IN THE COUNTY COURT OF VICTORIA

Revised
(Not) Restricted

AT MELBOURNE
COMMERCIAL LIST
BUILDING CASES DIVISION

Case No. CI-14-04210

CONSTRUCTPRO PTY LTD — Plaintiff

v.

MAICOME PTY LTD — Defendant

JUDGE:	His Honour Judge Anderson
WHERE HELD:	Melbourne
DATE OF HEARING:	10 October 2014
DATE OF JUDGMENT:	24 October 2014
CASE MAY BE CITED AS:	Constructpro Pty Ltd v. Maicome Pty Ltd
MEDIUM NEUTRAL CITATION:	[2014] VCC 1719

REASONS FOR JUDGMENT

Catchwords: Building contract – Variations – Whether "second class" variations claimable – Whether contract provided "*a method of resolving disputes*" – section 10A(3)(d)(ii) *Building and Construction Industry Security of Payment Act 2002* (Vic) – *Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452 (Kaye J) considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J.A.F. Twigg	Noble Lawyers
For the Defendant	Mr A.J. Silver	Billings Cloak

HIS HONOUR:

1 Constructpro Pty Ltd seeks judgment against Maicome Pty Ltd for two progress claims pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic). The progress claims relate to a residential unit development at Leopold.

2 Constructpro was engaged by Maicome after the previous builder went into liquidation. Constructpro was to rectify defects and to complete the 12 unit project.

3 The two progress claims were as follows:

a. $6,074.20 (including GST), being the amount unpaid in respect of a claim for preliminary works made 9 August 2013; and

b. $871,560 (including GST), being the whole of the claim made 20 February 2014 for rectification and completion works.

Preliminary works claim for $6,074.20 on 9 August 2013

4 Maicome's counsel, Mr Silver, made two submissions as to why the claim should not be allowed:

a. the claim had not been properly served in accordance with the Act. This submission was withdrawn when it became apparent that receipt of the progress claim by email had been acknowledged by a director of Maicome, Mr George Iliov. Mr Iliov's affidavit sworn in opposition to the application by Maicome was tendered in evidence by Constructpro;

b. there was no evidence that the claim was made pursuant to a "construction contract" as required by the Act.

5 There was no dispute that Constructpro performed works in advance of the execution of a formal written contract for the rectification and completion works. Mr Claudio Salvatore, a director of Constructpro, said in an affidavit in support of the application that, at Mr Iliov's request, Constructpro performed certain preliminary works before it "*could start any completion and rectification works at the site*".

6 In his affidavit, Mr Iliov admitted in respect of the first progress claim that, "*there is $6,074.20 outstanding, however there was no separate contract in place for the*

alleged preliminary works [and] the alleged preliminary works were in fact part of the rectification works".

7 The building contract is dated 7 August 2013. Mr Salvatore said that, "*Constructpro commenced the preliminary works on or about 17 June 2013 and completed the preliminary works in or about July 2013*". The progress claim for $18,474.20 (including GST) was served on about 12 August 2013. Maicome made a payment of $6,200 on about 19 August 2013 and a further payment of $6,200 on about 22 August 2013.

8 In my view there is no doubt that the preliminary works claimed in the progress claim were performed pursuant to "*a contract or other arrangement under which one party undertakes to carry out construction work for another party*" (definition of "*construction contract*" in s.4 of the Act). The Act is therefore enlivened and Constructpro is entitled to the unpaid balance of the first progress claim, being $6,074.20 (including GST) and interest from the date the claim was due for payment.

Rectification and completion works claim for $871,560 on 20 February 2014

9 Mr Silver submitted that the progress claim could not be made under the Act for the following reasons:

a. the rectification works were not performed pursuant to the building contract and were performed under a separate contractual arrangement;

b. insofar as the progress claim included "*rectification work*", payment for that work was specifically excluded from the written building contract executed by the parties;

c. the progress claim included amounts claimed for the rectification works as well as a claim for variations in relation to the works required to complete the development works;

d. the payment claim was a "*progress claim*" and by s. 10(1) of the Act the amount claimed must have been "*calculated in accordance with the terms of the contract*" or at least be related to construction work carried out "*under the contract*". The claim included amounts "*in relation to a claim arising at law other than under the construction contract*" and, by s. 10B(2)(d) of the Act, were to be regarded as "*excluded amounts*" which could not be claimed.

e. The variation works were of such a magnitude, being more than "*10% of the consideration under the construction contract at the time the contract is entered into*", that s.10A(3)(d) of the Act applied and those variations may not "*be taken into account in calculating the amount of a progress payment*" (s.10B(1)). This issue involves consideration of whether the building contract does "*provide a method of resolving disputes under the contract*" (s.10A(3)(d)(ii)).

f. the court was not entitled to give judgment under s.16(4)(ii) as the "*claimed amount*" in the progress claim included an "*excluded amount*".

