
Must a payment claim be made in good faith?

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Although good faith may be a requirement for a valid adjudication under the various Security of Payment Acts, importing into the Act an implied obligation for a claimant to make any payment claim in good faith would detract materially from the simple robust mechanism provided by the Act to achieve a speedy interim resolution of payment claims to promote early recovery of progress payments.

INTRODUCTION

It takes a measure of courage to reverse views publicly expressed previously. Lord Denning MR claimed to have spent most of his judicial career reversing a case he had won as counsel for the successful party in 1934.¹ Megarry J was another judge who had the courage to dissent from earlier views expressed as an author. In *Cordell v Second Clanfield Properties Ltd*,² counsel for Cordell, in support of his arguments, sought to invoke a passage in *Megarry & Wade, The Law of Real Property* where it was said that a grant was in general construed against the grantor and the rules governing grants applied equally to reservations.³ Megarry J refused the application, rejecting the proposition from *Megarry & Wade*. Furthermore at the conclusion of his judgment he stated:

The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the period of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a specific case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. ... I would therefore give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known.

In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd*,⁴ Vickery J had the courage to dissent from his own earlier view. In dismissing the proceeding and declaring the adjudication determination valid under s 1 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Act), he held that there is no requirement for a payment claim under the Act to be made in good faith. Notably, his Honour declined to follow his own decision in *Metacorp*,⁵ insofar as he had determined in that case that a payment claim must be made bona fide in order to be valid. The court also considered (and dismissed) a number of grounds raised by *Reed* which challenged the jurisdiction of the adjudicator. The case confirmed the court's reluctance to imply obligations into the Act and, moreover, to disturb adjudicators' findings.

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¹ See *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296-297. The House of Lords affirmed the decision in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

² *Cordell v Second Clanfield Properties Ltd* [1968] 3 WLR 864.

³ *Megarry & Wades, The Law of Real Property* (3rd ed, 1966) p 826.

⁴ *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235.

⁵ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141.

LEGISLATIVE FRAMEWORK

In Victoria, persons who carry out construction work or who supply related goods and services under construction contracts are generally entitled to progress payments. Under the Act, the payment of progress claims is required under a dual system:⁶ progress claims can be made under contractual entitlements, or, if the contract does not provide for progress payments, a progress payment process is implied by the statute into the contract. In either case adjudication of disputed claims is dealt with under the Act in a truncated timeframe and if the claim is established the payer is under a statutory obligation to pay, sometimes referred to as a “pay now, argue later” approach.

The Act has been in force for almost 10 years. The evolution of judicial consideration of the Act in *Hickory*,⁷ *Grocon*,⁸ and *Metacorp*⁹ has confirmed not only that adjudications under the Act are subject to judicial review but that if an adjudicator’s determination made under the Act breaches natural justice, that determination may be quashed by a writ of certiorari. Notwithstanding the avenue for adjudications to be reviewed judicially, in only a handful of cases have Victorian courts actually interfered with an adjudicator’s determination. But what about an instance where the salient issue is not the conduct of the adjudicator but the conduct of the claimant in bringing a payment claim?

Facts

Reed Constructions Australia Pty Ltd (Reed), made a payment claim pursuant to a construction contract with 470 St Kilda Road Pty Ltd (St Kilda Road), the principal. Pursuant to the contract, each payment claim was to be accompanied by a statutory declaration in the approved form to confirm that Reed’s workers, subcontractors and suppliers had been paid all amounts which were due and payable to them as at the time the statutory declaration was sworn.¹⁰ The payment claim in question was made for works undertaken in January 2012 and was accompanied by a statutory declaration by Reed that St Kilda Road later alleged, both before the adjudicator and before the court, to be false. St Kilda Road, although agreeing with the amount of the claim, withheld payment on the basis that Reed was not entitled at law to receive it. The dispute proceeded to adjudication under the Act. The adjudicator determined that St Kilda Road pay Reed the full amount of the payment claim, being \$760,698.84.

