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Supreme Court

New South Wales

Case Name:	Marques Group Pty Ltd v Parkview Constructions Pty Ltd
Medium Neutral Citation:	[2023] NSWSC 625
Hearing Date(s):	21 April 2023
Date of Orders:	13 June 2023
Decision Date:	13 June 2023
Jurisdiction:	Equity - Technology and Construction List
Before:	Rees J
Decision:	Motion dismissed with costs.
Catchwords:	CIVIL PROCEDURE — summary disposal — security of payment (SOPA) — principles at [14]-[17] — summary judgment sought in the amount of payment schedules as a statutory debt — defendant claims payment schedules only issued as a consequence of plaintiff's misleading and deceptive representations in subcontractor's statement as to payment of employees and solvency — Bitannia v Parkline Constructions — defence not so clearly untenable that it cannot possibly succeed.
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW) Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law
Cases Cited:	Aalborg CSP A/S v Ottoway Engineering Pty Ltd (2017) 129 SASR 283; [2017] SASCFC 158 Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41 Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9 Costain Australia v State Superannuation Board (Supreme Court (NSW), Brownie J, 22 February 1991,

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	unrep) Dey v Victorian Railways Commissioners (1949) 78 CLR 62; [1949] HCA 1 Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 Ke Qin Ren v Hong Jiang (2014) 104 ACSR 149; [2014] NSWCA 388 Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602 Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2011] 2 Qd R 114 Ottavio v Hayvio Pty Ltd [2011] NSWSC 1125 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4 RJ Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390 Silverton Ltd v Harvey [1975] 1 NSWLR 659 Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52 Spencer v Commonwealth of Australia (2010) 241 CLR 118 TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93 Vannella Pty Limited v TFM Epping Land Pty Ltd [2019] NSWSC 1379 Winslow Constructors Pty Ltd v John Holland Rail Pty Ltd [2008] VCC 1491
Category:	Procedural rulings
Parties:	Marques Group Pty Ltd (Plaintiff) Parkview Constructions Pty Ltd (Defendant)
Representation:	Counsel: Mr L Shipway / Mr G Campbell (Plaintiff) Mr D Hume (Defendant) Solicitors: Paramonte Legal (Plaintiff) Salim Rutherford Lawyers (Defendant)
File Number(s):	2022/386339

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JUDGMENT

1 **HER HONOUR:** The plaintiff subcontractor, Marques Group Pty Ltd, seeks summary judgment against the defendant contractor, Parkview Constructions Pty Ltd, in respect of two payment schedules served under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (*SOPA*).

Facts

2 The subcontractor had two construction contracts with the contractor, to provide formwork on projects in Woolooware and Parramatta for $22.7 million and $14.665 million respectively. The subcontracts were relevantly in the same terms. The subcontractor was entitled to submit a payment claim on and from the 25th day of each month: clause 10. Clause 11 provided:

> … The preconditions to an entitlement of the Subcontractor to submit a payment claim to Parkview are that the Subcontractor has strictly complied with the terms of this agreement and including without limitation having submitted to Parkview:
>
> (a) Statutory Declaration … signed by a director for by the Subcontractor that all employees, workers, suppliers, manufacturers and Secondary Subcontractors who are or have been engaged in relation to the Works have been paid in full all amounts payable to them by virtue of their engagement, employment, or Secondary Subcontract or by any statute, legislation, order or award …

3 On 25 October 2022, the subcontractor's representative, Alan Masterson, completed a Subcontractor's Statement and statutory declaration in respect of each project. Mr Masterson declared *inter alia* that all remuneration payable to employees for work done in October 2022 under each contract with the contractor had been paid. In his statutory declaration, Mr Masterson stated:

> 3. All workmen who are or at any time have been engaged on the work under the Contract have been lawfully employed and have been paid in full all wages and allowances which have become payable to them by virtue of their employment on the Work under the Contract.
>
> 4. All subcontractors who are or at any time have been engaged on the Work under the Contract have been paid in full all amounts which have become payable to them by virtue of their subcontracts with the Contractor.
>
> …
>
> 6. I personally know the truth of the matters which are contained in this declaration and the attached Subcontractor's Statement.
>
> …

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9. I am not aware of anything that would contradict the statements made in the statutory declarations and Subcontractor's Statements provided to the Contractor by its Subcontractors.

…

11. The Contractor is not, under any law, insolvent or unable to pay its debts as and when they fall due.

4 On 26 October 2022, the subcontractor submitted two payment claims, being:

(a) a payment claim for the Woolooware project in the amount of $1,610,212.26 (marked "DRAFT"); and

(b) a payment claim for the Parramatta project in the amount of $647,048.42.

The payment claims attached the Subcontractor's Statements and statutory declarations.

5 Section 14(4) of SOPA provides that any payment schedule must be served within ten business days of receipt of a payment claim, failing which the recipient is liable to pay the payment claim in full. Ten business days after 26 October 2022 expired on 9 November 2022. By that date, the contractor had issued two payment schedules, each marked "DRAFT":

(a) On 3 November 2022, the contractor issued a payment schedule in respect of the Parramatta payment claim: of the $647,048.42 claimed, the contractor proposed to pay $520,688.21.

