

KEMBLA COAL & COKE v SELECT CIVIL & ORS
[2004] NSWCA 628
Supreme Court of New South Wales – 23 July 2004

FACTS

Kembla Coal & Coke Pty Ltd ('Kembla') and Select Civil Pty Ltd ('Select') entered into a contract whereby Select undertook to carry out remedial works for Kembla at Coalcliff. Select served a Payment Claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'), claiming an amount of \$2,554,898.25, to which Kembla provided a Payment Schedule valuing the claim at nil. The matter proceeded to adjudication and the adjudicator determined that Kembla should pay \$1,761,886.70. The Adjudicated Amount included \$232,000.00 for "preparation costs", payable under cl 40.5 of the contract, and an allocated amount for delay costs and/or breaches of contract. Kembla then appealed the adjudicator's determination on the basis that the adjudicator erred in law, and in doing so exceeded his jurisdiction, by allowing amounts for preparation costs and delay costs. Kembla characterized these two amounts as damages and relied on considered the decision of Barrett J in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116, in particular that the relevant concepts do not extend to damages for breach contract, including damages for the loss of an opportunity.

ISSUE

Whether the adjudicator erred in law by:

1. making an allowance in the determination for costs of preparation of claim; and
2. allowing in the determination an amount for delay costs and delay damages.

FINDING

After considering the decision of *Quasar*, the Court agreed that the calculation of entitlement under ss 9(b) and 10(1)(b) is a calculation of the value of construction work carried out or undertaken to be carried out, and that there is no room for damages in such a calculation for breach of contract. However, the Court did not agree that it follows that this conclusion must necessarily apply where the entitlement is given by the express terms of the contract as an element of a progress payment and the calculation of that entitlement is, therefore, carried out pursuant to ss 9(a) and 10(1)(a). Accordingly, as there was an entitlement for preparation costs and delay costs in the contract, the adjudicator did not act in excess of his jurisdiction by awarding amounts for preparation costs and delay costs. Further, the court would not grant relief to Kembla on discretionary considerations because the relevant challenges were not taken before the adjudicator, and the parties should be held to the case that they sought to make out before the adjudicator.

QUOTE

McDougall J at paragraph 106 stated: "... in the context of the Act – specifically, having regard to the objects of the Act as stated in s 3 ... and the recognition, through s 9(a), of the primacy of contractual quantification where that is available... I think that a progress payment may include an amount for preparation costs where the contract so provides. In other words, where the contractual assessment of a progress payment (to which, pursuant to s 9(a), effect is to be given) includes preparation costs as a component of the entitlement, I do not think that the Act should be construed so as to deprive the claimant of that entitlement. It would be an extraordinary result if an assessment of the claimant's rights by the Superintendent, or other appropriate person having that function under the contract, included (as the contract demands) any applicable amount of preparation costs, but if the adjudicator's determination could not."

IMPACT

A claim for preparation costs, extension of time, delay or disruption, or interest, may be validly included in a Payment Claim if the Claimant is entitled to them under the construction contract.

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