

BUILDING CONTRACTS & REGULATION QUEENSLAND

SUPPLEMENT ONE – JANUARY 2017

CHAPTER THREE – Paragraphs [3.16], [3.28] & [3.82]

[3.16.1] Access to the regime set up by the *Building and Construction Industry Payments Act* 2004 may only be available to a claimant which is a going concern and not in administration, liquidation, or bankruptcy.¹

[3.16.2] It has, after some debate, been settled that the existence of a valid reference date is a precondition to the ability to make a valid payment claim.² Dependent upon the terms of the contract in question, termination of a construction contract may prevent the accrual of reference dates after termination.³

[3.28.1] Where insolvency has intervened, in the case of a winding up or bankruptcy, set-offs will be able to be raised.⁴

¹ *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2004) 21 BCL 443, [2004] NSWSC 1230 (Supreme Court of New South Wales) (administrative); *Façade Treatment Engineering Pty Ltd (In Liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (Victoria Court of Appeal) (liquidation).

² *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd & Ors* [2016] HCA 52, with the High Court of Australia overruling the New South Wales Court of Appeal in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288.

³ *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* (Supra) (High Court of Australia)

⁴ In the case of a company being wound up under section 533C of the *Corporations Act* 2001 (Cth) and, in bankruptcy, section 86 of the *Bankruptcy Act* 1966 (Cth). These provisions will override those in the

[3.82.1] A line of authority had developed, most notably in New South Wales, that one could, in relation to a statutory demand⁵ based upon a judgement consequent upon the registration, with the court, of an adjudication decision, still raise a genuine dispute as to the existence of the debt; based upon an offsetting claim that arose under the construction contract.⁶ However, it seems now that the position is firming that this is not the case. Instead it seems that an unsuccessful respondent to an adjudication, who wishes to set aside such a statutory demand, must demonstrate that there is not just an offsetting claim, but an offsetting claim that exists as a consequence of a transaction that was separate, to that concerned with the construction contract, which was the subject of the adjudication.⁷

Building and Construction Industry Payments Act 2004 (Qld) [sections 19(6) (b), 20(4) (b) or 31(4) (a)] due to section 109 of the *Constitution* (Cth). *Façade Treatment Engineering Pty Ltd (In Liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (Victoria Court of Appeal).

⁵ Under the *Corporations Act 2001*.

⁶ For example a claim for defective work even though such a claim could not be raised against the judgment itself under section 19(6)(b), 20(4)(b) or 31(4)(a) of the *Building and Construction Industry Payments Act 2004*, see generally: *Musico v Davenport* [2003] NSWSC 977; *Max Cooper & Sons (Builders) Pty Ltd v M&E Booth & Sons Pty Ltd* [2003] NSWSC 929; (2003) 202 ALR 680; (2003) 47 ASCR 696; *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553; *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186; *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284, to name just a few.

⁷ *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 (Western Australia Court of Appeal); see also: *In the matter of Douglas Aerospace Pty Ltd* [2015] NSWSC 167; *In the matter of J Group Constructions Pty Ltd* [2015] NSWSC 1607.

[3.82.2] Another way that an offsetting claim may be raised is if the claimant in the adjudication goes into administration, liquidation or bankruptcy as applicable.⁸

⁸ Under, as applicable, section 533C of the *Corporations Act* or section 86 of the *Bankruptcy Act*. *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* (2004) 21 BCL 443, [2004] NSW SC 1230 (Supreme Court of New South Wales); *Façade Treatment Engineering Pty Ltd (In Liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (Victoria Court of Appeal).