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No Forgone Conclusion: A Harsh Lesson in Enforcing Security of Payment Statutory Debts

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Background

Summary judgment applications to enforce statutory debts under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) are quite common fixtures in our civil court lists. They arise out of a respondent not providing a payment schedule or not paying its scheduled amount and benefit from statutory prohibitions on cross-claims or defences arising under the construction contract.

At first blush they seem straightforward. Many are. There are nonetheless a number of hurdles that need to cleared. Failure to clear any will likely be fatal, particularly if the respondent is well advised.

Hunt v RWC[1] provides some examples of such hurdles. So it is useful to claimants considering enforcing that which they understand to be a statutory debt and to respondents looking to frustrate the process.

Facts

The claimant engaged in discussions and exchanged draft contracts with the respondent's development manager concerning a development project in Brookvale. The claimant provided construction/project management services but no contract was signed.

The respondent's development manager later engaged another contractor in place of the claimant. The claimant subsequently issued a claim purporting to be a payment claim under the Act. The respondent neither paid the claimed amount nor served a payment schedule. The claimant commenced proceedings to recover the claimed amount as a statutory debt under section 15(2) of the Act.

Decision

The Court held that the claimant failed to establish the respondent's liability to pay the claimed amount, by failing to satisfy three requirements, so it was unable to recover under section 15(2).

1. There was neither a contract, or an "other arrangement" that satisfied the definition of 'construction contract' under section 4 of the *SoP Act*, so it failed to satisfy section 8. Key terms remained unresolved, such as the applicability of liquidated damages clause and provision of a substantial performance security. No contract was signed, and no "other arrangement" was pleaded.
2. The payment claim lacked sufficient detail in identifying the services performed, so it failed to satisfy section 13(2)(a). A simple description of "*construction/project management services*" over a six-week period was insufficient.
3. The claimant's purported payment claim, even if it was a valid payment claim, was not validly served. While it was addressed to the respondent, it was sent to the respondent's development manager, but there was no evidence of their authorisation to accept service on the respondent's behalf.

Takeaways

Whilst *Hunt v RWC* does have the scent of a slam-dunk, it reminds us that summary judgment in this context is somewhat

less than a forgone conclusion.

Claimants are vulnerable in the absence of a binding contract (an executed written contract being the best evidence of that) before commencing services or supplying goods. One is left wondering why the claimant in *Hunt v RWC* did not plead an "other arrangement" if that line of argument could possibly succeed – if that piques your curiosity, you may like our Insight on the meaning of "other arrangement" at https://piperalderman.com.au/insight/reciprocity-the-key-the-meaning-of-other-arrangement-in-sop-act-nsw-s-4-clarified-in-crown-green-square-v-transport-for-nsw/.

Pleading an "other arrangement" may not have overcome the claimant's shortcomings with service of the claim or more certainly its failure to sufficiently describe that being claimed.

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[1] *Bettar Holdings Pty Ltd trading as Hunt Collaborative v RWC Brookvale Investments Pty Ltd as trustee for Brookvale Development Trust* [2025] NSWDC 11 (*'Hunt v RWC'*).