



CONSTRUCTION LAW UPDATE No. 802

Summary judgment on architect's certificates

Introduction

A recent decision of the Adelaide Magistrates Court may be the first decision in Australia on the availability of summary judgment on architect's certificates under the standard form ABIC Simple Works contract.

Wedgewood Builders Pty Ltd ("**builder**") was engaged by Mr Karas and Ms Baillie ("**owners**") to undertake renovation works to their residence. For this purpose, the parties entered into an ABIC Simple Works contract, appointing the architect who designed the renovations to administer the contract. Under the terms of the contract, the architect was appointed as agent of the owners in giving instructions to the builder but in acting as certifier he was to act independently.

The architect issued 4 progress payment certificates and, subsequently, a final certificate. The owners refused to pay the full amount of the last progress certificate, and the final certificate, claiming this was justified by the builder's defective works and overcharging.

The builder sued the owners for the balance of the contract sum as certified by the architect. The builder then decided to seek summary judgment on the claim.

Summary judgment

Summary judgment is a mechanism whereby the court can, in certain cases, award judgment in favour of a party without the need to proceed to trial. It is only granted by the court in limited circumstances, where the defendant does not have a good defence to the claim on any possible view of the facts or law.

A successful summary judgment claim provides a prompt and comparatively cost effective resolution of a claim. It avoids the cost and delay of taking a matter to trial. It also provides all the benefits of an enforceable judgment of the court. An unsuccessful summary judgment claim can strategically bolster the defendant, who might consider that they will also win at trial.

The terms of the contract

The ABIC standard form contract contains terms that require:

- the architect to assess and certify any claim for payment made by the builder;

- the owner to pay (within a certain period) any claim certified by the architect as due and payable by progress certificate or final certificate.

The contract states that the final certificate issued by the architect is evidence of the parties' entitlements under the contract, and evidence that the builder has performed its obligations under the contract.

The usual right to a set off

Most building disputes involve claims by the builder for money and opposing claims by the owner (or equivalent party) for defective work or delays.

There is a legal presumption when a builder sues an owner to the effect that the owner can set off these opposing claims against the builder's claim. For example, the owner might claim that the cost of rectifying the builder's defective work reduces the amount it should pay the builder. On other occasions, an owner might claim it is entitled to compensation for delay costs caused by the builder's tardy construction program and accordingly reduce its payment to the builder.

Generally, this legal presumption of set off results in these disputes smouldering on for some time. Frequently, the parties negotiate a settlement at some commercial figure. Sometimes, the dispute will go to a full and expensive trial in court.

The right to set off can be excluded

The parties to a contract may, by the use of clear language in the contract, exclude the right to set off. The parties can agree that the owner must, after certification by the architect and the time period set in the contract, make immediate payment to the builder. Payment must be made even if the owner claims the builder is not entitled to the outstanding sum. To exclude the right to set off the contract must use very clear language to this effect and must have a provision whereby an independent party, such as an architect or superintendent, assesses a payment claim submitted by the builder and then certifies what amount is payable by the owner to the builder.

There are many reported cases where the courts have held that certain standard form contracts will allow a builder to obtain summary judgment upon amounts which have been independently certified as payable. Some of the standard form contracts in which this right on the part of the builder has been upheld include AS 2124-1992, AS 2545-1993, AS 4303-1995, AS 4000-1997 and AS 4300-1997.

However, at the time this case was argued and determined, there were no reported decisions specifically addressing the terms of the ABIC Simple Works contract.

The parties' submissions

Counsel for the builder argued that the terms of the ABIC Simple Works contract were sufficiently similar to those in contracts where a right of summary judgment has been upheld to allow the Court to conclude that the same right of summary judgment applied under the ABIC Simple Works contract. Counsel said that there was no need for the Court to consider the alleged defects or issues raised by the owners, as the certificates created the right for payment. The owners, by appointing the architect as their agent, had given him the authority to approve work and the quantum of payments to be made.

The owners, on the other hand, opposed the builder's claim for summary judgment on the basis that there were serious issues to be tried, namely their allegations of defective work and overcharging and failure on the part of the builder to substantiate certain amounts charged. The owners argued that these were matters which required witness evidence and that, as such, the matter needed to proceed to trial in the usual course.

The decision

On 4 April 2008 the presiding Magistrate handed down his decision in favour of the builder's application for summary judgment. The Magistrate found that the ABIC Simple Works displaces the general presumption at law which permits an owner to set off against the builder's claim. He concluded that the contract imposed on the owners an absolute obligation to pay the amounts certified by the architect immediately, without the need to go to trial.

The Magistrate concluded:

"In my view, in this instance, the defendants [owners] have given to the architect the power to determine the issues which the defendants now seek to put into contention. That is, the defendants have agreed by the contract that the architect was to decide whether the standard of work was adequate and to decide what payments were to be made to the plaintiff [builder]..."

The Magistrate awarded summary judgment in favour of the builder. The effect of the judgment is that the builder was entitled to immediate payment from the owners of the full amount certified as payable by the architect.

Conclusion

Standard form contracts are commonly used in the building and construction industry. This case highlights one of the great advantages of using standard form contracts – that of relative certainty. Given most standard form contracts have been the subject of legal interpretation, the parties have the benefit of certainty as to the meaning of the terms of the contract, and the manner in which the contract will be interpreted by the court.

Prompt payment of progress claims are the lifeblood of the construction industry and many builders are reliant on receipt of such payments in order to maintain a positive cash flow. Contracts such as the ABIC Simple Works contract, and many other standard form contracts, reflect this by containing provisions which will allow a builder to obtain summary judgment, or an order that the owner pay to the builder amounts which have been independently certified. An order for summary judgment simply requires the owner/principal to make immediate payment of the certified amounts in full. It does not prevent the owner from subsequently pursuing the builder for damages for defective works or other remedies open to the owner under the terms of the particular contract or at general law.

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