



Thought I was home and hosed with an adjudication determination in our favour and then my contractor wound itself up, what can I do now?

Shelley Mulherin

Navigating your way through the adjudication process under the Building and Construction Industry Security of Payment Act 2009 (ACT) (ACT SOPA) is not straight forward. But if you have taken the time to make an adjudication application under ACT SOPA and received an adjudication determination in your favour, you may have thought that you were home and hosed with getting payment UNTIL the contractor which owes you money winds itself up^[1], declines to make payment and instead says you owe them money! Knowing what you can do with your adjudication determination and what you should do in response to a payment claim received from an insolvent contractor in these circumstances is important.

This article will provide you with a step by step guide on what you should consider before engaging contractors, after engaging contractors, what you should do when you become aware of a contractor's insolvency and what can do with your adjudication determination to maximise your chances of recovery against the (now) insolvent contractor.

What does this mean if you are dealing with construction work in the Australian Capital Territory? We have not had a similar case here. Because of this, we set out below some steps you should consider if your construction work is conducted in the Australian Capital Territory and you find yourself holding an adjudication determination against an insolvent contractor and they also have a claim against you.

Steps that you should consider taking BEFORE engaging contractors

- **Seek legal advice on your construction contracts to place you in the best position to avoid not being paid, including, for example, whether there are clauses permitting you to hold onto payments or retention sums owing to the contractor if an “insolvency event” takes place.**
- **Obtain protection by way of director's guarantee, bank guarantee or charge in relation to your construction contractors;**
- **Obtain debt insurance to mitigate against the adverse impact which could arise if your business or company remained unpaid by an insolvent contractor;**

Steps that you should consider taking AFTER engaging contractors

- **Submit regular payment schedules in relation to “works” carried out under the construction contract to minimise the amount owing by contractors at any given**

time;

- Register adjudication determinations as enforceable judgments promptly and seek legal advice if you need help doing this;
- Take steps to enforce judgments obtained in your favour as quickly as possible and seek legal advice on enforcement mechanisms that are available to you;

Steps that you should consider taking when you become aware of a contractor's insolvency

- Seek prompt legal advice in relation to any signs of insolvency which you may become aware of during the course of the construction contracts;
- Ensure you are in a position to properly substantiate any claim you have against an insolvent contractor to gain the benefit of section 553C of the Corporations Act 2001 (Cth);

Steps that you should consider taking when you have obtained an adjudication determination and the contractor becomes insolvent

- Seek legal advice to determine whether (or not) you are entitled to hold onto payments or retention sums owing to the contractor if they place themselves in external administration at any point; and
- If an external administrator is appointed, seek assistance to prepare correspondence and documents to be provided to the external administrators claiming a statutory set-off under section 553C of the Corporations Act 2001 (Cth).

The Law

There are two major policy objectives of ACT SOPA which are mirrored in other states around Australia. First, it is to protect a contractor's cash flow by allowing "claimants"^[2] to recover entitlements under ACT SOPA regardless of whether (or not) there is a set-off or counterclaim. Secondly, ACT SOPA it is not intended to affect the rights of parties under the "construction contract." BUT Australian courts are not singing from the same song sheet when it comes to these competing policy objectives and figuring out whether an insolvent contractor can rely upon security of payment legislation. AND the Australian Capital Territory Supreme Court has not considered this issue yet. So what do other state courts say about it?

The Victorian Court of Appeal found that the proper interpretation of "claimant" did not extend to insolvent contractors under the Building and Construction Industry Security of Payment Act 2002 (VIC) (VIC SOPA).^[3] Why? Because a "claimant" is a person that had "undertaken to, and continued to, carry out construction work" and they determined that a company in liquidation cannot carry out construction work and is therefore not a claimant. This means if the payment claim you receive relates to construction work in Victoria that insolvent contractors cannot enforce any right to payment.

The NSW Supreme Court did not follow the Victorian Court of Appeal on the basis that it was "plainly wrong."^[4] They held that insolvent contractors remained a "claimant" under the Building and Construction Security of Payment Act 1999 (NSW) (NSW SOPA) because a "claimant" does not depend on whether that person "undertook" to carry out construction work but ONLY on whether a valid payment claim was issued. For this reason, insolvent contractors are free to exercise the rights available to claimants under NSW SOPA. BUT the NSW Supreme Court held that the parties' rights need to be determined in accordance with section 553C of the Corporations Act 2001 (Cth) which allows for a statutory set-off for "mutual credits, mutual debts or other mutual dealings" between an insolvent contractor and you. This means if the insolvent contractors claim relates to construction work in New South Wales that they can enforce a right to payment from you BUT it needs to be subject to set-off of your adjudication determination.

^[1] Or otherwise enters a form of "external administration" as defined in Schedule 2, Insolvency Practice Schedule (Corporations), Div 5-15, Corporations Act 2001 (Cth).

^[2] A "claimant" is defined as a "person who is or who claims to be entitled to a progress payment under section 10(1)": s 15 Building and Construction Industry Security of Payment Act 2009 (ACT); "if the person has undertaken, under the contract to: (a) carry out

construction work; or supply related goods and services”: s 10 Building and Construction Industry Security of Payment Act 2009 (ACT).

[3] Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247.

[4] Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2018] NSWSC 412.

Contact the article author for more info



Shelley Mulherin

Commercial Litigation | Canberra

T: 02 6201 7299

E: smulherin@mcw.com.au