidavit also states that pursuant to the terms and conditions contained in clause 43 of the

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2 (2010) 30 VR 141 at [101]

3 [2012] VSC 235

4 (2010) 30 VR 141 at [101]

5 [2012] VSC 235 [47]

6 [2004] VSCA 18 at [23]-[26]; see also *Simcorp Developments and Construction Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162

head Contract and clause 2.5 of the Tripartite Agreement, the plaintiff confirmed its obligation to provide a statutory declaration verifying the payment by it of its employees and subcontractors of all monies due and payable to them from progress payments previously made by the defendant as a precondition for the lodgement of a new payment claim.

17 The affidavit also stated that between September 2011 and May 2012, the defendant provided statutory declarations as required under the Tripartite Agreement with respect to progress claims 14 to 18. the plaintiff failed to provide a statutory declaration in any form to the financier's quantity surveyor with respect to progress claims 19 and 20, despite being required to do so by the Tripartite Agreement and being requested to do so by the defendant's Superintendent and the financier's quantity surveyor. The quantity surveyor did not approve the draw down from the defendant's finance facilities of payments for payment claims 19 or 20 because of the plaintiff's failure or refusal to provide the requisite statutory declaration.

18 The defendant at one point alleged that the amount of \$16,905.22 claimed by the plaintiff or part of it was the subject of adjudication determination in respect of payment claim 20. However, that point was not pursued.

### **Consideration of submissions**

19 I consider that the plaintiff was a person who claimed to be entitled to a progress payment within the meaning of s14(1) of the SOP Act. The amount of that payment, was the amount that the defendant had assessed as due under Progress Valuation 19.

20 The plaintiff claims precisely the amount that the defendant in Progress Certificate 19 indicated that it was entitled to receive.

21 The authorities concerning the SOP Act and its New South Wales counterpart are to the effect that regard must be has to the words of the section in order to

determine whether the plaintiff has established a right to serve a payment claim. It is not necessary for a plaintiff to establish its right under the contract to recover the amount claimed in the payment claim in order to serve a payment claim. There a number of decisions of Judge Shelton in this Court which reach the same conclusion.<sup>7</sup>

22 In the circumstances of this case, I do not consider that the failure of the plaintiff to serve a statutory declaration prevents the plaintiff being a “person who is or who claims to be entitled to a progress payment” within the meaning of s14(1) of the SOP Act.

23 The fact that the plaintiff had previously provided statutory declarations does not determine the ambit of the requirements created by s14(1). Nor do the requirements of the Tripartite Agreement.

24 The SOP Act demonstrates a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality.<sup>8</sup> However, apart altogether from that policy, I consider that the plaintiff's claim is supported by the plain meaning of s 14(1) of the SOP Act.

25 There being no other matter relied on by the defendant, I consider that the plaintiff has established that the defendant's defence has no real prospects of success.

26 The plaintiff is therefore entitled to judgment for the sum claimed: \$16,905.22.

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<sup>7</sup> See *Christos Charisiou Building Group Pty Ltd v Geospec Pty Ltd* [2006] VCC 1831 [13]

<sup>8</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [46]