

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
TEC LIST

No. S CI 2007 06949  
No. S CI 2007 02025

DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD  
(ACN 004 284 191)

Plaintiff

v

HUE BOUTIQUE LIVING PTY LTD (FORMERLY SC LAND  
RICHMOND PTY LTD) (ACN 106 117 506) & ORS

Defendants

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<u>JUDGE:</u>	DIXON J
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	16 and 20 APRIL 2012
<u>DATE OF JUDGMENT:</u>	1 MAY 2012
<u>CASE MAY BE CITED AS:</u>	DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD v HUE BOUTIQUE LIVING PTY LTD (No. 4)
<u>MEDIUM NEUTRAL CITATION:</u>	[2012] VSC 155

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BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Payment claims made under AS 2124-1992 referred to adjudication - Adjudicated payments paid into designated trust account following determinations - All disputes in relation to the construction contract resolved by judgment entered in favour of principal on a certificate under cl 44.6 following the works being taken from the contractor - How funds remaining in designated trust account are to be disbursed - ss 25, 26.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr TJ Margetts SC with Mr R Andrew of counsel	Noble Lawyers
For the Defendants	Mr D Levin QC with Ms K Stynes of counsel	Freehills

HIS HONOUR:

1 On 30 March 2012, I published my reasons for judgment in the building proceeding. At that time I reserved for further argument a question about what orders the court should make to deal with funds totalling \$1,007,694.49 held in a designated trust account following adjudications under the *Building and Construction Industry Security of Payment Act 2002* (Vic). The issue that now remains turns on provisions of the Act now repealed. A second issue has been raised, a claim by Hue to restitution to it of its contribution to the expenses of the adjudicators.

**The funds in trust**

2 There were three adjudications and three payments that constituted the trust funds. On 26 April 2006, Dura issued payment claim no 20 for \$595,291.80 (excluding GST). On 9 May 2006, the superintendent responded with payment schedule no 17A certifying the amount due to Dura as \$nil. On 16 May 2006, Dura applied for adjudication pursuant to the provisions of the Act and on 6 June 2006 the adjudicator published a determination that Dura was entitled to payment of \$98,862.59 (exclusive of GST). On 15 June 2006, Hue paid \$108,748.84 into a designated trust account.

3 Before publication of that determination on 26 May 2006, Dura issued payment claim no 21 claiming \$900,695.32 (excluding GST). On 9 June 2006 the superintendent issued payment schedule no 18 certifying the amount due to Dura as \$416,698 (including GST). On 19 June 2006 Dura applied for adjudication pursuant to the Act and a different adjudicator published his determination, on 7 July 2006, that Dura was entitled to payment of \$516,298 (including GST). On 11 July 2006, Hue paid \$99,330 into the designated trust account.

4 On 25 September 2006, Dura issued payment claim no 21 claiming \$2,219,451.49 (excluding GST). The superintendent issued payment schedule no 22 certifying the amount due to Dura as \$nil. On 13 October 2006, Dura applied for adjudication pursuant to the Act. On 4 December 2006, the adjudicator published his determination that Dura was entitled to payment of \$799,885.65 (including GST). On 11 December 2006, Hue paid \$799,885.65 into the designated trust account.

5 There is presently a principal sum of \$1,107,964.49 together with accrued interest in the designated trust account. That account is at the Melbourne branch of BankWest entitled 'Trust A/C for SC Land Richmond adjudication'. There was no attempt to reconcile the payments into the trust account to the adjudications and I was not informed of the quantum of the accrued interest.

6 Hue seeks an order that the total credit balance of the designated trust account be paid to it. Dura does not oppose that order but seeks a declaration that of that payment, \$907,163.40 and a relative proportion of the accrued interest, is received by Hue in partial satisfaction of the debt due upon the cl 44.6 certificate, which is now reflected in the court's judgment in Hue's favour.

7 Hue acknowledges that by virtue of the provisions of the Act, its access to the money in the designated trust account must await the expiration of Dura's right of appeal. Hue seeks an order that if, upon the expiration of the time for the service of the notice of appeal, no such notice has been served, or upon discontinuance of any such appeal, if notice is served, the money held on trust in the designated trust account and any interest accruing on that money be paid to Hue.

