Supreme Court

New South Wales

Case Name:	Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd
Medium Neutral Citation:	[2023] NSWSC 309
Hearing Date(s):	9 December 2022
Date of Orders:	30 March 2023
Decision Date:	30 March 2023
Jurisdiction:	Equity
Before:	Richmond J
Decision:	Application to have adjudication determination quashed or declared void refused.
Catchwords:	BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determination – whether adjudication determination was affected by jurisdictional error – whether the Act can operate in favour of a claimant which is insolvent or whether abuse of process
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 9, 13, 14, 15(2)(a), 17, 19, 20, 21, 22, 23, 24(1)(c), 25, 32, 32B, 34 Corporations Act 2001 (Cth), s 436A
Cases Cited:	Ardnas (No 1) Pty Ltd v J Group (Aust) Pty Ltd [2012] NSWSC 805 Brodyn Pty Ltd t/as Time Cost & Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394 Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190 Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico [2004] NSWSC 344; (2005) 21 BCL 266

	Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd [2016] NSWSC 1120 Hossain v Minister for Immigration & Border Protection (2018) 264 CLR 123; [2018] HCA 34 McNab Building Services Pty Ltd v Demex Pty Ltd (No 2) [2022] NSWSC 1496 Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd [2007] QSC 333 Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (2005) 64 NSWLR 462; [2005] NSWCA 409 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4 Seymour Whyte Constructions Pty Ltd v Ostald Bros Pty Ltd (2019) 99 NSWLR 317; [2019] NSWCA 11 TFM Epping Land Pty Ltd v Deakin Australia Pty Ltd [2020] NSWCA 118 Vannella Pty Ltd v TFM Epping Land Pty Ltd [2019] NSWSC 1379
Category:	Principal judgment
Parties:	Piety Constructions Pty Ltd (Plaintiff) Megacrane Holdings Pty Ltd (Administrator Appointed) (First Defendant) Navid King (Second Defendant) Adjudicate Today Pty Ltd (Third Defendant)
Representation:	Counsel: Mr D Weinberger (Plaintiff) Dr A Greinke (First Defendant) Solicitors: HWL Ebsworth (Plaintiff) Chamberlains (First Defendant)
File Number(s):	2022/281107

JUDGMENT

1 The plaintiff (**Piety**) seeks a declaration than an adjudication determination made by the second defendant, Mr King, under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) is void, or an order quashing the adjudication determination. Piety also seeks a permanent injunction restraining the first defendant (**Megacrane**) from

enforcing the judgment debt registered by Megacrane in the District Court in respect of the adjudication determination.

2 By its cross-claim, Megacrane seeks judgment for the amount of its payment claim ($258,976.18) pursuant to s 15(2)(a) of the Act plus interest and the release of the moneys previously paid into Court.

Background

3 On 30 June 2020, Piety entered into a sub-contract with Megacrane for the supply of tower cranes and associated labour in connection with a project situated at 93 Forest Road, Hurstville (**the Contract**).

4 On 9 March 2022, Mr Liam Bailey was appointed as administrator of Megacrane pursuant to s 436A of the *Corporations Act 2001* (Cth) (**Administrator**).

5 On 14 March 2022, the Administrator sent a letter to Piety stating that he was assessing the viability of engaging a third party to provide the labour services required for Megacrane to perform its obligations under the Contract and, in the absence of such arrangement being entered into, he would have no alternative but to cease to supply labour services under the Contract.

6 On 15 March 2022, Piety issued a notice to Megacrane pursuant to cl 39.4(a) of the Contract, taking the works remaining to be completed under the Contract out of Megacrane's hands. Piety's entitlement to issue this notice arose pursuant to cl 39.11 of the Contract because of the appointment of an administrator to Megacrane.

7 On 11 May 2022, the Administrator sent Piety an email with 3 PDF file attachments. The first was a letter (described in the covering email as a "Letter of Demand") which stated:

> I refer to my appointment as the Administrator of Megacrane on 9 March 2022. I also refer to my letter of 9 March 2022.
>
> Megacrane's records indicate, pursuant to the Design and Construct Sub-contract for "Beyond East Quarter Stage 3", Piety is indebted to Megacrane in the sum of $258,976.018 (including GST), calculated as:
>
> (i) $184,207.62 for works performed prior to my appointment; and
>
> (ii) $74,768.56 for works performed (being the dry hire of two tower cranes) during the period commencing on 1 March 2022, concluding on 30 April 2022.

