



Valeo Construction v Pentas [2018] VSC 243 (15 May 2018)

Last Updated: 17 May 2018

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE	Not Restricted
COMMERCIAL COURT	
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST	

VALEO CONSTRUCTION PTY LTD (ACN 139 755 801) Plaintiff

v

PENTAS PROPERTY INVESTMENTS PTY LIMITED (ACN 102 933 406) Defendant

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 14 May 2018
DATE OF JUDGMENT: 15 May 2018
CASE MAY BE CITED AS: Valeo Construction v Pentas
MEDIUM NEUTRAL: [2018] VSC 243
CITATION:

BUILDING CONTRACTS – Progress payment claims – Revision and correction and withdrawal of progress payment claim – Compliance with statutory requirements – Whether revised payment claim constituted a prohibited second claim in relation to same reference date – *Building and Construction Industry Security of Payment Act 2002* (Vic), s 14(8).BUILDING CONTRACTS – Progress payment claims – Payment schedule served out of time – Application for recovery of debt – *Building and Construction Industry Security of Payment Act 2002* (Vic), s 18(2)(a)(i).

APPEARANCES: **Counsel** **Solicitors**
 For the Plaintiff Mr J Twigg QC with Ms F Cameron Giannakopoulos Solicitors
 For the Defendant Mr M Robins QC with Mr N Phillipot Champion Lawyers

HIS HONOUR:

Overview1 By Originating Process dated 26 March 2018, Valeo Construction Pty Ltd (the plaintiff) applies for judgment against Pentas Property Investments Pty Ltd (the defendant) under s 18(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Act) for \$1,733,649.80.

2 The amount claimed is in the nature of an outstanding progress payment of \$2,240,160.13 for work done under a construction contract between the parties dated 28 March 2014, minus \$667,561.67 excluded under the Act, plus contractual interest at 8% per annum.

3 The principal issue in this proceeding is the validity of a payment claim served on the defendant on 1 March 2018. That claim was issued in circumstances which included the plaintiff earlier issuing a payment claim #45 on 28 February 2018, for a sum of approximately \$25,000 less.

4 The defendant submits that the revised payment claim #45 dated 1 March 2018 is invalid because it is an attempt by the plaintiff to issue a second payment claim in respect of the same reference date in contravention of s 14(8) of the Act.

Chronology5 On or about 28 March 2014, the parties 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 in the State of Victoria for the defendant, for the total sum of \$18,490,170.00 (exclusive of GST) (the Contract).^[1]6 Pursuant to the terms of the Contract,^[2] the plaintiff was entitled to make claims for payment under the Act on the fifteenth day of each month by serving a payment claim on the Superintendent. By subsequent agreement between the parties, the day upon which the plaintiff was entitled to serve payment claims was changed from the fifteenth day of the month to the thirtieth day of the month.^[3]7 The background to the above agreed change to the Contract Reference Date was that on 24 June 2014, the plaintiff's former Contracts Administrator, Mladen Josic, received an email from the Superintendent directing the issue of payment claims on the thirtieth day of each month.^[4] This departed from the written terms of the parties' Contract requiring payment claims to be issued by the plaintiff on the fifteenth day of each month.^[5] The parties do not dispute the existence of this oral variation to the terms of the Contract.^[6]8 On 28 February 2018 by email the plaintiff's Contracts Administrator, Nicholas Tsiakiris (Tsiakiris), sent a payment claim #45 in the total sum of \$2,215,150.03 to the defendant and the Superintendent.^[7] The defendant submits that this email effected 'service' of a valid payment claim under the Act.^[8]9 On 1 March 2018 by email the plaintiff's Contracts Administrator sent a revised payment claim which the plaintiff referred to as 'Rev 1' and 'updated', in the total sum of \$2,240,160.13 to the defendant and the Superintendent.^[9] The covering email to the defendant and Superintendent dated 1 March 2018 was in the following terms:

See attached Progress Claim #45 February 2018 – 178 Victoria Avenue Rev 1 for your approval.

