LESSONS IN FRAUD, PRECONDITIONS TO PROGRESS PAYMENTS AND THE RIGHT OF SETOFF: HUTCHINSON V GLAVCOM

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By: Sandra Steele

The NSW Supreme Court recently handed down its decision in the matter of *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, in which K&L Gates represented Glavcom. The decision sheds light on numerous issues, including whether the maker of a statutory declaration is required to have personal knowledge of the facts contained in the declaration, the validity of contractual preconditions to progress payments and whether there is a right of setoff in the calculation of an amount for progress payments.

The decision concerned a challenge by Hutchinson (a builder) to an adjudication determination made in favour of Glavcom (a subcontractor) under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA). Glavcom successfully defended that challenge.

KEY

POINTS

- A clause in a construction contract will be void if it makes the occurrence of a reference date or the right to a progress payment conditional on the furnishing of a statutory declaration concerning the payment of other amounts owed by the contractor.
- When a person states in a statutory declaration that he or she is in a position to know certain facts in the statutory declaration (that relate to the administration of a company), that person may be entitled to rely on what he or she has been told by others rather than undertaking his or her own direct investigations.
- If a contract is silent on how the amount of progress payment is to be calculated, a party may have no right of setoff in the calculation of that amount.

BACKGROUND

On 31 July 2014, Hutchinson and Glavcom entered into a subcontract under which Glavcom agreed for the sum of AUD5.3 million to carry out joinery works at Bondi Pacific, a residential and commercial development on the site of the former Swiss Grand Hotel at Bondi Beach.

Under the subcontract, Hutchinson was required to give Glavcom non-exclusive access to the site by 14 August 2014. However, Hutchinson did not provide Glavcom with access until sometime in late March or early April 2015.

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The date for practical completion under the subcontract was 21 April 2015. Glavcom did not complete the required works by this date.

On 23 November 2015, Glavcom served a payment claim for AUD2,948,510.80. Hutchinson then served a payment schedule which stated that Glavcom owed Hutchinson AUD6,322,578.96, which included an amount of AUD4,325,200.00 in liquidated damages for delay in completing the works.

The matter was referred to an adjudicator, who determined that Hutchinson owed Glavcom AUD1,263,399.72 plus GST. The adjudicator dismissed Hutchinson's claim for liquidated damages on the basis that Hutchinson could not take advantage of its fundamental breach in delaying Glavcom's access to the site.

Hutchinson applied to the NSW Supreme Court to set aside the adjudication determination for a range of jurisdictional issues and for fraud.

REQUISITE KNOWLEDGE OF FACTS IN A STATUTORY DECLARATION

Hutchinson submitted that the determination was voidable because Glavcom obtained it fraudulently by submitting a statutory declaration known to be untrue or with reckless indifference to its truth. Ball J rejected these submissions.

The statutory declaration in issue was given by Glavcom's sole director as part of Glavcom's payment claim. It stated that the director was "in a position to know the truth of the matters" contained in the statutory declaration and that to the best of the director's knowledge and belief, among other things, all relevant workers compensation insurance premiums had been paid.

Ball J found that in making that statement, the director was:

- entitled to rely on what he was told by others involved in Glavcom's administration, and
- not required to undertake his own direct investigations.

In reaching this conclusion, Ball J considered the following:

- the director was a cabinet maker and French polisher by trade and focused on the sales and supervision of factory work rather than on the company's administration
- the administration of the company was left to others
- given the size of the company, it was reasonable for the director to rely on others who knew or could be expected to know the relevant facts in the statutory declaration, and
- there was no reason to believe the director had personal knowledge of the relevant facts.

INVALIDITY OF PRECONDITIONS TO PROGRESS PAYMENT

Ball J also found that the statutory declaration's truth or falsity was irrelevant because the statutory declaration was furnished to fulfil a condition imposed by a contractual provision that was deemed void.

Clause 37.0 of the subcontract stated that Glavcom was required to submit the statutory declaration as a precondition to a reference date arising and to Glavcom being entitled to make a payment claim.

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Ball J noted that although section 8 of the SOPA permits a construction contract to state a method for fixing a reference date, it does not permit the imposition of additional conditions to the occurrence of a reference date or to the right to receive a progress payment. Ball J found that clause 37.0 sought to impose such conditions. Accordingly, clause 37.0 was deemed void by operation of section 34 of the SOPA for seeking to modify or restrict the circumstances in which a person was entitled to a progress payment.

As clause 37.0 was deemed void, it did not form part of the subcontract and it was therefore not open for the adjudicator to consider whether Glavcom complied with that clause by submitting the statutory declaration.

JURISDICTIONAL ISSUES

Hutchinson also submitted that the adjudication determination should be set aside because the adjudicator made a number of jurisdictional errors in refusing Hutchinson's claim for liquidated damages. One such alleged error was that Glavcom did not ask the adjudicator to decide that Hutchinson should be disentitled to liquidated damages by reason of the principle that a party in contractual default must not be allowed to take advantage of its own wrong. Accordingly, Hutchinson argued that it never made submissions in response to that principle and was denied natural justice.

Ball J found that Hutchinson was not denied natural justice because Glavcom, in its adjudication application, referred to such a principle. Ball J found that the adjudicator applied this principle despite the following:

- Glavcom only briefly addressed this principle and did so in the context of a discussion of the prevention principle
- the adjudicator expressly stated he did not deal with arguments based on prevention
- the adjudicator did not discuss the relationship between this principle and the prevention principle
- the adjudicator did not discuss whether this principle was good law, and
- the adjudicator accepted this principle without analysis, but this was in circumstances where Hutchinson did not take issue with the principle or the authority provided for it.

POWER TO DEDUCT LIQUIDATED DAMAGES

Although Ball J did not find it necessary to deal with the issue, he found merit in Glavcom's submission that an adjudicator is not entitled to deduct liquidated damages in the calculation of a progress payment where a contract does not express how to make such a calculation.

Ball J noted that section 9(b) of the SOPA applies if the contract makes no provision with respect to how the amount of a progress payment is to be calculated. Under section 9(b), the amount of a progress payment is to be calculated on the basis of the construction work under the contract. Section 9(b) does not refer to any setoff (including for liquidated damages). Against this background, Ball J considered that the "clear language" of section 9(b) would not give rise to any implied right of setoff in the calculation of the amount for a progress payment.

WHAT THIS MEANS FOR YOU

- Ensure the provisions in your contract do not contain preconditions for the existence of a reference date or the right to a progress payment, as they may be deemed void.

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- If you wish to maintain your right of setoff in the calculation of an amount for a progress payment (for example, for liquidated damages), ensure that is expressly provided for in your contract.

KEY CONTACTS



SANDRA STEELE
PRACTICE AREA LEADER - REAL ESTATE

SYDNEY
+61.2.9513.2528
SANDRA.STEELE@KLGATES.COM

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