

JUDGMENT Einstein J. Supreme Court New South Wales, Equity Division T&C List. 14th November 2006

Background

- 1 The three sets of proceedings presently before the Court arise in relation to contracts entered into for:
 - i. the supply, installation and commission of certain raw material conveyors at a concrete brick and block manufacturing plant at Port Kembla: ["the plant"].
 - ii. the preparation of a detailed design for the manufacture of the conveyors.

- 2 Brick and Block Company Pty Ltd ["B&B"] developed and operates the plant. The entity retained by B&B to supply, install and commission the raw material conveyors was JBK Engineering Pty Ltd ["JBKE"]. For present purposes it may be taken that the entity retained by B&B to prepare the detailed design for the manufacture of the conveyors was JBK Design and Construction Pty Ltd ["JBKD&C"].

[It may be noted that there is a dispute between the parties as to the precise nature of the legal relationship and the rights and obligations which may arise under the relationship as between the above described parties. Those matters do not constitute issues for present determination. Hence B&B accepts for purposes of these proceedings that:

- i. B&B was a party to a contract or other arrangement with JBKE;
- ii. B&B was a party to a contract or other arrangement with JBKD&C].

The three sets of proceedings

- 3 The parties are at issue with respect to three adjudication determinations purporting to have been made pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ["the Act"].
- 4 The first two determinations were made on 11 May 2006 and on 15 May 2006 by Mr Davenport as adjudicator. Those determinations are now reflected in judgments.
- 5 The adjudicator rejected an application that the two adjudications should be heard together. No challenge has been advanced to this approach.
- 6 The third determination in respect of which no request for a certificate under s. 24 of the Act has been made, was made by Ms Durham as adjudicator on 9 June 2006.
- 7 In proceedings number 55041 of 2006 and 55042 of 2006, the defendant, B&B, seeks orders that the judgments in the sum of \$518,202.93 [in the first proceedings] and in the sum of \$146,712.91 [in the second proceedings] be set aside. The contention is that the purported adjudication determinations by Mr Davenport and the certificates upon which they are based are void. Declarations to that effect are sought by in the first two sets of proceedings where JBKE and JBKD&C are the respective plaintiffs.
- 8 In proceedings number 55045 of 2006 B&B seeks a declaration that the third adjudication determination is void and ancillary relief.

The stages leading to the determinations

- 9 A chronology was prepared by the legal advisers for B&B in order to identify the stages leading to each of the three determinations. The convenient course is to include mark this chronology as 'MFI X'.

The material principles

- 10 At the commencement of the hearing Mr Flick SC, appearing for the JBK companies, formally submitted in order to preserve the right to argue the matters on appeal, that:
 - i. to the extent that B&B sought to set aside the determinations and the judgments, this could not be achieved by way of a notice of motion by way of s 25 (4) of the Act [accepting that the submission is contrary to the Court of Appeal holding in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.
 - ii. the majority judgment of the Court of Appeal in *Coordinated Construction Co Pty Ltd v J.M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 was incorrect "to the extent that it was held that the adjudicator had to give consideration to issues other than those raised in the response".
- 11 Subject to those formal matters the proceedings have been contested on the basis that the fundamental issue is whether or not the adjudicator has complied with the principles stated by Hodgson JA in *Coordinated Construction* at 399 [52].
- 12 These relevant principles are as follows:
 - i. "the adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act *and the true merits of the claim*": *Coordinated*, at 399 [52] (emphasis added); and
 - ii. "allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed *and without valuing it*" renders the determination void: *Pacific General Securities*, at [86].

[It may be noted that these principles were considered and followed by Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 at [86].]

The central attack by B&B

- 13 B&B has contended that in relation to *both* of the first and second adjudication determinations, the process of reasoning adopted by the adjudicator departed from the proper approach as expressed by the above

principles. The proposition is that the adjudicator allowed each claim on the basis that he rejected B&B's reasons for withholding payment *without considering the merits* of the two claims themselves. Whilst it is not put that the adjudicator in fact failed to read the adjudication application in each case, the proposition is that as a matter of *the substance of what occurred*, the adjudicator simply rejected the respondents adjudication responses, hence eschewing the need to conduct any examination which could sensibly qualify as being:

- i. a determination as to whether the construction work the subject of the claim had been performed; and/or
- ii. as a valuation of that work at all.

