

**JUDGMENT : Associate Justice Macready** : New South Wales Supreme Court : 5<sup>th</sup> July 2005

- 1 This is the hearing of proceedings in which the plaintiff seeks to set aside a determination by the second defendant of the amount of a progress claim pursuant to the provisions of the **Building and Construction Industry Security of Payment Act 1999**. A Judge of the Court has referred the matter to me for hearing.
- 2 These proceedings arise out of a sub-contract agreement between the plaintiff and the first defendant that was made on 18 June 2004. It was for the metalwork for a residential development known as the "Oxford Square Project" located on the corner of Oxford Street and Pelican Street Oxford.
- 3 The following matters of history are not in issue:
  - (a) The Contract was a "construction contract" within the meaning of section 4 of the **Building and Construction Industry Security of Payment Act, 1999** ("the Act");
  - (b) The metalwork that first defendant agreed to do for The plaintiff was "construction work" as defined in section 5 of the Act;
  - (c) The first defendant served a payment claim under the Act on 20 December 2004 claiming the sum \$351,270.48 inclusive of GST for the work done by first defendant under the Contract;
  - (d) On 10 January 2005, the plaintiff served a payment schedule under section 14 of the Act in response to first defendant's payment claim;
  - (e) On 21 January 2005, the first defendant lodged an adjudication application in connection with the disputed payment claim;
  - (f) The second defendant was appointed Adjudicator to determine the disputed claim;
  - (g) The plaintiff served its adjudication response on 31 January 2005; and
  - (h) On 8 February 2005 the Adjudicator made a Determination in first defendant's favour for the full amount of the payment claim.
- 4 The plaintiff contended in the proceedings that:
  - (a) There has been a failure by the Adjudicator to comply with the following provisions of the Act, viz:
    - (i) section 22(2)(d) – which requires the Adjudicator to take into account and consider the material in Tollfab's Adjudication Response; and
    - (ii) section 22(3)(b) – the provision by the Adjudicator of adequate and proper reasons for his determination;
    - (iii) section 10 - which requires the Adjudicator to value the work.
  - (b) That the aforesaid failures have resulted in a breach of natural justice or alternatively
  - (c) there has been a failure by the Adjudicator to comply with an essential element of the act, namely a bona fide attempt to exercise his power.
  - (d) That, in the circumstances, the Adjudication Determination is void.
- 5 The plaintiff in its original submissions contended that the failure to give adequate and proper reasons for his Determination made the Determination void. That claim was not pressed at the hearing no doubt because in **Brodyn Pty Ltd v Davenport** [2004] NSWCA 394 the Court of Appeal had held at para 54 that the failure to provide reasons was not a basic and essential requirement under the scheme of the Act a breach of which would make the Determination void. It was submitted that the various matters referred to above including the failure to give reasons meant that the Adjudicator had denied the plaintiff natural justice and accordingly the Determination was void. The first defendant in its submissions denied that there had been any factual breach alleged by the plaintiff and in any event that in law there was no breach of the rules of natural justice that would lead to the decision being void in the circumstances of this case.

**Failure to take into account the facts and submissions contained in the plaintiff's adjudication response**

- 6 The Adjudicator in his Adjudication Determination referred to the fact that the matters of dispute in the plaintiff's adjudication response were not dealt with by the plaintiff in its Payment Schedule and thus a question arises as to whether he considered them and took them into account in his Adjudication Determination.
- 7 The relevant paragraphs in the Adjudicator's Determination which it is said makes this clear, are as follows:

"Contract works

"[14(b)] in relation to reason that the contract works are have not been completed by the claimant and subject to my comments below relation to the contents of the adjudication response:

