

NSW COURT OF APPEAL QUASHES OSTWALD'S ADJUDICATION DETERMINATION AND HOLDS THAT FAÇADE CONTINUES TO BE 'PLAINLY WRONG'

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On 12 February 2019 the NSW Court of Appeal upheld an appeal by Seymour Whyte Constructions Pty Ltd (Seymour Whyte), represented by K&L Gates, relating to proceedings concerning a claim for a substantial progress payment under a Works Contract between Seymour Whyte as Contractor and Ostwald Bros Pty Ltd (in liquidation) (Ostwald) as Subcontractor. The adjudication determination was quashed on the basis that the adjudication application submitted by Ostwald was out of time.

The Court also held that

- although Ostwald was in liquidation at material times, including when it obtained an adjudication determination and commenced its claim under s 16 of the Building and Construction Industry *Security of Payment Act 1999* (NSW) (SOPA), that did not prevent Ostwald having rights under Part 3 of SOPA
- the conclusion in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247; 337 ALR 452 (Façade) to the contract was plainly wrong and should not be followed
- a claimant who makes an invalid adjudication application and pursues it to determination may nevertheless still sue a claimant under s 16 of the SOPA.

THE FACTS

On 28 July 2017, Ostwald served a progress payment claim on Seymour Whyte for the amount of AUD6,351,066.08.

On 11 August 2017, Seymour Whyte responded by providing a payment schedule that stated it proposed to pay AUD2,505,237.58 as a progress payment (Scheduled Amount).

On 25 August 2017, Ostwald entered administration.

On 27 September 2017, Ostwald purported to make an adjudication application under s 17(2)(a)(ii) of SOPA (Adjudication Application).

On 6 November 2017, the adjudicator determined the amount due to Ostwald was AUD5,074,218.27 (Adjudication Amount).

On 17 November 2017, Seymour Whyte commenced proceedings in the Supreme Court claiming that the Adjudication Application was invalid because Ostwald made the application outside the time limit specified by SOPA.

On 30 November 2017, the creditors of Ostwald resolved that it should be wound up under s 439C(c) of the *Corporations Act 2001* (Cth) (the Corporations Act).

By reason of ss 513B and 513C of the *Corporations Act*, the winding up of Ostwald was taken to have commenced on 25 August 2017, when Ostwald entered administration.

Thereafter, Ostwald filed a cross-claim seeking rectification of the construction contract to alter the due date for payment of progress payments and, accordingly, the date on which the adjudication application was due. It was common ground that if the claim for rectification succeeded, Ostwald's Adjudication Application was made within the time prescribed by SOPA, but if the Works Contract was not rectified the Adjudication Application was made out of time and therefore the Adjudication Determination was invalid. In the alternative Ostwald claimed that the unpaid Scheduled Amount of AUD2,505,297.58 was a statutory debt pursuant to s 16(2)(a)(i) of SOPA.

The main issues on appeal were:

- (i) whether the primary Judge erred in rectifying the Works Contract so as to alter the due date for payment (with the consequence that Ostwald's Adjudication Application was not made within time) and
- (ii) if yes to (i), whether Ostwald was precluded from suing to recover the unpaid amount as a statutory debt pursuant to SOPA
- (i) if no to (ii), a builder or sub-contractor in liquidation did not have the benefit of the Act, as was held by the Victorian Court of Appeal in *Façade*.

The Court of Appeal held that:

- (i) The primary Judge had erred in rectifying the Works Contract with the result that the Adjudication Application was served out of time and the Adjudication Determination was invalid.
- (ii) Ostwald was entitled to seek recovery of the Scheduled Amount pursuant to the SOPA even though it had made an adjudication application and pursued that application to a determination.
- (iii) Entitlement to a progress payment does not depend on the claimant continuing to perform work under a contract. Notwithstanding the winding up of Ostwald, the SOPA continued to apply to its claim.

THE IMPLICATION

The Court found that the SOPA, as a matter of construction, is capable of operating for the benefit of a builder or sub-contractor which has gone into liquidation for insolvency. The Victorian Court of Appeal decision to the contrary in *Façade*, was considered to be plainly wrong and not to be followed.

There now exists a disparity between the position in NSW and VIC, an argument for another day. However, the disparity will not last for long, as recent amendments to the NSW Act (available [here](#)) will expressly adopt the position argued by Seymour Whyte. Judges in other jurisdictions will now have to decide whether to follow the position articulated by the New South Wales Court of Appeal or the Victorian Court of Appeal.

Also, the respondent to an adjudication process is now potentially exposed to multiple proceedings. A claimant can pursue adjudication and, if the adjudication application turns out to be invalid, then sue for any statutory debt under s 16. This may incentivise upstream contractors to schedule lower amounts.

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