



Newsletter December 2015

Welcome to the December edition of the Doyles Construction Lawyers newsletter.

We hope you enjoy the articles.

Arbitration - a valuable option



Recently Jim Doyle acted for a contractor and who wished to collect the final payment of his project in Melbourne. A review of the contract revealed that disputes were to be settled by arbitration and this presented a quicker method of resolution than normal litigation.

The arbitration started with a Notice of Dispute in April 2015 and the arbitrator an experienced barrister was appointed by the nominating body. The parties filed their evidence by affidavit and cross-examination was available by way of a telephone conference. All of the interlocutory steps were completed in three months which is much quicker than normal litigation.

The arbitrator considered the evidence and awarded our client almost 90 per cent of his claim. The question of costs was then contested and after having given the appropriate notices on behalf of the client costs were awarded in favor of our client. The client despite initial concerns was highly appreciative of the process.

Arbitration should be considered as a dispute resolution method as its advantages of confidentiality, expedited processes and expert tribunal are very valuable for some disputes.



5 Tips and Traps in Home Building Contracts For Owners in Victoria

You are required to enter into a major domestic building contract in Victoria, when the total cost is \$5,000 or more and you carry out domestic building works which includes building; Repairs; Improvements; Maintenance; Demolition; and/or Removal.

Before you sign a domestic building contract, there are a number of things that you should check.

1. Is the builder registered with the Building Practitioners Board (at the Victorian Building Authority)?

Note that only builders that are registered with the Victorian Builders Association can carry out major domestic building works and enter into major domestic building contracts. You can conduct a search on the Victorian Builders Association website, noting that the results of this search should exactly match the details contained in your domestic building contract and your Building Permit.

2. Is there a domestic building insurance policy?

On a preliminary point note that it is only registered builders who can obtain insurance. Also you should be aware that if the cost of your domestic building works is \$12,000 or more, your builder will need to obtain home warranty insurance and provide you with a copy of this policy and your domestic building contract will also need to include details about this.

3. Are these fees included in the contract (or are you aware of them)?

The building fee, which may or may not include the cost of mandatory inspections by the building surveyor and may vary between companies **planning permit fees** (if your council requires a planning permit)

The lodgment fee paid to the local council for recording purposes

The crossing deposit or asset protection fee paid to the local council and refundable at the end of the project, if no damage has occurred to council property

An inspection fee, a non-refundable fee paid to the council for the cost of their inspection of council assets

A government levy which is a charge when the contracted cost of work is more than \$10,000. There are three levies based on the total cost of your building, which also apply to owner builders.

4. What should be included in domestic building contracts?

It must include a full description of the works to be carried out and be accompanied by plans and specifications of sufficient detail so that a building permit can be granted. In addition it should also include the following:

- Date of contract
- Names and addresses of the parties to the contract
- Home warranty insurance
- Commencement and completion date
- Cooling-off period
- Right to access
- Implied warranties
- Damages
- Termination, and
- Definitions.

5. What to do when we receive a building contract?

Your builder must give you sufficient time to review your domestic building contract and some builders say that it is the 'standard contract used by everyone'. You should never sign a domestic building contract and then forward to your builder to do the same. Additions or deletions from the contract could be made without your knowledge.

We are experienced in this area of law. If you are not familiar with current developments in this area you would be wise to have an experienced lawyer review it with you so that you have peace of mind about what you are signing.

It may be a simple matter of your lawyer asking the builder to delete some clauses that are not in your interests to sign; that limit your rights or expose you to significant costs.

If you or someone you know need more information or help or advise, please contact us on 1800 888 783 or email doyles@doylesconstructionlawyers.com.



Charges, winding up and the construction industry in NSW

In a recent decision of the Supreme Court of NSW, *NSW Land and Housing Corp v DJ's Home and Property Maintenance (In Liq)* the Court considered:

- whether a payment withholding request under the Building and Construction Industry Security of Payment Act (the Security of Payment Act) constituted a charge over funds due to be paid by a principal contractor under a construction contract;
- whether a notice of claim under the Contractors Debts Act constituted an assignment of a debt due by the principal contractor; and
- the effect on any charge or assignment of debt of the voluntary winding up of the head contractor.

