

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE

Revised

No. CI-04-01438

PERFORMANCE BUILDERS (VIC) PTY LTD

Applicant

v

SOUTHERN RESTAURANTS VIC PTY LTD

Respondent

JUDGE: HER HONOUR JUDGE COHEN
WHERE HELD: Melbourne
DATE OF HEARING: 15, 30 April 2004
DATE OF JUDGMENT: 30 April 2004
CASE MAY BE CITED AS: Performance Builders (Vic) Pty Ltd v Southern Restaurants
Vic Pty Ltd

Catchwords: *Section 27 Building and Construction Industry Security of Payment Act 2002*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr Pumpa	Noble Lawyers
For the Defendant	Mr Baker	Rigby Cooke

HER HONOUR:

- 1 This proceeding is an application by the Plaintiff under s.27 of the *Building and Construction Industry Security of Payment Act 2002* ("the Act") in which judgment in the sum of \$47,685.00 is sought as a debt due to the Plaintiff by the Defendant. The basis of the claim is that a duly appointed adjudicator, Mr John Coghlan, determined that sum on 2 January 2004 to be owing, and set a time for the payment to be made of 9 January 2004. It is common ground that no part of that sum has been paid. The Defendant argues that there should not be judgment or any progressing of this proceeding because it wants the opportunity to re-open the arguments for adjudication in front of Mr Coghlan on the basis that it alleges that he misunderstood or misinterpreted what was agreed or not agreed in the papers before him.

- 2 The material before me discloses that the timing of the claim, the appointment of the adjudicator, and his having a statutory time limit in which to make his decision, coincided with a time of year immediately before and after Christmas when offices of solicitors may be closed. There does appear to have been an unfortunate if understandable inattention to responding to a letter from the adjudicator dated 29 December, 2003. However, there are statutory time limits governing these matters, apparently enacted to implement a progress payment system to overcome delays. The Defendant and its solicitors must have known that there was such a claim being adjudicated before Mr Coghlan, and that his decision would be made over the Christmas/New Year period, and some arrangement presumably could have been made to check or redirect mail during that time. Although on 15 January the Defendant's solicitors wrote to Mr Coghlan requesting reasons with a view to disputing some matters, that was after his determination had been made and Mr Coghlan's response shortly afterwards was that he had not been asked for reasons in advance and he regarded his appointment as at an end. There was no further action apparently taken by the Defendant to otherwise re-open the factual dispute until this proceeding was issued more than three months

later.

3 Section 27 of the Act seems to me on its wording to leave the making of an order for such a debt in the discretion of the Court, however the width of that discretion would be limited in view of the clear purpose of the section being to enable a builder, once it has received an adjudication awarding an amount as a progress payment, to enforce that summarily. That is the expressed purpose of the Act, and the structure of the provisions which lead to s.27 convince me that the power conferred by s.27 is intended to enable summary judgments to be made based primarily on orders from an adjudicator as provided in the preceding sections. The Plaintiff submitted that the Court could not go behind the adjudicator's determination at all, and must give judgment if satisfied that it was made and remains unpaid. I am not persuaded that the adjudicator's determination provides conclusive proof of all its contents, including matters it recites as to the background to its being made. I consider that it is necessary for the Court to be satisfied that what was before the adjudicator giving rise to his determination was by its nature a claim for a progress payment, because the nature of the payment claimed is the jurisdictional basis for s.27. However, nor do I see the section as opening up for a Judge's consideration the merits of the claim before the adjudicator, such as whether certain work was or was not carried out satisfactorily, or even at all, or whether it was subject to particular contractual terms. The point at which this matter comes before the Court under s.27 is when an experienced person in the building industry who has been appointed as adjudicator has considered such material and made a decision. That adjudicator's determination may be open to judicial review elsewhere, but that is not the nature of an application under s 27.

4 On this matter first coming before me on 15 April 2004, I did not consider that the material before me was sufficient to satisfy me that what had been before the adjudicator was a claim for progress payment. I do not overlook that the

adjudication order included the statement that the amount was not a final payment, but in that regard I did not consider it conclusive. I gave the Plaintiff an adjournment to enable material to satisfy me of that to be filed and for the Defendant to file any material in response.

5 The Plaintiff filed an affidavit of John Ronald Coghlan sworn 28 April 2004. Mr Coghlan is, of course, the adjudicator who was appointed and made the order that gives rise to this application. I have considerable hesitation about the appropriateness of the adjudicator being the deponent to an affidavit filed in support of the Plaintiff's claim, at least for a purpose other than proving that the determination had been made, which had already been proved in this case. However, it is sworn evidence of a person with experience in the building industry, a building consultant, who had examined the material in front of him to make the order that is the subject of the bringing of this proceeding. The Affidavit states the conclusion that the Plaintiff's payment claim was for a progress payment. There is no explanation or reasons for that conclusion being reached. I would not encourage this form of supporting material to be generally used in future applications under this section.

6 The Defendant argues that by its nature what was before Mr Coghlan was a claim for final payment. That argument relies upon the contract between the parties, particularly s.11 of that contract, and the evidence put forward through the affidavit of Slavica Blajer sworn 29 April 2004, a qualified architect and engineer who was project manager in relation to these works. She states that the date of practical completion had been passed by the time of this claim., and it was argued that that made any subsequent claim one for a final payment. Her affidavit essentially is aimed at indicating why the builder was not entitled to various variations for which it claimed. That is not a matter that, in my view, is open to be re-litigated or re-argued in this proceeding.

7 The question for me is whether there is an arguable case that the claim on which the adjudication order was made was not, by its nature, a claim for a

progress payment. That conclusion is based on the normal principles that apply to whether leave to defend an application for summary judgment should be given.

8 Whilst I do have hesitation about the use of the adjudicator for proof of the nature of the claim, his affidavit before me is one by an experienced building consultant stating that it was a progress claim. I am not satisfied that the Defendant has raised an arguable case that this was other than a claim for a progress payment. I am particularly influenced by the fact that Ms Blajer, as an architect, engineer and project manager, seems to categorise what is the subject of dispute here as a progress claim. I refer particularly to the content of paragraph 26 of her affidavit.

9 For these reasons I am not satisfied that the material before me sets up an arguable defence to the proposition that this was a progress claim by its nature. I am satisfied that there was an adjudicated amount for a progress payment, that that amount remains unpaid beyond the date it was due, and accordingly I am prepared to give the judgment sought.