

PENINSULA BALMAIN PTY LTD V ABIGROUP CONTRACTORS PTY LTD [2002] NSWCA 211

New South Wales Court of Appeal – 3 July 2002

FACTS

Abigroup and Peninsula entered into an AS2124 building contract. In September 1999, Abigroup sought payment of a progress claim. In October 1999, Peninsula cross-claimed for liquidated damages, following a notice given by Peninsula alleging a substantial breach of contract by Abigroup and requiring Abigroup to show cause why Peninsula should not exercise a contractual right to terminate.

Abigroup purported to terminate on 1 December 1999 and claimed that Peninsula had breached the Trade Practices Act (TPA) by failing to disclose that it had an agency agreement on all matters relating to the design and construction of the project with the Superintendent who was hired by Peninsula. Thereafter another contractor completed the works.

The Judge at first instance found that Peninsula had breached the TPA by failing to disclose the existence of the agency agreement between it and the Superintendent. Peninsula appealed to the Court of Appeal.

ISSUES

Did Peninsula contravene s52 of the TPA by failing to disclose to Abigroup the existence of an agency agreement pursuant to which the Superintendent was Peninsula's agent in all matters relating to the design and construction of the project?

FINDING

The Primary Judge erred in his finding that failure by Peninsula to disclose the agency agreement was a breach of the TPA in that for the conduct to have been misleading or deceptive, it must have been such as to mislead or deceive in some non-trivial manner. Abigroup would have had to show some positive conduct on the part of Peninsula to convey that there was nothing inhibiting the Superintendent from acting honestly and impartially in its role. It was held that the agency agreement had no relevant impact on the Superintendent's exercise of its role to be performed in an honest and impartial manner.

QUOTE

"...the superintendent is the owner's agent in all matters only in a very loose sense, and that, when exercising certifying functions in respect of which the superintendent must act honestly and impartially, the superintendent is not acting as the owner's agent, in the strict legal sense.

In my opinion, this is confirmed by the consideration that the issue of a certificate by the superintendent does not bind the owner to any extent beyond what is prescribed by the building contract itself, so that the owner can challenge such certificates. If the superintendent was acting as the owner's agent in the strict sense, the issue of the certificate would be an act done by the owner through its agent, which the owner could not then challenge."

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IMPACT

This decision confirms that the superintendent appointed under an AS2124 contract is an agent of the Principal but not in every sense. When the superintendent is exercising certifying powers, it is not acting as an agent of the Principal. If the agreement between the superintendent and Principal had purported to restrict the superintendent's power to certify then such an agreement could be evidence of misleading or deceptive conduct or a breach of clause 23 of the AS2124 Contract.

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