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Sector: Infrastructure, Real Estate

A shot through the heart? Could a misleading or deceptive supporting statutory declaration give SOPA a bad name? Marques Group Pty Ltd v Parkview Constructions Pty Ltd [2023] NSWSC 625

Where a claimant seeks to enforce a statutory debt under ss 15 or 16 of the Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA), *such as where a respondent fails to serve a payment schedule or does not pay the amount scheduled in a payment schedule, can the respondent defeat such an action by establishing that the claimant's entitlement to the statutory debt rests upon its contravention of the misleading or deceptive conduct provisions of the Australian Consumer Law (ACL)? Daniel Fitzpatrick and Gareth Gillespie of Piper Alderman's Sydney construction team consider a recent decision of the NSW Supreme Court on this issue: Marques Group Pty Ltd v Parkview Constructions Pty Ltd [2023] NSWSC 625 (Marques v Parkview).

In a recent decision by Justice Rees of the Supreme Court of New South Wales, the Court considered the applicability of misleading or deceptive conduct defences in security of payment proceedings under ss 15 and 16 of the SOPA. Her Honour dismissed the Claimant's application for summary judgment seeking to enforce payment of approximately $1.7 million in progress payments that were scheduled to be paid by the Respondent to the Claimant in two payment schedules, on the basis that the Claimant failed to establish that the Respondent's misleading or deceptive conduct defence under the ACL was not an arguable defence.

The Claimant was a formwork subcontractor on two projects for the Respondent as head contractor. The Claimant served a payment claim for each project, to which the Respondent served two corresponding payment schedules in which the Respondent indicated it would pay a substantial portion of what the Claimant had claimed in the payment claims.

Both contracts between the parties made it a precondition to the Claimant's entitlement to receive a progress payment that it provide a subcontractor statement together with its payment claim. By the required subcontractor statements (provided in the form of a statutory declaration) the Claimant was required to swear that it had paid all amounts owing to its subcontractors and suppliers as at the date of its payment claim. The Claimant provided such a statement with its two payment claims, following which the Respondent served its two payment schedules, which scheduled approx. $1.7 million in progress payments to the Claimant.

The Respondent did not pay the $1.7 million by the due date for payment, so the Claimant commenced proceedings in the Supreme Court pursuant to s 16(2)(a)(i) of the SOPA to enforce the statutory debt created by the payment schedules, and then sought summary judgment against the Respondent on the basis that it had no arguable defence.

However, the Respondent raised as a defence that, after serving its two payment schedules, the Respondent learnt that, allegedly, the Claimant had not in fact paid all amounts owing to its subcontractors, contrary to the subcontractor statements the Claimant had provided with its payment claims. Therefore, the Respondent alleged that it was misled into scheduling the $1.7 million in its payment schedules and that, but for the misrepresentation, it would have scheduled $Nil or at least a far lower amount than the $1.7 million.

Therefore, the Respondent submitted, the Claimant's right under the SOPA to enforce the statutory debt created by the payment schedules could not stand, because an essential element of the Claimant's cause of action (being service of the payment schedules that scheduled $1.7 million) rests upon the Claimant's contravention of the misleading or deceptive conduct provisions of the ACL: *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 (***Bitannia v Parkline***) at [8], [13], [17] and [124].[1]

In *Bitannia v Parkline*, the NSW Court of Appeal dealt with s 15(4) of the SOPA, which is nearly identical to s 16(4) of the SOPA, except that it deals with the scenario where a respondent fails to serve a payment schedule rather than failure to pay amounts scheduled in a payment schedule. The NSW Court of Appeal held that the respondent could raise as a defence to the claimant's action under s 15 of the SOPA the claimant's alleged contravention of the misleading or deceptive provisions of the *Trade Practices Act 1974* (Cth) (**TPA**), which is the predecessor legislation to the ACL.

