

REIBY STREET v WINTERTON
[2005] NSWSC 545
Supreme Court of New South Wales – 16 June 2005

FACTS

Reiby Street Apartments Pty Ltd ('Reiby') entered into a Contract with Winterton Constructions Pty Ltd ('Winterton') for the construction of a two-level basement car park, 23 residential apartments and four shops in Newtown, Sydney. Winterton served a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') on Reiby and the matter proceeded to Adjudication. The Adjudicator then determined the matter, however, it was not issued within the time required by the Act (10 days). Shortly thereafter the fees were paid and the Adjudicator gave his determination. Reiby then requested reimbursement of the fees paid on the basis of section 29(4) of the Act, namely, that the Adjudicator is not entitled to be paid his fees if he fails to make a decision within 10 days. Winterton served a second Payment Claim for \$242,195, which again proceeded to Adjudication. The same Adjudicator was nominated for the second Payment Claim. Reiby requested that the nomination be reviewed because of a dispute about the fees of the earlier determination. The Adjudicator responded advising that no bias existed on his part and determined the Adjudication. After the second determination had issued, Reiby sought judicial review of the Adjudication Determination on the grounds of apprehended bias. Winterton submitted that there was no reason as to why the Adjudicator would not approach the task in an impartial manner as he had no interest in the result.

ISSUE

Whether there was a reasonable apprehension of bias.

FINDING

The Court found that Reiby's request was a courteous demand for payment for a refund of fees and that the Adjudicator did have an interest in the result because he was facing a demand to return his fees. Accordingly, the Court held that there was a reasonable apprehension of bias. On this basis, the Court found that Adjudication Determination was void and should be set aside.

QUOTE

Master Macready at paragraphs 28 and 29 stated:

"[28] The plaintiff's submission was that the principle relating to apprehended bias was to be applied with greater rigor in the context of adjudications under the act compared to judicial proceedings. The first reason was said to be the fact that judges by their training are conscious of these matters and have taken a judicial oath and secondly that appeals do not lie from decisions of adjudicators under the act. Reference was made to *Commonwealth Coatings Corp. v Continental Casualty Co.* 393 US 145 at 149 (1968) (21 L. Ed. 2d 301 at 305), where the court said: "[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review".

[29] The force of the last proposition is negated by the provisions of section 32 of the Act which will allow the dispute resolution procedures in an ordinary building contract to be used as a medium for adjusting the parties' rights following upon the interim determinations of the adjudicator during the course of the contract. The first proposition is certainly true and I feel that it is appropriate to be somewhat more particular in the case of an adjudicator rather than a judicial officer although this must depend upon the community's continued general acceptance of the role of judicial decisions in our society."

IMPACT

This case stands for the proposition that an Adjudication Determination is void if there is an apprehended bias on the part of the Adjudicator and very high standards are expected by the Court. The more concerning aspect of this case is that a disgruntled party to a determination under the Act may have an escape mechanism and avoid the effect of a determination in the event that the determination is unfavourable by making a request for a different Adjudicator on the grounds of bias.

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