



P: +613 9600 1643

F: +613 9600 3544

E: reception@lovegrovesolicitors.com.au

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Legal Bulletin

“Security of Payment Deadlines Trump ‘Undue Technicality’ at the County Court”

By Justin Cotton, Lovegrove Solicitors, Construction and Commercial Lawyers Partner, Construction Division

A recent decision at the County Court has keynoted the need to lodge payment schedules on time in response to payment claims under the *Building and Construction Industry Security of Payment Act 2003* (“the Act”). It has also shown the Court’s power to amend a sum for which judgment had previously been entered by default, and avoid the need for the plaintiff to start an exercise again for technical reasons when it was likely the same result would eventuate.

The case of *L.H. Blue Pty Ltd v A.X.F Constructions Pty Ltd* [2010] VCC (28 April 2010) concerned a claim by a plastering subcontractor against a head contractor in regard to three unpaid payment claims submitted under the Security of Payment laws. No payment schedules had been submitted on time by the Builder AXF and after the subcontractor filed a Writ, no Appearance was filed.

Judgment by default was entered against AXF for the sum of the three claims, for a sum of \$573,468.34. It was only when a statutory demand was served on AXF in February 2010 that AXF acted by applying to have the judgment set aside. This application was ultimately unsuccessful.

Key parts of Justice Shelton’s decision include:

- Most of the technical arguments by AXF against the payment claims, as to form and substance, could have been raised in

payment schedules served within time under the Act, but AXF failed to do this.

- Every allegation of fact in a statement of claim is taken to be admitted because AXF had failed to file an Appearance. The Court relied on *Parkville Court Pty Ltd v Salvaris* [1975] VR 393.
- The requirements of section 14 of the Act as to the form of payment claims should not be approached in an overly technical manner because although the invoices had referred to the name of the Act as “Building Construction Guarantee of Payment Act 2002” it was clear what Act was referred to in the circumstances.
- A cause of action (in this case an unpaid payment claim) can be added after the commencement of a proceeding, if the Court employs Rule 36.01(3). The unpaid final payment claim became overdue 4 days after the Writ was filed, but the Writ was served around 3 weeks after that.
- There is an inherent power for the Court to amend the sum for which judgment has already been entered, if there has been a previous error, and the Court can do this under Rule 36.07 without having to set aside the entire judgment.

AXF had argued that there were irregularities in

the payment claims and that claims brought under section 16 of the Act should not have judgments entered administratively but should be decided by a judge. Against this the Court found the allegations were taken to be admitted by the failure to file an Appearance, and that arguments on irregularity including as to sums owing and inclusion of retentions should have been raised in payment schedules.

On the mis-description of the Act in the invoices, the Court relied on *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd [2009] VSC 156* and held that the requirements of section 14 for payment claims should not be interpreted in an “overly technical manner”.

One of the major hazards for the subcontractor was the fact the Writ had been filed on 21 December 2009 but under the Subcontract the third payment claim did not become overdue until 25 December 2009. Was this payment claim valid as part of the judgment by default?

The Court allowed the third payment claim under Rule 36.01(3) after accepting the subcontractor’s argument that the cause of action on this payment claim had accrued by the time the Writ was served in January and at the time of entry of judgment, and further no payment schedule had been served.

An accounting error at the subcontractor’s office had seen a sum of \$49,500 from the first payment claim inadvertently duplicated in the second payment claim. This was brought to the Court’s attention by the subcontractor during the hearing and an application made to vary the judgment sum downward by \$49,500. However AXF argued the entire judgment should be set aside.

Justice Shelton gave leave to vary the judgment amount to \$516,945 plus interest and costs. He held that *“The Court has a discretion to allow the plaintiff to amend the sum for which judgment is entered pursuant to the inherent jurisdiction of the Court and Rule 36.07 of the Rules.”*

Adopting the decision in *Faircharm Investments Ltd v Citibank International plc [1998] EWCA Civ 171*, the Court considered that in exercising the discretion it would be pointless to set aside a judgment if the defendant was bound to lose a later application for summary judgment.

This case highlights the strength of the “guillotine dates” under the Security of Payment laws and the need to seek prompt legal advice if served with contested claims.

*For more information, please contact Justin Cotton
Phone: (03) 9600 1643 | Fax: (03) 9600 3544 | Email: justin@lovegrovesolicitors.com.au*

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