



Précis Paper

Construction Contractor's Win on Payment Claims Shows Successful Legal Process

A consideration of ASEA 1 Pty Ltd v Rudyard Pty Ltd [2020] VSCA 122

Abstract – Rudyard's claim for payment from ASEA 1 for design and construction work ran for nearly two years from the County Court of Victoria to Supreme Court appeals. Legal counsel, barrister Dr Michael Wolff and lawyer Darren Noble, give credit to a successful legal process with effective specialist judges and specialist lists.

Discussion Includes

- About the case
- Initial Appeal – were the payment claims valid?
- Identifying the work
- About work not done
- The case shifts
- Further applications

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1. In this edition of BenchTV, Rudyard's legal counsel Dr Michael Wolff (Barrister) and Darren Noble (Principal, Noble Lawyers) discuss the successful legal proceedings against ASEA 1, including insolvency, to receive payments for work done.

About the case

2. The case ran for nearly two years. It had a little bit of everything. It started off in the County Court of Victoria as a fairly straightforward judgment under the Security of Payments legislation.
3. There were three payment claims that Rudyard had submitted to ASEA 1. Rudyard had agreed to do a design and construction of an apartment building for ASEA 1. The payment claims were not responded to with payment schedules.
4. That means they become due and payable as they were not submitted with a payment schedule within 14 days as required in the Act.
5. Judge Woodward only found that the third claim was valid but the final payment claim picked up the amounts of the first two claims –it was successful and for an amount of \$343,000.

Initial Appeal – were the payment claims valid?

6. That led to the appeal. There were a couple of points the Judge had to consider to assess whether the payment claims were valid which are rather similar to points raised by many defendants in these cases.
7. The first thing encountered was an attempt by the defendant to raise service issues by fabricating a scenario where the director in charge of ordering the services removed himself from the day-to-day management and was not reachable by mail or email or even telephone so as to claim not having been served validly under s 50 of the Act.
8. His Honour took a practical view of the issue and refrained from looking at it in an overly legalistic way.

9. That was the first determination that flowed from this case – that the Victorian Courts will not countenance such an attempt to avoid the operation of the Act and will look to see the true intent of the parties.
10. Rudyard did also serve the claims on the officers of ASEA 1 by ordinary post.

Identifying the work

11. The next question was did Rudyard correctly identify the work carried out in the payment claims.
12. Many payment claims are not written by inhouse lawyers. They are written by contractors and sub-contractors and use colloquial not overly legalistic language.
13. Again, His Honour took the appropriate approach, as the Supreme Court in NSW and Vic have done when it comes to looking at the language of these payment claims – it does not have to be a precise enumeration of everything that happened in the work.
14. What this approach recognises is that when they make a payment claim contractors and sub-contractors assume things about the job are known by the person on whom they are serving the payment claim.
15. That is the approach taken by the NSW Court in *Multiplex* and the Victorian Court in *John Beever* – that the Security of Payment Act was supposed to make life easier for contractors and sub-contractors.

About work not done

16. Rudyard ran into one significant issue. Under the Security of Payment Act you cannot issue a claim for work that has not been done yet. The mistake that Rudyard made was to issue a claim for the 25th of a month when the actual invoice went to the end of the month.
17. The lesson for any claimant under the Act is if you write a payment claim, make sure it includes all previous unpaid payment claims.

The case shifts

18. One of the issues faced in this case was that ASEA 1 didn't have any assets. A Statutory Demand was served on ASEA 1 on 13 December.
19. A point to note when filing an application is that it may not be stamped on the day you deliver it. If you deliver it on 2 January at 3pm and the Registrar says you will not get it back today, you will get the document stamped on the 3 January, outside the 21-day period and you will fail under the provisions of the Corporations Act no matter how many affidavits you file saying you actually provided it on the 2nd to the court staff within their opening hours. A stamped copy has to be served within the 21 days.
20. There were a lot of violations of the technical requirements of the Corporations Act.

Further applications

21. ASEA 1 made an application to stay the judgment.
22. Having lost an application for a stay in the County Court, ASEA 1 were faced with a wind up application in the Supreme Court.
23. ASEA 1 paid \$343,000 into the Supreme Court to have a stay in the wind up application.
24. A word of advice for solicitors – the Court of Appeal does not look fondly on solicitors who file affidavits that include other affidavits which in turn include other affidavits.
25. After six or seven hearings, ASEA 1 made the required payments and Rudyard did end up getting all their money.

BIOGRAPHY

Dr Michael Wolff

Barrister, Douglas Menzies Chambers, Melbourne

Michael appears regularly in interlocutory hearings and trials across Australia in the Federal and Supreme Courts, and other courts and tribunals. In the past 24 months he has handled matters in the Supreme Court of Victoria, County Court of Victoria, NSW Supreme Court, Qld Supreme Court, District Court of Qld, Administrative Appeals Tribunal and Federal Court of Australia. He is an experienced practitioner in alternative dispute resolution, including mediations in various international jurisdictions.

Michael has practised extensively in jurisdictions outside Australia, specializing in banking cases or cases with an Australian connection. In the last years he has handled matters in the courts of Switzerland, Germany and the United Kingdom.

Darren Noble

Principal, Noble Lawyers, Melbourne

Darren's extensive legal experience includes risk management and compliance issues, drafting and negotiating contracts, special conditions and special purpose contracts.

He regularly manages disputes, debt recovery and insurance claims, advocating in both the courts and VCAT and representing clients in mediation and arbitration.

Darren represents builders, developers, sub-contractors, businesses and property owners. He is on the committee of the Building Dispute Practitioners Society and is a member of VCAT's Domestic Building List Users Group.

BIBLIOGRAPHY

Focus Case

ASEA 1 Pty Ltd v Rudyard Pty Ltd [2020] VSCA 122

Benchmark Link

https://benchmarkinc.com.au/benchmark/construction/benchmark_20-05-2020_construction.pdf

Judgment Link

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2020/122.html>

Cases

ASEA 1 Pty Ltd v Rudyard Pty Ltd [2020] VSCA 122

Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor [2009] VSC 156

John Beever (Aust) Pty Limited v Paper Australia Pty Ltd [2019] VSC 126

Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140

Rudyard Pty Ltd v ASEA 1 Pty Ltd [2019] VCC 195 (5 December 2019)

Legislation

Building and Construction Industry Security of Payment Act 2002 (Vic)
Corporations Act 2001 (Cth)