

LANSKEY CONSTRUCTIONS PTY LTD V NOXEQUIN PTY LTD (IN LIQ) [2005]

NSWSC 963

Supreme Court of New South Wales – 3 November 2005

FACTS

Lanskey Constructions Pty Ltd (“Lanskey”), the builder, was engaged in the construction of a project known as Northgate Apartments in Wollongong. Noxequin Pty Ltd (in liquidation) (“Noxequin”) was a sub-contractor to Lanskey engaged to do the formwork. Noxequin submitted a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (‘the Act’) for final payment and release of retention monies totalling \$145,849.40. Lanskey responded with a Payment Schedule rejecting Noxequin’s claims and claimed that it was owed an amount of \$21,481.92. Noxequin lodged an Adjudication Application and Lanskey lodged its Adjudication Response. An Adjudicator was appointed and determined the Adjudication in favour of Noxequin. The Adjudicator considered Lanskey’s deductions as “set offs”, however, determined that it was not necessary for the claims to be determined as Noxequin had not had an opportunity to address the reasons and determined that as a Subcontract Superintendent had not been appointed. Lanskey was not entitled to make its own assessment of its entitlement to set off. Lanskey then sought to appeal the Adjudicator’s Determination on the grounds that Adjudicator failed to engage in a bona fide exercise of power and failed to afford Lanskey natural justice in respect of the deductions.

ISSUES

Whether the Adjudicator exercised its powers in a bona fide manner.

FINDING

The Court found that the Adjudicator did not bona fide exercise his power to determine the matter as he had not considered Lanskey’s submissions contained within the Adjudication Response as to the deductions. The Court noted that this resulted in an error in the amount of \$12,435.39, a small proportion of the total claim, and considered whether invalidity in respect of only small part of the decision necessarily means that the whole decision must be set aside as being void. The Court concluded that it cannot declare some part only of the Adjudication Determination as void and, therefore, held that the whole Adjudication Determination, in this case, is void.

QUOTE

Windeyer J at paragraphs 12, 13 and 15 commented:

“[12]...the Adjudicator has considered that all 69 claims were ones relating to set off. Plainly, on the face of the documents before the Adjudicator, this was not the case. In a number of claims the plaintiff made plain in its payment schedule with support in its Adjudication Response that the defendant had not completed all the work required under the contract. If there was a claim that the Subcontractor had not performed all the work, as this was a final claim, the Adjudicator was bound to determine what amount the Subcontractor was entitled to in respect of the work that it had completed. Instead what has happened is that the Adjudicator

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has taken as his starting point the adjusted contract value less amounts paid and he has given no consideration to the omission or incompleteness of For example, the claim for liquidated damages to which the Adjudicator referred and claims for rectification works. However, there were a number of items where clearly there was reference to omissions for works not completed by the Subcontractor.

[15] The course adopted by the Adjudicator when he described all the plaintiff's claims as set offs, avoided the necessity for him to consider the very detailed documents and submissions of the plaintiff that dealt with the 69 items. Plainly on the face of the documents there was a real question about incomplete work that the Adjudicator has not considered because of the way in which he dealt with the claims as set offs. It is clear therefore that he has not considered the plaintiff submissions in this respect and this is apparent on the face of his reasons. Having regard to his obligations to consider of the submissions under section 22 of the Act this failure means that the plaintiff has not been accorded natural justice."

IMPACT

Where the Respondent includes in its Payment Schedule and/or Adjudication Response claims for set off, an Adjudicator should carefully consider whether those claims impacts on the Payment Claim and must consider all relevant claims by the Respondent.

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