

## Be Warned: Clauses in Contracts that restrict the SOP Act will be held to be void



### Case Note: Piety Constructions v Hville FCP Pty Ltd [2022] NSWSC 1318

#### Introduction

In NSW it is generally well known that if a Respondent does not submit a payment schedule within 10 business days, a claimant can seek judgement for the amount claimed under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act).

The SOP Act does not however state the time by when a payment claim or payment schedule needs to be served and there has been much uncertainty regarding whether a payment schedule can be served after a particular time in the day or whether a contract can dictate a particular time for service.

The case of Piety Constructions v Hville now confirms that a contract cannot dictate a time when payment schedules and payment claims need to be served. This is a stark reminder to all developers or head contractors trying to modify the process in the SOP Act through complex provisions under a contract.

#### Facts

- On 2 May 2022, at 2:10pm, Piety Constructions served a payment claim to Hville under 13 of SOP Act via the Procore platform – an electronic information exchange system used by project participants.
- On 16 May 2022, Hville responded by issuing a Payment Schedule through Procore.
- At 6:30pm that same day, i.e. 16 May 2022, a senior project manager from Piety received an email from Procore with a link to the Payment Schedule. He proceeded to open the link, read the Payment Schedule, and open other documents that were attached.
- Piety commenced proceedings against Hville for the claimed amount arguing that the Payment Schedule was served out of time as it was served after 4:30pm on the 10<sup>th</sup> working day.

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## Key Issue

The key issue was whether Hville issued the Payment Schedule within the 10-business day period required by the SOP Act or whether it was out of time as it was not submitted by 4:30pm on the 10th business day as required by the Contract.

- Piety relied on Clause 7.12 of the Contract which stated that:

*“(a) A notice.... (iv) delivered electronically... at or before 4:30pm on a Business Day, shall be deemed to be a notice in writing given on the day of transmission, or in any other case of notice by the approved electronic information exchange system, shall be deemed to be given at 9:30am on the next Business Day following the day of transmission.”*

- Hville relied on the contracting out the provisions at section 34 to argue Clause 7.12 was void and that the Payment Schedule was valid as it was served on the 10th business day as required by the SOP Act.

## Decision

Stevenson J agreed with Hville and held that the Payment Schedule was submitted on time. Stevenson J also found that Clause 7.12 was void as it attempted to restrict or modify the Act:

*“the better view in my opinion is that despite the parties’ agreement in cl 7.12 of the building contract that documents delivered electronically after 4:30pm are “deemed to be given” at 9:30am the following business day, if, as a matter of fact a document delivered electronically is actually accessed and viewed on the day it is in fact sent, it should be seen as being “provided” on that day for the purposes of s 14 of the Act.”* (Paragraph 28)

*“... if cl 7.12 was to be read in the manner proposed by Piety, its effect would be to restrict, or otherwise modify, for the purposes of s 34 of the Act, the meaning of “provide” within the Act to exclude actual provision where a payment schedule is served electronically; **and would to that extent be void.**”* (Paragraph 37)

## Key Takeaways

- A contractual term must not exclude, restrict, or modify any provisions in SOP Act.
- If a document is accessed and viewed on one day, pretending that the document was served on the following day **“would be to desert reality.”** (Paragraph 30)
- Be mindful when entering construction contracts, any restrictions to the process in the SOP Act in relation to time or otherwise, will not be enforceable. When negotiating and signing construction contracts, be aware of terms that seek to modify the process under the SOP Act.
- Ensure you are aware of your rights under the SOP Act in relation to payment claims and payment schedules so that you can protect those rights when faced with a contract term that attempts to water down those rights.

For assistance with drafting contracts that clearly set out your rights, contact the team at Construction Legal.

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