

SECURITY OF PAYMENT—SUBSTANCE PREVAILS OVER FORM

HICKORY DEVELOPMENTS V SCHIAVELLO [2009] VSC 156

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In line with other states, payment claims and adjudication applications made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act) are becoming more prevalent in Victoria. However, until recently, there was very little guidance from Victorian courts in relation to the interpretation of the Act.

On Friday 24 April 2009, the Victorian Supreme Court handed down what is likely to be a seminal decision in relation to the Act. The decision makes clear that the Act will be interpreted broadly, in a manner which facilitates the broad objectives of the legislation; 'to stamp out the un-Australian practice of not paying contractors for work they conduct on construction'.

Summarising this position, the Court said of the position adopted by the principal:

The submissions made by Hickory to which I have referred, smack of excessive technicality. The legislature did not intend, in my view, that precise compliance with all of the more detailed requirements of the Act is essential to the existence of a valid determination.

To approach the matter in the manner suggested by Hickory would not accord with the legislative intention disclosed in the Act that adjudication determinations should be made and given effect to with minimum delay and therefore should be approached with minimal technicality and court involvement.

THE CASE

Hickory Developments (Hickory) subcontracted to Schiavello (Vic) Pty Ltd (Schiavello) to carry out the design and construction of the base building and the fit out works for the TAC headquarters in Geelong.

[This affects] principals, construction companies and construction professionals who receive or submit claims for payment relying upon the security of payment legislation.

After receiving a nil payment schedule to one of its payment claims (comprised of two invoices), Schiavello made an adjudication application and eventually received a favourable adjudication determination.

Hickory applied to the Court to have the adjudication determination declared void on the basis that:

- The payment claim upon which the determination was based did not comply with the Act because it:
 - comprised two invoices and therefore two payment claims relating to one reference date; and
 - was a payment claim which had been made previously by Schiavello.
- The application for adjudication was not made within the time frame required by the Act (10 business days after receipt of the payment schedule) because:
 - physical receipt of the documents did not occur within the time frame (the adjudication application was made by email); and
 - the supporting documentation was provided late (it was sent by email at 9.54pm and 10.00pm on the day the application was made).

FINDINGS—'LET THE FORUM FIT THE FUSS'

The Court dismissed Hickory's claim and criticised the technical objections made by Hickory, which it concluded were not supported by the intentions of the Act. In summary, the Court found that the issues of compliance or otherwise with the technical requirements of the Act were for the adjudicator to determine and not the Court.

The Court found that the essential requirements of the adjudication process had been complied with and accordingly, the determination of the adjudicator was not void.

In its interpretation of the Act, the Court made the following conclusions:

- Multiple payment claims: depending on the construction contract concerned, a payment claim which comprises two parts (i.e. construct and fit out), can properly be described as one payment claim.
- Previous payment claims: the Act does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.
- Physical receipt of documents: an adjudication application does not need to be physically received by the authorised nominating authority, it can be lodged by email, and will be made at the time when it arrives at the authorised nominating authority's server.
- Content of an adjudication application: a failure to provide the supporting documentation at the time the adjudication application is made will not invalidate the application.

Jeremy Johnson, Matthew Muir and Dirk Luff's article was previously published in Corrs Chambers Westgarth's *Corrs in Brief*—April 2009. Reprinted with permission.

Technical deficiencies in payment claims and adjudication applications are unlikely to invalidate an adjudication determination. Unless there are substantive deficiencies in an adjudicator's determination, it will be effective and enforceable as a debt due and payable.