



Adjudication Determination quashed in Supreme Court

Introduction

Given the tension being experienced by players in the construction industry due to chain delays and increased cost of materials, contractors are increasing their reliance on statutory rights to payment under the security of payment legislation (**SOPA**).

Under SOPA, contractors can refer unpaid progress claims to adjudication where an adjudicator can make an independent assessment of that claim and require respondents to pay. The entire process usually takes 35 business days from the date a claim is made to the final determination thus being an extremely attractive and low-cost option for those seeking payment. The alternative is of course seeking payment through the traditional court process.

Regardless of which option a contractor chooses to take, contractors should note the recent decision of *Equa Building Services Pty Ltd v A & H Floors 2 Doors Australia Pty Ltd* [2022] NSWSC 152 where the court overturned an adjudication determination on the grounds that the adjudicator acted outside his mandate.

Equa Building Services Pty Ltd v A & H Floors

In February 2018, Equa entered a written contract with Rockinghorse to supply construction management services to Equa including the engagement of trades for a multi-unit development. Rockinghorse then in 2019 engaged A & H Floors 2 Doors Australia ('A & H') to complete flooring work. Disputes between Equa and Rockinghorse arose, resulting in Equa terminating the contract in February 2020. A & H then undertook work on the project directly with Equa.

A & H sent a progress claim to Equa via email addressed to "Lindsay Gregory", who they believed was a contract representative for Equa on the project. However, no such person was employed by Equa. The progress claim was also sent via email to the Senior Development Manager at Equa. Equa replied to this second email denying liability to the payment claim. A & H made an Adjudication Application and claimed that there was a written AS4903-2000 construction contract. Whilst A & H agreed the contract was quoted to and originally accepted by Rockinghorse, they alleged that Equa had taken over the construction project and the formal written contract was ultimately entered with Equa in August 2019. There was evidence of this AS4903-2000 contract yet it was undated and not signed by any representative from Equa. In reply, Equa argued no written contract existed and that oral agreements had been the basis of the relationship between A & H and Equa since Rockinghorse's departure. Equa further claimed that any works orally agreed to between A & H and Equa had been paid in full.

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Adjudication Determination

The Adjudicator ruled that:

- There was no evidence of a formal written contract directly between A & H and Equa, but A & H was entitled to use email to serve the payment claim as the parties' previous conduct in liaising with each other for performing the work was all via email;
- A & H did reasonably believe "Lindsay Gregory" to be a representative of Equa, as "Lindsay Gregory" was copied into the Adjudication Application and Response documents; and
- A & H did reasonably believe that contacting any member of staff from Equa, including "Lindsay Gregory", was a valid means to serve the payment claim; and
- Although there was no formal written contract between parties, there was an arrangement and oral instructions between A & H and Equa to complete flooring work. In the absence of a contract, A & H did have a statutory entitlement to claim a progress payment.

Equa referred the matter to the Supreme Court based on jurisdictional error of the Adjudicator.

Court Decision

The Supreme Court found that:

- There had been a breach of the service requirements of SOPA, because Equa did not specify a designated email for the service of payment claims. A mere belief that "Lindsay Gregory" was a representative of Equa was therefore not enough to satisfy service of a payment claim; and
- Equa had clearly contended that they had only first become aware of the alleged contract beyond the oral agreements during the Adjudication Application. As the adjudicator gave no evidence as to how Equa had taken over Rockinghorse's position, this finding was particularly found to be unreasonable and a breach of procedural fairness. Equa was not given sufficient opportunity to challenge that they had assumed Rockinghorse's position in the formal written contract; and
- Provided that Equa had been given the opportunity to challenge the earlier agreement, there was a reasonably foreseeable possibility that the adjudicator's findings about the contract would have been different.

As the Supreme Court found that Equa had not assumed Rockinghorse's position in the formal written contract with A & H, with the adjudicator's earlier findings breaching procedural fairness, orders were made for the adjudication determination to be quashed.

Key Takeaways

Whilst the provisions of SOPA are a highly valuable means for contractors to secure payments quickly, the decision of *Equa Building Services Pty Ltd v A & H Floors* emphasises the need for parties to formalise their contractual relationship.

If a dispute does arise, the existence of a clear contract will greatly help in the adjudication process and reclaiming payments owed. It is equally important that when seeking recovery, matters are dealt with through an alternative dispute resolution method or court with proper authority.

Please contact Construction Legal for more information or advice in relation to the matters discussed above.

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