Contractors and Subcontractors – Statutory Help Obtaining Payment

Introduction

Various statutes assist contractors and subcontractors involved in construction contracts with obtaining payment, particularly:

1. The Building and Construction Industry Security of Payment Act 1999 ("SOPA"), which gives a right to progress payments to a person who has carried out construction work or provided related goods and services and also provides a relatively fast and efficient process for obtaining payment, generally involving a maximum of 6 to 8 weeks.

2. The Contractors Debts Act 1997 ("CDA"), which enables a subcontractor to seek direct payment from the principal of monies due to the head contractor with whom he has contracted.

3. The Corporations Act 2001 ("CA"), which enables a contractor or subcontractor to serve a creditor's statutory demand on the contractor with whom he has contracted. However, such demands have limited usefulness, as they can only be used against a company (not including a strata owners corporation) and generally require that there be no genuine dispute as to the debt, so in a construction context are useful mainly as a means of enforcing judgments.

The parties cannot contract out of these procedures, so parties involved in construction work need to be aware of them.

Building and Construction Industry Security of Payment Act 1999

SOPA gives a contractor or subcontractor a right to progress payments and enables a contractor or subcontractor to initiate a fast track process for obtaining payment of progress payments, as compared with conventional court proceedings.

In order to avoid loss of rights, it is extremely important that parties to construction contracts understand the tight time table imposed by SOPA, including:

1. the importance of the principal serving a payment schedule within the required period after receiving a payment claim and including in it all reasons for withholding payment; and

2. the importance of the contractor determining whether any response received from the principal amounts to a payment schedule, the requirements for which are rather loose and if so taking further action within the required timeframe.

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The process is as follows:

1. The process begins with a reference date, being the date under a construction contract on which a progress claim is to be made. The parties can agree on the due date for progress payments, but Section 8 provides that, if the construction contract does not specify the date, it is the last day of the month in which the work was performed.

2. The contractor then makes a payment claim. This can be an invoice, provided that it complies with SOPA, particularly section 13, which requires that the claim indicate that it is a claim under SOPA and include specified information.

3. The principal then has 10 business days to serve a payment schedule on the contractor. This is a schedule of proposed payments and where it involves payment of an amount less than the amount claimed, giving reasons for that. This is very important, as the principal's submissions in any subsequent adjudication will be limited to these reasons. These reasons are limited to grounds on which the amount claimed is not payable and the principal cannot allege a cross claim against the contractor.

4. The contractor can take the following actions:

    a) If the principal serves a payment schedule, but the contractor disputes it, the contractor has 10 business days from receipt of the payment schedule to prepare and serve an adjudication application.
    b) If the principal serves a payment schedule and the contractor accepts it, but the principal does not make the payments provided for in the payment schedule:

        i. the contractor may suspend work on 2 business days' notice pursuant to section 27 and is given statutory protection in relation to action taken by the principal under the contract in relation to such suspension.

        ii. the contractor has 20 business days from the due date for payment to prepare and serve an adjudication application, in which case the principal has five business days after receiving the application to prepare and serve an adjudication response.

    c) if the principal does not satisfy the payment claim or serve a payment schedule within the required timeframe, the amount claimed becomes a statutory debt pursuant to section 14(4) and the contractor may take the following action:

        i. suspend performance of the work, on 2 business days' notice; and/or

        ii. either commence court proceedings (which ends the process under SOPA);

        iii. or prepare and serve a second opportunity adjudication notice. A second opportunity adjudication notice involves the contractor notifying the principal, within 20 business days of the due date for payment, that the contractor intends to apply for adjudication, in which case the principal has 5 business days from receipt of the notice to serve a payment schedule and the contractor has 10 business days from the conclusion of that 5 business day period to apply for adjudication. The principal may only serve an adjudication response, i.e. defend the adjudication, if the principal has served a payment schedule within the

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required time frame in response to the second opportunity adjudication notice, so it is very important not to miss this deadline.

5. The adjudicator has 10 business days from acceptance of the application to determine it.

6. The principal must satisfy the determination within five business days of it being made or the contractor may take the following action:

   a) suspend performance of the work, on 2 business days' notice; and/or
   b) enter judgment with the court for the amount of the adjudication certificate issued by the adjudicator and enforce that as a judgment of the court.

7. A contractor, following a progress payment becoming due, also has a lien over unfixed plant and materials supplied by him, without prejudice to third-party rights or rights of parties holding a prior charge or lien.

