

## Editor's Message

### Seasons Greetings to all



and a Happy New Year

As you contemplate the New Year and its many possibilities, please consider using your Chapter Newsletter as a means of communication and self-expression to share your experiences and ideas with your fellow members.

Chapter Committee members and other senior members are often approached by fellow members concerned about a particular matter which they wish to discuss or on which they have particular views.

Please consider asking the person to write a letter to the Newsletter Editor. All letters will be considered and referred, if appropriate, to Institute personnel for comment, which will also be published

## Sub Committee Chairman's Reports

### CPD Coordinator's report.

#### 2005 CPD programme:

In response to member feedback we will introduce a number of CPD innovations in 2005. Please support our efforts to educate, stimulate and entertain members by actively participating in the coming year's CPD - remember, CPD is compulsory for grading and re-grading, and it's designed to help keep you up-to-date and well connected.

#### Key Objectives:

- (1) Continuing professional development (technical and commercial).
- (2) Increased business and professional networking opportunities.
- (3) Enhanced opportunities to interact with IAMA and with the Victorian dispute resolution community generally.

#### Presentation Styles:

We have developed 2 main streams to address the needs of our main interest groups, Arbitrators and Mediators, but welcome members with interests in both areas.

Within each stream we have a range of session styles, from informal, small group fireside chats through seminars

and workshops to formal, multi-day, professional training courses.

#### Reciprocal recognition of CPD:

We also intend to pursue our discussions with other major professional bodies (so that they recognise our CPD and vice versa). Please contact Elisabeth if you can assist in making such arrangements with your professional body.

#### Business development programmes:

In order to attract attendees from the professions, business and government we plan to expand and enhance IAMA's CPD training services into associated areas such as, communication and negotiation training - there are people who want to use these skills in their workplace, without needing to become a dispute resolution professional. We would appreciate any "leads" you can provide us with, to potential clients, to help develop this part of our revitalized, Victorian Chapter business development program in 2005.

**Jon Kenfield** CPD coordinator  
[kenfield@forensic.com.au](mailto:kenfield@forensic.com.au)

## Sub Committee Chairman's Reports continued

### Mediation Practice Group

Responding to member's requests the topics of "Active Listening" and "Reframing" were chosen for the Mediation Practice Group - Skills Development Session on 24<sup>th</sup> November. The evening was very interactive and generated a lot of stimulating discussion.

Cheryl Thomas commenced with a presentation on "Active Listening", explaining the difference between hearing and listening, and conducted an exercise on distinguishing between content and feeling. She shared some good tips on how to improve our listening skills ("door openers", "minimal encouragers", the use of "silence" etc).

Body Language, a fascinating subject in its own right, was briefly discussed, as well as other influencing aspects such as the layout of the room and taking notes.

Breda Annesley then led a discussion on "Reframing", with a particular emphasis on the different purposes for which reframing can be used.

The power of this tool was considered, and members were also reminded of the risks associated with reframing.

### Dinner at the Barracks

A group of 29 IAMA luminaries, newer members, spouses and guests enjoyed an end-of-year dinner in the handsome surroundings of the Officers Mess at the Victoria Barracks – courtesy of IAMA member Robert Turner – on 8 December. Thanks also to sponsor Wordwave International.

Your newsletter editor, being unable to attend obtained the following report from "A reliable source"

**Conviviality?** -----high

**Controversy?** -----low

**Conciliation?** ----- none needed

**Concentration?** -- speaker Di Bretherton was much appreciated

**Concrete?** – not a reference to building disputes all evening!

**Conduct?** – all those present acquitted themselves well

**Conflict?** – Di is the director of the International Conflict Resolution Centre at the University of Melbourne.

**Constipation?** – none reported!

**Consumption?** – no excesses were noted

The conversation and the group exercises demonstrated the difficulty in effective reframing, as well as displaying a broad range of individual mediation styles. Both sessions gave members an opportunity to enhance their technical skills, and the level of interest indicated that an entire session could have been devoted to each topic.

The IAMA CPD program for next year will incorporate further Mediation Practice Group activities. The program has been designed to cover the key elements of the mediation process, and will enable participants to refresh and improve their mediation skills. A number of sessions have also been scheduled to focus on the "Professional and Business Development" needs of mediator members.

Thanks to everyone who has participated and contributed to the meetings throughout the year, and we hope to see you, as well as some new faces, next year.

