

**DE MARTIN & GASPARINI PTY LTD V STATE CONCRETE PTY LTD & ORS [2006] NSWSC 31**

Supreme Court of New South Wales – 11 January 2006

**FACTS**

De Martin & Gasparini Pty Limited (“DMG”) and State Concrete Pty Ltd (“State Concrete”) entered into a contract whereby State Concrete agreed to provide work and materials for a project known as Roads Waterside. State Concrete submitted a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (“the Act”) acknowledging that State Concrete had received payment from DMG in the amount of \$1,156,437 (a fact which was confirmed in the Adjudication of a previous Payment Claim) and claiming a further sum of \$168,768.05. DMG provided a Payment Schedule agreeing that the amount of \$1,156,437 had been paid but denying State Concrete’s entitlement to the further sum. The matter proceeded to Adjudication.

The Adjudicator, in calculating the amount to which State Concrete was entitled, determined that the amount that had been paid by DMG to State Concrete was \$962,143, which was less than the amount that the parties agreed had been paid. DMG appealed the Adjudication Determination, arguing that the Adjudicator had denied DMG the measure of natural justice it was entitled to receive.

**ISSUE**

Whether an Adjudicator, in light of the requirement that parties are to be afforded natural justice, may determine an issue on a basis for which neither party had contended without giving notice to the parties and an opportunity to address the point.

**FINDING**

The Court held that where an Adjudicator decides to determine a matter on which the parties agree on some other basis, it is a requirement of natural justice that he must notify the parties and allow them an opportunity to address him on the point. It followed, therefore, that the Adjudication Determination against DMG was declared void.

This requirement also applied, the Court held, to situations where the Adjudicator wished to exercise his right to depart from a prior determination (in this case in relation to the amount of payments made from DMG to State Concrete), but where neither party had requested that he do so.

**QUOTE**

McDougall J held at paragraph 21:

*“In my view, when Mr Sarlos decided to determine the obligation on the basis that the amount paid was less than the amount that the parties agreed had been paid, it was incumbent upon him, before issuing his determination, to give the parties notice and to give them an opportunity to address the point. To put it another way, when Mr Sarlos decided to reinvestigate for himself the merits of that which the parties had*

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*agreed, with a view to reaching a decision, he was required to tell them that he intended to do so and allow them to address him on the point. It was simply not open to him to go ahead without notice and decide the obligation on a basis for which neither party had contended.”*

## **IMPACT**

An adjudicator must afford the parties a reasonable opportunity to address all points considered by the Adjudicator in the Adjudication Determination, particularly where he reinvestigates a point the parties had previously agreed.

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