



Reference date, preconditions, supporting statements and service by a “good Samaritan” all in one SOPA case

Case note: *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317

There have been a number of decisions of the NSW Supreme Court which have dealt with the consequences of a head contractor serving a Payment Claim that is not accompanied by a supporting statement under section 13(7) and s13(9) of the *Building and Construction Industry Security of Payment Act 1999* (“the Act”).

In the recent decision *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317 the Court had to consider the question of whether a claimant which had failed to serve a supporting statement was in fact a head contractor for the purposes of s13(7) of the Act.

The decision is instructive as it also revisited the topical issue of reference dates, set out some helpful principles in dealing with contractual preconditions to the making of Payment Claims and addressed a novel set of facts concerning the service of documents under the Act by a “good Samaritan” not related to the parties.

THE CHALLENGE

The case concerned a challenge to a determination by an Adjudicator made under the Act for \$134,107.22 payable by Castle Constructions to the Ghossayn Group.

Castle Construction argued that the Adjudicator had no jurisdiction to make the determination on three grounds:

1. there was no available reference date within the meaning of section 8 of the Act for the Payment Claim the subject of the determination;

2. that Ghossayn Group was a head contractor under the Act and failed to serve a supporting statement with the Payment Claim, as required by s13(7) of the Act; and
3. the Adjudicator wrongly concluded that the Adjudication Response was not served within two business days after the Respondent had received notice of the Adjudicator’s acceptance of the Adjudication Application.

The Court found that Ground 2 had been established and set aside the Adjudication Determination.

WHAT HAPPENED?

In December 2015 Ghossayn entered into a construction contract for the demolition of a building at Sailors Bay Road, Northbridge.

The site was owned by and had been acquired by Castlenorth Pty Ltd (“**Castlenorth**”). Castle Constructions was the wholly owned subsidiary of Castlenorth.

It was unclear as to whether the other party to the Contract was Castle Constructions or Castlenorth.

On or about 6 May 2016, Ghossayn and Castle Constructions entered into an oral agreement for Ghossayn to undertake bulk excavation, piling, anchoring and shoring works at the site.

The oral agreement was evidenced by a letter sent by Ghossayn to Castle Constructions which stated:

“....same as demo [demolition] – must provide insurance showing the owner (C/N) [Castlenorth] as the interested party.

Payment within 14 days – less if possible – three progress invoices and one final. Final not to be issued until engineer and surveyor sign off on completion of work in accordance with approvals. Discussed reason and showed them conditions of sale.

Completion by end of October.” [Emphasis in original]

Ghossayn Group issued previous Payment Claims on Castle Constructions under the Act, all of which were paid by Castle Constructions.

On 30 September 2016, Ghossayn Group issued a Payment Claim for \$134,107.22. The Payment Claim purported to be the “final” claim.

REFERENCE DATE POINT

Castle Constructions argued that no reference date for the Payment Claim dated 30 September 2016 had arisen under the Contract or the Act as the Works not been:

- a) completed in accordance with relevant plans and specifications; and
- b) signed off by the project surveyor, the project structural engineer and the project geotechnical engineer.

Ghossayn argued that the provision that a contractor’s right to payment is contingent upon a third party forming an opinion, or certifying a particular state of affairs, was void by reason of section 34 of the Act and that a reference date to support the 30 September 2016 Payment Claim arose on that day pursuant to s 8(2)(b) of the Act.

The question for the Court was whether a contractual provision which states that a contractor’s right to payment is contingent upon a third party forming an opinion, or certifying a particular state of affairs, is one which is void by reason of s 34 the Act

The Court considered the freedom that parties have to determine when a reference date arises [47] but said that this freedom was not “unconstrained” [50]

The Court said that a provision will or may be invalidated under section 34 of the Act by a provision which goes beyond fixing a mechanism for determining the date on which the contractor is to be paid and which:

1. imposes conditions on the occurrence of a reference date (Hutchinson at [26]);
2. modifies or restricts the circumstances in which a contractor is entitled to a progress claim (Hutchinson at [26]);
3. inordinately delays or effectively prevents a reference date from arising (Lean Field at [55]);
4. unjustifiably impeaches the making of a Payment Claim or renders the statutory entitlement practically illusory (Lean Field at [68]);

5. imposes onerous conditions which make a reference date more of a theoretical possibility than an actuality (Lean Field at [73]); or
6. does not facilitate a statutory entitlement to a progress payment (Lean Field at [74]);

The court referred, in particular, to the following examples of when a provision of a contract would be void by reason of s34 of the Act:

- a provision that a contractor’s entitlement to a retention fund was conditional on the superintendent issuing a final certificate certifying the final balance due and payable to the contractor [Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2008] NSWSC 399] per McDougall J; and
- a provision that a contractor’s entitlement to a progress claim was conditional on it providing a declaration that its employees, subcontractors and suppliers Hutchinson, per Ball J.

In the present case, the Contract did not purport simply to provide that payment be made on achievement of a milestone (completion of the work).

Rather, it purported to provide that the payment be made only when an “*engineer and surveyor [have signed] off on completion of work in accordance with approvals*”.

According to the Court, that condition did more than simply provide a mechanism whereby the time on which Ghossayn Group could receive a progress payment could be ascertained.

The Court said that mechanism did not facilitate Ghossayn Group’s statutory entitlement to a progress claim.

The Court held that that the condition in the 6 May 2016 contract that Ghossayn Group only be entitled to a final payment when the relevant engineers and surveyors had signed off on completion of the work was void as it did purport to exclude, modify or restrict the operation of the Act, and might reasonably be construed as an attempt to deter Ghossayn Group from taking action under the Act.

