THE EARLY BIRD CATCHES THE WORM – OR DOES IT?

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The New South Wales Supreme Court has recently considered the effect of deeming provisions in respect of early payment claims made under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (**SOP Act**) in *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613.

The decision provides that deeming provisions (i.e. a provision in a construction contract that states that an early payment claim is deemed to be served on a later specified date) are ineffective under the SOP Act. These provisions do, however, remain valid under the contract.

BACKGROUND

Regal Consulting Services Pty Ltd (**Regal**) and All Seasons Air Pty Ltd (**All Seasons**) entered into a construction contract under which All Seasons undertook to perform mechanical, ventilation and air-conditioning works for Regal (**Contract**). The Contract was a construction contract for the purposes of the SOP Act.

The Contract provided that payment claims should be made monthly (on the 20th day of each month) and that "an early progress claim shall be deemed to have been made on the date for making that claim."

On 12 July 2016, All Seasons submitted an early payment claim (**Payment Claim**). Regal responded and stated that the Payment Claim was invalid because it was not supported by a valid reference date (the previous reference date (20 June 2016) had already been utilised and the next reference date (20 July 2016) had not yet arisen).

All Seasons made an adjudication application under the SOP Act and the adjudicator determined that an amount was payable to All Seasons from Regal (i.e. making a determination that the Payment Claim was valid).

SUPREME COURT PROCEEDINGS

Regal sought review of the adjudicator's determination. The matter came before Justice McDougall and the parties' positions were as follows:

- Regal contended the adjudicator did not have jurisdiction to deal with the Payment Claim because there was no valid reference date (i.e. the deeming provision was ineffective under the SOP Act). In doing so, Regal relied upon the High Court's decision in Southern Han (click here to read the previous K&L Gates alert on this case), which confirms that the existence of a reference date under a construction contract is a necessary pre-condition to the making of a valid payment claim under the SOP Act.

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- All Seasons contended that, notwithstanding the early submission of the Payment Claim, it was valid due to the deeming provision.

Justice McDougall rejected All Seasons' contentions and found that the deeming provision created a "contractual fiction" or "fictitious state of affairs" which had no effect under the SOP Act. Justice McDougall stated that any approach to the construction or interpretation of the SOP Act that "has the potential to introduce uncertainty is to be avoided if at all possible." Accordingly, Justice McDougall held that the Payment Claim was not valid under the SOP Act (because a reference date had not in fact arrived) and the adjudicator did not have jurisdiction to deal with the Payment Claim.

WHAT THIS MEANS FOR YOU

This decision has far reaching implications for participants in the building and construction industry and confirms that the early bird does not catch the worm regarding early payment claims under the SOP Act. By way of general reminder and incorporating some lessons learnt from this decision:

- Deeming provisions are ineffective for the purposes of the SOP Act. Parties making payment claims should ensure that a reference date has arisen in fact, before submitting a payment claim (regardless of any deeming provisions).
- The existence of a reference date under a construction contract is a necessary pre-condition to the making of a valid payment claim. A claimant should make submissions about the existence of the reference date in its adjudication application to assist the adjudicator.
- Parties making payment claims should ensure that only one payment claim is submitted for each reference date in compliance with the SOP Act.

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