

V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2021] VSC 849

FACTS

The case of *V601 v Probuild [2021] VSC 849* involved a dispute over a number of delays and variation claims, with the independence of the superintendent who was responsible for making a number of the decisions, being called into question.

In 2011, V601 Developments Pty Ltd (**V601**), the Principle, entered into an AS4902-2000 contract with Probuild Constructions (Aust) Pty Ltd (**Probuild**), with First Urban Pty Ltd (**First Urban**) acting as superintendent (having both duties for contract management and duties to assess and certify works, variations and claims), for the construction of a combined residential and commercial project comprising approximately 467 apartments, related facilities and further commercial premises.

After a number of delays and rejection of EOT requests by First Urban, the project was finished in or about December of 2013. V601 subsequently made a claim against Probuild for Liquidated Damages in the amount of \$4,712,519 and Probuild counterclaimed for Acceleration Expenses in the amount of \$1,834,853 and Delay costs in the amount of \$741,365.

At trial, Probuild claimed that the superintendent had conspired with V601 to limit EOT and Delay claims in breach of their obligations to impartiality and independence.

ISSUE

Whether First Urban had breached their duties in rejecting a number of EOT and Delay claims?

FINDING

The Supreme Court found for Probuild, with Digby J noting the tension which existed between the duties to act for the Principal and those of impartiality and stating:

239 *In the superintendent's role as agent of the principal, the superintendent acts in the principal's best interests and pursuant to the superintendent's obligations to the principal...*

240 *However, in the role of assessor and certifier, the superintendent must ordinarily act independently, and in an impartial and fair manner, and must not act in a way that advances the principal's interests over those of the contractor.*

302 *Here, in my view, egregiously, the Project Manager ... without contractual or factual or any other proper justification, as addressed elsewhere, failed or refused to approve Probuild's Contractor's program as it was obliged to and should have done pursuant to cl 32.3 of the Contract.195*

303 *In the result, in my view, the Project Manager's purported direction under cl 34.5(b) of the Contract, in relation to Probuild's EOT2A and 3 claims, was ill-founded and also void by reason of the Project Manager's lack of independence and its breaches of cl 20.2 of the Contract.*

IMPACT

This decision is a significant one as it exposes significant risks regarding conflict of interest issues for Superintendents or other entities carrying both assessment and certification and contract administration roles.

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