In addition, the Court summarised two essential features of a charge.

Facts

In 2011, the NSW Land and Housing Corporation (Land and Housing Corp) contracted with DJ's Home and Property Maintenance Services Pty Ltd (DJ's) to repair and maintain properties owned by Land and Housing Corp.

DJ's subcontracted part of that work to Zed Dujkovic (Zed) and YHY Building Services Pty Ltd (YHY). Zed and YHY performed approximately \$795,000 and \$135,000 worth of work respectively, which amounts were not paid by DJ's.

On 13 June 2013, DJ's was placed in creditors' voluntary winding up, owing \$2m to 40 creditors. At that time, Land and Housing Corp owed \$217,000 to DJ's. That sum (the Fund) was DJ's only asset.

Zed and YHY claimed to be entitled to the Fund in priority to other creditors

Timeline

The dates on which YHY, Zed and DJ's took certain steps were important. That is:

- the work was done in 2011
- between late 2011 and mid 2013 Zed pursued payment from DJ's and Land and Housing Corp in accordance with the Security of Payment Act and the Contractors Debts Act
- Zed served on Land and Housing Corp a payment withholding request under the Security of Payment Act on 16 July 2012 and a notice of claim under the Contractors Debts Act on 26 July 2013
- in 2013, YHY obtained default judgment against DJ's, and served on Land and Housing Corp a notice of claim on 31 May 2013
- DJ's was placed in voluntary winding up on 13 June 2013.

Is a payment withholding request a charge?

Zed claimed a charge over the Fund on the basis of either his payment withholding request or his notice of claim. As Zed's notice of claim was served on Land and Housing Corp after the commencement of DJ's winding up, that notice was void under S.500(1) of the Corporations Act.

Did Zed's earlier payment withholding request create a charge over the Fund?

A payment withholding request under the Security of Payment Act is a request by a subcontractor (Zed) that the principal contractor (Land and Housing Corp) retain from money owed to the head contractor (DJ's) money to cover the sub-contractor's claim while the amount owed to the sub-contractor by the head contractor is being determined in an adjudication application.

That is, at the time Zed served his payment withholding request on Land and Housing Corp, he was still seeking adjudication of the amount owed to him by DJ's.

The Court found that a payment withholding request does not create a charge.

Two essential features of a charge

A charge assigns proprietary rights in the subject matter of the charge (in this case the Fund) to the chargee, enabling the chargee to recover his now secured debt from the charged asset or Fund.

A charge has two essential features - a right in the chargee to resort to the asset for payment of a debt due to him; and an obligation on the entity holding that asset to pay or transfer it to the chargee in discharge of that debt.

A payment withholding request does not have those features. That is, it required Land and Housing Corp to retain money claimed by Zed, pending adjudication of Zed's application against DJ's. It did not oblige Land and Housing Corp to pay money to Zed, nor did it give Zed a right to payment at that time.

Accordingly, Zed was not entitled to payment from the Fund in priority to other unsecured creditors.

Is a notice of claim an assignment of debt?

Yes. The Contractors Debts Act clearly states that a notice of claim operates to assign to the unpaid contractor (YHY) a debt due by the principal contractor (Land and Housing Corp) to the defaulting contractor (DJ's). Unlike a payment withholding request, a notice of claim requires the principal contractor to pay the unpaid contractor money that the principal contractor owes the defaulting contractor.

Was YHY entitled to payment from the Fund?

Notwithstanding that assignment of debt, YHY was not entitled to payment in priority to other unsecured creditors. Its application to attach the Fund was commenced within six months of DJ's winding up. Accordingly, YHY had to repay to the liquidators any amount it had received from the Fund (less YHY's costs of execution) (Corporations Act S.569(1)).

Summary

Ultimately, despite YHY's and Zed's efforts to obtain payment from DJ's or Land and Housing Corp by following the Security of Payment Act and Contractors Debts Act procedures, neither of them were entitled to payment in priority to other unsecured creditors (except for YHY's costs of execution).