> Schedule of invoices for works performed prior to my appointment.
>
> [A table listing details of 50 invoices is then set out.]
>
> In that regard, I note invoices for works performed prior to my appointment have been previously provided to you, but are enclosed for further reference.
>
> You are kindly directed to make payment to the following account:
>
> [Bank account details are then set out.]

8 As noted in square brackets above, the letter included a list of invoices issued during the period from 20 April 2021 to 16 December 2021 and each of these invoices was included in the second PDF attachment to the email as one bundle. The third PDF attachment to the email was an invoice issued by the Administrator dated 11 May 2022 with the number "MH0004" and in the amount of $258,976.18 expressed to be the sum of two items:

Pre-Appointment Debts Incurred (Attached)	184,207.62
Post-Appointment Dry Hire Fees – March & April	74,768.56
	258,976.18

9 The first item refers to "Attached", which is a reference to the second PDF file being the invoices for the "pre-appointment" period. The second item for dry hire fees was described in the invoice as being for the hire of 2 tower cranes for 8 weeks at a specified rate per day, and the only invoice for that item was MH0004 itself.

10 Each invoice attached to the email (including invoice MH0004) contained the statement: "This is a payment claim issued pursuant to the *Building and Construction Industry Security of Payment Act NSW 1999*."

11 On 20 May 2022, Piety responded to the Administrator's letter of 11 May 2022 by an email which stated:

> We refer to the Subcontract, to email dated 15 March 2022 and notice titled "Notice pursuant to subclause 39.4(a) of the Subcontract" (**Notice**) and to your letter dated 11 May 2022 (**Your Letter**).
>
> Please see enclosed a copy of our Notice for your convenience.
>
> We deny that we are indebted to Megacrane in the amount stated in Your Letter or at all.
>
> As you are aware, pursuant to subclause 39.4(a) of the Subcontract, with immediate effect upon the giving of our Notice on 15 March 2022, we took out of the Megacrane Holdings Pty Ltd's (**Megacrane**) hands the whole of the

> work remaining to be completed under the Subcontract and suspended payment until it becomes due and payable pursuant to subclause 39.6 of the Subcontract.
>
> In the Notice, we also notified you and Megacrane that we will complete the work taken out of Megacrane's hands in accordance with subclause 39.5 of the Subcontract, and that the Subcontract Superintendent (as that term is defined in the Subcontract) shall perform its assessment and certification obligations under subclause 39.6 of the Subcontract when the work taken out of Megacrane's hands has been completed.
>
> We anticipate that the work taken out of Megacrane's hands will be completed on or around 30 September 2022.

12 On 3 June 2022, Megacrane made an application for adjudication of its payment claim under s 17 of the Act and, on 14 June 2022, Piety provided its adjudication response under s 20 of the Act contending, relevantly, that the adjudicator did not have jurisdiction to determine the adjudication application because (a) the payment claim relied on is not a valid payment claim, and (b) if it was a valid payment claim, Piety did not issue a payment schedule, and Megacrane was required to, but did not, issue a notice under s 17(2) of the Act before proceeding to adjudication.

13 On 14 June 2022 the Administrator provided a report to creditors in which he stated that Megacrane was insolvent and recommended that unless the Federal Court granted an extension of time for holding the second meeting of creditors of the company, the company should be wound up. Subsequently, the Administrator applied for and was granted that extension by the Court.

14 On 28 June 2022, the second defendant issued his adjudication determination in which he determined the adjudicated amount under s 22(1) of the Act to be $108,828.05 (**the Determination**). The Determination addressed Piety's argument that there was no valid payment claim in the following passage:

> 6. The issue in dispute is whether the 76 page correspondence of 11 May 2022 from the Claimant's administrator to the Respondent, as a whole, meets the requirements of a payment claim as outlined in section 13(2) of the Act.
>
> 7. Section 13(2) of the Act states:
>
> > "A payment claim –
> >
> > (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
> >
> > (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and

(c) must state that it is made under this Act."

8. Firstly, I note that the issue raised by the Respondent is a jurisdictional issue. However, I have no express power under the Act to determine a jurisdictional issue (see section 22(1) of the Act). The Respondent has not referred to any authority which establishes that I can determine a jurisdictional issue under the Act. Therefore, I am not satisfied that I can determine the issue raised by the Respondent regarding the validity of the payment claim.

