

## BACKGROUNDER

### KENNEDY CIVIL CONTRACTING PTY LTD (ADMINISTRATORS APPOINTED) v RICHARD CROOKES CONSTRUCTION PTY LTD

- Jirsch Sutherland runs landmark case.
- Major win for construction companies facing cashflow challenges: SOP Act available to entities in Administration regardless of solvency.
- 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. Link to case [here](#).
- Jirsch Sutherland was appointed joint and several administrators over Kennedy Civil Contracting (**KCC**). KCC's financial position was dire, owing creditors \$5.5 million while having debtors of only \$4.4 million.
- Jirsch Sutherland engaged Chamberlains Law Firm to pursue the debts owed to KCC. Proceedings were commenced against Richard Crookes Construction Pty Limited (and others) under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act).
- On February 10, 2023, the Supreme Court handed down judgement conclusively answering the question of whether the SOP Act can be used on behalf of an entity which is insolvent. This decision has far-reaching implications for construction companies, particularly during the current economic climate, which is placing ever further cashflow pressure on an already strained industry.
- To read the judgement click [here](#) and for a more detailed summary of the case prepared by Chamberlains Law Firm click [here](#).

### The issue

There had been some contention under the Security of Payment Regime as to whether it should apply to construction companies that were insolvent or in liquidation. In 2016, the Victorian Supreme Court of Appeal said it would not,<sup>1</sup> but in 2019 the New South Wales Supreme Court of Appeal said it would.<sup>2</sup>

After industry consultation and various reviews at both a Federal and State level into the SOP Regime, New South Wales enacted an amendment to the SOP Act by inserting a new section 32B which expressly provided that the SOP Act would not apply to a construction company in liquidation.

**The decision in the Kennedy Civil Contracting Case is the first reported decision testing the ambit and scope of section 32B.**

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<sup>1</sup> Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Ltd [2016] VSCA 247

<sup>2</sup> Seymour Whyte Constructions v Ostwald Bros Pty Ltd (in liq) [2019] NSWCA 11

## **The facts**

On November 1, 2021, Richard Crookes Construction Pty Ltd (Richard Crookes) engaged Kennedy Civil Contracting to carry out civil, stormwater and associated construction works under two separate subcontracts. During the performance of the works KCC served several payments claims under Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOP Act**). Richard Crookes responded to some of the payment claims with payment schedules and failed to respond to others.

On August 1, 2022, joint and several voluntary administrators were appointed to Kennedy Civil Contracting. During the administration, the administrators formed the view that KCC was “hopelessly insolvent”. Kennedy Civil Contracting commenced proceedings seeking to recover monies owed by Richard Crookes under the SOP Act. Particularly, at a meeting of its creditors, a vote was carried to, rather than enter into liquidation immediately, execute a “Holding Deed of Company Arrangement” (Holding DOCA) for the dominant purpose of pursuing Richard Crookes under the SOP Act. It was acknowledged by Kennedy Civil Contracting’s creditors that the company would inevitably be placed into liquidation in the future, and this was being done simply to “get around” section 32B of the SOP Act.

## **The Court decision**

Richard Crookes argued that the Holding DOCA was entered into for an “improper purpose” and thus the Court should override Kennedy Civil Contracting’s creditors and terminate the DOCA, placing Kennedy Civil Contracting into liquidation. They also argued that entering into the Holding DOCA for the sole purpose of avoiding section 32B of the SOP Act was an abuse of process. The Court did not agree. The Court held that the Holding DOCA was entered into to maximise returns to creditors and as such was entered into for a proper purpose and the Kennedy Civil Contracting organising its affairs carefully to avoid the operation of section 32B of the SOP Act was not an abuse of process.

## **What it means**

Construction companies facing cashflow difficulties which enter into administration now have a far greater chance of pursuing and being paid by their debtors. Recoveries can both assist a construction company that enters into administration to fund a DOCA and be able to continue to trade or return a far better result for creditors.