

**JUDGMENT : Barrett J :** New South Wales Supreme Court : 4<sup>th</sup> March 2004.

1 These proceedings were heard by me five days after I heard *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116, judgment in which has just been delivered. To the extent relevant, the observations in that judgment as to the meaning and operation of the provisions of the **Building and Construction Industry Security of Payment Act 1999** and as to the jurisdiction under s.69(1) of the **Supreme Court Act 1970** to make an order in the nature of certiorari quashing an adjudication determination under that Act apply here also.

2 As in *Quasar v Demtech*, the plaintiff seeks in these proceedings an order quashing such an adjudication determination on the basis that the adjudicator (who is the second defendant) fell into jurisdictional error of law. The claim for this and related relief is made in the plaintiff's summons filed on 24 February 2004. It is common ground that, in the circumstances at hand, the adjudicator was required to proceed under ss.8(2)(b), 9(b) and 10(1)(b) of the **Building and Construction Industry Security of Payment Act**, there being, on his findings, no written contract in existence and no express contractual terms regarding progress payments. It is the plaintiff's contention that the course of action the adjudicator took in making his determination was not the course laid down by those sections, with the result that the adjudicator determined a question other than the question raised by the relevant statutory provisions and did not determine the question so raised. The plaintiff's central contention is that the adjudicator did not embark upon any calculation of the value of work in accordance with ss.9(b) and 10(1)(b). The first defendant has not sought to argue that there is no jurisdiction to award a remedy by way of judicial review but contends that no case for the grant of the remedy has been shown.

3 The first defendant was retained by the plaintiff to carry out certain electrical works at a retail development in the course of construction at Parkes. On 31 December 2003, the first defendant served a payment claim (described as "Progress Claim No 5"). The plaintiff concedes that it was served in accordance with the **Building and Construction Industry Security of Payment Act**. The first defendant claimed a payment of \$107,600. The plaintiff responded with a payment schedule dated 15 January 2004 notifying "nil" as the amount the plaintiff proposed to pay in respect of the payment claim. The first defendant's adjudication application is dated 30 January 2004 and the plaintiff's adjudication responses dated 6 February 2004. An adjudication determination was made on 16 February 2004 by the second defendant, as adjudicator appointed under the Act. He determined the relevant progress payment to be \$122,348.19.

4 The composition of this sum of \$122,348.19 was stated in the determination as follows:

*Value of work as per Works Completed*

*Schedules \$ 107,600.00*

*Floodlights \$ 195.00*

*Interest \$ 1,164.04*

*Broken light \$ 72.50*

*Adjudication fees \$ 1,674.09*

*Temporary lighting \$ 520.00*

*Plus 10% GST \$ 11,122.56*

***TOTAL \$ 122,348.19***

5 The "Works Completed Schedules" thus referred to as the source of the main component of \$107,600 formed part of the first defendant's payment claim. There were two such schedules, each relating to work on a different part of the relevant site, one being Bi-Lo and the other K-Mart. Each schedule consisted of a list of work elements such as "Site Power", "Site Costs", "Underground Conduits" and "Mains and Sub-Mains Cables". Against each such item appeared a "Work Completed %" column consisting of two sub-columns, "Previous" and "Current", in each of which a percentage was entered, with the two percentages for a particular item always totalling 100%. There was then another main column headed "Approx. Cost \$" divided into two sub-columns again designated "Previous" and "Current" with a sum of money (or "\$0.00") in each sub-column. Finally, there were two columns headed "AJS Signature" and "Client's Signature". Against all but one of the items in relation to which the "Approx. Cost \$ - Current" sub-column shows something other than "\$0.00", there is a signature in each of the last two columns. The exception is an item in respect of which \$300 appears in the "Current" sub-column. In that case, there is a signature (or initials) in the "AJS Signature" column but none in the "Client's Signature" column.

6 The total in the "Approx. Cost \$ - Current" sub-column of the Works Completed Schedule relating to Bi-Lo is \$44,600. The corresponding item in the Works Completed Schedule in relation to K-Mart is \$63,000. It is the aggregate of these - \$107,600 - that is the starting point designated "Value of work as per Works Completed Schedules" referred to in the description of the calculation of the progress payment amount of \$122,348.19 in the adjudicator's determination.