Whether the building contract permits a claim for "*rectification work*"

10 The building contract was in the standard form HIC5 (Edition 1 – 2007) and included the following provisions:

a. the "*Description of major domestic building works, completion of works as detailed in each 12 unit specifications (attached)*" (item 5 of the Appendix);

b. the "*Contract price*", $270,000 (including GST) (item 10.1 of the Appendix)

11 The building contract contained six special conditions as follows:

a. SC1 – "*This contract covers all work required to achieve occupancy and / or completion certificates for all 12 units on the site*";

b. SC2 – "*This contract does not guarantee the work already undertaken by the previous builder and his subcontractors or suppliers*";

c. SC3 – "*This contract will ensure all non-compliant work is corrected and rectified prior to handover of works. This relates to defects found during completion that were part of the original builder's work*";

d. SC4 – "*All compliance certificates for work undertaken by Constructpro Pty Ltd sub cont. to be supplied at handover*";

e. SC5 – "*Constructpro Pty Ltd takes responsibility for only works undertaken and administered by them as per spec.*";

f. SC6 – "*Due to the unknown quality of quality non-structural and structural*

workmanship, all defective works found during completion of the project to occupancy will be paid as a separate arrangement outside the contract".

12 Constructpro's counsel, Mr Twigg submitted that I should construe special condition 6 as relating to the issue of payment and not the broader contractual arrangements between the parties. The "rectification works" should not be regarded as having been performed pursuant to a "*separate contract*" to the "*completion works*".

13 Mr Twigg referred to:

a. the structure of the six special conditions which made it clear that there was a single contract which "*covers all work required to achieve occupancy*" and this included the work necessary to "*ensure all non-compliance work is corrected and rectified prior to handover*";

b. special condition 6 required the issue of how the rectification work would be "*paid*" to be determined "*as a separate arrangement*" because of the "*unknown quality*" of the previous workmanship.

c. the "*contract*" price of $270,000 only covered what was required for "*completion of works as described in [the] specifications (attached)*";

d. the building contract specifically excluded the progress claims process prescribed under s. 40 of the *Domestic Building Contracts Act 1995* and provided that payments would be in accordance with a "*schedule of payment structure to be advised for completion of remaining works*" (Schedule item 23.2);

e. it was clear from the invoice comprising the payment claim that:

i. the "*completion works*" were generally not included, as was apparent from the item "*contract price monies paid and received from Westpac - $245,454.55*". This sum represented the contract price of $270,000 less GST;

ii. the "*rectification works*" included the balance of the items in the invoice, save for $51,374.96 for "*contract variations to complete works as per contract*" and $26,357.60 for "*contract price margin 15%*";

14 In my view, the better view of special condition 6 is that it was not included to delineate the "rectification works" as being performed pursuant to a separate contractual arrangement, but rather that the separate arrangement was to be made as to the payment for these works.

15 This conclusion is supported by special conditions 1 and 2 which make it clear that the "*contract covers all work required to achieve occupancy*" and that rectification of defective work will be necessary. Item 23.2 also anticipates that a "*schedule of payment structure*" would "*be advised for completion of remaining work*".

16 Section 14 is considered to only permit "*one payment per reference date per construction contract*" (*Rail Corporation of NSW v Nebaz Constructions* [2012] NSWSC 6, per McDougall J on the equivalent provision in the New South Wales Act.

17 In *Matrix Projects (Qld) Pty Ltd v Luscomb* [2013] QSC 4, Douglas J considered a "*period sub-contract*" by which the claimant agreed to perform unspecified rectification works to buildings for a lump sum where the respondent issued "*written work orders for certain projects*" which the claimant was entitled to accept or refuse. The claimant was issued nine work orders and was directed to undertake rectification works on five further buildings on a "*do and charge*" basis. Douglas J held that the claim in respect of this work was not made under a single contract or arrangement because the work was divisible into the work done pursuant to the subcontract and the do and charge work pursuant to a different regime.

18 However, in the present case, I consider that the contractual provisions make it clear that the parties intended that the whole of the construction work to be performed by Constructpro would be carried out pursuant to the building contract. Accordingly, I do not consider that either s. 10(1) operates to exclude the claim, or that s.10B(2)(d) has any relevance.

