

JUDGMENT : Master Macready. Equity Div. New South Wales Supreme Court. 26th February 2004

1 In this matter the plaintiff seeks orders in the nature of certiorari and declarations in respect of a decision by the second defendant who was an adjudicator appointed pursuant to the **Building and Construction Industry Security of Payment Act 1999** (NSW)(the Act). The plaintiff is a builder and the defendant is a subcontractor to that builder. A Judge of the Court has ordered that the whole of the proceedings be referred to me for hearing.

The parties' claims

2 The plaintiff claims orders quashing the determination or, alternatively, declarations in respect of an adjudication made by the second defendant. As an alternative it seeks damages in respect of misleading and deceptive conduct by the defendant in making the adjudication application to the second defendant. There is a cross claim by the defendant but only paragraphs four and five are pressed and they are nothing more than consequential declarations in the event that the plaintiff is not successful.

Background to the proceedings

3 The plaintiff was carrying out work at the Ex Servicemen's Club in Orange in New South Wales in late 2002. It issued an invitation to tender for electrical works for a car park at the Club. The defendant submitted a tender and apparently they were initially told that they were successful in respect of that tender. There was a revised tender submitted and the defendant carried out what had been described as temporary work which continued through November 2002.

4 On 5 December 2002 the representative of the plaintiff informed the representative of the defendant that the defendant was not the successful tenderer. This was confirmed in a letter of the same date. Thereafter the defendant did no further work on the site and a subcontract was issued to another company.

5 On 30 May 2003 the defendant issued a payment claim consisting of three documents to the plaintiff.

6 The first document in the series is headed "Payment Claim" and included the following:

*"Tender Price 13th September 2002 \$158,785
Price Including Variation E1 submitted
24th October 2002 \$161,315
Less Credit Payment Claim Schedule B \$130,790
\$30,525*

*Plus Payment Claim covers work carried out as per Attachment "A" \$3,938
TOTAL CLAIM \$ 34,463*

This claim is made under the terms of the N.S.W. Building and Construction Industry Security of Payment Act 1999."

7 The second document was Attachment "A" which was in the following terms:

"This attachment is the supporting document to our payment 30/5/03. Claim No. 1 attached.

It covers all work under the contract.

28.10.02-29.10.02

Disconnection's to make ready:

Wiring and connections of final sub-circuit to:

Builders Supply Boards

Site Office - Store Room - Lunch Room - Toilet Block

Installed double W.P. power point for water cooler

Tagged and tested all circuits

Labour 18 man hours @ \$40.00 = \$720.00

8.11.02

Tested and tagged worksheds and tools.

Labour 3 man hours @ \$40.00 = \$120

13.11.02 - 29.10.02

Disconnected and removed flood lights and poles from carpark to make way foe new carpark project.

Labour 9 man hours @ \$40.00 = \$ 360.00

Total Labour \$1,200.00

Contracting Materials \$2,260.00

Scissor Lift Hire \$ 120.00

\$3,580.00

GST 358.00

TOTAL \$3,938.00

This claim is made under the terms of the N.S.W. Building and Construction Security of Payment Act 1999."

8 The third document was Attachment "B" which was in the following terms:

"This attachment is the supporting document to our Payment Claim dated 30/5/2003.

It covers all work under the contract less credit for work not performed.

The credit has been calculated as follows:

(1) Estimated saving in labour not required. Hours 1135 @ \$40.00 per hour \$45,400.00

(2) Estimated savings in materials not required. \$64,500.00

Contracting Materials – Switchboard - Sub-mains Light Fittings etc.

(3) Estimated savings in overheads on work not required. \$9,000.00

Credit \$118,900.00

G.S.T. \$11,890.00

TOTAL CREDIT \$130,790.00

This claim is made under the terms of the N.S.W. Building and Construction Industry Security of Payment Act 1999."

