



LEGAL BRIEFING

Securities and excess

John Holland Pty Ltd v Roads and Traffic Authority of New South Wales

Supreme Court of New South Wales - Court of Appeal, Giles JA, Tobias JA and McColl JA, [2007] NSWCA 140

The Facts

This was a decision of the New South Wales Court of Appeal in relation to the New South Wales adjudication legislation, the Building and Construction Industry Security of Payment Act 1999 (the “Act”).

John Holland Pty Ltd (“John Holland”) and the Roads and Traffic Authority of New South Wales (“RTA”) entered into a contract to construct a roadway and associated bridgeworks (the “Contract”). The terms of the Contract provided for security “for the purposes of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract”.

In the course of the works adjudications were brought by John Holland and the adjudicator awarded amounts well in excess of the amount of security to be paid by RTA to John Holland. RTA paid these amounts.

After the works reached practical completion John Holland asked the RTA to return half the security and the RTA declined. By this stage, disputes had arisen between the parties whereby RTA sought to recover the amounts paid to John Holland.

John Holland brought proceedings for the return of half of the security. John Holland argued that to the extent that the Contract’s provisions sought to undo the adjudicators’ determination, they were void by reason of the Act. At first instance, the judge decided that the RTA was entitled to retain the securities. John Holland appealed.

The Issue

Was the RTA entitled to retain the securities?

The Decision

The RTA was entitled to retain John Holland’s securities. The contractual terms providing for the security to be retained to satisfy any obligation that John Holland might ultimately have to pay the RTA were not contrary to the operation of the Act.

As an adjudicator’s decision is interim, it is subject to a different position being established in relation to payment for the relevant work or related goods or services, either contractually or in proceedings. The contractual mechanisms for working out the parties’ rights under the Contract still operated, and had to be followed. The adjudicated claims were only part of the contractual tapestry.

It was not correct that the retention of security “undoes” an adjudicator’s

determination, or that a superintendent who, in performing his contractual function, came to a determination negates a statutory right to retain an adjudicated amount. The adjudicator's determination remains, and brings payment of the adjudicated amount, but that is interim and subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings.

Comment

By adopting the position set out above, the NSW Court of Appeal held that the contract administrator administering a final certificate has the power to come to a different conclusion to that reached by an adjudicator at first instance. This was not contrary to the New South Wales Act as the Act was only to ensure prompt interim progress payment on account, pending final determination of all disputes.

Charlene Linneman
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