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Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd [2018] VSCA 751

FACTS

On 10 June 2011 Coliban Heights Pty Ltd (**the Applicant)** entered into four (4) contracts with Citisolar Vic Pty Ltd (**the Respondent**) for the 'supply and install of photovoltaic electrical systems at four (4) locations' for the total sum of $72,600. The Applicant paid a deposit, the sum of $7,260, and the installations were completed in August 2011.

On 30 June 2012, the Respondent applied to VCAT for payment of the balance of the contract price whereas the Applicant counterclaimed breach of contract and damages on the basis that the Respondent failed to provide to the relevant authorities by a deadline of 30 September 2011, the paperwork that would have allowed the Applicant to qualify for a premium C-IM tariff and further, that the systems installed were incomplete and/or defective.

On 19 July 2013, the Applicant sought to terminate the contracts pursuant to s.267(3)(a) of the ACL and gave notice of the termination by its amended defence and counter-claim filed in VCAT.

In addition, the parties obtained expert reports, which identified various defects in the installation of the systems.

The parties entered into terms of settlement – providing for a payment to the respondent upon rectification works, which failed. In July 2015, the parties' reconvened the Tribunal hearing, which found that the cost of the rectification work was $2,200 and concluded that the sum due to the Respondent was $44,465.00.

The applicant sought leave to appeal pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the 'VCAT Act'**) to a judge in the Trial Division of the Supreme Court. It contended that the Tribunal had not validly applied the relevant provisions of the ACL, being s.269 rather than s.270.

The Applicant contended that it was entitled to terminate the contracts and recover any money paid for the services of the Respondent following upon the findings of the Tribunal that there were 'major faults' with the services performed by the Respondent, despite acceptance of the goods under the Contract.

The judge in the Trial Division refused the applicant leave to appeal from the decision of the Tribunal. The applicant now seeks leave to appeal from that refusal.

ISSUES

i. Whether a consumer can terminate a contract for goods and services under s.269 of the ACL based on 'major failure' pursuant to s.267(3)(a), having accepted the goods under the contract, but terminating based on major service failure.
ii. Whether termination is affected by only applying s.269, the termination provision, and whether s.270, the return of the goods under the contract, is read as a consequence of s.269, not as a requirement.

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FINDING

Tate JA, Kyrou JA and McLeish JA construed the relevant provisions of the ACL and found that under 269(2)(a), termination of a contract needs to be made known to the supplier of services, and the words of s.269 stipulates when termination is to take effect, but not to be read as what is required to constitute termination.

Their honours further state that a party who has chosen to accept the goods is suggestive that the intention is to not to terminate the contract under the ACL, stating, at [49] *"the purpose of s 270(1) is to create obligations regarding return of the goods and the payment of a refund to the consumer. It is predicated upon the deemed rejection of the goods, which emerges as a key feature of the statutory scheme for determining the consequences of a termination of a contract for services with which goods are connected".*

Their honours further found that the return of the goods, or deemed rejection of the goods, must occur reasonably after the act of termination under s.269 of the Act, but if the goods are accepted and other acts occur to manifest that acceptance, then termination of the contract cannot have been intended. Thus, the rejection of the goods and/or non-acceptance, is a requirement to validly invoke the termination provision under s.269 of the ACL.

QUOTE

Their honours held that:

[50] the judge was therefore not in error in his construction of the relevant provisions of the ACL. However, strictly speaking, it was not the applicant's failure physically to return the goods that betokened an intention not to terminate the contracts under s 267. As the applicant submitted, the obligation to return the goods would have arisen only after the act of termination. The inconsistent conduct was the applicant's acceptance of the goods, in circumstances where termination of the contracts necessarily involved rejecting the goods. The applicant's acceptance of the goods, manifested in particular by its acceptance of rectification works, was simply inconsistent with it having terminated the contracts for services.

IMPACT

This case highlights that invoking s.269 - termination of a goods and services contract under the ACL the terminating party must show non-acceptance of the goods and failing to return the goods or returning the goods outside a reasonable time after giving notice of termination, will invalidate the termination.

Thus, it can be seen that s.269 of the Act is predicated upon s.270 in that the deemed rejection of the goods under contract is a requirement, not a consequence of a valid termination under the ACL.

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