

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

No. 002389 of 2014

HALLMARC CONSTRUCTION PTY LTD
ACN 071 149 758

Plaintiff

v

GREG SAVILLE
and
PHILLIP MARTIN

First Defendant

Second Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 6 AUGUST 2014
DATE OF JUDGMENT: 7 OCTOBER 2014
CASE MAY BE CITED AS: HALLMARC CONSTRUCTION v SAVILLE
MEDIUM NEUTRAL CITATION: [2014] VSC 491

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Adjudication determination - Whether payment claim invalid - Payment claim served out of time under the Act - Jurisdictional error found - Adjudication determination quashed.

ADMINISTRATIVE LAW - Judicial review - Decision of adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether certiorari should be granted to quash the decision - Payment claim served out of time under the Act - Jurisdictional error found - Declarations as to invalidity made - Adjudication determination quashed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Robins QC with Mr A Rollnik	Kliger Partners
For the First Defendant	Mr J Mattin	Robertson Legal

HIS HONOUR:

- 1 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (the 'Act') in connection with a written construction contract dated 7 February 2013 and entered into between the Plaintiff principal, Hallmarc Construction Pty Ltd ('Hallmarc') and the First Defendant sub-contractor ('Mr Saville') on 28 February 2013 (the 'Construction Contract'). Although the Construction Contract contemplated a more formal document being executed at a later time, it is common ground that this did not occur.
- 2 The Construction Contract provided for the supply and installation of joinery by Mr Saville to a development being constructed by Hallmarc comprising 134 residential apartments known as Kingston Park Apartments being constructed by the Plaintiff at 1148 Nepean Highway, Highett (the 'Project'). This was a construction contract to which the Act applied.
- 3 This proceeding involves questions as to whether, under the Act:
 - (a) a payment claim served 21 February 2014 (dated 17 February 2014), purportedly made under the Construction Contract (the 'First Payment Claim') was valid;
 - (b) an Adjudication Determination dated 28 April 2014 purportedly made under the Act by the Second Defendant ('Mr Martin'), who was the adjudicator, in respect of the First Payment Claim, (the 'Adjudication Determination') was unlawful and void;
 - (c) a payment claim dated 16 May 2014, purportedly made under the Construction Contract (the 'Second Payment Claim') was valid; and
 - (d) whether Mr Saville was entitled to make a further Adjudication Application dated 11 June 2014 in respect of the Second Payment Claim.

4 Each of the purported Payment Claims (and the first Adjudication Application) was issued in the name of 'China Sourcing Services', which is a business name registered as being conducted by a deregistered corporation, and bore the ABN of that same deregistered corporation.

5 Hallmarc seeks declarations and injunctive relief that:

- (a) both the First Payment Claim and the Second Payment Claim are invalid payment claims;
- (b) the Adjudication Determination by the second defendant Mr Martin is unlawful and void;
- (c) that Mr Saville is not entitled to seek an adjudication of the Second Payment Claim under the Act and that there is no jurisdiction for any such adjudication to occur;
- (d) that Mr Saville is out of time to serve any final payment claim or any further payment claims in respect of the Construction Contract under the Act. In essence, Hallmarc contends that Mr Saville is out of time to serve any further Payment Claims or any Final Payment Claim under the Construction Contract, pursuant to the Act; and
- (e) permanent injunctive relief is sought in respect of both the First and the Second Payment Claims as well as in respect of Mr Saville's Adjudication Application dated 11 June 2014.

6 Further, Hallmarc contends that if the First Payment Claim was valid and the Adjudication Application was in time, then Hallmarc seeks judicial review of the Adjudication Determination. In this event, pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. Hallmarc seeks judicial review of the Adjudication Determination. Hallmarc submits that the Adjudication Determination should be quashed on the grounds set out in Hallmarc's amended originating motion dated 20 June 2014.

Approach of the Adjudicator to 'Jurisdictional' Issues

- 7 Mr Martin, the Adjudicator appointed under the Act in this case, made the following findings and ruling on his jurisdiction to embark upon the adjudication and make a binding Adjudication Determination under the Act:

The claimant issued a notice of intention to apply for adjudication which noted that due date for payment of the claimed amount was 23 March 2014. The respondent did not raise any objection to the Claimant's assessment of the due date for payment and provided a payment schedule. I determined that the respondent agreed with the due date for payment as stated in the Claimant's notice in not objecting to time and providing the payment schedule. I therefore accept this agreement between the parties that the due date for payment is 23 March 2014.

I determine the application is in accordance with the Act.

The Claimant has carried out but not completed the contract work. The Claimant submitted a payment claim on 21 February 2014. Respondent submits that this is a final claim as the Claimant supplied and completed its work by 30 September 2013 so that the subject payment claim must be a final claim. I do not accept the Respondent's submission. It is for the Claimant to decide if the claim is a final claim and it has not done so as set out in the Claimant's reply to the request for further submissions. I determine that the subject payment claim is a progress claim and as such section 9(2)(b) of the Act applies in relation to the reference date. Further submissions were requested in relation to the reference date. The Respondent submits that the reference date is 30 September 2013 being the day that the Claimant completed its work. The Claimant refers to an invoice of 25 November 2013 for repair being made to the wardrobes that form part of the Claimant's scope of work. The Respondent does not contest the submission and as such I determine that contract work was being carried out on 25 November 2013. The claim for this work arises from a reference date after this date.

