



Construction Bulletin

July 2007

Security of Payment Act Payment Claims and Payment Schedules: Common Sense Prevails

The NSW Supreme Court has handed down three decisions which confirm that a common sense approach will be applied when deciding issues concerning payment claims and payment schedules.

These decisions also send a clear message that purely technical arguments about payment claims or payment schedules will not succeed.

Tell them why you are not paying or lose the right: *John Holland Pty Ltd v RTA*

In this case, the NSW Court of Appeal set out the importance of getting the payment schedule right from the very first opportunity and putting forward in the payment schedule all the reasons for not paying. The time critical nature of the procedures under the *Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act)* means that even valid reasons for not paying are effectively barred unless they are raised in the payment schedule.

The Roads & Traffic Authority of New South Wales (**RTA**) entered into a contract with John Holland Pty Ltd (**John Holland**) for the construction of a dual carriageway and associated bridges in an area north of Kiama.

John Holland served on the RTA a payment claim under the SOP Act claiming \$8 million. The RTA responded with a payment schedule proposing to pay \$732, 003.42.

John Holland then served an adjudication application and the RTA responded saying that the adjudicator had no right to determine the adjudication application as he was being asked to perform a dispute resolution role under the contract and not a valuation role in relation to an amount of a progress payment. The RTA also argued that the adjudication of the claim was beyond the scope of the Act as the claim had already been determined and referred to expert determination under the contract.

The adjudicator rejected the RTA's submissions on the grounds that they were not included in the payment schedule and determined that the RTA must pay \$5.5 million.

The Court of Appeal decided that since the RTA had not included all of its reason for not paying in the payment schedule, the adjudicator could not consider them and the court could likewise not consider them.

Implications

- For principals, any grounds for non-payment such as 'reasons relating to non-performance of work, bad work, set offs or cross claim of any kind, contractual provisions, the claimant's right to payment or statutory provisions limiting the claimant's right to payments or indeed any other suggested justification' should be included as part of the payment schedule.

- In addition, if you think the payment claim is 'invalid' you should include this in the payment schedule. This will allow the principal to later raise this argument in both subsequent adjudication or litigation.
- For contractors this again shows the effectiveness of the SOP Act as a means of collecting on progress claims.

If it looks like a payment schedule, it probably is: *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation*

In this case, the NSW Court of Appeal found that a document that was called a payment schedule and looked like a payment schedule was, in fact, a payment schedule. The court also said that even though a payment schedule was signed by another person on behalf of the principal, this did not make the payment schedule invalid.

On 11 April 2006 Baulderstone Hornibrook Pty Ltd (BHPL) served 'payment claim 42' on Queensland Investment Corporation (QIC). On the 28 April QIC delivered to BHPL a box containing eight volumes of documents including:

- A letter referring to the Progress Payment Certificate (the accompanying letter).
- A Progress Payment Certificate.
- A document entitled 'Payment Schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW)' which was attached to the top of eight folders of documentation.

BHPL suspended work under the contract on the basis that these documents did not amount to a payment schedule because only the cover letter constituted the payment schedule.

BHPL then applied to the Supreme Court asking the Court to confirm BHPL's view that the boxes did not constitute a payment schedule and that QIC's solicitor had no authority to sign the payment schedule on behalf of QIC.

A single judge of the Supreme Court found the documents were in fact a payment schedule because they meet all the elements prescribed under the SOP Act. Also, the judge found that the solicitor could in fact act on behalf of QIC and sign the payment schedule.

BHPL appealed. In a unanimous decision the Court of Appeal found that:

- The boxes of documents provided to BHPL by QIC did constitute a payment schedule for the purposes of the SOP Act.
- The documents did not need to be signed by QIC because QIC's solicitor had authority to prepare a payments schedule on its behalf.

Implications

- A court will take a common sense approach in deciding whether a payment schedule is in fact a payment schedule.
- If a principal provides a number of documents relating to a contract concurrently with a payment schedule which look like they form part of the payment schedule, this of itself will not render that payment schedule invalid. However, it is recommended that such documents be clearly identifiable as forming part of the payment schedule.
- The Court of Appeal has sent a clear warning against contractors seeking to rely upon technical arguments relating to the validity of a payment schedule, that the scope of such arguments will be very limited.

