

**BRECON BUILDERS PTY LTD V RIPA STEEL FABRICATIONS PTY LTD [2004]**

NSWSC 838

Supreme Court of New South Wales – 10 September 2004

**FACTS**

Brecon Builders Pty Ltd ('Brecon') entered into a sub-contract agreement with the Ripa Steel Fabrications Pty Ltd ('Ripa') to design, fabricate, deliver and erect structural steel work for a warehouse development being constructed by the plaintiff at 205-215 Port Hacking Road, Miranda.

A dispute arose between the parties, with Ripa asserting that it was owed under the contract an outstanding amount of \$217,966.55. Brecon counterclaimed for a total sum of \$267,588.32. The dispute was referred to an engineer to arbitrate the matter pursuant to the Commercial Arbitration Act 1984 (NSW) ('the Act'). The arbitrator handed down his final award ordering Brecon to pay Ripa the sum of \$186,273.24.

Brecon then sought leave to appeal to set aside the final award of the arbitrator, on the ground of misconduct pursuant to section 42 (1) of the Act. The definition of misconduct under the Act includes corruption, fraud, partiality, bias and a breach of natural justice. The basis of the claim for misconduct was that without the parties having raised any question of waiver as to the time clauses and stipulations that time was to be of the essence which appear in the contract, the arbitrator decided the matter on that basis without giving the parties notice of his intention to do so, or any opportunity to present evidence on that aspect. That is, the arbitrator having decided a major claim on a basis not put or pleaded by the parties, committed a breach of natural justice.

**ISSUES**

Should the award be set aside for a breach of natural justice?

**FINDING**

The Court ordered that the award be set aside, on the grounds that the arbitrator, without notice, reached a conclusion of fact (that Brecon did not document the delays of Ripa) not dealt with in the submissions of the parties, when Ripa was in possession of material seemingly capable of refuting the accuracy of that conclusion. As Ripa did not raise a defence at any stage to the effect that Brecon had waived the contractual stipulations as to time, the arbitrator was not entitled to assume that the parties had 'missed the real point' and thereby failed to provide the opportunity of responding to his proposed factual conclusions.

**QUOTE**

Master Macready at paragraph 39 and 40 stated:

*"It is clear that in the points of claim and reply, no issue is raised by either party as to any failure by the plaintiff to object to the defendant's delays; rather, the defendant's approach was to attempt to shift responsibility for the delays back onto the plaintiff while accepting that time remained of the essence. In*

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*such circumstances, the defendant's contention that waiver was the very subject matter of the evidence placed before the arbitrator cannot be sustained.*

*Rather, that subject matter concerned which party was responsible for failing to comply with contractual timelines that remained on foot. Accordingly, there does not appear to have been any warrant for the arbitrator to come to a finding of fact as to supposed conduct of the plaintiff that was said to have constituted a waiver, without first giving the parties the opportunity to make submissions on the matter or adduce further evidence. [40] Finally, given the centrality of the issue of delay to the plaintiff's claims and the amount thereof, it is evident that substantial injustice or unjust prejudice was suffered by it as a result of this failure of the arbitrator to give notice".*

## **IMPACT**

This case stands for the proposition that a breach of natural justice is likely to be committed where an arbitrator decides a major claim on a basis not put or pleaded by the parties.

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