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A powerful tool – The Security of Payments Act

By Andrew Whitelaw, Partner

The *Building and Construction Industry Security of Payment Act 2002* was brought into existence in January 2003. This piece of legislation is an extremely powerful tool when applied correctly. The Act provides both contractors and sub-contractors further rights and remedies in securing payment of invoices and progress claims in relation to contract works.

The Act applies to all contracts (written and oral) for building and construction work, or for the supply of related goods or services within Victoria with the exception of contracts between builders and homeowners where the home is to be the principal residence of the homeowner, certain contracts with financial institutions and contracts where payment is calculated other than by reference to the value of work or where the work is for oil, natural gas or mineral extraction.

The Act enables a contractor or sub-contractor who carries out construction work or supplies related goods or services to make a claim for a progress payment under the Act. The claim ought to be made in accordance with the contract terms, however, if the contract is silent as to those terms, within 20 business days after the works are commenced or the goods/services are provided. This right continues every 20 business days until the works are completed.

In order for a progress claim to comply with the Act it must state on the claim that the claim is made under the "*Building and Construction Industry Security of Payment Act 2002*". Other conditions also apply. The Claim must also describe the construction works carried out, or the related goods/services supplied up to the date of the claim. It must also state the amount of the claim and how the claim is calculated.

After a claim which complies with the Act is submitted, the "respondent" that is, the person who receives the claim, has 10 business days in which to dispute the claim, by serving a "Payment

A powerful tool – The Security of Payments Act *cont*

Schedule” upon the claimant. These time limits are of great importance and if missed or ignored have serious consequences.

In a recent case of *Cooper Morison Pty Ltd v Casa D’Abrussa Club [2006] VCC 16th February 2006*, conducted by this firm before the County Court of Victoria, the Builder as claimant made several progress claims in accordance with the Act against a proprietor. The proprietors as respondent, however, failed to both pay the amounts and issue a payment schedule which complied with the Act. Instead the Respondent’s solicitors sent a letter merely stating that the Respondent disputed the claim, but without any details or particulars. The claimant in accordance with the Act issued proceedings in the Court for Summary Judgment due to the Respondent’s failure to issue a Payment Schedule.

The Court held that the letter did not comply with section 15(4) of the Act and further that it did not constitute a payment schedule. As a result, our

client was successful in obtaining an order against the Respondent for a sum in excess of \$180,000. Our client was also awarded the costs of having obtained the order.

The Court noted on several occasions, that where a claim is made and no payment schedule is served in accordance with the Act, then a Respondent cannot oppose an Application for Summary Judgment.

The Act is a powerful tool to be utilized by contractors in securing payment of progress claims. So long as the claim is properly made out and complies with the Act, and where a respondent has failed to issue a payment schedule, the courts provide a readily accessible means of obtaining Summary Judgment for progress claims. Time frames and strict accordance with the Act must be followed.

The Victorian Government is due to implement key changes to the Act shortly to bring the Victorian legislation in line with other states.

A timely warning: Buyers beware

By Tim Graham, Senior Associate

Since the inception of the *Domestic Building Contracts Act* in May 1996, owners of properties on which domestic building work is carried out enjoy the protections afforded by the Act in relation to workmanship, fitness for purpose and the standard of materials used in the work.

Since that date, a builder undertaking domestic building work warrants that the work has been carried out in a proper and workmanlike manner and in accordance with the plans and specifications, that the work will be reasonably fit for purpose and that all materials will be new unless otherwise stated in the contract. Moreover, the builder warrants that the work will be carried out with reasonable care and skill and that it will comply with all laws and legal requirements.

The benefit of the warranties endures for the benefit of subsequent purchasers (or successors in title) for the period of 10 years from the date on which the work was completed.

This means that a subsequent owner of land on which domestic building work has been carried out may institute an action against the builder for the cost of rectifying defective work up to 10 years from the date of issue of the Occupancy Permit, despite the fact that the subsequent owner has no contractual relationship with the builder.

However, two recent decisions of the Victorian Civil

and Administrative Tribunal, have severely limited the ability of successors in title to successfully pursue the original builder.

De Lutis v Housing Guarantee Fund Ltd

Mr De Lutis purchased a house in Lansell Road, Toorak at public auction on 18 October 2001. Shortly after settlement, Mr De Lutis noted that the render on the exterior of two walls was bubbling. In the process of obtaining quotations for the rectification work, it became apparent that rust stains would continue to appear in the render throughout the entire dwelling. Accordingly, De Lutis lodged a claim with the builder’s warranty insurer.

At trial, De Lutis gave evidence that he failed to notice the rust spotting on the property at or before the time of purchase. Thus the rust spots played no part in his assessment of the property’s value. Accordingly, De Lutis argued that the rust stains were a building defect for which he was entitled to indemnity as a subsequent owner of the property pursuant to the warranties concerning workmanship and materials implied by the *Domestic Building Contracts Act*.

However, the Tribunal found that the rust stains were so obvious that they must reasonably be supposed to have been known to De Lutis when he bid at the auction. Therefore the price he paid

A timely warning: Buyers beware *cont*

represented the value of the house in its apparent state; that is, with the obvious rust spotting.

De Lutis' case therefore stands for the proposition that knowledge of patent defects maintenance must be presumed to be reflected in the price paid for the property.

Beamish v Rosvoll

Mr Rosvoll, as owner-builder, had carried out extensive renovations to a residence including the addition of a second storey. The property was sold to Mrs Beamish by a contract dated 11 November 2002.

