

CO-ORDINATED CONSTRUCTION CO V CLIMATECH (CANBERRA) PTY LTD [2005] NSWCA 229

Court of Appeal of New South Wales – 13 July 2005

FACTS

Co-ordinated Construction Co Pty Limited ('Co-ordinated'), as contractor, retained Climatech (Canberra) Pty Ltd ('Climatech'), as subcontractor, to provide air conditioning and mechanical services for the refurbishment project of the Gazebo Hotel in Elizabeth Bay, Sydney. Climatech submitted Payment Claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act'). The Payment Claims contained claims for delay damages or delay costs arising from EOTs, that is, for "site supervision costs" and "office overheads" as a result of a delay. These Payment Claims were not paid, Climatech submitted an Adjudication Application and the matter was determined in favour of Climatech in the sum of \$588,275.15.

In determining the matter, the Adjudicator concluded that the claims were variation claims and therefore payable. Co-ordinated sought to set aside the Adjudication Determination on the basis that, in allowing claims for delay damages and interest, the Adjudicator failed to comply with the basic and essential requirements of the Act. The Supreme Court dismissed Co-ordinated's claim that the adjudication was void, holding that delay damages can be the subject of Payment Claims under the Act, if provided for by the terms of the particular Contract between the parties. Co-ordinated appealed to the Court of Appeal primarily on the grounds that a claim for delay damages and interest could not be validly made under the Act. This was dealt with in the decision of Co-ordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Limited [2005] NSWCA 228, which held that these claims could be valid. Co-ordinated also appealed on the grounds that the payment claim was invalid as it did not adequately identify the construction work or related goods or services in accordance with section 13(2) of the Act.

ISSUE

Whether the payment claim adequately identified the construction work undertaken.

FINDING

The Court found that the claim had been adequately identified.

QUOTE

Hodgson JA commented at paragraph 25:

"In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates."

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Hodgson JA continued at paragraph 26:

“In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s.20(2B) and s.22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant’s entitlement. Generally, however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s.22(1).”

IMPACT

This case confirms the proposition that a payment claim must be reasonably comprehensible to the other party: that is, the payment claim should be supported by supporting documentation, where necessary, and should identify the basis of the contractual entitlement to the claim. Further, if the payment claim fails to adequately set out the basis of the claim an

Adjudicator may exclude that claim or determine that the claimant is not entitled to payment.

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