9. Secondly, even if I could determine this issue, I would not have been persuaded to accept the Respondent's position on this issue. In my view, the 76 page correspondence of 11 May 2022, as a whole, meets the requirements of a payment claim as outlined in section 13(2) of the Act.

15 Later at paragraphs 19 and 20 of the Determination, it is stated:

19. The Respondent has submitted that the Claimant "had no entitlement to submit an adjudication application under the Act". The Respondent has contended that:

a) The Claimant has not served a valid payment claim on the Respondent:

b) The Respondent has not provided a valid payment schedule to the Claimant; and

c) The Claimant was required to issue a section 17(2) notice to the Respondent.

20. As discussed above, I reject those contentions. In my view:

a) The Claimant has served a valid payment claim on the Respondent;

b) The Respondent has provided a valid payment schedule to the Claimant; and

c) The Claimant was not required to issue a section 17(2) notice to the Respondent.

16 On 14 July 2022, Megacrane obtained an adjudication certificate in respect of the Determination under s 24(1)(c) of the Act and on the same day registered a judgment debt in the District Court in the amount of $121,321.50.

17 On 20 September 2022, Piety commenced proceedings in this Court and, on paying into Court the amount of the judgment debt, obtained an interim stay in the following terms:

… until the determination of these proceedings or earlier order, the First Defendant be restrained from:

c. enforcing the Judgment Debt; and

d. taking any further action to enforce the Adjudication Determination issued by the Second Defendant on 28 June 2022 with number 2022ADJT174 (Determination), including taking any further action to register the Adjudication

Certificate issued by the Second Defendant in relation to the Determination on 14 July 2022 in any other court.

Issues

18 Piety contends that the Determination is void because:

(a) a document which properly meets the description of a payment claim pursuant to s 13 of the Act was not issued by the Administrator to Piety;

(b) if contrary to (a) the Administrator issued a payment claim, Piety did not issue a payment schedule within the meaning of s 14, with the consequence that Megacrane was obliged to, but did not, issue to Piety a notice under s 17(2) of the Act; and

(c) the Adjudicator failed to exercise jurisdiction as required by s 22(2) of the Act in that he considered that he did not have the power to determine whether a valid payment claim had been issued, as contended by Piety in its adjudication response.

19 Piety also seeks a permanent injunction which, on its pleaded case, was based on an allegation that enforcement of the judgment debt given the insolvency of Megacrane would be an abuse of process.

20 If Piety fails on these issues, it will be necessary to consider the issues raised by Megacrane's cross-claim which are whether Megacrane is entitled to, first, judgment for $258,976.18 pursuant to s 15(2)(a) of the Act and, second, to the release of the moneys paid into Court.

Statutory scheme

21 In order to deal with the issues which arise, it is necessary to set out briefly the scheme of the Act. Sections 8 and 9 confer a statutory entitlement on a person who under a construction contract has undertaken to carry out construction work or to supply related goods and services, in an amount calculated in accordance with the terms of the contract (or if the contract makes no express provision with respect to the matter, it is calculated in the manner set out in s 9(b)).

22 Section 13 authorises a person who is or claims to be entitled to a progress payment (referred to as the "claimant") to serve a payment claim on the person who, under the construction contract, is or may be liable to make the payment. The expression "payment claim" is defined to mean a claim referred to in s 13.

Section 13(2) sets out what a payment claim must contain, in the following terms:

> (2) A payment claim –
>
> (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
>
> (b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and
>
> (c) must state that it is made under this Act.

23 Section 13(4) provides that a payment claim may be served only within the period determined by or in accordance with the terms of the construction contract, or 12 months after the construction work to which the claim was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.

24 Under s 13(4) and (5) a claimant may only serve one payment claim in any given month, but this does not prevent a claimant from including in a payment claim an amount that is the subject of a previous payment claim.

25 Under s 14, a person on whom a payment claim is served (referred to as the "respondent") may reply to the claim by providing a payment schedule to the claimant. The expression "payment schedule" is defined to mean a schedule referred to in s 14. The requirements for a payment schedule are set out in s 14(2) and (3) which provide:

> (2) A payment schedule –
>
> (a) must identify the payment claim to which it relates, and
>
> (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

26 If a claimant serves a payment claim on the respondent, but the respondent does not provide a payment schedule to the claimant within the time period specified in s 14(4)(b), the respondent becomes liable to pay the claimant the claimed amount on the due date for the progress payment to which the payment claim relates: s 14(4).

