

HOLDMARK DEVELOPERS v G J FORMWORK

[2004] NSWSC 905 Supreme Court of New South Wales - 24 September 2004

FACTS

Holdmark Developers Pty Limited ('Holdmark') entered into a sub-contract with G J Formwork Pty Limited ('GJ'). The contract was terminated by Holdmark and the day after the contract came to an end, GJ served what purported to be a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). Thereafter GJ made three further claims purporting to be payment claims under the Act, in total claiming \$6,870,981.09. Each of the payment claims, related, of necessity to the same work. That is because no further work was done under the contract after termination. The claims proceeded to Adjudication and determined in favour of GJ in the amount of \$3,891,852.19 together with costs.

Holdmark challenged the Adjudicator's Determination on the grounds that there had been more than one payment claim made in respect of the one reference date, in contravention of s 13(5) of the Act. Section 13(5) of the Act relevantly provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

ISSUE

Whether more than one payment claim can be made in respect of the one reference date or after the contract has been terminated.

FINDING

The Court held that a reference date is either one fixed by the contract as the date on which a claim may be made for work carried out, or a date determined by reference to the first performance of the work. Thus, where the contract fixes the reference date, it is fixed in relation to work carried out. Once work ceases to be carried out, then, by definition, there will be no more reference dates.

The entitlement to serve a payment claim is one that may be exercised on and from a reference date, and that reference date - does not (absent contractual provisions to the contrary) continue to occur once the contract has been terminated, or once work has ceased to be performed. In those circumstances then, subject again to any contractual provision to the contrary, there is one more reference date -that occurring next after the date of termination -by reference to which one more payment claim -which is in substance a final payment claim under the Act -may be made.

Furthermore, it was unlikely that the legislature intended that the principal or head contractor could be hounded by multiple payment claims and the drastic consequences of ignoring them support this view.

QUOTE

Master Macready stated at paragraph 34:

I do not think there is a successive reference date monthly (or at any other intervals fixed by the contract) thereafter. If there were, the builder could harass the proprietor with a series of claims for the same work, or parts of the same work. It is obvious that, in many cases, payment claims are complex and detailed. It is obvious that a proper response may often require a very great amount of work. If the response is inadequate, or if the proprietor for whatever reason omits to respond, then the mechanisms of the Act are engaged. That may have at least potentially very serious consequences for the proprietor.

IMPACT

This case stands for the proposition that periodic payment claims may be made while the contract is current and work is being carried out, and that only one final payment claim may be made at, or within 12 months after, the termination of a contract or cessation of the work.

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