THE HEAD CONTRACTOR ISSUE

Castle Constructions and Castlenorth contended that Ghossayn Group was a “head contractor” for the purposes of the Act was thus obliged not to serve a Payment Claim unless it was “accompanied” by a “supporting statement” of the kind referred to in s 13(9) of the Act.

As is now well known, under the Act a supporting statement is required to be served by a head contractor [sec 13(7) and s13(9)] any time the head contractor serves a Payment Claim on the principal.

Section 4 of the Act defines a Head Contractor as follows:

“[H]ead contractor means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the main contract) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

Note. There is no head contractor when the principal contracts directly with subcontractors.”

There was no dispute that Ghossayn Group engaged subcontractors for this project and therefore no dispute that the second limb of this definition was engaged (as it was a party “for whom” construction work was to be carried out as part of the work to be carried out under the “main contract”; that is, the contract between Castle Constructions and Ghossayn Group).

The matter for consideration was whether Ghossayn Group was carrying out construction work “for the principal” under the “main contract”.

This raised the critical question as to whether Castle Constructions, was a “principal” within the meaning of section 4 of the Act which states:

“[P]rincipal means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the main contract) and who is not themselves [sic] engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the main contract.”

What divided the parties was whether the second limb of the definition of “principal” was engaged; namely, that Castle Constructions was not itself engaged under a construction contract (by the owner of the land, Castlenorth) to do that work

In dealing with this issue the Court undertook a factual enquiry as to the relationship between Castle Constructions and Castlenorth.

In weighing up the evidence and in particular that Castle Constructions held no building licence at the relevant time, the Court said that the evidence overall makes clear that there was no construction contract made between Castle Constructions and Castlenorth

It followed that the Payment Claim was not validly served for the purposes of the Act, and that no statutory rights or entitlements arose by reference to that document: *Kitchen Xchange Pty Ltd v Formacon Building Services Pty Ltd* [2014] NSWSC 1602 (McDougall J) at [46]; *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334

(Meagher JA) at [37]; *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd* [2017] NSWSC 1121 (Hammerschlag J) at [28].

For that reason alone, the Adjudicator had no jurisdiction to make the determination. The court held that the adjudication determination must be set aside.

SERVICE ISSUE

Although it was not necessary for the Court to deal with the issue of service of the Adjudication Response, the Court did so.

The issue was the date on which Castle received notice of the Adjudicator’s acceptance.

The relevant facts were as follows:

- The ANA attempted to fax the notification of the Adjudicator’s acceptance on 2 December 2016. That transmission failed.
- The ANA sent notification of acceptance to Castle Constructions’ ordinary place of business (being suite 35 at the Sailors Bay Road address in Northbridge).
- There were 39 suites at the address and 39 individual letterboxes.
- The letter was deposited by error by Australia Post at 3.20pm on Monday 5 December 2016 in the Anytime Fitness letterbox for suite 38.
- The letter was not discovered in the Anytime Fitness letter box until about 7.30pm on Wednesday 7 December 2016.
- According to the evidence of the Anytime Fitness employee, on finding the letter addressed to Castle Constructions, he placed in in the mail box of Suite 35 marked Suite 35 – the Lahood Group.
- The Court said that service of the notice, by reason of section 31(2) of the Act, was effected when the notice was “received at that place.”
- The fact that service was by reason of the intervention of a ‘good Samaritan’ rather than by the agency of Australia Post was irrelevant.

The Court held that Castle Constructions received the Adjudicator’s acceptance on 7 December and that accordingly the service of its Adjudication Response on 12 December was out of time.

IMPLICATIONS OF THE CASE

The case deals with a range of important and topical issues and reaffirms the application of section 34 of the Act to contractual preconditions to a Payment Claim and the establishment of a valid reference date.

The facts relating to service are interesting and novel but not controversial nor relevant to the ultimate decision of the Court.

Of greater interest is that Ghossayn unintentionally became a head contractor under the Act and was therefore obliged to provide a supporting statement (and potentially a retention fund had the contract value been over \$20m).

The decision raises some broader issues as to when the obligation for the issue of a supporting statement and establishment of a retention fund arises.

The intent of the Act is that there is only one principal, one head contractor and potentially multiple subcontractors. However, not all construction projects operate in such a traditional contractual chain.

There are some significant projects taking place which are multi-tiered.

In major infrastructure and property development projects for example there are multiple tiers of subcontracting beyond the basic model.

In such cases the 'head contractor' may be an intermediary, for example, a special purpose vehicle or developer, rather than the traditional head construction contractor.

It would follow that the intermediary may be obliged under the Act to issue a supporting statement and also establish a retention fund.

Another conceivable scenario may be where a principal engages subcontractors directly or through a managing contractor (who might engage subcontractors as agent for the principal).

The Notes to the definition of main contract and subcontractor under the Act appear to anticipate such a scenario.

The Notes state:

Note There is no head contractor when the principal contracts directly with subcontractors.

Note: A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly

These "Notes" however, do not form part of the Act.

The question therefore arises as to whether a subcontractor may unintentionally become a head contractor under the Act if or when it engages sub-subcontractors.

The decision did not explore the variants of contractual chains and was decided on the unique facts of the relationship between Castle Constructions and the developer Castlenorth.

No doubt the requirement for Ghossayn to submit a supporting statement would have been unexpected at the time that Ghossayn submitted the Payment Claim.

What arises from the decision is the need for higher level of vigilance on contractors or intermediaries to assess the likelihood that they could be regarded as a head contractor in circumstances where:

- the party that the contractor believes to be the head contractor and the principal are related; and/or
- where the contractual relationships are more complex than the traditional relationships contemplated under the Act.

David Glinatsis is the Director of Kreisson.

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.

