



Précis Paper

Security of Payments

This excellent presentation reminds us all of how swift and effective adjudications are under the *Security of Payment Act*. A very worthwhile session for us all.

Discussion Includes

- What is the *Security of Payment Act*?
- Does it change the substantive rights between the parties?
- Are the decisions of adjudicators amenable to judicial review?
- What role does the concept of "reference date" play?
- What jurisdictional issues arise regarding reference dates?
- What are some ways that parties attempt to get around their obligations?

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Security of Payments

1. In this edition of BenchTV, Michelle Painter (Barrister) and Jill Gatland (Barrister) discuss the *Building and Construction Industry Security of Payment Act 1999* (NSW). Ms Painter and Ms Gatland are both barristers practicing in Sydney.

Purpose of the Security of Payment Act

2. The *Building and Construction Industry Security of Payment Act 1999* (NSW) (hereafter "the Act") was very policy driven and was intended to provide some protection to contractors in the construction industry against the notorious practice of slowing down or refusing payment. This is important as margins are notoriously very tight in the construction industry and contractors can very easily fall into insolvency. The Act intended to give contractors a right to a progress payment even where their contract did not permit it, in order to deal with problems of cash flow and to allow contractors to pay their own subcontractors and bills such as to keep the industry moving. Ms Painter notes that the Act allows for quite a hefty interference with contractual rights and privative clauses in the contract do not apply.
3. There are similar or identical regimes in every Australian State and Territory. The NSW Act was amended in 2013 following a substantial review and some of the amendments have yet to be adopted in the other States and Territories. In particular, decisions in Victoria inform how the Act is interpreted in NSW.

Process of Adjudication

4. Ms Gatland notes that the Act is driven by the extraordinary process of adjudication, in which an adjudication takes place before an adjudicator, and once a decision is made in the contractor's favour, the contractor can file and get a judgment debt. Adjudications are done under great pressures of time and content, as they are required to be done very quickly, within 10 days, and on the papers. Most adjudicators are not lawyers and may not be familiar in producing structured reasons for decisions involving complex matters. Ms Painter points out that it is a very high pressure environment with "rough and ready" outcomes but that is precisely what Parliament intended.
5. There is potential for fundamental errors to be made by adjudicators, for example failure to identify the correct counterparty to the building contract or identifying an individual as the contracting party rather than their company. This can sometimes amount to jurisdictional error. However, Ms Painter notes that in the vast majority of cases, adjudicators do good

work, quickly and under great stress, with only a tiny fraction of the hundreds of thousands of construction cases adjudicated each year in NSW ending up in dispute or litigation.

Challenging Adjudications

6. A challenge to an adjudication decision can only be made on the grounds of jurisdictional error and can only be made in the Supreme Court of NSW through s 69 of the *Supreme Court Act 1970* (NSW), regardless of the amount in dispute. The decisions of adjudicators are amenable to review under s 69 of the *Supreme Court Act* because an adjudicator is exercising State power granted under State legislation, which is different to arbitration which is based on private contractual rights.
7. Generally, the challenge seeks an order of certiorari to quash the adjudication and in order to receive such a remedy, the claimant must show a jurisdictional error. The claimant is prohibited under the Act from challenging factual findings that arose in the adjudication. It should be noted, however, that parties are entitled to sue each other in a separate set of proceedings, perhaps in a different court, for breach of contract or for an adjustment of their contractual entitlements.
8. A jurisdictional error includes a failure in finding one of the judicial facts. This might involve the adjudicator identifying the contracting party wrong or identifying that the limits were met when they were in fact not met. In the case *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 1167 a jurisdictional error arose from the failure to give proper notice.

Issues of Set Off

9. According to Ms Painter, a party who has the benefit of a judgment debt is not vulnerable to a counter claim for set off in relation to that judgment debt, since the Act expressly intends to give building contractors relief from the consequences of insolvency. Due to the statutory scheme, issues of set off can only arise in later proceedings but not in relation to the quantum or existence of the judgment debt which arises from an adjudication. The legislation makes it clear that where a building contractor obtains an adjudication in his company's favour, that debt is not amenable to subsequent challenges on similar grounds.
10. McDougall J in *Douglas Aerospace v Indistri Engineering Albury* [2014] NSWSC 1445, went through the characteristics of a judgment debt and why, in his Honour's view it was not amenable to review within the context of this legislation and that the adjudication gives the contractor the right to be paid. It should also be noted that s 73 of the *Personal Property Securities Act 2009* (Cth) gives priority to claims under the *Security of Payment Act* in NSW.

