

Bega Valley Shire Council v Kenpass Pty Ltd [2024] NSWSC 399

FACTS

The case of *Bega Valley Shire Council v Kenpass Pty Ltd [2024] NSWSC 399* involved an appeal by Bega Valley Shire Council (**Council**) against an adjudication decision in respect of a dispute over a delay claim in course of demolition of a bridge.

On 29 December 2023, Kenpass Pty Ltd (**Kenpass**) issued a delay claim in the amount of \$906,000.00 for delays in the course of works, with the Council responding with a payment schedule on 16 January 2024, with payment listed in the amount of \$-43,160.00 (negative value), rejecting the payment claim on the basis that insufficient evidence was provided by Kenpass.

On 31 January 2024, Kenpass applied for an adjudication of its Payment Claim, pursuant to s 17 of the Act. In the course of the adjudication, the Council added arguments that the claim was invalid on the basis Kenpass had applied incorrect rates and suffered no loss.

The adjudicator found against the Council, including in the reasons for the decision that:

“226 *In the response, the Respondent has provided new reasons for withholding payment not previously raised in the payment schedules.*

...

230 *Accordingly, I am not permitted by the Act to consider the Respondent’s new reasons for withholding payment that are set out in the Response.”*

ISSUE

Whether the adjudicator could consider the council’s new reasons?

FINDING

His Honour, Nixon J dismissed the appeal, drawing heavily from the High Court’s decision in the matter of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4*. His Honour, Justice Nixon stated at paragraph 86 of the judgment:

86. *In Probuild at [47], the High Court identified the “clear legislative intention” of the statutory regime as being “to ensure that the statutory entitlement can be determined and enforced with minimal delay”. It is consistent with this legislative intention that if a payment claim is made, and the adjudicator finds that the respondent does not advance in the payment schedule any valid reason for withholding payment, the adjudicator can “then and without more” determine the amount of the progress payment based on the payment claim, without independently examining and being satisfied as to the contractual basis for the claim, the merits of the claim, the proof of loss, or the quantification of damage. To the extent that there is an issue about any of those matters, the Security of Payment Act “defers the final determination of contractual rights to a different forum, in which the consequences of any erroneous determination can and must be taken into account”: Probuild at [47].*

IMPACT

This decision reinforces the *absolutely critical* importance of effective performance of Payment Claim and Payment Schedule processes under SOPA legislation in relevant jurisdictions around Australia.

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