(b) On 8 November 2022, the contractor issued a payment schedule in respect of the Woolooware payment claim: of the $1,610,212.26 claimed, the contractor proposed to pay $1,264,804.63.

6 By operation of section 14 of SOPA, the contractor became liable to pay these amounts, totalling $1,785,492.84, by 23 November 2022. The contractor made no payments in respect of either payment schedule.

These proceedings

7 On 22 December 2022, the subcontractor commenced these proceedings and also filed a motion seeking summary judgment. Initially, the subcontractor contended that "DRAFT" payment schedules were not payment schedules within the meaning of SOPA, such that the contractor was liable for the amount of the payment claims. During the hearing of this application, the subcontractor accepted that there was a triable issue on this question, where the contractor

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contended that the subcontractor was estopped from suggesting the "DRAFT" payment schedules were ineffective. As ultimately put, the subcontractor sought summary judgment in the amount of the payment schedules as a statutory debt pursuant to section 16(2)(a)(i) of SOPA.

8 In its Commercial List Response, the contractor contends that, by the Subcontractor's Statements and statutory declarations, the subcontractor engaged in misleading and deceptive conduct when representing that:

(a) all employees and subcontractors had been paid for work done in the period covered by the payment claim; and

(b) the subcontractor was paying its debts as and when they fell due.

9 In fact, the contractor contends that the subcontractor had not paid its workers' superannuation contributions and Australian Construction Industry Redundancy Trust contributions. Some subcontractors had not been paid. These non-payment were said to indicate that the subcontractor cannot pay its debts as and when they fall due. "In the premises", the payment claims are said not be a payment claim under SOPA.

10 Further, the contractor contends that, in reliance of these representations, the payment schedules were issued, accepting a large portion of the payment claims. Absent such conduct, the contractor would have served a payment schedule which scheduled an amount of $0, or an amount less than that scheduled. Further, in the circumstances, the payment claims were said not to be payment claims capable of giving rise to an entitlement under SOPA "where an essential element of a cause of action under [SOPA] was brought about by a plaintiff's contravention of the *Australian Consumer Law*, there is no entitlement … to … the claimed amount".

Submissions

11 The contractor submitted that its defence engaged the principles established in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9: a defence under the *Australian Consumer Law* is not barred by ss 15(4) and 16(4) of SOPA. Further, where a plaintiff sues on a cause of action, one essential element of which has been created by the plaintiff's misleading conduct, the contravention affords a defence and judgment cannot be

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obtained: *Bitannia* at [8], [13], [17], [124]. As a result of the subcontractor's contravention of s 18 of the *Australian Consumer Law*, the contractor scheduled positive amounts when, had the contraventions not occurred, it would have scheduled nothing. The defence under the *Australian Consumer Law* trumped the contractor's rights under SOPA, where Commonwealth legislation prevailed in the event of inconsistency and entitled the contractor to dismissal of the subcontractor's claim.

12 The plaintiff submitted that the defendant needed to articulate an application for an order under section 237 or section 243 of the *Australian Consumer Law*, framed in such a way as to seek compensation, or to prevent or reduce the loss. Whilst *Bitannia* says, as a matter of principle, that a party may rely on s 18 as a defence, an order must nonetheless be sought so that the loss contemplated is avoided. The Court would have regard to the relief which may be granted under the *Australian Consumer Law* and take this into account when fashioning an appropriate order on a summary judgment application: *Costain Australia v State Superannuation Board* (Supreme Court (NSW), Brownie J, 22 February 1991, unrep). Further, a breach of the duty to provide a subcontractor's statement does not invalidate a payment claim, as it would be contrary to the policy of SOPA: *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93; *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 (although I note in that case McDougall J at [46] held the lack of a supporting statement would invalidate *service* of a payment claim).

13 As to the suggestion that the subcontractor had misrepresented its solvency, the subcontractor submitted that the payor of a payment claim carries the risk of insolvency of the claimant pending final determination of the parties' rights: *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at [39]-[40] (Keane JA with whom Fraser JA and Fryberg J agreed); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [51]-[52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The fact that a claimant is insolvent is not a basis on which a recipient of the payment claim can decline to pay it. Permitting recipients of payment claims to raise points of this kind would have a "chilling effect" as such allegations are easily made and

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it would be a simple matter for the recipient to thereby delay payment, contrary to the purpose of SOPA.

Consideration

14 There was no dispute as to the principles, which have been variously expressed. The discretion of the Court to summarily dismiss a claim is to be sparingly invoked: Dey v Victorian Railways Commissioners (1949) 78 CLR 62 at 92 (per Dixon J); [1949] HCA 1; General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 129 (per Barwick CJ); [1964] HCA 69. It must be clear that there is no real question to be tried: Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87 at 99; [1983] HCA 25. A claim will be summarily dismissed as disclosing no reasonable cause of action only where "the case … is so clearly untenable that it cannot possibly succeed": General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 129-130 (per Barwick CJ); [1964] HCA 69; Spencer v Commonwealth of Australia (2010) 241 CLR 118 at 140; [2010] HCA 28 at [55] (per Hayne, Crennan, Kiefel and Bell JJ).

