Landmark legal win a ‘game-changer’ for construction sector

Creditors and construction companies facing cashflow challenges are set to be the ‘big winners’, following a recent ground-breaking Supreme Court decision that makes the NSW Security of Payment (SOP) Act* available to entities in Administration – regardless of their solvency. The action** was brought by Chamberlains Law Firm on behalf of insolvency specialist Jirsch Sutherland, to recover debts owed to a subcontractor, Kennedy Civil Contracting (KCC), which had entered Voluntary Administration. The ruling is the first reported decision testing the ambit and scope of Section 32B of the SOP Act.

The matter involved executing a ‘Holding DOCA’ for the purpose of pursuing the debtors, including Richard Crookes Construction Pty Ltd, under the SOP Act. Creditors voted to execute the DOCA rather than placing KCC into liquidation. While it was acknowledged by KCC’s creditors that the company would inevitably be placed into liquidation in the future, the action was being done to ‘get around’ Section 32B of the Act. The Court, which handed down its judgment on February 10, 2023, held that the Holding DOCA was entered into to maximise returns to creditors and, as such, was entered into for a proper purpose and that KCC organising its affairs carefully to avoid operation of Section 32B was not an abuse of process.

Jirsch Sutherland Partner Trent Devine calls the judgment “a game-changer”. “It will allow Administrators to take advantage of the SOP Act when companies are insolvent (not in liquidation) via a DOCA,” he says. “This will allow collection of debts for the benefit of creditors and it will help protect subcontractors. It’s a significant development for insolvency in the construction industry, particularly in NSW, but might also have ramifications in other States, as other security of payment regimes are based on the NSW SOP Act.”

Michael Terry-Whitall, Chamberlain’s Legal Director, Litigation – Building and Construction, adds, “This judgment conclusively answers the question of whether the SOP Act can be used on behalf of an entity that’s insolvent. Construction companies facing cashflow difficulties and which enter into administration now have a far greater chance of pursuing and being paid by their debtors. Recoveries can also assist a construction company that enters into administration to fund a DOCA, while being able to continue to trade or return a far better result for creditors.

“The decision has far-reaching implications for construction companies as a whole, particularly during the current economic climate, which is placing further cashflow pressures on an already strained industry.”

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**The Building and Construction Security of Payment Act 1999.*

***Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; in the matter of Kennedy Civil Contracting Pty Ltd [2023] NSWSC 99*

About Jirsch Sutherland

Established in 1984, Jirsch Sutherland is one of Australia's leading national independent insolvency specialists. The Jirsch Sutherland team works closely with small and mid-size accounting, finance and legal firms – and their clients – to provide a wide range of expert corporate and personal insolvency services including liquidations, voluntary administrations, receiverships and bankruptcy.

With head offices in Sydney, Melbourne, Brisbane, Newcastle and Perth, supported by a network of regional offices, Jirsch Sutherland's national reach combined with a local presence underpins the company's ongoing success. For almost four decades, Jirsch Sutherland has earned a well-deserved reputation for protecting and guiding clients through the insolvency process in a fair and ethical way.

In Western Australia, Jirsch Sutherland trades as WA Insolvency Solutions (WAIS).

About Chamberlains Law Firm

Chamberlains Law Firm is a full-service firm drawing on a range of industry leading experts to provide pragmatic legal solutions to any problem. The firm has specialty legal teams for insolvency, corporate & commercial, employment, construction, insurance, personal injury, property & conveyancing, commercial litigation and private wealth, estate planning and litigation. With Chamberlain's real-world understanding, wide range of nationally-recognised expertise, and straightforward advice, it guides clients through any legal challenges. Big or small, complex or simple, start to finish.

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