

PERINI CORPORATION V COMMONWEALTH OF AUSTRALIA [1969] 2 NSWLR 530

Supreme Court of New South Wales – 22 October 1969

FACTS

Perini Corporation (“Perini”) entered into a building contract with the Commonwealth of Australia (“Cth”) to build the Redfern Mail Exchange which appointed the Director of Works as the certifier. The building contract contained a term that a Commonwealth official called the ‘Director of Works’ who could extend the time for completion of the work to such period as he should think adequate upon sufficient cause being shown to him. On many occasions Perini made applications to the Director of Works for extensions of time but many of these requests were refused because of departmental policy and other requests were only partially granted. Perini contended that the Director of Works was under a duty to act impartially and that it was an implied term of the contract that the Commonwealth was obliged to ensure that the Director of Works so act.

ISSUE

Whether there was an implied term in the contract that the certifier should act impartially.

FINDING

The Court held that the Director of Works was a certifier under the contract and as such had certain duties imposed on him by the contract, including the obligation to act fairly, justly and with skill. Although the Director was entitled to consider departmental policy, he was not entitled to be controlled by it; on the contrary, he was subject to the implied term to exercise his discretion according to the rights and obligations of each party to the contract and the contract itself. Consequently, the discretion was a narrow one. The Court also held that there was an implied term in the contract that the Commonwealth would ensure that the Director of Works did his duty as certifier.

QUOTE

MacFarlan J, at 536, commented on the role of the Superintendent:

“The characteristic of them is that there is a person appointed on behalf of the government or semi-government body to supervise the execution of the contract on behalf of his employer. He is generally a senior engineer or a director of works or a principal architect or some other officer who, because of his technical qualifications and experience, is competent to undertake that work. He is, as I have said, an employee of the body on whose behalf he undertakes this work, but, in addition, the same cases show that he is commonly charged with a duty either of resolving disputes between the contractor and the body which employs him or in certifying as to the quality of the work done or the whole or part of the cost of doing that work. In my opinion, the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the government or semi-government body, but that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship in my opinion is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed

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to accept his opinion or certificate on the matters which he is required to decide. It has also been said, and in my opinion correctly said, that the agreement of the parties is that they have referred the decision of these matters to a person who by reason of his employment and who by reason of his other duties in supervising the execution of the contract is a person who has both bias and partiality. It is now in my opinion too late to hold that an appointment of this kind is not one for which the parties to a contract cannot provide. I have already expressed the opinion that in respect of the duties imposed on him by cl 35 of the general conditions that he is a certifier. The word "certifier" does not have an exact meaning but is used to describe a function which is somewhere between those of a servant and those of an arbitrator."

MacFarlan J, more specifically, said at 538:

"The kind of interest which must govern the exercise of the director's discretion is the interest of each party as it appears from all the provisions of the agreement. The interest in this sense, in my opinion, is measured both by the rights and obligations of each as they appear from the various provisions of the contract. Indeed, in my opinion the discretion is of a narrow scope... In my opinion, though without attempting to embrace every case that could arise or perhaps has arisen in the course of the current disputes, the director would be obliged to consider the contractual rights and duties of the plaintiff."

MacFarlan J also held at 542 that:

"...the duty of the Director when acting as Certifier was to act independently and in the exercise of his own volition according to the exigencies of a particular application."

Further, MacFarlan J commented that:

"In my opinion [Perini] and [Commonwealth], being the parties bound by this agreement, are bound to do all co-operative acts necessary to bring about the contractual result."

IMPACT

This case stands for the proposition that the Courts usually imply a term into the contract that the Superintendent will act, and the Principal shall ensure that the Superintendent will act, in a fair, unbiased and competent manner.

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