

# 'Validity of Reference Dates'

## A Case Study: *MPA Construction Pty Ltd v Profine Construction Pty Ltd* [2020] VCC 1035

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### 1. Introduction:

In October 2019, the reforms to the NSW *Building and Construction Industry Security of Payment Act 1999* saw the removal of the concept of 'reference dates' by the *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW). What replaced the principle was a right to progress payment for any person who undertook work or supplied goods / services, payment claims are able to be served 'on and from the last day of the named month'.

In comparison, the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) will rely on the contract to identify a 'reference date' and in circumstances where the contract fails to identify a reference date, the Act provides a reference date of the last day of the month in which the construction work or related goods / services were supplied.

The *Building and Construction Industry Security of Payment Act 2002* (VIC) ('the Act') gives contractors the right to claim progress payments on and from each 'reference date'. Without a reference date, a payment claim cannot be made under the Act. The reference date will be stipulated in the contract; where the relevant contract fails to identify a reference date, the Act provides rules for calculating the reference date. Under section 9 of the Act, a reference date for ongoing progress payment is 20 business days after construction work was first carried out, and reoccurring every 20 business days after.<sup>1</sup>

In John Murray AM's *Review of Security of Payment Laws* (2018), the concept of 'reference dates' had been slated for abolition<sup>2</sup>, New South Wales has done so by replacing 'reference dates' with an end of month entitlement to claim payment.<sup>3</sup>

### 2. Significance:

Under the principle that the statutory entitlement to a progress payment does not arise until a reference date has arrived, the County Court of Victoria in *MPA Construction Pty Ltd v*

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<sup>1</sup> *Building and Construction Industry Security of Payment Act 2002* (VIC), s9.

<sup>2</sup> John Murray, 'National Review of Security of Payment Laws', Chapter 11: Rights to progress payments, recommendation 14, s 11.1.

<sup>3</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW), sub-s 13(1A)

*Profine Construction Pty Ltd* [2020] VCC 1035 held that the terms of the contract will permit the claimant to include in a payment claim an amount for work after the reference date.

### 3. Facts:

On or about 23 November 2018, Profine engaged MPA to provide labour, materials, plant and equipment for works at 54-56 Scott Street, Dandenong. The Contract was partly written, partly oral and partly implied.

Clause I of the 'Conditions of Contract' provided that '*MPA will endeavour to provide tax invoices in accordance with [the SOP Act] by the 1<sup>st</sup> and 28<sup>th</sup> of each month for the full value of works completed to the date of invoice*'.

In order to comply with the SOP Act Profine was to submit payment schedules within 10 days of receiving a payment claim.

MPA carried out work up to 1 November 2019. Then issued a payment claim on 18 November 2019 for the sum of \$135,668.94 (incl GST).

### 4. Issue:

The dispute between the two was whether the progress claim included works performed by the 1<sup>st</sup> or also included works conducted from the 2<sup>nd</sup> onwards.

The issue put forward by the Defendant ('**Profine**') was:

[32] '*The payment claim contained work referable to unexhausted reference dates 28 October and 1 November, but also works referable to future reference dates that had not arrived when payment claim was served- being the reference dates 28 November. The works conducted from 2 November 2019 onwards would be claimable on 28 November 2019 at the earliest.*'

The Plaintiff ('**MPA**') submitted that the distinction is irrelevant, outlining three (3) rationale:

'(a) the Contract provided that the plaintiff '*endeavour*' to submit payment claims by the 1<sup>st</sup> and 28<sup>th</sup> of each month;

(b) Section 9 of the SOP Act entitled submission of a payment claim 'on and from' a reference date; and

(c) Condition I of the Contract provided that the amount claimed may encompass '*the full value of the works completed to the date of invoice*' allowing claims for all works to the date of invoice.'<sup>4</sup>

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<sup>4</sup> *MPA Construction Pty Ltd v Profine Construction Pty Ltd* [2020] VCC 1035 at [33].

## 5. Decision:

### 5.1. Reference Date

The first point of analysis was that the statutory entitlement to a progress payment is determined by a reference date, the date is determined by the terms of the contract. The Court reiterated the High Court analysis in *Southern Han*, 'a date set by contractual force as a date for making a contractual claim to be paid the whole or part of the contracted amount'.<sup>5</sup>

The Court went on to add that:

**[76]** *'The language of s 9(1), read in light of the analysis in Southern Han<sup>6</sup> and Seymour Whyte<sup>7</sup>, creates an entitlement to a progress payment in an amount to be quantified in accordance with Part 3 of the SOP Act. The entitlement accrues on satisfaction of the each of the conditions that the person had undertaken to carry out construction work under the Contract and a reference date under the Contract has arisen'.*

**[77]** *'...progress payments to which a person is entitled as and from the reference date is a payment for work done, or for work undertaken to be done, where some element of advance payment has been argued under the contract. This is because a progress payment is an amount that a Contract requires to be paid as part of the total price for the construction work'.*

### 5.2. Contract Interpretation

A progress payment to which a person is so entitled as and from the reference date is a payment for work done or undertaken to be done, where some element of advance payment has been agreed under the contract.<sup>8</sup>

The Court concluded that:

**[80]** *"In the circumstances of the present case, the Contract provided that the plaintiff endeavour to submit payment claims by the 1st and 28th of each month; s9 of the VIC SOP Act entitles the plaintiff to submit a payment claim on and from the reference date (in this case being 18 November 2019) and condition I of the Contract provided that the amount claimed may encompass the full value of works completed to the due date of the invoice. Therefore, the payment claim was calculated by reference to the reference date in accordance with s 9(1)."*

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<sup>5</sup> *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd* (2016) 260 CLR 340 at [70].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Seymour Whyte Constructions Pty Ltd v Otswald Bros Pty Ltd (in Liq)* (2019) 99 NSWLR 317.

<sup>8</sup> *Ibid* at [228]; *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd* (2016) 260 CLR 340 at [67]; *MPA Construction Pty Ltd v Profine Construction Pty Ltd* [2020] VCC 1035 at [77].

[81] *'On a proper reading and interpretations adopted in previous cases and in this matter, the provisions of the SOP Act and the contractual terms, it is open to the plaintiff ('MPA') to include the full value of the works completed to the due date of the invoice'.*

## 6. What does this mean for you?

The case illustrates the significance of well drafted contract agreements, and that the Courts will have regard to the provisions agreed to by the parties when determining whether any reference date, which accrues allows for work done past the reference date to be claimed in the relevant invoice. In other words, when drafting contract agreements with specific reference to progress claims and the entitlement to issue a payment claim when a reference date accrues, succinct and express drafting is crucial, as the Court will administer the parties being bound to the express agreements.