

22 NOVEMBER 2013

Can a payment claim be served several times in one reference period?

Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors [2013] VSC 552

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) provides that a claimant can only make one payment claim in each reference period. Until recently, the effect of this provision had not been considered by the courts.

On 17 October 2013, Justice Vickery handed down his judgment in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors* [2013] VSC 552 on the question of whether a payment claim can be served several times in one reference period. The case considered the application of sections 14(8) and 14(9) of the Act.

Facts

Cooperative Builders (**Cooperative**) entered into 14 building contracts with Jotham Property Holdings Pty Ltd (Jotham) to build 14 townhouses. Cooperative served three payment claims under the Act, each for a separate contract, dated 27 September 2012,

2 October 2012 and 5 October 2012 (**First Payment Claims**). The First Payment Claims were for amounts to be paid for reaching a particular milestone as set out in each of the three contracts. Jotham did not provide Cooperative with payment schedules for any of the First Payment Claims, nor did it pay any of the amounts claimed.

A disagreement arose between the parties as to payment, which they settled by way of Deed of Settlement dated 19 October 2012 (**Deed**). As a result of the Deed, Cooperative did not pursue its right under the Act; ie making an application for adjudication regarding the unpaid First Payment Claims.

The Deed of Settlement was terminated and Cooperative's rights under the Act for the First Payment Claims had expired. Cooperative sought to make a claim for the amounts owing by Jotham by serving a new single payment claim for the unpaid First Payment Claims dated



ARTICLE

25 January 2013 (**January Payment Claim**). Again, Jotham did not issue a payment schedule, nor did it pay the claimed amount. Cooperative served Jotham with the required notice, informing Jotham of its intention to make an application for adjudication. Jotham subsequently provided Cooperative with a payment schedule with a scheduled amount of \$Nil.

Cooperative made an application for adjudication dated 5 February 2013. The adjudication determination dated 4 March 2013 was in favour of Cooperative for the full amount of the January Payment Claim.

Jotham applied to the Supreme Court of Victoria to have the adjudication application reviewed. Jotham claimed that, among other things, Cooperative had made two payment claims for the one reference period by virtue of the First Payment Claims and the January Payment Claim. The Act prohibits the issue of two payment claims for the same reference period; hence the January Payment

Claim was not a valid payment claim under the Act – and the adjudicator, therefore, did not have jurisdiction to determine the matter.

Findings

Justice Vickery held that there had been two payment claims issued for the one reference period. While the Act contemplates that amounts remaining unpaid from earlier payment claims may be included in a later and different payment claim (s 14(9)), this only applies where the unpaid amount is added to a different payment claim for work carried out or goods/services supplied in a new reference period. In this case, the January Payment Claim was identical to the First Payment Claims and Cooperative had simply combined the three claims into one and re-issued them. The January Payment Claim for was for the same reference period and for the same amount as the First Payment Claims.

The First Payment Claims were held to be valid payment claims made under the Act. Since Cooperative did not pursue the claims under the Act, the strict time limits had expired and the Act was no longer available to Cooperative for these claims. Unfortunately, no further work was to be carried out under the contract – ie future reference periods in which these claims could have been included.

Justice Vickery held that:

‘To permit multiple payment claims to be made in respect of the same work (or goods and services) arising from the same contractual reference date, via the mechanism of 14(9), would be completely inconsistent with the underlying objective of

the Act, which is to provide an enforceable right to progress payments supported by expeditious and efficient means for enforcement of those rights.’

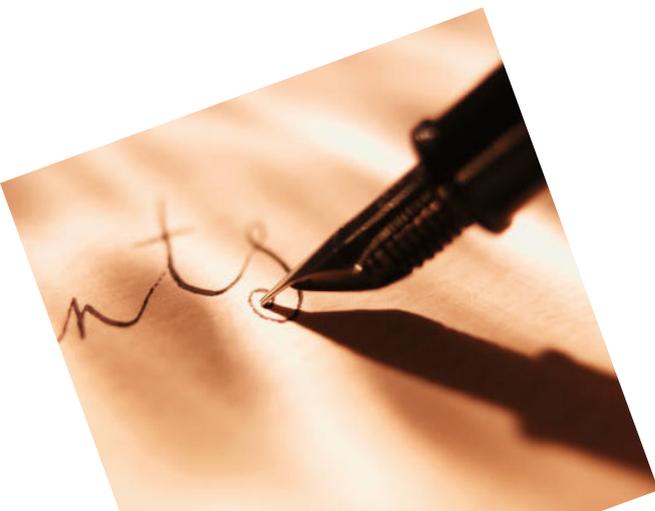
He went on to say:

‘If more than one payment claim was permitted to be made, it would also open up the prospect of there being more than one adjudication application for any particular payment claim... Such a regime would clearly not be in the interest of maintaining or promoting the core object of the legislation.’

Lessons learnt

A claimant should be wary when invited to engage in negotiations by the respondent where there is a valid payment claim on foot, particularly at the end of a project. In the present case, Cooperative forwent its rights under the Act by engaging in negotiations with Jotham. Cooperative ran a serious risk that, in the event the negotiations fell through, Cooperative would no longer have the Act available to it and would need to enforce its payment claim through more costly and lengthy alternatives. Unfortunately for Cooperative, there was no more work to perform under the contract and, as a result, the Act was no longer available to it.

If in doubt, proceed with the adjudication application and receive an adjudication determination. Afterwards, a party can choose not to enforce the determination and engage in negotiations. If the negotiations fall through, the adjudication determination may be used.



ARTICLE

Want to republish any of this newsletter?

If you would like to republish any part of this newsletter in your staff newsletter or elsewhere please contact our Marketing team on **+61 3 9608 2168**

Disclaimer

This newsletter is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



**For further information
please contact:**

John Hutchings, Head of Corporate &
Commercial
Phone (direct) **+61 3 9608 2245**
Mobile **+61 418 149 446**
Email j.hutchings@cornwalls.com.au

Jane Bion, Lawyer
Phone (direct) **+61 3 9608 2158**
Email j.bion@cornwalls.com.au