

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
Suitable for publication

AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Case No. CI-14-05668

BARON FORGE CONTRACTORS PTY LTD

Plaintiff

v.

VAUGHAN CONSTRUCTIONS PTY LTD

Defendant

JUDGE: His Honour Judge Cosgrave
WHERE HELD: Melbourne
DATE OF HEARING: 12 October 2015
DATE OF JUDGMENT: 15 October 2015
CASE MAY BE CITED AS: Baron Forge Contractors Pty Ltd v. Vaughan Constructions Pty Ltd
MEDIUM NEUTRAL CITATION: [2015] VCC 1424

REASONS FOR JUDGMENT

APPEARANCES:

For the Plaintiff

For the Defendant

Counsel

Mr Benjamin Reid

Mr Liam Connolly

Solicitors

Thomson Geer

Piper Alderman

HIS HONOUR:

Introduction

- 1 By an originating motion and summons dated 17 November 2014 the plaintiff, (“Baron Forge”) sought the following orders:
 - (a) judgment for the plaintiff in the sum of \$537,397.1 (excluding GST) pursuant to section 16(2)(a) of the *Building and Construction Industry Security of Payment Act 2002 (Vic)* (“the SOP Act”); and
 - (b) interest on the claimed amount pursuant to section 12(2)(b) of the SOP Act at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1993 (Vic)*; and
 - (c) the defendant pay the plaintiff’s costs of the proceeding.
- 2 Baron Forge relies on the affidavits of Walter Paz sworn 13 November 2014 and Alok Parikh sworn 8 September 2015. The defendant (“Vaughan”) relies upon the affidavits of Andrew Noble sworn 13 August and 8 October 2015 and Geoffrey Emmett sworn 13 August 2015. Vaughan opposes the application.

Application

- 3 In its originating motion and summons (as amended by leave at the hearing) Baron Forge seeks judgment pursuant to section 63 of the *Civil Procedure Act 2010 (Vic)* (“Civil Procedure Act”), Order 22.03 of the *County Court General Civil Procedure Rules 2008 (Vic)* (“Rules”) and the SOP Act. Section 63 of the Civil Procedure Act provides that a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counter-claim, or part thereof, has no real prospect of success. Order 22 provides for the giving of summary judgment. The test for summary judgment, whether under the Civil Procedure Act or the Rules, is effectively the same. The question is whether

the respondent to the application has a real as opposed to a fanciful prospect of success. The power is to be exercised with caution and only when it is clear that there is no real question to be tried.¹

Background

4 The claims relate to works at a property at 103 Pelham Street Carlton known as “Bravo Apartments” (“the Property”). In October 2013, Vaughan entered a construction contract in relation to the Property under which the contractor was to provide tiling, waterproofing, timber flooring and stone bench tops for the apartments. The contract price was \$2.035 million (exclusive of GST). Baron Forge contends that it was the contractor, but Vaughan denies this.

5 Baron Forge served a series of seven payment claims by email on Vaughan’s assistant project manager, Huw Richardson, for work done in relation to the Property over the period between about 26 August 2013 and 28 February 2014.

6 On 25 March 2014 Baron Forge served payment claim 9 on Vaughan in the sum of \$519,949 (excluding GST). This March claim was in the same form as the earlier payment claims under the SOP Act.

7 Vaughan’s practice in relation to payment claims 1 - 6, was to contact Baron Forge to advise the amount which it assessed as owing to Baron Forge and to ask that Baron Forge issue a tax invoice in that amount.

8 When Baron Forge served the March payment claim, Vaughan had paid in full the tax invoices from Baron Forge on claims 1 - 6 by direct deposit to a bank account at the CBA described as “SWC Mgnt Pty Ltd a/ts Paz Investment Group” (sic). This was the account nominated on each of the claims sent to Vaughan.

¹*Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* (2013) 42 VR 27, at [27 – 35]

- 9 On 1 May 2014, Harith Al-Shamaa of Baron Forge received an email from Huw Richardson acknowledging receipt of the March claim. In his email, Richardson also asked Baron Forge to reduce the amount of the March claim by \$107,550. On 1 May 2014 Baron Forge sent Richardson an invoice for the March claim in the sum of \$362,617.92.
- 10 On 2 May 2014 Vaughan purported to issue a remittance advice for the sum of \$362,617.92 being the amount sent out in the March invoice. However, Vaughan never actually paid this amount.
- 11 On 24 April 2014, Baron Forge served payment claim number 10 on Vaughan in the sum of \$537,397.10 (excluding GST). This was the April claim.
- 12 Vaughan did not serve a payment schedule in response to either the March claim or the April claim.
- 13 Vaughan paid only \$153,904.19 of the March claim leaving an unpaid balance of \$380,036.10 (excluding GST). The outstanding portion of the March claim was included in the April claim, as permitted by the SOP Act. Vaughan paid none of the April claim.
- 14 In these circumstances, Baron Forge claimed that having issued the March and April claims, and received neither a payment schedule nor payment in full from Vaughan, it was entitled to judgment for the outstanding amount together with interest.
- 15 Vaughan denies that it is liable to Baron Forge. It contends that the claim (for immediate judgment) is misconceived and must fail because:
- (a) Baron Forge was not the contracting party with Vaughan and was not entitled to commence the action;
 - (b) Baron Forge was not entitled to serve the March claim or April claim either under the contract or the SOP Act as it was not

party to the contract with Vaughan;

