

PACIFIC GENERAL SECURITIES LTD & ANOR V SOLIMAN & SONS [2006] NSWSC

Supreme Court of New South Wales – 31 January 2006

FACTS

Pacific General Securities (“Pacific”) and Finmore Holdings, as owners, entered into a construction contract with Soliman & Sons Pty Ltd (“Soliman”) to carry out demolition and construction works at 3-11 Hawkesbury Avenue, Dee Why. Soliman delivered a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (“the Act”) to Pacific in the amount of \$440,189.98 and proceeded to Adjudication.

The Adjudicator determined that as the submissions in the Adjudication Response could not be considered or, alternatively, do not relate to the contents of the Payment Schedule, Soliman was entitled to payment of the full amount claimed.

Pacific appealed the Adjudicator’s determination on several grounds, in particular, on the ground that the Adjudication Determination was not a valid and effective discharge of the Adjudicator’s function, because the Adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, but having rejected the matters raised by Pacific simply accepted, without examination, Soliman’s claim.

ISSUES

The nature of the Adjudicator’s duties and functions and whether these had been properly discharged by the Adjudicator.

FINDING

The Court held that the absence of relevant material from Pacific does not entitle the Adjudicator to simply award the amount of the claim without addressing its merits, which as a minimum involve determining whether the construction work identified in the Payment Claim has been carried out, and what is its value. To do so would result in a breach of one of the basic and essential requirements for there to be a valid Adjudication Determination. As the Adjudicator failed to come to a view as to what was properly payable on its merits, the Court concluded that the Adjudication was void.

QUOTE

Brereton J held at paragraph 82:

“...the adjudicator’s duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.”

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Brereton J, at paragraph 86, considered that:

“...by allowing a claim in full just because a respondent’s submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator. ... In short, there would not have been an adjudication, within the meaning of the Act, of the payment claim, but only a rejection of the respondent’s contentions.”

IMPACT

An Adjudicator should be careful to consider the merits of the Claimant’s Payment Claim where there is no Payment Schedule and/or Adjudication Response, as to simply rubber stamp the Claimant’s Payment Claim may result in the Adjudication Determination being held void.

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