

JUDGMENT : Associate Justice Macready : New South Wales Supreme Court : 3rd August 2005

- 1 This is an application by amended summons filed 18 July 2005 in which the plaintiff seeks a declaration that the Determination made by an Adjudicator, Mr Philip Martin, on 20 August 2004 under the **Building & Construction Industry Security of Payment Act 1999** (NSW) (the Act) is void.
- 2 Previously there had been proceedings between the same parties in respect of a statutory demand arising out of the same dispute between the parties. The evidence in this matter substantially corresponds with the evidence in the earlier matter and, accordingly, I will incorporate some of the chronology of the matter as I referred to it in my earlier judgment of 23 June 2005 in those proceedings.
- 3 The factual background giving rise to the dispute concerns building work carried out by the defendant company for the plaintiff company which was a contractor in respect of building work at 23 - 25 Chesterfield Parade, Bronte.
- 4 The plaintiff had entered into a contract with the owner of the site in about July 2003. The defendant was engaged as a sub-contractor to the plaintiff to carry out part of the relevant works.
- 5 There are conflicting accounts of the arrangements under which this work was to be carried out given by the principals of the two companies. Mr Paul Sussanna for the defendant gave evidence of giving a written quote which priced the job at \$128,760.90. He discussed the quote with Mr Rocco Gattellaro of the plaintiff company who said it was too much. The matter proceeded no further at that stage. Mr Sussanna says that a few days to a week later he had a telephone call from Mr Gattellaro to come and see him at the premises and during the course of that visit he says that Mr Gattellaro said to him that he wanted him to come and do the job. There is no doubt that thereafter the job proceeded and the work was done up until such time as work on the site ceased.
- 6 Mr Gattellaro's evidence is quite to the contrary. In a slightly more detailed account of the conversation he indicated that the quote was too high and he could not do a lump sum contract. He concluded by saying that he would only give Mr Sussanna the job if he would do it on a cost plus basis. He alleges that Mr Sussanna agreed to his proposal. Clearly the parties are at issue on this fundamental question of what were the terms of their contract.
- 7 There were three invoices submitted during the course of the job and in Mr Gattellaro's evidence he complained that the form of the invoices were not sufficient as they did not include backup invoices to enable him to properly assess the amount payable under what he described as a cost plus contract.
- 8 The plaintiff's contract with the owner of the property was terminated on 5 December 2003. By that stage according to the plaintiff there had been paid some \$65,000 on account to the defendant.
- 9 On 15 April 2004 the defendant commenced proceedings in the Consumer Trader & Tenancy Tribunal to recover the balance which it claimed was then owed. On 19 May 2004 directions were made by the Tribunal for the supply of invoices to the defendant so that the defendant could see the basis for the claim.
- 10 On 9 June 2004 there was served on the plaintiff company a progress claim under the Act. That claim was for a sum of \$20,541.49. Although in the form of a tax invoice it clearly included the relevant statement under the Act, namely, that "This claim is made under the New South Wales Building & Construction Security of Payments Act 1999 No 46". According to Mr Gattellaro at the time he received the claim he believed it was simply a statement sent to his company by the defendant setting out the previous invoices that were sent in answer to the Tribunal directions.
- 11 Although in response to the letter the plaintiff sent a letter to the defendant demanding supply of delivery dockets for steel and concrete in the context of the proceedings in the Tribunal, there was no payment schedule served by the plaintiff under the Act. The letter in response did not identify the payment claim or indicate whether any payment was to be made.
- 12 On 16 July 2004 the defendant sent a letter to the Master Builder's Association (MBA) with a copy to the plaintiff. It was an Adjudication Application. On the same day a letter was sent to the plaintiff enclosing a number of documents in the following terms: "*Further to our Payment Claim of the 9 June 2004 made under the NSW Building and Construction Industry Security of Payments Act 1999 No.46.*
The claim was served upon you by Dependable Couriers on that date. Your letter of the 24 June 2004, which included a copy of our claim with your handwritten note, confirms it was received by you on that date.
As we have received no response to our claim, we herewith advise that we will today be making an application through the Master Builders Association of NSW (ANA) for the appointment of an adjudicator to rule on the matter.
We herewith enclose documents as listed in attached page."
- 13 The defendant did not suggest that this was a notice required under s17(2) of the Act.
- 14 On 19 July 2004 the defendant faxed to the plaintiff a letter mistakenly dated 19 June 2004. The substance of that letter was in the following terms: "*I personally served on you on 9 June 2004 an invoice detailing money outstanding. Under the Building and Construction Security of Payment Act 1999 Section 11 payment was due 14 days after 9 June but allowing for the public holiday 15 June payment was due 24 June 2004.*"

You have not provided me with a Payment schedule under the Act. I hereby give notice that it is my intention to apply for adjudication under the Act and pursuant to Section 17(2). I hereby give you five (5) days to provide a payment schedule."

