



RHG Construction Fitout and Maintenance Pty Ltd v Kangaroo Point Developments MP Property Pty Ltd & Ors [2021] QCA 117

Building Industry Fairness (Security of Payment) Act 2017 - An Issue of Competing Payment Schedules

Damian Clothier QC and Florence Chen

June 2021

Background

This was an appeal from a decision of the Supreme Court of Queensland, *Kangaroo Point Developments MP Property Pty Ltd v RHG Construction Fitout and Maintenance Pty Ltd & Ors* [2021] QSC 30. At first instance, the Court held that an adjudication decision (which awarded the sum of AUD 788,439.54 with interest and half of the Adjudicator's fees to RHG Construction) made under the *Building Industry Fairness (Security of Payment) Act 2017 (BIF Act)* was not valid.

The Appellant (**RHG Construction**) was the builder and the Respondent (**KP Developments**) was the developer under a design and construct contract of an apartment block at Kangaroo Point. The contract between the parties included *AS 4902-2000 General Conditions*, in particular, an amended clause 37.2. The clause relevantly provided timeframes for the provision of a payment schedule with the penultimate paragraph of Clause 37.2 providing that the Superintendent was the agent of KP Developments and that any payment schedule issued by the Superintendent was deemed to be as agent of KP Developments.

The main issue was whether RHG Construction had "identified" the relevant payment schedule in the Adjudication Application pursuant to s 79(2)(c) of the BIF Act and, relatedly, what was the relevant payment schedule pursuant to s 69 of the BIF Act.

Building Industry Fairness (Security of Payment) Act 2017 and the Relevant Payment Schedule

RHG Construction contended that the Superintendent's payment schedule was the relevant payment schedule within the meaning of s 69 of the BIF Act and that it was correctly identified in the Adjudication Application pursuant to s 79(2)(c) of the BIF Act.

KP Developments contended that the Adjudicator lacked jurisdiction on a number of bases but, relevantly that RHG Construction failed to identify the relevant payment schedule pursuant to s 79(2)(c) of the BIF Act, as they contend that it ought to have been KP Developments' payment schedule, through their solicitors, rather than the Superintendent's payment schedule. This was on the basis that KP Developments advised RHG Construction in advance that KP Developments would be providing their own payment schedule and expressly stated that the Superintendent's payment schedule was not to be considered a payment schedule for the purposes of the BIF Act. Also, that KP Developments' solicitors' payment schedule was provided within the time limits of the BIF Act.

The Court of Appeal found that the Superintendent's payment schedule was the relevant payment schedule within the meaning of s 69 of the BIF Act. The Court found that the Superintendent's payment schedule stated how much KP Developments "shall...pay to [RHG]", which satisfied the requirements under s 69(b) of the BIF Act that requires a payment schedule to state the amount of payment, if any, that the KP Developments proposed to make.

The Court of Appeal also found that the Superintendent's payment schedule was deemed under Clause 37.2 to be KP Developments' payment schedule for the purposes of s 69 of the BIF Act. The Court determined that the deeming provision in clause 37.2 did not offend s 200 of the BIF Act and was not, *inter alia*, contrary to the BIF Act. The Court was not persuaded by KP Developments' contention that there were two separate payment claim and payment schedule regimes under the contract that allowed both the Superintendent and KP Developments to provide payment schedules within the same time frames that could be conflicting. Rather, the provision was enforceable and ought to be given a business-like interpretation.

Further, the Court of Appeal held that there was no power under the contract to revoke the Superintendent's authority to issue the payment schedule and the deeming provision bound KP Developments to accept that agency.

Ultimately, it was held that the Superintendent's payment schedule was the relevant payment schedule pursuant to s 69 of the BIF Act and having been correctly identified in the Adjudication Application the Adjudication Decision was valid. The Appeal was allowed in favour of RHG.

Damian Clothier QC and Florence Chen appeared for the Appellant, instructed by Jackson McDonald with CDI Lawyers acting as town agent.



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