

HOLMWOOD HOLDINGS v HALKAT ELECTRICAL CONTRACTORS & ANOR
[2005] NSWSC 1129
Supreme Court of New South Wales – 8 November 2005

FACTS

Holmwood Holdings Pty Ltd (“Holmwood”), through its construction manager Tricon Projects Pty Ltd (“Tricon”) entered into a construction contract with Halkat Electrical Contractors Pty Ltd (“Halkat”) for electrical works in relation to the refurbishment, renovation and extension of a nursing home. Halkat submitted a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”), which was disputed by Holmwood who claimed that it was entitled to \$83,265.50 for liquidated damages and rectification of defects. The claim was referred to Adjudication, the Adjudicator determining that Holmwood was to pay Halkat the sum of \$116,598.35 on the basis that he preferred Halkat’s assessment of the works to Holmwood’s, without examination of Holmwood’s set-off claims. Holmwood then appealed the Adjudication, alleging that the Adjudication was void by reason of the Adjudicator not having made a bona fide endeavour to perform the function entrusted to him, because the Adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, and rejected issues raised in the Payment Schedule.

ISSUES

The meaning of bona fide and whether the Adjudicator had acted in good faith.

FINDING

The Court found that the Adjudicator had not made a bona fide endeavour to perform his functions.

QUOTE

Brereton J at paragraphs 117 to 119 concluded:

[117] Accordingly, good faith as a condition of validity of the exercise of an adjudicator’s power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.

[118] Applying that test to the present facts, the [Adjudicator] did not meet its requirements. He was entitled to be critical of Holmwood for having advanced the unmeritorious submissions which it did about misnomer and service. He was entitled to conclude that the reports relied upon by Holmwood were of no assistance to the extent that they proceeded on an inappropriate basis of valuation. He was also entitled to find those reports to be other than independent (although the same surely had to be said of Halkat’s assessment). But left with Halkat’s claim and Holmwood’s assessment, he was not entitled to fail to evaluate the claim in the light of the payment schedule, and instead simply to accept it on the basis that other and unrelated submissions made by Holmwood were unmeritorious....

[119] In my opinion, when the adjudicator concluded that he was unable to decide for himself the extent and value of work completed, and instead would adopt Halkat’s assessment because Holmwood had made some unmeritorious submissions unrelated to this issue (rather than evaluating the adjudication application and response and the arguments advanced in them, or convening a conference and/or conducting an inspection which might have resolved at least some of those issues), he ceased to make a genuine or conscientious attempt to perform the function entrusted to him of assessing the payment claim, and substituted caprice for conscientious judgment. The quality of his determination in that respect did not differ from one based on a mere like or dislike of a party, based on unrelated conduct of the party. His ultimate determination, which depended upon acceptance in that way of Halkat’s claim, was therefore not the product of a good faith attempt at performing his function, but of caprice.

IMPACT

This case stands for the proposition that an Adjudicator must act honestly, conscientiously and not capriciously, in determining an Adjudication Application. Further, an Adjudicator’s failure to evaluate a Payment Claim in the context of a payment Schedule and the simple acceptance of only one party’s assessment may demonstrate a failure to act in good faith.

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