27 If the respondent provides a payment schedule disputing the payment claim or, alternatively, fails to provide a payment schedule and fails to pay the amount due in respect of the payment claim under s 14(4), the claimant may apply for adjudication of the claim under s 17. This involves making a written adjudication application in accordance with s 17(2) and s 17(3).

28 Sections 19, 20 and 21 deal with the appointment of an adjudicator and the procedure for determination of the adjudication application, including the provision by the respondent of an adjudication response.

29 Under s 22(1), the adjudicator is required to determine the amount of the progress payment to be paid by the respondent to the claimant (referred to as the "adjudicated amount"), the date on which such amount became or becomes payable and the rate of interest payable on that amount. The mandatory considerations which the adjudicator is required to take into account are set out in s 22(2) which provides:

> (2) In determining an adjudication application, the adjudicator is to consider the following matters only –
>
> (a) the provisions of this Act;
>
> (b) the provisions of the construction contract from which the application arose,
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

30 The adjudicator's determination must be in writing, include the reasons for the determination (unless the parties do not require reasons) and be served by the adjudicator on the claimant and the respondent: s 22(3).

31 By virtue of s 23, the adjudicated amount is payable on the relevant date referred to in s 23(1). If the respondent fails to pay the whole or any part of the adjudicated amount in accordance with s 23, the claimant may request the authorised nominating authority to whom the adjudication application was made (here the third defendant) to provide an adjudication certificate under s

24, which it may then file in a court of competent jurisdiction giving rise to a judgment debt under s 25.

32 The parties may not contract out of the scheme in the Act (s 34), but the rights, duties and remedies arising under a construction contract are preserved by s 32 (and, in particular, in proceedings in a court or tribunal relating to a matter arising under the construction contract, allowance is to be given in any award for an amount paid under the Act). Hence it can be said that the Act provides a statutory entitlement for interim payments with the final determination of the party's entitlements being determined by proceedings brought in a court or tribunal to enforce the contract: *Probuild* at [38]–[39].

33 Under s 32B, a corporation in liquidation cannot serve a payment claim or take action to enforce a payment claim or an adjudication determination.

Relevant principles

34 It is not in dispute that the adjudication determination will only be subject to judicial review if it is affected by jurisdictional error: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [2] and [29]. Jurisdictional error in this context refers to a failure to comply with one or more statutory pre-conditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it: *Hossain v Minister for Immigration & Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [24].

35 An adjudication determination will be affected by jurisdictional error if the claimant has not served on the respondent a "payment claim" which complies with s 13(2) of the Act.

36 The requirements in s 13(2) are relatively undemanding. All that is required to satisfy s 13(2)(a) is an identification of the construction work (or related goods and services) to which the progress payment relates in sufficient detail to enable the recipient to understand the basis of the claim, to determine whether to make the payment or to dispute it by providing a payment schedule in response with reasons as to why it is disputed: *Vannella Pty Ltd v TFM Epping*

Land Pty Ltd [2019] NSWSC 1379 at [76] and [78]–[79]. Similarly, the requirements in s 13(2)(b) and (c) are straightforward.

37 In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (2005) 64 NSWLR 462; [2005] NSWCA 409 Hodgson JA said:

> I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.

38 In the same case, Ipp JA agreed with the reasons given by Hodgson JA and added:

> Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2) is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15.

39 An adjudication determination will also be affected by jurisdictional error if the respondent has failed to provide a payment schedule and the application for adjudication is not made within the period specified in s 17(2)(a) of the Act: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [96], [285]. The requirements for a payment schedule, like a payment claim, are also relatively undemanding. They are set out in s 14(2) and (3) and will be satisfied where the document identifies the claim to which it is responding, what the respondent proposes to pay instead and what parts of the claim are objected to and why: *Vannella* at [135].

40 It is clear that a court must approach the question whether a document is a payment claim or a payment schedule having regard to substance rather than form, and without taking an unduly critical approach: *Ardnas (No 1) Pty Ltd v J Group (Aust) Pty Ltd* [2012] NSWSC 805 at [11]; *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333 at [20].

