Article Information

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Security of Payment – Service of Notices and Actual Receipt, BCFK Holdings v Rork Projects

The recent NSW Supreme Court decision in BCFK Holdings v Rork Projects provides useful guidance on important aspects of the critical milestone of valid service of claims under the Building and Construction Industry Security of Payment Act 1999 (NSW).

Security of payment disputes often involve arguments about whether and when a party was served with a relevant notice under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoP Act**), including arguments as to who needs to be served with the notice (e.g. the Superintendent or the Principal itself).

The NSW Supreme Court has recently provided useful guidance in *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd*.[1] Rork Projects (**Builder**) and BCFK Holdings (**Principal**) entered into a construction contract in May 2021 (**Contract**). The Contract was terminated by the Builder in May 2022.

In July 2022, the Builder served a payment claim, by personal delivery, on the Superintendent for the Principal (**First Payment Claim**). The Contract required payment claims to be served on the Principal directly. The Superintendent passed on the First Payment Claim to the Principal and the Principal responded with a payment schedule served within time. In the payment schedule, the Principal argued that the First Payment Claim was invalid due to it being served on the Superintendent instead of the Principal.[2]

The Builder, on the advice of its solicitor, decided not to proceed to adjudication on the First Payment Claim and instead served a further payment claim in August 2022 (**Second Payment Claim**). The Builder then succeeded in an adjudication based on it.

The Principal commenced Supreme Court proceedings to set aside the adjudication determination, alleging that the First Payment Claim had in fact been validly served and, therefore, the Second Payment Claim was invalid pursuant to s 13(1C) of the SoP Act, as it was the second payment claim served after termination of the Contract. The section reads:

> *"In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination."*

Was the First Payment Claim validly served?

The Court held that the First Payment Claim was validly served because the Principal actually received and perused it when the Superintendent forwarded the First Payment Claim to the Principal. In holding thus, Stevenson J relied on his own past decision in *Piety Constructions Pty Ltd v Hville FCP Pty Ltd*,[3] where his Honour held that a payment schedule was served at the time that it was actually served and received, not at the time that a deeming provision in the Contract deemed it to have been served.[4]

Stevenson J said that the SoP Act is "*clearly intended to operate in a realistic fashion and… in a manner that avoids arid technical disputes*". For this reason, a person who actually receives and considers a payment claim, even though it was not served in accordance with the Contract or with the "*facultative*" regime in s 31 of the SoP Act, should not be permitted to deny being served with the payment claim on that purely technical ground.

The Court noted that its decision could cause confusion for claimants relying on actual receipt to establish service, rather than relying on the service provisions of the contract, as claimants in such a situation may not know from when time starts to run for a respondent under the SoP Act. The Court hoped that parties in such a situation would engage in *"sensible communication"* to resolve uncertainty about when time starts to run.

Consequences of changing position on whether service valid – misleading or deceptive conduct and costs consequences

You may have noticed that the Principal did an about-face as to the validity of the First Payment Claim. The Builder challenged its entitlement to do so. The Court, perhaps surprisingly, allowed the Principal to change its position, but there were two potential consequences of this change that are worth bearing in mind.

Firstly, the Court was inclined to order the Principal to pay the Builder's costs of the Supreme Court case (even though the Principal won the case) as, arguably, the case would have been unnecessary had the Principal not contended in its first payment schedule that the First Payment Claim was invalid.[5]

Another consequence was that the Builder ran a misleading or deceptive conduct case against the Principal, alleging that the Builder relied on the Principal's representation that the First Payment Claim was invalid in not proceeding to adjudication based on that payment claim. The Builder sought an estoppel and/or compensation pursuant to s 237 of the Australian Consumer Law.

Ultimately, the Builder's misleading or deceptive conduct claim was unsuccessful, as the Court found that the Builder had not relied on the Principal's representation (relying instead on its solicitor's advice, which considered a range of factors in advising the Builder to make a second payment claim and not proceed to adjudication based on the First Payment Claim). A lucky escape for the Principal, perhaps?

Although the misleading or deceptive conduct claim was unsuccessful in this case, respondents remain exposed to the burden of defending such a claim should they equivocate on the invalidity of an earlier payment claim.

Only one payment claim can be served following termination – s 13(1C)

Subsection 13(1C) of the SoP Act was introduced by the 2018 amendments, applying to construction contracts entered into after 21 October 2019. The subsection reads:

> *"In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination."*

The subsection was designed to close a loophole identified by the High Court in *Southern Han*[6] and thus ensure that there was a right under the SoP Act to serve a payment claim following termination.

Stevenson J had regard to Parliament's second reading speech, where the Minister used singular, rather than plural, language to describe the right to make a payment claim following termination and interpreted the subsection to mean that only one valid payment claim under the SoP Act can be served following termination of a contract.

In the *BCFK* case, this ruling meant that the Builder's Second Payment Claim was invalid, as it was the second payment claim served following termination.

This article has been written for general educational purposes only, and is not to be taken as legal advice. Should you require legal advice on your specific situation, please contact the author.

[1] [2022] NSWSC 1706. Decision dated 14 December 2022.

[2] Clause 7 of the Contract provided that service of notices was deemed to be effective on the date of "actual receipt", but this clause applied only to emails, mail and fax, not personal delivery (which is how the First Payment Claim was served).

[3] [2022] NSWSC 1318.

[4] In *Piety*, Stevenson J had regard to the earlier decisions of *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* [2006] NSWCA 259 per Hodgson JA and *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 per Ball J, both of which took a pragmatic approach to service issues, accepting actual receipt as establishing good service despite lack of compliance with applicable contractual or legislative service provisions.

[5] In a subsequent judgment on costs, *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd (No 2)* [2023] NSWSC 185, Stevenson J made "no order as to costs", meaning that the Principal had to bear its own costs, despite winning the case (normally the loser is ordered to pay the winner's costs of bringing the case).

[6] *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340.