- 9 On 5 June 2003 the plaintiff forwarded to the defendant a document entitled "Progress Claim Reduction Advice (Payment Schedule)" in the following terms:

"This is a payment schedule under the Building and Construction Industry Security of Payment Act 1999

Please be advised that your Progress Claim has been rejected/reduced as follows:

Total Value being Claimed as Complete \$34,463.00 incl. GST

(Payment Claim)

Total Value of Work Approved as complete \$ 2027.30 incl. GST

Value Current Claim Reduced by: \$32,435.70

The amount of the payment (if any) that the Respondent proposes to make is \$2027.30 incl. GST. This amount is less than the claimed amount for the reasons set out in the Schedule. The Respondent is withholding payment for the reasons set out in the Schedule."

- 10 In the Schedule was written: "Refer to attached letter to claimant dated 5/6/03". That letter was in the following terms: "Reference is made to a document received from you on 30/5/03 headed 'Payment Claim' for an amount of \$34,463.00 with reference to the 'N.S.W. Building and Construction Industry Security of Payment Act 1999'.

We acknowledge that you were engaged to complete some temporary electrical works to sheds in late October and early November 2002 some seven months ago. This was the full extent of your engagement on the project and you have completed no work on the site since. Your offer for the construction electrical works was not accepted and such works were awarded to others. Hence no construction contract between us exists beyond that covering the temporary electrical work.

Our assessment of your claim is:-

In respect to Attachment A to your claim

· labour as claimed 1200.00

· scissor lift hire 120.00

· materials (you did not respond to our requests of 2nd and 5th /6/03 for a breakup so we have assessed a value of \$523.00 being 120 lm of cable @ 2.00, 1 no waterproof GPO @ 35.00, 4 no circuit breakers @ 12.00 and 200.00 for sundries) 523.00

· GST 184.30

2027.30

In respect to the rest of your claim

As no construction contract exists and as no construction work has been completed nil"

- 11 The defendant thereafter served an adjudication application which ultimately led to the determination by the adjudicator, the subject of the present challenge.
- 12 There were proceedings between the parties in 2003 which were dealt with by Bergin J. In those proceedings the plaintiff claimed that the adjudicator did not have jurisdiction to determine the matter. Her Honour concluded that the adjudicator was validly appointed and could embark on the adjudication.
- 13 The adjudication proceeded and the adjudicator made his determination on 3 October 2003. His adjudication was that the plaintiff was liable to the defendant for an amount of \$32,552.30. He apportioned the amount between the two claims which are referred to in the payment claim as follows:

"Attachment 'A' - \$2,027.30

Attachment 'B' - \$30,525.00"

- 14 There has been a payment, presumably before the determination, by the plaintiff of the sum of \$3,938 to the defendant.

The plaintiff's claim to quash the determination for jurisdictional error

- 15 The plaintiff proceeded on its claim to quash the determination based upon jurisdictional error. There was no dispute as to its entitlement to do so on this basis provided, of course, jurisdictional error was apparent. Given this agreement, it is not necessary to go into the various authorities but for convenience they are located, inter alia, in a decision of mine in the matter of *Transgrid v Siemens Limited* [2004] NSWSC 21 at paragraphs 8-14. The plaintiff submitted that the adjudicator committed jurisdictional error by determining that an amount was payable for expectation damages, as opposed to construction work actually performed, when he reduced the claim in Attachment 'B' to zero. The defendant resisted the application on the basis that on the materials before him the adjudicator was quite entitled to treat the matter as a variation of the contract if he found that there was a contract. It also submitted that in any event there was no jurisdictional error. These arguments require a consideration of the nature of the claim made to the adjudicator, the materials before him and his decision.
- 16 The adjudicator had before him inter alia the payment claim to which was apparently attached several documents relating to the circumstances of the tender in question. In particular, there was a letter from the defendant to N.E.C.A. New South Wales Chapter of 6 December 2002 which detailed the history of the tender process.

