JUDGMENT : McDougall J : New South Wales Supreme Court : 11th January 2006.

1 The plaintiff (DMG) and the first defendant (State Concrete) were parties to a contract made on about 5 January 2004. Under that contract, State Concrete agreed to provide work and materials, which on any view amounted to construction work and related goods and services, for a project known as Roads Waterside. There is no doubt that the contract was a construction contract for the purposes of the Building and Construction Industry Security of Payment Act 1999 (the Act).

2 On 31 March 2005, State Concrete served a payment claim on DMG and on 4 April 2005 DMG served a payment schedule in response. The dispute resulting from those documents was referred for adjudication under the Act to Mr Anthony Fowler. On 11 May 2005, Mr Fowler gave his determination. He determined that State Concrete was entitled to be paid $145,265, in a context where DMG and State Concrete agreed that DMG had already paid to State Concrete a total amount of $1,011,135. Those amounts, and all other amounts referred to in these reasons unless otherwise indicated, are exclusive of GST.

3 On 2 May 2005 DMG paid the adjudicated amount (and other amounts) to State Concrete. It follows that the total, exclusive of GST, paid by DMG to State Concrete became $1,556,140.37.

4 On 11 August 2005 State Concrete served a further payment claim on DMG. Consistent with what I have said, that payment claim acknowledged that the total already paid by DMG to State Concrete was $1,556,140.37. The amount claimed by the payment claim was a further sum of $ 168,768.05.

5 DMG served a payment schedule on State Concrete. The resulting dispute was referred to determination under the Act to the second defendant (Mr Sarlos).

6 On 16 November 2005, Mr Sarlos made his adjudication determination available to the parties. He determined that the amount claimed by State Concrete was in fact payable. However, on review of the determination, it is apparent that Mr Sarlos had decided, for reasons that are completely unclear, that the amount already paid by DMG to State Concrete was not the agreed amount of $1,156,437 but an amount of only $962,143. It is apparent that if State Concrete's entitlement were as determined by Mr Sarlos, then the addition of that amount to his view of the amount paid to date (962, 143) would produce an amount that is still less than the agreed amount already paid.

7 There is no controversy between DMG and State Concrete as to the fact that payments to date, the date in question being the reference date 31 July 2005 to which the payment claim of 11 August 2005 related, were in total $1,156,400.37. There is no controversy between DMG and State Concrete that the payment claim made by State Concrete on DMG on 11 August 2000 claimed an amount in excess of that sum. There is no controversy between DMG and State Concrete that the dispute referred to adjudication and adjudicated by Mr Sarlos proceeded on the agreed or conventional basis that the amount in fact paid was $1,156,400.37.

8 When DMG received the determination from Mr Sarlos, it requested him to correct the determination pursuant to section 22(5) of the Act: the "slip rule" provision. I interpolate that this was done on notice to State Concrete. State Concrete opposed that course being taken, and Mr Sarlos decided that he had no power to correct his determination under section 22(5.)

9 After those events, an adjudication certificate was issued setting out the adjudicated amount and that certificate was filed in the District Court of New South Wales. Accordingly, pursuant to section 25 of the Act, there became payable by DMG to State Concrete a judgment debt in the amount of the adjudication certificate.

10 In these proceedings, DMG claims that the adjudication is void. It seeks a declaration to that effect, and orders restraining State Concrete from seeking to enforce its judgment recovered in the District Court. I note that enforcement has been attempted through garnishee process, and the relief claimed extends to that enforcement activity.

11 The matter came before the Court on 16 December 2005 and on that date the Court ordered that interlocutory relief be granted restraining the enforcement of the judgment. As a condition of that relief, DMG was required to pay into Court (this Court), and did pay into Court, the amount of the judgment. Accordingly, DMG now claims an order that the amount paid into this Court be paid out to it.

12 DMG puts its case, as to invalidity of the determination, in two ways. Firstly, it says, in deciding the matter in the way he did, Mr Sarlos denied it natural justice. Secondly, it says, in deciding the matter in the way in which he did, Mr Sarlos failed to exercise in good faith the powers given to him as adjudicator by the Act for the purpose for which those powers were given. The grounds of review reflect some of those established by the Court of Appeal in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at 440 and following.

