

SERVICE OF PAYMENT CLAIMS UNDER THE SECURITY OF PAYMENT ACT

THE OWNERS—STRATA PLAN NO 56587 V CONSOLIDATED QUALITY PROJECTS PTY LTD [2009] NSWSC 1476

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IMPACT

This decision is a significant one in the context of the *Building and Construction Industry Security of Payment Act 1999* (the Act) in that it contradicts the general understanding expressed by various commentators as to how payment claims made under the Act must be served.

Further, the repercussions of the decision are not confined to New South Wales but extend to every state in Australia with equivalent legislation [see for example the *Building and Construction Industry Security of Payment Act 2002* (Victoria) whose relevant provisions are almost identical].

BACKGROUND

In or about April 2007, the Owners—Strata Plan No 56587 (the Owners) entered into a contract (the contract) with Consolidated Quality Projects Pty Ltd (CQP) for the completion of building defects rectification work by CQP.

The Owners and RHM Consultants Pty Ltd (RHM) entered into a contract for the superintendence of the building defects rectification work completed by CQP.

Clause 23.1 of the contract stated inter alia:

Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.

Section 13(1) of the Act states:

A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the 'claimant') may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

At the outset, the difference between clause 23.1 and section 13(1) should be noted. That is, clause 23.1 requires that 'each progress claim shall be given in writing to the Superintendent' and section 13 requires service of the payment claim on the person liable to pay.

Section 31 of the Act addresses the service of notices and states:

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business, or

(d) in such other manner as may be prescribed by regulations for the purposes of this section, or

(e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

Justice McDougall held that a payment claim under section 13 of the Act is a notice under section 31 of the Act that is authorised or required to be served on a person. Section 31(1)(e) regarding service 'in such other manner as may be provided under the construction contract concerned' should be particularly noted.

A payment claim was issued by CQP on 7 October 2009 in excess of \$470,000 and served on RHM (payment claim).

The payment claim was not paid by the Owners and was referred to adjudication under the Act. The adjudicator determined that more than \$470,000 was payable to CQP by the Owners.

Twenty-five payment claims had been issued by CQP and provided to RHM before CQP served the payment claim. Each of these payment claims was a progress claim under the contract and a payment claim under the Act.

The twelfth progress claim was referred to adjudication under the Act and although a number of defences were raised by the Owners, none of the defences raised the fact that this payment claim had not been validly served on the Owners.

It was common ground that service of the payment claim was by delivery of the payment claim

to RHM (rather than the Owners) notwithstanding the fact that RHM was not, and could not have been, a person who, under construction contract concerned, was liable to make the payment.

The Owners alleged that service of the payment claim on RHM was not valid service and therefore one of the 'basic and essential requirements' set out in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 was not met.

DECISION

Justice McDougall began by starting that the question although narrow in compass, was not an easy one.

At paragraph 24 he observed that service of the payment claim is only valid if RHM was authorized 'to receive service of payment claims on behalf of the owners corporation. I do not think that it is correct to say that RHM should be regarded as the agent of the owners corporation.'

The analysis of the question of authorization begins at paragraph 26 with the observation that 'the Act operates supplementary to, and not to the exclusion of, relevant provisions of the contract. If the contract gives a right to progress payments, and does so in a manner that cannot be seen to offend section 34 of the Act, the contractual regime has to be made to coexist with the statutory regime'.

At paragraph 29 his Honour further observed that the 'parties should not be taken to have contracted unaware of the provisions of the Act. ... the intention of cl 23 of the contract should be taken to be that it deals with claims to progress payments not only having regard to their contractual character but also having regard to their statutory character' and 'the parties could not have intended that there should be a dual

track mechanism whereby contractual claims were provided and assessed in one way and statutory claims were provided and assessed in quite a different way'. That is, the contradictory provisions in relation to service in clause 23.1 and section 13(1) must be reconciled and cannot be left as a 'dual track mechanism'.

Finally, his Honour held at paragraphs 31, 32 and 33 as follows:

31 ... the more helpful way of understanding the parties' objective intention is that they appear to have engaged in a regime whereby documents purporting to be both progress claims under the contract and payment claims under the Act were delivered, as one document, to the owners corporation in care of RHM. The parties appear to have treated that, in at least one case, as being capable of giving rise to a dispute that could be referred to adjudication. That would only be possible if the document that was served had been served on the owners corporation. ...

32 For these reasons, it seems to me, as a matter of construction the regime set out in cl 23 of the contract should be taken to extend not only to progress claims strictly so called but also to the parallel track statutory mechanism for payment claims.

33 For those reasons, I conclude that the payment claim was served in a manner authorised by the contract, and thus that it was validly served for the purposes of s 31 of the Act.

His Honour then indicated that if he was wrong in this conclusion then, given the contractual arrangement regarding service of payment claims and notwithstanding the provisions to the contrary, 'the parties agreed or arranged that payment

claims for the purpose of the Act could be served on the owners corporation by being served, in their dual capacity as progress claims under the contract, on RHM.'

CONCLUSION

This decision takes the clear words of section 13 requiring service on the person who, under the construction contract concerned, is or may be liable to make the payment, and reads them down such that contractual provisions enabling service of progress claims on a superintendent and an intention to combine progress claims and payment claims in the one document, can circumvent section 13.

From a contractor's point of view, this makes compliance with the Act easier to do.

From a principal's point of view, it requires greater vigilance when completing contract administration to ensure that if the principal requires strict compliance with the Act, then the contract administration reflects this fact. That is, the contract administration makes it clear that the payment claims under the Act must be served on the principal.