- (c) Baron Forge had not served valid payment claims on Vaughan. The claims were defective because they were both premature and included work which had not been performed at the time the claims were served; and
- (d) the work for which Baron Forge sought payment was defective and hence, Vaughan was not obligated to pay the amount claimed (or indeed any lesser amount) for the work.

Legislative Framework

16 The legislative scheme created by the SOP Act is important in this proceeding. As noted in the preliminary provisions of the Act, the main purpose of the SOP Act is to provide for entitlements to progress payments for persons who carry out construction work, or who supply related goods and services under construction contracts.² The object of the Act is to ensure that anyone who undertakes to carry out construction work, or to supply goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the performance of that work and the supply of those goods and services.³

17 A construction contract is defined in the Act to mean a “*contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services for another party*”.⁴ There was no dispute that the work the subject of the proceedings fell within the definition of “*construction work*” in section 5 of the SOP Act.

18 Subject to section 7 of the SOP Act, the Act applies to any construction contract, whether written or oral, or partly written and partly oral, and applies

² Section 1, *Building and Construction Industry Security of Payment Act 2002 (Vic)*

³ *Ibid* section 3(1)

⁴ *Ibid* section 4

even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

19 The main provisions of the SOP Act, for present purposes are:

S. 14(1):

*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.*

S. 14(4):

A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

- (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or*
- (b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—*

whichever is the later.

S. 15(1):

*A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.*

S. 15(4):

If—

- (a) a claimant serves a payment claim on a respondent; and
- (b) the respondent does not provide a payment schedule to the claimant—
 - (i) within the time required by the relevant construction contract; or
 - (ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

S. 16(1):

This section applies if the respondent—

- (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and
- (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

S. 16(2):

In those circumstances, the claimant—

- (a) may—
 - (i) recover the unpaid portion of the claimed amount from

the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

S. 16(4):

If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied—

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

Parties' contentions

20 In the final part of his oral submissions, counsel for Baron Forge contended that it was enough for the court to focus on section 15(4). He submitted that Baron Forge had served a payment claim and Vaughan had failed to provide a payment schedule in response, so Vaughan was liable to pay on the due date for the amount claimed.

21 This argument has an elegant simplicity to it. But to grapple with the argument in greater detail, one needs to address the points raised by Vaughan as to the claimant and the claim.

22 Vaughan's first argument is that Baron Forge had no contract or arrangement with it and therefore, was not entitled to serve the March or April claims under the SOP Act or to commence this proceeding.

23 Vaughan contended the history of the negotiations between the parties before signing the contract established that the party which contracted with Vaughan was Baron Forge Contractors (Vic) Pty Ltd ("BFVic"). Vaughan relied upon the correspondence which passed between them during the negotiations. Documents sent to Vaughan with quotes, or emails or revised estimates explicitly referred to BFCVic.

24 The written agreement is ambiguous to the extent that it refers only to "Baron Forge". However, a comparison of the ABN numbers indicates that there is substance to Vaughan's contention. The ABN number shown beneath the name Baron Forge in the written agreement with Vaughan is 91 372 544 149. This is identical to the ABN number appearing on the various letters passing between Vaughan and BFCVic. By comparison, Baron Forge has the ABN number 96 160 547 035. This number appears on the various payment claims submitted to Vaughan under the SOP Act.

25 Vaughan commented that it has always been its position that the other party

to its agreement in relation to the Property was BFVic. By letter dated 5 June 2014, before Baron Forge commenced this proceeding, Vaughan's solicitors wrote to the plaintiff's solicitors stating:

"This letter solely responds to your erroneous assertions in your correspondence that 'Baron Forge's Payment Claim No. 9 was issued under the SOP Act'

Your statement is incorrect and the document called 'Payment Claim No.9' is not a valid claim under the Building and Construction Industry Security of Payment Act 2002 (SOP Act) for reasons including the following:

1. The Payment Claim No.9 is submitted by Baron Forge Contractors Pty Ltd ABN 96 160 547 035. The Subcontract Agreement referred to in your letter dated 29 May 2014 is expressly made between our client and your client Baron Forge ABN 91 372 544 149"

26 Vaughan also referred to the length of the negotiations which preceded the agreement and contended that the choice of contracting party is often important to the other party. Especially was this the case when negotiating with a corporate group. In that context, the final choice of corporate entity as a contracting party could be determined, or substantially affected, by considerations or criteria which would not necessarily be satisfied by all members of the corporate group.