41 There will also be jurisdictional error in relation to an adjudication determination where the adjudicator fails to take into account one of the mandatory considerations set out in s 22(2) of the Act, and that failure is material in the sense that the decision made could have been different as a matter of reasonable conjecture if the particular consideration had been taken into account: *McNab Building Services Pty Ltd v Demex Pty Ltd (No 2)* [2022]

NSWSC 1496 at [4]–[7]. The adjudicator is bound to consider the matters in s 22(2) and not to consider other matters, and this requires a process of evaluation that is not merely a "formalistic referencing" to those matters, but errors of law in the reasoning process in determining the amount and timing of a progress payment will not constitute jurisdictional error: *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107 at [13] and [40]–[41]; *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [16]–[19].

Whether jurisdictional error is established

42 Piety submitted that the determination was affected by jurisdictional error for three reasons. First, Piety submitted that the Administrator's letter of 11 May 2022 was not a payment claim for two reasons. First, it was submitted that what s 13(1) entitled Megacrane to do was to serve a single payment claim which complies with s 13(2), but that had not occurred here because the Administrator had sent a letter which made a claim for a sum of money ($258,976.18) and provided multiple invoices, each of which was said to be a payment claim. Second, it was submitted that the Administrator's letter was not on its face a payment claim, but rather a letter of demand claiming a sum of money, and the invoices were merely "enclosed for further reference". Reliance was placed on the authorities referred to above regarding the requirements for a payment claim.

43 In my view, the Administrator's letter of 11 May 2022 needs to be considered as a whole. It was expressed to be a claim for a debt of $258,976.18 calculated as the sum of two amounts, the first being for works performed prior to the Administrator's appointment and the second being for the dry hire of two cranes for the period from 1 March 2022 to 30 April 2022. The first amount was supported by invoices previously issued for work performed prior to his appointment which were "enclosed for further reference". The second amount was supported by invoice MH0004 issued by the Administrator and dated the same date as the letter. That invoice was expressed to be a payment claim issued pursuant to the Act and it itemised the two amounts which made up the total sum of $258,976.18. On fair reading the letter, read as a whole, it is a claim for $258,976.18 in respect of amounts which are particularised in invoice

MH0004, which identifies the construction work to which it relates in sufficient detail to enable Piety to understand the basis of the claim and whether to dispute it, and states that it is a claim issued under the Act. Given the relatively low threshold for the validity of payment claims, as indicated by the authorities referred to at [36]-[38] and [40] above, the letter is a single payment claim for $258,976.18 which satisfies the requirements s 13(2) and while it includes an amount of $184,207.62 which had been the subject of previous payment claims, that is permitted under s 13(6)(b). There is no reason why a payment claim cannot also be stated to be a letter of demand.

44 Second, Piety submitted that its email of 20 May 2022 was not a payment schedule within the meaning of s 14, with the consequence that Megacrane could not make an adjudication application unless it had served written notice on Piety in accordance with s 17(2)(a), which had not occurred.

45 In my view, Piety's email of 20 May 2022 is a payment schedule, because (a) it identifies the payment claim to which it relates by the reference in the first sentence to the Administrator's letter dated 11 May 2022, (b) it indicates that no amount is proposed to be paid, by the denial of any liability to Megacrane in the third paragraph, and (c) it states the reasons for that contention in the fourth paragraph, being that Piety had elected to give a notice under cl 39.4(a) to take out of Megacrane's hands the work remaining to be completed and thereby suspending its payment obligation under cl 39.6.

46 Third, Piety submits that the adjudicator failed to discharge his statutory obligations pursuant s 22(2) of the Act by failing to deal with Piety's submission in its adjudication response that the payment claim was not a valid payment claim for the purposes of the Act. This was put in two alternative ways: first, it was said that the adjudicator had failed to take into account a mandatory consideration, being whether he lacked jurisdiction due to the absence of a valid payment claim or second, that he had failed to provide adequate reasons for his determination.

47 In my view, there is no substance to this submission. While the adjudicator doubted that he could determine whether he had jurisdiction, he went on to address in paras 9 and 20 the question whether the Administrator's letter of 11

May 2022 was a payment claim, and concluded that it was. The relevant mandatory consideration is that stated in s 22(2)(d) and he has addressed it. His reasons for concluding as he did, although brief, are stated, being that the letter read as a whole met the requirements outlined in s 13(2). For the reasons already given, in my view, this conclusion was correct. Nor has the adjudicator failed to provide adequate reasons because his stated reason (that the letter read as a whole meets the requirements of s 13(2)) is adequate.