13 In that case, the Court of Appeal (speaking through Hodgson JA, with Mason P and Giles JA concurring) held that this Court could interfere with the decisions of adjudicators in four limited circumstances. The first was where the determination failed to satisfy the conditions laid down by the Act as essential for the existence of a valid determination. The second was where the adjudicator had failed to afford to the parties such measure of natural justice as, having regard to the statutory scheme, they were entitled to receive. The third was where the adjudicator failed to exercise the statutory powers in good faith for the purposes for which they were given, again having regard to the statutory scheme. The fourth was where the exercise of the statutory powers was fraudulent, with the adjudicator being complicit in that fraud.

14 In all those situations, the Court held, the determination would be a nullity: void, and not merely voidable.

15 That approach has been reinforced by subsequent decisions of the Court of Appeal and is binding upon me. Neither party submitted that I should take any other approach to the determination of these proceedings, although Mr Newton, of counsel, who appeared for State Concrete, put the matter in written submissions in terms of jurisdictional error of law. If that is intended to be a summary reference to failure to comply with the basic and essential requirements of validity, then I have no difficulty; but use of that terminology does involve some inconsistency with the approach identified by Hodgson J A at 441 [54].

16 The Court of Appeal in *Brodyn* did not consider the relationship between what I will call the "good faith" ground of impeachment on the one hand and the protection afforded by section 30 to, among others, adjudicators on the other. Section 30 provides, relevantly, that an adjudicator is not personally liable for anything done or omitted to be done in good faith in exercising the adjudicator's functions under the Act or in reasonable belief that it was done or omitted to be done in the exercise of those functions. Nor did the Court of Appeal explore this in any of its subsequent decisions in which it confirmed the approach taken by it in *Brodyn* .

17 I gave some consideration to the ***"good faith"*** requirements imposed by virtue of the decision of the Court of Appeal in my decision in ***Timwin Constructions v Facade Innovations*** *[2005] NSWCA 197* . However I was not referred to, and did not consider, the interaction between the good faith ground and section 30. The only decision of which I am aware that does give consideration to this is that of Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129. It is clear, as his Honour pointed out at para [109], that the meaning of the term ***'good faith'*** will vary having regard to the context in which it is used. Thus, it is quite conceivable that the term may mean one thing for the purposes of the good faith test, and something else for the purposes of section 30. However, given that I have come to the view that DMG is entitled to succeed on the basis of denial of natural justice, I do not think that this is an appropriate occasion to consider the varying meanings of the term, or the relationship between the good faith test and section 30.

18 In ***Musico v Davenport*** [2003] NSW SC 977, I said at [107]-[108] that where an adjudicator proposes to make a determination on a basis for which neither party has contended and which neither has addressed, then natural justice requires the adjudicator to give the parties notice of what he or she is contemplating to enable them to address it. I said that, where this does not happen, there is a breach of the requirements of procedural fairness or natural justice. Although the approach to review that I took in ***Musico v Davenport*** was disapproved by the Court of Appeal in ***Brodyn*** , nothing that their Honours said cast any doubt upon the approach that I took to the question of natural justice, it being common ground between them and me that denial of natural justice, having regard always to the statutory scheme, rendered a determination void.

19 What I said on this topic in ***Musico*** was adopted by Einstein J in ***John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd*** [2004] NSW SC 258 at [13]. Both his Honour's decision and mine were referred to, I think with approval, on this point, by Brereton J in ***Holmwood Holdings*** at [135.]

20 In my view, it is plain that the dispute that the parties submitted to Mr Sarlos for adjudication proceeded on the agreed or conventional basis that the amount already paid was $1,152,400.36. It must follow that it was only if Mr Sarlos concluded that the value of the construction work carried out exceeded that figure that there could be any amount payable by DMG to State Concrete. There was no dispute that Mr Sarlos was required to resolve as to the amount of the payments to date. The dispute that he was required to resolve was as to the value of construction work over and above the amount paid agreed to have been paid to date.

21 In my view, when Mr Sarlos decided to determine the obligation on the basis that the amount paid was less than the amount that the parties agreed had been paid, it was incumbent upon him, before issuing his determination, to give the parties notice and to give them an opportunity to address the point. To put it another way, when Mr Sarlos decided to reinvestigate for himself the merits of that which the parties had agreed, with a view to reaching a decision, he was required to tell them that he intended to do so and to allow them to address him on the point. It was simply not open to him to go ahead without notice and decide the obligation on a basis for which neither party had contended. As I have said already, it is apparent that his conclusion on the amount paid was fundamental to his ultimate conclusion that an amount was owing by DMG to State Concrete, because it was only if the amount paid to date was substantially less than that which the parties agreed was the case that there could be, on his other findings, any amount payable.

