



## **Precision Coating Services Pty Limited and Another v Building Equipment Services Pty Ltd [2012] NSWSC 550**

### **FACTS**

The Subcontractor (Precision Coating Services) entered into a contract with the Contractor (Building Equipment Services) for the coating of lengths of conduit that would be supplied by the defendant and on sold to a contractor. The Subcontractor changed the coating powder used and this failed when the conduit was bent. The contractor therefore rejected the bent lengths which had failed and therefore the subcontractor reordered the required lengths with correct powder. However the Contractor did not pay the Subcontractor for the reordered materials.

The Subcontractor had not been told that the conduits were to be bent and so sued for the work that he was not paid for and was unsuccessful.

The Subcontractor appealed the decision seeking to have the Local Court judgement, rejecting his claim, set aside on the basis that the Magistrate had made a finding for which there was no evidence that the subcontractor should have known the conduit was to be bent.

### **ISSUES**

Did the Magistrate make a finding of fact without evidence? And if so did it amount to an error of law?

### **FINDING**

The Court held that the Magistrate had wrongly concluded that "People in the industry generally must know that metal parts are likely to be bent at times...Not all conduits will run in perfectly straight lines without ever needing to turn a corner. I believe that is a proposition of common sense and common knowledge." Barr AJ allowed the appeal on the grounds that the Magistrate had made his conclusion based on no evidence and the judgement was set aside.

### **QUOTE**

Barr J at para [14] stated..."Whether there is evidence of a fact is a question of law whether a particular inference can be drawn from facts found is a question of law. The makings of findings and the drawing of inferences in the absence of evidence in an error of law: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 per Mason CJ at 355; *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473."

Barr J at para [25] held..."I conclude that his Honour's finding that it was an implied term of the agreement that the colour coating should be able to withstand bending was made without evidence. I do not consider that such a conclusion could be arrived at as matter of common sense or common knowledge. I do not consider that it was a matter about which his Honour was entitled to make judicial notice. I think his Honour erred in law. The Plaintiffs are entitled to have the matter dealt with according to law."

### **IMPACT**

Contract Managers should be careful to ensure that all factual issues are fully supported by evidence. A failure to prove an essential element of the case can prove costly.

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