

IN THE COUNTY COURT OF VICTORIA

Revised
(Not) Restricted

AT MELBOURNE
BUSINESS LIST
BUILDING DIVISION

Case No. CI-06-01264

PACD PTY LTD

Plaintiff

v

DEPAS PTY LTD and PAULINE DE PASQUALE

Defendants

JUDGE: HIS HONOUR JUDGE ANDERSON
WHERE HELD: Melbourne
DATE OF HEARING: Further written submissions dated 21 December 2007
DATE OF JUDGMENT: 23 January 2008
CASE MAY BE CITED AS: PACD Pty Ltd v. Depas Pty Ltd & Anor.
MEDIUM NEUTRAL CITATION: [2008] VCC 26

REASONS FOR JUDGMENT

Catchwords: Building contract – Major domestic building contract between owner-builder and builder – Failure by the parties to comply with the requirements of the *Domestic Building Contracts Act 1995* – Further submissions made by the parties - Final orders.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr. S.R. Grahame and Mr. B. Powell	Romeo & Associates
For the Defendants	Mr. P.W. Lithgow	Neil McPhee & Associates

HIS HONOUR:

- 1 Following the publication of my reasons for judgment on 12 December 2007, the parties have made written further submissions. They have declined my invitation to make further oral submissions.
- 2 In its submissions, the plaintiff raised three matters:
 - a. The sum of \$8,051.42 representing “costs conceded as wrongly claimed” was deducted twice. This matter is not contested by the defendants. An error was made by me in the initial calculations and an adjustment must be made.
 - b. The builder should be entitled to recover for variations on the basis of the principles of unjust enrichment. The plaintiff submits that as the legislation makes the underlying “domestic building contract” unenforceable, ss.37 and 38 have no application. Alternatively, the interpretation adopted in the reasons for decision is inappropriate as it involves an unrealistic distinction between matters litigated in the courts and those litigated at VCAT.

Firstly, I do not consider that the matter raised by the plaintiff is one appropriate for me to review at this stage. The invitation to the parties to make further submissions was limited to submissions as to whether certain items should be treated differently in light of the general findings I had made. The plaintiff’s submission seeks to challenge the basis for my decision.

In any event, the plaintiff’s further submissions are dealt with in the original reasons for decision. Whilst the present case is not entirely on “all fours” with *Sevastopoulos v. Spanos*, the reasons for decisions discuss why a similar conclusion should be reached. The interpretation adopted may result in cases dealt with by the courts and by VCAT having different outcomes. This follows from the statutory provisions themselves.
 - c. The builder opposes the defendants’ claim that the Court should make an allowance in the defendants’ favour of \$64,350 for the monies paid direct to trades by the defendants. This matter is dealt with below.

3 In their submissions, the defendants have raised two matters:

- a. The Court should make an allowance in the defendants' favour of \$64,350 for the monies paid direct to trades by the defendants.

The defendants' entitlement to this sum depended on the status of the plaintiff's "estimate"; whether it was a term of any agreement that the work must be completed for the estimated price or whether the plaintiff or Mr Dimitriou made representations to that effect.

The original reasons for decision make it clear that the legislation does not permit the defendants to enforce the domestic building contract. The payments direct to contractors were part of the damages claimed for the alleged breach of contract. There is no basis for that claim. The alleged representations were not pressed in defendants' counsel's final submission. On the basis of the findings of fact set out in the original reasons for decision there was no basis for the defendants to conclude that the causes of action in the amended counterclaim relying upon those representations had been successful. The counterclaim was dismissed. The defendants are not entitled to recover the amount of \$64,350 from the plaintiff or Mr Dimitriou.

- b. Each party should bear their own costs of the proceeding.

This matter will be the subject of submissions from the parties at a further hearing at a time to be arranged with my associate.

4 **Final calculation:** In the circumstances the plaintiff should recover the sum of \$55,101.58 which is calculated as follows:

Total costs invoiced by the plaintiff (less costs conceded as wrongly claimed of \$8,051.42):	\$560,036.60
Less payments made by the defendants:	<u>\$415,147.02</u>
	\$144,889.58
Less costs disallowed:	<u>\$3,517.00</u>
	\$141,372.58

Less works not completed satisfactorily:	<u>\$14,372.00</u>
	\$127,000.58
Less the costs attributable to variations:	<u>\$71,899.00</u>
Total sum recoverable by the plaintiff:	<u>\$55,101.58</u>

Conclusion

- 5 There will be judgment for the plaintiff against the second defendant in the sum of \$55,101.58. The claim by the plaintiff against the first defendant is dismissed. The amended counterclaim by the second defendant against the plaintiff and Christopher Dimitriou will be dismissed.
- 6 I will hear further submissions about questions of interest and costs.

Certificate

I certify that these 3 pages are a true copy of the further reasons for decision of His Honour Judge Anderson delivered on 23 January 2008.

Dated: 23 January 2008.

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Joel Harris

Acting associate to His Honour Judge Anderson