  - i) no details of lack of completion were provided by the Respondent to the Claimant in its payment schedule;
  - (ii) the Claimant could not therefore properly respond to such allegation in its adjudication application.
  - (iii) the percentages of work stated by the Respondent to have been completed by the Claimant vary between that stated by the Respondent in its adjudication response and that stated in payment certificate no 4;
  - (iv) despite providing additional reasons in its adjudication response including photographs and statutory declarations, I am not satisfied on the material provided by the Respondent that the Claimant has not completed the Contract work and value of the original contract works to the percentages stated by the Claimant in its payment claim;"

"[16] In relation to the value of the original contract works claimed by the Claimant in its payment claim:

    - (a) in its payment schedule the Respondent provides various percentages complete for such items stating in its payment certificate no 4 that the overall original contract works are 72% complete;
    - (b) in its adjudication response the Respondent changes the percentages complete for such items and reduces the overall percentage to complete for the original Contract works to 56%;

- (c) *apart from the reason stated in paragraph 12(b) above, the Respondent has not provided in its payment schedule reasons for reducing the percentages complete for each of the items comprising the original Contract works in the payment claim;*
- (d) *whilst other reasons are provided by the Respondent in its adjudication response both in the various attachments and in the two statutory declarations, those reasons were not provided by the Respondent in its payment schedule, therefore the Claimant has not had the opportunity to respond to such reasons in its adjudication application;*
- (e) *pursuant to Section 20(2B) of the Act and as the additional reasons provided by the Respondent in its adjudication response where (sic) not provided by the Respondent in its payment schedule, I cannot take the reasons provided by the Respondent in its adjudication response into account in this determination;*
- (f) *notwithstanding the above and despite providing additional reasons in its adjudication response including photographs and statutory declarations, I am not satisfied on the material provided by the Respondent that the Claimant has not completed the Contract work and variations to the percentages stated by the Claimant in its payment claim;*
- (g) *I am therefore satisfied that the percentages of work and values completed by the Claimant for the original Contract works as stated by the Claimant in its payment claim, are correct."*
- 8 Variation claims were also dealt with in a somewhat similar manner. He said:  
"[15] *In relation to variations claimed by the claimant in its payment claim*
- (a) *no reasons for reducing the value of such variations were provided by the Respondent in its payment schedule;*
- (b) *The Respondent did however provide such reasons in its adjudication response at Attachment B;*
- (c) *pursuant to Section 20(2B) of the Act I cannot take into account the reasons stated in the adjudication response if such reasons were not provided by the Respondent in its payment schedule;*
- (d) *as no reasons for reducing the value of such variations were provided by the Respondent in its payment schedule I therefore determined that the Claimant is entitled to the full payment for variations as claimed in its payment claim."*
- 9 In his adjudication the Adjudicator dealt with four separate reasons advanced in the payment schedule that was before him. The particular complaints go to one of these, namely, the question of whether or not "the contract works have not been completed".
- 10 In considering those reasons it is important to realise that the defendant was not suggesting that that the work under the contract had been completed. The first defendant was merely making a progress claim up until that time in the contract when following a falling out between the parties its involvement on the site ceased. It is necessary to examine the documents that were before the Adjudicator.
- 11 The progress claim by the first defendant was made in December 2004 and dealt with the matter by reference to 12 contract areas, giving a summary of the value, percentage to complete and a dollar value of the work completed. Item 1 was "aluminium facade panels installation including balustrade capping to Riley Street" and the claimed percentage completion was 93%.
- 12 The payment schedule was written by the plaintiff's solicitor and consisted of a letter of 10 January 2005 and some attached schedules. In respect of the subject matter of the present element of the dispute the only thing the latter letter advised was: "*As a part of our clients payment schedule we advise that our client is not prepared to pay the schedule amount due presently on the basis that the contract works have not been completed,....*"
- 13 This clearly did not deal with the amount of the work completed to the date of the claim.
- 14 The schedule attached to the letter also dealt with the claim by reference to the various sections. After the description the headings were job value, claimed to date, claim previous, approved this claim, outstanding claim. Under the heading "approved this claim" is a particular percentage and in this case in respect of item 1 was 5%. Apart from this heading there was no explanation for arriving at this percentage which is less than the amount in the payment claim.
- 15 The first defendant's adjudication application was dated 21 January 2005 and was a detailed request attaching a substantial number of the contract documents including claim forms. It addressed in detail many of the claims. It said at page 6 of the application the following: "*Tie Fab's claim is fully explained in our original claim document (Attach 1). Page 2 of the claim is for works as detailed in our original contract. For each items the percentage of work completed at the time of the claim is identified. Tollfab have provided a spread sheet (Attach 3) with percentages complete which vary from those claimed by Tie Fab. However Tollfab have proved no justification for these quantities or why they differ from those claimed by Tie Fab. Tollfab in Attach 3 Paragraph 4 advised Tie Fab that they have engaged another contractor to complete the works. This makes it impossible for Tie Fab to return to site and provide verification of the actual quantity complete at the time of this claim.*
- In Tie Fab's first 4 claims Tollfab never questioned the quantities claimed by Tie Fab and there is no basis for Tollfab to question the quantities now. Tie Fab stand by the quantities in our claim and request the adjudicator adjudicate the claimed amount."*
- 16 Prompted no doubt by this submission the plaintiff's answer was to launch into a substantial amount of detail in their adjudication response of 31 January 2005. For instance, in their letter part of the response it was suggested that 60% of item 1 was not done by the time the contractor left the site. It attached a summary document which differed from that result as it indicated that the plaintiff thought that 70% of the work had been completed.