Consequences of contract works variations being included in the payment claim

19 There was no dispute that the only claimable variations were those falling into the second class of variations outlined in s.10A(3) of the Act. The contract variations in the payment of claim $51,374.86 exceeded 10% of the contract price of $270,000 and therefore s.10A(3)(d)(ii) should be read as if the amount of "*$150,000*" were substituted for $5m.

20 However, Mr Twigg submitted that, even with that substitution, s.10A(3)(d)(ii) did not

exclude the contract variations as claimable variations, as the building contract did not "*provide a method of resolving disputes under the contract (including disputes referred to in paragraph* (c))".

21 The provision of the building contract dealing with "*Resolution of disputes*" is clause 26.1, which reads as follows:

> **26.1 Unsettled disputes may be referred to VCAT**
>
> "*If any dispute between the owner and the builder, in connection with this contract cannot be resolved by informal agreement either party may make application to the Victorian Civil and Administrative Tribunal ("VCAT") which is located at 55 King Street, Melbourne and which may be contacted by telephone on (03) 9628 9999*".

22 In *AC Hall Airconditioning Pty Ltd v Schiavello (Vic) Pty* Ltd [2008] VCC 1490 ("*AC Hall Air Conditioning*"), His Honour Judge Shelton at paragraph 33 stated that, "*What is required by ss. (3)(d)(ii), in my view is a binding dispute resolution mechanism separate from the Court system*". His Honour said that he was *"fortified in my approach by comments of Kaye J in Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452" ("*Siemens*"), a decision on "*s.25(2) of the Act prior to its amendment*".

23 His Honour concluded that the provision in the contract that any "*dispute or difference shall be resolved by a court of competent jurisdiction in the State where the works are performed [although] the parties may agree in writing to refer part or all of such dispute or difference to arbitration…*" did *"not provide a method of resolving disputes under it and therefore ss. 3(d)(ii) is applicable*" (paragraph 34).

24 In *Adam Wood Group Pty Ltd v Procon Builders Pty Ltd* [2012] VCC 2001, His Honour Judge Ginnane (as he then was) reached a similar conclusion in relation to the "*dispute resolution*" clause of the contract between the parties in that proceeding. His Honour quoted paragraphs 31-34 from Judge Shelton's judgment in *AC Hall Airconditioning* and stated, at paragraph 25, "*I do not consider that clause 47.2 provides a method of resolving disputes under the construction contract and I apply the reasoning in AC Hall v Schiavello*".

25 In *Siemens*, Kaye J considered s.25(2) of the Act before wholesale amendments were made to the procedures in the Act that a respondent must follow if a

determination were made that it pay an adjudicated amount to the claimant. The respondent must either "*pay that amount to the claimant, or…must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them*" (s.25(1)).

26 However, s.25(2) provided as follows:

> *(2) The respondent may only give security under sub-s.(1)(b) if the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.*

27 Section 25(5) and (6) provided that the claimant could not enforce any security given under s.25 until the "*final determination of the* "*matters in dispute*" between the parties; essentially "*when the determination is made*", appeal or review rights have expired, or any "*appeal or review proceedings have been finally disposed of*".

28 Clause 25 of the contract, considered by Kaye J in Siemens, was entitled "*Dispute Resolution*" and provided before works commenced, for the appointment of a "*Dispute Committee*" with representatives nominated by the parties. All disputes were to be referred to the committee which was required to "*undertake to resolve and agree matters of difference or dispute*". Any "*mutual decision confirmed by the Dispute Committee in connection with respective difference or dispute shall be considered final and binding upon the parties*".

29 If the Dispute Committee cannot "*resolve and agree*" a dispute, either party may "*refer such matters to adjudication*". "*Where the amount involved in a single dispute exceeds $10,000,000* [a party may] *initiate arbitration proceedings*".

30 At paragraph 18, Kaye J concluded that "*the processes of a Dispute Committee under clause 25.2 do not constitute 'other dispute resolution proceedings' under s.25(2) of the Act*". Kaye J, at paragraph 19, noted that, "*In ordinary usage, the terms 'proceedings' and 'arbitration proceedings' contemplate curial, or quasi-curial, processes involving the independent adjudication or determination of a dispute between two or more parties*".

31 At paragraph 23, Kaye J noted that it was, in his view, "*essential that, whatever process is adopted, that process must involve the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of*

procedural fairness". At paragraph 27, Kaye J concluded that, "*The whole context of clause 25.2 would make it unimaginable that the dispute committee should be required to conform with the basic dictates of procedural fairness*".

