

Construction Alert

Reference dates not bankable under Security of Payment Legislation

August 2013

Introduction

The recent New South Wales Supreme Court decision of Stevenson J in *Hill v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865 held that it is not possible for claimants to “bank” reference dates under the New South Wales security of payment legislation.

Facts

Robert and Christine Hill, the trustees of the Ashmore Superannuation Benefit Fund (**Hill**), entered into a project management agreement (**Agreement**) with Halo Architectural Design Services Pty Ltd (**Halo**) for Halo to project manage a development on behalf of Hill.

In the period between 9 November 2012 and 7 December 2012, Hill received ten claims for payment for different dates from Halo, each of which purported to be a “payment claim” made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**BCISP Act**). Each of the payment claims were in respect of work said to have been done in ten separate months, namely February to November 2012 (inclusive). With the exception of the last four payment claims, all were paid or settled by Hill. Halo proceeded to adjudication on the outstanding four payment claims (**Payment Claims**). The adjudicator found in favour of Halo. Hill subsequently sought a review of the

adjudicator’s determination in the Supreme Court of New South Wales on the basis that the Payment Claims were invalid.

Reference date issue

It was common ground for all purposes that the reference date was the seventh day of each month. In considering the relevant provisions outlined in the BCISP Act, Hill submitted His Honour should contemplate the observations of McDougall J in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 (**Nebax**) in that an adjudication application can only be made with respect to one payment claim.

While Halo conceded it was not possible for a party in their position to “bank reference dates”, it submitted that the ten payment claims it served between 9 November 2012 and 3 December 2012 should be seen as one payment claim, made progressively and by ten instalments, over that period. It contended that “we can serve all of our invoices together as one continuous facsimile or we can serve them on consecutive days or we can serve them as they are prepared and put.” Accordingly, Halo submitted it had not acted inconsistently with section 13(5) of the BCISP Act as it had served but one payment claim in respect of the relevant reference date of 7 November 2012.

His Honour rejected Halo's submission. This was because, notwithstanding the fact that in its adjudication application Halo described the last four payment claims as each being separate, the ten payment claims were made on different dates, each for a different month and required payment on different dates. In this respect, His Honour said it was not possible for a party in Halo's position to "bank" reference dates and serve multiple payment claims following one reference date for work carried out in previous months.

Relying on McDougall J's reference in Nebax to section 13(5) of the BCISP Act preventing service of more than one payment claim per reference date, His Honour found that Halo was only entitled to serve one payment claim "in respect of" the reference date of 7 November 2012. As Halo's first payment claim served on 9 November 2012 was paid by Hill, it was not possible for Halo to serve any further payment claims "in respect of" the reference date of 7 November 2012. Therefore, the purported Payment Claims were not payment claims within the meaning of the BCISP Act and the adjudicator had no jurisdiction in making his determination.

Implications

Should a claimant want to issue payment claims in relation to outstanding payment for work completed over several months, it will need to issue a single payment claim in respect of the most recent reference date and include all relevant work from the preceding months in this payment claim. This will ensure claimants act in accordance with the BCISP Act, particularly in relation to section 13(5), and that they avoid any notions of "banking" reference dates.

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