INTEN CONSTRUCTIONS V REFINE ELECTRICAL SERVICES AND ANOR [2006] NSWSC 1282
Supreme Court of New South Wales – 1 December 2006

FACTS

Inten Constructions Pty Ltd ("Inten") engaged Refine Electrical Services Pty Ltd ("Refine") as subcontractor to perform electrical works at a project at Neutral Bay. Some months after the project had been completed, Refine served on Inten a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"). The majority of the claim was for what Refine described as "Commercial Costs", and included claims for prolongation, loss of productivity and interest. Inten disputed Refine's contractual entitlement to these costs in its Payment Schedule and denied liability for all but $14,000 of the claim.

Refine referred the dispute to adjudication. The Adjudicator decided that the Commercial Costs were allowable under the contract, characterising the claims as variations which were permitted under the contract rather than claims for "cost, expense or loss" arising from delay to the works which were not. The Adjudicator determined that Refine was entitled to $181,000 including about $147,000 in respect of Commercial Costs.

Inten commenced proceedings in the Supreme Court to have the determination set aside. It contended that it had been denied natural justice, on the basis that in finding that the claims were variations, the Adjudicator had decided the matter on a basis for which neither party had contended without allowing each of them an opportunity to respond.

ISSUES

Had the Adjudicator afforded the parties the level of natural justice required under the Act?

FINDING

The Court found that in circumstances where the issue of lack of contractual entitlement had been raised by Inten, the Adjudicator was entitled to examine the relevant provisions of the contract in detail in order to resolve the issue, and did not need to request further submissions from the parties. The Court held that Inten's challenge to the determination should fail.

QUOTE

McDougall J held at [64 - 66] that:

> In *Brodyn*, Hodgson JA referred to the concept of natural justice, in its application to adjudication applications, at 441-442 [55] and 442 [57]. In the former paragraph, he referred to "the measure of natural justice that the Act requires to be given". In the latter, he referred to ss 17(1) and (2), 20, 21(1) and 22(2)(d) and stated "that natural justice is to be afforded to the extent contemplated by those provisions." That was because the sections to which his Honour referred required "notice to the respondent and an opportunity to the respondent to make submissions". The significant point, for present purposes, is that the entitlement to natural justice is not at large: it is to an extent circumscribed, or its content defined, by the statutory scheme...
>
> ...The adjudicator's task included a determination of Inten's contention that no provision of the contract supported, or sanctioned, the claim for prolongation and loss of productivity costs. That submission was advanced forcefully, in its payment schedule and adjudication response. In those circumstances, the measure of natural justice for which the scheme of the Act by implication provides did not require the adjudicator to give Inten an opportunity to be heard further in support of that contention, once he had reached the view, contrary to the position for which Inten contended, that the claim could be supported by reference to relevant provisions of the contract.

IMPACT

The entitlement to natural justice under the Act must be considered in light of the framework for resolving disputes set out by the Act. That framework envisages a limited opportunity to make submissions, and parties should ensure that all issues are properly canvassed prior to the Adjudicator's decision.

NSW
Jim Doyle
P: 02 9283 5388
E: jdoyle@doylesconstructionlawyers.com

QLD
Frank Nardone
P: 07 3034 3333
E: fnardone@doylesconstructionlawyers.com

VIC
Vinodhini Krisnan
P: 03 9620 0322
E: vkrisnan@doylesconstructionlawyers.com

www.doylesconstructionlawyers.com