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'*Pay when paid*' and preconditions to payment - Do they hold up to scrutiny?

By David Rodighiero, Partner and Marnie Carroll, Solicitor

The introduction of security of payment legislation in all Australian jurisdictions has reinforced the common law position that '*pay when paid*' and '*pay if paid*' clauses are void in respect of contracts for construction works performed or related goods and services supplied in Australia. In Queensland for example, s 16 of the *Building and Construction Industry Payments Act 2004* (Qld) provides that '*a pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the construction contract*'. Prior to the bar on '*pay when paid*' and '*pay if paid*' provisions under security of payment legislation, courts had viewed such clauses unfavourably: see *Ward v Eltherington* [1982] QdR 561; *Sabemo (WA) Pty Limited v O'Donnell Griffin Pty Limited* (1983) (unreported, Court of Western Australia); *Crestlite Glass & Aluminium Pty Ltd. v. White Industries (QLD) Pty Ltd* (Unreported, Federal Court of Australia).

While head contracts are typically drafted to avoid such clauses, '*pay if paid*' and '*pay when paid*' mechanisms tend to inadvertently creep into subcontract provisions concerning the release of security or head contract claims.

Release of security

A clause that provides that the release of security under a subcontract will be subject to the release of security under a head contract is a '*pay when paid*' provision. These clauses are typically drafted so that the subcontractor will be paid the outstanding security when the contractor is paid its security under the head contract.

While it is common for contractors to seek to extend the various periods under subcontracts to coincide with events under the head contract, drafters must be careful that such an event under the head contract is not the payment of money. An alternative trigger to provide for the release of subcontract security is to make the release of the subcontract security subject to practical completion or the expiry of the defects liability period under the head contract.

Head contract claims

A clause that makes recovery of a claim under a subcontract subject to payment for the claim under the head contract is effectively a '*pay if paid*' provision. Variation, delay costs and latent condition clauses under subcontracts sometimes provide that the subcontractor's entitlement to a claim will be subject to whether the contractor is able to recover payment for such a claim under the head contract. Sometimes such clauses go even further and require subcontractors to incorporate their claim within the contractor's claim under the head contract (effectively subrogating their rights to what the contractor can recover and further limiting options for the subcontractor to independently recover against the contractor).

Generally, a subcontractor's entitlement to recover payment of a claim under the subcontract should be tied only to the subcontractor's compliance with the subcontract. Accordingly, a condition to payment of the claim which is referrable to the contractor receiving payment under the head contract may be deemed a '*pay if paid*' clause and, if so, therefore void.

In any event, where the contractor does not receive payment under the head contract because it fails to comply with the requirements for making a claim under the head contract, it will likely be considered unreasonable to preclude a subcontractor's entitlement to receive payment as the contractor's non-compliance with the head contract is out of the subcontractor's control.

Conclusion

Parties to a construction subcontract must ensure that any provisions which make payment (including the release of security or payment of a claim) subject to the head contract do not unintentionally result in a '*pay when paid*' or '*pay if paid*' mechanism. To avoid this, subcontract payment provisions should be carefully drafted so that payment is subject to an event under the head contract rather than payment.

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Dropboxes, links and attachments: the pitfalls of electronic service of documents

By John Grant, Special Counsel

Conveyor & General Engineering Pty Ltd v. Basetec Services Pty Ltd & Anor [2014] QSC 30

Conveyor & General Engineering Pty Ltd (**CGE**) challenged an adjudication decision that required it to pay $121,472.02 to Basetec Services Pty Ltd (**Basetec**).

CGE asserted in the Queensland Supreme Court that:

- The adjudication application was not duly served upon it, so that the adjudicator had no jurisdiction; and consequently that
- The adjudicator denied procedural fairness to it, by refusing to permit it to make certain submissions about the merits of the claim.

Background

On 30 July 2013, Basetec delivered payment claims under the *Building and Construction Industry Payments Act 2004 (Qld)* (**BCIPA**) for each of two subcontracts with CGE. It then pursued adjudication applications, although the court application related only to one.

Service of the applications was undertaken by Basetec as follows:

1. On Friday, 23 August 2013, Basetec sent an email to CGE's lawyer that:
   a. Attached the two adjudication applications and a letter to the Institute of Arbitrators & Mediators Australia; and
   b. Included a copy of an email that Basetec had sent to the Institute that day, saying:

      'Please find attached letter, Adjudication Application Forms as well as Dropbox links below for the two Adjudication Applications …'

below which there appeared two links to Dropbox files. Those files contained Basetec's submissions to the adjudicator and some documentation described as '*evidence of contract*'.

2. On Monday, 26 August 2013, Basetec sent a similar email to Mr How of CGE.

On receipt of their respective emails (and this appears not to have been disputed):

- CGE's lawyer read the email and its attachments, but did not follow the links to the documents within those Dropbox files.
- Mr How also read only the email and attachments and did not follow the links to the documents in Dropbox.

