



Fail to Respond, Pay the Price: Court of Appeal Upholds \$3.8M SOPA Judgment

Case Note: A J Portelli Medical Pty Ltd ATF A J Portelli Medical Trust v Black Sheep Building Pty Ltd

Executive Summary

This case confirms the importance of strict compliance with the provisions regarding payment schedules and payment of amounts under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOPA").

The Court of Appeal dismissed the appeal of the developer in favour of upholding the summary judgment that awarded the head contractor a sum of \$3,822,378.26 for two SOPA payment claims that the developer failed to pay or issue payment schedules for. A J Portelli Medical Pty Ltd (ACN 669 583 475) ATF A J Portelli Medical Trust ("**Portelli**") is the developer which engaged Black Sheep Building Pty Ltd ("**Black Sheep**") as the head contractor in a design and construct contract. ("**Contract**").

Black Sheep served two payment claims on Portelli on 21 August and 22 September 2025 ("PC3" and "PC4"). Portelli neither paid the full amounts claimed nor served a payment schedule in response to PC3 or PC4. Black Sheep commenced proceedings in the Supreme Court of NSW and sought summary judgment, asserting entitlement to recover the unpaid portions of Payment Claim 3 ("PC3") and Payment Claim 4 ("PC4") pursuant to SOPA.

Portelli's appeal questioned the validity of service for PC3 and PC4, in addition to Black Sheep's entitlement to claim progress. The Court of Appeal (Free JA, with Ward P and Griffiths AJA agreeing) granted leave to appeal but dismissed the appeal. It was held that a payment claim under SOPA need only state what the claimant claims to be entitled to, not what is objectively owed and that conditional contractual provisions can establish earlier dates for service of payment claims. Payments on account of lacking the requisite insurance. The Court of Appeal (Free JA, with Ward P and Griffiths AJA agreeing) granted leave to appeal but dismissed the appeal. It was held that a payment claim under SOPA need only state what the claimant claims to be entitled to, not what is objectively owed and that conditional contractual provisions can establish earlier dates for service of payment claims.

Facts

Portelli and Black Sheep entered a contract on 14 May 2025 for the design and construction of high physical support accommodation at North Gosford, NSW, with the contract price being \$13,944,595. Black Sheep served two payment claims under the SOP Act:

(a) Payment Claim 3 (PC3): served 21 August 2025 for \$480,004.21, covering work from 22 July to 21 August 2025.

(b) Payment Claim 4 (PC4): served 22 September 2025 for \$3,679,593.90, covering work from 22 August to 21 September 2025, plus unpaid amounts from earlier claims.

Portelli did not serve a payment schedule under the SOP Act in response to either claim. Black Sheep commenced Supreme Court proceedings and sought summary judgment. The primary judge granted summary judgement, comprising the unpaid portions for PC3 and PC4, plus interest. Black Sheep commenced Supreme Court proceedings and sought summary judgment. The primary judge granted summary judgement, comprising the unpaid portions for PC3 and PC4, plus interest. Portelli appealed.

Issues

The Court is asked to confirm whether a payment claim requires proof of work carried out as a precondition to enforcement of the liability arising from service of a payment claim.

Additionally, the Court is asked to determine if PC3 and PC4 were served prematurely.

Court of Appeal Decision

The Court of Appeal granted leave to appeal, however, ultimately dismissed the appeal. Additionally, the Appellant (Portelli) is ordered to pay respondent's (Black Sheep's) costs of the appeal and \$3,822,378.26 paid into Court by the appellant to be paid out forthwith to the Respondent (Black Sheep).

Court of Appeal Reasoning

Proof of work required for the validity of a Payment Claim:

The Court emphasised that there is no room to construe SOPA as requiring, as a precondition to payment, that the work must be objectively established to have been performed.

Section 13(1) permits a person who is “**or claims to be**” entitled to a progress payment to serve a payment claim. The claim constitutes an assertion of contractual entitlement that work has been carried out or undertaken as described. The phrase “or claims to be” forecloses Portelli’s argument that objective proof of completed work is a precondition to a valid claim.

Where a recipient wishes to resist payment, the appropriate avenue is to serve a payment schedule stating reasons for withholding payment under ss 14(2) and (3) of SOPA. Where a recipient fails to serve a payment schedule, the statutory consequence under s 14(4) is that the recipient “becomes liable to pay the claimed amount to the claimant”.

PC3 and PC4 were not served prematurely:

Portelli argued that PC3 and PC4 were served “prematurely” because they included claims for work carried out in the same month as service, relying on special conditions within the contract to argue that time clauses were conditionally invoked. The Court rejected this reasoning, holding that both conditional and unconditional contractual provisions can identify the permitted date for service of payment claims. Accordingly, PC3 and PC4 were both served at times authorised by the SOP Act. The Court also noted that s 13(5) implicitly permits a payment claim served in a particular month to relate to work carried out in that month, and s 13(6)(c) permits claims for work in a previous month.

Key Takeaways

If you receive a payment claim under SOPA, you must serve a payment schedule within the statutory timeframe. Failure to do so means you become liable for the claimed amount as a statutory debt, regardless of whether the work was actually performed.

A builder does not need to prove as an objective fact that work was performed before serving a valid payment claim. The claim is based on what the builder “claims to be” entitled to. The onus shifts to the recipient to dispute via a payment schedule.

More information

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