

Construction Alert

Caught out for want of construction contract

September 2013

Introduction

In a recent decision of the Supreme Court of New South Wales, Justice McDougall in *Class Electrical Services v Go Electrical* [2013] NSWSC 363 reminds claimants and respondents that not all agreements fall within the definition of construction contract for the purposes of security of payment legislation.

Facts

Go Electrical agreed to supply and deliver various electrical fittings and appliances to Class Electrical by way of a general credit agreement. By the terms of the credit agreement, Class Electrical would from time to time raise purchase orders with Go Electrical, and Go Electrical would issue a reciprocal tax invoice to Class Electrical upon supply of the relevant electrical equipment.

Go Electrical made an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Security of Payment Act**) claiming over \$1.8 million for the supply of electrical equipment to Class Electrical under the credit agreement. The adjudicator determined the claim in Go Electrical's favour. Class Electrical applied to the Supreme Court to have the adjudicator's decision set aside on five grounds, the primary ground being that there was no single construction contract to which the adjudication application and determination could be said to relate.

It is trite that an essential requirement of a valid adjudication application and subsequent determination is the existence of a construction contract on which the adjudication application is made.

Class Electrical submitted that the adjudication application (and the payment claim on which it was based) was not valid because the credit agreement was not a construction contract, and the true interpretation was that each purchase order and supply were individual construction contracts as between Class Electrical and Go Electrical.

Go Electrical's position was that the credit agreement was the over-arching arrangement between the parties and the fact that individual contracts may have been formed upon request and supply did not mean that the credit agreement could not be a construction contract for the purposes of the Security of Payment Act.

Decision

Justice McDougall considered the definition of construction contract given in section 4 of the Security of Payment Act 'a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party'. The definition of construction contract is essentially identical to that in the *Queensland Building and Construction Industry Payments Act 2004* (QLD).

Justice McDougall preferred Class Electrical's position and held that the credit agreement did not constitute a construction contract for the purposes of the Security of Payment Act. What was critical was that the credit agreement did not contemplate particulars such as the specific items for supply, the dates and times for the supply, the prices payable for the supply or the location of the supply. In the absence of that detail, Justice McDougall held that the credit agreement did not contain an 'undertaking to supply related goods' as there was nothing which indicated that Go Electrical undertook to make the supply.

Rather, Justice McDougall's view of the credit agreement was that any question of supply was to be negotiated at some future dates between the parties.

As a result, the true position was that the credit agreement was not a construction contract, and the relevant construction contracts, so far as the Security of Payment Act is concerned, arose as a result of the individual purchase orders raised by Class Electrical.

Implications

This decision is a reminder that parties should be aware of the types of contracts and 'other arrangements' which fall under the umbrella of security of payment legislation.

Prior to agitating claims by way of the adjudication process, claimants should consider how the contractual relationship with the respondent, on which the payment claim is based, arises. In most instances where goods or services are supplied from time to time in response to individual purchase orders, a separate contract is created in respect of each performance of the relevant work. In these circumstances, individual payment claims would need to be made in respect of each construction contract.

It is equally important for respondents to payment claims to be fully aware of the types of arrangements which fall outside of the operation of security of payment legislation. In order to avoid wasting time and resources responding to payment claims and adjudication applications which are made without merit, respondents can cut the snake at the head in circumstances where it is clear that a claimant has submitted a payment claim in the absence of a construction contract.

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