



HIGH COURT OF AUSTRALIA

7 December 2016

DANIEL MATTHEW SIMIC & ORS v NEW SOUTH WALES LAND AND HOUSING
CORPORATION & ORS
[2016] HCA 47

Today the High Court unanimously allowed an appeal and cross-appeals from a decision of the Court of Appeal of the Supreme Court of New South Wales. The High Court held that it was not possible to construe references to a non-existent entity in two instruments ("the Undertakings") and underlying finance applications ("the applications") as references to the first respondent, the New South Wales Land and Housing Corporation ("the Corporation"). However, the High Court held that the Undertakings and the applications should be rectified to refer to the Corporation.

In March 2010, the Corporation and the third respondent ("Nebax") executed a contract for the demolition of existing buildings and construction of unit blocks ("the Construction Contract"). The Corporation required Nebax to provide, as security, unconditional undertakings by a financial institution to pay on demand. Mr Simic, a director of Nebax, gave the details required to generate the Undertakings and the applications to an employee of the second respondent ("ANZ"). The appellants ("the guarantors") were guarantors of Nebax's obligations to ANZ.

There were errors in the details Mr Simic gave, such that the Undertakings and the applications referred to a non-existent "Department", not the Corporation. The Corporation later sought to make a demand on ANZ for payment under each Undertaking. ANZ refused the demand on the basis that the Corporation was not the entity named in the Undertakings. The Corporation issued proceedings in the Supreme Court of New South Wales seeking payment.

The primary judge (Kunc J) held that the Undertakings should be construed as referring to the Corporation. His Honour entered judgment for the Corporation against ANZ and declared that ANZ was entitled to be indemnified by Nebax. The Court of Appeal dismissed an appeal by the guarantors. By grant of special leave, the guarantors appealed to the High Court. ANZ and the Corporation each sought special leave to cross-appeal, seeking rectification of the Undertakings and the applications so that each referred to the Corporation.

The High Court held that it was not possible to construe the Undertakings as being in favour of the Corporation because such a construction was inconsistent with both the express terms of the Undertakings and the commercial purpose of such instruments. It therefore allowed the guarantors' appeal.

However, the High Court also held that the Undertakings and the applications should be rectified to refer to the Corporation because it was the actual common intention of the parties that the Undertakings should enure to the benefit of the party with which Nebax entered into the Construction Contract – namely, the Corporation. It therefore granted special leave to cross-appeal and allowed each of ANZ's and the Corporation's cross-appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*