

HALKAT ELECTRICAL CONTRACTORS P/L V HOLMWOOD HOLDINGS P/L [2007] NSWCA 32

Court of Appeal of New South Wales – 28 February 2007

FACTS

Halkat Electrical Contractors Pty Ltd (“Halkat”) was retained by Holmwood Holdings Pty Ltd (“Holmwood”) as the electrical contractor for a building project. A Payment Claim made by Halkat was referred to adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW) (“the Act”). The Adjudicator determined that Halkat was entitled to a progress payment from Holmwood of \$116,598.35. In determining Halkat’s entitlement, the Adjudicator admitted that he did not have evidence on which he could arrive at a value, but preferred Halkat’s valuation because Holmwood had made unmeritorious submissions elsewhere in its Adjudication Response which reflected on its credibility.

Holmwood brought an application in the Supreme Court to have the determination set aside. The Court found in favour of Holmwood, declaring the determination void on the basis that in preferring one assessment over the other simply because he was more inclined to believe that party, the Adjudicator had acted capriciously, and his determination was not made in good faith.

Halkat appealed this decision to the Court of Appeal.

ISSUES

Was the Adjudicator’s determination void on the grounds of lack of good faith?

FINDING

The Court of Appeal upheld the decision of the trial judge but found that rather than being void on the basis of a lack of good faith, the determination was void because the Adjudicator, in valuing the claim simply on the basis of which party was more believable, had considered matters which were outside the scope of section 22 of the Act.

QUOTE

Giles JA held [at 26 - 27] that:

“Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant’s valuation in preference to that of the respondent because of the respondent’s unmeritorious challenges to the validity of the payment claim.”

On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination “to believe the claimant rather than the respondent”: the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.”

IMPACT

In making a determination, an Adjudicator should confine their consideration to the following matters set out in section 22 of the Act:

- (a) the Act,
- (b) the construction contract,
- (c) the payment claim, together with all submissions (including relevant documentation),
- (d) the payment schedule (if any), together with all submissions (including relevant documentation),
- (e) the results of any inspection.

And parties should present their claims accordingly.