- 14 In effect the adjudicator is said to have done no more than to 'rubber-stamp' the adjudication applications without any attempt to weigh or test them.
- 15 These suggested failings are said to be apparent upon a close reading of the reasons given in these adjudication determinations.
- 16 B&B has emphasised that s 21 (3) of the Act provides that "*an adjudicator is to determine an adjudication application*". B&B's submission is that the logical starting point for any such determination must comprise an analysis of the adjudication application itself. The central submission has been that the adjudicator treated with the determination by regarding the respondent as having an onus to *disprove* the validity of the claims made in the adjudication application and simply failed to weigh the merits or otherwise of the actual adjudication application pursued by the JBK companies.
- 17 The position with respect to the third determination is somewhat different and essentially must stand or fall with the decision in relation to the attack on the first determination. The third determination is dealt with below.

The submissions advanced by B&B in relation to the first determination

- 18 B&B has submitted that the first determination is flawed and that a careful reading of the determination discloses that the adjudicator simply failed to form a view as to what was properly payable by the respondent, on what the adjudicator considered to be:
 - i. the true construction of the contract and the Act;
 - ii. the true merits of the claim.
- 19 The principal focus by Mr Christie, leading counsel for B&B, put the following propositions:
 - i. that the reasons given by the adjudicator disclose no analysis of the payment claim itself [in particular there being no consideration of, or even reference to, any of the many invoices that comprised the payment claim];
 - ii. that to the contrary:
 - a) the first determination is plainly based upon a process of reasoning which takes as its starting point, the premise that the claim is payable in full, unless the respondent established otherwise;
 - b) it is apparent that the reasoning process adopted by the adjudicator was to find in favour of the claimant by rejecting the respondent's reasons, rather than by making any attempt to ascertain the value of the payment claim by reference to the contract.
- 20 Descending into more adjectival information Mr Christie submitted as follows:
 - i. that it was common ground that the cost plus contract provided that the claimant was to be paid its cost plus a margin;
 - ii. that the actual costs incurred by a claimant will normally be peculiarly within the knowledge of the claimant;
 - iii. that the claimant in the first adjudication had provided very little documentary information to support the proposition that it had in fact incurred specific costs for labour and materials as claimed [including in its payment claim and in its adjudication application, invoices to B&B rather than invoices, such as those received from labour contract hire companies which the claimant had received, which should have been put forward in order to establish that the costs had actually been incurred].

Dealing with the attack on the first determination

- 21 B&B faces the obstacle posed by s 20 (2B) of the Act which provides that a respondent cannot include in the adjudication response, any reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant. As Hodgson JA observed in *Coordinated Constructions* (at [24]), the task of the adjudicator is in substance to determine the claimant's entitlement within *the framework of the dispute that was propounded by the parties*.
- 22 Albeit that B&B now puts forward the contention that both the payment claim [and the subsequent adjudication application] were defective in failing to include particular classes of invoices or otherwise proof that costs claimed by the JBK companies in invoices sent to B&B in truth represented costs actually incurred by the JBK companies, the fact is that B&B simply failed to put forward any such allegation in its payment schedule. The adjudicator made the point that the respondent had not in its payment schedule raised any issue concerning the amount paid. There was nothing untoward in the adjudicator having required strict compliance with s 20 (2B) of the Act.
- 23 Indeed a careful reading of the payment schedule makes clear that the respondent's reasons for non-payment of any amount shown in the payment claim, covered the following matters:
 - i. alleged non-compliance with the relevant ASA Code;
 - ii. an allegation that such non-compliance had created workplace health and safety issues requiring solutions involving expenditure of funds;

