

JUDGMENT BERGIN J Supreme Court of New South Wales, Equity Div. T&C List 21 NOVEMBER 2007

- 1 By summons filed on 22 October 2007, the plaintiff, Berem Interiors Pty Limited, seeks a declaration that the purported adjudication determination (the Determination) issued by the second defendant, the Adjudicator, pursuant to the *Building and Construction Industry Security of Payment Act 1999* (the Act) dated 15 October 2007 is void.
- 2 The determination concerned a payment claim made by the first defendant, Shaya Constructions (NSW) Pty Limited, to which I will refer as "*the defendant*", on the plaintiff. The Adjudicator determined that the plaintiff was required to pay the defendant \$208,325.70 plus interest running from 14 September 2007.
- 3 The plaintiff claims that the Determination is void because a basic and essential requirement for a valid determination was absent, namely, the existence of a construction contract between the plaintiff and the defendant. The plaintiff claims that there was a construction contract between the defendant and another company known as Berem Constructions Pty Limited (Constructions). The plaintiff makes an alternative claim, that the Determination is void by reason of a denial of procedural fairness.
- 4 On 12 December 2006, Constructions issued an Invitation to Tender to the defendant for the supply, delivery and installation of suspended ceilings, partitions and lining works in respect of the alterations and additions to an existing industrial building to facilitate the construction of 14 retail tenancies, some commercial suites and some residential apartments at premises known as 9-15 Danks Street, Waterloo. That letter of invitation included the following:
Berem Constructions Pty Limited have been awarded the Alterations and Additions to the existing industrial building to facilitate the construction (of the abovementioned work) at 9-14 Danks Street, Waterloo.
- 5 The scope of works was listed within the Invitation to Tender and the Invitation to Tender was signed by Peter Inkpen, as the Project Manager of Constructions.
- 6 On 17 January the defendant wrote to Constructions in a letter that included the following:
We have pleasure in submitting for your approval, our quotation for the works pertaining to the above property. Our price is based on Invitation to Tender dated 12 December 2006.
- 7 The lump sum price, GST exclusive, was \$508,464.
- 8 The evidence discloses that there were meetings between 17 January 2007 and 24 January 2007. There is not a great deal of difference between the parties as to what was said at those meetings. It appears there were at least two meetings, one of which was attended by the principal, Niklas Green as the managing director of the defendant, a former director of the defendant, Peter George and Mr Inkpen. Mr Green's evidence today established that Mr George was the person within the defendant who put together the quote that was submitted to Constructions, and the person who prepared the documentation in respect of the contractual arrangement or contract that was to be entered into by the defendant.
- 9 Mr Green candidly admitted that he had not seen a number of the documents that were sent to Constructions until the adjudication process. In particular he did not see the letter of 17 January 2007. Mr Green also gave evidence that he did not speak to Mr George at the time that Mr George was preparing these documents.
- 10 In any event, on 24 January 2007 the defendant wrote to Constructions in terms that included the following:
We have pleasure in submitting for your approval, our quotation for the works pertaining to the above property.
Our price is based on
 1. *Invitation to Tender dated 12 December 2006.*
 2. *Tender meeting on 19 January 2007.*
- 11 The total lump sum price in that letter was \$494,207.
- 12 According to Mr Green's evidence, at a meeting on 24 January 2007, Mr Inkpen asked Mr Green what he "could do it for" and Mr Green replied, "*well, we can do it for 478*". Mr Inkpen paused for a moment and then said "that should be okay". Mr Green gave evidence that he then marked up "*our quote document*", that the parties talked a little more about the project and that he, Mr Green, marked on the document other points of agreement. Mr Green's evidence is that the only entity that Peter, meaning Peter Inkpen, referred to was "Berem". That is not inconsistent with Mr Inkpen's evidence. He gave evidence that at no stage during the meetings did he ever mention Berem Interiors, the plaintiff.
- 13 The document that Mr Green said that he wrote on is apparently an identical document to the 24 January 2007 letter that was sent to Constructions but peculiarly it does not have the words "*Constructions Pty Limited*" in the address. It just has the word "*Berem*". That has not been explored in the evidence, other than by way of identifying it as a curiosity and I do not need to determine the reason for those differences.
- 14 The defendant commenced work at the site and subsequently sent its Tax Invoices Progress Claims to "*Berem Interiors*", the plaintiff. Each of the progress claims had at its foot "*Claimed under the Building and Construction Industry (Security of Payment) Act of 1999 NSW section 13*". In respect of each of the invoices, Constructions issued a Recipient Created Tax Invoice (RCTI) in which the defendant was identified as the supplier and the recipient was identified as Constructions. Those invoices set out the original contract sum, any revised contract value, variations, less retention, total after retention, less amounts previously certified, the item for GST, the invoice amount and bore a signature as payment approved. Each of the RCTIs is in the same format identifying Constructions as the "*recipient*". It is the uncontroverted fact that all of the defendant's invoices were paid by Constructions.