The PC sum for the pool has been updated to include builders margin on Icon pools submitted price as noted in the head contract. Stat Dec to be provided shortly.^[10]

10 The 'update' pool PC Sum added to the payment claim served by the plaintiff on 1 March 2018, resulted in an approximate \$25,000 increase from the payment claim served the day before.

11 The plaintiff submits that the email of 1 March 2018, containing the 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 claim of 28 February 2018 or when read with the 28 February 2018 payment claim constituted one in the same payment claim as with the 28 February 2018 claim.^[11]

12 In contrast, as explained below, the defendant disputes the validity and effectiveness of the revised progress claim pursuant to s 14(8) of the Act.

13 On 6 March 2018 the plaintiff's Contracts Administrator sent a further email to the defendant and the Superintendent stating that the plaintiff has withdrawn the 28 February 2018 payment claim and that the plaintiff relied on the 1 March 2018 payment claim.^[12]14 The defendant submits the 6 March 2018 email was, amongst other things, an acknowledgement by the plaintiff that its conduct up to this point had caused confusion.^[13]15 On 13 March 2018, at 12:42pm, the Superintendent, Ms Jenna Emmanouilides, sent an email to the plaintiff.^[14] This email provided in part:

The contractor is not entitled to make progress Claim #45 (February 2018) a claim for payment as Valeo has not complied with Subclause 37.1a, Clause 16 'Insurance of the Works', Clause 17 'Public Liability Insurance' and Clause 18 'Insurance of employees, Motor Vehicles and Professional Indemnity for consultant' compliance remains outstanding as Valeo have not provided an extended insurance cover.^[15]

16 The plaintiff responded to the Superintendent's email on 13 March 2018 at 12:50pm.^[16] Tsiakiris attached a copy of an updated Certificate of Currency of Insurance.^[17] On the same day, at 12:58pm, the Superintendent replied:

Thank you. Now that we have received this, today is the day of Progress Claim #45 submission. We will arrange a site visit with the QS.^[18]

17 I note that that the defendant did not pursue the argument adopted in the Superintendent's email of 13 March 2018, that entitlement to a progress payment claim under the Act was contingent upon the plaintiff providing evidence of compliance with insurance requirements under the Contract.

18 Ultimately, no issue arises in this proceeding in relation to questions of adequate insurance certification by the plaintiff.

19 By email on 22 March 2018, the Superintendent served a Payment Schedule sent to the plaintiff a URL from which a purported payment schedule under the Act could be downloaded.^[19]20 On 22 March 2018, the Superintendent served a payment schedule on the plaintiff, being more than 10 business days after service of the payment claim. In these circumstances, by operation of the Act, the plaintiff asserts that the defendant became liable for the claimed amount on the due date.^[20]21 Tsiakiris deposes that the email of 13 March 2018 and the purported payment schedule of 22 March 2018 are the only correspondence the plaintiff has received from the Superintendent or the defendant between 28 February 2018 and 22 March 2018.^[21]**Plaintiff's Submissions**

22 In summary the plaintiff makes the following submissions:

(a) The plaintiff acknowledges that s 14(8) of the Act prevents a claimant from serving more than one payment claim in respect of a single reference date. However, the plaintiff observes that the Act is 'silent on the revision, or withdrawal and replacement, of a payment claim.'^[22] To this end, the plaintiff submits that the revision, or withdrawal and replacement of a payment claim is consistent with the scheme of the Act,^[23] and that the subsequent rectification of a claim is permissible to a certain degree and does not infringe s 14.^[24]

(b) The plaintiff also submits that it did not serve more than one payment claim. In support of this submission, the plaintiff refers to the terms of the 1 March 2018 payment claim submission and also refers to Tsiakiris' email dated 6 March 2018 confirming that the plaintiff would rely, exclusively, on the claim which was served 1 March 2018.^[25] The plaintiff also invites the Court to infer that, in purporting to serve its response by way of a payment schedule, without objections, the defendant accepted that the claim involved a revision of the claim served 28 February 2018, understood how the claim was put and did not suggest any irregularity or non-compliance with the Act.^[26]

