



Rojo Building Pty Limited v Jillcris Pty Limited [2007] NSWSC 880 New South Wales Supreme Court 12 July 2007

FACTS:

Rojo Building Pty Limited (“Rojo”) carried on business as a building company. They entered into an agreement with Jillcris Pty Limited (“Jillcris”) to construct a two-storey beach house.

Rojo served a payment claim under the *Building and Construction Industry Security of Payments Act 1999* (NSW) (“the Act”). Jillcris failed to serve a payment schedule in the time specified by s14 of the Act. Rojo then had a choice to sue to recover the claimed amount as a debt due under s15(2)(a)(i) of the Act or to make an adjudication application under s15(2)(a)(ii).

Rojo chose the later giving Jillcris the requisite notice of that intention, and in turn providing Jillcris a further 5 days in which to provide its payment schedule. Jillcris had indeed provided its payment schedule but prior to receiving the notice of adjudication.

Rojo then notified Jillcris that it did not intend to proceed with adjudication, and proceeded to sue Jillcris for the claimed amount.

ISSUES:

Does there exist a right of election under the Act by which a claimant is entitled to elect to withdraw notification of adjudication and proceed to follow an alternative statutory remedy for recovery once a notification of intention of adjudication has been given?

FINDING:

Held to be on the facts that Rojo was entitled to the amount claimed in its payment claim on the basis that it had decided to pursue its statutory right of enforcement by way of Court proceedings. The payment schedule provided by Jillcris was not, in fact, in response to the notification for adjudication provided by Rojo and thus no relevant withdrawal of notification took place.

QUOTE:

McDougall J at [66]...

“In those circumstances, I do not accept that the mere giving of a notice under s 17 (2)(a) is of itself sufficient to constitute, or to trigger, the making of any election for which s 15 (2)(a) provides.”

IMPACT:

The case illustrates that the contract manager should carefully consider the alternative strategies available under the Act to avoid losing rights which it may otherwise have had.