

## Construction Alert

# Reference dates under Security of Payment legislation

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### Introduction

In a recent case the New South Wales Supreme Court has determined the meaning of 'named month' as it relates to the definition of a "reference date" in security of payment legislation. The decision in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 has important implications for claimants who are seeking progress payments and arms respondents with another line of defence.

In a surprising decision, where a contract does not specify dates upon which claims for payment can be made, the Court found that a party will only have a 'reference date' under security of payment legislation where work has been performed in the 'named month'.

### Facts

Grid Projects NSW Pty Ltd (**Grid Projects**) is a builder. It engaged Proyalbi Organic Set Plaster Pty Ltd (**Proyalbi**) to do rendering and plastering work at a site in Cremorne. Work commenced on the site on 22 November 2011 and was completed on 25 June 2012. During this period Proyalbi sent Grid Projects four payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**).

The fourth payment claim, dated 14 August 2012, was for work done between 9 March 2012 and 25 June 2012 and in the amount of \$62,963.95. The fourth payment claim was in respect of work completed for the same dates as the third payment claim (of which Grid Projects

only paid a small portion); however it was for a slightly higher amount due to the inclusion of a claim for materials. On 20 August 2012, Grid Projects served a payment schedule on Proyalbi, proposing to pay \$4,966.46 of the fourth payment claim.

On 31 August 2012, Proyalbi made an adjudication application in respect of Grid Project's payment schedule. The adjudicator determined that Grid Projects should pay Proyalbi a progress payment of \$59,399.95.

Grid Projects made an application to the Supreme Court that the determination of the adjudicator be set aside on the grounds that it was made without jurisdiction.

### Decision

Reference dates under a construction contract can either be determined by the parties in the contract itself, or if no such provision is made, by default the reference date occurs on the last day of the month in which construction work was first carried out and on the last day of each subsequent named month. No such provision for progress claims was made in the construction contract between Grid Projects and Proyalbi and the default provisions dealing with reference dates applied.

It was commonly thought that where contracts were silent as to dates upon which claims for payment could be made and the default regime applied, parties simply had reference dates upon which to make claims at the end of each month i.e. 30 June, 31 July, 31 August etc. This is not the case.

Justice Stevenson of the Supreme Court referred to a raft of authority to confirm that 'named month' means the month 'named' in the payment claim as being the month in which the work referred to in the claim for progress payment was undertaken. Accordingly, it was not the case that there was a reference date automatically crystallising at the end of each month but only where work had been performed in each named month. In the present case, the last month 'named' in a payment claim was June 2012, and as a result, the last reference date available to Proyalbi was 30 June 2012.

Grid Projects relied on section 13(5) of the NSW Act which provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. Grid Projects claimed that Proyalbi had made both the third and fourth payment claims in respect of the 30 June 2012 reference date and as a result, the 14 August 2012 payment claim was void because it offended section 13(5) of the NSW Act and was made without jurisdiction.

Justice Stevenson held that it was open to Proyalbi to proceed to adjudication in respect of its third payment claim, but it chose not to do so. Security of payment legislation is not designed to allow a claimant to make claims for payment in respect of identical work in successive payment claims.

Ultimately, the Supreme Court found that Proyalbi had no statutory entitlement to make its fourth payment claim and the determination of the adjudicator was made without jurisdiction and was void.

## The Queensland and South Australian Acts

The definition of reference date in the *Building and Construction Industry Payments Act 2004 (Qld) (Queensland Act)* is similar, but not identical, to the NSW Act definition. In the Queensland Act, reference dates are described as occurring on the last day of each later named month (as opposed to subsequent). The difference

does not affect the applicability of the decision of Justice Stevenson to the Queensland legislation.

The definition of reference date in the *Building and Construction Industry Security of Payment Act 2009 (SA)* is identical to that in the NSW Act, and the decision has equal applicability in South Australia.

## Implications for claimants

The decision in Grid Projects casts doubt on the previously accepted theory that a claimant can submit a payment claim for 12 reference dates following the completion of construction work where the contract does not specify dates for progress claims. In order to avoid any uncertainty as to when a claimant is entitled to a reference date on which to submit its claim for payment, the parties should specify in the construction contract the precise dates on which a reference date arises. Further, where contracts are silent and the default payment regime applies, claimants should be careful to make claims in months in which work has been performed and agitate those claims through adjudication.

## Implications for respondents

The interpretation of the definition of reference date opens up to respondents a legitimate reason for withholding payment and subsequently defeating any adjudication. The decision has effectively limited a claimant's opportunity to make a valid payment claim in circumstances where the default regime applies, and before making progress payments, respondents should give serious consideration to whether claimants are in fact entitled to make such claims.

Written by:

**Andrew Kelly**

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

**Tom McKillop**

Lawyer

+61 7 3338 7530

tmckillop@thomsonslawyers.com.au

For further information, please [click here](#) to contact our national Construction team

[www.thomsonslawyers.com.au](http://www.thomsonslawyers.com.au)