(c) Further, the plaintiff submits that the defendant's basis for delaying service of the payment schedule, in response to the payment claim served on 1 March 2018, does not accord with the Contract. On the plaintiff's submission cl 19 of the Contract, requiring the plaintiff to provide evidence on request of compliance with insurance requirements, is unrelated to the temporal requirements associated with payment of the progress claim or service of a payment schedule under the Contract.^[27] In any event, even if compliance with cl 19 is a precondition to payment under the Contract, the plaintiff submits that a 'contractual precondition to payment is not necessarily a prerequisite to establishing an entitlement to payment under [the Act].'^[28]

I note that in any event the defendant does not press the point.

Defendant's Submissions

23 In response, the defendant in summary submits:

(a) There should be no derogation from the requirement for 'strict compliance' with the Act such which results in it not being permitted to revise its claim. The defendant submits that this construction of the legislation is made clear by several of its features including the provision of a mandatory regime that is superimposed over the parties' Contract; the introduction of 'extremely abbreviated' timeframes for compliance; that respondents are at risk of suffering a default judgment for non-compliance with a temporal requirement; and that, in the absence of strict compliance, there are other remedies available to a complainant.^[32]

In essence, the defendant contends that, in circumstances where the Act is silent as to progress claims being able to be revised and rectified, the need for strict compliance in accordance with the scheme of the Act precludes finding that the plaintiff could revise its claim.

(b) Further, the defendant submits that in any event, the plaintiff has not revised its claim, but instead in reality made two payment claims. The defendant submits that a change in the amount claimed, between the emails of 28 February 2018 and 1 March 2018, precludes finding that the latter progress claim was a mere revision of the former.^[30] In making this submission, the defendant seeks to distinguish the present case from authorities, such as *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)*^[31] (*Amasya*), which upheld claims that were later supplemented by additional material.^[32] In particular, the defendant points out that in distinction to the present matter, *Amasya* did not involve a retrospective revision of the amount claimed. The upshot is that the plaintiff's second progress claim of 1 March 2018 is invalid and of no effect under s 14(8) of the Act.

(c) The defendant also submits that, even if there is an ability to withdraw and re-issue a claim under the Act, the conduct of the plaintiff was neither express nor sufficiently clear to found an express communication, or the implication, that the 28 February 2018 progress claim was withdrawn by the plaintiff. The defendant relies on statements of McDougall J when examining the New South Wales equivalent to the Act in *Kitchen Xchange v Formacon Building Services*,^[33] in which his Honour identified the need for the 'circumstances [to] make it very clear to the respondent that a payment claim is to be withdrawn' is that be what is asserted.^[32] Here, the defendant submits that the wording of the plaintiff's email of 6 March 2018 was insufficiently precise to make it clear that the plaintiff's progress claim made 28 February 2018 had been withdrawn.^[33]

Considerations

24 The key question which arises in the above circumstances, and on the parties' submissions, is whether the plaintiff's service of a payment claim dated 1 March 2018 contravened s 14(8) of the Act because the plaintiff had earlier served a payment claim dated 28 February 2018, and in those circumstances the payment claim dated 1 March, 2018 constituted the service of a second payment claim in respect of the same reference date under the Contract.

25 During this trial the defendant's submissions were directed principally to impugning the validity of the 1 March 2018 payment claim and the plaintiff's to upholding that claim.

Building and Construction Industry Security of Payment Act 2002 (Vic)

26 The Act provides insofar as is relevant, as follows:

9. Rights to progress payments

(1) On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—
is entitled to a progress payment under this Act, calculated by reference to that date.

(2) In this section, reference date, in relation to a construction contract, means—

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract; or

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that—

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate; or

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that—

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

14 Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

The Scheme of this Part of the Act

27 The scheme of the Act reflects a mandatory regime whereby, on an interim basis, in compliant circumstances the Act facilitates vital cash flow to a person entitled to a progress payment pursuant to a construction contract.

