

Construction Alert

Service of payment claims on superintendents?

July 2011

The recent District Court of Queensland decision of *Penfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77 (**Penfold Projects**) is the first Queensland authority to consider whether service of a payment claim made under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**) on a superintendent constitutes valid service under the BCIP Act. Surprisingly, this decision distinguished New South Wales and Victorian authorities and determined that in the absence of an express contractual provision, service of a payment claim on a superintendent is not sufficient service for the purpose of the BCIP Act.

It is common practice for construction contracts to provide that (or to similar effect):

- A contractor is to serve progress claims under the contract on the superintendent.
- The superintendent is to certify the amount due to the contractor.
- The principal is to pay the amount of the superintendent's certificate.

However, under the BCIP Act, a claimant is required to serve a payment claim pursuant to section 17(1) "on the person who, under the construction contract

concerned, is or may be liable to make the payment". This is the client or in the case of a subcontract, the main contractor rather than the superintendent or contracts administrator.

The interaction between the terms of a construction contract and the provisions of the BCIP Act regarding the service of payment claims was addressed in *Penfold Projects*.

The key findings of the decision were:

- Service of a payment claim on a superintendent is not effective service under the BCIP Act in the absence of an express contractual provision allowing such service. The requirements of service under the BCIP Act must be strictly complied with due to the harsh consequences which are imposed on the respondent where there is non-compliance with the relevant time limitation periods.
- Where there is no express contractual provision permitting service of payment claims under the BCIP Act on the Superintendent, the courts will scrutinise contractual payment provisions, and where the contractual provisions are so similar to the statutory regime that they have a dual character, service of the payment claim by a method stated in the contract, including on the superintendent, will constitute valid service under the BCIP Act. It is recommended that, to avoid unnecessary and costly disputes in relation to this issue, parties should deal with the matter by way of an express contractual provision.

In short, the prudent course of action to take where a contractor may refer a payment dispute to adjudication, is to ensure that the payment claim is served on the client.

The facts

In Penfold Projects, the relevant payment provisions to the contract provided that:

- Each progress claim shall be given in writing from the trade contractor (Penfold) to the construction manager.
- Within 14 days after receiving such a claim from the trade contractor, the construction manager shall issue to the principal and trade contractor a progress certificate evidencing the construction manager's opinion of the moneys due from the principal and a certificate evidencing the construction manager's assessment of retention moneys and moneys due from the trade contractor to the principal.
- The principal (Securcorp) shall, within 7 days after receiving both such certificates, or within 21 days after the construction manager receives the progress claim, pay to the trade contractor the balance of the progress certificate after setting off such of the certificate as the principal elects to set off.

Penfold served two payment claims by email on the construction manager only, who acted in a similar way to a superintendent. The progress claims stated: *'This is a progress claim made under the Building and Construction Industry Payments Act 2004'*.

Penfold then applied to recover the amount of the unpaid payment claims from Securcorp as a debt owing to it under section 19(2)(a) of the BCIP Act on the basis that Securcorp failed to serve payment schedules on Penfold in response to either of the payment claims within the time allowed under section 18 of the BCIP Act.

Securcorp resisted Penfold's application on the basis that the claims were not validly served on Securcorp under the BCIP Act by emails to the construction manager.

The Court's findings

Justice Irwin concluded that service of a payment claim on a construction manager or superintendent is not valid service under the BCIP Act, subject to an express contractual provision allowing such service. A payment claim made under the BCIP Act must be served on the principal, being under section 17(1) of the BCIP Act the person who is or may be liable to make payment.

In reaching this conclusion, Justice Irwin distinguished the New South Wales and Victorian decisions of *The Owners Strata Plan 56587 v Consolidated Quality Projects* [2009] NSWSC 1476 (Quality Projects) and *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 (Metacorp) which held that service of payment claims on the superintendent constituted valid service under the relevant NSW and Victorian security of payment legislation on the basis of differing contractual provisions and factual circumstances.

