

Broad Construction Services (NSW) Pty Limited v Michael Vadasz trading as Australasian Piling Co & Ors [2008] NSWSC 1057

(21 August 2008)

FACTS:

The plaintiff (Broad Construction Services (NSW) Pty Ltd) (“the Plaintiff”) and the first defendant Michael Vadasz trading as Australasian Piling Co (“the Defendant”) entered into a subcontract whereby the Defendant would design supply and install certain piling works.

The Defendant issued a payment claim under the Building and Construction Industry Security of Payment Act 1999 (“the Act”), which was later, referred to an adjudicator, who (being the second defendant in these proceedings) found in favour of the Defendant.

The Plaintiff asserted that the adjudicator’s determination is void because it denied it natural justice or, failed to exercise the powers given to him under the Act in good faith; on the basis that the adjudicator refused to consider a geotechnical report, as a ground for rejecting the payment claim.

The adjudicator took the view that he could not consider the geotechnical report because it advanced reasons for withholding payment that had not been included in the Plaintiff’s payment schedule.

ISSUE:

Whether the adjudicator denied an appropriate measure of natural justice to the Defendant by failing to consider the geotechnical report?

FINDING:

The Court found that whether the geotechnical report went beyond the submissions “duly made” because the reasons advanced for non-payment outlined in the report were outside the ambit of the payment schedule, was a matter for the adjudicator to determine.

QUOTE:

McDougall J at 26 and 27 referred to the Court of Appeal’s decision in John Holland Pty Ltd v Roads and Traffic Authority of New South Wales (2007) 23 BCL 205:

[at 26] “the false premise is that the scope of the payment schedule and the identification of submissions “duly made” by the respondent in support of the schedule are matters to be objectively determined by this court. In my view they are not: they are matters to be determined by the adjudicator.”

[at 27] “So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.”

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[at 36] "...there could be no denial of natural justice if it were correct to regard the [geotechnical report] as something going beyond the reasons for non-payment advanced in the payment schedule."

IMPACT:

This case demonstrates that a respondent must be careful to include in the payment schedule a full explanation of reason why payment is not made.

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