32 It is important to analyse the legislative provision that was considered by Kaye J and the context in which the phrase "*other dispute resolution proceedings*" appears, and to compare s.10A(3)(d)(ii) which includes the phrase "*a method of resolving dispute under the contract*".

33 The former s.25(2) offered a respondent ordered to pay an adjudicated amount to a claimant, the option of either paying that amount (ss.(1)(a)) or, giving security for the payment of that amount "*pending the final determination of the matters in dispute between them*" (ss.(1)(b)).

34 The option of providing security was only available in the circumstances provided in ss.(2); that "*the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute*".

35 By contrast, s.10A(3)(d) (particularly having regard to the operation of ss.(4)), determines what disputed variations are capable of being taken into account in calculating the amount of a progress payment to which a claimant is entitled.

36 In the present case:

a. there was, in relation to the contract variations, no agreement between the parties as to at least one of the matters set out in ss.(3)(c);

b. therefore, the variations were of the "*second class*";

c. the plaintiff, by the progress claim dated 20 February 2014, claimed contract variations of $51,374.86

d. this was more than 10% of the consideration in the construction contract of $270,000, so that ss.(3)(d) applied;

e. the contract consideration exceeded the applicable threshold under ss.(3)(d)

of $150,000, so that ss.(3)(d)(ii) applied.

37 As a consequence:

a. if the construct contract did provide "*a method of resolving disputes under the contract*", the variations could not be taken into account in calculating the plaintiff's entitlement under the progress claim;

b. if a dispute resolution method was not provided for in the contract, the variations (although they were to be regarded as "*second class*" disputed variations) could be taken into account in calculating the plaintiff's entitlement.

38 In the case of s.25(2), the phrase "*or other dispute resolution proceedings*", was intended to further elucidate the word "*proceedings*" as including, not only arbitration proceedings, but also "*other dispute resolution proceedings*". Such "*proceedings*" must have been "*commenced*", if a respondent who was required to pay an adjudicated amount, were to be permitted to exercise the option of providing security rather than actually paying the adjudicated amount.

39 It should be noted that by ss.(5) and (6), the security could not be enforced by the claimant until the "*proceedings*", and any appeal taken, was finally determined. In these circumstances, if a form of dispute resolution proceeding were pursued in relation to a dispute (other than court or arbitration proceedings), such other form of dispute resolution proceeding would need the degree of formality and finality discussed by Kaye J in Siemens.

40 For the disputed contract variations claimed as part of a progress claim under the Act, the relevance of a contract "*providing a method of resolving disputes under the contract*", has a very different purpose. If the contract does contain a dispute resolution method, then disputed variations claimed in respect of a contract (with a consideration exceeding the statutory amount - $5m, or $150,000 if the variations are more than 10% of the consideration), cannot be taken into account in a progress claim made under the Act.

41 This seems to suggest that the intention of s.10A and particularly ss.(3)(d)(ii) is to limit the circumstances in which the procedures of the Act can be used to claim variations. These circumstances include where:

a. any relevant aspect of the variation is disputed;

b. the variations claimed are more than 10% of the contract consideration;

c. the contract involves a consideration in excess of the statutory amount ($5 million or $150,000);

d. the contract "*does not provide a method of resolving disputes under the contract*"

42 In these circumstances, the legislation must have recognised that where the contract itself provides a method of dispute resolution, the use of the procedures under the Act to recover certain disputed variations may be dispensed with.

43 Clearly, the Act provides abbreviated procedures. In these circumstances, it is understandable that variations, where an essential element is disputed, might not be permitted as part of a claim.

44 If the disputed variations are only a small element of the overall contract consideration (less than 10%) or the overall contract consideration is limited ($5million or $150,000), then again the expedited processes of the Act may not be inappropriate.

45 Similarly, this reasoning may also apply if a method of dispute resolution were provided for by the contract. It is presumably intended that those dispute resolution processes might be followed, rather than the special procedures in the Act being invoked. It should be noted that, the availability of the dispute resolution method is only relevant if the contract consideration exceeds the statutory amount of $5m (or $150,000, if ss.(4) applies).

46 In these circumstances, what might one expect to be the features of such a dispute resolution method? One would expect that it would provide an avenue by which a claimant for variations, with at least one element disputed, might obtain resolution of the dispute relating to those variations with reasonable expedition and at limited cost.

47 In the present case, clause 26.1 of the "*Home Improvements*" building contract

provides for "*informal*" discussion although, if agreement is not reached, the parties must litigate the dispute at VCAT, in the Domestic Building List.

