

Article Information

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Service: Projects & Construction

Sector: Infrastructure

Warning! Wait for your reference date

The Supreme Court of New South Wales in *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613 recently confirmed that a payment claim will only be valid (under the SOP) if it is submitted on or after the reference date. A provision in a construction contract that 'deems' an early payment claim to be submitted on the actual reference date is ineffective for the purpose of the security of payment legislation.

Facts

The claimant and respondent entered into a construction contract and the works commenced. The claimant submitted a payment claim 8 days prior to the stated reference date. The respondent's payment schedule disputed the claim on the ground that no reference date was available for the claimant to submit its payment claimant, as the claimant had already submitted a payment claim in respect of the June reference date. Therefore, the adjudicator did not have jurisdiction to make a determination.

The claimant proceeded to adjudication, and the adjudicator ultimately awarded the claimant the whole of the claimed amount. The respondent reviewed the decision.

Claimant's argument

The progress claim clause contained in the contract provided that any payment claims submitted early were **deemed** to have been made on the date for making that claim. The claimant argued that the early payment claim was valid as the deeming provision meant that the early payment claim was deemed to be submitted on the reference date.

Respondent's argument

The respondent argued that a reference date was not available for the respondent to submit its payment claim, and relied upon the decision of *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52. The respondent submitted that:

1. the reference date was the relevant date fixed by the contract to make a payment claim;
2. difficulties would arise in assessing when to serve a payment schedule if the claimant's argument was favoured, as it would be unclear whether time (for the purpose of submitting a payment) would run from the actual date of service of the payment claim or the date on which the payment claim was deemed to be submitted.

Court's decision

McDougall J accepted that the effect of the deeming provision was that for the purpose of the contract, a payment claim submitted prior to the reference date was effective.

However, his Honour concluded that for the purpose of the security of payment legislation, an early payment claim was ineffective. This conclusion was supported by the decision of *Southern Han*, which determined that s 8(1) of NSW SOP Act (being a right to a progress claim arises on 'on and from each reference date under a construction contract') fixed a condition of entitlement to a progress payment.

Lessons learned

Contractors should carefully consider whether a reference date has arisen before submitting their payment claim.

For the purposes of the relevant SOP legislation, payment claims can only be submitted on or after the reference date, irrespective of a clause in a contract stating otherwise. If a payment claim has already been submitted on or after a particular reference date, a contractor will need to wait until the following reference date before submitting the payment claim.

If the relevant SOP legislation does not apply to a construction contract, then depending on the relevant progress claim clause, an early payment claim may be valid.

See link to our Common Mistakes handout for further information [here](#).