

THE SECURITY OF PAYMENTS AND ITS INTRUSION INTO CONTRACT

The Trend

Since the commencement of the *Building and Construction Industry Security of Payment Act 1999 NSW* (as amended) (SOPA) a great deal of activity has occurred in the Supreme Court of NSW as a consequence of challenges made to the determinations of Adjudicators.

These challenges have highlighted a tension between the objects of SOPA to ensure the movement of cash flow on the one hand and the constraints imposed by prescriptive contracts on the other.

These challenges have also raised important questions such as *firstly*, to what extent can SOPA interfere and vary the bargain reached by the parties; and *secondly* what is the extent of the power that is given to an Adjudicator under SOPA.

Although an adjudication determination is not final and although the rights of the parties to ventilate contractual disputes in another forum are preserved, anecdotal experience confirms that the involvement of the Adjudicator does and must alter the contractual expectations of the parties.

The most obvious way in which this occurs is the way in which procedures under SOPA can overtake the contractual arrangements that have been agreed to by the parties with respect to claims for payment, the valuation of works and time of payment.

As a consequence, contracting parties must now look outside of the contract and to SOPA in order to obtain some wider appreciation of their respective obligations and risks.

There are at least three areas in which the intrusive nature of SOPA into the contract has been confirmed by the Court of Appeal.

The role of the Superintendent?

Firstly in *Transgrid v. Siemens Ltd & Anor [2004] NSWCA 395* the Court of Appeal suggested that the method of valuing works under the contract may, despite a certification by the superintendent, be exercised by the Adjudicator.

In that decision the Court of Appeal considered the earlier decision of *Master McCready in Transgrid v Siemens & Anor [2004] NSWSC 87* where Master McCready had to determine whether the Adjudicator could carry out his own valuation of the works or whether the Adjudicator was bound by the valuation of the Superintendent.

In the opinion of Master McCready, the preferable interpretation of SOPA was that the Adjudicator "*does not step into the shoes of the superintendent*".

Master McCready's decision would suggest that the Superintendent's Certificate was not capable of being challenged by an Adjudicator.

The view of Master McCready however, was not supported by the Court of Appeal, which preferred the interpretation of SOPA that would allow the Adjudicator to review the valuation of the works despite the existence of a Superintendent's Certificate.

What is the last Payment Claim opportunity?

A second example of how SOPA intrudes into the contract is where the contract has been terminated by an accepted repudiation or where payment claims under SOPA have continued after the obligations of the parties under the contract have been discharged.

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These circumstances were considered by the Court of Appeal in *Brodyn Pty Limited trading as Time Cost and Quality v Davenport and Anor* [2004] NSWCA 394 ("Brodyn").

In that case, the Court of Appeal decided amongst other things that a right to a progress payment under SOPA survives the termination of the contract.

In particular, (Hodgson JA with whom Mason P and Giles JA) said at paragraph 63

"Section 8 (2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under section 8 (2)(a) if the contract so provides but not otherwise.... In my opinion the only non contractual limit to the occurrence of reference dates is that which in effect flows from the limits of section 13(4): reference dates cannot support the serving of any payment claims outside these limits".

The effect of this statement is that SOPA provides for a payment regime which may overtake the regime provided under the contract and continue the entitlement of a claimant to make 12 further payment claims after the completion of the contract works.

This may mean that it could still be possible for a subcontractor to make payment claims for a period of up to 24 months after the date of practical completion being 12 months after the expiration of a 12 months defect liability period if it can be established that rectification of defective works are construction works or related goods and services under SOPA.

When are Contractual provisions rendered void?

A third example of how SOPA intrudes into the contract arises by reason of section 34 of SOPA which provides:

- (1) *"The provisions of this Act have effect despite any provision to the contrary in a contract.*
- (2) *A provision of any agreement (whether in writing or not):*
 - a) *under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
 - b) *that may reasonably be construed as an attempt to deter a person from taking action under this Act is void".*

Section 34 was the subject of the decision of Justice McDougall in *Minister for Commerce v The Contrax Plumbing and Anor* [2004] NSWSC 823 where his Honour considered the finding of the Adjudicator that contractual provisions disentitling the contractor to a disputed payment until the implementation of a dispute resolution procedure (which could have taken up to 6 months) were void under section 34 of SOPA.

That decision has also been considered by the Court of Appeal which considered the question as to whether an alleged error in the construction of the contract and application of section 34 could invalidate the Adjudicator's Determination.

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Although the Court of Appeal did not finally determine the section 34 issue, His Honour Justice Hodgson did comment that where the provisions of a contract were so against the objects of SOPA; for example provisions in the contract for a yearly reference date or that progress payments be calculated on the basis of 1% of the value of work done, those provisions could be avoided under section 34 of SOPA.

Summary

As the cases suggest, SOPA does have its own regime outside of the contract to give effect to its objects even where the contract may provide otherwise.

Builders therefore need to be aware that contractual shields and defences cannot provide any real comfort if the terms of the contract offend SOPA and limit the rights of a claimant.

Where this all leaves the parties degree of certainty in respect of their contractual position, obligations and risks, is not always entirely clear.

What is clear however, is that:

- a) SOPA can modify the parties contractual positions, expectations and risks.
- b) the Superintendent's certifying role can in many cases be redundant in the assessment of the value of work performed under SOPA.
- c) the Supreme Court is becoming increasingly reluctant to interfere with the determinations by Adjudicator's which is consistent with the scheme of SOPA.

- d) Builders need to be educated in respect of their exposure under SOPA and in the proper administration of procedures under SOPA.

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