If you have any queries about the Mediation Practice Group, please contact **Breda Annesley** on 9600 4921 or by email at [breda@solutionist.com.au](mailto:breda@solutionist.com.au).

**Content?** – Di's talk was both thoughtful and laced with humorous anecdotes

**Context?** – Di's central message was to never, when attempting dispute resolution, forget the great importance of the cultures and customs of the disputants

**Contrast** between what, when speaking in another language, Di meant ("I'll wait outside for my partner to arrive") with what she thinks she actually said ("I prefer to wait outside for romance")

**Conundrum:** when is a Japanese silence one of respect, and when is it one of hostility?

**Conclusion:** finally a couple more gems from Di's talk:

♣ Shock at the concept of a neutral mediator: how can anyone respect a person with no passion?

♣ The importance of ceremony in marking the reaching of agreement:

"We roasted a pig in honour of the agreement, and this shows how importantly we view it."

**We do not reveal our sources!** Ed.

## Personal Notes

## Congratulations to the following members

### Associate Membership

Mr Granton Hay  
Ms Sue Hawker  
Ms Felicity Smith  
Mr Louis Vatosios

### Arbitrator Grade 3

Mr Michael Sweeney

### Arbitrator Grade 2

Hon Neil Brown QC

### Mediator Accreditation

Ms Breda Annesley  
Hon Neil Brown QC  
Mr Phillip Connors  
Mr Malcolm Ferrier  
Ms Anne Markiewicz  
Mr John Rundell  
Mr Louis Vatosios

## Security of Payment legislation and adjudication

Judgment of  
His Honour  
Judge Frank  
Shelton

A County Court  
Judgment on an  
Adjudication matter

Considering, amongst other  
things, the validity of a payment  
claim in terms of Section 14 of  
the Act

**IN THE COUNTY COURT OF VICTORIA AT MELBOURNE**  
**CIVIL APPLICATIONS**

(Un)Revised (Not) Restricted

**AMD FORMWORK PTY LTD V YARRAMAN CONSTRUCTION GROUP PTY LTD**  
(ACN 101 284 708) (ACN 087 804 359)

Catchwords: Summary Judgment Application –  
Building and Construction Industry Security of Payment Act 2002, S.14 and S.16.

### APPEARANCES:

For the Plaintiff

For the Defendant

### Counsel

Mr M Roberts

Mr J Pennell

### Solicitors

Deacons

Eggleston Whelan

### **HIS HONOUR:**

1. This is an application for summary judgment pursuant to Order 22 of the Rules. The application is based upon s.16 of the *Building and Construction Industry Security of Payment Act 2002* ("the Act").
2. The approach to be taken to a summary judgment application is stated by the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154CLR 87 at 89 as follows:

*"The power to order summary or final judgment is one that should be exercised with great care. It should never be exercised unless it is clear that there is no real question to be tried."*

### **THE FACTS**

3. On 3 September 2003, the plaintiff and defendant entered into a written agreement pursuant to which the plaintiff agreed to carry out construction work for the defendant at 72 – 76 High Street, Windsor for the sum of \$436,363 plus GST ("the agreement"). The works to be performed were described in the agreement as "Concrete"; Stage 1, Basement to Floor Level".
4. There was no dispute that clause 14(a) of the agreement, although inelegantly worded, entitled the plaintiff to submit a claim for a progress payment on the 15<sup>th</sup> day of the month and at the end of each month and to receive payment within 14 days.

5. On 15<sup>th</sup> October 2003, the plaintiff delivered by hand to the defendant a document dated 14 October 2003, headed "Claim No. 6". This claim relevantly stated:

**Tax Invoice**

To: Yarraman  
Att: Alan Anderson  
Contract: Yarraman Const. Group P/L  
From: Sean McGovern

**Claim No. 6**

Fax: 9529 2459  
Project: 72 High St. Prahran  
Contract Date: Sept. 3<sup>rd</sup> 2003  
Date: October 14<sup>th</sup>; 2003

**THIS IS A CLAIM UNDER THE VICTORIAN BUILDING AND  
CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002**

**Re: 6th Progress claim for the Period October 1<sup>st</sup> to October 15<sup>th</sup> and including claims 4 & 5**

1. Balance of Transfer slab	\$ 8,083.00 + G.S.T.
2. Add Claim no. 4	\$188,790.00 + G.S.T.
4. Add Claim no. 5	\$ 98,700.00 + G.S.T.
Total Claimed	\$295,573.00 + G.S.T.

