

Suppliers Beware

The Supreme Court of New South Wales has decided that Credit Applications are not necessarily construction contracts under *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”). *Class Electrical Services v Go Electrical* [2013] NSWSC 363

The Facts

Go Electrical had supplied over \$1.8M of electrical components to Class Electrical for use in construction projects, across a number of purchase orders and invoices, but all governed by the terms of a signed Credit Application. Go Electrical sought recovery through Adjudication. The appointed adjudicator found in favour of Go Electrical on the basis that the goods were supplied under a single arrangement, the Credit Application, that amounted to a construction contract under the Act. Class Electrical appealed on the basis that each purchase order was a separate contract. The Act only allows payment claims which relate only to one contract.

The Issue

Whether an executed Credit Application amounts to a Construction Contract as defined under the Act

The Decision

It was common ground that the goods and services were “related goods” for the purposes of the Act. However, in reviewing the Credit Application against the definition of Construction Contract in the Act, McDougall J held at para 38 that:

“For there to be an undertaking to supply related goods under an arrangement, there must be something in the arrangement which indicates that the prospective supplier in some way undertakes to make the supply. There is nothing in the arrangement on which Go Electrical relied in this case to impose that burden. On the contrary, as I have said, if anything is clear from the document, it is that any question of supply was to be negotiated later, as needs required.”

Of significance to the Court was the Credit Application allowed the withdrawal of the credit facilities at any time, and it contained no prices or specification of items to be supplied. The Court concluded that there was a multiplicity of construction contracts supporting the suppliers claim and as such the adjudicator’s determination could not stand.

Impact

Suppliers must make separate claims each based on arrangements, that constitute an agreement to supply, if multiple purchases by customers are to be recovered through adjudication.

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