

JUDGMENT His Honour McDougall J. Common Law Division Supreme Court of New South Wales. 10th July 2006.

- 1 The questions for decision in these proceedings are:
- (1) Whether an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (the Act) was made outside the relevant time limit prescribed by s 17 of the Act.
 - (2) If so, whether an adjudicator's determination that concluded otherwise is void.
 - (3) Whether the adjudicator in finding the relevant facts:
 - . asked the wrong question, or
 - . ignored relevant material, or
 - . took into account irrelevant material.

Background

- 2 The defendant (S & H) as subcontractor and the plaintiff (Multipower) as head contractor, made a subcontract in July or August 2004 whereby S & H undertook to carry out electrical work for Multipower on two projects at Courallie Avenue, Homebush. The parties accept that the subcontract was a construction contract to which the Act applied. They agreed that the subcontract was terminated in January 2006; the precise date, although disputed, is irrelevant.
- 3 On 10 February 2006, S & H served two tax invoices on Multipower. It is convenient to refer to those together as the "payment claim" because the parties agree that each was a payment claim for the purposes of the Act. The total amount claimed was \$83,028. Each tax invoice stated at its foot "(NETT 7 DAYS)".
- 4 On 24 February 2006, Multipower served a payment schedule on S & H. It conceded an overall liability of \$22,884.50. No part of that conceded amount was, or since has been, paid.
- 5 On 24 March 2006, S & H made application to an authorised nominating authority for adjudication of the dispute. An adjudicator was appointed. She made her determination in writing on 10 April 2006. She concluded that S & H was entitled to the whole of the amount claimed by it and that Multipower should pay the whole of the adjudication fees and expenses totalling \$6,875.

The issue

- 6 Multipower claims that the determination was made without jurisdiction in that, it says, the adjudication application was made out of time. It follows, Multipower says, that the determination founded on that adjudication application is void.
- 7 As I have said, Multipower attacked the adjudicator's relevant findings of fact by saying that they were addressed to the wrong question, failed to take into account relevant material, or took into account irrelevant material.
- 8 The issues were very difficult to define. Written submissions ordered by Einstein J failed to clarify them. I therefore ordered the parties to file points of claim and defence, with statements of the issue arising, and then to file an agreed statement of issues. This last step was not taken. The result is that the issues were not finally clarified (I hesitate to say "defined") until the morning of the hearing.

The statutory scheme

- 9 The relevant provisions of the Act include the following:
- "11 Due date for payment**
- (1) A progress payment under a construction contract becomes due and payable:
 - (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
 - (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:
 - (a) prescribed under the Supreme Court Act 1970 in respect of unpaid judgments of the Supreme Court, or
 - (b) specified under the construction contract,whichever is the greater.
 - (3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.
 - (4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).
 - (5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials. ...

Division 1 – Payment claims and payment schedules

13 Payment claims

- (1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

- (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.
- (4) A payment claim may be served only within:
 - (a) the period determined by or in accordance with the terms of the construction contract, or
 - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.
- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. ...

14 Payment schedules

- (1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant. ...
- (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. ...

16 Consequences of not paying claimant in accordance with payment schedule

- (1) This section applies if:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent provides a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier, and
 - (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and
 - (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
 - (a) may:
 - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract. ...

Division 2 Adjudication of disputes

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. ...
- (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. ...

22 Adjudicator's determination ...

- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
 - (a) the provisions of this Act,
 - (b) the provisions of the construction contract from which the application arose,
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
 - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates....”

The ambit of the dispute before the adjudicator

10 I have set out the dates of receipt of the payments claim and the assertion of an entitlement to be paid within seven days. The payment schedule asserted that the payment claim was received on 10 February 2006. It said nothing as to the due date for payment.

11 The adjudication application stated that the due date for payment was 14 February 2006. The adjudication response was not in evidence. However, the parties' submissions to the adjudicator were.

12 Paragraphs 10 and 11 of the submissions for S & H dealt, at least inferentially, with the due date for payment. Multipower replied to those paragraphs. It did not dispute the relevant assertions as fact.

13 I set out paragraphs 10 and 11 of S & H's submissions, indicating in bold paragraphs 10 and 11 of Multipower's response:

“10. The Claimant believes it has met all the requirements under the Act to put in a lawful claim and apply for adjudication under the Act. In particular:

a. The Claimant served a payment claim by way of a letter from Macquarie Lawyers to the respondent on 24 February 2006. Annexed hereto and marked 'B' is a copy of the letter together with the facsimile transmission.

Noted.

b. The Claimant received a Payment Schedule on 24 February 2006. The schedule was dated 23 February 2006 and served by way of facsimile on the Claimant's legal representatives, Macquarie Lawyers, on 24 February 2006. Annexed hereto and marked 'C' is a copy of the facsimile received from the Respondents enclosing its Payment Schedule.

