



Final Payment or Final Say? What Merkon v Residence Company Teaches Builders About Getting Paid

The Supreme Court of Victoria recently handed down a decision that has big implications for builders chasing final payments and for developers relying on certificates and side agreements to push back.

In *Merkon Constructions Pty Ltd v Residence Company Pty Ltd* [2025] VSC 151, the Court made it clear that a completion certificate is not necessarily the end of the line when it comes to payment claims. It also clarified how breaches of side deeds affect enforceability, and when estoppel arguments fall short.

What Was the Dispute About?

This case involved a \$37 million residential apartment project in Melbourne.

- Merkon (the Builder) and Residence Company (the Developer) had a major works contract in place.
- During the project, they signed a second variation deed that extended the completion date and gave Merkon an unregistered mortgage over the land as security for unpaid amounts.
- However, a Side Deed between the Builder, Developer and lender prohibited the Builder from taking any security interest without the lender's written consent.
- After practical completion, Merkon issued a final payment claim for \$2.45 million.
- The Developer refused to pay, arguing that:
 - a. The variation deed was unenforceable because it breached the Side Deed.
 - b. The Builder was estopped from claiming more money because they had signed a completion certificate saying all certified amounts were paid.

Breaking a Side Deed Does Not Automatically Invalidate the Variation

The Developer claimed the variation deed was illegal and unenforceable because it conflicted with the Side Deed's 'no security' clause.

But the Court disagreed. Just because a new agreement breaches a separate deed (especially one with a third party like a lender), that doesn't make it void or illegal unless, it involves a breach of law or public policy. The variation deed remained valid between the Builder and Developer and the security clause didn't wipe out Merkon's payment claim.

Completion Certificate Does Not Mean Final Payment

A central issue was whether Merkon's signed completion certificate meant they had no further claim. It confirmed all 'certified' money had been paid but, the Court said that didn't mean all money owed was settled.

The Developer also relied on estoppel, a legal principle that prevents someone from going back on a representation if the other party has relied on it to their detriment. They argued Merkon's certificate gave the impression nothing further was payable.

But the Court found no evidence that the Developer actually relied on the certificate or suffered any disadvantage because of it. More importantly, the variation deed that came after the certificate clearly stated that further payments were due. As a result, Merkon wasn't "locked out" from pursuing its final claim.

Why This Case Matters

Builders Can Still Claim After Completion

Even if a certificate has been signed, builders may still be entitled to further payments, especially if a variation deed or other document recognises that more money is owed.

Private Side Agreements Need Careful Handling

If you're entering into a variation deed that could conflict with earlier agreements (like a side deed with a lender), be cautious. It might not invalidate the new deed, but it can create commercial and legal risk.

Estoppel Requires Real Reliance and Loss

Estoppel isn't automatic. To succeed, the other party must show they relied on your statement and that they'd be worse off because of it. A certificate alone won't do that, especially if a later document says otherwise.

Final Thoughts

Merkon v Residence Company is a practical reminder that certificates, side deeds, and contract variations don't operate in isolation. For builders, it confirms that final payment claims can survive past practical completion, if the contract supports it. For developers and funders, it highlights the importance of reviewing all agreements before assuming a variation is unenforceable.

At the end of the day, clear and consistent contract drafting matters, because when disputes arise, it's the details in the paperwork that determine who walks away with payment.