8. A contractor may make a payment withholding request against a party owing money to the principal (e.g. where the principal is a head contractor owed money by the property owner) and that party must comply with that request or potentially be exposed to penalties and personal liability.

9. The Act also provides for interest to be paid to the contractor, at a substantial rate.

10. Section 34 prohibits contracting out of this process and section 12 voids provisions making payment conditional on the principal receiving payment from a third party, commonly known as "pay when paid" provisions or being conditional on action other under contracts.

Contractors Debts Act 1997

CDA enables a subcontractor to pursue monies due by the principal to the head contractor with whom he has contracted, in a similar fashion to obtaining a garnishee order.

The process is as follows:

1. The subcontractor obtains judgment against the head contractor in a court. Alternatively, the subcontractor can file an adjudication certificate obtained against the head contractor under SOPA, but this is usually not advisable, as in this case a separate application will be required and the court may require a hearing.

2. The Court issues a debt certificate pursuant to section 7 of CDA, for the amount of the judgment, on application by the subcontractor.

3. The subcontractor may request details of the principal from the contractor and the contractor must supply them.

4. The subcontractor may serve a formal claim and the debt certificate on the principal. The claim must be made within 12 months of the debt arising.

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5. The principal is then obliged to pay to the subcontractor directly, from monies due from the principal to the contractor, the amount claimed by the subcontractor, as an assignment of that debt to the subcontractor.

6. The principal may request a discharge notice from the subcontractor, in which case the subcontractor must provide it and the principal is given statutory protection against claims by the contractor with respect to the monies paid to the subcontractor.

7. The parties cannot contract out of this procedure.

The effect of this is as follows:

8. A subcontractor having difficulty obtaining payment from a contractor may wish to use this process to obtain payment of monies due to the contractor by the principal.

9. A principal may potentially be required to pay monies directly to subcontractors and notwithstanding the statutory protections should ensure that its contract with the head contractor and its procedures generally adequately address this possibility.

Corporations Act 2001

CA enables a party owed monies by a company, including a contractor or subcontractor, to serve a creditors statutory demand on the company and in the event that the demand is not satisfied or set aside by the court, commence winding up proceedings against the company, with a view to winding up of the company and appointment of a liquidator.

However, such demands have limited usefulness, as they can only be used against a company (not including a strata owners corporation) and generally require that there be no genuine dispute as to the debt, so in a construction context are useful mainly as a means of enforcing judgments.

The process is as follows:

1. The creditor contractor may serve a creditors statutory demand pursuant to section 459E of CA, in the form of prescribed form 509H, together with an affidavit verifying the debt, unless the debt is a judgment debt. The debt must exceed $2,000.

2. The debtor company must, within 21 days of service of the demand, either satisfy the demand or apply to the court pursuant to section 459G of CA to have the demand set aside. Section 459F provides that the period for compliance with the demand ends seven days after the application has been determined by the court, effectively extending the 21-day period for compliance which would have applied had the application not been made.

3. On application by the debtor company pursuant to section 459G, the court can set aside the demand on one of the following grounds:

    a) Pursuant to section 459H, on the basis that there is a genuine dispute between the parties as to the debt or the debtor company has an offsetting claim, if deduction of the disputed amount or offsetting claim from the amount claimed would reduce it below the $2,000 minimum.

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b) Pursuant to section 459J, on the basis that because of a defect in the demand, substantial injustice will be caused or "there is some other reason why the demand should be set aside".

4. If the demand is not satisfied or set aside, the debtor company is deemed insolvent and the creditor contractor may commence winding up proceedings against the debtor company, with a view to appointment of a liquidator. This commonly induces the debtor company to pay or negotiate a settlement of the debt, where it is able to do so.

5. Given the prospect of the demand being set aside and the creditor contractor being put to considerable expense and delay, it is advisable not to serve a creditors statutory demand unless the debt is not the subject of a genuine dispute. This will generally be the case where the debt is a judgment debt or the subject of an adjudication certificate under the Building and Construction Industry Security of Payment Act 1999.

Key takeaways

- The Building and Construction Industry Security of Payment Act 1999 provides a right to progress payments for contractors and subcontractors.
- Contractors must understand the strict timelines imposed by SOPA to avoid losing their rights.
- A payment schedule must be served by the principal within 10 business days of receiving a payment claim.
- Contractors can dispute a payment schedule and must act within 10 business days if they choose to do so.
- The Corporations Act 2001 allows contractors to serve a creditor's statutory demand, but it has limited applicability in construction contexts.

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