

MINISTER FOR COMMERCE v CONTRAX PLUMBING & ORS
[2004] NSWSC 823
Supreme Court of New South Wales – 13 September 2004

FACTS

The Minister for Commerce ('the Minister') and Contrax Plumbing (NSW) Pty Ltd ('Contrax') entered into a construction contract where Contrax as builder undertook to carry out construction work for the Minister as principal. Clause 42 of the Contract provided that the "in aggregate, payment claims shall not exceed the Contract Price" and "in valuing work, regard shall not be had to the value of variations which value has not been included in the Contract Price".

Contrax served a Payment Claim pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") claiming an amount of \$2,662,645 for works performed, and thus excluding the Contract Price. In support of its claim, Contrax relied on s.34 of the Act and submitted that cl 42 was void as it purported to exclude, modify or restrict the operation of the Act. The adjudicator determined that Contrax was to be entitled to a payment of \$1, 519,014.99 on the grounds that cl 42 was void.

The Minister then applied to quash the determination on the basis that the adjudicator erred in law in his construction of section 34 of the Act and by concluding that provisions of the contract were void. Contrax submitted contended that the Act created a statutory entitlement to a progress payment in respect of construction work and that a mechanism that displaced or delayed that entitlement was caught by s.34 of the Act.

ISSUES

Did the adjudicator err in law in his construction of s. 34 of the Act?

FINDING

The relevant contractual provisions exclude, modify or restrict the operation of the Act because, if relied upon, they defer the entitlement given by s 8 (1) of the Act to be paid from a reference date for construction work carried out prior to that reference date. That is, under the contractual regime, once the Contract Price had been paid out, Contrax would not be entitled to a further progress payment. It follows that the adjudicator was correct to disregard those provisions of the contract in assessing and making his determination on the grounds of s 34.

QUOTE

McDougall J at paragraphs 39 and 40 stated:

"The "amount that is to be valued in accordance with s 9 is the amount of a progress payment to which a person is entitled in respect of a construction contract. The entitlement in question is that given by s 8 (1). It is given to a person who has undertaken to carry out construction work and it is given on and from each reference date under the contract. It may be correct to say that the Act operates to supplement rather than to displace contractual entitlements. As Austin J put it in *Jemzone v Trytan* [2002] NSWSC 395 at [37], "the Act.... Generally leaves it to the construction contract to define the right of the parties but makes "default provisions" to fill in the contractual gaps". However, as s 34 makes clear, the contractual regime cannot diminish rights given by the Act.

"Generally speaking, the Act seeks to strike a balance between freedom of contract on the one hand and protection of the statutory rights to a progress payment on the other. It is at least arguable that the amendments to s 34 effected in 2002 have swung the balance somewhat away from freedom of contract and somewhat towards strengthening the rights given by the Act."

IMPACT

A provision in a construction contract that diminishes, displaces or delays a contractor's entitlement under the Act to payment for construction work will be void.