Against some of the items there were comments, which could be properly considered as reasons, but it is plain that none of those reasons were included in the payment schedule.

- 17 All the payment schedule did was to list certain percentages under the heading "approved this claim". The Adjudicator relied upon the provisions of section 20 (2B) of the Act which is in the following form: "(2B) The 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."
- 18 The Adjudicator is restricted in what he may consider. S 22 (2) provides:  
"(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."
- 19 It is noted that submissions are to be "duly made". Therefore submissions contrary to s 20(2B) cannot be considered by the Adjudicator. To understand what is prohibited by s 20 (2B) one needs to consider the terms of s 14.

#### 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.
- (2) A payment schedule:  
(a) must identify the payment claim to which it relates, and  
(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (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.
- 20 It is important to note that in 14(3) there are two matters with which the schedule must deal if the scheduled amount is less than the claimed amount. They are:  
(a) why the scheduled amount is less and  
(b) (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- 21 It is notable that s 20(2B) only refers to reasons and does not refer to the first matter, namely, why the scheduled amount is less.
- 22 An example of the second matter was something that occurred in this case, namely, that they were withholding the payment because there had been an alleged repudiation of the contract.
- 23 The construction of s 14(3) and s 20(2B) was dealt with by Palmer J in **Multiplex Constructions Proprietary Limited v Luikens** [2003] NSWSC 1140 at paragraphs 60 to 71. He referred to the fact that Multiplex's payment schedule gave only one reason for rejecting variation work, namely that it was barred by a clause in the contract and that the adjudication response gave a detailed assessment of the amount of the variation work. After referring to the statutory provisions he said:  
"65 Mr Rudge submits that the words in s.14(3), "if it is less because the respondent is withholding payment for any reason", are to be construed as meaning "if it is less because the respondent is holding back a payment, otherwise properly due under the contract, by reason of a cross claim or set-off": see e.g. T22.51ff, T5.1-.17. Where a cross claim or set-off is the reason for not paying the amount claimed in the Payment Claim, says Mr Rudge, that reason must be disclosed in the Payment Schedule. But where the respondent refuses to pay the amount claimed on the ground that it is not due and payable according to the terms of the contract, that is not "withholding payment" within the meaning of that phrase in s.14(3) and the reason for not paying the amount claimed is not required to be shown in the Payment Schedule.
- 66 In the present case, Mr Rudge says, one reason for not paying the amount claimed for Item 8 was that the claim was excessive when valued according to the terms of the contract. That reason was not required to be disclosed in the Payment Schedule and, consequently, the adjudicator was not entitled to exclude it from his consideration by reason of s.20(2B). That reason, together with the evidence in support of it, was, therefore, properly part of

