

Article Information

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Service: Projects & Construction
Sector: Infrastructure

Security of Payment and Factoring. Not so Fast!

The security of payment regime is by far the fastest, cheapest and most efficient method for contractors to secure payment of their progress claims. Whether the respondent is disputing the claim, or just tardy in its payment behaviour, the pay now argue later approach is a very popular express lane to payment. However this week the NSW Court of Appeal has slowed that traffic, rolling out a virtual tyre shredder for contractors that have factored their debts.

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Robert Riddell, Partner and **Daniel Fitzpatrick, Special Counsel** discuss the decision of the NSW Court of Appeal.

In our update, '[Factoring debtors and leading with your Chin](#)' we alerted the industry to Court of Appeal proceedings challenging the decision *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd*^[1] which permitted contractors factoring their debts to pursue claims for payment under the *Building and Industry Security of Payment Act 1999* (NSW)(Act).

The Court of Appeal has now, by a 2-1 split decision held that the claimant was not entitled to use the Act to pursue payment of an invoice containing a notice of assignment required under the terms of the claimant's factoring agreement.^[2]

The majority, Gleeson and Leeming JJA, in a brief joint judgment, noted that at the moment a payment claim, that included a notice of assignment of the "invoice" to the financier, was received by the respondent, the claimant ceased to be a creditor of the respondent. They concluded that:

"...this was not a case where there was a disputed claim that [the claimant] was owed money. This was a case where [the Claimant] by the very document contended to be a payment claim asserted, correctly, that it was no longer a creditor"

This decision has significant implications for contractors seeking to avail themselves of the progress payment regime under the Act, and no doubt their invoice financiers. In many instances, enforcement of progress claims under construction contracts has just become a whole lot harder.

[1] [2017] NSWSC 1140

[2] *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd* [2017] NSWCA 337