



Walton Constructions (Qld) Pty Ltd v Robert Salce & Ors [2008] QSC 235 (3 October 2008)

FACTS:

The applicant Walton Constructions (Qld) Pty Ltd (“the Applicant”), was the builder engaged by the owner to perform work at a child care centre. The Applicant subsequently engaged Eastwing Contracting Pty Ltd (“Eastwing”) as subcontractor who in turn subcontracted certain plastering work to Robert Salce (“the Respondent”). The Applicant guaranteed payment by Eastwing to the Respondent.

The Respondent obtained judgment against the Applicant in the District Court of Queensland pursuant to an adjudication decision of its payment claim against the Applicant, which was now stayed by the Supreme Court pending determination of this application.

ISSUE:

This application involves, among other things, a question to be determined by the Court, namely whether there was a valid ‘construction contract’ in terms of the *Construction Industry Security of Payment Act 2004 (Qld)* between the Applicant and the Respondent such as to allow the Respondent to obtain a decision under the Act against the Applicant.

FINDING:

That there was no “construction contract” in the terms of the Construction Industry Security of Payment Act 2004 only a contract of guarantee, and that the adjudicator erred in his decision in favour of the Respondent. The Court set aside the adjudicator’s decision and held that it was invalid.

QUOTE:

McMurdo J said: [at 20]

“This case...is clearly within s 3(3)(c)(ii) with the result that the Payments Act does not apply to Walton’s undertaking to pay him. The result is not inconsistent with the objects of the Act. Walton’s undertaking is in the nature of a guarantee because it was a collateral undertaking to answer for the debt or default of Eastwing, against which Mr Salce retained his contractual right to payment, and his statutory right to progress payments according to the Payments Act.

On the other hand, if s 3(3)(c)(ii) did not apply to exclude the operations of the Act in Walton’s case, the result would be that Mr Salce would be entitled to progress payments and to the regime of adjudication, against different parties and under different construction contracts, but for the same work. Similarly Walton could be subjected to simultaneous claims for progress payments by Mr Sales and Eastwing for the same work, and to different adjudications. (Apparently this has occurred here).

It is unremarkable then that according to s 3(3)(c)(ii), the guarantor should be obliged to pay only what and when the principal debtor must pay, and should not be subject to progress claims or an adjudication by which the guarantor’s liability could be different.”

IMPACT:

This case demonstrates the distinction between the provision of a guarantee and the definition of a “construction contract” under the Payment Act (Qld), and excludes a guarantee being used as a basis of a payment claim under the Construction Industry Security of Payment Act.

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