Justice Irwin noted that the contractual provisions under consideration in Metacorp and Quality Projects were closely aligned to the statutory regime, whereas the contractual provisions in this case were of a separate and distinct character.

Furthermore, Justice Irwin considered that these cases were further distinguishable on the basis that:

- In Metacorp, the contract made specific reference to the Victorian SOP Act.
- In Quality Projects, the parties engaged in a course of prior conduct whereby documents purporting to be both progress claims under the contract and payment claims under the Security of Payments Act were delivered, as one document to the principal, care of the Superintendent. There was only one occasion where a failure to pay a claim gave rise to a reference to adjudication, and no point as to service was taken.

Justice Irwin also relied heavily on the obiter comments of Justice Einstein in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWCC 903 to conclude that:

"service of a payment claim under s 17(1) is a matter which must be strictly complied with in accordance with its terms . . . This is particularly so, when . . . service being effected in accordance with the legislation is critical as it governs the commencement of time limitations following such service, and the consequences of non compliance with these time limitations period is harsh . . . [There] are serious consequences which attach to 'the respondent', and to no other person."

His Honour went on to state that if the contractual regime which sits along the statutory regime provides a separate and distinct mechanism which the claimant may elect to follow for the recovery of progress claims, this mechanism does not provide a way in which a payment claim may be served for the purposes of a payment claim under the BCIP Act.

Upon review of the contractual provisions and the practice adopted by the contracting parties, Justice Irwin was not satisfied that the parties agreed or arranged that payment claims for the purposes of the BCIP Act could be served on the principal, by being served in their dual capacity as progress claims under the contract on the construction manager.

Thus, the provisions of the contract which permitted service of progress claims on the construction manager were limited to the service of progress claims under the separate and distinct contractual regime, and accordingly, the construction manager was not Securcorp's authorised agent for the service of payment claims under the BCIP Act.

Implications

The decision of Penfold Projects clarifies that in Queensland, service on the superintendent of a payment claim made under the BCIP Act does not constitute valid service, subject to any express contractual provision.

It is still open to contracting parties to insert contractual provisions which expressly allow the superintendent to be agent of the principal for the purposes of service of payment claims under the BCIP Act. Clear words should be expressed to this effect such as:

"For the avoidance of doubt, in receiving a payment claim from the Contractor under the Building and Construction Industry Payments Act 2004 (Qld), the Superintendent does so on behalf of and as agent of the Principal."

Or to broader effect:

"For the avoidance of doubt, in receiving and responding to any communications of whatever nature in relation to the Building and

Construction Industry Payments Act 2004 (Qld) (BCIP Act), (including, without limitation, a payment claim under the BCIP Act), the Superintendent does so on behalf of and as agent of the Principal."

Or:

"The Principal accepts service of payment claims upon the Superintendent under the Building and Construction Industry Payments Act 2004 (Qld) (BCIP Act) in lieu of service on the Principal and the Contractor agrees that the provision of payment schedules by the Superintendent complies with the Principal's obligations under the BCIP Act."

Where the contractual regime for progress payments in essence 'mirrors' the statutory regime under the BCIP Act so that the contractual provisions have a dual character, service for the purposes of the BCIP Act will be satisfied where the payment claim is served by any method of service contemplated by the contract. To avoid any arguments and confusion as to the dual character of the payment provisions, it is again open to the parties to remove such doubts by including an express contractual provision. The other option is to ensure that at all times payment claims under the BCIP Act are served upon the party liable to make payment i.e. in the case of a head contract, the principal and in the case of a subcontract, the main contractor.

It is yet to be seen whether the decision of Penfold Projects is appealed, but for now, it remains the law in Queensland.

Written by:

Clare Kenny

Associate

+61 7 3338 7541

ckenny@thomsonslawyers.com.au

Andrew Kelly

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

For further information, please contact:

Andrew Kelly

Partner

+61 7 3338 7550

akelly@thomsonslawyers.com.au

www.thomsonslawyers.com.au