Both Zed and YHY had served notices of claim on Land and Housing Corp, but both were too late to effectively create a secured right to payment from the Fund.

Zed's notice of claim was served after DJ's winding up commenced, making it void. YHY's attachment application was commenced less than six months before DJ's winding up, requiring YHY to repay to the liquidator any amount it had received.

Further, Zed's payment withholding request did not give Zed a right to be paid from the Fund, nor did it require Land and Housing Corp to pay Zed, and therefore it was not a charge.

If you or someone you know wants more information or needs help or advice, please contact us on 1800 888 783 or email doyles@doylesconstructionlawyers.com.



Security of Payment – Construction Contracts WA

When entering into a contract for building and construction work it is important for all parties to understand what the process is if a dispute arises over payment of money under the contract.

Regardless of whether the contract is written or oral, if a dispute arises about payment there is a legislated process to resolve the dispute.

The process provides an effective rapid adjudication process for payment disputes. The rapid adjudication process helps individual parties and the industry with cash flow issues.

It will help you understand the process better if you know what the various terms mean and the steps and time limits involved in the process.

What is an adjudication?

Adjudication is when an experienced, registered and independent adjudicator is appointed to review a payment dispute, and if satisfied that some payment is due, make a binding determination for money to be paid.

What is a payment dispute?

A payment dispute arises when the amount claimed; or the amount retained; or the security held by a party to a contract becomes due and has not been paid in full or is paid in part.

The dispute could be a:

- contractor claiming against a principal;
- subcontractor claiming against a contractor; or
- supplier of goods claiming against a subcontractor.

The adjudication process

If a payment dispute arises one party, known as the claimant, lodges a claim.

The claim must be lodged within 28 days from when the payment was due under the contract or from when all or part of the payment was rejected i.e. When the dispute arose.

A claim for payment for work or the supply of goods and/or services must be made in accordance with the written contract. In the case of an oral contract the payment claim must:

- be in writing;
- be addressed to the other party to which the claim is made;
- state your name, the date of the claim and the amount claimed;
- if you are the contractor – itemise and describe the obligations performed (to which the claim relates) in sufficient detail for the principal to assess the claim;
- if you are the principal – describe the basis of the claim in sufficient detail for the contractor to assess the claim; and
- be signed by the claimant and given to the party to which the claim is made.

Depending on the circumstances of the claim there may be other formalities that need to be considered.

Appointment of the adjudicator

An adjudicator is appointed, either by agreement between the parties in dispute or by a registered person or organisation that is allowed to appoint adjudicators, known as an appointor.

The adjudicator charges a fee that is usually split between the parties.

The adjudicator has wide powers to decide how to assess the claim, whether to seek more information, to invite the parties to meet in a conference or to inspect or test the work.

The adjudicator's decision on the payment dispute is binding on the parties. It can be enforced through the courts.

The response to the claim

The respondent, usually the party that benefited from the claimant's construction work, service or materials, has 14 days to respond to the claim.

A copy of the response must be sent to the adjudicator and the claimant within 14 days of receiving the adjudication claim. The adjudicator can only take into account your side of the story if you respond in time. The adjudicator has a further 14 days to make a decision.

The response must be relevant to the dispute and should:

- challenge any statements or claims that are wrong or not properly described;

- make a clear statement about why you haven't paid the claim or why you are disputing the amount claimed; and
- where possible, show how your actions relate to your rights under the contract and include any relevant information or documentation.

After the adjudicator's determination

The determination is final and cannot be appealed.

In most cases the parties will be satisfied with the adjudicator's determination and end the dispute. Where a party is not satisfied, that party can continue to use the dispute resolution processes in the contract or the courts to finally resolve the dispute.

Conclusion

If you are unsure about making or responding to a claim or what you need to do, you should seek advice from a lawyer or a construction industry expert. It is important to adhere to the procedures and comply with the relevant time limits.

If you or someone you may know need more information or assistance or advice on how to proceed please call us on 1800 888 783 or email doyles@doylesconstructionlawyers.com.

This publication is intended to be a report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted.
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