

SIMIC & ORS v NSW LAND AND HOUSING CORPORATION & ORS
(S136/2016)

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 413

Date of judgment: 18 December 2015

Special leave granted: 5 May 2016

In March 2010 Nebax Constructions Australia Pty Ltd (“Nebax”) entered into a contract with the first respondent (“the Corporation”) for the construction of home units at Bomaderry (“the construction contract”). In relation to the construction contract, Nebax obtained financial facilities from the second respondent (“the ANZ Bank”). Under one of those facilities, the ANZ Bank issued two performance bonds (“the Undertakings”), each of which was headed “Bank Guarantee”. Nebax in turn agreed to indemnify the ANZ Bank against any expenses it might incur, either in making the payments under the Undertakings or arising from any claim in relation to them. Nebax’s obligations to the ANZ Bank were guaranteed by the appellants (“the Guarantors”), who are three individuals and two corporations.

In each of the Undertakings, the ANZ Bank undertook to pay “the Principal” up to \$73,482.53 on demand. The Undertakings described the Principal as “*New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940*”, which was not the correct name (or ABN) of the Corporation.

In October 2013 the Corporation sent a letter of demand to the ANZ Bank, requiring payment in accordance with the Undertakings. The ANZ Bank however refused to pay, due to the discrepancy between the description of the Principal in the Undertakings and the description of the Corporation in the letter of demand.

The Corporation then commenced Supreme Court proceedings against the ANZ Bank, which in turn cross-claimed against Nebax and the Guarantors. (Leave was granted to proceed against Nebax, which had gone into liquidation.) On 24 March 2015 Kunc J declared that the description of the Principal in the Undertakings meant the Corporation. This was after finding that a reasonable business person would have understood that the beneficiary of the Undertakings was the entity with which Nebax had made the construction contract, and that it would be absurd for the misdescription to cause the Undertakings to be ineffective. Kunc J then ordered the ANZ Bank to pay the Corporation \$146,965.06 plus costs. His Honour also declared that the ANZ Bank was entitled to indemnity from Nebax and that the Guarantors were liable to the ANZ Bank under various surety and guarantee arrangements. Kunc J found it unnecessary to order that the Undertakings be rectified by correcting the description of the Corporation in each of them.

The Guarantors appealed, whereupon the Corporation and the ANZ Bank each cross-appealed. On 18 December 2015 the Court of Appeal (Bathurst CJ, Ward JA & Emmett AJA) unanimously dismissed the appeal and both cross-

appeals. Their Honours held that Kunc J, in construing the Undertakings, had not erred by considering the construction contract insofar as identifying its parties. This was because the construction contract and its parties were referred to in the Undertakings, which were to be construed so as to give them the effect they were clearly intended to have. The Court of Appeal held that such an approach did not violate either the principle of autonomy, which ought not be applied with unyielding exactitude, or the principle of strict compliance, which was a principle of performance rather than a principle of construing documents. Their Honours found it unnecessary to order rectification of the Undertakings because, properly construed, they were addressed to the Corporation.

The grounds of appeal include:

- The Court of Appeal erred in finding that the misdescription of the beneficiary in the two bank guarantees issued by the ANZ Bank, at the request of Nebax, did not entitle the issuing bank to refuse to payout on the bank guarantee to the Corporation whose name was similar to but materially different from the named beneficiary in the bank guarantee.
- The Court of Appeal erred by finding that the “documentary discrepancy” present in the two subject bank guarantees did not affect the “principle of strict compliance” because that was a principle of performance only that applied only after the instruments were properly construed.

The Corporation has filed a notice of cross-appeal, the ground in which is:

- The Court of Appeal erred in not ordering rectification of the Undertakings.

The ANZ Bank has also filed a notice of cross-appeal, the grounds in which include:

- If the Court finds that the Court of Appeal erred as alleged in the notice of appeal filed on 19 May 2016 and does not find that the bank guarantees the subject of this appeal are ineffective to create an obligation on the part of the ANZ Bank, the Court of Appeal erred:
 - a) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank’s cross-appeal pursuant to the admission of liability made by the appellants in the agreement between the ANZ Bank and the appellants reached during the hearing at first instance on 6 February 2015 (“the ANZ/Appellants’ Agreement”) and communicated to the Court at first instance on that date;
 - b) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank’s cross-appeal to give effect to the ANZ/Appellants’ Agreement under s 73 of the *Civil Procedure Act 2005* (NSW);

- c) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank's cross-appeal to give effect to the ANZ/Appellants' Agreement on the basis that it constituted accord and satisfaction.