

CONSTRUCTION CONTRACTS ACT WA - CITYGATE PROPERTIES PTY LTD V BGC CONSTRUCTION PTY LTD [2016] WASC 101

05 July 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Sian Newnham**, **Raghav Gupta** and **Emilie Soust**

The recent decision of the Supreme Court of Western Australia in *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101 (the **Decision**) confirms one of the fundamental differences between the *Construction Contracts Act 2004* (WA) (**WA Act**) and the equivalent security of payment legislation applying in Queensland¹, New South Wales² and Victoria³ (together the **East Coast Acts**).

Under the East Coast Acts, a party performing construction work or supplying related goods and/or services is entitled to seek a progress payment by serving a payment claim on the other party to a construction contract. A disputed payment claim will be adjudicated and resolved within certain predefined timeframes. The objective is to entitle persons who carry out construction work (or supply related goods and/or services) to receive timely payment for their work (or for the related goods and/or services they supply).

In Western Australia, many of the protections offered under the legislation extend to both parties, and a recipient of construction work (or supplier of related goods and/or services) is also permitted to serve a payment claim on a party performing construction work (or supplying related goods and/or services). The WA Act has the broader objective of ensuring a rapid flow of money through the entire contracting chain.

The Decision provides an example of a principal enforcing an adjudication determination that was given in its favour.

FACTS

On 1 April 2014 Citygate Properties Pty Ltd (**Citygate**) entered into an approximately \$58m contract with BGC Construction Pty Ltd (**BGC**) for the construction of the expansion to the Eaton Fair Shopping Centre in Bunbury, WA (the **Contract**). BGC submitted a number of payment claims in relation to its works under the Contract, some of which led to payment disputes.⁴

On 23 September 2015 an adjudicator determined a payment dispute between Citygate and BGC in favour of Citygate (the principal), and required BGC to pay Citygate on or before 30 September 2015 the sum of approximately \$815,000. No payment was made.

Citygate sought the Court's leave to enforce the adjudication determination as a judgment or order of the Court under section 43(2) of the WA Act.

THE DECISION

The Court granted Citygate leave to enforce the adjudication determination.

In exercising its direction to grant leave the Court noted that, *"leave to enforce a determination must be exercised having regard to the objects, purpose and policy of the [WA] Act which, expressed compendiously, is 'to keep the money flowing'. Having regard to that object, a party who has the benefit of a determination is entitled to enforce it."*⁵

BGC argued that:

- although the WA Act contemplated a payment up the contracting chain, its primary purpose is to keep money flowing down the contractual chain by enforcing timely payments from a principal to contractor,
- as the payment claim, the subject of the adjudication determination (that Citygate sought leave to enforce), was issued by Citygate after the works were completed and after the progress payment regime provided for under the Contract had ended, Citygate's reliance on the adjudication process to determine the payment dispute was a ploy or 'at best opportunistic and at worst an abuse of the [WA] Act's process',
- enforcing a determination which would lead to money flowing up the chain, would be inconsistent with the purpose of the WA Act, and
- it would be manifestly unjust and inconsistent with the purpose of the WA Act to allow the determination in Citygate's favour pending the determination of BGC's application to enforce other adjudication determinations in its favour.⁶

These arguments were unsuccessful.

The Court stated that *“the [WA] Act clearly contemplates that determinations may be made which call for money to be paid by a contractor to a principal. Thus, granting leave to Citygate to enforce the determination is not inconsistent with the purpose of the [WA] Act”*.⁷

As BGC did not challenge the validity of the adjudicator’s determination by bringing an application for judicial review, the Court disregarded BGC’s arguments that Citygate’s reliance on the processes of the WA Act were opportunistic, a ploy or an abuse of process.

Finally, BGC’s argument that allowing the enforcement of Citygate’s determination in this matter would be inconsistent with the other pending determinations in BGC’s favour was rejected because those determinations were quashed in an earlier Supreme Court decision.⁸

IMPLICATIONS

Unlike the East Coast Acts, the WA Act prioritises the contracted intention of the parties. Only when a contract does not include basic payment provisions does the WA Act imply payment terms into the construction contract. Parties to construction contracts in WA should be mindful that both the principal and contractors may be entitled to rely on the express payment terms in a contract, or if none are included, certain implied payment terms (including the defined timing requirements) under the WA Act.

This decision confirms that principals who are owed money by contractors or suppliers under construction contracts may also bring, and subsequently enforce, adjudication determinations under the WA Act.

ENDNOTES

1. Building and Construction Industry Payments Act 2004 (Qld).
2. Building and Construction Industry Security of Payment Act 1999 (NSW).
3. Building and Construction Industry Security of Payment Act 2002 (Vic).
4. See for example, the decision in *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88, which considers some of the other payment disputes.
5. *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101 at [6].
6. *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101 at [9].
7. *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101 at [12].

8. BGC Construction Pty Ltd v Citygate Properties Pty Ltd [2016] WASC 88.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



JAY LEARY
PARTNER, AUSTRALIA

+61 8 9211 7877 / + 61 7 3258
6619
Jay.Leary@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close