Look to the substance not the form of the claim: *Fernandes Constructions v Tahmoor Coal t/a Centennial Coal*

Fernandes undertook construction work for Centennial. Fernandes sent a tax invoice containing the words:

'This invoice is prepared under the *Building and Construction Industry security [sic] of payments [sic] Act 1999*'.

The document described as 'tax invoice 05', claiming payment of \$919, 427.52. There was a schedule attached to that tax invoice identifying the construction work, which was the subject of the claim.

The tax invoice was faxed to Centennial. Centennial raised the technical argument regarding the failure to strictly comply with the name of the SOP Act and errors in the form of claim. Centennial refused to issue a payment schedule.

The Supreme Court said you should look at the tax invoice objectively and in context. The context may include all the terms of the documents, the terms of any covering letter or fax. The court looked at the technical requirements of the SOP Act and found that a reasonable reader would know that:

- The tax invoice was a claim made by Fernandes to Centennial.
- Fernandes carried out work for Centennial under the contract.
- Fernandes was entitled to be paid in accordance with the terms of the contract.

The Court held common sense should prevail and that the tax invoice, 'read fairly and not pedantically', would convey to a reasonable reader that Fernandes was seeking by issuing the document to rely upon the operation of the SOP Act. Therefore the tax invoice sufficiently complied with the requirements of SOP Act.

Implications

- Contractors who meet the requirements in the SOP Act for a payment claim will find that this is sufficient to constitute a valid payment claim.
- If contractors have met the minimum requirement for a payment claim then the principal should treat it as a valid payment claim.

For further information, please contact the author:

David Jury, Senior Associate
 Tel: +61 2 9286 8225
david.jury@dlaphillipsfox.com

Implied Licences and Copyright in Architect's Plans: Is There A Concrete Explanation?

When you buy land with a development consent, can you assume that you can use the architect's plans submitted with the consent to build? What if there is a dispute between the architect and the developer - will you be drawn into the litigation mire as a purchaser of the land? A decisive answer to this question can be found in the High Court decision *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55 (6 December 2006).

An architect (or his or her employer), who creates plans owns the copyright in them, whether or not the architect has been paid its fee, unless the copyright is assigned in writing to the client.

Where an architect is engaged to prepare plans and a fee is paid, there is an implied licence to the client to use the plans. However, it has long been assumed that where no fees are paid, no implied licence arises. This assumption was challenged in 2005 in *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138; 219 ALR 373.

Because of its importance, the case went to the High Court in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55, which clarified when these plans can be used, and what effect a development consent has on the issue.

Background

In 1998, Landmark Developments and Toyama entered an unwritten joint venture to purchase and develop land at Nelson Bay. Architectural drawings and plans were commissioned from Parramatta Design, a company wholly owned by one of the directors of Landmark. The joint venture participants obtained a development consent based on those plans in 2000.

Due to a falling out between Landmark and Toyama, the development did not proceed. Trustees were appointed to oversee sale of the land, which was purchased by Concrete Pty Ltd ('Concrete') in 2003. Concrete requested permission to use the plans and offered \$33,000 to Parramatta Design for the right to use the plans. Parramatta Design refused permission on the basis it owned copyright in the plans and wanted \$5 million for a licence.

Concrete commenced proceedings in the Federal Court on the basis of 'unjustifiable threats' under section 202 of the *Copyright Act* 1968 (Cth) by Parramatta Design and its director. At first instance, the court held Concrete did have a right to use the plans, however the Full Federal Court reversed this on appeal. Concrete subsequently appealed to the High Court.

Findings

The High Court unanimously reversed the Full Federal Court decision and found that Concrete was entitled to utilise the plans prepared by Parramatta Design, despite the fact that Parramatta Design had not been paid.

In general, a person who commissions plans has an implied licence (or consent) to use those plans for the purpose for which they were created.

