

**LIFESTYLE RETIREMENT PROJECTS NO 2 PTY LTD V PARISI HOMES PTY LTD**

[2005] NSWSC 705

Supreme Court of New South Wales – 11 July 2005

**FACTS**

Lifestyle Retirement Projects No 2 Pty Ltd ('Lifestyle') entered into a construction contract with Parisi Homes Pty Ltd (Parisi). Parisi served a Payment Claim under section 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') on Lifestyle, who responded with a Payment Schedule under section 14 of the Act. The matter was referred to Adjudication; the Adjudicator determining that Lifestyle was to pay Parisi \$151,000.00.

Parisi then served a statutory demand for that sum. Lifestyle commenced proceedings to set aside the statutory demand on the basis that there was a bona fide dispute as to the existence of the debt, that is, a dispute whether or not the adjudicator's determination is void.

Lifestyle submitted that the Payment Claim was not served within the time required by section 13(4) of the Act. Section 13(4) of the Act relevantly provides that a payment claim may be served only within (a) the period determined by or in accordance with the terms of the construction contract, or (b) the period of 12 months after the construction work to which the claim relates was last carried out.

**ISSUE**

Whether the compliance with section 13(4) of the Act is grounds for a bona fide dispute as to the existence of the debt.

**FINDING**

The Court found that section 13(4) was not "a basic requirement which is essential to a purported determination" but actually one of the "more detailed requirements". The Court held that section 13(4) of the Act was not grounds for a bona fide dispute as to the existence of a debt. Therefore, the statutory demand was not set aside.

**QUOTE**

Campbell J at paragraph 19 held:

*"[19] In my view, consistently with Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 390-391, the question of what was intended to be essential for compliance with the basic requirements of a determination is not decided solely by these textual matters. The fact that the language of section 13(4) is in one sense mandatory shows that it sets out a "requirement", but not that it is a basic and essential requirement.*

*Rather, the question of what is essential needs to be decided, bearing in mind the object and purpose of the legislation. It is concerned with providing a quick and relatively easy way in which an obligation to make a payment on account of what ultimately might be found to be due can be established.*

*Viewed in that light, I do not find that precise compliance with section 13(4) is a basic requirement which is essential to a purported determination actually being a determination under the Act. Rather, section 13(4) is one of the “more detailed requirements”, which Hodgson JA held exist in the Act. When there has been a document which purports to be a Payment Claim served, the fact (if it were a fact) that the construction work to which the claim relates was last carried out more than 12 months before the payment claim was served does not mean that the “basic and essential requirement” of “service ... of a payment claim (s.13)” has not been complied with.*

*And even if it turned out that the adjudicator was mistaken in deciding that section 13(4) had been complied with, that would not mean that his determination was void, when he has addressed in a bona fide way the question of whether section 13(4) has been complied with. In those circumstances, I find that there is no bona fide dispute as to the existence of the debt claimed.”*

## **IMPACT**

This case stands for the proposition that section 13(4) is not a basic and essential requirement. Accordingly, even if an Adjudicator is wrong in concluding that section 13(4) has been complied with, an Adjudicator's Determination will not void.

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