Before Vickery J, St Kilda Road challenged the adjudicator’s determination on three principal grounds:

- (1) the adjudicator did not have jurisdiction, as the payment claim was void for want of good faith;
- (2) the adjudicator erred in finding the amount was not nil; and
- (3) the adjudicator erred in his consideration of an allegedly false statutory declaration by Reed.

Specifically, on the third ground, St Kilda Road submitted that the adjudicator erred in:

- (a) finding that the Act did not empower or require the adjudicator to consider whether the statutory declaration was false;
- (b) finding the statutory declaration was true and failing to provide reasons for the finding; and
- (c) failing to take into account the terms of the contract in determining the amount properly due and payable.

The good faith ground

St Kilda Road first relied on the New South Wales Court of Appeal decision in *Nepean Engineering*, where (in St Kilda Road’s submission) Ipp JA observed that in order for a payment claim to be valid it needed to be made in good faith.¹¹ St Kilda Road also relied on the obiter of Santow JA to support its good faith argument. Vickery J noted that “the observations of Ipp and Santow JJA are a long way

⁶ See *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141 at [18].

⁷ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112.

⁸ *Grocon Constructions Pty Ltd v Planit Cocciardi Joint Venture* (2009) 26 VR 172.

⁹ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141.

¹⁰ *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [13].

¹¹ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in Liq)* (2005) 64 NSWLR 462 at [76].

from authoritatively ruling, following reasoned analysis, that ‘good faith’ was an essential requirement for a valid payment claim under the statute”.¹² Vickery J observed that “the issue was raised and considered in some depth”¹³ in *Bitannia*, in which Basten JA (with whom Hodgson JA agreed on the question of whether a good faith obligation existed) said of the appellants’ submission:

Such an approach has an undeniable attraction. However, s 13 should not be read in isolation: rather, consideration must be given to the whole of the procedure envisaged under Part 3 of the *Building Payment Act*. Thus, a proprietor who seeks to resist a payment claim is entitled (and required) to provide a payment schedule in reply. A claimant who makes a patently unsustainable or untrue claim is thus likely to be met by a payment schedule. If the claimant wishes to pursue the claim in that event, it must be referred to and determined by an adjudicator, who is very likely to disallow so much of the claim as is patently false or unsupported. Accordingly, as the Respondent argued, *the “bona fides” of the claimant should not be treated as a separate criterion of a valid claim: rather, as with any other issue going to the merit of the claim, the scheme of the legislation was to require that an assessment be made by an adjudicator.*¹⁴

Vickery J further observed:

After pointing out that the observation of Ipp JA in *Nepean Engineering* appeared to be obiter “and also without explanation”, Basten JA continued:

This last statement invites closer attention to what is meant by a lack of good faith on the part of the claimant. At the very least it would appear to involve two elements, namely that the claim was without merit and that the claimant knew it. But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in *Coordinated Construction Pty Ltd v Climatech*, at [43]-[46] (a passage cited without disagreement by Hodgson JA in *Nepean Engineering* at [32]-[34]) determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a Court. If the express requirements of the Act are to be so treated, it is difficult to see why some unexpressed precondition should have a different status. Even more so is that the case when, as has been noted, a key element in the supposed condition of “good faith” is that the claim is without merit, a matter indisputably within the powers of the adjudicator to determine.¹⁵

Moreover, Vickery J adopted Basten JA’s observation that there was a distinction between there being no implied obligation of good faith in making a valid payment claim on one hand, and the requirement for the statutory powers of an adjudicator to be exercised in good faith and for the purpose for which they were conferred on the other.¹⁶ Vickery J then considered and adopted the “compelling” reasoning of Muir JA in the Queensland Court of Appeal in *Neumann*.¹⁷

There being no material differences in the wording of the relevant statutory provisions, this Court should follow the decision in *Bitannia* unless persuaded that it was plainly wrong. In my respectful opinion, Basten JA’s relevant conclusions are not wrong, let alone plainly so. The importing into the Act of an implied obligation to make payment claims in good faith would detract materially from the simple robust mechanism provided by the Act to achieve a speedy interim resolution of payment claims to promote early recovery of progress claims. In keeping with the Act’s purpose, s 17 sets out the requirements for a valid payment claim.¹⁸

Finally on the good faith question, Vickery J, having regard to the authorities, observed that when implying words into statutory text, “[t]he fundamental duty of the Court is to apply the law as enacted

¹² 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [33].

