

LEE KONG NELDER NOMINEES V JOHN HOLLAND CONSTRUCTION & ENGINEERING
[1998] WASCA 135

Full Court of the Supreme Court (WA) – 27 May 1998

FACTS

Lee Kong had traded as an aluminum and glazing business and had agreed to sell the business to Acegold, a company employed by one of its employees. Lee Kong at the time had a subcontract with John Holland and wished to assign that contract to Acegold.

The contract could only be assigned with the consent of John Holland and negotiations were conducted between the three parties to arrange an assignment. The three parties executed a Deed of Assignment on 18 December 1991 and the whole benefit of the contract was assigned to Acegold.

Lee Kong alleged that the Deed had left out an agreement between the parties whereby Lee Kong was entitled to payment for all work completed under the contract up to 31 October 1991. Lee Kong sued John Holland for unpaid accounts for work allegedly completed before 31 October 1991. John Holland denied that such an agreement had been made and claimed that Acegold, which had been liquidated, was entitled to payment for any unpaid work completed up to 31 October 1991.

ISSUES

Should the Deed of Assignment be rectified to include a provision that Lee Kong was entitled to payment for work completed up to 31 October 1991?

Could John Holland defend the claim on the basis that Lee Kong had unreasonably delayed its claim for payment and may have paid the claimed amount to Acegold?

FINDING

The evidence suggested that the common intention of the parties was that the Assignment of the contract would include a clause that Lee Kong be paid for work completed up to 31 October 1991. Therefore, the Deed could be rectified to reflect the correct intention of the parties. John Holland was unable to prove that it would be prejudiced if the claim by Lee Kong was allowed to proceed.

While it was true that John Holland may have paid the money to Acegold, they had not alleged that Lee Kong was not entitled to payment up to 31 October 1991 until 1994 and had been warned not to pay Acegold any of the disputed amounts. Therefore, John Holland were unable to prove that Lee Kong delaying its claim for payment unfairly prejudiced them.

QUOTE

Malcolm CJ said:

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“What is required is ‘convincing proof’ that the executed deed of assignment failed to properly reflect the antecedent agreement or the intentions of the parties ...

In my opinion, the evidence to justify rectification was clear ... There is no doubt that the intentions of the parties continued unchanged until the deed of assignment was executed ...

Once rectified, the document is treated as having been in its rectified form from the date of execution.”

IMPACT

When the other party to a contract wishes to assign their interest in the contract to a third party, the contract manager should be careful to ensure that all relevant negotiations leading up to any Deed of Assignment are reflected in that Deed.

This is especially important if confusion about the rights of the assignee and assignor are to be avoided. In this case, John Holland was exposed to possibly paying twice for the same work.

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