

GLEN EIGHT V HOME BUILDING [2005] NSWSC 907

Supreme Court of New South Wales – 6 September 2005

FACTS

Glen Eight Pty Ltd (“Glen Eight”) entered into a contract with Home Building Pty Ltd (“Home Building”) (now in liquidation) for the construction of a residential apartment building at 8 Glen Street, Milsons Point. Home Building served a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (‘the Act’) in the sum of \$6,650,000 for building work carried out on the site.

The matter proceeded to Adjudication, Glen Eight submitting that no money was owed to Home Building as it had paid Home Building’s subcontractors under Clause 29.3 of the Contract, which provided that Glen Eight may pay a subcontractor instead of Home Building if no evidence is provided that the subcontractors have been paid.

The Adjudicator determined that the amount of \$2,919,000 was due to Home Building on the basis that Glen Eight had not elected to pay Home Building’s subcontractors under Clause 29.3 and did not allow a credit of \$5,700,000 which had been paid to Home Building’s subcontractors. The Adjudicator did not request submissions on the construction of Clause 29.3.

Glen Eight then commenced proceedings challenging the Adjudicator’s Determination on the grounds that it breached the essential requirement of natural justice by making a fundamental decision of law without either party knowing the Adjudicator might adopt that construction. Glen Eight sought an interlocutory injunction to restrain Home Building from applying for an Adjudication Certificate.

ISSUE

Whether an interlocutory injunction should be granted.

FINDING

The Court granted an interlocutory injunction to Glen Eight, holding that there was a serious question to be tried concerning the validity of the Adjudicator’s Determination.

QUOTE

Campbell J at paragraph 19 held:

“The way in which the failure of the Adjudicator to (as the plaintiff alleges) carry out his foreshadowed consideration of the merits of claims one by one is said to fit within the grounds which Brodyn Pty Ltd t/as Time Cost & Quality v Davenport (2004) 61 NSWLR 421 lays down as the ones on which a determination can be set aside, is that it demonstrates a failure to give bona fide consideration to the correct question.”

It is not contended that there has been any subjective lack of bona fides on the adjudicator's part, rather it is submitted that there is the kind of deficiency in his reasoning process which shows that he has not made an adequate effort to understand and deal with the issues he is required to deal with to discharge his statutory function.

It is submitted that when he has himself stated the way in which he should go about discharging that statutory function - namely by considering the merits of the claims one by one - and he has not followed his own prescription, that shows that there has not been a bona fide attempt to exercise the statutory power. I am satisfied that there is a serious question to be tried concerning that matter."

IMPACT

An interlocutory injunction is likely to be granted where an Adjudicator determines an Adjudication Application in a manner which is not satisfactory or not as he/she indicated is the proper way, his decision may be open to attack.

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com