

**THE MINISTER FOR COMMERCE (FORMERLY PUBLIC WORKS & SERVICES) v
CONTRAX PLUMBING (NSW) PTY. LIMITED & ORS
[2005] NSWCA 142**

Supreme Court of New South Wales – 6 May 2005

FACTS

The Minister for Commerce ('the Minister') entered into a contract with Contrax Plumbing (NSW) Pty Limited ('Contrax') for certain works to be carried out by Contrax at Concord Repatriation General Hospital for \$5,423,000.00. Contrax submitted a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') to the Minister seeking \$2,622,645.00. The Minister issued a Payment Schedule under the Act, indicating a proposed payment of \$NIL. The matter proceeded to Adjudication, Contrax asserting that it was entitled to the progress payment, notwithstanding the non-fulfilment of certain conditions precedent to entitlement of payment because of section 34 of the Act rendered the applicable terms void. The Adjudicator determined that Contrax was entitled to \$1,519,014.99, concluding that section 34 rendered void certain provisions of the Contract. The Minister filed a summons in the Supreme Court of NSW which was dismissed. The Court agreed with the Adjudicator and held that the provisions were rendered void by section 34 of the Act.

The Minister then appealed from those proceedings on the grounds that the primary judge erred in his construction and application of section 34. In particular, section 34 relevantly applied only if "the operation of the Act" is excluded, modified or restricted. Where the contract makes provision for the calculation of progress payments, the Act says that this is to have effect; so that effect is in accordance with the Act and not contrary to it. Contrax submitted that section 8 of the Act establishes an entitlement to progress payments as and from each reference date, and makes no distinction as to the type of construction work included in the original contract and construction work pursuant to a variation or Superintendent's direction. The provisions of the Contract limited the effect of the Act, because they deprived the Contractor of a right to make a progress claim for such work and to obtain an interim determination in relation to such work.

ISSUE

What is the effect of section 34 of the Act?

FINDING

The Court found that even if section 34 does not invalidate the terms of the Contract, the Adjudicator's Determination would not be invalid for the reasons set out in *TransGrid v Siemens Limited* [2004] NSWCA395. However, the Court was of the view that section 34 rendered the terms of the Contract void. The Court held that the certification of a progress payment by a Superintendent which precludes payment fell foul of section 34.

QUOTE

Hodgson JA stated at paragraph 54: "...in my opinion a provision of a contract as to the determination of reference dates, or as to the calculation of the amount of progress payments, could be such as to restrict the operation of the Act within the meaning of s.34, even though the Act in s.8(2)(a) and s.9(a) expressly defers to such provisions. For example, if a contract provided for yearly reference dates, or provided that progress payments should be calculated on the basis of 1% of the value of work done, in my opinion such provisions could be so inimical to s.3(1), s.3(2) and s.8(1) as to be avoided by s.34. If, contrary to the first ground, cl.46 is a provision as to calculation, the relevant parts of cl.42 could still be seen as restricting the operation of the Act..." However, Byrson JA disagreed with Hodgson JA's decision as to section 34 invalidating clause 42 of the Contract and Brownie JA reserved his judgment on the effect of section 34.

IMPACT

A provision in a construction contract that diminishes, displaces or delays a contractor's entitlement to work may be void (and if void presumably void for all purposes). Provisions subject to section 34 includes those relating to the determination of reference dates and the calculation of the amount of progress payments even though the Act expressly refers to such provisions.

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