JUDGMENT : HIS HONOUR YOUNG CJ in EQ : Supreme Court of New South Wales. 12th April 2006.

1 These proceedings concern the application of the **Building & Construction Industry Security of Payment Act** 1999 (NSW).

2 The plaintiff, Gary Wooding, was ordered to pay $82,334.15 by the first defendant Mr Brian Eastoe to the second defendant Maitland Fabrications Pty Ltd in respect of a contract which Mr Eastoe held to exist between the plaintiff and Maitland Fabrications Pty Ltd (Maitland). The relevant contract was one to supply, fabricate and erect structural steel for a project at 10 Enterprise Drive, Beresfield.

3 For present purposes I can assume that the only matter in contention between the parties is whether the person liable to the second defendant was Mr Wooding as found by the adjudicator, Mr Eastoe, or alternatively, a company controlled by Mr Wooding, Bryshan Pty Ltd (Bryshan).

4 Mr Wooding says that because Mr Eastoe wrongly determined that he was the contracting party, Mr Eastoe has committed such an error that his determination must be declared to be void.

5 Before entering into the facts of the matter, I must refer to the three leading cases on the role of the Court when there is a dispute as to whether there has been a proper adjudication under this Act.

6 In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421, the Court of Appeal determined that whilst relief in the nature of certiorari is not available to quash a determination of an adjudicator made under this Act, if the determination is void because of a fundamental error on the part of the adjudicator, the Court can declare accordingly. In that case Hodgson JA, with whom Mason P and Giles JA agreed, said at p 441 that: *"A document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, … must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void … ."*

His Honour then went on to state five basic and essential requirements of which number 1 was: *"The existence of a construction contract between the claimant and the respondent."*

7 The second case is ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521. At p 539, Hodgson JA, again with whom Mason P and Giles JA agreed, referred to ***Brodyn*** and then said: *"Review is available only where the determination is not a determination within the meaning of the Act, because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination. If an adjudicator has erroneously decided that such an essential pre-condition has been satisfied when in truth it has not, then that can be considered a jurisdictional error making the determination 'reviewable'. However, for reasons given in Brodyn, such an error would in fact make the determination void ...".*

8 The third case is ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385, a decision of Hodgson, Ipp and Basten JJA. In that case Basten JA drew attention to a number of matters which may require reconsideration by a Court of Appeal, but considered that the case before the Court was not one where ***Brodyn*** should be reconsidered.

9 Whether ***Brodyn*** be right or wrong in the absolute, it is binding on a single Judge of this Court.

10 The basic submission of Mr Chrysostomou who appeared for the plaintiff was that one of the matters which Hodgson JA lists as being essential to validity is that there is a contract between the plaintiff and the defendant. He says that if there is in fact and in truth no contract between those parties, then the decision of the adjudicator that there is such a contract is one which vitiates his whole decision.

11 I would not consider that ***Brodyn*** justifies that attitude.

12 First, as acknowledged in ***Brodyn***, the purpose of the Act is to minimise the number of situations in which a court can interfere with the obvious purpose of the Act and that is to make sure that pending the resolution of building disputes the sub-contractor or similar will actually receive money so that it can remain liquid, whereas before the Act it would be starved of funds until the dispute was determined or settled.

13 Secondly, there are a whole series of decisions which distinguish between situations where an adjudicator or the like is given power to determine whether he or she has jurisdiction as well as jurisdiction to determine the dispute and those situations where an adjudicator or the like must objectively and in truth only determine a question if jurisdictional matters are absolutely established.

14 The leading case in this area is ***Parisienne Basket Shoes Pty Ltd v Whyte*** (1937) 59 CLR 369. At 389 Dixon J said: *"The clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter* ***is coram non judice****. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable."*

15 In ***Ex parte Hulin; Re Gillespie*** (1965) 65 SR (NSW) 31, a decision of the Full Court of this Court constituted by Sugerman, Maguire and Nagle JJ, Sugerman J said at 33 that there was a very real distinction between the absence of some essential preliminary, and an objection "that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try." Nagle J, in a separate judgment, came to the same view.

16 In the instant case a matter for the adjudicator to decide was who were the parties to the contract under which the second defendant did its work. The adjudicator made a bona fide attempt to deal with those issues. He made a decision and I do not consider that there is anything in ***Brodyn*** which would make me say that if an adjudicator decides a question of fact which is one of the essential matters to his jurisdiction, after a bona fide inquiry into the fact, there is anything more than a mistake of fact and no error which would vitiate his judgment.

17 But in case I be wrong on that I will turn to the merits of the case. There is no doubt that about 16 April 2004 Mr Wooding arranged for a set of engineer's drawings to be delivered to the offices of the second defendant, Maitland, at Rutherford. Maitland gave a quotation on 23 April. On 28 April there was a conversation between Mr Wooding and a Mr Slupik from Maitland, in which conversation Mr Slupik allegedly said, "We really want this job" and after other words passed between them Mr Wooding said, "*On the basis that there are no extras no matter what happens you can have the job.*" Mr Slupik gives evidence of much the same conversation. Mr Slupik says that he commenced work on the project on 28 April 2004 and remained in contact with Mr Wooding up until 1 June 2004 and during this period was in communication with Mr Wooding. His co-director, Mr Dean, then took over the project.

