

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

S ECI 2015 000374

RAW BUILD PTY LTD (ACN 159 255 142)

Plaintiff

v

JBK INDUSTRIES PTY LTD (ACN 106 713 115)

First Defendant

and

RICHARD HAPGOOD (IN HIS CAPACITY AS
ADJUDICATOR IN AN ADJUDICATION UNDER
THE *BUILDING AND CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT ACT 2002 (VIC)*)

Second Defendant

JUDGE: VICKERY J
WHERE HELD: Melbourne
DATE OF HEARING: 3 May 2016
DATE OF JUDGMENT: 3 May 2016
CASE MAY BE CITED AS: *RAWBuild v JBK Industries & Anor*
MEDIUM NEUTRAL CITATION: [2016] VSC 242

PRACTICE AND PROCEDURE - Payment claim of a sub-contractor under a construction contract unpaid - Entry of judgment under s 28R *Building and Construction Industry Security of Payment Act 2002 (Vic)* (the 'Act') - Application for judgment under O 10 *Magistrates' Court (Miscellaneous Civil Procedure) Rules 2010 (Vic)* - Certified Extract of order made failed to record or evidence a judgment for a debt due of the unpaid portion of the amount payable to the applicant - Certified Extract did not record a judgment made under s 28R of the Act or under O 10 of the *Magistrates' Court (Miscellaneous Civil Procedure) Rules 2010 (Vic)*.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr D Cain	Kliger Partners
For the First Defendant	Mr A McKellar	Macpherson Kelley Lawyers



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HIS HONOUR:

- 1 In this case, the First Defendant, JBK Industries Pty Ltd ('JBK'), provided mechanical works and services to the Plaintiff, RAW Build Pty Ltd ('RAW Build'), in relation to the construction of residential apartments located at 486 Victoria Street, Richmond. The engagement between RAW Build and JBK was in writing and contained in a subcontract dated 26 March 2014. On 25 July 2015, the subcontractor, JBK, made a claim against RAW Build for payment of a payment claim due under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act').
- 2 RAW Build did not provide a payment schedule within ten business days after service of the payment claim.
- 3 On 22 September 2015, JBK served on RAW Build a notice of its intention to proceed to adjudication pursuant to s 18(2) of the Act.
- 4 On 30 September 2015, JBK lodged an adjudication application to Rialto Adjudications Pty Ltd, an authorised nominating authority within the meaning of s 4 of the Act, for provision of an adjudication determination purportedly made pursuant to the Act in relation to the payment claim.
- 5 On 16 October 2015, the Second Defendant, the Adjudicator, delivered the Adjudication Determination and purported to determine that JBK was entitled to be paid, by way of an interim payment under the Act, the sum of \$81,415.00 which included GST and adjudicator's fees. That sum has not been paid by RAW Build.
- 6 There having been no injunction granted to restrain JBK from doing otherwise, JBK applied to the Magistrates' Court at Melbourne for judgment under s 28R of the Act. In support of its application JBK filed with the Magistrates' Court, an adjudication certificate and an affidavit as required under s 28R(2) of the Act.
- 7 Sub-sections (1) and (2) of s 28R of the Act provide as follows:

Proceedings to recover amount payable under section 28M or 28N

- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a

debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

- (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court –
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

8 The *Magistrates' Court (Miscellaneous Civil Procedure) Rules 2010* (Vic) includes provisions for the management of proceedings under the Act. Order 10 of these rules provides:

Order 10

PARTICULAR PROCEEDINGS UNDER THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002*

10.01 Definitions

In this Order –

adjudication certificate has the same meaning as in section 4 of the Act;

authorised nominating authority has the same meaning as in section 4 of the Act;

claimant has the same meaning as in section 4 of the Act;

principal has the same meaning as in section 4 of the Act;

the Act means the *Building and Construction Industry Security of Payment Act 2002*.

10.02 Commencement of proceeding under section 28R of the Act

A proceeding under section 28R of the Act may be commenced by a person, who has been provided with an adjudication certificate by an authorised nominating authority, applying to the Court by filing in the Court the certificate and affidavit that are required to be filed under section 28R of the Act.