48 It is worth noting, that clause 26.1 would appear to satisfy the purpose s.25(2), if a proceeding had been commenced at VCAT, but not if the informal discussion process was still underway. The VCAT proceeding would have been covered by the broad expression "*proceedings*", whereas the informal discussions would not (upon Kaye J's analysis) have been regarded as coming within the phrase "*other dispute resolution proceedings*".

49 The present issue is more difficult. Can the reference of a dispute to VCAT, if an informal agreement cannot be reached, be regarded as a "*method of resolving disputes*"? A dispute only exists if the parties cannot reach agreement. Unstructured informal discussion or negotiations, hardly seems to fit the description of a "*method*", without the definition of more formal processes.

50 The commencement of proceedings at VCAT is a usual remedy for a party to a domestic building contract. If proceedings are commenced in the Supreme Court, County Court or Magistrates' Court, the court must, upon the application of a party, stay the proceeding under s. 57 of the *Domestic Building Contracts Act 1995* (Vic), if the limited requirements of that section are satisfied.

51 By s. 7(2)(b) and (ba) of the *Building and Construction Industry Security of Payment Act*, the Act has application only to certain types of domestic building contracts, generally where the person for whom the construction work is carried out is "*a person who is in the business of building residences*" and the contract directly relates to that business.

52 In the circumstances, I do not accept in the present case, that the building contract provided "*a method of resolving disputes*". The powers under the Act, for example under s. 16(2)(a)(i) and s.17(2)(a)(ii) may only be exercised by "*any court of competent jurisdiction*" and not by VCAT. Parties to a domestic building contract cannot contract out of the *Domestic Building Contracts Act* (s.132), including the right to bring a proceeding in VCAT. Clause 26 does not therefore provide a separate method of resolving disputes under the contract.

53 Whilst, by this analysis, I have reached a similar conclusion as His Honour Judge

Shelton in *AC Hall Air conditioning* and His Honour Judge Ginnane in *Adam Wood Group,* I am not confident that the principles which they applied necessarily have general application to the construction of s.10A(3)(d)(ii).

54 Having reached the decision I have in relation to ss(3)(d)(ii), it follows that the "*contract variations to complete works as per contract*" of $51,374.96 are properly claimable as part of the progress claim. In the absence of a payment schedule, the plaintiff is also entitled to judgment in respect of this aspect of its progress claim.

Severance

55 Although it is not necessary to consider the matter further, I did hear argument on the question whether, if I had determined that the claim for variations had been wrongly included in the progress claim, this would have prevented me from severing that amount and entering judgment for the balance. I will consider the matter briefly.

56 Section 16(4)(a)(ii) of the Act provides that in proceedings to recover the unpaid portion of a progress claim, "*judgment in favour of the claimant is not to be given unless the court is satisfied…that the claimed amount does not include any excluded amount*".

57 In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J specifically considered whether he could sever part of the payment claim which related to claims which did not satisfy the requirements of the Act to sufficiently identify the work performed. At paragraph 114, Vickery J rejected the argument that "*severance should not be permitted because the Act did not permit this to occur [and that] if one part of the progress claim did not satisfy the requirements of s. 14(3)(a) the whole of the progress payment would therefore fail and should be set aside as being invalid*".

58 At paragraphs 115 and 116, Vickery J stated:

"*I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act earlier described are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.*

Severance in this case would operate to achieve the purpose and objects of the Act and would not operate to diminish the attainment of these goals. A respondent to a payment claim and an adjudicator, if appointed, should be able to assess the valid part of this progress claim which sufficiently describes the work for which payment is claimed, and provide a rational response or adjudication determination in respect of that part of the claim, and exclude from consideration that part of the claim which does not comply".

59 Although it is not necessary for me to sever the sum of $51,374.86 claimed as "*contract variations*", because of the construction I have given to s.10A(3)(c)(ii), if I had concluded that the variations were not claimable as part of the progress claim, I would have severed that sum and entered judgment for those sums which were properly claimable.

60 Following the conclusion of the hearing, I have noted that the progress claim includes the further sum of $26,357.61 for "*contract price margin 15%*". This sum appears to be claimed in addition to the full amount of the contract price; $245,454.54 (excluding GST) which is noted as having been paid by Westpac.

61 As the matter was not raised during the hearing, I will give the parties the opportunity to address submissions to the Court as to whether judgment should be entered for this sum, or severed from the judgment sum.

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Certificate

I certify that these 13 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 24 October 2014.

Dated: 24 October 2014

Olivia Bramwell
Associate to His Honour Judge Anderson