

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.

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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 sub-contractor (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.

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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.

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