

**PROCORP CIVIL PTY LTD v
NAPOLI EXCAVATIONS AND CONTRACTING PTY LTD & ORS
[2006] NSWSC 205
Supreme Court of New South Wales – 29 March 2006**

FACTS

Napoli Excavations and Contracting Pty Ltd (“Napoli”) entered into a subcontract with Procorp Civil Pty Ltd (“Procorp”) to undertake demolition and excavation works at the *Great Southern Oceans Coastline Precinct Project* at Taronga Zoo. Napoli provided Procorp with a document, said to be a claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”), which was a list of invoices, including those previously received and paid by Procorp (“the Payment Claim”). Procorp responded with a Payment Schedule, listing in a column beside the scheduled amount for each invoice brief comments as to why the amount was less than claimed.

Napoli applied for Adjudication, and Procorp submitted an Adjudication Response raising a number of reasons why the Payment Claim was invalid but not challenging the Payment Schedule. The Adjudicator found that there had been a valid Payment Claim and determined in favour of Napoli in the sum of \$378,887.92.

Procorp applied to the Supreme Court to have the Determination set aside on the grounds that there had been a failure to satisfy a basic and essential requirement of the Act, namely a valid Payment Claim, or alternatively, that there had been a breach of the requirements of natural justice arising from a failure of the Adjudicator to consider Procorp’s submissions as to defects in the Payment Claim and request further submissions on the issue from the parties.

ISSUE

Whether the Adjudicator gave adequate consideration to Procorp’s submissions as to the validity of the Payment Claim, and whether, in the circumstances, the court should decide to whether the Payment Claim in fact complied with the Act.

FINDING

The Court examined the consideration given by the Adjudicator to Procorp’s submission that the Payment Claim did not meet the requirements of the Act, in light of the materials the Adjudicator was required to consider. The Court held that the Respondent had not raised the issue of a defective Payment Claim in its Payment Schedule, and accordingly, the Adjudicator was not required to consider the reasons advanced by Procorp in relation to this point in its Adjudication Response or invite further submissions on the point from the parties.

The Court refused to accept evidence that had not been put to the Adjudicator concerning the making of the Payment Claim and provision of the Payment Schedule.

It was found that the Adjudicator had determined the claim bona fide based on the materials before him, and had not offended the requirements of natural justice. The application was accordingly dismissed.

QUOTE

Einstein J held at paragraph 29:

“I reject the proposition that the adjudicator, following receipt of the adjudication response of Procorp, was obliged to invite further submissions first from Napoli and then further responsive submissions from Procorp. The adjudicator was entitled to proceed upon the basis that s20 (2B) was operative. That he did so is clear from his use of the words “fatally for the respondent”. Indeed nothing in the adjudication response submissions of Procorp threw up the vital questions put to the Court, concerning precisely what had occurred on 14 December 2005.”

IMPACT

The time for raising issues with a Payment Claim is in a Payment Schedule. Issues raised after this time may not receive consideration by an Adjudicator, much less by the courts, and do not require the Adjudicator to investigate by inviting further submissions.

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