Agreed.

c. Section 17 of the Act requires that if the Respondent provides a payment schedule stating an amount to be paid, but fails to pay that amount by the due date, the Claimant has to make an application for Adjudication within 20 business days.

Noted.

d. Therefore, the adjudication application is due on 24 March 2006.

Noted.

e. I now apply for adjudication on 24 March 2006 and have lodged my application with Adjudicate Today on this day.

Noted.

11. The Claimant respectfully seeks the following rulings:

a. That the Respondent pay to the Claimant the full amount of the consolidated payment claim, that is, \$83,028.00.

b. That the money became due and payable on 14 February 2006.

c. That interest should be awarded against the Respondent at the Supreme Court rate for unpaid debt, of 9% per annum from 14 February 2006.

d. That the costs of the adjudication, being adjudicator fees and the fees of the ANA be paid in full by the Respondent.

Noted but denied that the rulings sought should be made.”

14 The clear inference from Multipower's response is that it did not dispute the particular assertions in paras 10(c) and (d) and 11(b) of S & H's submissions. Multipower certainly did not raise the argument that it relied upon in this Court.

- 15 S & H's assertion in the adjudication application of a due date of 14 February 2006 was on any view wrong, given that even if the requirement for payment within seven days was a term of the subcontract, it could only be seven days from receipt. A party to a contract can hardly be expected to pay, within seven days or any other limited time, an invoice that it does not receive. It follows that the adjudicator was bound to satisfy herself of the due date. She sought to do so by considering what to her were the relevant terms of the subcontract.

The determination

- 16 Leaving aside formal parts, the adjudicator commenced by looking at the "scope of works and the contract". She noted at page 4 of the determination that "there is no agreement between the parties as to the contract made or the contract terms". She set out the documents that each party relied on as constituting, or evidencing, the contract. At page 5 she concluded, "I am more persuaded that the claimant's submission and quotations represent a more reliable reflection of the scope of works at each site and the price for the work."
- 17 The relevant quotations were in evidence before me. Neither of them contains any provision for a due date for payment of any payment claim.
- 18 The adjudicator then turned her attention to the payment claim. She noted that the contract had been "cancelled" in January 2006 and referred to the two tax invoices. She noted that each was received on 10 February 2006.
- 19 She then turned her attention to s 14(4) of the Act, and considered certain dates in the following paragraph: "*The Respondent provided a payment schedule dated 23 March 2006 which was served on the Claimant's lawyers on 24 March 2006, which is within the period stipulated in the Act. Although, I note that on 24 March 2006 both the Claimant and Macquarie Lawyers served the two payment claims on the Respondent for the second time.*"
- 20 It is clear that the reference to dates in "March" is wrong in each case, and that the relevant dates were dates in February 2006. The reference to resending the payment claim on 24 February 2006 (picking up the correction which I have just indicated should be made) is to a letter from S & H's lawyers in effect repeating the two payment claims. It is not particularly clear why this course was taken, and it appears to have generated some confusion: not in the adjudicator's mind, but in the submissions that were put before this Court.
- 21 The adjudicator then noted the terms of the payment schedule. Having done that, she turned her attention to s 11(1) of the Act. She said that "payment was due on the date occurring ten business days after the payment claim was made, which was 24 February 2006. Section 17(1)(a)(ii) provides that if the Respondent fails to pay the whole or any part of the schedule amount to the Claimant by the due date for payment, then the claimant may apply for adjudication."
- 22 It is apparent that the adjudicator decided, although she did not expressly say so, that the subcontract made no express provision for the time of payment (para (a) of s 11(1)). That would reflect her finding on the previous page that S & H's documents "represent a more reliable reflection of the scope of work ... and the price". In any event, to the extent that she preferred those documents, the implicit conclusion that there was no specification of an express time in the documents was correct.
- 23 On this basis, the adjudicator's conclusion that the time for payment was governed by para (b) of s 11(1) was correct.
- 24 To step aside from the determination for a moment: Multipower submitted in this Court that the words, "which was 24 February 2006", refer not to the due date for payment but to the date when the payment claim was made. In other words, it submitted that the adjudicator had taken into account not the payment claim constituted by the two tax invoices dated 7 February 2006 and served three days later, but the resent payment claims of 24 February 2006. I do not agree. When one looks at the relevant passage of the determination in context, it is quite clear that the adjudicator was saying that 24 February 2006 was the due dates of payment, and not the date of the payment claim.
- 25 The adjudicator then turned her attention to the reasons for non payment. There is no need for me to look at those, because Multipower did not attack what she there said. However, as is apparent from her conclusion that S & H was entitled to receive the whole of the amount claimed, she found nothing in the payment schedule, the adjudication response or the submissions in support of it to indicate otherwise.

