RothnereP/L v Quasar Constructions NSW P/L, Mr Robert Sundercombe & Australian Solutions Centre P.L

JUDGMENT : **McDougall J** : New South Wales Supreme Court : 26th November 2004

1 The question for decision in these proceedings is whether the determination of the second defendant ("the adjudicator") made on 25 October 2004 under the *Building and Construction Industry Security of Payment Act* 1999 ("the Act") on 25 October 2004 is void.

Background

2 The plaintiff ("Rothnere") and the first defendant ("Quasar") are parties to a contract made in about March 2002 whereby Rothnere engaged Quasar to perform construction work in relation to a shopping centre at Wyoming. No-one has suggested that the contract is not a construction contract for the purpose of the Act; clearly, it is. No-one has suggested that the work performed by Quasar for Rothnere under the contract was not construction work; clearly, it was.

3 Quasar performed work under the contract and, from time to time, served claims for progress payments. At least three of those claims, numbered 11, 13 and 14, have been the subject of adjudication under the Act.

4 Progress claims 11 and 13 were adjudicated by Mr Scott Pettersson. He made his determination on 3 June 2004 ("the Pettersson determination").

5 In the way that such things appear frequently to happen, progress claim 14 traversed much of the same ground and comprehended much of the same work as had been traversed and comprehended in progress claims 11 and 13. That is permitted: see s 13(6) of the Act. However, when that happens, s 22(4) of the Act is brought into play.

6 Section 22 sets out requirements that attend the making of a determination under the Act. I will not set out the whole of the section, but I will note that subs (2) specifies matters that the adjudicator is to consider, and specifies them in an exclusive manner. Against that background, subs (4) reads as follows:

> "*(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:*
> *(a) the value of any construction work carried out under a construction contract, or*
> *(b) the value of any related goods and services supplied under a construction contract,*
> *the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.*"

The issues

7 The parties agreed that there were two issues. The first is whether, on the facts, s 22(4) is engaged at all. The second is whether, if s 22(4) is engaged, and on the assumption that the adjudicator determined the value of construction work in a sum different to that earlier determined by Mr Pettersson, compliance with s 22(4) is a fundamental provision of the Act, non-compliance with which has the effect that there is in law no determination.

The second issue

8 I propose to deal with the second issue first.

9 The basis upon which the Court can intervene in the determinations of adjudicators made under the Act has been considered by the Court of Appeal in two recent cases: specifically, I refer to ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394. Reference may also be made to ***TransGrid v Siemens*** [2004] NSWCA 395.

10 Hodgson JA gave the leading judgment in both appeals. Mason P and Giles JA agreed with his Honour in both. His Honour said that the determination of an adjudicator could be made the subject of judicial intervention in a number of circumstances. They include:

(1) That the adjudicator has failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination.

(2) That the adjudicator has denied natural justice to a party (the content and operation of this depending, of course, upon the relatively limited scheme put forward by the Act for the provision of natural justice).

(3) That the adjudication determination is procured by fraud in which the adjudicator is complicit.

11 Hodgson JA listed in *Brodyn* at [53] some (apparently not necessarily all) of what his Honour called *"the basic and essential requirements"*:

> "*1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 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 (ss.18 and 19).*
> *5. The determination by the adjudicator of this application (ss.19(2) and 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 (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*"

12 It is apparent, both from the way his Honour phrased para [53] and again from para [55], that the list "may not be exhaustive". It will be seen that the list does not include s 22(4). Rothnere contends that it should.

13 The reasoning of the Court of Appeal needs to be understood against the background to the challenges that the appellant in *Brodyn* raised. Hitherto, it had been thought that the determinations of adjudicators could be challenged on the grounds of denial of natural justice, jurisdictional error of law on the face of the record, and

fraud; and that challenges could be brought, pursuant to s 69 of the *Supreme Court Act* 1970, by applications for relief in the nature of certiorari. See, for example, ***Musico v Davenport*** [2003] NSWSC 977; ***Abacus Funds Management v Davenport*** [2003] NSWSC 1027; and ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140.

14 The effect of the Court of Appeal's decision in ***Brodyn*** is that relief in the nature of certiorari is not available and that judicial intervention is not justified simply on the basis of jurisdictional error of law on the face of the record. What Hodgson JA said was that relief could be granted by way of declaration or injunction; but that, if it were to be granted, it should be granted upon the basis of the criteria that I have earlier set out.

15 I mention that history because it is necessary to an understanding of his Honour's reasons in *Brodyn*, particularly in paras [55] and [56].

16 In para [55], his Honour said that the legislature did not intend that exact compliance with all the detailed requirements that it laid out was essential to the existence of a (valid) determination. His Honour said that what the legislature required *"was compliance with the basic requirements ..., a bona fide attempt by the adjudicator to exercise the relevant power ..., and no substantial denial of the measure of natural justice that the Act requires to be given"*. (I have referred above to fraud; that is picked up later in his Honour's reasons, at para [60].)