28 That regime, if invoked, imposes expedited times within which the critical steps defined by the Act are required to be undertaken and the Act creates certain rights contingent upon the strict observance of the statutory requirements giving rise to such rights.^[30]

29 Under the Scheme of the Act, the service by a claimant on the respondent of a payment claim for a claimed amount is a trigger for the procedures provided for in ss 14 and 15.^[31] Accordingly, the establishment of service of a payment claim by a claimant is a critical aspect of the claimant enlivening its potential statutory right to a progress payment pursuant to ss 9, 10 and 15 of the Act.

30 To avail its potential payment claim entitlement, it is necessary for a claimant under Part 2 of the Act to comply with each of the mandatory stipulations 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 s 14(8) that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract, fixed by s 9(2) of the Act.

31 It is common ground in this matter that the parties amended an earlier agreed date in each month on which a progress payment claim may be made, to the thirtieth day of each month.^[30] The parties accept that in relation to the month of February in any calendar year, that resulted in the agreed reference date being 28 February.

32 Accordingly, it is not in contention that, notwithstanding the parties agreement defining the reference date in relation to the construction contract as the thirtieth day of each relevant month, the 28 February 2018 Payment Claim was when served a valid progress claim under the Act.^[30]

The Payment Claims dated 28 February 2018 and 1 March 2018

33 On 28 February 2018 the plaintiff served a payment claim under the subject construction contract and the Act. This claim, described as 'Progress Payment Claim #45' (the 28 February 2018 Payment Claim) in the sum of \$2,215,160.03, complied with the Act in all critical respects.

34 On 1 March 2018, the plaintiff also served what it also referred to as Progress Payment Claim #45 in the sum of \$2,240,160.13 (the 1 March 2018 Payment Claim).

35 The 1 March 2018 Payment Claim was served under cover of an email of the same date to the Superintendent in the following terms:

Hi Sebastian,

Please see attached Progress Claim #45 February 2018 – 178 Victoria Avenue Rev 1 for your approval.

The PC sum for the pool has been updated to include builders margin on Icon pools submitted price as noted in the head contract.

Stat Dec to be provided shortly.

Kind Regards,

Nicholas Tsiakiris

Contracts Administrator

Valeo Construction Pty Ltd

34 Eastern Road

South Melbourne VIC 3205

36 Although the covering email of 1 March 2018 refers to payment claim #45 being in the nature of 'Rev 1' and states that 'the PC sum for the pool has been updated to include builders margin on Icon pools submitted price as noted in the head contract', in my view, that communication and the attached payment claim did not clearly and unequivocally convey to the defendant and the Superintendent that the 28 February 2018 payment claim was withdrawn or abandoned by the plaintiff and replaced by the 1 March 2018 payment claim.

37 I do not consider in the context of the service of the 1 March 2018 payment claim, and the formal nature of both that payment claim and the preceding 28 February 2018 payment claim, including because of their potential significance as triggers to the operation of Part 3, Division 1 of the Act, that either the progress payment claim itself dated 1 March 2018 or the covering email of the same date clearly and unequivocally communicated to the defendant, or its Superintendent, that the payment claim dated 28 February 2018 was withdrawn or abandoned.

38 I consider that the plaintiff's covering email of 1 March 2018 fails to clearly and unequivocally communicate whether the later payment claim of 1 March 2018 is to be received as revised claim or a replacement claim or a corrected claim or whether it is to be read together with the payment claim of 28 February 2018 as one and the same payment claim. I highlight these uncertainties below by reference to the plaintiff's own submission and also highlight below the potential problems created by such uncertainties in the context of the operation of the Act.

39 The plaintiff submitted that it was of significance that the 1 March 2018 payment claim related to the same works as the 28 February 2018 payment claim and had the same reference date and identified as the earlier payment claim submission, namely as Progress Claim #45.

