



December 2023

The Two Competing Policies of the Security of Payment Act

CASE NOTE - Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd (Administrator Appointed) (No 2) [2023] NSWSC 682

There are two (2) competing policies of the *Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA)*.

On the one hand, contractors should be paid promptly for work done.

On the other hand, payment under the SOPA does not affect the final rights of parties under a contract.

These competing policies become complicated when a subcontractor is in financial difficulty, and money is payable to that subcontractor under the SOPA.

Imagine the following scenario.

You are a head contractor, and one of your subcontractors has a judgment debt against you based upon an adjudication determination under the SOPA, but that subcontractor is also about to go into liquidation.

You also have a substantial counter-claim against that subcontractor but you cannot pursue it under SOPA and have to wait to bring substantive proceedings against the subcontractor.

You don't want to pay the amount of that determination given the fear that the money will be lost in the liquidation and there will be no company left to sue later on.

How do you deal with this situation?

In such a case, the Court can order that enforcement of an adjudicated amount be stayed (or "paused") if the head contractor can sufficiently prove that a subcontractor is in financial difficulty and there is an irreparable prejudice that may be suffered.

This is also known as "Grosvenor stay" which stems from the case of *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico & Ors* [2004] NSWSC 344.

The recent case of *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd (Administrator Appointed) (No 2)* [2023] NSWSC 682 looked further at the circumstances in which a Grosvenor stay will be ordered.

THE FACTS AND DISPUTES

In June 2020, Piety as head contractor entered into a subcontract with Megacrane as subcontractor for the supply of tower cranes and labour for a construction project in Hurstville, NSW.

In March 2022, Megacrane went into administration, leading to Piety's concerns about Megacrane's ability to perform the terms of the subcontract.

Piety issued a notice to Megacrane under the subcontract and took over the remaining work under the subcontract due to Megacrane going into administration.

Subsequently, Megacrane's administrator issued a payment claim and obtained an adjudicator's determination against Piety under the SOPA in June 2022, and registered a judgment debt in the Court for the sum of \$121,321.50.

In September 2022, Piety commenced proceedings seeking to set aside the determination and obtained an interim order that restrained Megacrane's administrator from enforcing the judgment debt on the condition that Piety would pay the amount of the judgment debt into the Court.

Also around this time, the administrator had acknowledged that Megacrane would be in liquidation by no later than June 2023.

As such, Piety brought a further application for the Grosvenor stay, which in the subject case, sought that there should be a permanent stay of enforcement of the judgment debt as Piety will be unable to recover any costs if it ultimately sued Megacrane for its counter-claim.

In response, Megacrane's administrators:

- (a) proposed to hold funds for the judgment debt in trust for Piety, depending on the outcome of further legal processes to be commenced by Piety, and undertook that the trust would persist even if Megacrane entered liquidation; and
- (b) also provided an undertaking that it would be personally liable for any adverse costs order in the subsequent proceedings in favour of Piety.

THE DECISION

Richmond J considered the two (2) competing policies under the SOPA referred to above which was also articulated by *Ball J in Hakea Holdings Pty Ltd v Denham Constructions Pt Ltd* [2016] NSWSC 1120.

While His Honour acknowledged the risk that Piety would suffer irreparable prejudice if a stay was not granted, the administrator's undertakings overcame that prejudice.

Therefore, the Court ordered that Piety's application for a stay of enforcement of the judgment be refused.

KEY TAKEAWAYS

This case highlights the following important lessons regarding the Grosvenor stay:

1. The Court has the power to stay the enforcement of a judgment debt under the SOPA if a claimant is impecunious (or in substantial financial difficulty) and a respondent has an arguable counterclaim against the claimant;
2. Even if a respondent has an arguable counterclaim, a mere impecuniosity or insolvency of a claimant is not enough to obtain a Grosvenor stay;

KEY TAKEAWAYS CONTINUED

3. The Court considers and performs a balancing exercise between two policies under the SOPA, that is, prompt payment and the interim nature of that payment; and
4. Even if a claimant is impecunious, if there is a mechanism for a respondent to overcome a risk of irreparable prejudice for recovery of a debt by way of a counterclaim, the Grosvenor stay may not apply.

CONTACT US

If you would like more information on the above or need any assistance, please contact Kreisson on **(02) 8239 6500** or email us at **excellence@kreisson.com.au**

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