Ability of a Person Subject to Adjudication to Pay Money into Court

11. If a company or individual (usually the principal) find themselves on the wrong side of the adjudication, owing money to the other party (i.e. the contractor), and they decide to challenge under contract in a separate court, rather than paying directly to the contractor per the adjudication, the principal can pay the money into court, which preserves it and makes it available to the contractor but at a later time. This creates conflicts with the intended purpose of the Act which is to ensure contractors are paid, by allowing a principal to keep the money out of the hands of contractors while bringing a proceeding regarding contractual rights. This might be one factor that founds a successful application for expedition or to bring proceedings in the corporations list or commercial list, which is a specialist list intended to deliver rapid judicial outcomes in the Supreme Court, given the significance of solvency issues.
12. It should be kept in mind that the Act envisages monthly payment claims for works already completed. As contractors are billing for works already done, the contractors have already expended the money in wages, services or goods and the pressure is on them to keep money coming in.

Differences between Jurisdictional and Non-Jurisdictional Errors under the Act

13. In *Chase Oyster Bar*, which is the leading case on the establishment of what is a jurisdictional fact or error under the Act, the three judges separately analysed what a jurisdictional fact and a jurisdictional error meant, each coming up with different ways of describing the same concept using different words. The effect of what they said is that if a fact is a necessary precondition to determining a matter, then it is a jurisdictional fact. Consequently, it is a jurisdictional error if an adjudicator is wrong about a payment date if it is a precondition of the grant of an adjudication that payment be served on or before a particular date.
14. The High Court in *Kirk v Industrial Court of New South Wales* [2010] HCA 1 had previously dealt with jurisdictional facts in the context of workers' compensation and occupational health and safety. This meant that the court in *Chase Oyster Bar*, in the context of the *Security of Payment Act* was required to reconsider its earlier decision in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, which had made it very difficult to challenge any part of an adjudication decision. *Kirk* had changed the landscape in such a way that *Brodyn*, to the extent that it related to jurisdictional error and challenging an adjudication, could no longer be relied on.
15. Ms Painter acknowledges that determining a jurisdictional error can be difficult but it should be determined by looking at the Act and the facts of the case.

Implications

16. The *Security of Payment Act* can give rise to fairly wide arguments. It has recently been reported that there is a dispute in the Supreme Court of the ACT concerning a builder and a foreign government over the construction of an embassy [*Denham Constructions Pty Ltd v Islamic Republic of Pakistan* [2016] ACTSC 67]. In that dispute, the Islamic Republic of Pakistan is resisting payment under the *Security of Payment Act* in the ACT, by relying on the fact that construction took place on diplomatic land, which they claim means they are not bound to pay. Ms Painter remarks that the possibility of a defence of diplomatic immunity would have large implications for any contractor doing work for any diplomatic mission across Australia. This case has not yet been finally decided.
17. Ms Painter also notes that there have also been interesting developments in how the Act interacts with the insolvency provisions of the *Corporations Act 2001* (Cth) and the *Income Tax Assessment Act 1936* (Cth).
18. Overall, the legislation seems to be having its desired effect as there has been a corresponding drop in insolvencies in the construction industry.

BIOGRAPHY

Michelle Painter SC

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Michelle Painter SC was admitted to the NSW Bar in 1998 and took Silk in 2013. Her practice includes commercial disputes, construction, equity and trusts, and she has extensive experience in restraints of trade within the context of commercial and employment law. She also has experience in commissions of inquiry, including the Royal Commission into Trade Union Governance and Corruption. Michelle is Chair of the Women Barristers Forum, NSW Bar Association,

Jill Gatland

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Jill's areas of practice include administrative, alternative dispute resolution, commercial, crime, employment, equity, local government/environmental and taxation. Prior to joining the Bar, Jill was a Principal Litigator with the Australian Taxation Office for over 14 years. She has been involved on a pro-bono basis with major criminal appeals including the successful appeal against the conviction of Jeff Gilham in 2012.

BIBLIOGRAPHY

Cases

Chase Oyster Bar v Hamo Industries [2010] NSWSC 1167
Douglas Aerospace v Indistri Engineering Albury [2014] NSWSC 1445
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Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421
Denham Constructions Pty Ltd v Islamic Republic of Pakistan [2016] ACTSC 67

Legislation

Building and Construction Industry Security of Payment Act 1999 (NSW)
Supreme Court Act 1970 (NSW)
Personal Property Securities Act 2009 (Cth)
Corporations Act 2001 (Cth)
Income Tax Assessment Act 1936 (Cth).