- 17 In his determination the adjudicator referred to what he described as jurisdiction and document issues and said the following in respect of those matters:
- “a) Contract formation**
- Contract formation and the extent of the scope of work is an issue raised by the Respondent.*
- The Respondent’s Payment Schedule dated 5th June 2003 admits that the Claimant was engaged however limits the scope of work to “some temporary electrical works”.*
- The Claimant, in the Adjudication Application provided a copy of the Respondent’s fax dated 31st October 2003 titled Orange Ex-Services Club Carpark Project – Electrical Services Package – Attachment ‘D’,*
- The document requested that the Claimant complete and return Attachment ‘D’ ‘as it is to be incorporated in the Contract Documents’.*
- The document did not limit the scope of work to some ‘some temporary electrical works’ and in fact mentioned the ‘Electrical Services Package’ which I believe can only be interpreted to be the total Electrical Services Package for the Orange Ex-Services Club Carpark Project.*
- The Claimant also included in the Adjudication Application a Claimant letter dated 6th December 2002 to the National Electrical & Communication Association (NECA) outlining a series of events that occurred from 13th September 2002 to 5th December 2002.*
- Of particular note were the following events:*
- i) 13th September 2002 – The Respondent (Mr Allen Dent) verbally advised the Claimant that the Claimant was successful with their tender and that they looked forward to working together. Mr Peter Doherty (witness to the Respondent’s advice) confirmed hearing this advice in a statement prepared on 30th May 2003.*
- ii) 5th November 2002 – After the Claimant voiced some disappointment that another party (Ifflands Electrical) may becoming involved the Respondent (Mr Allen Dent) contacted the Claimant and advised them not to worry because the project was theirs.*
- The Respondent has not disputed the above events.*
- Based on the above and that the Respondent has not provided any supporting evidence to suggest that the engagement of the Claimant was for anything less than the ‘Electrical Services Package’ and that the temporary electrical services formed an integral part of the Claimant’s offer for the “Electrical Services Package”. I am satisfied that it was the Respondents intention to enter into a contract with the Claimant for the total ‘Electrical Services Package’ not just for ‘some temporary electrical works’.”*
- 18 In section 6 of his report he made his findings and reasons dealing first with that claim in Attachment ‘A’ which he reduced, as I have indicated before. In respect of Attachment ‘B’ \$30,525 he said the following:
- “Attachment ‘B’ - \$30,525.00.**
- The Respondent has effectively varied the Claimant’s contract by reducing the scope of work under the contract to ‘some temporary electrical works’. The Claimant has agreed to the variation and has made a claim for all work under the contract, being the total ‘Electrical Services Package’ less a credit for work not performed. It is not unusual for a construction contract to provide for such an occurrence under a variation clause.*
- The Respondent has not disputed the amount of the claim. I therefore find in favour of the Claimant.”*
- 19 He then went on to make the determination, the substance of which I have set out above. He made other relevant findings as to interest and the time for payment. The plaintiff’s submission was based on the proposition that the proper construction of the Act indicates that an award of what the plaintiff described as “expectation damages” is inconsistent with the Act. The plaintiff’s submissions at 30, 31 and 32 were as follows:
- “30. The proposition that the Act comprehends an award of expectation damages is inconsistent with section 13(4)(b), which contemplates work having been carried out.**
- 31. Section 13(1)(a) makes it clear that the payment claim must identify the construction work (or related goods and services) to which the progress payment relates. The term ‘construction work’ in section 13 must be a reference to actual construction work and not hypothetical construction work which has never taken place. This is confirmed by the definition of ‘progress payment’, which is the subject of the ‘payment claim’ — see the opening words of section 13. ‘Progress payment’ is defined in section 4.**
- 32. The definition includes reference in paragraphs (a), (b) and (c) to work having been ‘carried out’ or ‘the carrying out [of] construction work’ and ‘milestone payments’. In relation to attachment ‘B’, the amount which the adjudicator held was payable by the Plaintiff to the First Defendant was not payment for ‘construction work carried out’ or ‘for carrying out construction work’. Nor was it be a ‘milestone payment’. It could only be a payment for expectation damages for breach of contract. That is, it is in the nature of expectation damages, on the premise that it has lost the benefit of a contract. The Act does not contemplate such claims.”**
- 20 The plaintiff supported those submissions by reference to **Jemzone Pty Limited v Trytan Pty Limited** [2002] NSWSC 395 at [44] and the objects of the Act contained in s 3(1) as amplified in the second reading speech.
- 21 The underpinning of the plaintiff’s submission that it was an award of damages and not a payment for work comes from the terms of the payment claim and in particular Attachment ‘B’. Particular reference was made to the words “it covers all work under the contract less credit for work not performed” and the nature of the other claim which was for the temporary work set out in Attachment ‘A’. Clearly there was no work performed which was the

subject of the claim in Attachment 'B' and the words to which I have referred is no doubt a reference to all work to be performed under the contract. Subject to one error which I will deal with shortly, it seems to me that it is plain that what is referred to in Attachment 'B' is a claim which does not comprehend there having been any work under that contract. It is on this basis that the plaintiff submitted that in truth it was a claim for damages.