40 In my view however this is not strictly so. In the progress claim served on 1 March 2018, Variation Number CV 45 includes a builders margin component, whereas that component of the 28 February 2018 payment claim did not. Further, both the PC sum for the pool forming part of the works, and the overall progress payment claim sought claim different and for larger amounts compared with the payment claim dated 28 February 2018.

41 At all events the plaintiff throughout has contended that the 1 March 2018 payment claim is the claim in respect of which it is entitled to immediate judgment.

42 The 1 March 2018 payment claim was, leaving aside for the moment the effect of the provisions of s 14(8) of the Act, I consider a compliant payment claim under the Act. That claim was however a different claim to the 28 February 2018 payment claim including because it claimed a different total payment sum to that sought by the plaintiff by its payment claim of 28 February 2018 and also because it contained an additional component relating to the builders margin for the PC pool works. The 1 March 2018 payment claim rectified what appears to have been an omission from the payment claim served on 28 February 2018 in that the latter claim added a sum of approximately \$25,000 (Variation Report, Variation Number CV#45) and correspondingly increased the total amount claim.

43 I anticipate that by the 1 March 2018 payment claim the plaintiff intended to effect the service of a different payment claim for an increased amount, by way of the inclusion of a sum omitted from the 28 February 2018 payment claim.

44 However, as I have outlined above, the plaintiff did not do so in a way which clearly and unequivocally communicated to the defendant and the Superintendent that the 28 February 2018 claim was withdrawn or abandoned or wholly replaced by the 1 March 2018 claim and the 28 February 2018 claim should therefore be disregarded. In my view this was required in the circumstances of this matter.^[40]

45 In the result, by March 2018, contrary to the prohibition contained in s 14(8) of the Act, the plaintiff had served two payment claims in respect of the February 2018 reference date agreed by the parties.

46 Although not decisive because in my view the effect of the 28 February 2018 and 1 March 2018 payment claims fail to be determined on their terms in the setting of the construction contract and the Act, I consider that the plaintiff's communication to the Superintendent of 6 March 2018 reflected and highlighted the equivocal and confusing position created by the plaintiff's itself as a result of the earlier service of its second payment claim dated 1 March 2018.

Dear Sebastian,

I refer to:

- The payment claim dated 28 February 2018, which was emailed to you at 4.14 pm on 28 February 2018; and
- The amended payment claim dated 1 March 2018, which was emailed to you at 9.21 am on 1 March 2018.

For the sake of clarity, I confirm that:

- Valeo has withdrawn the payment claim dated 28 February 2018 and no longer relies on that payment claim; and
- Valeo relies on the amended payment claim dated 1 March 2018.

Kind Regards,

Nicholas Tsiakiris
Contracts Administrator
Valeo Construction Pty Ltd
34 Eastern Road
South Melbourne VIC 3205

47 In *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*^[41] 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*^[42] 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.^[43]

48 In *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd*^[44] Vickers J also concludes that pursuant to the Act a claimant cannot serve more than one payment claim in respect of each payment date.

49 Further, the plaintiff concedes that the Act is silent as to the claimant's entitlement to revise or withdraw and replace a payment claim.^[45]

50 The defendant's submission is emphatic that there is no basis expressly provided in the Act, nor arising by implied statutory right, for the claimant to unilaterally revise or amend a payment claim once it has been served.

51 As I have noted the parties however acknowledge that if adequately communicated a payment claim can be withdrawn or abandoned and a new or resubmitted payment claim can then be served in respect of the relevant reference date.^[46]

52 I observe that the plaintiff's own submissions reflect the uncertainty and equivocal nature of what it is that the plaintiff's sought to achieve by its second payment claim dated 1 March 2018. The plaintiff variously submits that on 1 March 2018 the plaintiff 'revised' or 'withdrew and replaced' its progress payment claim #45 dated 28 February 2018. The plaintiff also submits that the intention of the parties was to treat the 28 February 2018 payment claim as having been 'updated' or substituted or abandoned by sending the 1 March 2018 payment claim, or 'the payment claim documents sent on 28 February 2018 and 1 March 2018 in fact constitute one in the same payment claim'. The plaintiff in addition submits that the 1 March 2018 payment claim was in the nature of a 'correction' to the 28 February 2018 claim.^[47]

53 It was not until 6 March 2018, that by correspondence extracted above, the plaintiff clearly and unequivocally communicated its position, namely that 'Valeo has withdrawn the payment claim dated 28 February 2018 and no longer relies on that payment claim; and Valeo relies on the amended payment claim dated 1 March 2018'.