Abuse of process

48 Piety in its Amended Technology and Construction List Statement contends that Megacrane is insolvent and as a consequence it is an abuse of process for Megacrane to exercise its rights under the Act. However, as counsel for Megacrane submitted, it is clear from *Seymour Whyte Constructions Pty Ltd v Ostald Bros Pty Ltd* (2019) 99 NSWLR 317; [2019] NSWCA 11 that unless and until a claimant goes into liquidation, the Act is capable of operating in favour of a claimant which is insolvent. Once a claimant goes into liquidation, the position changes due to s 32B of the Act.

49 However, it is possible for a respondent to seek interlocutory relief in the form of a stay of a judgment obtained pursuant to s 25(1) of the Act relying on the insolvency of the claimant on the basis that s 25(4) of the Act does not apply to a stay of the judgment pending a decision on what is effectively a cross-claim by the respondent: *Seymour Whyte* at [253]–[254]; *TFM Epping Land Pty Ltd v Deakin Australia Pty Ltd* [2020] NSWCA 118 at [72]; *Brodyn Pty Ltd t/as Time Cost & Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [85]; *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344 at [14] and [31]–[39]. As stated in *Grosvenor* at [39], where proceedings have yet to be commenced by the respondent, a condition of such a stay would be the requirement for such proceedings to be commenced within a limited period of time.

50 The principles to be applied in determining whether to grant what may be called a "Brodyn/Grosvenor stay" were summarised by Ball J in *Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd* [2016] NSWSC 1120 as follows:

[5] In determining whether to grant a stay or an injunction, the court must balance two competing policies of the SOP Act. One is that contractors should be paid promptly for the work that they have done. The other is that any payment under the Act is not intended to affect the rights of the parties under the relevant construction contract. To give effect to the second of these policies, the SOP Act specifically provides in s 32 that the court or tribunal hearing a dispute under the relevant construction contract may make such orders as it considers appropriate for the restitution of any amount paid as a result of an adjudication determination. That right may prove to be worthless if the contractor is or becomes insolvent.

[6] The factors that the court will take into account in balancing the competing policies include the following:

(a) the strength of the applicant's claim: see *Veolia Water Solutions v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459 at [73]; *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124 at [95] (where Blue J (with whom Sulan and Stanley JJ agreed) described the factor as "an important criterion"); *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397 at [19], [36] per Keane JA (with whom Fraser JA and Fryberg J agreed);

(b) the basis of the applicant's claim. Obviously, an important factor is whether the applicant challenges the adjudicator's determination. Another important factor is whether the applicant challenges the debt the subject of the adjudication determination. The absence of a challenge to the debt is a powerful factor against the grant of a stay: *Romaldi* at [110];

(c) the likelihood that the contractor will be unable to repay the amount the subject of the determination. It is accepted in this context that the policy of the Act is generally to place the risk of insolvency on the applicant: *R J Neller* at [40]. However, where there are strong reasons for believing that the applicant will be unable to recover any amount paid, that fact favours granting a stay: *Veolia* at [36]–[39];

(d) the risk that the contractor will become insolvent if a stay is granted: *Romaldi* at [101].

51 As noted in (c) above, the insolvency of the claimant is a relevant and important factor to be taken into account but, as it is not in itself decisive, I cannot determine the question whether a Brodyn/Grosvenor stay should be granted on the evidence presently before the Court. Also, counsel for Megacrane submitted, and I accept, that the question whether a stay of this kind should be granted was not raised on the pleadings, or prior to the hearing in sufficient time for Megacrane to address it properly. Ultimately, the parties were in agreement that the appropriate course was for the Court to allow a short period for the parties to put on evidence and submissions on the question whether a stay should be granted to enable Piety to bring proceedings to

determine the amount of any countervailing claim it has against Megacrane under the construction contract. I agree that this is the appropriate course.

Conclusion

52 For the above reasons, the Determination is not affected by jurisdictional error and therefore is not void. Consequently, Piety is not entitled to the relief sought in prayers 9, 10 and 11 of the Amended Summons. As I have found that the Administrator served a payment claim on Piety and Piety provided a payment schedule in response, Megacrane is not entitled under its cross-claim to judgment for $258,976.18 (which I note was a claim made for alternative relief in the event that Piety succeeded in its argument that there was no payment schedule). If the parties are not able to agree on the form of orders for a Brodyn/Grosvenor stay, I will make orders providing for a timetable for evidence and submissions to address the question whether such a stay should be granted and on what terms. As the parties have not addressed costs, those orders should also allow for the parties to make submissions on costs.

53 I will stand the matter over for a short period to allow the parties to consider these reasons.

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