

Key Security of Payment Act Judgements

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Introduction

The *Building and Construction Industry, Security of Payment Acts* (the Acts)¹ now in force in most States are causing a radical re-think of many traditional project management and contract management processes. The Acts apply to every business involved in Building and Construction including contractors, subcontractors, clients, suppliers and professional firms.

The Acts have been the subject of numerous judgments that are beginning to clarify and define the meaning of many key clauses and identify exactly what is required of a party to successfully make or defend a claim under the Act. Some of the critical judgments and their primary effect are listed in this paper. Each of the judgements listed below is also the subject of a Doyles 'Casewatch' report that can be freely downloaded from www.doylesconstructionlawyers.com.

The Act and judgments together now present a difficult, but reasonably clear, theatre of operations for making and defending claims. Provided both the Claimant and the Respondent ensure they:

- Have proactive protocols in place to manage their contract, and
- Strictly comply with every requirement of the Act.

Key Judgements and their primary effect:

Alan Conolly v Commercial Indemnity [2005] NSWSC 339 29/04/2005

- A payment Claim may be constituted by several different documents served at the same time.
- However, multiple documents may not constitute a valid Payment Claim and care should be taken to ensure that the form of the Payment Claim is clear.

Air Dynamics Control & Services Contracting v Durham [2005] NSWSC 366 22/04/2005

- The Applicant not required to repay monies received in error from enforcement proceedings pending final decision of the Supreme Court.

Australian Remediation Services v Earth Tech Engineering [2005] NSWSC 362
14/04/2005

- Confirms that the policy of the Act is “pay now argue later”. As such, the court is unlikely to interfere and grant an injunction unless the Adjudicator’s jurisdictional entitlement is to be clearly exceeded.

Pacific General Securities v Soliman & Sons [2005] NSWSC 378 14/04/2005

- That in order for the period for the adjudication response to run and the determination to be valid, the notice of acceptance by the Adjudicator must actually be received by the Respondent.

Co-Ordinated Construction v Climatech [2005] NSWSC 312 13/04/2005

- That claims for delay damages can be the subject of payment claims under the Act, if provided for by the terms of the particular Contract between the parties.

Vince Schokman v Xception Construction [2005] NSWSC 297 04/04/2005

- The option to apply for Adjudication when a payment Schedule is not given must be made strictly within the statutory timeframe.

Aldoga Aluminium v De Silva Starr [2005] NSWSC 284 01/04/2005

- That sections 14 and 15 of the Act do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside a demand under the Corporations Act, even where the dispute has not been the subject of a Payment Schedule served in accordance with the Act.

Cooper v Veghelvi [2005] NSWSC 227 23/03/2005

- A respondent is required to pay into the court as security the unpaid portion of an Adjudication Award, pending the final determination of those proceedings, to challenge the determination.

Falgat Constructions v Equity Australia [2005] NSWCA 49 03/03/2005

- Consecutive proceedings may be made under the Act and under the contract.

Coordinated Construction v J M Hargreaves [2005] NSWSC 77 22/02/2005

- An Adjudicator’s determination is not void because of the Adjudicated Amount includes an amount “for” construction work including delay damages and interest.

Okaroo v Vos Construction [2005] NSWSC 45 11/02/2005

- Arrangements between parties do not need to be legally enforceable in order for claimants to exploit the Act.
- Consequently, parties should ensure all agreements are documented and informal arrangements are restricted to minor obligations.

McLaughlin’s Family Restaurant v Condukes [2004] NSWCA 447 20/12/2004

- There must be more than “a real risk of prejudice” for a stay to be granted.

Brodyn v Dasein Constructions [2004] NSWSC 1230 15/12/2004

- Despite the provisions of s25(4) of the Act, a Respondent may be entitled to set off a claim in separate proceedings where the Applicant is in administration or liquidation and Commonwealth Legislation prevails.

Hersho v Expile [2004] NSWCA 468 13/12/2004

- The courts appear to require more than a “real risk of prejudice” to grant a stay of judgment.

Greenways Australia v CBC Management [2004] NSWSC 1186 10/12/2004

- Pursuing an offsetting claim under Commonwealth Legislation does not involve any attempt to have the District Court judgment under the Act set aside.

Barclay Mowlem v Tesrol Walsh Bay [2004] NSWSC 1232 09/12/2004

- To “provide” a payment schedule means at least that the process of delivery must be initiated by the Respondent rather than the actual receipt of the Payment Schedule by the Claimant.

TQM v Dasein [2004] NSWSC 1216 03/12/2004

- “Receipt” is defined as “taking into one’s possession” and is not the equivalent to “being served” or “having been served”.
- Care should be taken to ensure that the Adjudication Application is actually received.

Rothmere v Quasar [2004] NSWSC 1151 26/11/2004

- That section 22(4) is not a provision, which if not complied with by the Adjudicator, would result in an Adjudication Determination being void.

Corbett Court v Quasar [2004] NSWSC 1174 25/11/2004

- A tripartite agreement for payment of moneys from a financial institution is unlikely to constitute a loan agreement unless the tripartite agreement imposes an obligation on the bank to lend.

Property & Equity Developments v Parnell [2004] NSWSC 1035 12/11/2004

- A payment claim is valid if any part of the construction work included in the payment claim is carried out in the previous twelve months.

TransGrid v Siemens [2004] NSWCA 395 03/11/2004

- The preferable construction of the Act is that the adjudicator does not step into the shoes of the superintendent.

Estate Property v Barclay Mowlem [2004] NSWCA 393 03/11/2004

- Some work included in the Payment Claim must be performed in the last twelve months.

Brodyn Pty Ltd t/as Time Cost & Quality v Davenport [2004] NSWCA 394
03/11/2004

- Court of Appeal's judicial review, is no longer available, except in respect of:-
 - A breach of the 'basic and essential requirements' which are:
 - A construction contract
 - A claim under the Act
 - A valid reference to, and appointment of, the Adjudicator
 - Fraud or
 - The failure of the Adjudicator to exercise his/her powers 'bona fide'
 - The denial of natural justice
- It is now possible to upset an Adjudicator's determination only if "no valid determination was made" (ie, it is void), not for errors in the determination.

References

Updates on key aspects of case law affecting the application of Security of Payments legislation and Adjudication can be found in the 'Casewatch' section of our web site at www.doylesconstructionlawyers.com

¹ Current Acts:

Vic: *Building and Construction Security of Payment Act 2002* (currently being reviewed)

NSW: *Building and Construction Security of Payment Act 1999* (amended 2002 and the next review being discussed)

Qld: *Building and Construction Industry Payments Bill 2004*

WA: *Construction Contracts Bill 2004*

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