22 It follows, in my view, that there has been a material - indeed, in this case, fundamental - denial of natural justice.

23 Mr Newton sought to support the adjudication by pointing to the circumstance that, as is apparent from the detailed reasons given by Mr Sarlos, he had paid attention to the amounts listed in section 22(2) of the Act for the purpose of carrying out his functions under section 22(1). Accepting, for the purposes of the argument, that this is so, it does not follow that, thereby, he gave the parties the measure of natural justice to which they were entitled. As I have already said, the obligation to give natural justice is one additional to the other grounds of invalidity established by the decision in *Brodyn*. It therefore does not follow that an adjudication determination that complies with the essential statutory requirements for validity must also be one that gives the parties the requisite measure of natural justice.

24 There is another aspect of the matter to which I think it is necessary to draw attention. Section 22(4) of the Act in substance prevents an adjudicator from determining the value of construction work or related goods and services, inconsistently with that arising from any prior determination "unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous

determination." The amount of the value of construction work, and related goods and services, was determined on a prior occasion by Mr Fowler in the determination to which I have already referred. Mr Sarlos' approach involved a departure from that, in circumstances where neither the claimant nor the respondent had asked him to do so (let alone had sought to satisfy him that it was appropriate to do so). Again, I think, if Mr Sarlos was intending to exercise the power implicit in section 22(4) to depart from the product of a prior determination, it was incumbent on him to notify the parties that he intended to do so and to give them an opportunity to address him on it.

25 For that reason also, I think that there is a denial of natural justice in a fundamental respect.

26 The result, as I have said, is that the determination is void. It follows, as the decision in *Brodyn* makes clear, that it cannot be the foundation of a judgment.

27 Because the judgment was not recovered in this Court, I do not think that I have power to set it aside.

28 However, these reasons, and the orders that I am about to make, establish the situation, as to validity and entitlement, conclusively as between the parties (in the absence of any appeal). It follows that if DMG moves in the District Court to set aside the judgment, on the ground that the underlying determination is invalid, State Concrete will not be able to proceed on any different basis.

29 State Concrete relied on some discretionary matters to suggest that I should not grant the relief sought. By an affidavit of its manager, Mr Frisoli, State Concrete claimed that it was entitled to a further sum of about $511,913. Thus, it said, even if it were not strictly speaking entitled to the fruits of Mr Sarlos' determination, it was nonetheless owed substantially more, so that as a matter of discretion I should not set aside the judgment.

30 As I understand it, there has been no adjudication in respect of the claim; far less has there been any determination, either by a Court or by an arbitrator, of the claim. Mr Frisoli's evidence falls a long way short of establishing, as a matter of proof, that there is any amount owed. He says, in paragraph 8 of his affidavit affirmed 4 January 2006: *"I submit that State is owed by the plaintiff approximately $511,917 (plus GST)"*.

31 No objection was taken to that evidence. Nonetheless, a submission of that kind, entirely unsupported by any documentary or other evidence, is not probative of anything other than Mr Frisoli's state of mind; and his state of mind is not relevant to any issue in these proceedings.

32 I therefore do not regard the matters relied upon by State Concrete as providing any basis for withholding the relief on which, on the conclusions I have come, DMG is entitled.

33 I make a declaration in terms of prayer 1 of the amended summons filed in Court on 11 January 2006. I order that the first defendant be restrained permanently from by itself, its servants or agents or otherwise enforcing or seeking to enforce the garnishee order entered by it against the plaintiff on 29 November 2005 in District Court proceedings number 246 of 2005.

34 I order that the first defendant be restrained permanently from by itself its servants, its agents or otherwise enforcing or seeking to enforce the judgment recovered by it against the plaintiff on 29 November 2005 in those District Court proceedings.

35 I reserve for further consideration the relief sought by prayer 6 of the amended summons.

Mr F C Corsaro SC with Mr D Miller Plaintiff instructed by Crisp Plaintiff
Mr R K Newton First defendant instructed by Summit Law First defendant
Mr I H Bailey SC Second defendant Peter Sarlos Second defendant & National Australia Bank Third defendant