27 Baron Forge denies that BFVic contracted with Vaughan in relation to the Property. Baron Forge relies upon the affidavits of Walter Paz and Alok Parikh. Paz, who is a director of Baron Forge, says that Baron Forge signed a subcontract with Vaughan on 31 October 2013 and exhibits the same document which Vaughan relies upon for its contentions. Parikh too says that Vaughan engaged Baron Forge by the 31 October agreement to provide and install tiling, waterproofing, timber flooring and stone bench tops at the

Property.

28 Apart from their assertions and the payment claims sent to Vaughan in the name of Baron Forge, the plaintiff has not identified other supporting evidence. Nor has it rebutted in any detail why BFVic is not the contracting party. The fact that, on close inspection, Baron Forge sent payment claims to Vaughan and Vaughan paid them, appears to be the high point of the plaintiff's case.

29 In deciding this matter, I was helped by a case neither party referred to, a decision of the New South Wales Court of Appeal, *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132. In that case, the defendant company fitted out Grave's dental surgery in the Sydney central business district and sent a payment claim under the New South Wales equivalent of the SOP Act. Grave paid \$66,000 on account by a cheque drawn on his service company Gradenco Pty Ltd. A month later, the defendant company made a payment claim for \$57,000. Grave did not pay that claim, or make any further payment to the defendant. Nor did he provide a payment schedule to either of the payment claims. The defendant filed a proceeding in the District Court seeking judgment for the monies owing together with interest and costs. Grave did not file a defence but wrote a letter to the Registrar of the Court saying that he opposed the granting of the relief set out in the statement of claim. On 10 June 2009 the defendant entered judgment in default of appearance by Grave. Grave applied to set aside the default judgment on the grounds that it was Gradenco Pty Ltd, and not he personally, who was party to the construction contract with the defendant. The District Court judge did not find the proposed defence was untenable but nonetheless refused to set aside judgment. This seems to have been because the court found that Grave was a person who fell within section 13(1) of the New South Wales Act because he was a person "*who is or might be liable to pay the amount claimed*". Grave appealed the refusal to set aside the default judgment.

30 The leading judgment was delivered by McDougall J, a recognised expert in the field of building and construction law. McDougall J held that the primary judge's finding was wrong, because he did not pay attention to the words "*under the construction contract concerned*". His Honour noted that the object of the legislation was limited to operating between those who are parties to a construction contract. Section 8 of the New South Wales Act⁵ was the source of the statutory right to receive progress payments. It said who was entitled to be paid, namely, a party to the construction contract; someone who undertakes to carry out construction work. His Honour noted that while the legislation did not say in terms who was liable to make the payment, he thought it implicit that the liability is one that is created against the other party to the construction contract. His Honour noted that section 15 of the New South Wales Act⁶ provides for alternative ways of enforcing a statutory liability which might arise under section 14(4)⁷. If the alternative of litigation were chosen, the rights of the respondent were limited by section 15(4)(b). He noted that in sub paragraph (ii) the words "*under the construction contract*" are used. He said it followed from section 15(4)(b)(ii) that the statutory liability created by section 14(4) may be defeated by a defence that does not arise under the construction contract.

31 His Honour said further:

"In this case...the words 'arising under the construction contract' must be construed having regard to their statutory context and the object of the legislation in which they appear. The statutory object does not extend to imposing obligations on those who are not parties to construction contracts. The context of section 13 makes it clear that the liability that is enforced through the mechanism of the judgment is one of which the starting point is, again, 'arising under a construction

⁵ This is equivalent to section 9 of the SOP Act.

⁶ This is equivalent to section 16 of the SOP Act.

⁷ This is equivalent to section 15 of the SOP Act.

contract.

The alternative construction – that it is sufficient that the person be named as a respondent and not supply a payment schedule, so as to be susceptible to judgment – has consequences which render it unlikely.”

His Honour then went on to detail these consequences.

- 32 Allsop P agreed with the substance of Justice McDougall’s reasons as did Macfarlan JA. The latter, in addition, made the following comment:

“The opening words of section 13(1) of the Building and Construction Industry Security of Payment Act 1999 give the right to serve a payment claim only to a ‘person referred to in section 8(1)’. Section 8(1) in turn, confers a right to progress payments only upon someone who has undertaken to carry out work under a construction contract. It is implicit in that section that that must be a construction contract to which the person liable to make progress payments is a party.

Section 13(1) in my view requires the claimant to be a person of the character described in section 8(1), and not simply arguably so.”