- 15 It was this letter which the defendant suggested was the relevant notice under s17(2) of the Act.
- 16 On 4 August 2004 there was an adjournment of the Tribunal proceedings as relevant invoices demanded by the plaintiff in these proceedings, the defendant in the Tribunal proceedings, had not been supplied.
- 17 On 9 August 2004 the plaintiff received a letter from the Adjudicator dated 6 August 2004 which stated that he had been appointed and proposed to consider the matter on 11 August 2004.
- 18 On 6 September 2004 the Adjudicator issued his certificate. On 10 September 2004 the certificate was registered as a judgment in the Local Court at Hornsby.
- 19 In the meantime, the matters were still proceeding in the Tribunal. On 20 September 2004 the plaintiff in these proceedings did a calculation of what he alleged was due to him and forwarded the documents to the Tribunal.
- 20 On 28 September 2004 a letter was sent to the Tribunal by the defendant in these proceedings in which he advised the Tribunal as follows: *"We write to advise that the above matter between Masterform Pty Ltd & Falgat Constructions Pty Ltd has been settled. Action at the CTTT is no longer required."*
- 21 The matter was back before the Tribunal on 5 October 2004 when the plaintiff attended to find that the hearing date had been vacated because the Tribunal had decided that as there was a settlement the matter was not proceeding.
- 22 It is plain that there was no agreement for a settlement and probably what was intended by Mr Sussanna in his letter, which used an unfortunate choice of words, was that the proceedings in which he was the moving party no longer needed to be continued because he had obtained his judgment under the Act. However, this a matter of some dispute in the present proceedings.

The plaintiff's claims

- 23 The plaintiff advanced four matters in support of its claim that the Adjudication Determination was void. These matters were:
1. The failure by the defendant to serve a proper payment claim.
 2. The failure by the defendant to properly notify the plaintiff of the Adjudication Application such that the plaintiff was given no opportunity to file an adjudication response.
 3. The failure by the defendant to serve a copy of the Adjudication Application.
 4. The false declaration by the defendant to the CTTT that the proceedings were settled thereby denying the plaintiff a hearing of the contractual dispute between the parties.
- 24 I turn to each of these matters.

The failure by the defendant to serve a proper payment claim

- 25 The plaintiff submitted that the payment claim in this case did not comply with s13(2) of the Act. That sub-section is in the following terms:
- "13 (2) A payment claim:*
- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and*
 - (b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and*
 - (c) must state that it is made under this Act."*
- 26 The payment claim was in the form of a tax invoice from the defendant to the plaintiff referring to the job by its address, the contract value and it contained a statement of the value of work completed and claimed. This was set out under six headings which were number, date, value of claim, date paid, amount paid and amount. There were four items under these headings and it is apparent that they are a reference to three previous invoices issued by the defendant to the plaintiff on the three dates specified in the claim. The invoice carried a notation which was required under s13(2)(c) of the Act. The real complaint of the plaintiff is that the payment claim merely referred to the value of the various claims made previously and made no specific reference to work of any kind. It is to be noted that under s13(2)(a), the payment claim must identify the construction work to which the progress payment relates. This seems perfectly plain to me as on its face the payment claim incorporates by reference the earlier tax invoices. These invoices themselves clearly give a description of the work and the amount claimed for each item of work. In my view there is an appropriate identification of the construction work to which the progress payment relates.
- 27 It was also suggested that the payment claim did not identify the basis on which the amounts were claimed and pointed to the fact that the payment claim, although referring to a contract value of \$128,760.90 did not refer to a percentage of the claims that were complete. Under s13(2)(b) all the payment claim has to do is indicate the amount of the progress payment that the claimant claims to be due. On the face of the payment claim, the document does this as it sets out the value of the claim in respect of each invoice and gives credit for the amounts that have been paid in respect of that invoice. It is plain what the amount is that the claimant claims to be due.

