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Timing is Everything: Security of Payment, Set-off and (In)solvency – *Professor Helen Anderson and Dr Matthew Bell*

Security of payment laws are meant to ensure cash keeps flowing down the chain of contractors within the building and construction industry to avoid unnecessary insolvency. However, the enforceability of security of payment obligations by companies in liquidation is currently in a state of flux because of differing judicial approaches. Recent NSW legislation and a Victorian Court of Appeal decision favour denying the payment claims of claimants in liquidation based on the possibility of an insolvency set-off in the hands of the respondent. This article argues against that approach. The policy drivers in favour of protecting set-off can be countered by equally strong arguments to support the claimant’s right to be paid regardless of its liquidation. Allowing respondents to avoid their security of payment obligations where the claimant is in liquidation provides a perverse incentive to respondents to precipitate that liquidation. We further argue that courts should not be party to this behaviour by staying payment of the respondent’s obligation while they establish their set-off or wait for the claimant’s liquidation to eventuate. 453

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