*Multiplex's Adjudication Response and the adjudicator had a duty under s.22(2)(d) to consider it. His error of law in refusing to consider it was a jurisdictional error requiring that the determination be quashed.*

- 67 I am unable to accept this submission. The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.
- 68 Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).
- 69 A subsidiary argument which Mr Rudge appeared to advance in his oral submissions was that Multiplex had given a sufficient reason in its Payment Schedule for withholding payment of the claim in respect of Item 8 simply by stating that the claim was "rejected"; Multiplex had thereby complied with the requirements of s.14(3) and was permitted to amplify that reason in its Adjudication Response by giving particulars of valuations and calculations on the basis of which the claim had been rejected.
- 70 I am unable to accept this submission. For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.
- 71 For these reasons, I am of the view that Mr Luikens did not fall into error in his construction of s.14(3) and s.20(2B) of the Act and that he rightly rejected the submissions and evidence of Multiplex in its Adjudication Response in support of reasons for withholding payment of Item 8 which were not indicated in the Payment Schedule. It follows that Mr Luikens did not commit jurisdictional error of law in his determination of Item 8."
- 24 It is apparent that the payment schedule which His Honour was considering was quite different from the one which I have to consider. Plainly, His Honour thought that the payment schedule in his case gave no reasons by simply rejecting the claim. It could also be said that it did not indicate why the scheduled amount was less and thus His Honour did not have to distinguish between the two concepts.
- 25 In the present case the heading in the payment schedule "Approved This Claim" and the use of a percentage figure in the context of the other headings was a clear indication of the value of the work performed to the date of the claim. It is plainly apparent that the defendant understood that this is what was meant by the payment schedule. See the section of the adjudication application to which I have referred in paragraph 15 above. There can thus be no question of ambush by the plaintiff as the defendant knew by the time it had to make its adjudication application the ambit of the dispute and could thus address it in its application for consideration by the Adjudicator.
- 26 In my view the payment schedule indicated why the amount was less and to the extent that it may have been necessary to do so it gave reasons for withholding, being, inter alia, that the value of the work completed was less than claimed. This was a formula the parties had used in their documentation over the previous progress claims.
- 27 It seems, therefore, that the Adjudicator was obliged to consider the matters in the response dealing with this area. The question is, whether he did so consider the material.
- 28 It is apparent from the terms of 14(b)(iii) and (iv) and 16(f) of the Adjudicator's reasons that in considering the extent of the value of the original contract works claimed by the first defendant, the Adjudicator may have dealt with the matter on an alternative basis to encompass the situation of s 20(2B) applying or not applying.

