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Walton v Illawara [2011] NSWSC 1188

FACTS

Illawarra engaged its architect to be the Superintendent. She awarded certain extensions of time and valued variations that Walton had to undertake. Disputes arose as to the EOTs granted and the values given to the variations. The disputes were referred to a referee who determined that Walton was entitled to significantly more EOTs than had been granted and higher values for the variations. Walton then sued Illawarra for a breach of the contractual term that required Illawarra to ensure that the Superintendent acted honestly and fairly. The contract was an AS 2124 - 1992.

ISSUE

In the circumstances where it had been determined that Walton was entitled to more EOTs and values for variations than the Superintendent had allowed, was Illawarra in breach of the term of its contract with Walton that required it to ensure that the Superintendent acted honestly, fairly and reasonably.

FINDING

The Court held that the obligations on the Superintendent were to act honestly and fairly and determine reasonable EOTs to be granted where Walton had shown a right to them and to determine reasonable values for the variations. She could act honestly and fairly, but if she did not arrive a reasonable decision in respect of EOTs and the value for variations, then Walton had not received what it was entitled to receive under the contract and Illawarra was in breach. Damages were the difference in values for the variations, delay costs etc arising from the extra EOTs to which Walton was entitled.

QUOTE

McDougall J at [42]:

"...the contract requires, in relation to extensions of time, both that the Superintendent's manner of exercise of her functions must be honest and fair and that the product of her deliberations must be reasonable. It follows that, even if the Superintendent had acted honestly and reasonably, Walton could not be bound by her determination if that determination did not meet the description "a reasonable extension of time". That is because, by definition, it would not have got what it was entitled to receive."

[at 75]

"It must follow that, if in any respect the Superintendent failed to arrive at a reasonable measure or value of work, quantity or time, Illawarra has breached that obligation by not ensuring that she do so."

IMPACT

The case shows that the obligations under cl 23 of the AS 2124 contract are not just window dressing. If a Court determines that a contractor is entitled to more than the Superintendent has allowed, damages will

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flow from a breach of cl 23. The case also highlights the nature of the provisions which Superintendents should insist that a Principal include to protect the Superintendent from criticism.

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