- 15 The defendant left the site on 27 August 2007 and made a payment claim on the plaintiff dated 30 August 2007. On 27 September 2007, the claim remained unpaid and the defendant applied for adjudication of the unpaid amount.
- 16 The respondent to the adjudication process was the plaintiff, not Constructions. There is no issue between the parties that when the plaintiff filed its payment schedule in the adjudicative process it raised, in paragraph 1.7 of its Schedule, a claim that it was not the contracting party to the construction contract. It would appear that the defendant was on notice from that time that any adjudication process under the Act would not be resisted, at least jurisdictionally, by Constructions because the plaintiff identified Constructions as the contractor with the defendant to the construction contract. The defendant pressed on against the plaintiff.
- 17 The Adjudicator determined the application on 15 October 2007. In that determination the adjudicator wrote:
- 4. Jurisdiction and Document Issues.**
- The following jurisdiction and/or document issues were identified:*
- (a) *The respondent's adjudication response raises an issue of the 'contracting party' and whether the respondent is Berem Constructions or Berem Interiors. The respondent asserts Berem Constructions is the contracting party, therefore, as the claimant has provided, the payment claim to Berem Interiors adjudication application is not valid. I have viewed the documentation and considered this matter in detail. I agree with the respondent that the tender offers were made to Berem Constructions. However, I am satisfied that something during the course of negotiations triggered the claimant to change the company name from 'Constructions' to 'Interiors'. This change itself, given the 'cut & paste' regime of computers, would require a conscious decision. The claimant provided correspondence and payment claims during the entire project duration, all of which were addressed to Interiors and not once have I discovered did Berem Interiors formally notify the claimant of the issue associated with the contracting party. For the respondent to now use the 'contracting party' issue as a reason for withholding payment is not acceptable. I am satisfied that Berem Interiors is the contracting party.*
- 18 The adjudicator also said that he was satisfied that on or about January 2007, the parties entered into a construction contract (see paragraph 5).
- 19 The plaintiff submitted that there was no construction contract, even given the broad definition of "construction contract" in section 4 of the Act which provides:
'Construction contract' means a contract or other arrangement under which one party undertakes to carry out construction work or to supply related goods and services for another party.
- 20 The plaintiff relied upon the decision in *Brodyn Pty Limited t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421 in support of the submission that one of the basic and essential requirements for the existence of an adjudicator's determination is the existence of a construction contract between the claimant and the respondent to which the Act applies (per Hodgson JA at 441 paragraph [53]). The plaintiff submitted here, as it did before the Adjudicator, that there was a construction contract between the defendant and Constructions. The point was dealt with by the Adjudicator in the way that I have indicated.
- 21 There was apparently no evidence before the Adjudicator of any conversation during negotiations that the entity Constructions should be changed to the plaintiff. In fact there was apparently no evidence of any conversation during negotiations that would entitle the defendant to "cut and paste", to use the Adjudicator's terminology, the names of the company. Indeed, it is common ground that neither party made such a submission to the Adjudicator.
- 22 Mr Allan, on behalf of the defendant, in both written submissions and oral submissions, pointed to the evidence of other arrangements and contracts that were entered into between the various companies within, what I will loosely call, the "Berem Group". The Berem letterhead says "Berem Building It Better". At the foot of the letter four companies are identified: the plaintiff, Constructions, Berem Industrial Pty Ltd and Berem Administration Services Pty Ltd, each with the relevant ABN number.
- 23 Mr Allan identified in detail the various loose arrangements that had been made in respect of other contracts between the defendant and various companies within the Berem group in support of the submission that in this case there was some looseness of arrangement and that it is unconscionable for the plaintiff, at such late stage, to claim, as it does, that it was not a party to a construction contract. It is certainly true that the evidence relied upon by the defendant establishes some looseness of arrangement in respect of other contracts: for instance, Berem Interiors wrote to the defendant in relation to a sub-contract agreement in the Marketplace at Leichhardt; the defendant invoiced Berem Interiors, and it is apparent that Berem Industrial paid the fees. However those contracts are not the ones that I need to determine today. The question before me is whether there was a construction contract between this plaintiff and this defendant as an essential prerequisite for the exercise of the Adjudicator's jurisdiction.
- 24 Mr Allan submitted that there was not one skerrick of evidence establishing that Constructions was the contracting party. He submitted that these parties were in a broad dynamic commercial relationship and that in those circumstances, the Court should review the relationship with more flexibility than approaching the matter in reliance on the more limited contractual doctrine of offer and acceptance. There is authority that in fact cautions judges against being too constrained by the traditional approach of simply examining whether there was an offer and acceptance, counter-offer and so forth: *Port Sudan Cotton Co v Chettiar* [1977] 2 Lloyd's Rep 5 per Lord Denning at 10; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 per Bingham J at 611; affirmed on appeal at 615; *Pobje Agencies Pty Ltd v Vinidex Tubemakers Pty Ltd* (2000) *Aust Contract R* 90-112 per Mason P at [23]. However, it is a principled and appropriate way to determine whether there is a contract between relevant parties.

