



Integral Energy Australia v Kinsley & Associates Pty Limited [2009] NSWSC 64 (18 February 2009)

FACTS:

The Plaintiff is the principal of a construction contract and refused to pay the claimed amount in the Defendant's payment claim made under the *Building and Construction Industry Security of Payment Act 1999* (NSW), which subsequently proceeded to adjudication.

The Plaintiff in its payment schedule provided the only reason for withholding payment as; that the claimed variations in the payment claim were not authorised by the Plaintiff, and therefore pursuant to clause 3 of the contract between the two parties, the Defendant is not entitled to any payment.

The adjudicator in his determination did not consider any other matters other than the reason provided in the Plaintiff's payment schedule; and determined adjudication in favour of the Defendant in the full claimed amount.

ISSUE:

Whether the adjudicator has failed to include the adequate reasons for his determination under section 22(3)(b) of the Act; and whether the adjudicator was required to consider issues provided in the adjudication response that were not raised in the payment schedule under section 22(2)(d) of the Act.

FINDING:

The Court found that the adjudicator was, pursuant to section 22(2)(d) of the Act, correct in not considering matters put forward by the Plaintiff in its adjudication response where those matters were not raised earlier in its payment schedule; and therefore the determination is valid.

The Court further found that the adjudicator did not have to seek to have an issue of valuation of the unauthorised variation works because the Plaintiff in its payment schedule did not raise issues as to the value of the variation works, but merely relied on the fact that those variations were unauthorised.

QUOTE:

Hammerschlag J at 39:

[at 39]

"The plaintiff's sole angle of attack was that there had been no agreement or approval as required by cl 3.3 of the building contract, and that the remaining claims for variations were for that reason, and that reason alone, precluded.."

[at 40]

"It follows, because of s 20(2B) of the Act, that the plaintiff (as respondent) could not legitimately include in its adjudication response as a reason for withholding payment that the amount of the variations did not represent a fair and reasonable valuation of the claims."

IMPACT:

This case demonstrates that a respondent in proceedings under the security of payment legislation, in order to properly make submissions in the adjudication response, is required to carefully consider all necessary and relevant issues that may be raised in the adjudication process and accordingly bring forward all of its reasons for refusing to pay in its payment schedule.

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