10.03 Power of registrar to make order in proceedings under section 28R of the Act

In any proceeding commenced under Rule 10.02, the Court constituted by a registrar may make an order that the respondent pay the person applying under that Rule the unpaid amount if the registrar is satisfied that –

- (a) the adjudication certificate has been provided by the authorised nominating authority; and

- (b) an amount payable under section 28M or 28N of the Act has not been paid.

10.04 Setting aside an order

Order 46 of the *Magistrates' Court General Civil Procedure Rules 2010*, with any necessary modifications, applies to making an application to set aside an order in any proceeding under section 28R of the Act.

10.05 Certification of debt by Court

- (1) For the purposes of section 33 of the Act, the court may be constituted by a registrar.
- (2) An application for an order under section 33(1) of the Act may be made in writing and Order 46 of the *Magistrates' Court General Civil Procedure Rules 2010* does not apply to any such application.

10.06 Application for stay of payments

- (1) For the purposes of section 37(1) of the Act, an application by a principal for a stay of payments under that section must be made in the proceeding in which the claimant has obtained an order for the adjudicated amount or part of the adjudicated amount as referred to in section 30(c) of the Act.
- (2) Order 46 of the *Magistrates' Court General Civil Procedure Rules 2010*, with any necessary modification, applies to an application under section 37(1) of the Act.

9 Order 46 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) sets out the rules for making any interlocutory or other application in a proceeding in the Magistrates' Court. It applies to an application for judgment under the Act.

10 By a document dated 1 April 2016 and entitled 'NOTICE OF ORDER MADE', orders are recorded in a proceeding in the Magistrates' Court, being Case No. G10886173, pursuant to which JBK was the applicant and RAW Build the respondent. The certified extract of the order was in evidence (the 'Certified Extract').

11 The Certified Extract relevantly recorded the proceeding as 'ORDER REGISTRATION', identified the Plaintiff and First Defendant as the parties and the claim amount as \$85,355.94.

12 The following was recorded under 'OTH order':

This is not theregistration [sic] of an order but the filing of an adjudication certificate pursuant to the *Building and Construction Industry Security of Payments Act 2002* (Vic) [sic] to become an order of the Magistrates' Court

- 13 The Certified Extract identified the order as having been made by 'Registrar: K. HUSSEY'.
- 14 In my opinion, the record of the Magistrates' Court, as comprised in the Certified Extract to which I have referred, does not constitute or record a judgment for the purposes of s 28R of the Act. At best, it merely records that a certificate, being an adjudication certificate pursuant to s 28R, has been filed with the Magistrates' Court. The Certified Extract does not record a judgment of the court for the reasons which follow.
- 15 First, it does not specify that a debt is due to JBK from RAW Build.
- 16 Second, it does not record that an affidavit has been filed as required by s 28R(2)(b) as an essential step to obtaining judgment pursuant to s 28R of the Act. Section 28R(3) provides that the affidavit is required to state that the whole or any part of the amount payable under ss 28M or 28N of the Act has not been paid at the time the certificate is filed. This is not recorded in the order made by the Magistrates' Court. This points away from the Certified Extract evidencing a judgment in light of the fact that a key element, being the filing of a s 28R(2)(b) affidavit, has not been referred to.
- 17 Third, and critically, the order contained in the Certified Extract does not record anything in the nature of a judgment for a debt in favour of JBK as would be required in order to amount to a judgment for a debt due to it from RAW Build pursuant to s 28R of the Act.
- 18 Fourth, it does not amount to an order that the respondent pay to the person applying under O 10 of the *Magistrates' Court (Miscellaneous Civil Procedure) Rules 2010* (Vic) the unpaid amount that is found to be due.
- 19 Fifth, the Certified Extract does no more than record that an adjudication certificate has been filed with the Magistrates' Court, pursuant to s 28R(2) of the Act.

20 For these reasons the Certified Extract does not record a judgment made under s 28R of the Act or under O 10 of the *Magistrates' Court (Miscellaneous Civil Procedure) Rules 2010* (Vic).
