

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-21-01737

Seascope Constructions Pty Ltd (ACN 083 415 561)

Plaintiff

V

Ouson Land Group (Wheelers Hill) Pty Ltd (ACN 601 668 179)

Defendant

JUDGE: Judicial Registrar Burchell
WHERE HELD: Melbourne
DATE OF HEARING: On the papers
DATE OF JUDGMENT: 21 May 2021
CASE MAY BE CITED AS: Seascope Constructions Pty Ltd v Ouson Land Group
MEDIUM NEUTRAL CITATION: [2021] VCC 641

REASONS FOR JUDGMENT

Subject: CONTRACTS

Catchwords: Building contract – payment claim

Legislation Cited: *Building and Construction Industry Security of Payment Act 2002* (Vic) ss3, 4, 5, 7, 9(1),10B, 12, 14, 15, 16(2), 16(4), 47, 48, 50; *Civil Procedure Act 2010* (Vic) s61, 63

Cases Cited: *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; *Rudyard Pty Ltd v ASEA 1 Pty Ltd* [2019] VCC 1995; *One Scaf Pty Ltd v Rudyard Pty Ltd* [2020] VCC 1109 - *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2021] VSCA 44 - *Titcher v Marcelis* [2015] VSC 578

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the plaintiff	Benjamin Reid	Ward & Co Legal Consultants
For the defendant	-	-

JUDICIAL REGISTRAR:

1 The plaintiff (“Seascope”) applies for judgment against the defendant
2 (“Ouson”) pursuant to s16(2) of the *Building and Construction Industry
3 Security of Payment Act 2002* (Vic) (“the Act”). Seascope makes the
4 application by summons on originating motion dated 27 April 2021. The
5 application arises out of the development of 54 townhouses (“the Works”) at
6 820-830 Ferntree Gully Road, Wheelers Hill in the State of Victoria (“the Site”)
7 for the sum of \$15,852,216.02 (“the Construction Contract”).

8 Seascope claims judgment on the basis that Ouson failed to make payment in
9 respect of one single payment claim, PC 36, dated 22 February 2021 for the
10 sum of \$1,130,559.95 (incl GST) (“Payment Claim”).

11 Ouson has not filed a notice of appearance in the proceeding.

12 In my judgment, I am satisfied that the payment claim has been issued in
13 accordance with s16(2) of the Act.

14 Therefore, I will order that there be judgment for Seascope against Ouson in
15 the sum of \$1,004,997.15 (incl GST). I will order that Ouson pay Seascope’s
16 costs of and incidental to the proceeding fixed in the amount of \$5,829.12,
17 unless either party can show a basis for seeking a different order to costs. I
18 invite the parties to prepare draft orders to give effect to these reasons. Any
19 further issue as to costs will be determined on the papers.

The factual background

20 Seascope relies upon an affidavit of David John Sagor sworn 27 April 2021;
21 and the affidavit of service of Freya Veska affirmed on 5 May 2021.

22 On or about 12 June 2018, the parties entered into an AS 4300-1995
23 construction contract for Works at the Site.

24 Item 34(a) of Annexure Part A of the Construction Contract provides for the
25 issuing of payment claims on the “25th day of each month during the delivery
26 of the Works and at Practical Completion”

27 On or about 22 February 2021, in accordance with Clause 43.1 and Item 34(a)
28 of Annexure Part A of the Contract, Seascope issued a claim for payment in

respect of works undertaken at the Site up to the 25th day of November 2020. The Payment Claim was issued to Ouson under invoice number PC36 and dated 22 February 2021 for the sum of \$1,130,559.95. It contained the wording “This is a payment claim made under the *Building & Construction Industry Security Act 2002 (Vic)*”. The Payment Claim was validly served on Ouson pursuant to clause 7 of the Contract via email to:

- (a) the Defendant’s director, namely Mr. Ryan Ouyang; [mailto:](#)
- (b) the Defendant’s superintendent, namely Incollaboration Projects (the ‘Superintendent’) to Mr. Luke O’Grady and Ms. Jessica Bailey; and
- (c) the Defendant’s accountant, namely James Meng.

