

CO-ORDINATED CONSTRUCTION CO v CLIMATECH (CANBERRA) PTY LTD
[2005] NSWSC 312

Supreme Court of New South Wales – 13 April 2005

FACTS

Co-ordinated Construction Co Pty Limited ('Co-ordinated'), as contractor, retained Climatech (Canberra) Pty Ltd ('Climatech'), as subcontractor, to provide air conditioning and mechanical services for the refurbishment project of the Gazebo Hotel in Elizabeth Bay, Sydney.

Climatech submitted Payment Claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). The Payment Claims contained claims for delay damages or delay costs arising from EOTs, that is, for "site supervision costs" and "office overheads" as a result of a delay. These Payment Claims were not paid, Climatech submitted an Adjudication Application and the matter was determined in favour of Climatech in the sum of \$588,275.15. In determining the matter the Adjudicator concluded that the claims were variation claims and therefore payable.

Co-ordinated sought a permanent injunction restraining Climatech on the basis that, in allowing the claims arising out of EOTs, the Adjudicator failed to comply with the basic and essential requirements of the Act. The failure was said to have arisen in the following way: (1) the Act requires Payment Claims to identify the "construction work to which the progress payment relates" and requires that the claimed amount and the progress payment be "for construction work carried out"; (2) that the delay damages arising from EOTs are not amounts due "for construction work carried out"; and (3) a basic and essential requirement of the Act – that the claimed amount and the amount awarded be for construction work carried out – has not been complied with by the awarding of the determination.

ISSUE

Whether claims for delay damages are properly the subject of Payment Claims under the Act.

FINDING

The Court found that the Adjudicator's determination was valid even though he had fallen into error in determining the claims were variation claims rather than delay damages associated with EOTs. Such an error was not a failure to comply with the "basic and essential requirements of the Act". Accordingly, the Adjudicator's determination was held valid. The Court also held that claims for delay damages can be the subject of Payment Claims under the Act, if provided for by the terms of the particular Contract between the parties.

QUOTE

Bergin J at paragraph 38 stated "...the provision of "related services", ... are defined in the Act to include "the provision of labour to carry out construction work": s 6 (1)(b)(i). Notably, that definition is not expressed as "the provision of labour for construction work carried out". Rather, it seems to me to envisage, consistently with the practical reality of the construction industry, the provision of the labour force for the particular project that will be available "to carry out construction work". It is that "provision" that is able to be the subject of the progress claim and a payment claim under the Act. It also seems to me to encompass not only the cost of the labour but also the cost of what is needed to be in a position to enable its "provision", for instance, a proportion of the overheads of the business. If the labour force is provided on days when there is no "construction work" for it to carry out on the site caused by any qualifying reasons under the relevant contract, then it seems to me that the Act contemplates that, because labour was "provided" on site "to carry out construction work", the contractor is still entitled to be paid for the cost of that provision as a "related service". If the Superintendent awards an EOT, delay damages or costs may be claimed as an amount for that related service. However this must be subject to the terms of the particular contract between the parties.

IMPACT

This confirms the proposition that claims for delay damages can be the subject of Payment Claims under the Act, if provided for by the terms of the particular Contract between the parties but care still should be exercised when preparing the Payment Claim.

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NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com