6. Clause 14(d) of the agreement stated:

"As part of the Builder's payment obligation the following wording should be noted the progress claims, "This is a payment claim under the *Building and Construction Industry Security of Payment Act 2002*".

Section 14(3)(c) of the Act also requires that a claim made under the Act must state that it is made under the Act.

7. Claim No. 6 refers to Claims No. 4 and 5. Claim No. 4 dated 15<sup>th</sup> September 2003 relevantly stated:

Re: 4<sup>th</sup> Progress claim against contract.

1. 2<sup>nd</sup> stage ground slab – (not including ramp).
2. Completion of formwork to 1<sup>st</sup> stage of transfer slab – Approx. 500m2 this claim.
3. 52 tonne steel reinforcements supplied and fixed to 1<sup>st</sup> stage of transfer Slab.
4. Concrete to same.

Total claim no. 4 \$188,790.00

Total Payable \$188,790.00 (Excl. G.S.T.)

8. Claim No. 5 dated October 2<sup>nd</sup> 2003, relevantly stated:

Re: 5<sup>th</sup> Progress claim against contract.

1. 2<sup>nd</sup> stage of ground floor suspended slab.

Total claim no. 5 \$ 98,700.00

Total Payable \$98,700.00 (Excl. G.S.T.)

9. Neither Claims 4 nor 5 stated that they were made under the Act. In response to Claim No. 6, the plaintiff did not receive a "payment schedule" pursuant to s.15 of the Act within the time limited by that section. The plaintiff thus claims that on or about 29<sup>th</sup> October 2003, pursuant to s.15(4) of the Act, the defendant became liable to pay it the sum claimed in Claim No. 6 - \$295,573.00 plus G.S.T., namely \$325,130.30.

10. On 30 October 2003, the defendant paid the plaintiff the sum of \$45,000 and on 10 November, the sum of \$65,000, leaving a balance claimed by the plaintiff of \$215,130.30. The plaintiff abandons the excess of \$15,130.30 and claims the sum of \$200,000 pursuant to s.16 of the Act.

**THE LAW**

Legal submissions by both parties focused upon the meaning and application of s.14 of the Act. This section states:

*14. Payment claims*

(1) *A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is liable to make the payment.*

(2) *A claimant may serve only one payment claim in respect of a specific progress payment.*

(3) *A payment claim –*

*(a) must identify the construction work or related goods and services to which the progress payment relates; and*

*(b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and*

*(c) must state that it is made under this Act.*

12. Section 13 of the New South Wales *Building and Construction Industry Security of Payment Act 1999* is in substantially identical terms to s.14. It states:

*“(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*

*(2) A payment claim:*

- (a) must identify the construction work (or related goods and services) to which the progress payment relates; and*
- (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and*
- (c) must state that it is made under this Act.*

This section has been the subject of considerable judicial comment. A useful starting point is *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395 (7 May 2002) where Austin J. stated, at paragraphs 43 and 44:

*[43] S.13(2)(a) requires the payment claim to identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to “motel construction for Jemzone Pty Ltd”. That falls well short of satisfying the requirement of s.13(2)(a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.*

*[44] S.13(2)(b) requires that the progress claim must indicate the amount of the progress payment that the claimant claims to be due for the construction work done. This requirement is also not satisfied by the document in question. Since the document fails to identify the construction work to which the progress payment relates, it cannot, and does not, indicate the amount of the progress payment said to be due for that construction work. It merely identifies an overall balance owing and makes some adjustments to that balance.”*

13. Two days later, in *Hawkins Construction (Australia) Pty Ltd v Mac’s Industrial Pipework Pty Ltd* [2002] NSWCA136. Davies A.J.A., with whom Handley J.A. and Stein J.A. agreed, stated at paragraph 20.

