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The first rule of SOPA fight-club prevails in Victoria

It's trite that the first rule of 'SOPA' is to provide a payment schedule, or face judgment for the full amount of the claim. The second rule of SOPA fight-club is that nothing is quite what it seems in Victoria, even the first rule and that 'excluded amount' regime affords defaulting respondents with a serious line of counter-attack.

Claimants have been rightfully apprehensive about approaching the Court for summary judgment where there is no payment schedule for fear of being trapped in expensive, time consuming, highly technical and risky litigation focussed on excluded amounts.

It is however always darkest before the dawn, and it would appear from the recent decision in *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* that the first rule of the fight-club indeed prevails in Victoria.

The plaintiff, Façade, represented by Piper Alderman, sought judgment against Yuanda under s 16(2)(a)(i) of the Victorian Security of Payment Act (SOPA), claiming $3.5M as the unpaid portion of the amount claimed by its payment claim issued for the month of September 2019. The payment claim comprised a claim for the contract sum and claims for variations, reconciled into a total claim amount, from which retention and previous payments were deducted.

Yuanda failed to serve a payment schedule within 10 business, and therefore, according to s15(4) of the Act was liable to pay the amount claimed in the payment claim.

Open and shut? Not exactly. Yuanda disputed liability, contending that the payment claim was invalid because it:

- didn't sufficiently identify the construction work to which it related; and
- that judgment should not be entered at all because the Court could not be satisfied that the claimed amount does not include any excluded amount.

In respect of the latter ground, 26 separate claim items in the payment claim were challenged, including the claim for original contract works.

Gloves were off and with the bass pounding the heavy metal soundtrack to litigation in the Supreme Court of Victoria then went to work, producing:

- a highly detailed schedule of issues, completed by the parties at several stages of the preparation to the litigation;
- extensive discovery;
- the filing of fifteen affidavits;
- a court book consisting of 3,260 pages;
- cross-examination of witnesses over five days;
- written submissions in excess of 350 pages;
- a book of authorities in excess of 1,500 pages;
- eight hearing days (!!);
- a delay of nearly nine months from filing to completion of the hearing; and
- judgment being delivered almost a year after the Payment Claim was originally served.

What a process!

In his judgment for Façade, Justice Riordan was scathing as to the delays and substantial associated costs caused by this procedure, describing them at paragraph 72 of the decision as

> '*an anathema to the scheme of the Act*'

and observing that

> '*if permitted to continue, it will have the effect of discouraging contractors from exercising their rights to apply for judgment for fear of being caught in the Court's procedures*'

and that

> '*the Court should strive to adopt appropriate procedures to allow contractors to exercise their rights in a summary, expedient and cost-effective manner*'.

The decision then outlined the principles relevant to determining the key issues arising on 'summary' judgment applications under s16(2)(a)(i) of the SOPA including:

1. Identification of construction work in a payment claim:

- Whether a payment claim sufficiently identifies the construction work to which it relates is to be determined objectively. It will be enough if a reasonable building practitioner in the position of the recipient would have understood the payment claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim is made.
- The 'identification' requirement applies to the payment claim in its totality, and not to individual claim items.

2. Excluded amounts:

- In satisfying itself that the claimed amount does not include an excluded amount, the Court's assessment should be made on the face of the payment claim, including the supporting documents **and not after a full investigation of the facts and circumstances**.
- The inclusion of an excluded amount in a payment claim will not preclude the Court from giving judgment under s 16(2)(a)(i) of the Act. The 'claimed amount' for the purposes of s16(4)(a)(ii) of the Act is to be interpreted as the claimed amount at the time entry of judgment is sought – i.e. it can be reduced from the amount stated in the payment claim, so as to remove any amounts accepted to be excluded amounts or to account for double counting.
- Further, **severance is available** in the context of s16(2)(a)(i) applications, consistent with the decision in *Seabay Properties*[1].

Applying these principles, the Court entered judgment for Façade on its revised claimed amount of approximately $3.35M (reduced to account for some minor double counting and a claim for interest on previous outstanding progress payments that was conceded as an excluded amount).

This practical and reasoned approach must come as a relief to contractors and subcontractors in Victoria. The construction of the SOPA provisions relevant to summary judgment applications and strong signal that the process of the Victorian Supreme Court will be developed so as to accord with the first rule. The heavy 'punch' that the SOPA promises when a respondent fails to provide a payment schedule in answer to a valid payment claim may again ring loudly in Victoria!

[1] Seabay Properties [2011] VSC 183