*The statutory provisions*

8 At the time of the adjudications, s 25 of the Act provided that if an adjudicator determines that the respondent must pay an adjudicated amount to the claimant, the respondent must pay that amount to the claimant, or, give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them. The respondent may only choose to give security if proceedings against the claimant in relation to a dispute under the construction contract have been commenced. Security could be given by payment of the adjudicated amount into a designated trust account. Section 25(5) precluded the claimant from enforcing a payment to it out of that designated trust account until any matters in dispute between the claimant and the respondent in connection with the progress payment to which the security related had been finally determined. Notice to the respondent was required that an adjudicated amount had been paid into a designated trust account.

9 The *Building and Construction Industry Security of Payment (Amendment) Act 2006*<sup>1</sup> relevantly commenced operation on 30 March 2007. The primary Act was significantly amended, including by the repeal of ss 25-27 and the insertion of a new Division 2A providing for review of an adjudication.

10 Although there was no evidence adduced about either matter, neither party disputed that Hue:

- (a) had given the notice required by s 26(1); and
- (b) had commenced proceedings as contemplated by s 25(2),

when it paid the adjudicated amounts, set out above, into a designated trust account. I was informed from the Bar table that such proceedings had been commenced in VCAT, and consolidated with this proceeding, although at no stage during the trial was my attention drawn to any originating process or points of claim. I was neither invited to, nor did, determine any matter in dispute between Dura and Hue in connection with any of the adjudicated progress claims and the payments made into the designated trust account following the adjudication determinations.

#### ***Relevant contract terms***

11 The procedure for payment claims was governed by cl 42 of AS 2124-1992. The clause provided, inter alia, that making a progress payment does not prejudice the right of either party to dispute, under cl 47, whether the amount so paid is the amount properly due and payable and a payment is not evidence of the value of work, or an admission of liability, or evidence that the work has been executed satisfactorily, but is a payment on account only (subject to the final certificate provision under cl 42.8<sup>2</sup>).

12 The final accounting between the parties was undertaken on the basis of a cl 44.6 certificate, by which the superintendent ascertains, and certifies, two amounts being:

- (a) the amount of the cost incurred by the principal in completing the work;

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<sup>1</sup> No 42/2006.

<sup>2</sup> The provisions for a final payment claim and a final certificate did not become operative for Dura because the work was taken out of its hands.

- (b) the amount which would otherwise have been paid to the contractor if it completed the work.

It is in the second of those calculations that the superintendent reconciles amounts already paid to the contractor. The superintendent's cl 44.6 certificate certified that the costs incurred by the principal exceeded the amount which would have been paid to the contractor by \$4,457,308. Dura's claims that this sum was erroneously certified by the superintendent have been rejected.

***Resolution of the application***

13 When challenging the conclusive nature of the certificate, and inviting the court to re-open and reconsider the proper certification of the debt due, Dura neither put an argument based on a reconciliation of progress payments, nor explored the material facts in evidence. Dura did not contend that there was error in the cl 44.6 certificate on the basis that Dura was entitled to the funds, or any part thereof, that Hue had paid into the designated trust account.

14 Money paid into a designated trust account is held upon the trusts stated in s 26(2) of the Act, as it stood prior to amendment. The money is first to be applied in satisfaction of the claimant's entitlements to the progress claim and the claimant's entitlements in respect of earlier progress claims are to be satisfied before its entitlements in respect of a later progress claim. To the extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent. The phrase 'claimant's entitlements' is defined in these terms:

Claimant's entitlements in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled after any matters in dispute between the claimant and the respondent in connection with the progress payment to which the money relates have been finally determined.

15 All of the disputes between Dura and Hue in connection with the construction contract have now been finally determined. Although the parties did not bring forward any specific or particular dispute concerning the three adjudicated progress payments, completion of a final accounting renders otiose any residual dispute about

a payment on account. Further, the final certification is of a debt due from Dura to Hue. There can be no entitlements now arising in favour of Dura to the moneys held in the designated trust account.

16 This conclusion is inescapable for three reasons. First, Dura did not establish any entitlement generally to a payment in its favour. Second, there was no issue raised in the proceeding concerning Dura's entitlement to the funds in the designated trust account. Third, Dura did not challenge the cl 44.6 certificate as reviewable for error on this ground and cannot now mount a collateral challenge against the certificate on that basis. It ought be borne in mind that the structure of progress claims is to deduct from the valuation of the work at the relevant date of the claim the amount that has been paid by the principal to that time. The cl 44.6 certificate derived, in part, from Dura's earlier claims carried through in this manner. Thus, the amount paid by the principal, and the manner in which it was accounted for in the cl 44.6 certificate, could have been, but was not, challenged in the proceeding.