17 At para [56], his Honour dealt with the proposition that a decision (in that case, the determination of an adjudicator) might be a nullity if the adjudicator refused to take into account something that he or she was required to take into account, or based his or her decision on something that he or she had no right to take into account. His Honour referred to the decision of the High Court in ***Craig v South Australia*** (1995) 184 CLR 163 at 173 for the proposition *"that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision"*. However, his Honour said, the statutory scheme did not give rise to a right to relief *"for mere error of law on the face of the record"*. By reference to the matters set out in s 22(2), his Honour said that they "could involve extremely doubtful questions of fact or law", giving examples. He therefore said: *"In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in section 22(2), or bona fide addresses the requirements of section 22(2) as to what is to be considered."*

18 I accept that the list of "basic and essential requirements" given in ***Brodyn*** may not be exhaustive. However, I do not accept that s 22(4) should be added to that list. The reasons that Hodgson JA gave in para [56] of *Brodyn* for holding that the requirements of s 22(2) were not basic and essential seemed to me to apply with equal force to s 22(4).

19 In this context, it is significant that Hodgson JA referred to the decision of the High Court of Australia in ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355: in particular, to the decision of the majority (McHugh, Gummow, Kirby and Hayne JJ) at 390-391.

20 The question that the majority were considering in ***Project Blue Sky*** was whether *"[a]n act done in breach of a condition regulating the exercise of a statutory power" is "invalid and of no effect"* (see 388-389, [91]).

21 Their Honours, having posed this question, said that whether there was invalidity and lack of effect "depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition" (ibid).

22 At 390 [93], their Honours said that "a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid". Their Honours applied that reasoning to the particular legislative requirement under consideration in ***Project Blue Sky*** at 391 [94], [95]. They noted that the section in question "proceeds on the hypothesis that the ABA has power to perform certain functions and directs that it "is to perform" those functions "in a manner consistent with" the four matters set out in the section. They then said that "the fact that section 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its function strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section".

23 Their Honours then said, in para [95], that there might be room for "widely differing opinions as to whether or not a particular function has been carried out in accordance with" legislative requirements. They therefore concluded that "when a legislative provision directs that a power or function be carried out in accordance with matters of policy, ordinarily the better conclusion is that the direction goes to the administration of a power or function rather than to its validity".

24 In my judgment, the approach taken by the majority in *Project Blue Sky*, and the approach taken by Hodgson JA in *Brodyn,* alike dictate that s 22(4) is not to be regarded as a provision, non compliance with which would have the effect of undoing a purported exercise of power by an adjudicator.

25 As did the relevant section in *Project Blue Sky*, s 22(4) proceeds on the basis that the adjudicator has power to perform his or her functions under the Act. As did the provision in *Project Blue Sky*, s 22(4) regulates the way in which, in one respect, the adjudicator is to exercise that function.

26 Further, as I have said, the comments made by Hodgson JA in relation to s 22(2) appear to me to apply with almost equal force to s 22(4). That may be shown, in the context of the present case, by the extent of argument that was necessary to show (if it were shown) that the adjudicator had not complied with s 22(4).

27 Mr Christie of Counsel, who appeared for Rothnere, submitted that, if the adjudicator were to reach a different view to his predecessor, it was necessary for him to be satisfied "that the value of the work ... has changed since the previous determination": the concluding words of s 22(4). That is so. Mr Christie then submitted that the concept of satisfaction invoked the concept of "reasonable satisfaction", so that (absent satisfaction on a reasonable basis) the pre-condition could not be considered to have been met, and the decision must be taken as susceptible to review. He referred to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, in particular at 1172 [36]; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 150 [45]; and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 652-653 [133] to [134].

28 I accept, of course, that if one is looking at the problem in terms of the traditional bases upon which administrative decisions may be reviewed, then the principles set out in the cases to which Mr Christie referred would be of direct application. However, I do not think that this is the basis upon which the task in relation to determinations of adjudicators, as it is now understood, is to be performed.

29 I take the law to be, as laid down in *Brodyn*, that a determination may only be set aside if it is void - ie, no determination - and that it will only be void in the circumstances specified in that case, and already summarised. (In this context, I remind myself that, although in principle the class of invalidating circumstances appears to be defined, in one case - "basic and essential" statutory requirements - the subclass may need revision.)

30 I therefore do not think that anything is to be gained by considering whether it was reasonably open to the adjudicator to be satisfied that the value of the relevant work had changed since Mr Pettersson's determination.

31 The conclusions that I have reached make it unnecessary to consider the first issue. However, I will set out briefly my conclusions in respect of that issue.

The first issue

32 The argument focused on three variations, each in respect of items for which provisional sums had been allowed in the contract. Taking them in the order in which they were addressed, they are variation 118 (relating to signage), variation 53 (relating to certain columns), and variation 115 (relating to external works).