- 25 It is also important to remember that this is not the determination of whether a contract exists in a simple commercial setting. This is the determination of whether a contract exists that gives parties rights and imposes obligations under a statute. Although I accept Mr Allan's submission that there are instances when the Court, particularly a Commercial Court needs to be flexible in its approach, it is important to ensure a principled approach is adopted when determining the issue of the existence of a contract and the identity of the contracting parties.
- 26 The Adjudicator was invited effectively not to proceed with the Determination because of the plaintiff's claim that it was not a party to a construction contract. In determining the existence of such a contract, the Adjudicator did not refer to the correspondence, that I have referred to, in any specific way. Indeed, it would appear that some of the correspondence (that dated 17 January 2007) may not have been before the Adjudicator.
- 27 I disagree with Mr Allan's submission about the lack of specific evidence of the identity of Constructions as a contracting party. Constructions made the offer to the defendants in its Invitation to Tender dated 12 December 2007. The defendant responded to that offer on 17 January 2007 and met with Mr Inkpen. After further discussion, the defendant accepted the offer by submitting its quotations to Constructions for approval. It seems to me that where alleged looseness of arrangements is relied upon, it is all the more important to look at the original documents between the parties to decide whether a contract was made and the identity of the parties to that contract. I am not satisfied that there was a construction contract between the plaintiff and the defendant. It seems to me that the Adjudicator fell into error and that it was a jurisdictional error.
- 28 Mr Allan, in his detailed written submissions, relied on Nicholas J's reasons in *Okaroo Pty Limited v Vos Constructions and Joinery Pty Limited & Anor* [2005] NSWSC 45 and, in particular, the passage at paragraph 42 in which his Honour said:
In deciding whether a contract or other arrangement is within the definition of 'construction contract', the only matter for consideration is whether it is one under which one party undertakes to carry out construction work or to supply related goods and services for another party. There is no other requirement for qualification which is expressly or by implication included in the definition which must be satisfied.
- 29 In that case an arrangement had been made between a developer and a sub-contractor to the builder. It appears that the developer and the builder were parties to a construction contract but an arrangement was made with the sub-contractor by the developer for the developer to pay the sub-contractor directly. In that case there was evidence of a conversation between the developer and the sub-contractor in relation to such an arrangement which satisfied Nicholas J that the arrangement fell within the broad definition of "construction contract" in the Act.
- 30 In the present case the defendant submitted that even if the Adjudicator fell into error in concluding that a construction contract existed between the plaintiff and the defendant, he was entitled to reach the same conclusion on the basis that there was an "arrangement" within the meaning of that term in the definition in the Act of construction contract, whereby work was performed for the plaintiff, albeit that the plaintiff did not pay for the work. The Adjudicator did not address this matter at all. In this case there is no evidence upon which I could be satisfied that there was an arrangement between Interiors, the plaintiff, and the defendant, such that would fit within that term in the definition of a "construction contract". From the outset, it was Constructions that made the offer in its Invitation to Tender. From the outset, it was the defendant who accepted that offer by tendering its quote for approval by Constructions. I am not persuaded that the fact that the invoices had the wrong company name on them establishes any contractual entitlement in the defendant as against the plaintiff.
- 31 In *TransGrid v Seimens Ltd* (2004) 61 NSWLR 521, Hodgson JA said at 539 paragraph [29]:
However, for reasons I have given in Brodyn Pty Limited v Davenport (2004) 61 NSWLR 421, and as submitted by Mr Walker SC for Seimens in this case, in my opinion this review is available [that is a review for jurisdictional error] only where the determination is not a determination within the meaning of the Act, because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination. If an adjudicator has erroneously decided that such an essential pre-condition has been satisfied when in truth it has not, then that can be considered a jurisdictional error making the determination 'reviewable'. However, for reasons given in *Brodyn*, such an error would in fact make the determination void.
- 32 In *Brodyn* Hodgson JA said at 442 [55]:
What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhausted), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf R v Hickman; Ex parte Fox & Clinton (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this natural measure of justice, then in my opinion a purported determination would be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a detailed determination.
- 33 I am satisfied that there is no construction contract between the plaintiff and the defendant and thus a basic and essential requirement as a prerequisite to a valid determination has not been satisfied. I am satisfied that the Adjudicator fell into error and that it was a jurisdictional error. The Determination is void.
- 34 I make the declaration in paragraph 1 of the summons filed in these proceedings.