The adjudicator advised the parties of his acceptance of his nomination on 28 August 2013 and found that the deadline for an adjudication response was 30 August 2013.

Neither Mr How nor CGE's lawyer became aware of the contents of the Dropbox files until Monday, 2 September 2013.

On 2 September 2013:

- Basetec sent an email to the adjudicator and to CGE's lawyer that contained submissions about service.
- CGE's lawyer sent a submission in response on the service question to the adjudicator and Basetec.
- CGE's lawyer then received a further submission (by email) from Basetec on that question.

The adjudicator considered these submissions.

On 2 September 2013, CGE's lawyer also emailed to the adjudicator and Basetec an adjudication response to the application, including submissions and a statutory declaration by Mr How.

In his decision, the adjudicator concluded that the adjudication application including the material in the Dropbox files had been served by the email sent to CGE's lawyer on 23 August and that he was precluded from considering submissions from CGE after 30 August, other than those concerning the service question.

The outcome of the application to the court depended on the question of when the application had been properly served.

Statutory requirements for service

Section 21(5) of BCIPA requires a copy of an adjudication application and supporting submissions to be served on the respondent.

It was not suggested in argument before Justice Philip McMurdo that the relevant contract between the parties made provision for the service of documents. Accordingly, reference was made to s 39(i)(ii) of the *Acts Interpretation Act 1954* (Qld), which permits service:

> *(ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document; or …*

CGE's submissions seemingly accepted that, in general, a document to be served under BCIPA can be served by email.

While his Honour doubted the finding in *Penfolds Projects Pty Ltd v Securcorp Limited* [2011] QDC 77 that email is a '*similar facility*' to '*… post, telex, facsimile …*' under s 39(ii), he considered that, even it were, service must nevertheless involve something analogous to '*sending*' the entire adjudication application to a relevant office of CGE.

In his view, only part of the adjudication application was sent to CGE. CGE may have been told where the balance was located, but that was not the same as being sent.

Justice McMurdo then considered the facilitative provisions in the *Electronic Transactions (Queensland) Act 2001* (**ETA**), s 11 of which provides:

1. If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).

2. The circumstances are that –

   a. at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and

   b. the person to whom the information is required to be given consents to the information being given by an electronic communication.

His Honour concluded that s 11 did not authorise the service of the adjudication application, for two reasons:

1. CGE had not agreed to be electronically served within the meaning of the ETA; and.

2. The material within the Dropbox was not part of an electronic communication, as defined.

Further, s 24 of the ETA provides that, unless otherwise agreed between the parties, an electronic communication is received when it '*becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.*'

Some of the documentation comprising the adjudication application was not itself within, or attached to, the email, but was accessible only by way of a Dropbox link and it could not be said that Dropbox was an electronic address designated by CGE.

His Honour considered that the use of the Dropbox meant that the whole application was not within an '*electronic communication*', thereby precluding the operation of s 24.

Thus the adjudication application was not served in a way that was permitted by relevant statutory provisions.

Requirements at Common law

In *Capper v Thorpe* (1998) 194 CLR 342, it was said that a document will be served '*… if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document. …*' [at 352].

The emails of 23 and 26 August advised their recipients that there were other documents that were part of the application and of their location. However, service does not require the recipient to read the document, but does require something akin to receipt. A document can be served in this sense, even in electronic form.

The files within the Dropbox were not part of the emails. While use of the Dropbox facility may have been a practical and convenient way for CGE to be directed to the documents, it did not result '*… in the person to be served becoming aware of the contents of the document …*' before 2 September 2013.

In the judge's view the result was that the application was not served on 23 or 26 August and, consequently, the adjudicator erred in concluding that CGE was out of time to provide an adjudication response and also in consequently depriving CGE of the opportunity to present submissions in response to the application.

He declared the adjudicator's decision to be of no effect.

Conclusions

Adjudications are conducted with tight, inflexible time-frames and electronic service and delivery of documents is often used. While service of claims might be permitted electronically, care must be taken to ensure that documents are properly served where required. Parliament has intervened to facilitate electronic service of documents, but this case is a good example of the pitfalls that might still occur.

The issue of electronic service of large documents, for which dropbox services or project management systems are often used due to email file size limits, remains fraught, especially in the case of service of initiating processes.

For the moment, the position is that documents attached to emails are considered to be received with that email and accordingly, in relevant circumstances, served. However, a link in (even one in the same email as other attachments) to a document held elsewhere will not constitute service of the linked document. The result may then be (as it was in this case) that service of the whole is not effected until it can be shown that the linked documents have been received.

In this case, the result was that the adjudicator's decision in favour of the claimant was set aside, but these dangers are not only present for claimants.

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Carter Newell would like to congratulate Kyle Trattler, Senior Associate on his recent appointment as a Registered Adjudicator.