- 28 There was also reference made to the fact that it is not apparent on what basis the contractual claim is advanced, but I do not think that this is relevant. The payment claim only needs to set out the matters required by the section. In my view the payment claim does comply with s13(2) of the Act.

The failure by the defendant to properly notify the plaintiff of the Adjudication Application such that the plaintiff was given no opportunity to file an adjudication response

- 29 The plaintiff's claim is that there has been a breach of the rules of natural justice in respect of the provision of notices required under the section. The extent to which the Court may declare void a determination has been dealt with definitively by the Court of Appeal in *Brodyn Pty Limited v Davenport* [2004] NSWCA 394. In the majority judgment Hodgson J distinguished between the basic and essential requirements, and the more detailed requirements for the purposes of determining whether a breach may make the determination void. He said:

"53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

- 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (s.7 and s8).*
- 2. The service by the claimant on the respondent of a payment claim (s.13).*
- 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*
- 4. The reference of the application to an eligible adjudicator, who accepts the application (s.18 and s19).*
- 5. The determination by the adjudicator of this application (s.19(2) and s21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s.22(1)) and the issue of a determination in writing (s.22(3)(a)).*

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

*55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. **Project Blue Sky Inc. v. Australian Broadcasting Authority** (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), 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 and 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 measure of natural justice, then in my opinion a purported determination will 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 determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."*

- 30 It is plain that a substantial denial of the measure of natural justice that the Act requires to be given can lead to a determination being void. His Honour went on to describe the measure of natural justice that the Act requires in paragraph 57, in these terms:

*"57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in **Emag Constructions Pty. Ltd v. Highrise Concrete Contractors (Aust) Pty. Ltd** [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example **Ridge v. Baldwin** [1964] AC 40, **Durayappah v. Fernando** [1967] 2 AC 337, **Banks v. Transport Regulation Board (Vic)** (1968) 119 CLR 222 at 233, **Calvin v. Carr** [1980] AC 574 at 589-90, **Minister for Immigration v. Bhardwaj** (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."*

- 31 The provisions to which His Honour refers are of course the provisions for submission of various responses to the Adjudicator in the course of making his determination. His Honour has indicated the ambit of the measure of

natural justice the Act requires by extending it beyond the basic and essential requirements, which he identified in paragraph 53, to cover the particular process during the Adjudication that he identified in paragraph 57.

32 It seems to me that the question of any breach of natural justice must also take into account whether or not the plaintiff was given a copy of the Adjudication Application as required under sub-section 5 of s17.

33 The Act requires that a payment claim be served within 12 months after the work to which it relates was last carried out (s13(4)(b)). A payment schedule is required to be served within 10 business days after service of the payment claim (s14(4)(b)). If a party intends to apply for Adjudication, that party must notify the other of its intention within 20 business days of the due date of the payment and allow a further five business days for the provision of a payment schedule before the Application is made to the authorised nominating authority and served on the other party (s17(2)). An adjudication response can be made either five business days after the copy of the Application is served, or two business days after receiving notice of the Adjudicator's acceptance (s20(1)). Importantly an adjudication response can only be made where a payment schedule has been made within the times set out above (s20(2A)) and can only include information set out in the payment schedule (s20(2B)). There is no time frame for when the Adjudicator must accept the Application. After the acceptance of the Application, the Adjudicator must determine the matter within ten days or in a time agreed by the parties (s21(3)).

34 The relevant section of the Act dealing with notification is s17 which is in the following terms:

"17. Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1) (b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application:

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and

(c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and

(d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and

(e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable."

35 In this case, of course, there was no previous payment schedule served by the plaintiff and the procedure in the s17(1)(b) is the one that is applicable. Both the letter dated 16 July 2004 served on that day and the letter dated 19 June 2004 served on 19 July 2004, fall within the period of 20 business days immediately following the due date for payment. However, the first document did not comply with the section as it gave no opportunity for the respondent to provide a payment schedule to the claimant within five business days after receiving the claimant's notice, as required under sub-section (b) of s 17(2). The document of 19 June 2004 which was served on 19 July 2004 was within time. However it clearly was served after the Adjudication Application was lodged on 16 July 2004. In terms it gave the relevant five business days notice under sub-section (b) of s17(2) but not (as it said on its face) of an intention to make an Adjudication Application as such an Application had already been made.