7 The adjudicator referred, in his determination, to the use he had made of the Works Completed Schedules. He did so in the context of an explanation of the way in which he had arrived at the starting point of \$107,600: "The first amount making up the payment claim is an amount of \$107,600. The claimant says, 'the process adopted on site is that the Respondent's on-site foreman meets with the Claimant's representative each month and 'signs off' on an agreed value of work. December was no exception; please refer to the documents 6-1 (K-Mart for \$63,000.00) and 6-2 (Bi-Lo for \$44,600.00). The addition totals the claimed amount of \$107,600'.

*The documents 6-1 and 6-2 are headed 'Works Completed Schedule' and are tables of amounts against items of work. The fifth column has the heading 'Approx. Cost \$ Current'. The amounts in this column add up to the amount claimed by the claimant. The last column is headed 'Clients Signature'. The respondent says that the respondent's site*

foreman who signed for the respondent 'does not and has never valued the contract value of works completed at the date of the claim' and 'held no authority to carry out such a task'. The respondent says that the site foreman 'only signed the form to confirm the Claimant had men on site during that period'. It does not appear to me that that is the purpose of the schedules. On the contrary, it appears to me that that the schedules are an acknowledgment by the respondent of the approximate value of the work carried out."

- 8 In contending that the adjudicator fell into jurisdictional error warranting judicial review, the plaintiff attacks the adjudication on two bases. The first is that the adjudicator failed to give effect to and proceed in accordance with s.10(1)(b)(i).
- 9 The plaintiff says, and I agree, that, under s.22 of the Act, the adjudicator was required to determine the amount of the progress payment in accordance with ss.9(b) and 10(1)(b), since, in a case such as this where the contract is silent on the matter, an entitlement to a progress payment cannot arise otherwise than through those sections together with s.8. The plaintiff then says that, of the matters specified in s.10(1)(b) as those to which an adjudicator is required to have regard in calculating the value of work, the only one relevant to what became the \$107,600 component of the determination is that specified in s.10(1)(b)(i), that is, "the contract price for the work". From that point, the plaintiff's argument is as stated in the following extract from counsel's written outline of submissions: "The determination of the value of construction work for the purposes of a progress payment must be arrived at by reference to the proportion that the value of the construction work bears to the total contract price. For the purposes of s.10(1)(b) the adjudicator is not authorised to simply arrive at a value for the work carried out during the reference period, based, for example, on a reasonable cost or a cost plus basis. To take a simple example, if the contract price is \$100,000 for all of the contract work and the proportion of work completed during the period is 20% of the contract work, the contractor would not be entitled to payment in excess of \$20,000 even if the reasonable value of the work carried out was \$50,000. In this way, s.10(1)(b) by reference to the contract price for the work ensures that a progress payment does not exceed the contract value."
- 10 The plaintiff says that by adopting the \$107,600 from the Works Completed Schedules, the adjudicator failed to consider or value the claim by reference to the contract price. The submission continued: "More particularly, his failure to address the issue is evident from the following matters, all of which would impact on the proportional relationship between the payment claim and the contract price for the works:
- a. The 'Works Completed Schedule' to which the adjudicator referred was not in the proper or conventional form of a progress claim and could not itself have constituted a payment claim.
  - b. The Works Completed Schedule was internally inconsistent and contained anomalies. By way of example, with reference to the Bi-Lo site (document 1, p. 7) the claim with respect to 'Power Fitout' is disproportionate and does not make any sense.
  - c. There is no indication that the adjudicator gave any consideration to Quasar's contention set out in its facsimile to Stockman dated 8 January 2004 as to the discrepancy between 'the final claim figure and the contract value' and that the 'total claim figure will exceed the contract value'.
  - d. The adjudicator did not consider the anomalies referred to in Quasar's above-mentioned facsimile, for example with respect to the claim for Distribution Boards.
  - e. The adjudicator did not consider the Payment Summary set out in Schedule 1 (document 4, p. 109)."
- 11 I am not satisfied that the constraints upon an adjudicator suggested by the plaintiff's submissions are to be found in the Act. They are certainly not prescribed by any express provision. Nor, in my view, can the Act be said to incorporate by implication a requirement to adopt the proportional approach, by reference to the contract price, for which the plaintiff contends, even though that may be an approach commonly adopted by contracting parties who actively turn their minds to the creation of a contractual progress payments regime. This comment also applies to the plaintiff's criticism based on the adjudicator's failure to reconcile the cumulative amount claimed as against payments already made.
- 12 The requirement imposed by s.10(1)(b) is that the adjudicator make his or her calculation "having regard to" the contract price and the several other matters specified in sub-paragraphs (i) to (iv). But those factors, in my view, represent no more than matters that must be recognised and accepted by an adjudicator as matters to be taken into account in performing the specified valuation task. A provision compelling a decision maker to "have regard to" specified matters in making the particular decision does no more than require that he or she "give weight to them as a fundamental element" in coming to a conclusion: *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333 per Gibbs CJ. In the present case, the contract price can be seen to have played a direct part in the adjudicator's decision. The first page of the payment claim referred to the "Original Contract Amount" of \$945,000 (agreed, as I understand it, to be what s.10(1)(b)(i) calls "the contract price for the work") and showed against that \$107,600 as the sum the first defendant was "now claiming". The adjudicator also had before him a so-called "spreadsheet" sent by the first defendant to the plaintiff on 12 January 2004 that identified the \$107,600 claimed as part of the overall sum of \$945,000 and showed, by reference to various parts of the site and approximate percentages of completion, a relationship between the two. In accepting the sum of \$107,600 as he did, the adjudicator cannot but have taken into account and given some weight to the contract price of \$945,000 which, in these ways, was before him as part of the parties' contentions.
- 13 The plaintiff's first basis for a finding of jurisdictional error is therefore not made out.

