

ADJUDICATOR'S DECISION VOID BECAUSE NO "CONTRACT OR OTHER ARRANGEMENT" FOUND TO EXIST BETWEEN THE PARTIES

By Misha Rouyanian & Namira Rahman

In the case of *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685, the Supreme Court of New South Wales considered whether a "contract or other arrangement" existed within the meaning of the Building and Construction Industry Security of Payment Act 1999 (NSW) between the first defendant Timecon Pty Ltd and LLBJV, an unincorporated joint venture formed by Lendlease and Bouygues. The LLBJV sought a declaration that a determination purportedly made by an adjudicator under the SOP Act was void.

The determination related to an amount claimed by Timecon, under a contract or arrangement said to have been entered into between LLBJV and Timecon. Under this alleged agreement, Timecon purported to agree to a fee of \$4.00 per tonne to permit the LLBJV to store spoil on their site which was produced by excavation and tunnelling work for the NorthConnex Project.

LLBJV contended that the adjudicator did not have jurisdiction to determine the payment claim because there was no "contract or other arrangement" between the parties. Alternatively, if one existed, it was not one under which Timecon undertook to carry out construction work or to supply related goods and services for the LLBJV.

Timecon argued that an arrangement did not need to be legally binding for it to be an "other arrangement" for the purposes of the SOP Act. As there was no authority supporting this argument, Ball J rejected this submission.



In determining the interpretation of "arrangement" under the SOP Act, Justice Ball considered several cases. Ultimately his honour found it unhelpful to look to cases interpreting "arrangement" in other legislative provisions and did not follow them. Instead, for the SOP Act to apply, Justice Ball held that the subject of the "contract or other arrangement" had to be the provision of construction work or the supply of related goods or service. Therefore under this Act, the expression "contract or other arrangement" gave rise to a legal obligation to provide something in return for the construction work or related goods or services.

Justice Ball was not persuaded by Timecon's claim that an arrangement existed between the parties, finding a key witness' evidence unreliable, due to a failure to address critical matters in his affidavit evidence and its inconsistency with a considerable amount of correspondence between the parties.

Overall, Justice Ball found that no contract or other arrangement existed between Timecon and LLBJV within the meaning of the SOP Act. As a result, he did not need to consider whether the contract or other arrangement related to construction work. Justice Ball did note however that, on the evidence, the work was not construction work, but rather an arrangement for the tipping of spoil at that site.

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