10 Seascope says that the Payment Claim includes amounts for;

- (a) Works completed up to 25 November 2020;
- (b) claimable variations; and
- (c) previously claimed and unpaid amounts.

11 The Payment Claim includes Works completed between around 26 October 2020 and 24 November 2020 totalling the sum of \$48,396.00, exclusive of GST.

12 Seascope submits that the Payment Claim also includes claims for variation works undertaken up to 25 November 2020, totalling the sum of \$865,236.10, exclusive of GST.

13 On 27 April 2021, the day prior to the day proceedings were accepted for filing in this court, the Superintendent served two documents via email on Seascope, a purported payment schedule and a superintendent extension of time advice document.

14 The purported payment schedule, as identified by the solicitors for the plaintiff, was served 64 days after the Payment Claim, outside the 10 business day window for a valid payment schedule to be served (s15(4) and cl 43.1 of the Construction Contract). The superintendent recommended the amount for payment to be \$32,497.00, subtracting an alleged less assessed value of

previous approved amounts (to a total of \$13,504,404.98).

Service of the defendant

15 As indicated above, the proceeding is undefended. Ms Veska deposed to her service of the defendant.

16 On 4 May 2021 at around 10:25am, Ms Veska posted by registered mail to the registered office of Ouson at Suite 1217, 401 Docklands Drive, Docklands in the State of Victoria the following documents (hereinafter referred to as "the documents"):

- covering Letter;
- filing Confirmation Notice;
- originating Motion and Summons; and
- affidavit of David John Sagar with exhibits.

17 On the material before the court, I am satisfied that Ouson was validly served and is aware of the proceeding.

Procedural matters

18 By email dated 27 April 2021, the court informed the plaintiff that if a notice of appearance is not filed by the defendant, as required by the *County Court Civil Procedure Rules 2018* ("the Rules") and the plaintiff files an affidavit of service by 4.00pm on the Wednesday before the hearing, the Judge in Charge of the Building Cases List ("JIC") will ordinarily hear and determine the application in the absence of the defendant.

19 If the plaintiff wishes to proceed with that determination, it should – by 4.00pm on the Thursday before the hearing – email to the JIC brief written submissions that:

- (a) confirm that the pre-requisites for the making of an order under the Act are proved on the evidence filed and served by the plaintiff, and
- (b) identify any potential deficiencies in the evidence.

20 Pursuant to the overarching obligations under the *Civil Procedure Act 2010* (Vic), the Court proceeded to determine the application on the papers.

The legal context

23 The Act seeks to ensure that persons who undertake to carry out construction work can recover progress payments for the performance of that work.¹ Section 4 defines construction contract as 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”. The Act applies to any construction contract whether written or oral, or partly written and partly oral.² “Construction work” is defined by s5.

24 Section 14 of the Act concerns the form and content of payment claims. Sections 14(2) and (3) provide that a payment claim:

- must be in the prescribed form (if any) and contain the prescribed information (if any) – neither is prescribed;
- must identify the construction work or related goods and services to which it relates;
- must indicate the amount of progress payment that the claimant claims to be due;
- must state that it is made under the SOP Act; and
- must not contain “excluded amounts”.

25 Section 14(4) of the Act addresses when a payment claim that is not a final, single or one-off progress payment can be served. It provides that such a payment claim may only be served within whichever is the later of:

- the period determined in accordance with 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

¹ s3.

² s7.

- the period of 3 months after the “reference date referred to in s9(2) that relates to the progress payment”.

26 Section 9(1) provides that “on and from each reference date under a construction contract” a claimant is “entitled to a progress payment under this Act calculated by reference to that date”. Section 9(2)(a) provides that a reference date is a date determined by or in accordance with the construction contract as:

- a date on which a claim for a progress payment may be made; or
- 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. The rest of s9 concerns situations where the contract makes no express provision for reference dates.