- 22 The error to which I have referred is the fact that it will be noticed that in his determination the adjudicator clearly decided that the temporary electrical services, which is the subject of the work in Attachment 'A', was included within the total tender price, which is what is referred to in Attachment 'B'. Rather than treating it as one contract, he adopted the claimant's segregation of the claim in his mathematical calculation. Leaving aside this error, which he is probably entitled to make without attracting jurisdictional error, it is plain that there were no other works other than the temporary works carried out and that he treated them as part of the contract.
- 23 The defendant's submissions were that the adjudicator dealt with the matter as a variation of the works by deleting a substantial part of the works. The adjudicator, in his determination, referred to the fact that he had regard to the contract. That contract was tendered before me and it provided for variations in clause 16. That clause includes:- "...
(c) *Paynter Dixon may at any stage omit all or any part of the Subcontract works and may engage another person to carry out the omitted work.*
(h) *If the price of a variation is not agreed it will be valued:*
(1) *by applying the rates or prices in the Bill of Quantities or Schedule of Rates, to the extent that it is reasonable to use them;*
(2) *otherwise by applying reasonable rates or prices determined by Paynter Dixon.*
The value of any Variation includes the cost of any delays caused by the Variation."
- 24 On the face of the adjudicator's determination he has clearly dealt with the matter as a variation by an omission of works. Although on its face it is probably true to that in respect of Attachment 'B' there was no work done it is clear that on his express findings, the work carried out as described in Attachment 'A' was part of the total contract. In these circumstances, and on the information before me, it does not seem to be open to find that any other basis was adopted by the adjudicator.
- 25 Even if one could accept that a proper consideration of his reasons led to him making a decision to vary the work in a contract under which no work had been performed and thus make a claim that was truly reflective of a claim for damages, there would still be some difficulties with the question as to whether the correct construction of the Act is as contended for by the plaintiff. However, given my decision on the reasons of the adjudicator, it is unnecessary to address these aspects.

The plaintiff's claim under the Trade Practices Act

- 26 This claim is based upon Attachment 'B' to the payment claim being misleading and deceptive. Once again the relevant words are "it covers all work under the contract less credit for work not performed". Counsel for the plaintiff conceded that this would only be misleading and deceptive if it is read that there had been work actually performed under that contract. The preferable construction, I think, is as I have indicated earlier and accordingly the claim would not succeed. The damages said to be suffered were the plaintiff's legal costs of the adjudication and the earlier court proceedings.
- 27 The defendant suggests an additional two bases for suggesting that there is no claim.
- 28 These were first that it is an abuse to seek the costs of the earlier proceedings as damages and second, that the conduct did not occur in trade or commerce.
- 29 In respect of the latter argument it is to be noted that although the actual letter was sent to the plaintiff as a payment claim, it is the forwarding of the letter to the adjudicator in the course of pursuing that adjudication that is said to be the misleading conduct.
- 30 Reference was made to what was said by Lee J in *Merman Pty Limited v Cockburn Cement Limited* (1988) 84 ALR 521. At paragraph 75 His Honour said: "*The test of whether conduct has the characteristic of activity in trade or commerce is not difficult to apply. For example, the issue of legal proceedings or the commencement of arbitration proceedings would be acts that do not on their face bear the stamp of acts in trade or commerce and do not become so merely because a person engaged in trade or commerce has resorted to their use.*"
- 31 It would seem to me that the circumstance of supplying the payment claim to the adjudicator would not be in trade or commerce.

Conclusion

- 32 In my view there has been no misleading or deceptive conduct by the defendant nor any jurisdictional error on the part of the adjudicator. Accordingly, I dismiss the summons with costs.

Mr M Christie for plaintiff instructed by Phillips Fox
Mr K Tapsell of Watkins Tapsell for first defendant