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TOLFAB V TIE [2005] NSWSC 326

Supreme Court of New South Wales – 5 July 2005

FACTS

Tolfab Engineering Pty Ltd ('Tolfab') entered into a sub-contract arrangement with Tie Fabrications Pty Ltd ('Tie') for metalwork for a residential development known as the "Oxford Square Project" located on the corner of Oxford Street and Pelican Street Oxford. Tie served a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') claiming $351,270.48 for work done under the Contract. Tolfab responded with a Payment Schedule under the Act. The Payment Schedule included a table which provided a description of the works, job value, claimed to date, claimed previous, approved this claim and outstanding claim. This was a formula the parties had used in previous progress claims.

Tie lodged an Adjudication Application addressing many of the claims in detail. In answer, Tolfab launched into a substantial amount of detail in its Adjudication Response. The Adjudicator determined the Adjudication in favour of Tie, determining that the full amount of the Payment Claim should be paid. The Adjudicator in his Adjudication Determination referred to the fact that the matters of dispute in the Adjudication Response were not dealt with in the Payment Schedule and therefore he could not consider them in his Adjudication Determination under section 20(2B) of the Act.

Tolfab, in these proceedings, contended that the Adjudication Determination was void on the grounds that the Adjudicator failed to take into account the facts and submissions contained in its Adjudication Response which constitutes a breach of the rules of natural justice.

ISSUE

Was the formula used in the Payment Schedule sufficient to allow Tolfab to rely on further reasons in its Adjudication Response?

FINDING

The Court found that the reasons were sufficient as the formula used provided a clear indication of the value of the work performed. The Court also found that the measure of natural justice that the Act requires to be given extends to a failure to consider submissions under section 22(2)(d) of the Act. However, in the circumstances, the Court found that the Adjudicator had considered the Adjudication Response in the alternative and thus there was no breach of natural justice.

QUOTE

Associate Justice Macready at paragraphs 25 to 27 held:

"[25] In the present case the heading in the payment schedule "Approved This Claim" and the use of a percentage figure in the context of the other headings was a clear indication of the value of the work performed to the date of the claim. It is plainly apparent that the defendant understood that this is what was

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meant by the payment schedule... There can thus be no question of ambush by the plaintiff as the defendant knew by the time it had to make its adjudication application the ambit of the dispute and could thus address it in its application for consideration by the Adjudicator.

[26] In my view the payment schedule indicated why the amount was less and to the extent that it may have been necessary to do so it gave reasons for withholding, being, inter alia, that the value of the work completed was less than claimed. This was a formula the parties had used in their documentation over the previous progress claims.

[27] It seems, therefore, that the Adjudicator was obliged to consider the matters in the response dealing with this area."

IMPACT

A Payment Schedule which provides a clear indication of the value of the work in a wide variety of forms, may be sufficient to allow a Respondent to rely on reasons in its Adjudication Response if it puts the Claimant on proper notice of the ambit of the dispute. Further, an Adjudicator is wise to consider submissions in the alternative where practicable.

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