Normally, in an action by a claimant to enforce a statutory debt under ss 15 or 16 of the SOPA, sub-s (4)(b) bars a respondent from making any cross claims or raising any defence in relation to matters arising under the construction contract. Section 16(4) is as follows:

> *"(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—*
>
> *(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and*
>
> ***(b) the respondent is not, in those proceedings, entitled—***
>
> ***(i) to bring any cross-claim against the claimant, or***
>
> ***(ii) to raise any defence in relation to matters arising under the construction contract."***

However, a respondent can still challenge the claimant's action under s 16 (or s 15) if it can show that the claimant cannot establish the *"existence of the circumstances referred to in subsection (1)"*. Section 16(1) is as follows:

> *"(1) This section applies if—*
>
> *(a) a claimant serves a payment claim on a respondent, and*
>
> *(b) the respondent provides a payment schedule to the claimant—*
>
> *(i) within the time required by the relevant construction contract, or*
>
> *(ii) within 10 business days after the payment claim is served,*
>
> *whichever time expires earlier, and*
>
> ***(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant**, and*
>
> *(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates."*

On the strength of the reasoning in *Bitannia v Parkline* that a claimant cannot succeed in an action where an essential element of its case rests upon its contravention of the misleading or deceptive conduction provisions of the TPA / ACL, it was open to the Respondent to argue that the Claimant could not satisfy the Court as to the *"existence of the circumstances referred to in subsection (1)"*, particularly sub-s (1)(c) (in bold in the extract above), because the Respondent contended that it would not have scheduled the $1.7 million in its payment schedules but for the Claimant's misleading or deceptive conduct.

The Court in *Bitannia v Parkline* also held at [12], [17] and [96] that a defence of the kind advanced in that case (i.e. misleading or deceptive conduct under the TPA / ACL) is not a defence *"in relation to matters arising under the construction contract"*, this being the wording used in ss 15(4)(b)(ii) and 16(4)(b)(ii); thus, the SOPA does not bar such defences from being raised. The Courts in *Bitannia v Parkline* and in *Marques v Parkview*, were also of the opinion that,

generally speaking, misleading or deceptive conduct under the TPA / ACL could be raised as a defence to a claimant's action rather than only by way of cross-claim: *Bitannia v Parkline* at [7], [17]-[18], [78]-[104], [124] and *Marques v Parkview* at [18].

Further, to the extent there is any inconsistency between the ACL and the SOPA in terms of the Claimant's entitlement to enforce the statutory debt or the Respondent's right to raise ACL provisions as a defence – when defences and cross claims are usually barred by s 16(4)(b) – the ACL trumps the SOPA because it is Commonwealth legislation.[2]

As it was only a summary judgment application that was before the NSW Supreme Court in the present case (*Marques v Parkview*), it is unclear whether the Respondent would actually succeed in its defence of misleading or deceptive conduct at a final hearing.[3] The Court only held that it was *"arguable"* that such a defence could be made out, thereby rejecting the Claimant's application for summary judgment. Further, it was observed (at [20]) that the *"suggestion that, if the* [Claimant] *had advised the true position, the* [Respondent] *'would have looked very carefully at that claim' and issued a 'Nil' payment schedule…appears to strike* ***at the heart of the*** **[SOPA]** ***scheme***". [emphasis added]

Future case law on this point will be intriguing. Could a misleading or deceptive conduct defence based on a supporting statutory declaration really invalidate the obligation to pay a scheduled amount? If so, that would seem to mean that the payment claim was misleading and invalid at first instance. Could such a defence breath life back into the currently dormant argument that a payment claim that is not accompanied by a supporting statement (where required by s 13(7) of the SOPA) is invalid? Or will a respondent, having scheduled payment on the basis of a misleading statement, have nowhere to run? One can only hope the answers to these curly questions will not give the SOPA scheme a bad name.

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[1] In this respect, the Court in *Marques v Parkview* also considered the case of *Winslow Constructors Pty Ltd v John Holland Rail Pty Ltd & MVM Rail Pty Ltd* [2008] VCC 1491 per Judge Shelton, which followed the reasoning in *Bitannia v Parkline*.
[2] *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 at [105]-[119] and [125] per Basten JA, having regard to s 109 of the *Commonwealth of Australia Constitution Act 1900* (Imp), which renders State legislation inoperable to the extent of any inconsistency with Commonwealth legislation.
[3] Her Honour at [20] of *Marques v Parkview* raised some doubt about the chances of the misleading or deceptive conduct case succeeding at a final hearing, noting the objects of the SOPA are to ensure maintenance of *"cash flow"* to subcontractors, and so a court might be reluctant to allow a misleading or conduct defence of the kind advanced in this case.