- 33 While Grave’s case dealt with the reverse of the present case – the recipient of the payment claim, not the giver of the payment claim, was arguably not party to the construction contract – it seems to me that the situation is effectively governed by the same principle. The relevant provisions of the SOP Act can only apply to persons who are party to a construction contract as defined. If the person serving the payment claim is not a party to such a contract then it has no entitlement under the SOP Act to serve the payment claims. In my view, the material in this case shows that Vaughan’s position is plainly arguable and, therefore, it cannot be said that its defence has no real prospect of success. Accordingly, on this ground, Vaughan should have leave

to defend the proceeding.

34 Under section 14(1) of the SOP Act a person referred to in section 9(1) who is, or claims to be, entitled to a progress payment may serve a payment claim on the person who, under the construction contract, is or may be liable to make the payment. It is clear from the authorities that it is enough to enliven the operation of section 14 that a person claims to be entitled to a progress payment serves a payment claim.⁸ The assertion of the entitlement is sufficient to bring about the operation of the Act. As a matter of fact and law, the claimant does not have to be entitled to make a claim for the SOP Act to have effect. There is nothing to prevent a person from making a claim which is unsustainable or untrue. There is no precondition to enforcement action under the Act which requires a claimant to have a bona fide belief in its entitlement to the monies claimed.⁹ However, the assumption underlying the legislation is that the claimant serving the progress payment claim must be party to a construction contract, as defined.

35 Vaughan argued next that the March and April payment claims were premature because they were sent before the appropriate date under the contract. Vaughan submits that each of those claims was submitted early and in breach of clause 16.2 of the contract. This clause states that the contractor may not more than monthly and then, only on the last day of each calendar month, save December, submit to the defendant a progress claim in a form satisfactory to the defendant.

36 Section 9(1) of the SOP Act provides that: "*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*

⁸ *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707 at [19-20];
Consolidated Constructions Pty Ltd v Etttamogah Pub (Rouse Hill) Pty Ltd [2004] NSWSC 110 at [61]
⁹ *Bitannia Pty Ltd & Anor v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 at [58], [75]

- (b) *who has undertaken to supply related goods and services under the contract,*

is entitled to a progress payment under this Act, calculated by reference to that date”.

37 Section 9(2) of the SOP Act says: “*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*
- (ii) *a date by reference to which the amount of a progress payment is to be calculated,*

In relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract”.

38 Vickery J has considered the issue of premature claims in a number of cases including *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199¹⁰, *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011]¹¹; *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor* [2012]¹²; *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and Michael Heaton QC* [2015]¹³. Vaughan contended that, in several cases, Vickery J had determined that a payment claim was not invalid when served early in circumstances where the work the subject of the claim had been completed.

¹⁰ *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 at [71– 114]

¹¹ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183

¹² *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor* [2012] VSC 235 at [45-48]

¹³ *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and Michael Heaton QC* [2015] VSC 426 at [64-70]

39 I agree that His Honour found that the early submission of a payment claim did not render the claim necessarily invalid. In *Seabay*¹⁴ His Honour referred to his earlier judgment in *Metacorp*¹⁵ where he said:

*“In the case of the premature delivery of the payment claim, prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of section 15(4) until the arrival of the reference date. On that date, the earlier physical delivery of the document will result in the document becoming a valid payment [claim] on the reference date”.*¹⁶

40 Vaughan sought to distinguish this approach to premature service on the basis that in the cases he referred to, the work covered by the payment claim had already been completed when the claim was sent. Vaughan contended that this was not so in the present case. Assuming for the purposes of argument that the March and April claims included work which had not been performed when the payment claim was sent (early) to Vaughan, I nonetheless consider that this does not invalidate the claim. The short point is that these legislative provisions in the SOP Act are to be read and interpreted in a businesslike and not overly technical way. There is no specific legislative requirement that a payment claim cover only work which was already completed. I do not consider that I should imply such a requirement or find such a requirement as a matter of construction. If a claim is made, where it

¹⁴ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183

¹⁵ *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 at [71-114]

¹⁶ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 at [133], citing *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 at [107]

includes work not yet completed, and this creates an issue for the recipient of the payment claim, that person should simply register a complaint about the matter in its responding payment schedule.

41 Vaughan's final contention was that because the work for which Baron Forge sought payment was defective, Vaughan was not obligated to pay for that work. If Vaughan were party to a construction contract with Baron Forge then by reason of section 16(4) of the SOP Act it would be precluded from raising this issue in the application. To the extent that Vaughan wished to rely on such an argument, the appropriate forum for raising it was in a payment schedule delivered to the claimant. Because of my earlier findings, I need say nothing further regarding this matter.

Conclusion

42 Subject to hearing from the parties as to the final form of order, I find that Baron Forge is not entitled to summary judgment and that Vaughan should have leave to defend the claim.