54 However, no further compliant payment claim was served with the plaintiff's explanatory email of 6 March 2018 pursuant to s 14(1) of the Act.

55 More significantly, as at 6 March 2018, the position which had endured since 1 March 2018 was that, in contravention of s 14(8) of the Act, more than one payment claim had been served by the plaintiff in respect of the February 2018 reference date.

56 Further, I do not accept that in respect of the clear mandatory requirements of the Act there is any authority or judicial guidance which endorses an approach to interpreting and applying the operation of s 14(8) of the Act in a manner which is not 'unduly technical ... and or applies that provision ... it in a common sense practice manner ...' as was submitted in substance by the plaintiff as a general proposition in relation to Part 3 of the Act.^[48]

57 Neither do I accept that in *Amasya*^[49] Vickers J supported such an approach.

58 Both parties referred to the decision of Vickers J in *Amasya*. The facts of that case are somewhat similar to those at hand. On 7 October 2014, a contractor served a payment claim on one principal that was substantiated by three tax invoices.^[50] On 9 October 2014, the contractor re-sent the payment claim to both principals with additional trade invoices.^[51] A covering letter included with the facsimile accompanying the 9 October 2014 claim contained the following statement:

Sorry, I am re-sending these because I forgot to include the trade invoices for your reference. Please see following invoice numbers 69, 72 & 74. Prompt payment would be appreciated.^[52]

59 An adjudication was entered under s 18 of the Act. In an application for judicial review, the principal submitted that the payment claim said to engage the adjudicator's jurisdiction infringed s 14(8) of the Act, and, accordingly, that the adjudication was void for jurisdictional error.

60 Vickers J accepted the defendant's submission that the two series of correspondence 'in fact constituted one and the same Payment Claim'.^[53] It followed that the re-sending of the payment claim on 9 October 2014 did not contravene s 14(8) of the Act. In so doing, his Honour made the following observation:

The principal vice sought to be addressed by s 14(8) of the Act is to prevent multiple claims being made in respect of the same reference date, which, unless curtailed, could impose an unreasonable burden on recipient respondents who are called upon to expend resources in addressing claims.^[54]

...the re-sending of the same payment claim, even if reasonably supplemented with additional material and information, does not offend these objectives of the Act. Indeed, it would be inimical to these objectives to inhibit reasonable corrections to be made to payment claims if they are called for. A realistic degree of tolerance needs to be observed to adjust for such shortcomings or mistakes made in the course of submitting a payment claim.^[55]

61 Crucial to his Honour's finding was the fact there was no discrepancy in the claimed amounts.^[56] The effect of the follow-up correspondence was limited to effecting service on the second principal; and to providing supplementary documentation in support of the claim. Both correspondences referred to the same amount of \$2,064,974.36. From this, Vickers J inferred that both documents claimed in respect of the same work.^[57] These factors in my view distinguish *Amasya* from this case.

62 It appears that his Honour's observations in *Amasya* at [87], relate to the Court's approach to the Act in relation to the statutory requirements for a payment claim as distinct from the proper operation of s 14(8) of the Act.

Practical Ramification of Multiple Payment Claims

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.

66 By contrast, the application of the Act in accordance with the requirement for strict compliance is reflected in the approach taken in *Saville v Hallmarc Construction Pty Ltd*,^[58] *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*,^[59] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*,^[60] and *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd*.^[61] Such an approach would likely obviate a potential plethora of issues of the type generally described above.