I determine that the reference date is a date determined under section 9(2)(b) of the Act calculated from the date that work commenced and being after 25 November 2013. The Respondent submits that the payment claim was served outside the periods provided in the Act. The Act requires at section 14(4)(b) a payment claim in respect of a progress payment (other than in respect of the progress payment that is final, single or one-off payment) may be served only within the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment. ...

The reference date is after 25 November 2013 and the payment claim was served on 21 February 2014 which is within the 3 month period.

- 8 However, applying principles derived from the observations of the High Court in *Craig v South Australia*,¹ in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor*,²

¹ *Craig v South Australia* (1995) 184 CLR 163 176 ('Craig').

² *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535.

this Court has said that where issue of the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior Court entertaining an application for certiorari may, subject to applicable procedural and evidentiary rules, take account of any relevant material, including new material, placed before it.³

9 Taking into account the new evidence presented at the trial which was relevant to the jurisdictional issue, I am satisfied that Mr Martin, the Adjudicator appointed under the Act, was mistaken in his assumption of jurisdiction in this case. As such, he fell into jurisdictional error, in the sense described in *Craig*. The error was that, for the purposes of the time limit running under the Act for the service of the First Payment Claim, the reference date was found by the Adjudicator to be after 25 November 2013, when this was not the case.

10 In relation to the work done pursuant to the invoice of 25 November 2013, which was relied upon by the Adjudicator to make a finding that this was the last date when Mr Saville performed work under the Construction Contract, it is to be noted that the Construction Contract did not require Mr Saville to review or assess the invoices of installation contractors engaged by the Plaintiff to install the joinery or rectify defects in the joinery supplied.

11 With regard to the work done evidenced by the 25 November invoice, Mr Joseph Italiano, a director of Hallmarc, gave evidence to the following effect, which I accept:

I am informed by Charbel Sarkis and verily believe that, there were various defects in the joinery supplied and installed by the First Defendant, such that the Plaintiff itself engaged other contractors directly to rectify defective of joinery and installation. This was instituted solely by the Plaintiff and was not done pursuant to any agreement or arrangement between the Plaintiff and any of the First Defendant 'Kbl Studio' or 'China Sourcing Services'.

12 Further, Mr Charbel Sarkis, a contract administrator employed by Hallmarc, gave unchallenged evidence before this Court that:

Various Items of the joinery supplied by the First Defendant were defective and required additional work by the joinery contractors engaged by the

³ *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535 [55]-[56].

Plaintiff to install the joinery. For example, an email to me from Marc McAlpine from Max Joinery & Installations Pty Ltd dated 8 October 2013 sets out various defects identified in the joinery provided by the First Defendant.

Accordingly, the Plaintiff itself engaged joinery contractors after the First Defendant had left the site to rectify defects in the joinery supplied by the First Defendant.

One of the contractor's engaged by the Plaintiff to perform rectification work was JMP Carpentry. In September 2013 I called Jake Panozzo from JMP and engaged him to undertake joinery works on hourly rate basis. On 25 October 2013 and on **25 November 2013**, JMP Carpentry rendered invoices to the Plaintiff for work that it performed on the Project which invoices were paid by the Plaintiff on 30 October 2013 and 6 December 2013 respectively.

[Emphasis added]

- 13 The Construction Contract did not provide for the issue of any final certificate or any defects liability period.
- 14 I find that late in 2013, Hallmarc directly engaged its own contractor, JMP Carpentry, to attend to rectification works on its own behalf. I reject the contention advanced by Mr Saville that JMP Carpentry was engaged by Hallmarc as Mr Saville's agent.

Whether Payment Claims and Adjudication Application Were Out of Time and Void

- 15 The first question is whether the First and Second Payment Claims and the Adjudication Application were out of time and therefore void.
- 16 It is accepted that the Construction Contract in this case did not provide for a number of matters such as for the calculation of reference dates under the Act, rectification periods, final claims or the time for payment of Mr Saville's payment claims. Accordingly the various default provisions covering such matters under the Act apply. Thus:
 - a) reference dates were to be calculated under s 9(2)(b) and (d) of the Act respectively;
 - b) any valid payment claims under the Act had to be served by Mr Saville within the time provided by s 14(4)(b) of the Act; and

- c) the time by which Hallmarc was to pay any such valid payment claims was that provided by s 12(1)(b) of the Act.

17 Mr Joseph Italiano, a director of Hallmarc, gave evidence to the following effect:

I am informed by Charbel Sakris, the Plaintiff's contract administrator for the Project and verily believe that:

- a) Goods were last despatched from the factory and delivered to the Project Site in August 2013.
- b) The First Defendant ceased performing work under the Construction Contract on 30 September 2013, being the date on which he last attended the Project site to clean up and remove his tools and materials

To my knowledge, after 30 September 2013, the First Defendant has not supplied any joinery to the Plaintiff, installed any Joinery at the Project, attended to rectification of any defects in the joinery supplied or installed by him at the Project or attended the Project site at all. To my knowledge, after that date, no subcontractors nor any other servants or agents of the First Defendant, 'Kbl Studio' or 'China Sourcing Services' ever returned to the site or provided to the Plaintiff any related goods or services, nor was any construction work undertaken by them, under the Construction Contract.

