

**EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd [2024] NSWCA**

**162**

**FACTS**

The case of *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd [2024] NSWCA 162* involved an appeal by EnerMech Pty Ltd (**Appellant**) of an adjudication decision. The original adjudication was in respect of a payment claim in the amount of about \$10 million, issued on 8 June 2024 and a subsequent payment schedule issued by the respondents, essentially alleging no payment was due.

The adjudicator ruled in favour of the appellant at first instance, however the respondents then appealed the matter to the NSW Supreme court, seeking to have the adjudication quashed.

The respondents alleged that the payment claim was not in respect of work completed under a construction contract and was instead sought to recover an amount of \$9,230,157.40, obtained by the respondents in exercise of a bank guarantee. The argument was that since the payments claimed were not for construction work, the adjudicator was not empowered to issue a decision under the NSW security of payment legislation.

**ISSUE**

Whether the amounts taken from bank guarantees were ‘payments under a construction contract’ for which adjudicators in NSW have jurisdiction to make decisions under the *Building and Construction Industry Security of Payment Act 1999 (NSW)*?

**FINDING**

Their Honours, Meagher JA, Basten AJA and Griffiths AJA found for the applicants, allowing the appeal unanimously, and stating the following at paragraphs 59-60 of the judgment:

59. *Neither the primary judge, nor the respondents in this Court, identified any provision in the Security of Payment Act which required a payment claim to be made “for construction work”. As the primary judge acknowledged at [71] (set out at [49] above), having had regard to the definition of progress payment, “the Act does not provide, in terms, that a payment claim must be ‘for’ construction work”. The respondents did not take issue with that proposition.*
74. *“Understanding the objects of the Security of Payment Act, its structure and its spare language, there is little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule.”*

Accordingly, the court found that the adjudicator did have jurisdiction to decide the issue and the appellants were awarded \$10,160,109.77 plus interest.

**IMPACT**

This decision (supportive of adjudication) shows that where construction contracts allow for fiscal mechanisms such as bank guarantees to affect payments under a construction contract, this will not generally result in parties being deprived of adjudication jurisdiction.

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