27 In order to recover a progress payment, a claimant must first serve a “payment claim” in accordance with s14(1) of the Act. Subsection 14(2) sets out the requirements for a valid payment claim.

28 Under s15(1) of the Act, a person on whom a payment claim is served may reply to the payment claim by providing a payment schedule to the claimant. Section 15(2) sets out the information which must be provided in a payment schedule.

29 It is now well established in Victoria that unless a payment claim answering the description in s14(1) of the Act is served, there can be no application to a court under s16(2)(a)(i). Although dealing with the alternative option of an adjudication application referred to in the New South Wales equivalent of s16(2)(a)(ii), this follows inexorably from the decision of the High Court in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*³ (“*Southern Han*”). On the other hand, the available defences to a payment claim are very limited.

30 The available defences generally concern either the nature of the underlying

³ (2016) 260 CLR 340 [44] (“*Southern Han*”).

contract or the form and service of the purported payment claim and thus, whether the payment claim triggers the procedures in Part 3 of the Act.⁴

31 Under s47, nothing in Part 3 of the Act precludes bringing or continuing proceedings under the construction contract, including where those proceedings deal with the same issues in dispute in the proceeding relying on Part 3. Thus, a judgment under ss16 and 17 is a provisional judgment in what it grants and what it refuses.⁵ The statutory context both contemplates and permits inconsistent judgments.⁶ This section is, in effect, the statutory manifestation of the “pay now, argue later” epithet behind the Act and its counterparts in other states.⁷

32 In considering any purported defences to a payment claim, it is important to consider s48 of the Act. This section provides that the provisions of the Act have effect despite any contractual provision to the contrary. It further provides that any provision in any contract purporting to exclude, restrict or modify the operation of the Act or that may reasonably be construed as an attempt to deter a person from taking action under the Act, is void.

33 This court has endorsed the hearing of applications under the Act on a summary basis by summons on originating motion with affidavit evidence.⁸ Such claims are assessed on the balance of probabilities.⁹ The court weighs the quality of the evidence having regard to the fact that the legislation intends to facilitate a swift but temporary remedy.¹⁰

Analysis

23 The contract in issue is a “construction contract” within the meaning of the Act, provided under a “construction contract” for the purpose of the Act. The contract for construction services is a contract under which Seascope

⁴ *Southern Han* at [62].

⁵ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112 [2] and [43]-[46] (Vickery J), cited with approval in *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99 [11].

⁶ *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385 [22] (Handley JA, with whom Santow JA and Pearlman AJA agreed).

⁷ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112 [2] and [43]-[46].

⁸ *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674 [39]-[54]. See also *SJ Higgins v The Bays Healthcare Group Inc* [2018] VCC 805 [26].

⁹ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).

¹⁰ *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674 [51]-[54].³⁶

undertook to carry out construction work for Ouson (s4). Accordingly, Seascope was entitled to progress payments under s9(1) of the Act.

24 Seascope served the Payment Claim upon Ouson (s14(1)) within three months (s14(4)). Ouson failed to serve a valid payment schedule within the time required and as such became liable to pay the claimed amount to Seascope on the due date for the progress payment to which the payment claim relates (s15(4)). Further, while Ouson's purported payment schedule identified an outstanding amount of \$32,497.00, no such payment has been made to Seascope.

25 The payment claim was made on or from a reference date (s9(2)). The Payment Claim was referable to the date 25 November 2020. Consequently, Seascope was entitled to make its claim for the progress payments served.

26 The amounts were claimed in accordance with s10 of the Act, for they were calculated in accordance with the terms of the contract (s10(1)(a)).

27 The Payment Claim identifies the construction work with sufficient particularity (s14(c)), as it indicates the amount that Seascope claims is due (s14(d)). It states that it is a claim under the Act: "This claim is made under the BUILDING AND CONSTRUCTION SECURITY OF PAYMENT ACT 2002" (s 14(e)).