15 There must be a high degree of certainty about the ultimate outcome of the proceedings if it went to trial: Agar v Hyde (2000) 201 CLR 552 at 575-576; [2000] HCA 41 at [57] (per Gaudron, McHugh, Gummow and Hayne JJ). The Court must form a view that the claim would fail if permitted to go to the trial such that it would be an abuse of process for the Court to allow the proceedings to continue: Ke Qin Ren v Hong Jiang (2014) 104 ACSR 149 at 158; [2014] NSWCA 388 at [49] (Barrett, Gleeson and Leeming JJA).

16 Summary disposal is not limited to cases where argument is unnecessary to show the futility of the defence or claim. Argument, even of an extensive kind, may be necessary to demonstrate that the defence is so clearly untenable that it cannot possibly succeed. The Court will determine questions of law on summary disposal applications if the Court is satisfied that the point is clear: Silverton Ltd v Harvey [1975] 1 NSWLR 659 at 665 (per Rath J). Summary judgment may be obtained for part of a claim: *Costain Australia Ltd v State Superannuation Board* (Supreme Court (NSW), Brownie J, 22 February 1991, unrep), followed in *Ottavio v Hayvio Pty Ltd* [2011] NSWSC 1125 (Ward J).

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17 As to applications for summary judgment in respect of payment claims and payment schedules served under SOPA, the nature of the statutory regime and the relatively low threshold for the validity of payment claims and payment schedules means that it may be appropriate to resolve short points of law or construction on a final basis, where there is often no distinction between a summary and final determination and disputes are often wholly documentary in nature: *Vannella Pty Limited v TFM Epping Land Pty Ltd* [2019] NSWSC 1379 at [60] (Henry J); upheld on appeal in *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 (Basten, Meagher JJA and Emmett AJA).

18 *Bitannia* established that breaches of the *Australian Consumer Law* can be pleaded by way of defence to a claim for judgment under section 15 of SOPA, without bringing a cross-claim or substantive proceedings: at [7]–[9] per Hodgson JA; [90]–[104] per Basten JA (with each of whom Tobias JA agreed); followed in numerous cases including *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114; *Aalborg CSP A/S v Ottoway Engineering Pty Ltd* (2017) 129 SASR 283; [2017] SASCFC 158. Nor do I read *Bitannia* as requiring that the respondent 'pin their colours to the mast' in respect of which remedies are sought under the *Australian Consumer Law*, in terms of compensation or ancillary orders. That would be a cross claim. Such a claim would certainly assist a claimant to obtain summary judgment for *part* of its claim. But that does not make it a requirement of an arguable defence.

19 *Bitannia* was followed in *Winslow Constructors Pty Ltd v John Holland Rail Pty Ltd* [2008] VCC 1491, where Judge Shelton refused a summary judgment application based on a payment schedule which indicated that the respondent proposed to pay a certain amount. The respondent said when it issued the payment schedule it was not aware of misleading and deceptive conduct of the claimant, being the cancellation of bank guarantees without the respondent's knowledge and statutory declarations as to payment of subcontractors. The claimant sought to distinguish *Bitannia* on the basis that the misleading and deceptive conduct was concerned with the service of the payment schedule, being the same basis on which the subcontractor's counsel sought to distinguish the case here. However, Judge Shelton held at [17]-[18]:

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> The payment claims are, in my view, tainted with misleading or deceptive … conduct. Had the plaintiff known that the bank guarantee … had been cancelled, or that sub sub-contractors had not been paid, it is inconceivable, in my view, that the defendants would have issued the same Payment Schedules.
>
> In my view, there is certainly a "real question to be tried" as to whether the defendants are entitled to rely upon alleged misleading or deceptive … in breach of the *TPA*.

That decision is indistinguishable to the case at hand.

20 I agree with the subcontractor that the contractor's defence based on alleged misleading and deceptive conduct in respect of the subcontractor's solvency appears to run contrary to the SOPA scheme. It is notorious that SOPA is designed to ensure that subcontractors can obtain cash flow: *Probuild* at [39], [43], [47] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The legislation was designed to "reform payment behaviour in the construction industry" by "stamp[ing] out the practice of developers and contractors delaying payment to subcontractors and suppliers": *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52 at [3]-[4] (Kiefel, Bell, Gageler, Keane and Gordon JJ). The suggestion that, if the subcontractor had advised the true position, the contractor "would have looked very carefully at that claim" and issued a "Nil" payment schedule or a payment schedule for a lower amount, appears to strike at the heart of the scheme. As inherently unattractive as that defence is, I cannot say that it is so clearly untenable that it cannot possibly succeed.

Orders

21 For these reasons, I make the following orders:

(1) Dismiss the amended motion filed on 21 April 2023.

(2) Plaintiff to pay the defendant's costs of the motion.

(3) List the matter for directions in the Technology and Construction List on 16 June 2023.

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Amendments

13 June 2023 - Orders: Matter listed in the Technology and Construction List

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