18 Mr Charbel Sarkis, a contract administrator employed by Hallmarc, gave evidence that:

On September 2013, the First Defendant was last on site to undertake final cleaning of the basement where his goods and tools were stored throughout construction. No subcontractors nor any other servants or agents of the First Defendant, 'Kbl Studio' or 'China Sourcing Services' ever returned to the site or provided to the plaintiff any related goods or services, nor was any construction work undertaken by them, under the Construction Contract after that date.

In particular, I say that the First Defendant did not supply or install any joinery or rectify any defects in joinery supplied or attend the Project site after 30 September.

19 I accept the evidence that the last date on which Mr Saville last undertook construction work, or provided related goods or services, under the Construction Contract was 30 September 2013.

20 The First Payment Claim was served on 21 February 2014. It was expressly described as: '*A final payment to CSS is claimed herewith for work under contract and contract variations*'. It was in form and in substance couched as a final claim. The Second

Payment Claim was served on 16 May 2014. It is also described as a final payment claim. Both the First Payment Claim and the Second Payment Claim were claims for 'final payment'. They were both claims which sought a 'final balancing of account' between the contracting parties as described by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*.⁴

21 Putting to one side the question as to whether these were duplicate final claims in respect of the same reference date, the service of these documents, which purported to be 'final' payment claims, were not undertaken within the time provided by s 14(5)(b) of the Act. Section 14(5) of the Act provides:

- (5) 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; or
 - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

22 Pursuant to s 9(2)(d) of the Act, the following time limits apply in relation to a final payment claim:

- (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –
 - (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
 - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate*; or
 - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –
 - (A) construction work was last carried out under the contract; or

⁴ [2008] FCA 1248 [17].

(B) related goods and services were last supplied under the contract.

23 Given that the Construction Contract in this case made no express provision with respect to the matter, neither subparagraph (i) nor subparagraph (ii) of s 9(2)(d) applies. Thus, the date when construction work was last carried out under the contract or when related goods and services were last supplied under the contract is the date which governs the situation.

Conclusion

24 In *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors*⁵ the Court emphasised that, while the Act is intended to provide for the rapid determination of progress claims under construction contracts, without the parties becoming weighed down in lengthy and expensive litigation or arbitration (which would tend to suggest that excessive technicality in the construction of its provisions should be avoided), nevertheless the clear time limits in the Act which are mandatory need to be strictly observed in order to properly balance the relevant competing interests. In this regard, the Court said:

[T]he Act gives very valuable, and commercially important, advantages to builders and subcontractors. It alters the balance of power in favour of those parties in relation to progress payments in a significant way. In recognition of this position, the availability of the rights conferred by the Act are governed by, and depend upon, the observance of clear specifications of time and the other requirements expressed in the Act, either in mandatory terms or as defined prohibitions. These provisions are to be found at each stage of the regime for enforcement of the statutory right to progress payments. Such provisions, in accordance with the legislative purpose expressed in the text of each, call for strict observance.

25 I have found that the last date on which Mr Saville last undertook construction work, or provided related goods or services, under the Construction Contract was 30 September 2013. The date immediately following was 1 October 2013, when time under s 14(5)(b) of the Act began to run. This meant that payment claim in respect of a final payment could be served only within three months of 1 October 2013, which is 1 January 2014.

⁵ [2013] VSC 552 [73].

26 Accordingly, the First Payment Claim being served on 21 February 2014 and the
Second Payment Claim being served on 16 May 2014 were both hopelessly out of
time.

27 It follows from these findings that both purported First and Second Payment Claims
failed to comply with the mandatory requirements under ss 9 and 14 of the Act, and
were invalid.

28 It also follows that the Adjudication Determination made by the Second Defendant
Mr Martin, which was founded on the First Payment Claim, is void.

29 It further follows that Mr Saville is out of time to serve any further Payment Claims
or any Final Payment Claim under the Construction Contract, pursuant to the Act.
His only remedy is to seek recourse for any payment he claims may be due to him in
proceedings in a Court of the appropriate jurisdiction, should he be so advised to
pursue such proceedings.

Orders

30 Declarations will be made that:

- (a) both purported First and Second Payment Claims did not comply with the
mandatory requirements under ss 9 and 14 of the Act and were invalid; and
- (b) the Adjudication Determination made by the Second Defendant Mr Martin,
which was founded on the First Payment Claim, is void.

31 An order is made that the Adjudication Determination be quashed.

32 Given my findings in relation to the entitlement of Mr Saville to serve any further
Payment Claims or any Final Payment Claim under the Construction Contract,
pursuant to the Act, it is unnecessary to grant any injunctive relief at this point.

33 I will hear the parties on costs.
