

Valeo Construction v Pentas [2018] VSC 243

FACTS

Valeo Construction Pty Ltd (**the Plaintiff**) and Pentas Property Investments Pty Ltd (**the Defendant**) entered into a contract whereby the Plaintiff would construct a five-storey residential apartment building, with two levels of basement car-parking and some commercial tenancies at 178 Victoria Avenue, Albert Park (**the site**) in Victoria, for a total sum of \$18,490,170.00 (exclusive of GST).

Pursuant to the Contract, the plaintiff was entitled to make claims for payment under s.9 of the Building and Construction Security of Payment Act (2002) Vic (**the Act**) on the fifteenth day of each month, by serving a payment claim on the superintendent. The parties then agreed to modify this orally, and it became the thirteenth of the month

The plaintiff sent a payment claim #45 for the total sum of \$2,215,150.03 to the defendant and the superintendent.

The payment claim was then revised, resulting in a \$25,000 increase, totalling \$2,215,150.03 and was emailed to the defendant on 1 March 2018

ISSUES

- Validity of the Revised Progress Claim pursuant to s.14 of the Act
- Whether s.14 of the Act is silent on the revision, or withdrawal and replacement, of a payment claim – allowing subsequent rectification.
- Whether a revised progress claim, effected service of a valid progress claim which revised or updated or withdraw or replaced or effected a reasonable correction to the original claim or when read with the original claim constituted one in the same payment claim as with the original progress claim

FINDING

Digby J considered the scheme of the Act, and determined that the service of a payment claim for a claimed amount is a trigger for the procedures provided for in ss 14 and 15 of the Act, including in respect of the prescribed form and timing of the payment claim served pursuant to s.14(1) of the Act and the negative stipulation in s14(8) that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract, fixed by s9(2) of the Act' is valid, unless express notification is given of the withdrawal of the first payment claim.

Digby J referred to *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*, where the High Court of Australia has expressly approved the proposition contained in the decision of the Court of Appeal of New South Wales in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* that a subsequent document purporting to be a payment claim, that is in respect of the same reference date as a previous payment claim, is prohibited from being recognised as such under the Act.

QUOTE

Digby J held that:

[63] *“In my view, as a practical observation, it could be problematic for respondents to payment claims, and their advisers, if it was valid and effective for a payment claim to be revised or amended or corrected after initial service, by means of the service of a subsequent payment claim in relation to the same reference date, unless the earlier payment claim served is clearly abandoned or withdrawn prior to or contemporaneously with the revised or amended or corrected subsequently served payment claim in respect of the same reference date”.*

[64] *“If it were otherwise, difficult issues would be likely to arise as to what the nature or extent of a permissible charge might be and as to when under the relevant construction contract and the Act, such a charge could be made to a payment claim earlier served”.*

[65] *“Undesirable issues and uncertainties could also well arise as to the implications, if any, in relation to the time within which a responsible payment schedule must be provided under the Act and in addition such a change, or possible multiple changes at different times, could unduly burden the respondent, and its consultants. Such issues would be likely to vex the parties to applicable construction contracts, contract administrators and the courts”.*

IMPACT

The case highlights the importance of clarity in initial service of a payment claim, and if an amendment or revised payment claim is to be served, the previous payment claim needs to be expressly abandoned or withdrawn in respect of the same reference date

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