Defendant's Failure to Reject Plaintiff's 1 March 2018 Claim

67 The defendant's failure to reject the plaintiff's 1 March 2018 claim, or identify it as invalid as a result of it being in breach of s 14(8) of the Act, cannot in my view save the prohibited second payment claim in respect of the reference date for February 2018.

68 I accept the defendant's submission that there is no evidence that it accepted or agreed to the validity of the March 2018 payment claim, although the defendant did provide a progress Payment Schedule and Certificate asserting that the plaintiff's entitlement in respect of its 1 March 2018 progress payment claim was nil. That Payment Schedule was served out of time under the Act, on 22 March 2018.

69 In my view, neither the defendant's 22 March 2018 'Progress Payment Schedule and Certificate' nor any other conduct by the defendant has had the effect of negating the operation of s 14(8) of the Act, or in some other way curing the prohibited service by the plaintiff of a second payment claim on 1 March 2018 in respect of the February 2018 reference date.

70 I note that the plaintiff does not seek to rely in this regard upon any operative estoppel or waiver in respect of the defendant's conduct in relation to the plaintiff's 1 March 2018 payment claim.

General Observations

71 It is common ground between the parties that, should I find that the plaintiff's 1 March 2018 payment claim is invalid, the plaintiff may nevertheless hereafter, within the temporal limitations fixed by the Act, serve a compliant payment claim in relation to the February 2018 reference date, including if it chose adding to that claim the earlier omitted builders margin which it sought to add to the 28 February 2018 payment claim.

72 This further payment claim would, in all likelihood, be progressed in the usual way under the Act. This would result in the plaintiff either being paid what it considers to be its entitlement in respect of its February 2018 progress payment claim or the plaintiff being entitled to pursue an adjudication to the extent the defendant may reject that claim or parts of it.

73 On the other hand, if in the circumstances the plaintiff were entitled to enter judgment in the sum of \$1,733,649.80 under s 16(2)(a)(i) of the Act pursuant to its current application, that sum would in effect have to be immediately paid by the defendant with no recourse until the final rights and entitlements of the parties are ultimately adjudicated, or resolved, at some presently unascertainable and relatively distant point in time.

74 Further I observe that the scenario outlined in the last preceding paragraph would be founded upon the plaintiff deploying the Act and relying upon the strict operation of its provisions against the defendant because the defendant did not serve a payment schedule within the time prescribed by the Act, in circumstances where the plaintiff's underpinning payment claim did not strictly comply with the requirements of the Act, in particular s 14(8).

Conclusion – Decision

75 For the above reasons, I find that the plaintiff's progress payment claim dated 1 March 2018 was served in breach of s 14(8) of the Act and is therefore invalid and incapable of supporting the plaintiff's present claim for judgment pursuant to s 16(2)(a)(i) of the Act.

Orders

76 Accordingly I shall order:

1. The plaintiff's Originating Process dated 26 March 2018 is dismissed.
2. The plaintiff pay the defendant's costs of the proceeding on a standard basis.