- 14 I turn now to the plaintiff's second ground of attack on the adjudicator's determination, namely, that he failed to make, in accordance with s.10(1)(b), any determination of the value of the work. The plaintiff says that the adjudicator merely adopted the values stated in the Works Completed Schedules signed by employees of the respective parties which he regarded as "an acknowledgement of the approximate value of work carried out", thereby failing to perform his statutory function. The plaintiff also says that the plaintiff's signatory, Mr Wilson, the site foreman, was not a certifier under the contract (not surprisingly, as there is no written contract) and that Mr Wilson's signature, contrary to the apparent message in the Works Completed Schedules, signified no more than confirmation that some work had been carried out during the relevant period, he having no authority from his employer to agree quantities or values.
- 15 The plaintiff submits that the adjudicatory function under the Act is not performed merely by rubber stamping someone else's decision. Counsel for the plaintiff referred to the observation of Einstein J in **Brodyn Pty Ltd v Davenport** [2003] NSWSC 1019 that an adjudicator under the Act plays a "judgmental role in determining" and does so "by reference to the integers stipulated for by the Act". Reference was also made to like observations of McDougall J in **Abacus Funds Management Pty Ltd v Davenport** [2003] NSWSC 1027 and, in particular, the following passage: "*In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours.*"
- In **Transgrid v Walter Construction Group Ltd** [2004] NSWSC 21, McDougall J held that an adjudicator was not bound by a determination of a superintended or other certifying official operating under a contract and was "entitled to exercise his or her own judgment". In **Transgrid v Siemens Ltd** [2004] NSWSC 87, Master Maccready doubted this aspect of the decisions of McDougall J in **Abacus** and **Transgrid v Walter**.
- 16 In the present case, the adjudicator did not fail to bring judgment to bear on what he found in the Works Completed Schedules. He noted the process, as described by the first defendant (the claimant before the adjudicator), under which site meetings occurred monthly and employees of the parties signed off schedules recording quantities and approximate values of work items. He noted the plaintiff's contention that the Works Completed Schedules were not what they appeared to be and that Mr Wilson's signature represented no more than an acknowledgement that some work had been done during the month; also that Mr Wilson had no authority to agree the value of work done. His decision took those matters into account.
- 17 Competing contentions about matters relevant to a proper determination of the value of work were thus addressed by the adjudicator. He did not merely "rubber stamp" the content of the Works Completed Schedules. He had regard to the processes that resulted in the production and signing of those schedules and to the parties' respective contentions as to the reliability and efficacy of those processes and the result they produced as embodied in the schedules. There was, in the true sense, an adjudication and an exercise of judgment.
- 18 The second ground on which the plaintiff argued for a finding of jurisdictional error is not sustainable.
- 19 Judicial review, on the basis for which the plaintiff contends in this case, is available only if the decision maker does not address the question posed by the legislation and fails to embark upon the course the legislation requires him or her to follow. Neither of the objections raised by the plaintiff justifies a finding of jurisdictional error of law of that kind. This is not to say that the decision reached by the adjudicator was necessarily the right one or that some other and better conclusion might not have been open to him. But that is a question that is irrelevant to these proceedings and on which I make no finding.
- 20 The summons is dismissed with costs.

Mr D D Feller SC – Plaintiff instructed by James R Knowles Lawyers Pty Limited  
Mr K J Tapsell, Solicitor - First Defendant instructed by Watkins Tapsell