- iii. alleged representations by the claimant in terms of the advantages of its market conveyor design program, which is said in the payment schedule to have in fact been an inferior design requiring extensive modification to suit the existing plant;
 - iv. alleged excessive charges for design and engineering of the conveyors as well as for the general structural steelwork;
 - v. an allegation that excessive hours of labour had been invoiced in a situation where the alleged hours invoiced were as a direct result of JBKE's failure to design, manufacture, construct and erect the scope of work as represented within a commercially acceptable time and at commercially acceptable market rates for the scope of works the subject of their brief.
- 24 The adjudicator travelled in his reasons through each of these grounds presented in the payment schedule. It is inappropriate to repeat the whole of the reasons given in the determination but it is fair to say that a common theme comprised the lack of substantiation of the propositions put forward by the respondent. Again and again the adjudicator makes the point that there was insufficient specificity in the reasons given by the respondent in the payment schedule to permit the adjudicator to determine matters such as, what were the specific provisions of the contract that were allegedly breached, what the estimated cost of works said to be required by a contractual breaches would be, how the adjudicator could be satisfied that work of the claimant was defective in the aspects alleged, the lack of substantiation of the respondent's claims to withhold payment and similar. Indeed the adjudicator makes the point that even though the respondent had alleged that there was duplication in terms of invoices which it received in the adjudication response, it had not provided a single example of such.
- 25 Mr Flick during his address took the Court through the mass of documentary material included in the respective adjudication applications and to the mass of verification, inter alia by statutory declaration, in that regard.
- 26 The adjudication application contended that the "respondent's brick and block plant is fully operational and the respondent is benefiting from the claimant works". The claim for \$510,485.83 was supported by:-
- i. a Statutory Declaration of Mr. Greg Buchanan, a director of JBK deposing to his belief that "the sum of \$ 510,485.83 remains due and owing";
 - ii. invoices;
 - iii. detailed time sheets; and
 - iv. a "Contract Summary and Reconciliation." That Summary detailed the manner in which \$ 510,485.83 was calculated.
- 27 The adjudication response as filed by B&B contended in important part that:-
- i. what was supplied was "*a substandard conveyor that does not present the efficiencies for material handling represented*";
 - ii. the costs charged were "*excessive having regard to competitive market rates for a similar scope of works, the cost claimed is unsubstantiated*";
 - iii. there "*are repeated circumstances where unnecessary works have been done and at times repeated as a result of the claimant's negligence, lack of expertise and breach of representations*"; and
 - iv. the two JBK companies "*have colluded to issue invoices which are a duplication of the scope of works and therefore duplicating costs by both companies issuing invoices which on close examination result in many instances of the same work being charged twice...*".
- 28 The Adjudicator considered the claim made and the basis upon which it was advanced for resolution. His reasons included:-
- *The claimant has satisfied me that the invoices represent the amounts (costs plus the agreed percentage) to which the claimant is entitled under the terms of the contract.*
 - *I am satisfied that the progress payment to which the claimant is entitled is the whole amount of the payment claim.*
 - *The claimant has simply not claimed a lump sum for the conveyor. The claimant has provided details of alleged dates, times, labour, materials etc. The respondent has provided nothing to show that the costs claimed by the respondent were not costs actually incurred in carrying out the work....*
- 29 Finally it is appropriate before moving to the challenge to the second determination, to note that Mr Christie did not suggest that the adjudicator did not read the adjudication application [transcript 22.16]. That concession in itself is important when one takes into account the central submission put by B&B that the adjudicator effectively 'closed his eye' to that application and determined the adjudication by focusing, and focusing only, on the shortcomings which he identified in the adjudication response.
- 30 In my view there is no substance to the challenge to the validity of the first determination

The challenge to the validity of the second determination

31 B&B's relevant payment schedule in this instance was extraordinarily short. It read:

"Reasons for non payment of amount shown in Payment Claim

The time based rates for construction and procurement works and services are excessive in that:

- *The hours claimed are an excessive amount of hours which would be needed for a similar scope of works, involving the amount of steel and materials supplied in the scope of works delivered by JBK.*
- *Hours claimed are hours which are not the responsibility of the respondent, in that these hours expended were as a result of JBK Engineering Pty Ltd and JBK Design and Construction Pty Ltd failing to properly design,*

manufacture, construct and erect a scope of works suitable for the brief given to them. Their design required extensive modifications, cut and shut work to allow installation of their scope of works to the existing plant and equipment, these excessive hours for design modifications, manufacture, erection and installation are not the responsibility of the respondent.

