



Illawarra Retirement Trust v Denham Constructions Pty Ltd [2015] NSWSC 823

FACTS

Illawarra Retirement Trust (**Plaintiff**) and Denham Constructions Pty Ltd (**Defendant**) entered into a contract for the construction of a residential aged care facility. On 15 May 2015, the Plaintiff purported to end the contract in reliance on a ‘*termination for convenience*’ clause noting in the termination notice its ‘effect from Friday 29 May 2015’. Subsequent to receiving the termination notice, the Defendant issued two payment claims on 27 and 29 May 2015 under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).

The Plaintiff commenced proceedings in the Supreme Court of NSW by way of Summons seeking interlocutory and final injunctive relief restraining Denham from acting on the payment claims and applying for adjudication. The Defendant withdrew its Payment Claim dated 27 May 2015 during the proceedings narrowing down the issues in dispute. The Plaintiff contended that the remaining pressed payment claim was not a valid claim under the Act and therefore could not be subject of a valid adjudication under the Act on the basis that:

- 1 there was no reference date to support the payment claim post termination as a reference date did not arise; and
- 2 the payment claim included a ‘cash held’ item relating to security and not claimable under the Act and it did not identify the particular work in which the claim was made.

ISSUES

The validity of the Payment Claim

- Whether the contract was terminated before the last business day of the month (29 May 2015) so as to give rise to a reference date under the Contract entitling the Defendant to a progress payment under the Act;
- Whether a reference date arising on the last business day of the month was available for the claim
- Whether the “cash held” (security retained by the Principal) invalidated the payment claim in part or in whole.

FINDING

Darke J determined that the reference date arose at a time when the contract was on foot as the termination did not take effect until 29 May 2015 (as the parties held discussions and agreed that termination would not take effect until 29 May 2015) and therefore the payment claim dated 29 May 2015 was a valid claim.

He also determined that the inclusion of an item concerning an amount of security called upon by the principal did not invalidate the payment claim and that such matters would themselves form part of the adjudicator’s role in accordance with Section 22 of the Act. The Plaintiff’s Summons for injunctive relief was dismissed.

QUOTE

Darke J held that:

[27] “...the issue of the Notice of Termination (which did not clearly identify the time when the termination would take effect) the parties held discussions and agreed that the termination would not take effect until the end of 29 May 2015. In those circumstances, 29 May 2015, being the last Business Day in May, became a reference date under the contract. Accordingly, on and from 29 May 2015 the defendant was a person entitled to a progress payment within the meaning of s 8(1) of the Act, and was therefore able to serve a payment claim using 29 May 2015 as the relevant reference date.”

[33] “... the inclusion of the “cash held” item in the payment claim does not in my view invalidate it, either in whole or to that extent. It is merely an item that forms part of the actual monetary position between the plaintiff and the defendant which may be taken into account in the determination of the amount (if any) that should be paid to the defendant in respect of its claim. It is not expressed to be an amount claimed in respect of any particular construction work, and it does not seem to be a claim, as such, for release of an amount held by the plaintiff (c.f. s 13(3)(b) of the Act). Neither is it expressed to be a claim for damages, a *quantum meruit* or other claim for restitution.”

IMPACT

The case highlights the importance of identifying in Notice of Termination, the effective date and time of termination and the effect it may have on reference dates giving rise to rights to progress claims under the Act and the inclusion of security does not give rise to an invalid claim.

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