Total Construction and Kennedy Civil

The Significance of the 'Characterisation Exercise'

Newsletter

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In this Newsletter, we discuss the decision in the case of *Total Construction Pty Ltd v Kennedy Civil Contracting Pty Ltd (subject to a Deed of Company Arrangement)* [2023] NSWCA 306. This landmark ruling provides invaluable insights into the intricacies of payment claim requirements as elucidated by the *Security of Payments Act.*

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Introduction

In this newsletter, we will review our recent success in the Court of Appeal in *Total Construction Pty Ltd v Kennedy Civil Contracting Pty Ltd (subject to a Deed of Company Arrangement)* [2023] NSWCA 306. In focus, we will discuss how the courts will approach assessing the validity of a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).

Facts

In February 2022, Kennedy Civil (**respondent**) entered into a subcontract with Total Construction (**appellant**) and carried out construction works on a project in Arndell Park until August 2022. From February to June 2022, each of Kennedy's payment claims were disbursed in accordance with their corresponding payment schedule.

After Kennedy fell into administration on 1 August 2022 a further payment claim was served and responded to, with Total scheduling a negative amount due to delays.

Months later on 25 October 2022, the solicitors for Kennedy's administrators sent a letter and attachments to Total. This correspondence included a demand that $545,353.18 be paid to the solicitor's trust account within 5 days, and a series of invoices with identical dates to the payment claims that were served from the period of February to August. Total did not serve a payment schedule within 10 days. As such, Kennedy pursued action in the District Court seeking to recover the stipulated amount as a statutory debt pursuant to sections 15 and 16 of the Act.

First Instance Proceedings

In the District Court, Abadee DCJ decided that the 25 October letter (**the Letter**) and attachments amounted to a single payment claim "comprising (or purporting to comprise) an aggregate total derived from the combination of the sums in the individual invoices".[1] His Honour established, that the relevant question to ask is "whether the documents reasonably convey to Total that Kennedy intended to engage the operation of the Act".[2]

When determining this question of whether the Letter complied with section 13 of the Act, His Honour had regard to the surrounding context of the claim and assessed each invoice individually. As such, His Honour ruled that the payment claim's recipient, Mr Francois, should have had "little real difficulty" in matching up the dates of the invoices to the previously submitted payment claims. Despite the shortcomings identified by Total, namely the incorrect

[1] *Kennedy Civil Contracting Pty Ltd (subject to a Deed of Company Arrangement) v Total Construction Pty Ltd* [2023] NSWDC 325, at [92].
[2] Ibid, at [93].

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