- ^[1] Affidavit of Nicholas Tsiakiris sworn 23 March 2018 (Tsiakiris Affidavit), Exhibit 'DT-3'.
- ^[2] Clause 37 of the Contract, see Affidavit of Dimitrios Tzouvelis sworn 26 March 2018 (Tzouvelis Affidavit), Exhibit 'DT-3'.
- ^[3] Tzouvelis Affidavit, [8] and Exhibit 'DT-4'; Plaintiffs Submissions, 26 April 2018, [3]; Defendant's Submissions, 26 April 2018, [4].
- ^[4] Tzouvelis Affidavit, [8] and Exhibit 'DT-4'.
- ^[5] *Ibid* [6(f)] and Exhibit 'DT-3'.
- ^[6] Plaintiff's Opening Submissions, 26 April 2018, [5]; Defendant's Opening Submissions, 26 April 2018, [4].
- ^[7] Tsiakiris Affidavit, [3].
- ^[8] Defendant's Opening Submissions, 26 April 2018, [5].
- ^[9] Tsiakiris Affidavit, [5].
- ^[10] *Ibid* Exhibit 'NT-2'.
- ^[11] Plaintiff's Opening Submissions, 26 April 2018, [22]; Plaintiff's Reply Submissions, 3 May 2018, [4] and [6].
- ^[12] Tsiakiris Affidavit, [7] and Exhibit 'NT-3'.
- ^[13] Defendant's Opening Submissions, 26 April 2018, [19].
- ^[14] Tsiakiris Affidavit, [8].
- ^[15] *Ibid* Exhibit 'NT-4'.
- ^[16] *Ibid* [8].
- ^[17] *Ibid* Exhibit 'NT-5'.
- ^[18] *Ibid* Exhibit 'NT-6'.
- ^[19] *Ibid* [11] and Exhibit 'NT-7'.
- ^[20] *Ibid* [11] and Exhibit 'NT-7'; s 15(4) of the Act.
- ^[21] *Ibid* [12].
- ^[22] Plaintiff's Opening Submissions, 26 April 2018, [21].
- ^[23] *Ibid* [21].
- ^[24] Plaintiff's Reply Submissions, 3 May 2018, [3].
- ^[25] Plaintiff's Opening Submissions, 26 April 2018, [22].
- ^[26] *Ibid* [23].
- ^[27] *Ibid* [27].
- ^[28] *Ibid* [28].
- ^[29] Defendant's Opening Submissions, 26 April 2018, [10]–[11].
- ^[30] *Ibid* [18].
- ^[31] [\[2015\] VSC 500](#).
- ^[32] Defendant's Opening Submissions, 26 April 2018, [17]–[18].
- ^[33] [\[2014\] NSWSC 1602](#).
- ^[34] Defendant's Opening Submissions, 26 April 2018, [23].
- ^[35] *Ibid* [26].
- ^[36] *Savile v Hallmarc Construction Pty Ltd* [[2015\] VSCA 318](#); [\[2015\] 47 VR 177](#), [80]–[81]; *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [[2016\] VSCA 119](#), [51].
- ^[37] *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [[2016\] HCA 52](#); [\[2016\] 340 ALR 193](#), [14].
- ^[38] Plaintiff's Submissions, 26 April 2018, [5]; Defendant's Submissions, 26 April 2018, [4].
- ^[39] *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] 30 VR 141.
- ^[40] *Kitchen Xchange v Formacon Building Services* [[2014\] NSWSC 1602](#), [25]–[27].
- ^[41] [\[2016\] HCA 52](#).
- ^[42] [\[2009\] NSWCA 69](#); [\(2009\) 74 NSWLR 190](#).
- ^[43] *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [[2016\] HCA 52](#); [\[2016\] 340 ALR 193](#), [12]–[16].
- ^[44] [\[2015\] VSC 426](#), [20].
- ^[45] Plaintiff's Submissions, 26 April 2018, [21].
- ^[46] *Ibid* [2]; T 17.8–29.
- ^[47] Plaintiff's Submission, 3 May 2018, [4].
- ^[48] *Ibid* [2].
- ^[49] [\[2015\] VSC 500](#), [85]–[88].
- ^[50] *Ibid* [80].
- ^[51] *Ibid* [81].
- ^[52] *Ibid* [82].
- ^[53] *Ibid* [77], [88].
- ^[54] *Ibid* [85].
- ^[55] *Ibid* [86].
- ^[56] *Ibid* [81].
- ^[57] *Ibid* [89(b)].
- ^[58] [\[2015\] VSCA 318](#); [\[2015\] 47 VR 177](#).
- ^[59] [\[2016\] VSCA 119](#).
- ^[60] [\[2009\] NSWCA 69](#); [\(2009\) 74 NSWLR 190](#), [14]; relevantly approved by the High Court of Australia in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [[2016\] HCA 52](#); [\[2016\] 340 ALR 193](#), [62].
- ^[61] [\[2015\] VSC 426](#), [94]–[97].

