

GMW Urban v Alexandria Landfill [2012] NSWSC 237

FACTS

GMW Urban had constructed a waste facility at Eastern Creek and provided bank guarantees in the sum of \$695,000 under a contract made with Alexandria Landfill Pty Ltd (ALF.)

As a result of an adjudication application judgement was obtained by GMW for \$805,000. ALF had threatened to call upon the bank guarantees on the basis that there was \$360,000 owing for liquidated damages. The question of liquidated damages had been considered by the Adjudicator and he had concluded that the Superintendent had not exercised his powers in good faith and that there were strong grounds supporting an extension of time.

Accordingly, GMW sought ex parte interlocutory relief and was granted orders restraining ALF from the calling of the guarantees and the bank from paying out.

ISSUES

Whether the court would restrain the calling of the bank guarantees where the calling of the bank guarantees would vitiate the benefit of the proceedings under the Act?

FINDING

The Court held at para [15]... *"its been observed in both the Court of Appeal of Queensland and in the Court of Appeal in this state that one of the features of the legislative scheme is that it involves a conscious decision to transfer the risk of insolvency from proprietors or head contractors, to contractors, or subcontractors, as the case might be..."*

At para [16].. *" Those considerations suggest very strongly that GMW should not be kept out of the enjoyment of the fruits of its relative success in the determination..."*

The Court held at para [25]...*"In those circumstances, I think it demonstrates that the actions of ALF, in seeking to enforce its alleged entitlement to delay costs by calling upon the bank guarantees, are an attempt, through actions rather than otherwise, to dispute the limited finality of that issue which was considered and resolved by the adjudicator in this case."*

At para [26]...*"Thus without going into the merits of the other arguments raised by GMW and the merits of the responses to them, I conclude that GMW is entitled to a continuation of the interlocutory relief that it seeks."*

IMPACT

This judgment presents a substantial new ground on which resistance to the calling up bank guarantees can be made and demonstrates the Court's attempt to find a fair balance of rights and obligations in respect of bank guarantees.

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