28 The claim contains first class claimable variations. Consistently with s10A(2), in the respective payment schedules, Ouson agrees as recorded in the 30 pages of the trade breakdown attached to the Payment Claim:

- that the work has been carried out (it lists "variations");
- as to the scope of the work that has been carried out;
- that the doing of the work constitutes a variation ("variation" is employed);
- that Seascope is entitled to a progress payment that includes an amount in respect of the variation (an amount for variations is indicated);
- as to the value of that amount; and
- as to the time for payment of that amount (due dates are specified).

29 The payment claim contains supporting documents that expressly or inferentially show that the parties agreed that the doing of the work or the supply of the goods and services constitutes a variation to the contract, as required for first class claimable variations (s 10A(2)(c) and *Yuanda*¹¹). I am, therefore, satisfied on the face of the payment claim that the claimed amount does not include any excluded amounts.¹²

30 The requirements for a valid payment claim, as set out in s14(2) of the Act, are satisfied. The payment claim identifies the construction work to which they relate, indicates the amount of the progress payment that the claimant claims to be due and states that they are made under the Act.

31 Each payment claim was validly served via email to Ouson's director, superintendent and accountant.

32 Ouson did not serve a payment schedule within the requisite period of time as required by the Act.

33 In a related proceeding in this court (CI-21-00154), the plaintiff was awarded judgment against the defendant by his Honour Judge Woodward in respect of the \$125,562.80 under payment claim 35 ("October Payment Claim"), which was included in this Payment Claim as it predated the judgment. Therefore, the amount pursuant to the October Claim is to be excised from this judgment.

34 Accordingly, Ouson is liable to pay the amount of \$1,004,997.15 (ex GST).

35 By force of s16(4) of the Act, the defendant as a respondent to a proceeding under s16(2), is prohibited from bringing a cross claim or raising any defence in relation to the matters arising under a construction contract. Even if Ouson appeared in this proceeding, it could not raise any claims or defences in this action by reason of this provision.

36 Accordingly, in circumstances where:

- a) Seascope issued a valid payment claim and validly served it on Ouson,
- b) Ouson has failed to issue a payment schedule certifying scheduled

¹¹ *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2021] VSCA 44 at [43].
¹² *Ibid* at [38]-[48] (McLeish and Niall JJA).

amounts owing to Seascope in response to Seascope's payment claims;

- c) Ouson has failed to make payment in full of the claimed amount by the relevant due date or at all; and
- d) the requirements of the Act in relation to obtaining judgment for a debt pursuant to s16 are satisfied.

37 As a consequence, Seascope is entitled, pursuant to s16(2)(a)(i) of the Act, to recover the unpaid portion of the claimed amount as a debt due in this court. Seascope is also entitled to interest pursuant to s12(2)(a) of the Act, calculated pursuant to the *Penalty Interest Rates Act 1983* (Vic).

38 Riordan J in *Titcher v Marcelis*¹³ considered the desirability of fixing fees to avoid the inconvenience and expense of taxation, although those comments were made in a slightly different context to the present. Given that the amount claimed in legal fees is modest, and in the circumstances in this case where Ouson is in receivership, in my view it would be more appropriate to have costs fixed than subject to taxation. I therefore propose fixing the plaintiff's costs in the sum of \$5,829.12 under r63A.07 of the Rules to avoid the inconvenience and expense of having costs formally taxed.

Conclusion

39 For the foregoing reasons, there is judgment for the plaintiff in the remaining amount claimed of \$1,004,997.15 (GST inclusive), together with interest pursuant to s12(2) of the Act and the costs of the application fixed in the amount of \$5,829.12.

Certificate

I certify that these 9 pages are a true copy of the judgment of Judicial Registrar Burchell delivered on 21 May 2021

Dated: 21 May 2021

Julia Despard
Associate to the Judicial Registrar Burchell

¹³ [2015] VSC 578 at [12].