

## **A limitation on the ability to obtain judgment pursuant to s 16(4) of the Security of Payment Act**

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The Victorian Court of Appeal, by majority, has held that judgment cannot be entered pursuant to s 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Security of Payment Act**) where the payment claim includes “excluded amounts”.

*Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2021] VSCA 44 (5 March 2021) involved an appeal from a decision of Riordan J giving judgment in favour of Façade Designs on a payment claim that included an amount for interest, which was an excluded amount.

Façade Designs contracted with Yuanda to carry out installation of façade elements as part of the “Arch on Collins” project. It issued a payment claim for \$4.5 million which included a claim for interest, together with a number of variations alleged by Yuanda to be non-claimable variations. In response, Yuanda paid \$1.115 million of the amount claimed, but did not issue a payment schedule. Façade Designs made application for judgment pursuant to s 16 of the Act, which provides a means of entering judgment for the unpaid portion of a payment claim when no payment schedule has been served.

The Victorian *Building and Construction Industry Security of Payment Act 2002* (Security of Payment Act) is unique in including the concept of “excluded amounts” as amounts that must not be included in a payment claim. Excluded amounts are defined in s 10B of the Act, and broadly include claims for variations that are not “claimable variations”, compensation for latent conditions, time-related costs and regulatory changes, damages for breach of contract, and other legal claims not based on contract.

There were five grounds of appeal. Yuanda succeeded on Ground 2, the key issue in the appeal. The two main issues on appeal were:

1. whether on an application for judgment pursuant to s 16 the Court’s role is to assess the payment claim and attached documentation on its face to determine if “excluded amounts” are claimed, or whether the Court should be involved in “further digging” for that purpose (Ground 1); and
2. whether judgment can be entered pursuant to s 16 on the basis of a payment claim that includes excluded amounts (Ground 2).

In relation to the second issue, the majority of McLeish and Niall JJA held that judgment pursuant to s 16 is given for a “claimed amount” which is an amount claimed in a payment claim that does not include an excluded amount.

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Their Honours noted that the Court’s role pursuant to s 16(2)(a)(i) is to identify and enforce a statutory liability.<sup>1</sup> That liability is to pay the “claimed amount”, which is defined in s 4 as “an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14”. Section 14 provides that the claimed amount must not include any excluded amount.

The liability that is to be enforced is that created under s 15(4), which is for the claimed amount, nothing less. The natural meaning of the words “judgment is not to be given” in s 16(4) is that if the claimed amount (to which the statutory liability attaches) includes any excluded amount, the court is not to give judgment.<sup>2</sup>

By contrast, the role of an adjudicator is to determine “the adjudicated amount”. Section 23(2A)(a) refers to an adjudicator “not taking into account an excluded amount”, which is by way of contrast with the claimed amount referred to in s 16(4) “not includ(ing) any excluded amount”.<sup>3</sup>

Their Honours found that the Act exhibits a “clear policy” that disputes regarding liability for payment are to be dealt with by adjudication, and where there are substantive issues in dispute about the contents of a payment claim, the proper course is adjudication.<sup>4</sup>

In dissent on this point, Sifris JA found that Riordan J had been correct in holding that judgment could be entered for a lesser sum than the claimed amount stated in the payment claim. His Honour said that there was nothing in the Act to indicate that at time of judgment, “claimed amount” is not capable of referring to the amount claimed and actually owing at that time. The position adopted by the majority, his Honour noted, “may lead to absurd and entirely unintended consequences”, as the case demonstrated in relation to the claim for interest. His Honour considered that his interpretation of the Act was preferable as it promoted the purpose of the Act.<sup>5</sup>

Justices McLeish and Niall dismissed the respondent’s notice of contention that, in the event Ground 2 were successful, the primary decision should be upheld as the excluded amount could be “severed” from the claimed amount. The doctrine of severance applies where part of an instrument is preserved by severance notwithstanding the invalidity of another part. In this instance, there was no instrument to which the doctrine could apply. It did not apply to the payment claim; a payment claim that includes an excluded amount is still a valid payment claim albeit that it cannot be the basis for a judgment under s 16. Their Honours found that none of the cited authorities supported the respondent’s reliance on the doctrine of severance. Justice Sifris, based on his dissenting view on Ground 2, found it unnecessary to consider the application of the doctrine of severance, however agreed with the majority that the doctrine did not apply.<sup>6</sup>

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<sup>1</sup> Paragraphs [5], [13], [17].

<sup>2</sup> Paragraphs [13], [21], [22].

<sup>3</sup> Paragraphs [14], [15], [30].

<sup>4</sup> Paragraphs [18], [19], [21].

<sup>5</sup> Paragraphs [131], [133], [134], [136], [138].

<sup>6</sup> Paragraphs [31], [36], [143].

On the first issue, all three judges agreed that the question of whether a payment claim includes excluded amounts is to be determined on the face of the payment claim and documents referred to in it, or served with it, without a full investigation or “further digging” to determine the point.<sup>7</sup>

Justice Sifris, with McLeish and Niall JJA agreeing, granted leave but did not uphold grounds 3 to 5. These grounds related to alleged errors in the judge’s assessment of whether claims were for excluded amounts, and whether claims were based on an alleged fraudulent settlement agreement, which infected the entire payment claim.

## **Summary**

The Court of Appeal’s decision has significant consequences for the availability to contractors of judgment pursuant to s 16 where a payment schedule has not been issued. Where previously a contractor could include a range of claims (including potential excluded amounts) in a payment claim, on the understanding that judgment could be issued for a lesser sum if the claimed amount were found to include an excluded amount, the majority’s decision in *Yuanda* makes clear that s 16 offers an “all or nothing” avenue for contractors. If a payment claim includes “excluded amounts” then an application for judgment cannot be made; adjudication is the only avenue to pursue if a payment schedule has not been issued. This means that if contractors wish to have the s 16 avenue available to them, they must be careful to ensure that their payment claims do not include any excluded amounts.

However, the Court’s finding on Ground 1 provides some comfort that the issue of excluded amounts will not be the subject of a detailed investigation by the Court. If on the face of the payment claim and supporting documents the claim does not include “excluded amounts” then judgment can be entered, and the court will not engage in “further digging” on the basis of a challenge that the claim includes excluded amounts.

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<sup>7</sup> Paragraphs [43], [45], [117], [120].