18 There would seem to me to be no doubt on the evidence that there was a contract between the second defendant and someone in the plaintiff's camp on 28 April and that the evidence points to that someone being Mr Wooding.

19 Mr Chrysostomou argues that whilst there was some offer and acceptance on 28 April, a material term to the contract remained outstanding. That term related to the commencement and completion dates of construction and was not finalised until 12 July 2004. It is put, and the High Court's decision in ***Quadling v Robinson*** (1976) 137 CLR 192 is cited in this connection, that there was thus no contract until that date. However, ***Quadling's case*** was a case involving a condition precedent and has nothing to do with the present case.

20 The parties entered into a regime on 28 April. They both knew that some of the terms would have to be fleshed out during its currency, but that does not prevent the finding that a contractual relationship existed between the parties; see ***Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*** (1988) 5 BPR 11,110 (CA) per McHugh JA at 11,118.

21 Once it has been accepted that a contract came into existence between Mr Wooding and the second defendant, then one must look to see whether there has been: (a) a variation; (b) a rescission and the making of a new contract with a different person; (c) novation; or (d) the parties have so acted that there is a conventional estoppel as to who are the parties to the contract.

22 There is no evidence as to any of these transactions having taken place. Mr Chrysostomou says, however, there was an equitable assignment of the contract. He says that on 27 May 2004, the property at 10 Enterprise Drive, Beresfield was transferred from another of Mr Wooding's companies to Bryshan.

23 Bryshan had been incorporated only in June 2004 for the purpose of being the trustee of a family trust. To this end the Beresfield property was transferred from Mr Wooding's trading company Ungidoo Pty Ltd to Bryshan in June 2004.

24 On 10 June 2004, Mr Wooding sent Maitland a fax which concluded as follows: *"P.S. I have just transferred the property/development into my company name, so please direct all of the above and any future correspondence to: Bryshan Pty Ltd 2/65 Munibung Road, Cardiff NSW 2285."*

That address was also the office address of Gary Wooding. The defendant did indeed send a fax to *"Mr Gary Wooding Bryshan Pty Ltd"* at that address on 11 June. However, Mr Wooding, in his own name and on his own letterhead, sent a facsimile to the second defendant on 22 June about the project.

25 Mr Chrysostomou submits that the postscript to the fax of 10 June operated as an assignment in equity.

26 Apart from the problem that this proposition may never have been put to Mr Eastoe, there are a number of fatal objections to the submission.

27 The first is that one can only assign the benefits under a contract and not the liabilities: ***Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*** [1902] 2 KB 660, 668.

28 Secondly, it must be remembered that any such assignment would be an assignment of a legal chose in action not an equitable chose in action. Although there is some obscurity in the law, apart from special cases, consideration is needed for an equitable assignment of legal property. There is no consideration here. Mr Chrysostomou referred me to ***Kekewich v Manning*** (1851) 1 De GM & G 176; 42 ER 519, and to Meagher, Gummow & Lehane's **Equity Doctrines and Remedies** 4th ed (Butterworths, Australia, 2002) at para [6-015], but that case and that paragraph deal with equitable assignments of equitable property and have nothing to do with equitable assignments of legal property, for which see Meagher, Gummow & Lehane [6-050].

29 Thirdly, it must be remembered that what is meant by an equitable assignment is that equity will compel the assignor to lend his or her name to proceedings to enforce the obligation. At law the assignor still is the person who must sue. In the case of an adjudicator under this Act, there is no jurisdiction to consider questions of equity forcing an assignor to have his or her name used by an assignee. All that the adjudicator can look at is the contract between the alleged assignor, Mr Wooding, and the second defendant.

30 Fourthly, what occurred in this case did not constitute an equitable assignment.

31 In a passage relied on by the plaintiff in ***William Brandt's Sons & Co v Dunlop Rubber Co Ltd*** [1905] AC 454 at 462, Lord MacNaghten stated, "The language is immaterial if the meaning is plain." It is submitted by counsel that the correspondence relates to the construction contract and that this is sufficient to make out the relevant intention. However, the words are not capable of bearing this construction. In their plain meaning, the words take correspondence as their subject matter, not the rights under the construction contract. The words evince a meaning consistent with the purpose of directing Maitland to address certain correspondence to Bryshan, even where the postal address remains the same as before, so as to identify the legal owner of the development property, which will assist the trustee in the administrative record keeping of that entity which functions as a Family Trust, and not to transfer the construction contract from Mr Wooding to Bryshan.

32 The plaintiff cannot validly assert that contractual rights were transferred as a bundle of rights attaching to the development property. The relevant proprietary rights under the construction contract which is purported to have been assigned, are Maitland's entitlement to be paid a liquidated sum as a debt falls due in return for the fabrication and supply of construction materials to Mr Wooding. These personal property rights do not attach to the development property itself. There must be plain words in evidence that identify these rights for a valid equitable assignment to be effected. As in ***Shepherd v The Commissioner of Taxation*** (1965) 113 CLR 385, the words used do not identify the subject matter with sufficient clarity and therefore fail to constitute an equitable assignment.

33 Accordingly, on the merits, the original contract must have been made before Bryshan was incorporated, between Mr Wooding and the second defendant. There has been no novation or assignment at law. There has been no equitable assignment, but even if there had been an equitable assignment, it was not something that Mr Eastoe could have taken into account.

34 Thus, the proceedings must wholly fail and be dismissed with costs. The exhibits, being documentary, may remain with the file.

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