

BROOKHOLLOW PTY LTD V R&R CONSULTANTS PTY LTD & ANOR [2006] NSWSC 1

Supreme Court of New South Wales – 30 January 2006

FACTS

Brookhollow Pty Ltd (“Brookhollow”) and R&R Consultants Pty Ltd (“R&R”) entered into a subcontract whereby R&R would perform demolition and excavation works. R&R served a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (“the Act”) on Brookhollow in the sum of \$169,494.25. Brookhollow did not provide a Payment Schedule in relation to the claim and the matter proceeded to Adjudication.

The Adjudicator, in a brief determination, decided that as Brookhollow had not disputed or denied responsibility for the claim, R&R was entitled to the full amount of the Payment Claim.

Brookhollow appealed the Adjudication Determination on several grounds, most significantly that the Adjudicator had not considered in good faith all the issues and had, in effect, merely “rubber stamped” Claim No 9.

ISSUE

Whether an Adjudicator’s failure to consider the issues in detail result in a lack of good faith, voiding the Determination.

FINDING

The Court held that in an adjudication, the Adjudicator needs to consider only those provisions of the Act and of the Contract that are relevant to the issues raised by the parties. An oversight or failure on the part of an Adjudicator to address a major issue will not necessarily invalidate the Determination. The court commented that it is possible that failure to deal with an issue might result from error on the part of the Adjudicator, rather than a lack of good faith in addressing the issues.

Where a Payment Claim is undefended, that is, where the Respondent does not provide a Payment Schedule, the Adjudicator need not “play devil’s advocate” on behalf of the absent respondent to test the claim for every flaw or defect and “ritualistically recite” that the Claim complies with each section of the Act. Consideration should be given by the Adjudicator, in most cases, to the existence of a contract, compliance with section 13(2), service, contractual provisions, completion of work and payment.

QUOTE

Palmer J held at paragraph 58:

“In some cases, it may be possible to say the issue overlooked was of such major consequence and so much to the forefront of the parties’ submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination.”

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com

In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties.

If the adjudicator has dealt carefully in the reasons with most of the issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result.

Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons; the Court should not be too ready to infer lack of good faith from an adjudicator's omission to deal with an issue when error alone is a possible explanation."

IMPACT

An Adjudicator should consider all issues raised by the parties in an Adjudication, as a failure to do so on a major issue may indicate a lack of good faith, voiding the Determination. However, the courts will not readily find a lack of good faith if error on the part of the Adjudicator is a possible explanation.

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