*“However, subs (2) of s.13 of the Act should not be approached in an unduly technical manner.... As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.”*

14. In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, (9 April 2003) Nicholas J. stated, at paragraph 82:

*“Section 13(2)(c) requires the payment to state that it is made under the Act. It must be clear on the face of the document that it purports to be a payment claim under the Act. The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning.”*

15. In *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited*, [2003] NSWSC 1103, (3 December 2003) Einstein J. stated at paragraphs 52:

*“I would respectfully agree with the view taken by Nicholas J. in Walter at [65] that a purpose of the Section 13(2)(a) requirement is that a respondent served with a payment claim be provided with adequate information to enable it to provide a payment schedule under section 14.”*

16. Then in paragraph 54 he stated that he was in agreement with the comments of Davies A.J.A. in *Hawkins Construction (Aust) Pty Ltd v Mac’s Industrial Pipework Pty Ltd* at paragraph 20. He continued in paragraph 55:

*“To the extent that the authorities disclose a difference of approach in this regard, my view is that the analyses and expressions of opinion by Nicholas J. in both Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 (9 April 2003) (“Walter”), paragraphs 63-66 and 81-85, and in Parist Holdings Ltd v WT Partnership Australia Pty Ltd [2003] NSWSC 365 (“Parist”), paragraphs 27-29 adopted by Bergin J. in Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd [2003] NSWSC869, paragraphs 30-34, should be preferred to the views expressed as obiter by Austin J. in Jemzone Pty Ltd v Trytan Pty Ltd [2002] NSWSC 395 (“Jemzone”), generally for the reasons set out above.*

17. On the next day, in *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, Palmer J. stated, at paragraph 76:

*“A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim, a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.”*

18. In *John Holland Pty Ltd v Cardno MBK (NSW) Pty Limited* [2004] NSWSC 258 (20 April 2004), Einstein J., at paragraph 14, quoted with approval, the comment of Palmer J. in *Multiplex Constructions v Lukins* at paragraph 76. He further stated:

17. *“A difficulty which arises concerns the fact that section 13 of the Act does not, at least expressly, require the payment claim to include reasons for the claimed entitlement to a particular progress payment....*

18. ....The whole notion of a payment claim, it seems to me, requires as an essential condition thereof that the document by which the payment claim is put forward, include, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is.

19. There is a powerful argument that this effectively means that the statutory regime requires that the claim to be valid must be comprehensible by the respondent....

20. However, as earlier observed, there are no words within section 13(1) which require the claimant to do otherwise than:

- to identify the subject construction work to which the progress payment relates [subsection (1)(a)];
- to indicate the amount of the progress payment that the claimant claims to be due [subsection (1)(b)];
- to state that the claim is made under the Act [subsection (1) (c)].

21. Ultimately it seems to me that the accepted principles of statutory construction simply do not permit the Court to take the further step of holding that in order to be valid, a payment claim must be comprehensible by the respondent in terms of its supporting materials.”

19. As appears from these extracts, the more recent judicial approach is to move away from an overly strict interpretation of the s.13 of the NSW Act as suggested by Austin J. in *Jemzone* and adopt a more practical approach, recognising that progress claims are made in the course of a busy construction project and without the opportunity to descend to drafting niceties. It is sufficient if the payment claim tells the recipient enough to enable it to lodge a payment schedule in response, if thought appropriate. I adopt this approach to s.14.

### THE DEFENDANT'S SUBMISSIONS

20. Mr Pennell submitted that claims no.4 and 5 were defective in that they did not state that they were made under the Act as required by s.14 (3)(c). Mr Pennell submitted that this defect cannot be cured by incorporating these claims in claim no. 6 which complies with s.14(3)(c). I agree with the plaintiff's submission that it is sufficient for claims no. 4 and 5 to be incorporated in claim no. 6 which complies with s.14(3)(c) of the Act for it to form part of the payment claim upon which the plaintiff relies. The purpose of s.14(3)(c) is presumably to alert the recipient to the fact that the claim has been made under the Act which may have far reaching consequences for it if it does not avail itself of procedures available to it under the Act. This purpose was achieved by claim no.6.

