Can an adjudicator's decision be overturned?

Case Note - Miller v LMG Building Pty Ltd [2023] NSWSC 995

Introduction

An adjudication outlines the legal process that helps courts deliver outcomes in disputes between parties. If successful, a claimant may receive an adjudication certificate, which then may be enforceable in a court decision. Once a judgement is ordered and delivered, it is binding on all parties involved.

Adjudication determination

The plaintiff, Ms Suzanne Miller, sought to set aside an adjudication determination made by the adjudicator under the NSW Building and Construction Industry Security of Payment Act 1999, regarding a payment claim made by LMG Building Pty Ltd (the remedial builder). The adjudicator had determined that Ms Miller was liable to pay the sum of $249,516.92, as well as the adjudicator's fees.

What did the remedial builder do?

- LMG was to undertake alterations to Ms Miller's home. Under the contract, LMG was entitled to make progress claims.
- Ms Miller terminated the contract and LMG proceeded to make a progress claim. Included in the claim was $96,250.00 (including GST). Under the contract, this amount was payable on completion of 90.5% of the contracted work. This claim by LMG was supported by a quantity surveying firm, Canning & Associates Cost Consulting, stating that the progress claim appears to comply with the approved design intent.

What did the client do?

- In response, Ms Miller served a payment schedule stating the amount that she proposed to pay in respect of the claim was Nil. Part of Ms Miller's reasoning was that the claimant did not undertake the remedial works that was claimed. Ms Miller also asserted LMG did not take into account any defective works or supplied materials that LMG claimed in their payment claim.

  Ms Miller believed the works were not at the level of 90.5% complete (which the remedial builder claimed) but rather at around 65% complete. Ms Miller included in the payment schedule that the claimant had been paid for the works based on 87% completion and therefore, the claimant had been overpaid. Ms Miller also included two expert reports in her payment schedule. One report was prepared by Quest Associates Pty Limited, which identified defects in the building work, supported by descriptions and photographs. Her second report was a statutory declaration by Nathan Grice, an architect, who supported the view that Ms Miller had overpaid the remedial works.

How did the remedial builder respond?

- LMG lodged an adjudication application, stating that Ms Miller has no right to set-off any amounts owed.
- Ms Miller provided her adjudication response, which included supplementary documentation from her two experts.
- In the adjudication determination, the adjudicator indicated that he did not want to consider the supplementary reports provided by Ms Miller.
- The adjudicator concluded that there were inconsistencies in the supporting documentation presented by Ms Miller. The adjudicator was unable to find the same inconsistencies in the remedial builder's progress claim.
- The adjudicator then concluded that LMG was entitled to recover $96,250 for the remedial work under the contract. The adjudicator added that LMG had not been overpaid and that they were entitled to recover the additional amounts they claimed for contract and provisional sum adjustments.

Decision

- The matter then proceeded to the NSW Supreme Court with a decision by Justice Ball on 23 August 2023.
- Ball J had found that the adjudicator made jurisdictional errors in his approach.
- Ball J summarised that, under the Building and Construction Industry Security of Payment Act 1999, an analysis must be given to what is properly payable and focus on the true merits of the claim. Ball J affirmed that consideration must be given to the payment schedule (if any) with all submissions and therefore, the adjudicator failed to undertake the appropriate tasks required of him. Ball J concluded that the adjudication decision be quashed and that LMG must repay to Ms Miller the amount it received as a consequence of enforcing that judgment, together with interest on that amount.

Key Takeaways:

- Although all contractors and builders (including residential builders) have a statutory entitlement to receive progress payments, a matter before an adjudicator does not necessarily create an automatic assumption that a builder is entitled to payment claims. Despite the existence of an adjudicator to help support and enforce builders' entitlements to receive payments, this example shows us that an adjudicator is always under strict scrutiny and that in certain circumstances, courts are willing to overturn an adjudicator's decision.
- All adjudicators are obliged to give valid reasons and to consider all essential issues presented in front of them, however, their reasoning must take into consideration the intent of legislation and its true ordinary meaning.

More information

For further information contact the team at Construction Legal.

CONSTRUCTION LEGAL

Jessica Rippon, Principal Solicitor
jrippon@constructionlegal.com.au
+61 (02) 8591 9132
www.constructionlegal.com.au