

ERROL INVESTMENTS PTY LTD V TAYLOR PROJECTS GROUP PTY LTD [2005] NSWSC 1125

Supreme Court of New South Wales – 4 November 2005

FACTS

Errol Investments Pty Ltd (“Errol”) and Taylor Projects Group Pty Ltd (“Taylor”) entered into a construction contract. Taylor served two Payment Claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) (‘the Act’) on Errol in the sum of \$771,000.00. In response, Errol submitted two Payment Schedules under the Act contending that the Payment Claims were invalid because it could not “in any meaningful manner assess all parts of the claim being made”. In support of its contention, Errol, in its Adjudication Response, submitted a statutory declaration (by Mr. Norman Barnes) which said that the progress claim relied upon differed from many previous claims in respect of the same construction contract and that either it was impossible for him to assess it in a reasonable way or, later, that the claim was difficult to assess. The statutory declaration of Mr. Barnes continued to say that, nevertheless, Errol went on to endeavour to assess the claim. Errol also submitted a statutory declaration by Mr. David Collins who assisted Mr. Barnes. Two Adjudicators were appointed to determine the two Payment Claims and the matter was determined in favour of Taylor. The Adjudicator noted the statutory declaration of Mr. Collins, however, did not appear to consider the statutory declaration of Mr Barnes.

Errol then sought to appeal the Adjudication Determination on the grounds, firstly, that there was a denial of natural justice or procedural fairness on the part each Adjudicator and, secondly, that there was a failure to comply with section 22(2) of the Act. Section 22(2) of the Act sets out the matters which the Adjudicator is to consider in making his determination, including “the Payment Schedule together with all submissions that have been duly made...in support of the schedule”. In particular, Errol contended that neither Adjudicator considered material in the form of the statutory declaration by Mr. Barnes put forward as part of the submissions.

ISSUES

Whether the Adjudication Determination was void for want of natural justice and whether the Adjudicator had considered the statutory declaration of Mr. Barnes.

FINDING

The Court held that there was no basis upon which the Court could come to the conclusion that the Adjudicators did not consider the declaration of Mr. Barnes. The fact that the Adjudicator rejected the statutory declaration of Mr. Collins, yet did not refer to that of Mr. Barnes, could just as well lead to an inference that he considered it, read it, but did not think that it carried the day in an argument as to the validity of the Payment Claim. Accordingly, the Court dismissed Errol’s claim.

QUOTE

Windeyer J at paragraph 4 said:

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“There was, in addition to the statutory declaration of Mr Barnes, a statutory declaration of a David Collins, who worked with Mr. Barnes in assessing the payment claims. This declaration by Mr. Collins was referred by the adjudicator in 2005 ADST 203 who said that, following the decision of Palmer J in Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140, it was unhelpful for the purposes of the Act. From that statement and the fact that that declaration was mentioned, the plaintiff in these proceedings wishes the court to take a step which, in my view, involves an impermissible jump to reach a conclusion or to infer that, because the declaration of Mr. Collins was referred to and the declaration of Mr. Barnes was not, then the adjudicator failed to take into account material placed before him by way of submission in the payment schedule, which failure brought about a denial of natural justice making the determination void.”

IMPACT

The fact that an Adjudication Determination does not on its face show that an Adjudicator expressly considered a matter, submission or supporting document does not conclusively demonstrate that the Adjudication Determination is void for want of natural justice or a failure to comply with section 22(2) by not considering all required material.

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