

Lanskey Constructions Pty Ltd v Westrac Pty Ltd [2022] WASC 90

FACTS

The case of *Lanskey Constructions Pty Ltd v Westrac Pty Ltd [2022] WASC 90* involved a dispute in respect of interlocutory orders preventing the use of bank guarantees, in the context of a dispute over extensions of time and liquidated damages between a builder (**Lanskey**) and the principal (**Westrac**).

On or about 14 April 2020, the parties entered into a contract for Lanskey to perform works on a construction Project under an amended AS 4902 2000 contract. As per the agreement, Lanskey provided a number of Bank Guarantees to Westrac, three of which were to be retained by Westrac for the duration of the defects liability period, totalling \$168,993.04.

Pursuant to cl 5.2 of the contract, Westrac was entitled to recourse to the security where there was a debt payable by Lanskey to Westrac. The court also identified the effect of 34.7 of the Contract as being, ‘*if Lanskey did not reach practical completion by the required date, it was indebted to Westrac for liquidated damages at the rate stated in Item 29*’.

On or about 11 January 2021, the parties conducted negotiations regarding liquidated damages.

On or about 8 February 2022, Westrac made a claim for liquidated damages, reserving its rights to have recourse to the bank guarantees. Lansky responded, raising the negotiations between the parties, and denying that any liquidated damages were owing.

On or about 25 February Lansky applied for urgent injunctive relief to prevent Westrac from using the bank guarantees, until the dispute could be heard.

ISSUE

Whether the court should provide orders to restrain the use of bank guarantees on an interim basis?

FINDING

The court refused the orders sought, with Hill J stating:

“36 ...I accept that it is clear from the wording of cl 5.2(d) that the parties agreed that where Westrac has a bona fide claim against Lanskey, it is Lanskey and not Westrac who is 'out of pocket' pending final resolution of any dispute between them...

53 [W]hile I accept the evidence before the court supports a finding that there is a dispute between Lanskey and Westrac as to whether, ultimately, Westrac will be entitled to succeed in its claim for liquidated damages, this, of itself, does not mean that Westrac's claim for liquidated damages is not a 'bona fide claim'...

54 In my view, it cannot be said on the evidence before the court that Westrac's claim for liquidated damages is unarguable, specious or not made in good faith, or that it can be said that in making its claim for liquidated damages, the defendant has not acted bona fide.”

IMPACT

This decision shows the courts’ treatment of the use of bank guarantees by parties as a commercial tool for the management of risk in construction projects, where the Courts are reluctant to prevent a party holding bank guarantees from calling on them.

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