- 29 On a fair reading of the reasons and 16 (f), I think the Adjudicator in using the words “on the material provided by the respondent” is referring to the additional material included in the adjudication response. In these circumstances he has dealt with the matter on the alternative basis taking into account the matters in the adjudication response. In effect he has said that even if he were permitted to take it into account it would not persuade him to reduce the amount claimed.
- 30 The Adjudicator’s reasoning in respect of variations, a separate item, was different. See paragraph 15 of his reasons which I have set out above in paragraph 8. The payment schedule only referred to some of the variations in the payment claim in the same manner as I have identified in paragraph 14 above and made no reference to the other claimed variations. The adjudication response attached a spreadsheet and copies of supporting correspondence.
- 31 The spreadsheet dealt with three categories of variation as follows:  
Accepted as claimed  
Accepted as claimed with back charges for repair of gaps  
Contested
- 32 There is no matter to debate in respect of the first category.
- 33 The second category accepts the amount claimed but claims a back charge which is not quantified for the “repair of gaps”. This is a “reason for withholding payment” which did not appear in the payment schedule.
- 34 The third category lists 14 variations and deals with them under the following headings:  
Whether written request received  
Whether approval given  
Value of variations agreed  
Percentage completion at 20/12/04  
Amount of back charges  
Comments as at 2/12/04
- 35 The first two headings and the fifth heading are likely to truly be “reasons for withholding payment” which did not appear in the payment schedule.
- 36 If one studies the individual items there are three items, namely, 8, 26 and 27 where the only question raised is the amount of work completed. These three claims totalled \$15,321 and they were allowed in the adjudication response in an amount of \$3,375. The response gave an explanation why the amount was less. However, as items 26 and 27 were not dealt with in the payment schedule the Adjudicator could not consider them. One is left, item 8, which is the additional aluminium domino façade panels on the Riley Street elevation.
- 37 The payment claim was for the balance of the 100% of the total value of this item, namely, \$6,000. The payment schedule allowed it in full but the adjudication response sought to bring that previous concession back to 30%. In these circumstances the adjudication response indicates a matter which was not indicated in the payment schedule and correctly was not taken into account by the Adjudicator.
- 38 Thus there appears to be no matters in the adjudication response which the Adjudicator should have taken into account on the variations.
- 39 If there had been such a breach it would have been one of the more detailed requirements of the Act and does not of itself make the determination void. It may have, however, been a breach of the rules of natural justice a point I will consider below.

#### **Application of the rules of natural justice**

- 40 In careful submissions the plaintiff brought to my attention a series of cases where Court considered the content of the requirement to give natural justice. As an example reference was made to *Xuereb v Viola* (1989) 18 NSWLR 453 where Cole J, who was considering whether a referee’s report should be adopted, had the following to say (at 469): *“Quite apart from Pt 72, r 11(c), natural justice requires that a referee give reasons for his opinion. This is not just to permit the court better to exercise its functions under Pt 72, r 13. The deeper reason is that it enables the parties and the disinterested observer to know that the opinion of the referee is not arbitrary, or influenced by improper considerations but is the result of a process of logic and the application of a considered mind to factual circumstances. I adopt, with respect, the passage in the judgment of Samuels JA in Strbak v Newton (Court of Appeal, 18 July 1989, unreported), in speaking of the requirements for reasons in the judgment of a District Court judge, as being an appropriate statement of principle applicable to the statement of reasons required by a referee:*
- ... “it is going too far to suggest that in every case a judge must submit the material before him or her to the most meticulous analysis and carry into judgment a detailed exposition of every aspect of the evidence and the arguments. What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that the reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given.*
- In the present case, the reasons are certainly succinct; but that is often to be regarded as a judicial virtue. Trial judges must always endeavour to balance their duty to explain with their duty to be brief”.*
- 41 In their submissions the plaintiff referred to cases which had followed this approach and also a line of cases which suggested to the contrary. These cases were ones that dealt with courts, tribunals, or other bodies rather than an

Adjudicator under the Act. However the problem has been addressed specifically by the Court of Appeal in **Brodyn Pty Ltd v Davenport** [2004] NSWCA 394. In the majority judgement Hodgson J distinguished between the basic and essential requirements and the more detailed requirements for the purposes of determining whether a breach may make the determination void. He said:

“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 (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)).

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator’s determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. **Project Blue Sky Inc. v. Australian Broadcasting Authority** (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman*; *Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.”

42 It is plain that a failure to make a bona fide attempt to exercise the relevant power and a substantial denial of the measure of natural justice, that the Act requires to be given can lead to a determination being void. His Honour went on to describe the measure of natural justice that the Act requires in paragraph 57, in these terms:

“57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in **Emag Constructions Pty. Ltd v. Highrise Concrete Contractors (Aust) Pty. Ltd** [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example **Ridge v. Baldwin** [1964] AC 40, **Durayappah v. Fernando** [1967] 2 AC 337, **Banks v. Transport Regulation Board (Vic)** (1968) 119 CLR 222 at 233, **Calvin v. Carr** [1980] AC 574 at 589-90, **Minister for Immigration v. Bhardwaj** (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.”

