

**ENERGETECH AUSTRALIA PTY LTD v SIDES ENGINEERING PTY LTD & ANOR
[2005] NSWSC 801
Supreme Court of New South Wales – 5 August 2005**

FACTS

Energetech Australia Pty Ltd ('Energetech') entered into a construction contract with Sides Engineering Pty Ltd ('Sides') whereby Sides undertook to carry out construction work for Energetech. Under the contract, Sides was entitled to be paid upon the achievement of "Milestones", the second of which was defined as "Practical Completion".

Sides claimed to have reached Practical Completion and submitted a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). Energetech submitted a Payment Schedule in response asserting that nothing was payable because the milestone had not been reached. Sides thereupon made an Adjudication Application. The Adjudicator determined that Sides had reached Practical Completion and that it was entitled to a payment of \$559,457.20.

Energetech submitted that the Adjudicator's Determination was void on the grounds of section 13(4) of the Act, which provides that a Claimant may only serve a Payment Claim within the period determined by the terms of the construction contract, as the Adjudicator had incorrectly determined that Practical Completion had been achieved. That is, under the contract and section 13(4) of the Act, Sides was not entitled to serve the Payment Claim until after Practical Completion. Therefore, Energetech submitted that the Payment Claim was invalid.

Sides submitted that the Adjudicator was correct to determine that Practical Completion had been achieved. However, Sides also submitted that even if the Adjudicator was incorrect in so determining, his determination was not void.

ISSUE

Whether Practical Completion had been achieved and whether the Payment Claim was valid.

FINDING

The Court found that the requirement of section 13(4) is not a "basic and essential" requirement for the existence of a valid determination. Therefore, the Court concluded that even if the Adjudicator erred in determining Practical Completion had been achieved, that error was not such as to vitiate or void the Adjudicator's Determination so as to entitle Energetech to an injunction or declaration.

QUOTE

McDougall J commented at paragraph 21:

"Clearly, the assertion of an entitlement to a progress payment includes an assertion that the relevant reference date, on or from which the entitlement accrues, has past. In the present case, that assertion necessarily involves an assertion that practical completion - the date of which forms the relevant reference date - has occurred. In that context, I think, the requirement to serve the payment claim within the period determined by or in accordance with the terms of the contract must mean that the payment claim is to be served after the claimant claims that the relevant time has accrued. That is consistent with the scheme of s 13, from which it is evident not only that there maybe a dispute, ultimately capable of resolution by adjudication, as to the amount of progress payment but also a dispute as to the actual entitlement."

IMPACT

This case stands for the proposition that an Adjudicator is entitled to finally determine a dispute as to whether a stage has been reached in a contract for staged payments.

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