17 Dura sought to meet these difficulties by contending, not for payment of the funds in the designated trust account to it, but that of the moneys held in the designated trust account, \$907,163.40 represented Dura's entitlement which should be paid to Hue in diminution of its judgment on the certificate. For the reasons that follow this contention is rejected.

18 Dura's contentions can conveniently be summarised in a table:

Item	Cl 44.6 Certificate	Dura's alternative characterisation	Dura's further submission
Contract value	8,450,000		8,450,000
Add variations	633,438		633,438
Less deduction in contract scope	(166,226)		(166,226)
Adjusted contract value on completion	8,917,212		8,917,212
Value of works completed at 23 October 2006	7,034,419	Total paid to Dura to 23 October 2006	6,209,725
Amount that would have been paid to Dura had it completed	1,882,793	Uncompleted contract price payable to Dura	2,707,487
Cost of rectification and completion	5,934,890	Cost of rectification and completion	5,934,890
Certified debt	4,052,097		3,227,403
Add GST	405,210		322,740
	4,457,308		3,550,143
Difference			907,165

19 It is immediately clear that Dura's contentions are not based upon any finding of 'claimant's entitlements', as defined in s 26 of the Act. Rather, Dura is raising a new challenge to the finality of the certificate.<sup>3</sup> Dura is in effect contending that the sum certified by the superintendent under cl 44.6(b) is in error.<sup>4</sup> Dura effectively contends that the superintendent's certification of the sum of \$1,882,793 - as the amount that would have been paid to Dura if it had completed the work, which the superintendent has calculated by deducting his ascertained value of the works completed from the adjusted contract value - is wrong. Dura's alternative calculation raises a new, differently ascertained amount, the uncompleted contract price payable to Dura. Dura submits that this amount is ascertained by deducting the total amount paid to Dura<sup>5</sup> from the adjusted contract value. I do not accept that the simple mathematical calculations put by Dura in submission are either correct or appropriate. This particular analysis of the ascertainment of the debt certified under cl 44.6 has not ever been alleged as an issue in the proceeding and, unsurprisingly, was not put to any witness at trial. There was no mention of the funds in the designated trust account in the context of what Dura had paid, or should be deemed to have paid. Yet, Dura contends that the superintendent, and presumably Mr Clack, made an incorrect assumption about the quantum of progress payments to which Dura was entitled or had received, and now invite the court to assume that fact without the contention having been put to either witness.

20 I made no finding that the total amount paid to Dura to 23 October 2006 was \$6,209,725 (exclusive of GST). This figure is, of course, pivotal in Dura's submissions. The figure is derived from Mr Maaser's primary witness statement. I was not invited at trial to make this finding, presumably because the cl 44.6 certificate was not challenged at trial on the basis now advanced. In addition, that particular statement of Mr Maaser was contradicted by the evidence of Mr Wong, whose evidence I generally preferred. Mr Wong stated that the total payments to Dura to 23 October 2006 were

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<sup>3</sup> In argument, Dura denied that it was challenging that it was paid less than what is in the certificate and accepted the certificate as final and binding.

<sup>4</sup> In argument, Dura characterised its contentions as directed to the value ascertained under cl 44.6(a) submitting that it took no issue with the cl 44.6(b) sum.

<sup>5</sup> in the opinion of Mr Maaser.

\$6,864,847.88 (exclusive of GST), by 18 separate payments. Dura contended that source documents, which are in evidence, demonstrated that one of these payments was GST inclusive and, for that reason, I should prefer Mr Maaser's evidence to that of Mr Wong. It is inappropriate to do so. The opportunity to challenge Mr Wong's evidence was by cross-examination at trial not by submission after judgment. More broadly, this alternative basis for calculating the cl 44.6 certificate is nothing more than a collateral attack on its conclusive nature that was not taken at trial. No application was made to set aside my judgment and re-open the trial to permit Dura to amend its pleadings and explore this issue. There must be finality in litigation and in the building proceeding that point has been reached. Dura relied on a broad and general statement to be found in paragraph 38 of its third further amended reply and defence, as supporting the relief it seeks but the language of the paragraph cannot be tortured to expose that meaning. Dura's plea is directed at the possible payment to it of the funds in trust had it succeeded with its contention that the construction contract was repudiated by Hue and terminated by Dura<sup>6</sup>. Hue's pleading contends that Dura cannot establish any entitlement to the trust funds.