43 The provisions to which His Honour refers are of course the provisions for submission of various responses to the Adjudicator in the course of making his determination. His Honour has indicated the ambit of the measure of natural justice the Act requires by extending it beyond the basic and essential requirements, which he identified in paragraph 53, to cover the particular process during the adjudication that he there identified. His Honour had earlier noted that the requirement to give reasons was not one of the basic and essential requirements.

44 The particular question did not arise for decision in **Brodyn**. However His Honour’s classification of the status of the provision of reasons is a strong indication that it is not one, a failure of which might extend the reach of the measure of natural justice that the Act requires to be given. I appreciate the force of the reasons given by Cole J

for extending the rules of natural justice to a failure to give reasons. In paragraph 51 of his judgment, Hodgson JA refers to the legislative scheme, the intention to give a quicker entitlement to progress payments with a minimum of delay and the minimal opportunity for court involvement. In particular His Honour pointed to the necessity for confining the ambit of court intervention.

- 45 In these circumstances it seems to me that the measure of natural justice that the Act requires to be given does not extend to giving of reasons under s 23 of the Act but does extend to a failure to consider submissions under s 22(2)(d) of the Act.

**The failure to provide adequate reasons**

- 46 Under section 22(3)(b) of the Act it is provided that:

*“The adjudicator’s determination must:*

*(a) ...*

*(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include such reasons in the determination).”*

- 47 The “reasons” provided by the Adjudicator for two crucial findings in paragraphs 14(b)(iv) and 16(f) of his Adjudication Determination were said by the plaintiff to be grossly inadequate. Those paragraphs are as follows:

*“14(b)(iv) “despite providing additional reasons in its adjudication response including photographs and statutory declarations, I am not satisfied on the material provided by the Respondent that the Claimant has not completed the Contract work and value of the original contract works to the percentages stated by the Claimant in its payment claim;*

*16(f) “notwithstanding the above and despite providing additional reasons in its adjudication response including photographs and statutory declarations, I am not satisfied on the material provided by the Respondent that the Claimant has not completed the Contract work and value of the original contract works to the percentages stated by the Claimant in its payment claim.”*

- 48 The fuller reasons given by the Adjudicator appear in the earlier section of my judgment.

- 49 The duty of the Court to give reasons has been dealt with in many cases. For example in **Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd & Anor** (1983) 3 NSWLR 378 the Court of Appeal dealt at some length with the need to give reasons. Notwithstanding this at 381 Hutley JA noted: *“The extent to which a court must go in giving reasons is incapable of precise definition. A court must not nullify rights of appeal by giving no or nominal reasons, but there is no duty to expound reasons so as to facilitate appeals. This applies particularly to the situation where a judge has to decide between conflicting witnesses, including experts. The choice between conflicting experts may have to be a matter of judgment, not of detailed reasoning.”*

- 50 In the same case Mahoney JA who, after considering authorities at 386 concluded: *“But, subject to matters such as these, the basis of the decision of a trial judge or of an intermediate court of appeal should be made apparent. This does not mean that the reasons given need to be elaborate: an elaborate argument may not require an elaborate answer. Reasons need be given only so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise such rights as may be available to them in respect of it.”*

- 51 Turning to the particular reasons which are criticised it is plain from the full form of the reasons which I set out in paragraph 7 above that the Adjudicator has considered the payment schedule in the adjudication response. In particular he has noted the variations in the adjudication response made by the respondent in contrast to what is alleged in the payment schedule. The Adjudicator notes the absence of reasons and that the changes were not justified in the payment schedule. He then makes a decision plainly preferring the applicant’s claim. He then goes on to deal with the alternative basis and it is plain that he has had regard to the photographs and statutory declarations to see whether even having regard to those it would change his view. The Adjudicator then indicates that he is satisfied that the work has not been completed in the manner alleged by the Respondent but as by the Claimant.

