

KQ NEWSLETTERS

November 2009

KQ Client Victory at the Court of Appeal

Construction work under security of payment legislation

MATTER OF ADVANCE EARTHMOVING PTY LTD v FUBEW PTY LTD 2009 NSWCA 337

The Building and Construction Industry Security of Payment Act 1999 (NSW) ('the SOP Act') applies to construction work or the supply of related goods and services within New South Wales under a construction contract.

Construction work is defined under s.5 (1) of the SOP Act. It covers the construction, alteration, repair, restoration, maintenance, extension, demolition of building / land or any works forming part of a building / land, the installation of fittings, site clearance, earthmoving, excavation, laying of foundations, scaffolding and so on.

Section 5 (2) of the SOP Act identifies work to which the Act does not apply, namely the drilling for, or extraction of oil or natural gas and the extraction of minerals and residential building works performed for homeowners, where the homeowner resides in or proposes to reside in the premises.

The issue of residential works are determined by the Home Building Act 1989 (NSW) ('the HBA') and concerns the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling.

BACKGROUND TO CASE

This firm was recently successful in the New South Wales Court of Appeal in bringing a claim for a client, Advance Earthmovers ('Advance') with respect to earth work carried out under an oral agreement for the preparation of an access road and building pad on the site of a proposed residence.

Advance is a construction company that was engaged by Fubew Pty Ltd ('Fubew'). The Directors of Fubew proposed to live in the residence.

Advance issued a Payment Claim under the Act to Fubew who inturn failed to pay the money due to Advance or issue a Payment Schedule giving reason why it would not provide payment to our client.

Under the SOP Act, where a Respondent either fails to make payment to Claimant and or provide reasons for failing to provide payment within 10 business days of receipt a Claimant may seek to recover unpaid monies as a debt due in any court of competent jurisdiction.

In the first instance Advance was successful in securing Summary Judgment at the District. However the Judge who made orders for Summary Judgment subsequently set aside his own decision in response to an application brought by Fubew which argued amongst other things that the Judge's initial decision was incorrectly made because Fubew had, prior to Advance filing its application for Summary Judgment, commenced proceedings at the Consumer, Trader and Tenancy Tribunal ('CTTT') and argued that the Act did not apply and that any claim should be determined under the HBA because the work carried out was residential building work.

COURT OF APPEAL

This firm advised Advance to appeal the decision of the District Court Judge to overturn his original decision.

The issue arose before the Court of Appeal as to whether Fubew as a company could reside in a dwelling for the purposes of the HBA and further which forum; ie: the District Court or the CTTT, had jurisdiction to hear the matter.

The Court of Appeal held that because Fubew was a corporation it could not reside and therefore the work which Advance performed was not residential building work and that the SOP Act applied.

...continued next page

18 MERRIGANG ST
BOWRAL NSW 2576

LEVEL 57, MLC CENTRE
SYDNEY NSW 2000
(BY APPOINTMENT ONLY)

LEVEL 7
43-51 QUEEN STREET
MELBOURNE VIC 3000
(BY APPOINTMENT ONLY)

PO BOX 1428
BOWRAL NSW 2576

TEL (02) 4862 2020
FAX (02) 4862 2021

APQUINN@KQLAWYERS.COM.AU
WWW.KQLAWYERS.COM.AU



IMPORTANCE OF DECISION

The decision is a lead case in the area of the SOP Act and it is authority for the following :

1. A company can not reside in a residential premises.
2. It re-affirms the absolute necessity for Respondents who receive Payment Claims issued under the SOP Act to respond with reasons in the form of a Payment Schedule issued under the SOP Act which confirms why they do not propose to make full payment for the work claimed for by the Claimant.

RECOMMENDATION

If you are a Respondent who is served with a Payment Claim issued under the SOP Act and you do not intend to pay the claim in full you must ensure that you provide a response with reasons as to why you are withholding payment within 10 business days of receipt.

If you have any questions in relation to Payment Claims or the impact of the SOPA on your business, please do not hesitate to contact Paul Quinn of this office on (02) 4862 2020.

18 MERRIGANG ST
BOWRAL NSW 2576

LEVEL 57, MLC CENTRE
SYDNEY NSW 2000
(BY APPOINTMENT ONLY)

LEVEL 7
43-51 QUEEN STREET
MELBOURNE VIC 3000
(BY APPOINTMENT ONLY)

PO BOX 1428
BOWRAL NSW 2576

TEL (02) 4862 2020
FAX (02) 4862 2021

KQ@KQLAWYERS.COM.AU
WWW.KQLAWYERS.COM.AU



KQ LAWYERS HAVE EXPERTISE IN COMMERCIAL AND CONSTRUCTION LITIGATION. IF YOU WOULD LIKE FURTHER INFORMATION PLEASE VISIT OUR WEBSITE, EMAIL **PAUL QUINN, OR CONTACT US ON 02 4862 2020.**