

ALAN CONOLLY & CO V COMMERCIAL INDEMNITY [2005] NSWSC 339

Supreme Court of New South Wales – 29 April 2005

FACTS

A R Conolly & Company ('Alan') engaged Commercial Indemnity ('Commercial') to carry out construction works, which were an office fit out, at Alan's business premises. There was no written Contract and the works were carried out pursuant to an oral agreement between the parties, which did not make any provision for progress payments.

Commercial served by facsimile a Payment Claim consisting of three tax invoices totalling \$78,456.40. The invoices were entitled "Variations to the scope of works – various", "Variations to the scope of works – after hours labour" and "progress claim # 3" respectively, all of which carried the notation "Note: This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW".

Commercial issued a notice of its intention to apply for Adjudication under section 17(2) of the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') as Commercial did not provide a Payment Schedule within 10 days.

The matter proceeded to Adjudication and the Adjudicator considered the facsimiles to be regarded in their entirety as one Payment Claim.

Alan then sought to appeal the Adjudicator's Determination on the grounds that (1) the second and third invoices were not Payment Claims under the Act as they breached section 13(5), which states that only one Payment Claim can be made in respect of each reference date; and (2) the Adjudicator's decision to the contrary constituted a failure to comply with an essential requirement of the Act.

ISSUE

Are the three invoices, each of which complies with the requirements of the Act, served practically at the same time one Payment Claim or are they three Payment Claims?

FINDING

The Court found that based on the language and the description of the different types of work the three invoices constituted one Payment Claim as it was clear to the recipient, Alan, what was being claimed. The Court considered the case if the invoices did not constitute a Payment Claim and held that it was not an essential requirement of the Act.

QUOTE

Master Macready at paragraph 20 stated:

"The timing is something that which was emphasised... Having regard to the numbering which appears on each of the pages of the facsimile I would infer that pages two and three were received immediately after the

© Doyles Construction Lawyers 2015

This publication is intended to be a report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com

preceding page. Thus, the documents were received at a close point in time and as part of the one facsimile transmission. This has to be contrasted with an example of three separate invoices being delivered on successive days. In such circumstances clearly there would be a breach of the provisions of the Act.”

Further, [paragraph 26]:

“If the argument before me was whether the service of multiple documents simultaneously meant that legally no payment claim was served at all then a finding by the adjudicator that such multiple documents constituted a claim may well be amendable to review. But that is not the present case.”

IMPACT

A Payment Claim may be constituted by several different documents served at the same or practically the same time.

The more concerning aspect of this case, however, is the possibility that the service of multiple documents at the same time may not constitute a valid Payment Claim. Accordingly, care should be taken to ensure that form of the Payment Claim is clear.

© Doyles Construction Lawyers 2015

This publication is intended to be a report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com