- 52 Here, one is talking about an Adjudicator dealing with the extent to which a particular item of construction is completed. It is not a legal point and is simply a factual matter as to the extent of completion. The Adjudicator is bound to do it on the documents before him and the evidence submitted. In my view it is a fairly simple matter for him to determine and I think his response is a simple one as befits the point which he had to decide. In these circumstances I would not find there has been a failure to give reasons.

**Failure to value the works**

- 53 In this case there is no provision in the contract documents for the issue of progress claims. Accordingly, the value of the construction work has to be valued by the Adjudicator pursuant to s10(1)(b). The criticism levelled at the Adjudicator seems to be that in fact he rubber stamped the Claimant’s payment claim and did not exercise a judgment as to the value. In this respect it will be recalled that we are only dealing with the extent of completion of the work and not with matters such as rectification of defective work. Effectively what the Adjudicator has done is to attempt to assess whether there was any merit in the Respondent’s reasons for withholding payment and noting their varying claims, he decided that they were not supportable and accordingly he accepted the claimant’s claim.

- 54 It is to be appreciated that the Adjudicator is limited in the matters which he can consider under s22(2). He is obliged to consider the submissions including relevant documentation in order to determine value and he has no power to call witnesses before him or to hear oral evidence. In the circumstances where the determinations have to

be made within ten days and substantially on documents, it seems to me that the Adjudicator's approach is appropriate.

**Has there been a bona fide attempt by the Adjudicator to exercise his power?**

55 This ground of challenge to the Adjudicator's decision has recently been accepted in **Timwin Construction Pty Limited v Façade Innovations Pty Limited & Ors [2005] NSWSC 548** McDougall J 1 June 2005. In paragraphs 38 to 44, His Honour analysed the requirement of good faith as follows:

*"34 In setting out the nature of its response to the issue - that the variations were either authorised in writing or that there was a course of conduct from which the adjudicator could infer that Timwin had waived the requirement for writing - Façade was articulating its response to this aspect of the payment schedule. It may be noted that Façade did not suggest that an argument based on want of writing, or want of compliance with the requirements of clause 7 of the contract, was excluded by s 20(2B). Rather, it said, any other reason other than those summarised in para 45 and elaborated in its responses in paras 46 to 82 could not be relied upon.*

*35 In my judgment, reading that section of the submissions in totality, the clear inference is that Façade understood what the dispute was - as one relating to compliance with clause 7 of the contract - that it so defined the dispute for the adjudicator; that it told the adjudicator that no other dispute could be considered; and that, at least by implication, it accepted that the dispute as understood by it could be considered.*

*36 As to this, it may be noted that the reference to s 20(2B) in para 45 is repeated in each section of the submissions where Façade attempts to rebut the defences, and again in the summary of its attitude: see paras 78, 80 and 87.*

*37 The adjudicator referred to none of this. Insofar as one can gather from reading the determination, he appears not to have read the submissions at all. He certainly does not indicate that he has gained any enlightenment as to the argument in relation to variations from Façade's submissions. Further, when dealing with the other reasons given by Timwin in support of its claim that it was not liable to pay, he dealt only with the arguments raised in the payment schedule.*

*38 There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in **Brodyn**. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in **Roberts v Hopwood [1925] AC 578, 603**, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

*39 That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see **Zhang v Canterbury City Council (2001) 51 NSWLR 589 at 602** (Spigelman CJ, with whom Meagher and Beazley JJA agreed)."*

56 In this case I have found that the Adjudicator did value the works, he did give appropriate reasons and he did not fail to take into account part of the respondent's submissions. In these circumstances there is no question of there being no bona fide exercise of the powers.

57 Accordingly, I dismiss the proceedings with costs.

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