33 A review of the determination shows that the adjudicator was alive to the need to consider whether s 22(4) enabled him to reach a determination of value other than that reached by Mr Pettersson. In each case, he decided that it was open to him to do this. It has not been suggested that he acted otherwise than in good faith in doing so.

34 In relation to variation 118, Mr Pettersson's reason for rejecting the amount claimed was expressed to be, in substance, that the costs in question were costs that should not be borne by Rothnere. He said specifically that he accepted "that Quasar has incurred costs relating to signage as evidenced in the adjudication application and the statutory declarations".

35 In my judgment, that is a finding by Mr Pettersson that the valuation of the construction work comprised in that valuation was as claimed by Quasar.

36 he adjudicator, in his adjudication, reached no different conclusion on valuation. He did, however, decide (contrary to Mr Pettersson) that Rothnere was obliged to pay the amount.

37 As to variation 53, it is apparent again that (with a minor and presently irrelevant exception), Mr Pettersson decided the question not on some valuation basis, but because he concluded that the work in question was not a variation at all. He did not express any opinion as to the value of the work, except to say, in respect of the small component to which I have referred, that he had not determined any value for it. If it were not, as he thought it was not, a variation, then, as he concluded, Rothnere was not obliged to pay. It is apparent that the adjudicator concluded that the work did comprise a variation. He therefore allowed it.

38 The remaining variation, 115, relates to external works. The position is not quite so clear in this case. However, it is not clear simply because Mr Pettersson failed to include any explicit reasoning that would enable an identification of the amounts involved. At least part of that amount related to a claim for $55,237. Mr Pettersson said explicitly that he had not valued that claim. As Rothnere conceded, it was therefore open to the adjudicator to undertake (as he did) an evaluation of that amount. However, it submitted, the adjudicator's determination was flawed because, in addition to work that he could legitimately value, he also revalued work that had been valued by Mr Pettersson.

39 It is perhaps an available inference, if one puts together Mr Pettersson's determination with documentation produced by third parties, that Mr Pettersson valued the claim for external works at the figure of $111,145. Certainly, the adjudicator seems to have interpreted the material in this way. However, there is nothing in Mr Pettersson's determination which could be said, even having regard to the standards of informality required by the Act, to amount to a valuation of that work in that amount.

40 Had it been necessary to do so, I would have concluded that the challenge failed on the facts.

41 There is one other point that needs to be mentioned. Mr Christie submitted that, where s 22(4) referred to the valuation of construction work, it meant, in substance, the value that the respondent to a payment claim was liable to pay. That was a step in his argument which was that s 22(4) was introduced by the *Building and Construction Industry Security of Payment (Amendment) Act* 2002, to discourage what the Minister, in the Second Reaching

Speech, had referred to as "adjudicator shopping", and that it should be construed (if ambiguous) so as to facilitate the achievement of that end.

42 I do not think that it is possible to read s 22(4) in this way. Section 8 gives an entitlement to a progress payment for construction work. Section 10 sets out how construction work is to be valued. The phrase "construction work" itself is a defined phrase: see section 5.

43 A determination under the Act may involve both questions of quantification - the section 10 issue - and questions of entitlement; or it may involve one or the other.

44 In my judgment, s 22(4) itself makes it clear that an adjudication determination need not necessarily include the valuation of construction work: the use of the introductory word "If" makes this clear. Subsection (4) therefore only applies where a component of a determination - that is to say, in terms of s 22(1)(a), of the determination of the amount of the progress payment (if any) to be paid - includes a determination of the value of construction work. Where it does, then subs (4) applies. Where it does not (either because the work has not at all been valued before or because the value of the work has changed) then s 10(1) applies. But there is nothing in these considerations that indicates that the phase "construction work" when used in s 22(4) should be construed in any way other than the way that it is used throughout the Act.

45 For these reasons, I conclude that Rothnere's challenges to the determination fail. The summons should be dismissed.

RUDGE: I ask for costs.

CHRISTIE: I have nothing to say.

46 I make the following orders:
(1) I order that the summons be dismissed.
(2) I order the plaintiff to pay the first defendant's costs of the proceedings; otherwise no order as to costs.
(3) The exhibits are to be retained within 28 days and then dealt with in accordance with the Rules.

RUDGE: The plaintiff has in fact paid the adjudicated amount into Court as a condition of the stay. We would obviously like to get that out.

CHRISTIE: Your Honour, might we just have the matter stood over for 24 hours? It may well be my client would prefer to pay the cash.

RUDGE: Could we mention it on Monday morning at 9.30?

47 I add to the orders:
(4) I stand the proceedings over to 9.30am on Monday 29 November 2004 for mention.

M Christie (Plaintiff) instructed by Blake Dawson Waldron
M G Rudge SC/A S Kostopoulos (Defendants) instructed by Wright Stell