



Kell & Rigby Holdings Pty Limited v Lindsay Bennelong Developments Pty Ltd
[2010] NSWSC 777
16 July 2010

FACTS:

Kell & Rigby (“the Plaintiff”), entered into a contract with Lindsay Bennelong (“the Defendant”) whereby the Plaintiff was to undertake construction work at of a development at Rushcutters Bay, Sydney. The development comprised 3 relevant stages.

Practical completion was certified in respect of stage 1 on 24 November 2008 and in respect of stage 2 on 3 in December 2009. The parties then entered into an advance payment deed whereby the Defendant advanced the Plaintiff \$2m repayable on completion of stage 3, or on termination of the contract or if the works are taken out of the hands of the Plaintiff. The Plaintiff provided a bank guarantee in return for the advanced payment.

At May 2010, the parties were in dispute as to the progress of work. The Superintendent issued a variation notice to the Plaintiff and also a certificate of practical completion for stage 3 works. The Defendant then demanded the return of the \$2m advanced to the Plaintiff.

The Plaintiff obtained an injunction from the Court to restrain the Bank from paying out on the Bank guarantee given in exchange for the advanced payment. The Plaintiff relied on, inter alia, the submission that the certificate of practical completion was invalid.

ISSUES:

Whether the certificate of practical completion was valid?

FINDING:

The Supreme Court found that the certificate of practical completion was vitiated as a result of the failure by the superintendent to act fairly.

QUOTE:

Hammerschlag J [at 72]:

“I conclude that the Certificate of Practical Completion was vitiated as a result of the failure by the Superintendent to act fairly.”

IMPACT:

The case illustrates that notwithstanding the existence of contractual rights, where a party acts unfairly in commercial dealings with another party, that unfair conduct may have the effect of vitiating the unfair act.

Contract administrators should ensure that they act fairly and not be unduly influenced by one party or another to a contract in order to ensure that contractual rights are preserved and should be careful to follow due process to avoid challenges to their decisions.