¹³ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [35].

¹⁴ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 [58] (emphasis added). The equivalent section in Victoria is s 14 of the Act.

¹⁵ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [37] (footnotes omitted).

¹⁶ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [38].

¹⁷ *Neumann Contractors Pty Ltd v Trasput No 5 Pty Ltd* [2011] 2 Qd R 114 at [72].

¹⁸ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [39]-[40] (footnotes omitted).

by the parliament”.¹⁹ His Honour found that there was “no warrant for implying into the Act an obligation of good faith on the part of a claimant in preparing and submitting a payment claim”.²⁰ Emphasising that the adjudication process contemplated by the Act places the adjudicator in a position to “addresses [sic] and determine the merits of the parties’ dispute as articulated in the payment claim and payment schedule”,²¹ his Honour went on to say:

No enquiry into the bona fides of a claimant is necessary for the effective functioning of these processes. Nor is any such enquiry desirable, given the important objective of providing expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract. It would fly in the face of this purpose of the Act, and the robust determination of disputes under the statutory adjudication process, to import an element of good faith as an issue to be considered and determined for a valid payment claim, in addition to the s 14 requirements.²²

In *Metacorp*, Vickery J had considered the validity of a payment claim that had been served prematurely²³ and found that a claimant who makes a payment claim bona fide is permitted to serve that claim under the Act.²⁴ In revisiting that analysis of whether good faith was a requirement of a valid payment claim under the Act, in *St Kilda Road*, his Honour concluded:

In the light of the authorities I have cited in these reasons, which were not referred to the Court in *Metacorp*, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.

There is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.²⁵

In so finding, Vickery J laid to rest any suggestion that a payment claim under the Act must be made in good faith in order to be valid.

THE JURISDICTION OF THE ADJUDICATOR – PAYMENT SCHEDULE TIME LIMITS

St Kilda Road also submitted that the adjudicator had no jurisdiction to determine the adjudication application as Reed had failed to submit the adjudication application within 10 business days of receipt of the payment schedule as required by the Act.²⁶ In Reed’s submission, the time regime provided under the Act “was not a basic and essential requirement, with the consequence that a failure in compliance would not result in the Adjudication application being rendered invalid”.²⁷ Vickery J quoted²⁸ from his earlier decision in *Grocon (No 2)*, where his Honour had held that:

Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.²⁹

Having considered the relevant passages of the adjudicator’s determination, his Honour held that the adjudicator had fulfilled his statutory duty as required by s 23(2) of the Act.³⁰ His Honour observed that:

¹⁹ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [42].

²⁰ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [43].

²¹ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [43].

²² 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [44].

²³ Meaning before the appointed “reference date” as defined in the Act.

²⁴ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] 30 VR 141 at [101].

²⁵ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [46]-[47].

²⁶ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 18.

²⁷ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [56].

²⁸ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [59].

²⁹ *Grocon Constructors Pty Ltd v Planit Cocciardi (No 2)* (2009) 26 VR 172 at [115].

³⁰ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [65].