Contentions in this Court

- 26 Multipower submitted that the due date for payment was (as the adjudication application asserted) 14 February 2006. Thus, it submitted, regardless of which paragraph of s 17(3) applies, the adjudication application was made out of time.
- 27 S & H accepted that if 14 February 2006 were the due date then the adjudication application had been brought out of time. However, it submitted:
- (1) The correct due date was, as the adjudicator found, 24 February 2006.
 - (2) Accordingly, the adjudication application was made within time.
 - (3) Alternatively, if the adjudicator were in error, it was not an error of such a kind as would make the determination void.
- 28 Multipower accepted that if the due date were 24 February 2006, and if it had been open to the adjudicator so to find, then the adjudication application had been brought within time.

29 In the course of submissions, I raised with counsel for Multipower whether his client wished to submit that the adjudicator had denied Multipower natural justice by deciding what on its case was an issue not propounded by the parties, without first giving them an opportunity to be heard.

30 The first response was that this point was covered by paras 34 to 36 of Multipower's points of claim. Those paragraphs read as follows:

"(34) In the first alternative the Adjudicator asked herself the wrong question to make an erroneous finding to reach a mistaken conclusion bringing her jurisdiction into question as an error of law.

Particulars

- (a) The adjudication application*
- (b) Adjudication submissions by S&H*
- (c) The payment schedule dated 23 February 2006 in response to the claim dated 7 February 2006 or*
- (d) The adjudication response which did not agree as to the due date for payment.*

(35) In the second alternative the Adjudicator ignored relevant material make [sic] an erroneous finding to reach a mistaken conclusion bringing her jurisdiction into question as an error of law.

Particulars

- (a) The adjudication application*
- (b) Adjudication submissions by S&H*
- (c) The payment schedule dated 23 February 2006 in response to the claim dated 7 February 2006 or*
- (d) The adjudication response which did not agree as to the due date for payment.*

(36) In the third alternative the Adjudicator relied on irrelevant material to make an erroneous finding to reach a mistaken conclusion [sic] her jurisdiction into question as an error of law.

Particulars

- (a) The adjudication application*
- (b) Adjudication submissions by S&H*
- (c) The payment schedule dated 23 February 2006 in response to the claim dated 7 February 2006 or*
- (d) The adjudication response which did not agree as to the due date for payment."*

31 When I indicated that I did not regard those paragraphs as raising the issue (as they do not), he said, after considering the matter over the mid-morning adjournment, that his client did not wish to pursue this issue further.

32 I have said that I do not regard the relevant paragraph as raising the issue. To my mind, that is apparent not only from the paragraphs themselves but also from the statement of issues that was founded upon them.

Grounds of review

33 The grounds upon which an adjudicator's determinations may be reviewed were dealt with by the Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. In that case Hodgson JA, with whom Mason P and Giles JA agreed, identified four grounds of review, from pages 441 [52] to 443 [60]. I paraphrase what his Honour said, giving paragraph citations:

- (1) The first ground of review arises where an adjudicator does not satisfy the conditions laid down by the Act essential for there to be a valid determination ([52]).
- (2) The second ground of review arises if the adjudicator does not try in good faith to exercise the relevant power relating to the subject matter of the legislation in a way that is reasonably capable of reference to the power ([55]).
- (3) The third ground of review arises where an adjudicator denies a party such measure of natural justice as the legislative scheme requires to be afforded ([57]).
- (4) The fourth ground of review arises if there is fraud in which the adjudicator is complicit ([60]).

34 I note that if there is fraud in which the adjudicator is not complicit then the decision is reviewable, but, on the analysis of Hodgson JA, is voidable rather than void (again, [60]).

35 It will be seen that the first of these requirements relates to the "basic and essential" preconditions of validity. Those were defined at 441 [53] as follows:

"[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 s 8).*
- 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 s 19).*
- 5. The determination by the adjudicator of this application (s 19(2) and s 21(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))."*

- 36 Hodgson JA referred at 441 [54] to what he called “more detailed requirements”. Those included “s 17 as to the time when an adjudication application can be made ...”. His Honour said at 441 [55] that “[t]he legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination”. This followed on from what his Honour had said at 441 [54], to the effect that approaching the question by reference to the old classification of jurisdictional or non jurisdictional error of law “... has tended to cast the net too widely; ...”.
- 37 In my view, it is clear from His Honour’s analysis that even what might have been called jurisdictional error of law in days gone by would not result in the avoidance of a determination unless the subject matter of that error were a “basic and essential requirement”.
- 38 Multipower relied on a number of other decisions. They included the decision of Campbell J in *Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856, and the decision of Einstein J in *Vince Schokman & Anor v Xception Construction Pty Limited & Anor* [2005] NSWSC 297.
- 39 Neither of those cases say anything that is inconsistent with the decision in *Brodyn* (and if they did, it would hardly help). In my view, the reliance on *Schokman* was misplaced. Einstein J was considering whether, as a result of the time limit set out in the Act and its operation in the facts of that case, the plaintiff had been denied natural justice. He concluded that it had. It followed that the plaintiff was entitled to succeed. That had nothing to do with the fundamental issue in this case.
- 40 Multipower relied in particular on what His Honour said at para [6] and then at paras [14] and [15]. In my view, the submissions that were founded upon those paragraphs were dependent on a misreading both of what Einstein J was seeking to do and what his Honour in fact did. Nothing in those paragraphs, in my view, lends any support to the proposition that a failure to comply with the relevant time limit arising out of s 17(3) vitiates a determination on the ground of failure to comply with a basic and essential precondition of validity.