The Vendor's Statement contained a clause by which the purchaser acknowledged having inspected the property and was purchasing the property in its present condition and state of repair. The clause further stated that the vendor was under no liability or obligation to the purchaser to carry out repairs, renovations or alterations to the property.

However, this clause was inconsistent with the obligations imposed by the *Building Act* on owner-builders which include:

- all domestic building work carried out on behalf of the vendor was carried out in a proper and workmanlike manner
- all materials used in that domestic building work were good and suitable for purpose
- any person who is a successor in title may take proceedings for a breach of warranty
- a provision of an agreement that purports to restrict the right of a person to take proceedings for breach of warranty is void (unless the breach was known or should have been known by the purchaser when the contract was signed)

Domestic building work & the builder

By Bryan Thomas, Senior Consultant

In Victoria, all residential ("domestic") building work (including renovations, extensions and landscaping) is governed by the *Domestic Building Contracts Act 1995* ("the Act").

The Act does not apply to farm and commercial buildings, buildings to accommodate animals, the transporting of a residence from one site to another, and to any one of the following types of work if carried out under individual contracts:

- Attachment of external fixtures
- Drainage work
- Electrical work

The Tribunal had little difficulty in declaring the clause in the Vendor's Statement that purported to limit the vendor's liability to the purchaser to be void.

However, Deputy President Aird warned that for the owner to succeed in her claim, the Tribunal must be satisfied that she had suffered loss and damage attributable to the vendor's breach of the statutory warranties, and that the rectification works carried out were reasonable and necessary in the circumstances. The Deputy President stated that she would allow the reasonable cost of rectification of latent defects; but where the works were reasonably apparent to the purchaser at the time of purchase (whether or not actually noted by the purchaser), no allowance would be made.

The Deputy President stated:

A prospective purchaser may have clearly observed the situation which constitutes a defect and not being offended by (indeed, may have positively accepted) the situation. In those circumstances, it would be untenable for the purchaser to later attempt to establish loss.

Conclusion

In spite of the degree of consumer protection implied by the operation of the *Domestic Building Contracts Act 1995* and the *Building Act 1993*, the principle of *caveat emptor* ("buyer beware") remains alive and well. Not only should a purchaser inspect the property closely prior to purchase but before completing the purchase, obtain an inspection report from a reputable building consultant which may identify defects not apparent to the purchaser.

- Glazing
- Installation of floor coverings
- Insulating
- Painting
- Plastering
- Plumbing
- Tiling

The Act provides that if the price of the domestic building work is more than \$5,000, the work must be governed by a major domestic building contract ("the contract") and only a builder registered with the

Domestic building work & the builder *cont*

Building Commission may enter into such a contract with a building owner ("an owner").

A major domestic building contract must:

- be in writing
- state the names and addresses of the parties
- state the date of the contract
- state the contract price
- set out the terms of the contract
- contain a description of the work to be carried out
- include the plans and specifications for the work
- state the registration of the builder
- state when the work is to commence
- state when the work will be completed
- sets out details of the insurance required under the *Building Act*
- include a statement regarding the cooling off period

and

- contain a warning if the contract price is likely to vary

An owner may withdraw from a major domestic building contract within 5 business days of having signed the contract. If the contract does not contain a notice advising the owner of this entitlement, then the owner may withdraw from the contract within 7 days of becoming aware that the contract should have contained the notice.

A builder may not commence domestic building work unless the required insurance under the *Building Act* is in place and a Building Permit has been issued by a Registered Building Surveyor.

Variations requested by either the builder or the building owner must follow the procedure laid down by the Act and specified in the contract; that is, they must be in writing and signed by both parties before the work covered by the variation is commenced.

Before commencing any work, the builder is entitled to require the owner to pay a deposit (to a maximum sum of 5% if the contract price is \$20,000 or more and 10% if the contract price is less than \$20,000).

Unless the parties agree otherwise in the contract, the builder may only submit claims for progress payments on completion of the base, frame, lock-up and fixing stages, as defined in the Act, and for

no greater than the percentage of the contract price as stated in the Act.

On completion of the work the builder is also entitled to submit a final claim, but not until:

- (i) the work has been completed in accordance with the plans and specifications; and
- (ii) the owner has been given a copy of the Occupancy Permit or the Certificate of Final Inspection issued by the Building Surveyor.

The owner has an automatic right to terminate the contract if either:

- (i) the contract price has increased by more than 15%; or
- (ii) construction has not been completed within 1.5 times the construction period as stated in the contract.

However, if the owner terminates the contract for one of these reasons, the builder is entitled to be paid a reasonable sum for the work carried out.

Both the builder and the owner may terminate the contract if the other is in breach of the contract. However, legal advice should be sought if termination is being contemplated, as strict time limits apply and written notices must be served.

The Victorian Civil and Administrative Tribunal (VCAT) determines disputes between building owners, builders or insurers concerning domestic building work, major domestic building contracts and builders' warranty insurance claims. In doing so, the Tribunal may make a broad range of orders including:

- the appointment of a mediator
- the payment of money
- varying a term of a domestic building contract
- declaring that a term of a contract is, or is not, unlawful
- the refund of monies paid under an unlawful contract
- the rectification of defective building work
- the completion of incomplete work

Although the intent of the *Domestic Building Contracts Act* is to simplify residential construction in Victoria, it is still a "minefield" for the unwary. It is therefore essential that both builders and building owners are aware of their obligations (and rights) under the Act so that projects are completed without disputation, and the expense and inconvenience of litigation in VCAT is avoided.