The time regime set out in s 18(3) of the Act is not a basic and essential requirement resulting in an invalid adjudication if the initiating adjudication application is not made within time. The Act confers jurisdiction on the appointed adjudicator to determine the question of his or her jurisdiction, including the question of compliance with the time limits provided under s 18(3). The adjudicator may determine the question wrongly and may commence the adjudication. However, this is not a matter which should be the subject of an objective determination by a court, and even if it is, and the matter is determined against a finding of jurisdiction made by the appointed adjudicator, the outcome will not render the adjudication determination invalid.³¹

In dismissing this ground, his Honour noted that “[t]his was a matter for the Adjudicator, and the court is not in a position to disturb his findings on the matter”.³²

THE JURISDICTION OF THE ADJUDICATOR – VERACITY OF STATUTORY DECLARATION

This ground of review arose from cl 38.1 of the construction contract which, as noted above, required Reed to provide a statutory declaration with each payment claim to confirm that Reed’s workers, subcontractors and suppliers had been paid all amounts which were due to them. In determining that Reed had complied with cl 38.1, the adjudicator also concluded that the Act did not empower or require him to consider whether the statutory declaration was false. His Honour said:

The Adjudicator did not have the advantage of having Mr Robinson cross-examined or directly challenged on his Statutory Declaration. Such a forensic tool, which is a traditional means of determining controversial issues of fact by courts, is not appropriate for adjudications conducted under the Act. Adjudications are ill-equipped to deal with controversial issues of fact in this way, particularly within the tight time frames permitted for the delivery of Adjudication Determinations. The interim determination which results from an adjudication determination can always be tested, and indeed reversed or modified in the appropriate case, following a later court hearing in the matter. This is clearly the appropriate forum to determine contractual entitlements founded upon controversial issues of fact. As for the approach of the Adjudicator to such issues, each must do the best they can to arrive at a level of positive satisfaction one way or the other based on the documentary material before them.³³

Citing the relevant passages from his own decision in *Grocon*,³⁴ his Honour declined to find that the adjudicator’s determination on this point was an error of fact resulting in an error on the face of the record as:

although the Adjudicator may have made a wrong finding of fact and it was open for him to arrive at a different conclusion on the issue, equally there was some evidence upon which the Adjudicator could have arrived at the finding of fact which he did.³⁵

Coupled with its argument about the veracity of the statutory declaration, St Kilda Road also submitted that the adjudicator erred in finding that Reed had complied with cl 38.1 of the contract. His Honour dismissed this ground because there was some evidence for the adjudicator to have found the statutory declaration was true and Reed had not breached this term of the contract.

Adjudicator’s findings and adequacy of reasons

Section 23(3) of the Act requires the adjudicator’s determination to be in writing and include reasons for the determination and the basis on which any amount or date has been decided. In dealing with St Kilda Road’s attack on the adequacy of the adjudicator’s reasons his Honour found that, although “relatively brief”, the reasons satisfied s 23(3), adding the words “in the context of the robust procedure provided for in Act”.³⁶ Importantly, his Honour was at pains to draw a distinction between adjudication on one hand and court decisions and arbitral awards on the other:

³¹ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [62].

³² 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [66].

³³ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [81].

³⁴ *Grocon Constructors Pty Ltd v Planit Coccianti (No 2)* (2009) 26 VR 172 at [123]-[124].

³⁵ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [84].

³⁶ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [92].

The procedure set in place for an adjudicator under the Act is not designed to operate as a court of law. The limited evidentiary material to be considered, the tight time frames within which a determination is required to be made, and the interim nature of the effect of the determination which results from the process, all point to this being the case. The determination of an adjudicator made under the Act is quite unlike a curial decision of a court or the award of an arbitrator. It cannot finally determine the rights of the parties to the dispute.³⁷

Although by no means definitive, his Honour's reasoning seems to suggest that, having regard to the purpose of the Act (and barring exceptional circumstances) an appellant will have some difficulty in persuading a court that an adjudicator's reasons are inadequate under the Act.

CONCLUSION

The decision in *St Kilda Rd v Reed* confirms the court's reluctance to allow the purpose of the Act – being to provide a fast track mechanism for the interim resolution of payment disputes in construction contracts – to be frustrated by technical legal arguments. At a practical level it highlights the need for respondents to respond promptly and properly to payment claims and adjudication applications as although a clear scope for judicial review exists under the Act, that scope is limited.

³⁷ 470 *St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 at [92].