

Article Information

Author: Robert Riddell

Service: Arbitration, Construction Litigation, Planning & Environment, Project Finance, Projects, Infrastructure & Construction, Property & Development, Property Development, Restructuring & Insolvency, Strata & Community Title

Sector: Government, Infrastructure, Private Clients, Real Estate, Transport & Logistics

Submissions Advanced and Reasons Given, Together Again! □ A Civil Aust Pty Ltd v Ceerose Pty Ltd [2024] NSWCA 7

A recent decision of the Supreme Court, subsequently upheld by the Court of Appeal, demonstrates the need for adjudicators to keep within the bounds of the submissions to ensure that the measure of natural justice, prescribed by the *Building and Construction Industry Security of Payment Act 1999 (NSW)*, is applied. Determination of material issues, without a party having an opportunity to be heard, puts the determination at risk.

Background

Ceerose Pty Ltd (**Respondent**) was the main contractor, on a site in Sydney, where A-Civil Aust Pty Ltd (**Claimant**) was a subcontracted to undertake excavation works. The Respondent terminated the subcontract whereupon the Claimant left the site and issued its final payment claim, which included the release of retention monies. The claim for retention of \$115,577.79 was simply a line item in a schedule to the claim, without more.

The Respondent issued a payment schedule which denied that the Claimant was entitled to the retention monies on the basis that;

1. the Claimant had not satisfied contractual requirements for payment of the retention and alternatively;
2. the Respondent was entitled to recourse to the retention monies for the Claimant's breach of contract; and
3. when the contract was terminated the Claimant did not accrue and right to the retention money

The payment schedule asserted the Claimant owed the respondent \$3,221,374.40 before applying the retention.

In the adjudication application the Claimant submitted that it was entitled to the retention monies because the Respondent wrongfully terminated the contract. It did not respond to grounds 1- 3 above.

In its response, the Respondent reiterated that the Claimant had no right to the retention monies, it having exercised its right of recourse and it denied the wrongful termination.

Adjudication

The adjudicator determined that the Respondent had validly terminated the Contract and "*therefore the Claimant is entitled to release of its security*".

This was contrary to submissions of both parties. The Claimant disputed the termination and the Respondent asserted that as the contract was validly terminated, it would have the recourse to the retention monies.

Primary Judgement

The primary judge Darke J held that the adjudicator's determination, in awarding the retention money to the Claimant, was contrary to both parties' positions regarding the impact of the contract on the retention monies. He did not find the contract wrongfully terminated (the basis of the Claimant's claim). He instead found that termination entitled the Claimant

to its release, a position put by neither party.

He found procedural fairness had been denied to the Respondent in it not having an opportunity to make further submissions on the impact of the termination on the retention monies. He found that the adjudicator had made a determination on the basis of an issue that was “not on the table”. He found that the determination was based on something that neither party had contended nor had the opportunity to address in submissions.

Appeal

In the Appeal the Claimant contended that the primary judge had:

- mischaracterised the basis of the adjudicator’s determination that the retention monies being released due to a valid termination of the contract was not an “*issue on the table*”; and
- erred in concluding that the Respondent could not have reasonably anticipated the adjudicator would decide the retention monies claim on the basis that he did.

Court of Appeal Judgement

Mitchelmore JA with whom Leeming JA and White JA agreed, held that the appeal be dismissed. Mitchelmore JA held that the primary judge did not err in finding that the adjudicator’s reasoning was so far removed from the parties’ submissions that it resulted in a breach of procedural fairness.

The Mitchelmore JA outlined a number of reasons why he considered the primary judge, Darke J, did not err in his findings that:

1. the adjudicator’s reasoning could only be premised on the contract clauses governing the return of the retention having no operation upon valid termination;
2. the Claimant was claiming the retention monies, it did not articulate the basis for that, in circumstances where the contract was terminated;
3. there was, in the adjudication, a denial of procedural fairness, being substantial and material, in the sense that it was realistically possible that the determination could have been different had the Respondent been provided an opportunity to make submissions on the reasoning adopted by the adjudicator.

Her Honour Leeming JA, summed up in the following way:

“...in this particular case, the reasons given by the adjudicator for determining that A-Civil was entitled to the retention monies were so far removed from the submissions advanced by both of them that this is a rare case where there has been a substantial breach of the obligation to accord procedural fairness. The primary judge was correct so to conclude.”