36 It is plain that the scheme of s17, in a case where there has been a failure to provide a payment schedule, is to allow a further five days after notice for the respondent to provide a payment schedule and thereafter it allows a further ten days for the lodgment of the Adjudication Application. No doubt this is intended to allow the person who is intending to make an Application to do so by reference to the other party's stated position in the payment

schedule which they are given a second opportunity to serve. Section 17(3)(f) requires the Application to identify both the relevant payment claim and payment schedule.

- 37 In the present case this scheme was not followed because the Adjudication Application had already been lodged and, accordingly, the respondent had to consider the provision of a repayment schedule and was also obliged to put in an adjudication response.
- 38 The letter of 16 July 2004 was not only the notification of the intention to apply for Adjudication but a copy of the Application itself. The defendant abridged the time required to perform all the necessary steps in the process. Thus the plaintiff was required to prepare and serve an adjudication response by the later of either five business days after service of the Application, also 23 July 2004, or two business days after receiving notification of the acceptance of the Adjudicator's acceptance of the Application.
- 39 The Adjudicator could have accepted the Application and given notice at any time after the Application was made. The plaintiff could not have known that the Adjudicator would not accept the Application until 9 August 2004 thus requiring the adjudication response to be served by 11 August 2004. Thus the plaintiff was required not only to prepare the payment schedule but also to prepare the adjudication response within the same five business day period in order to be ready to lodge it if the Application was accepted promptly.
- 40 Rocco Gattellaro, for the plaintiff, stated in his affidavit sworn 14 July 2005 (at paragraph 45):
"45. On receiving the 16 July letter and the adjudication application, by reason of what was written in it, I understood that Masterform was filing its application for adjudication that day and it was too late for Falgat to give any other response to the payment claim."
- 41 The evidence was admitted provisionally and it seems to me that it is relevant. This is a reason why the plaintiff did not seek to serve a payment schedule with a consequent adjudication response after it received the 16 July 2004 letter which it will be remembered did not give notice that five days was being allowed for a further payment schedule. Mr Gattellaro was not cross-examined to suggest that the letter served three days later on 19 July 2004 dispelled any confusion that he had after receipt of the letter of 16 July 2004.
- 42 The Act has specified the time frames for the completion of the steps so as to balance the ability of the parties to prepare the requisite material with the efficiency required to determine these matters. The plaintiff was not given the opportunity to properly put its case to the Adjudicator because it assumed that the time had passed within which it could respond. In my opinion the failure of the defendant to abide by the timetable of the Act constitutes a substantial breach of the measure of natural justice expressly afforded by the Act in accordance the decision of **Brodyn**.

The failure by the defendant to serve a copy of the Adjudication Application

- 43 It is acknowledged that on 16 July 2004 the plaintiff received a letter from Masterform along with a copy of a letter to the MBA as an Application for Adjudication. It is not clear whether the engineer's instructions and plans referred to in the Application were served at this time. It is possible that they were but this does not seem to be the complaint made by the defendant.
- 44 The plaintiff contends that the proforma Application for Adjudication form sent to the MBA was never served. This is a minor issue. The material the plaintiff was served contains all the information required by s17(3) of the Act. The proforma Application form appears to be a summary of the information required by s17(3). It may be that the MBA required this form to be filled out by those applying to it for Adjudication but it only contained information that was already included in the written application. I do not think a failure to serve the proforma Application form constitutes a breach of the rules of natural justice which would be sufficient in the exercise of my discretion to set aside the determination on this basis.

The false declaration by the defendant to the CTTT that the proceedings were settled thereby denying the plaintiff a hearing of the contractual dispute between the parties

- 45 It is suggested that the statement that the proceedings had been settled indicated that the defendant had abandoned its right to further proceed at general law. It was submitted that in these circumstances that interim rights under the Act should therefore not continue to be available to the defendant. The precise basis on why this was so was not fully articulated and it seems to me that the submission overlooks the fact that the interim rights can give rise to a judgment with all that follows from that judgment. Just because someone may have abandoned their rights to take some other proceedings does not mean that that judgment loses its force and effect.
- 46 The order that I make are as follows:
1. I declare that the Adjudication Determination made by Philip Martin dated 20 August 2004 in respect of the dispute between the plaintiff and the defendant is void.
 2. Subject to submissions I order the defendant to pay the plaintiff's costs.

Mr M. Southwick & I. Wylie for plaintiff instructed by Julie Orsini
Mr S.A. Benson for defendant instructed by Marks Griffiths & Bova