

## Article Information

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## Factoring and Security of Payment

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Who would have thought that the ubiquitous factoring agreement could become so controversial? Few would dispute that cash-flow is the lifeblood of the construction industry and that factoring is a popular way to maintain it. However, like most financial products, factoring agreements present complexities and at times surprises, one of which was recently before the Supreme Court in the decision of *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd*.<sup>[1]</sup>

In that case the court considered whether a 'factored' invoice could constitute a valid payment claim under the *Building and Construction Industry Security of Payment Act 1999* (Act). Quickway, as the respondent, contended that the subcontractor Electrical Energy (EE)'s invoices did not engage the Act because the underlying debt claimed had been assigned under the factoring agreement. Those using factoring agreements can, however breathe a sigh of relief, as the Court held that an assignment of debts under a factoring agreement will not prevent them from pursuing their statutory rights under the Act.

The key facts were as follows:

1. Under its factoring agreement Electrical Energy (EE) assigned to the financier all present and future debts owed to it by its customers to Bibby (under a Full Service Factoring Agreement).
2. EE, in the normal way, issued an invoice to Quickway for electrical cable installation works performed pursuant to a construction contract they had entered into.
3. The invoice included a note stating that "the invoice" had been assigned to the financier and directing payment of the invoiced amount to the financier Bibby.
4. Quickway issued a payment schedule disputing the whole of the invoice (ie a scheduled amount of \$Nil). One of the grounds for disputing the claim was that the invoice was not a valid payment claim under the Act.
5. As the factoring agreement provided that the line of credit available only extended to debts scheduled for payment, Quickway's payment schedule meant that EE could not draw down on the line of credit in respect of the invoice as the scheduled amount was \$Nil.
6. EE proceeded to make an adjudication application under the Act in respect of the invoice. The determination was in its favour, for the whole amount of the invoice.
7. Before EE could enforce the determination, Quickway commenced the Supreme Court proceedings challenging the validity of the payment claim and the adjudication determination on the basis that EE had assigned the debt claimed to Bibby.

After close consideration of the parties competing submissions as to the availability of the Act, His Honour Parker J found that it was not until the adjudication determination was made in favour of EE that a debt assignable at law came into existence. Prior to that point, EE's statutory rights under the Act were personal to it (as the party who had undertaken to do the work under the relevant construction contract) and, despite the notation on the invoice, not capable of assignment.

Quickway also argued that the invoice was not a valid payment claim because it did not require payment to EE but to the

financier (Bibby). However this argument was also rejected. Parker J accepted it was possible for an assignee (ie Bibby) to enforce a contractual right to payment notwithstanding the contractor (ie EE) had earlier enforced its statutory right to payment under the Act, but found that it was not a decisive consideration and that it should not prevent a claimant who had factored its debts from pursuing its rights under the Act.

In coming to his decision Parker J noted the alignment of factoring agreements facilitation of cashflow and the 'cashflow' objective of the Act and factoring agreements. His Honour concluding that *'Factoring agreements are well known, and I think that it would be a surprising gap in the legislative scheme if the existence of such a factoring arrangement was to prevent statutory rights under the BCISPA from arising, or from being enforceable'*.

The key 'take-away' from this decision is that factoring won't prevent you or others from utilising security of payment legislation. However, as identified in our article earlier in the year (see [here](#)) factoring can cause numerous complications to otherwise straightforward claims and it remains important to be informed about and mindful of the implications of both your own factoring and the factoring activities of those to whom you extend credit.

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[\[1\]](#) [2017] NSWSC 1140