21 It follows that, having concluded that there are no 'claimant's entitlements' to a progress payment claim to be satisfied from the funds held in the designated trust account, those funds are held on trust for Hue. Accordingly, I will order that the moneys in the designated trust account, including any interest that has accrued, be paid to Hue, once the period in which a notice of appeal may be served has past or upon the finalisation of any appeal.

22 I will add that the Act is not concerned with the final adjustments between the parties to a construction contract, which was the broad issue in the proceeding. That its field of operation is so limited is clear from s 47 of the Act.

#### *Adjudicator's expenses*

23 Hue also sought to recover fees that it paid to the adjudicator in respect of the three determinations. As it applied at the time, s 45(2) of the Act provided that the claimant

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<sup>6</sup> as Dura's counsel conceded in argument.

and respondent are jointly and severally liable to pay the adjudicator's fees and expenses. Section 45(3) provided that as between themselves the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions. If the adjudicator determined that the adjudication application or the adjudication response was wholly unfounded, the adjudicator may determine that the parties are liable for his fees in some other proportion. That did not occur.

24 There was no direct claim for the adjudicator's fees made in the proceeding by Hue and counsel could not identify the sum being sought. Hue did not include its share of the adjudicator's fees in the costs to complete the contract works when ascertaining the costs incurred for the purposes of the cl 44.6 certificate. Hue did not claim its share of the adjudicator's fee as damages. It contends that s 47(3) of the Act gives the court a discretion to grant it the relief it seeks. I disagree.

25 Section 47 was not amended in 2006. It relevantly provides:

**47 Effect of Part on civil proceedings**

- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and
  - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

This section has no application in relation to adjudicator's fees since the expression 'any amount so paid' where it appears in ss (3)(b) refers back to the expression 'any amount paid to a party to the contract' where it appears in ss (3)(a). The extended jurisdiction to make such other order as the court considers appropriate only operates in the context of orders for restitution of 'any amount so paid'. As the share of the adjudicator's fees paid by Hue is not of that character, this section has no application.

26 In any event, s 45(3) of the Act plainly requires that the claimant and the respondent are, as between themselves, each liable to contribute to the adjudicator's fees and expenses in equal proportions.

27 For these reasons I reject Hue's claim for restitution to it of its share of the adjudicator's fees and expenses in connection with the three determinations.

***Applications for costs against non-parties***

28 Hue has foreshadowed that it may seek orders under s 29 of the *Civil Procedure Act 2010* (Vic). Section 30(2) of the Act requires such an application to be made prior to 'the finalisation of the civil proceedings to which the application relates (excluding any period for appeal)'.  
29 To avoid engaging in a close analysis of precisely when the date of finalisation of this proceeding might occur, I will direct that Hue bring any application it wishes to make for an order under s 29 of the *Civil Procedure Act 2010* by no later than:

- (a) 30 days after the expiry of the time permitted for notice of appeal under r 64.03 of the Rules, if no notice of appeal is served, or;
- (b) if a notice of appeal is served, any such application may be made within 30 days of the discontinuance or determination of the appeal.

30 Subject to any further submission from counsel, I will order that Dura pay the costs incurred since publication of my reasons for judgment, of and incidental to the application for the funds in the designated trust account to be taxed on an indemnity basis.

***Orders***

31 I will make the following orders.

- (a) The credit balance of the designated trust account, entitled 'Trust A/C for SC Land Richmond Adjudication', at the Melbourne branch of Bankwest, BSB: 303-111 Account Number: 050058-0, including all accrued interest, be forthwith paid to Hue.
- (b) The time for Hue to bring any application it may be advised to make for an order under s 29 of the *Civil Procedure Act 2010* is extended to:
  - (i) if no notice of appeal is served, 30 days after the expiry of the time limited for notice of appeal under r 64.03 of the Rules; or,
  - (ii) if a notice of appeal is served, 30 days after the date of discontinuance or determination of the appeal.
- (c) Hue's costs, incurred since 30 March 2012, of and incidental to the application for the funds in the designated trust account shall be paid by Dura, such costs to be taxed on an indemnity basis.
- (d) By consent, if a notice of appeal is served, execution of the judgment in this proceeding is stayed until 5:00 pm on 8 June 2012.

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