No vitiating error

- 41 It follows necessarily from what Hodgson JA said in *Brodyn* that, even if the adjudication application had been made out of time, the adjudicator’s implicit conclusion that it was made within time does not mean that the determination is void. At most, and assuming error, there would have been an error within the scope of the jurisdiction that is entrusted to adjudicators: a mistake that the adjudicator would have been entitled to make.
- 42 Nor do I think that the alternatives expounded in paras 34 and 36 of the points of claim suggest otherwise. A reading of the determination shows that the adjudicator considered the material that the parties put before her. She preferred the material propounded by S & H. She accepted the conclusion to which that material led. She was entitled to do so.
- 43 It is necessary to bear in mind, in this context, that the matters relied upon by Multipower in this Court as giving rise to the suggested error were not articulated in any way in the documents provided to the adjudicator.
- 44 It is unnecessary to consider the factual basis of Multipower’s attack, because any error of fact, or any error in a conclusion (whether of fact or law) based thereon, does not lead to the result for which Multipower contends. But, since the point was argued, I think it appropriate to say that the approach taken by the adjudicator was well open to her upon the facts.
- 45 Multipower’s submissions relied on the payment claim as setting out the relevant terms (as to due date) of the subcontract, by the parenthetical statement to which I have referred. But this does not necessarily follow: especially where, as the adjudicator found, the relevant contractual documents were silent on the point. Normally, an invoice will show the existence of an underlying contract. But not everything that is stated on the invoice will necessarily show, or be consistent with, the terms of that contract. To say that the documents that constitute a contract include invoices issued, or purportedly issued, pursuant to the contract (which is the essence of Multipower’s submission to this Court) is to reverse the proper order of inquiry.

Another matter

- 46 What I have said disposes of Multipower’s case. But there is one other matter to which I wish to refer.
- 47 As I have indicated, the amount in dispute (including the adjudication fee) was less than \$100,000. It lay within the jurisdiction of the District Court. Indeed, S & H has obtained judgment in that Court through the mechanism of s 25 of the Act. The dispute could and should have been raised and dealt with in that Court. It could have been raised through an application to stay, and to set aside, the judgment. It is clear that the judgment entered through s 25 may be set aside if the underlying determination is void (see *Brodyn* at 443 [61]).
- 48 It is inappropriate that such a dispute over such an amount should be brought in this Court. For my own part, I wish to make it quite clear that such applications should be, and in the ordinary case will be, discouraged.

Orders

- 49 I order that the injunction granted on 21 June 2006 be dissolved. I order that the summons be dismissed. I will hear the parties on costs.

(Counsel addressed on costs.)

- 50 The defendant asks for its costs. The plaintiff referred to the size of the amount in issue, but otherwise did not oppose a costs order. I should add that after I gave my reasons counsel for the plaintiff indicated why it was that the proceedings had been brought in this Court and I accept that as explaining what happened in the particular

case. What I have said should not therefore be taken as any reflection upon the particular act of the present parties in bringing the litigation in this Court, but I stand by what I said as a general warning.

- 51 It appears that, as the price for obtaining interlocutory relief, the plaintiff brought into Court a sum of money to cover the adjudication amount and the adjudicator's fees. The parties agree that the money was paid into Court to abide the outcome of the proceedings with the intention that it be paid out to the successful party.
- 52 In the circumstances of this case, I see no reason why costs should not follow the event. Accepting for the moment that the proceedings had to be brought in this Court, notwithstanding the size of the amount in issue, it follows that the ordinary costs rule in this Court ought to apply.
- 53 The defendant asks for payment out of the amount paid in. As I have indicated, the plaintiff accepted that the amount was brought into Court to abide the outcome of the proceedings and that it was the defendant that had succeeded.
- 54 I therefore add the following to the orders that I have made.
- 55 I order that the monies brought into Court in these proceedings by the plaintiff be paid out to the defendant or as it directs.
- 56 I order the plaintiff to pay the defendant's costs of the proceedings.

T Bland (Plaintiff) instructed by James Dimitriou

J P Donohoe (Defendant) instructed by Macquarie Lawyers