21. Mr Pennell further submitted that the description of the works in claim no.6 was not a sufficient identification of the works in respect of which the claim was made as required by s.14(3)(a), even given a non technical practical approach to s.14 of the Act. As mentioned by Einstein J. in *Leighton Contractors* at paragraph 52, a requirement of a payment claim is that it identifies the works in respect of which it is made to a sufficient degree to enable the recipient, if it wishes, to dispute the claim and provide a payment schedule under s.15 of the Act. In this application, Lazaros Tsakiridis, a director of the defendant, has sworn an affidavit dated 5 July 2004. In it he has no difficulty in disputing in detail the claim made in progress claim nos. 4, 5, and 6. He has not stated in the affidavit that progress claims no. 4, 5 and 6 were unintelligible to him nor has he stated why no payment schedule was lodged. In an affidavit sworn 15 July 2004 and filed on behalf of the plaintiff, Greg Dzuma deposes that he was engaged by the plaintiff to provide project management and administration services for the project at 72 - 76 High Street, Windsor. He states that claims 4, 5, and 6 relate almost totally to the ground floor transfer slab and that prior to the commencement of works in respect of this item he was asked by a representative of the defendant to provide a separate costing of that work to assist in the assessment of claims. In response, he provided the information requested by letter dated August 22, 2003, which he deposes was hand delivered to a representative of the defendant. In the circumstances, it is not surprising that the defendant was able to comprehend claims nos. 4, 5 and 6.

22. Thirdly, Mr Pennell contends that the affidavit of Tsakiridis shows that there is a genuine dispute in relation to the amount claimed by the plaintiff and particularly refers to payments made by the defendant, directly to subcontractors of the plaintiff, a procedure for which there was no provision in the agreement. He relies upon s.47 of the Act which preserves the rights of a party to a construction contract covered by the Act. The short answer to this submission is that if the defendant wished to dispute the plaintiff's payment claim no.6, it could have done so by providing a payment schedule pursuant to s.15 of the Act and then have the matter adjudicated upon pursuant to the Act. The defendant's rights are preserved in that it can raise the matters referred to in Tsakiridis' affidavit in later arbitration or court proceedings. It cannot rely on such matters to defeat the present claim. I note that the Explanatory Memorandum accompanying the Bill introducing the Act states: "*The recovery procedures in the Act are not intended to affect any other rights that parties may have under a construction contract.*" The Explanatory Memorandum further states with respect to s.47: "*This section is intended to ensure that the Act does not limit any other entitlements that a person may have under a construction contract or any other remedy that a person may have for recovering that other entitlement.*"

23. Mr Pennell sought to rely upon Order 13.14 of the Rules. In my view, given the purpose and wording of the Act and my comments in paragraph 23, the defendant cannot do so – see generally *L.U. Simon Builders Pty Ltd v H. D. Fowles* [1992] 2 V.R.189, particularly at 195.

24. Mr Pennell further sought to rely upon the decision of Master Macready in *Tooma Constructions Pty Ltd v Eaton and Sons Pty Ltd* [2002] NSWSC 514. That was an application under s.459G of the *Corporations Act* to set aside a statutory demand. There a payment schedule had not been provided in response to a payment claim. That decision can be distinguished in that it was not a claim brought, as here, under the equivalent New South Wales provision to s.16 of the Act, but rather concerned the interpretation of s.459G of the *Corporations Act*.

### SUMMARY

In the circumstances, I am satisfied that payment claim no. 6 complied with s.14 of the Act. No payment schedule having been lodged by the defendant pursuant to s.15 of the Act, the plaintiff is, pursuant to s.16 of the Act, entitled to recover the sum of \$200,000 from the defendant. There will be judgment for the plaintiff in the sum of \$200,000. I will hear from the parties on the question of interest, costs and the hearing of the plaintiff's stay application with respect to the defendant's counterclaim.

## Some more useful websites

### LAW AND LEGAL NEWS

#### Online newspapers

The Australian Online

<http://www.theaustralian.com.au>

The Australian Financial Review Online

<http://afr.com>

The Sydney Morning Herald Online

<http://www.smh.com.au>

The Age Online

<http://www.theage.com.au>

#### Popular Legal Web Sites for Lawyers and Non-Lawyers

AUSTLII (Australasian Legal Information Institute)

<http://www.austlii.edu.au>

Law for You

<http://www.law4u.com.au>

Legal Information Access Centre (LIAC)

<http://liac.sl.nsw.gov.au/>

The Law Report (ABC Radio National)

<http://www.abc.net.au/rn/talks/8:30/lawrpt/lawrpt.htm>

#### 'One Stop Shop' Sources of Case Law, Legislation, and Information on Legal Topics

AUSTLII (Australasian Legal Information Institute)

<http://www.austlii.edu.au>

Australian Law Online

<http://www.law.gov.au>

Australian Law on the Internet (National Library of Australia)

<http://www.nla.gov.au/oz/law.html>

BAILII (British and Irish Legal Information Institute)

<http://http://www.bailii.org>

FindLaw

<http://www.findlaw.com>

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