- 32 Mr Christie focused upon the fifth and sixth paragraphs of the determination emphasizing the following matters:
- i. the statement in the fifth paragraph that:
*"In the adjudication response, contrary to s 20 (2B) of the Act the respondent raises additional reasons, for example, that the claimant colluded with [JBKE] to create unnecessary work, that **the claimant had refused to hand over drawings** and that the respondent had overpaid the claimant by \$41,000. In support of the allegations made in the payment schedule, the respondent relies upon a letter of 8 May 2006 from Mr Rea of Lejah Pty Ltd, a company engaged in designing and manufacturing materials handling equipment and conveyors..."*
 - ii. the statement in the sixth paragraph that:
*"...The respondent submits that a substantial amount of extra drawings prepared were the result of the claimant's negligence," [this being part of a quotation from the adjudication response]. However, the respondent has not identified the alleged extra drawings. **I appreciate that the respondent asked the claimant for and has not been provided with the drawings.** This was not raised in the payment schedule. Had it been raised, then that may have been grounds for withholding payment or [sic] portion."*
- 33 In short B&B had apparently made a complaint that the claim had been made for payment with respect to designs and drawings albeit that neither it nor the adjudicator had been provided with those designs and drawings. The complaint is that the respondent raised that as a matter for withholding payment and that the adjudicator had taken the s 20 (2B) point. The proposition was that if the adjudicator considered that the matter was possibly relevant, it was his obligation to consider it **whether or not** it had been raised by the respondent in the payment schedule. In this respect Mr Christie reverted to the principles earlier set out in these reasons [citing **Co-ordinated and Pacific General Securities**].
- 34 The submission was that the adjudicator's decision was vitiated because he did not look at the adjudication application and consider what he regarded was possibly a relevant matter [inescapably so on B&B's submission], namely the non-provision of the drawings. The proposition was that if the adjudicator was not satisfied that the drawings had actually been prepared this was a factor which he was required to take into account. The submission was that this matter illustrated the inappropriate nature of the approach adopted by the adjudicator who it is again said, determined the application without weighing the true merits of the claim, doing no more than rejecting the respondent's adjudication response.
- 35 The transcript includes the following exchange [corrected and added to for clarity]:
"His Honour: [In] relation to the second determination, your case seems to reflect some type of emperor's clothes parameter: that this was all most artificial, an extreme exercise because it was being assumed that there were some drawings that had not been passed across, it was totally nonsensical for an adjudicator to start trying to evaluate the appropriate claim when the very substance of the subject of it was not apparent and had never been identified and that outflanked everything else..,
Mr Christie: Yes, your Honour" [transcript 16]
- 36 In my view there is no substance in the submission that the adjudicator failed in his required task by relying upon the undoubted fact that the non-provision of drawings had not been *"raised in the payment schedule."*
- 37 The adjudication application was supported by:-
- i. a statutory declaration of Mr. Brian Moore, a partner in JBK Design & Construction Pty Limited, deposing that the sum of \$146,875.80 was owing and setting forth a Table of Invoices totally \$146,875.80- revised down to \$142,739.87;
 - ii. a "Contract Summary and Reconciliation"; and
 - iii. invoices.
- 38 The adjudication response of B&B contended in important part that:-
- i. *"the claimant has delivered in part a sub-standard conveyor..."*;
 - ii. there is a need for rectification work;
 - iii. the two JBK companies *"have colluded to issue invoices which are a duplication of the scope of works and therefore duplicating costs for the same scope of works attempting to camouflage these duplicated costs by both companies issuing invoices which on close examination result in many instances of the same work being charged twice."*
- 39 There is no substance in the submission that the adjudicator failed to consider the claim made on the basis upon which it was advised for resolution. His reasons included inter alia:
- The contract price was in part at agreed rates and in part at costs....
 - ...I am satisfied that that [\$142,739.87] is the amount of the progress payment due.
 - The adjudication application includes details of how the claimed amount is arrived at....
- 40 The adjudicator considered each of the defences sought to be advanced by B&B. It is inappropriate for the court to infer from the reasons that in considering these defences, the adjudicator approached his task otherwise than by considering the progress claim being advanced and whether there was a reason for not allowing the claim.

The third determination

- 41 It is possible to treat very shortly with the third determination which is the subject of the proceedings brought by B&B by summons. The short position in this regard is as follows:
- i. In respect of work previously claimed by JBKE, Ms Durham considered herself bound by reason of section 22(4) of the Act to give the work the same value as that previously determined by Mr Davenport in the first determination.
 - ii. To the extent that the work considered by Ms Durham was the subject of the first determination, Ms Durham gave it the same value as the first determination, namely \$510,485.83.
 - iii. In light of the finding that the first determination was valid the approach taken by Ms Durham in relation to the work which was the subject of the first determination was exceptional.
 - iv. There is no challenge by any party to so much of the third determination as considered work that was not the subject of any earlier determination, (namely the additional claims).

General

- 42 None of the determinations has been shown to fail to fulfil the mandatory "pre-conditions" on power in the Act
- 43 None of the determinations offends the basic requirements of natural justice required by the Act
- 44 It has not been established that either of the adjudicators failed to address the correct question in good faith by reference to their bona fide opinions in addressing the requirements of the Act.
- 45 It has not been established that either of the adjudicator's departed from the proper approach adopted by the principles to be found earlier in these reasons as enunciated in **Co-ordinated** and **Pacific General Securities**.

Matters of discretion

- 46 The JBK companies put forward suggested discretionary grounds upon which relief may be refused to B&B. Bearing in mind the above reasons it becomes unnecessary to deal with these submissions.

Short minutes of order

- 47 The parties are to bring in short minutes of order on which occasion costs may be ordered

Mr G Flick SC (JBK Engineering Pty Limited, JBK Design & Construction Pty Limited) instructed by Doyles Construction Lawyers (JBK Engineering Pty Limited, JBK Design & Construction Pty Limited)

Mr M Christie, Mr B Kremer (Brick & Block Company Pty Limited) instructed by Corrs Chambers Westgarth (Brick & Block Company Pty Limited)