The High Court found, in this case, the architectural plans and drawings were contemplated to be used by the joint venturers to develop the site from the stage of obtaining development consent, through to achieving profits from the sale of any development built in accordance with that development consent. Therefore in this case the purpose extended to a sale of the land by the joint venturers.

Accordingly, once the development consent was granted, the implied licence to the site owners to use the plans for the purpose was irrevocable, because one of the purposes for which the plans and drawings were prepared had been achieved. The benefit of this implied licence could subsequently be relied upon by Concrete.

The fact that Parramatta Design had not been paid a fee for preparing the plans and drawings did not alter the High Court's view that an implied licence exists to use plans and drawings prepared for the construction of a development on a particular site.

The High Court concluded the fact Parramatta Design did not charge the joint venturers a fee to prepare the plans suggested no more than that Parramatta Design was willing to contribute architectural services to the joint venturer free of charge, given Parramatta Design's indirect interest in the success of the joint venture.

Implications

The following implications can be drawn from the High Court's decision:

- Architects should ensure that their agreement with clients comprehensively define any express permission to use the resulting plans and drawings to use by third parties. This should be done in writing (in a letter, email prior to commencement of work).
- Property developers should ensure that their rights to use architectural plans and drawing are clearly expressed and the scope of any licences clearly defined to avoid commercial uncertainty occurring. This should also be in writing.
- In the absence of express terms to the contrary, it is implied an architect consents to the owner of land using the plans for the purpose for which they were prepared. This consent extends to any successor in title to the land.
- The implied licence becomes irrevocable, without the agreement of the architect, when a key purpose for which the plans were prepared is achieved, eg the grant of development consent subject to those plans.

For further information, please contact the author:

Alex Hartmann, Partner

Tel: +61 2 9286 8562

alex.hartmann@dlaphillipsfox.com

About DLA Phillips Fox

DLA Phillips Fox is one of the largest legal firms in Australasia and a member of DLA Piper Group, an alliance of independent legal practices. It is a separate and distinct legal entity. For more information visit www.dlaphillipsfox.com

DLA Phillips Fox offices are located in Adelaide Auckland Brisbane Canberra Melbourne Perth Sydney and Wellington. A list of DLA Piper offices can be found at www.dlapiper.com

Your personal details

DLA Phillips Fox may use information we have collected about you to send you material about issues we think will be of interest, as well as DLA Phillips Fox services. If you do not want us to use your personal information for that purpose, or would like us to update your details, please email legalupdates@dlaphillipsfox.com with your name, company, title, email, postal address and phone number.

Visit www.dlaphillipsfox.com to obtain a copy of our privacy policy. If you need a copy sent to you, please contact us.

Copyright

If you would like to reproduce any of this publication, please contact Nicole Cooper, Marketing Consultant, on +61 3 9274 5325 or nicole.cooper@dlaphillipsfox.com

© DLA Phillips Fox, July 2007 - CZR04/DFP440/0707

More information

Contact your nearest DLA Phillips Fox office:

Adelaide

Level 14, 100 King William St
Adelaide SA 5000
Tel +61 8 8124 1811
adelaide@dlaphillipsfox.com

Brisbane

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel +61 7 3246 4000
brisbane@dlaphillipsfox.com

Canberra

Level 1, 54 Marcus Clarke St
Canberra ACT 2601
Tel +61 2 6201 8787
canberra@dlaphillipsfox.com

Melbourne

Level 21, 140 William St
Melbourne VIC 3000
Tel +61 3 9274 5000
melbourne@dlaphillipsfox.com

Perth

44 St George's Terrace
Perth WA 6000
Tel +61 8 6467 6000
perth@dlaphillipsfox.com

Sydney

201 Elizabeth Street
Sydney NSW 2000
Tel +61 2 9286 8000
sydney@dlaphillipsfox.com

Auckland

209 Queen Street
Auckland
Tel +64 9 303 2019
auckland@dlaphillipsfox.com

Wellington

50 - 64 Customhouse Quay
Wellington
Tel +64 4 472 6289
wellington@dlaphillipsfox.com

www.dlaphillipsfox.com