

VICTORIAN COURT OF APPEAL IN FAÇADE TREATMENT CASE WAS "PLAINLY WRONG"

Date: 6 April 2018

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WHAT YOU NEED TO KNOW IN LIGHT OF

SEYMOUR WHYTE CONSTRUCTIONS PTY LTD V OSTWALD BROS PTY LTD (IN LIQ)

The NSW Supreme Court recently handed down its decision in the matter of *Seymour Whyte Constructions Pty Ltd v Oswald Bros Pty Ltd (in liq); Oswald Bros Pty Ltd (in liq) v Seymour Whyte Constructions Pty Ltd [2018] NSWSC 412*, in which K&L Gates represented Seymour Whyte. The decision sheds light on numerous issues, including:

- the ability of a company in liquidation to enforce an adjudicator's determination under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (SOP Act)
- the operation of section 553C of the *Corporations Act 2001 (Cth)* (Corporations Act).

In short, the Court decided to grant a stay sought by Seymour Whyte in the proceedings and the Court held that the enforcement of an adjudicator's determination by a company in liquidation will be stayed until the parties' rights are finally determined in accordance with section 553C of the Corporations Act.

This case has significant impacts for:

- companies that are either insolvent or close to insolvency, that are seeking to exercise rights under the SOP Act
- companies seeking to stay the enforcement of an adjudicator's determination on the basis of the claimant's financial position.

BACKGROUND

On 6 September 2016, Seymour Whyte Constructions Pty Ltd (Seymour Whyte), as a head contractor, entered into a contract with Oswald Bros Pty Ltd (now in liquidation) (Oswald) as subcontractor, to perform road works on the Woolgoolga to Ballina Pacific Highway Upgrade Project (Subcontract).

On 28 July 2017, Oswald served a payment claim on Seymour Whyte pursuant to the SOP Act in the sum of AUD6,351,066.08.

Seymour Whyte responded to the payment claim on 11 August 2017 by serving a payment schedule on Ostwald.

On 27 September 2017, Ostwald made an adjudication application in respect of the payment claim and the adjudicator made a purported determination on 6 November 2017. In the purported determination, the adjudicator determined that the sum of AUD5,074,218.27 was payable from Seymour Whyte to Ostwald.

During this period, the following events occurred in respect of Ostwald's financial position:

- Ostwald was placed into voluntary administration on 25 August 2017
- on 23 November 2017, the administrators of Ostwald reported to creditors that, in their opinion, Ostwald was insolvent, that no funds would be available to pay out secured creditors, and recommended that the company be placed in liquidation
- the creditors of Ostwald resolved that it should be wound up on 30 November 2017.

SUPREME COURT PROCEEDINGS

Overview

Seymour Whyte commenced proceedings in the Supreme Court on 17 November 2017. In the proceedings Seymour Whyte:

- challenged the validity of the adjudicator's determination
- advanced that, due to Ostwald's financial situation (in liquidation):
 - Ostwald had lost the right to rely on the SOP Act. This position was consistent with the decision of the Victorian Court of Appeal in *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247* (Façade Treatment)
 - Seymour Whyte was entitled to stay any judgement arising from the filing by Ostwald of an adjudication certificate until the final determination of the parties' rights in accordance with s 32 of the SOP Act.

The matter was heard by Justice Stevenson of the New South Wales Supreme Court.

Façade Treatment

The Victorian Court of Appeal held in *Façade Treatment* that a "claimant" under the Victorian equivalent of the SOP Act is a person that had "*undertaken to, and continued to, carry out construction work*". On that premise, the Victorian Court of Appeal determined that a company in liquidation cannot carry out construction work and is therefore not a claimant because:

"[O]nce a winding-up order is made in respect of a builder...it only continues to exist for the purpose of being wound up, it would cease to be a claimant for the purposes of Pt 3 of [the Act]...[and] would therefore lose the right to issue payment claims under [the Act]".

The Victorian Court of Appeal's decision has been widely understood to stand for the proposition that the benefit of the SOP Act is not available to a company in liquidation.

Justice Stevenson determined that the Court of Appeal in Façade Treatment was "*plainly wrong*" and determined that:

- a person's status as a "claimant" under the SOP Act does not depend on whether that person "undertook" to carry out construction work, rather it depends only, on whether the person served a payment claim (and was entitled to do so)
- a company in liquidation remains a "claimant" notwithstanding it is being wound up. The SOP Act, by its terms, continues to apply regardless of the liquidation. The status of the company (i.e. in liquidation) will only impact on the ability of the company to exercise rights otherwise available to a solvent company under the SOP Act (e.g. to enforce judgement of an adjudicator's determination).

Stay of Judgement

Seymour Whyte submitted that due to Ostwald's financial situation (in liquidation):

- a stay should be granted because an interim payment (as contemplated under the SOP Act) would become a final payment (i.e. Seymour Whyte would not be able to recover monies from Ostwald in final proceedings because of Ostwald's inability to satisfy a judgement that may be awarded in Seymour Whyte's favour)
- section 553C of the Corporations Act applied (i.e. the provision which allows set-offs for mutual credits/debts against an insolvent company) and Seymour Whyte was entitled to prove in the winding up of Ostwald for any amount found to be due by Ostwald to Seymour Whyte.

Justice Stevenson agreed with Seymour Whyte's submissions in respect of the Corporations Act and held that as Ostwald went into liquidation following the making of the adjudication determination, and before it moved for judgment, section 553C of the Corporations Act applied.

The mechanism was described by Justice Stevenson as being one that substitutes "*the parties' rights under the contract and for such rights as Ostwald retains by reason of the adjudication determination*" and accounts for:

- in the case of Ostwald, any amount found to be due to it by Seymour Whyte
- in the case of Seymour Whyte, to be able to prove in the winding up of Ostwald for any amount found to be due by Ostwald to it.

Noting the above, Justice Stevenson's stayed the statutory process for enforcing the adjudication determination as a judgment for debt in light of the mandatory "set off" procedure under s 553C of the Corporations Act.

WHAT THIS MEANS FOR YOU

This decision has far reaching implications for participants in the building and construction industry in that:

- the Façade Treatment case has been expressly distinguished by a New South Wales Court. As such, a company in liquidation remains a "claimant" notwithstanding it has been wound up. The SOP Act, by its terms, continues to apply regardless of the liquidation. The status of the company (i.e. in liquidation) will impact on the ability of the company to exercise rights otherwise available to a solvent company under the SOP Act
- in circumstances where a claimant has entered liquidation, the statutory enforcement process can be stayed by a respondent (through Court intervention) in light of the mandatory "set off" procedure under s 553C of the Corporations Act.

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