

RENARD CONSTRUCTIONS (ME) PTY LTD V MINISTER FOR PUBLIC WORKS

FACTS

The Minister for Public Works (“the Principal”) entered into two NPWC contracts with Renard Constructions (ME) Pty Ltd (“the Contractor”) for the construction of pumping stations as part of a sewerage project in the Gosford/Wyong area.

After the Contractor commenced work, delays occurred, and the Principal gave notice to the Contractor under Clause 44.1 of the contract calling on it to show cause as to why the Principal should not take over the work or cancel the contract. The Contractor responded indicating that the Principal had not yet supplied materials which under the contract it was required to supply, and the work would be completed soon after its supply. The Contractor was instructed to proceed, and further delays occurred. After concerns that the delays were due to poor workmanship the Superintendent recommended the Contractor be called upon to show cause under Clause 44.1 in respect of both contracts. Clause 44.1 conferred power to take over the whole or any part of the work or to cancel the contract. The Contractor indicated that it was willing and able to complete the contracts with a reasonable time and that it considered the action a repudiation of the contracts.

The Superintendent, who was not fully informed of the relevant circumstances by the Principal, recommended cancellation of both contracts and the Principal took over the remaining works. The matter was referred to arbitration, the Supreme Court and appealed in the Court of Appeal on the grounds that the Principal was unreasonable in exercising its power to take over the work and exclude the Contractor from the site, in breach of an implied condition of the contracts.

ISSUE

Whether the Principal was under a duty to act reasonably.

FINDING

The Court of Appeal held that Clause 44.1 should be construed as requiring the Principal to act reasonably as well as honestly in forming the opinion that the Contractor had failed to show cause to his satisfaction and thereafter in deciding whether or not to exercise the powers conferred; this derived from the ordinary implication of reasonableness, the provision for the Contractor to be given an opportunity to show cause against the exercise of the power and the provision enabling disputes to be referred to arbitration.

The Court of Appeal also considered that the duty of good faith and equitable interference in the exercise of legal rights is relative to considerations of reasonableness.

QUOTE

Priestly JA commented at 263:

“The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith...”

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At 265, “in ordinary English usage there has been constant association between the words fair and reasonable.

Similarly, there is a close association of ideas between the term’s unreasonableness, lack of good faith, and unconscionability. Although they may not be always co-extensive in their connotations, partly as a result of the varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses there is a great deal of overlap in their content...”

[268] further commented: “As the words in the sequence of statutes show, the ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.”

IMPACT

This case stands for the proposition that reasonableness may overlap and be indistinguishable from good faith. Accordingly, in the event of a Contractor’s challenge to the reasonableness of a direction by a Principal, it is important to consider both the reasonableness of the Principal’s actions and whether the Principal was acting in good faith. (1992) 26 NSWLR 234