JUDGMENT : de Jersey CJ. Trial Division. Supreme Court of Queensland at Brisbane. 23rd August 2007

[1] This is an application, under the Judicial Review Act 1991, to review a decision of the second respondent given as adjudicator under the Building and Construction Industry Payments Act 2004. The second respondent's adjudication, dated 4 May 2007, was that the applicant owed the first respondent subcontractor the amount of $59,702.50.

[2] What the adjudicator describes in his reasons as "*the most contentious issue*" was whether the question of what amount was due, fell to be determined by reference to the applicant's purchase order of 9 August 2006, which effectively accepted the subcontractor's revised tender of 1 August 2006; or by reference to a more formal and comprehensive subcontract agreement signed subsequently by the parties (in the case of the subcontractor on 25 September 2006, and in the case of the applicant on 2 October 2006).

[3] There was much to commend a view that the latter document should have prevailed. I mention three relevant considerations: the earlier purchase order referred expressly to a forthcoming subcontract; the scope of the work did not vary from purchase order to subcontract; and the subcontractor continued to carry out the work, including the work the subject of the relevant claim, after that formal subcontract was executed.

[4] Yet the adjudicator found the earlier documents definitive of the subcontractor's relevant entitlement. He observed that the parties were entitled to expect that *"the basic manner in which the existing arrangement was being undertaken would continue*", and that "*if changes were necessary that both parties would have an input"*. That appears to ignore the earlier expressed expectation of the parties (cf. ***Masters v Cameron*** (1954) 91 CLR 353) that a formal subcontract would follow, and the prima facie important circumstance that the parties in fact executed that later form of contract.

[5] The adjudicator went on to hold - it may be thought rather robustly - that *"furthermore",* that later subcontract was signed *"under duress, as the respondent had stipulated that signing was a precondition of continuation of progress payments"*. Ms Hindman submitted, for the applicant, that the adjudicator was not entitled to make such a finding, because under s 26(2)(b) he was obliged to have regard to the *"construction contract from which the application arose",* and not, in effect, set aside that contract.

[6] Whatever the limits of the adjudicator's powers, it is notable that he made his finding on the basis of written submissions only, not evidence; that he provided no discussion of the circumstances in which an application of arguably ordinary commercial pressure will not amount to duress (cf. ***Mitchell v Pacific Dawn Pty Ltd*** [2007] QCA 74); and that he expressed his view without any apparent consideration of the significance of, among other matters, the subcontractor's continuing to carry out the work after executing the formal subcontract agreement. It may be added that the "*adjudication procedures*" set out in s 25 are plainly not apt for the determination of an issue such as whether an apparently concluded agreement is to be avoided for duress.

[7] But that the adjudicator (may have) erred in law is not necessarily determinative of this application, if it be the case that "*provision is made by a law, other than [the Judicial Review Act], under which the applicant is entitled to seek a review of the matter by another court..."* (s 13(b) Judicial Review Act). In that case, I would be bound to dismiss this application if satisfied, having regard to the interests of justice, that I should do so.

[8] Section 100 of the Building and Construction Industry Payments Act is such a provision. It provides that nothing in Part 3 (which covers the matter of adjudication) affects any right a party to a construction contract may have under that contract. Also, nothing done under Part 3 affects any civil proceeding arising under a construction contract. In any such proceeding, the court must allow for payments already made, and "may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings".

[9] That provision falls within the scope of s 13(b) of the Judicial Review Act. The issues agitated by Ms Hindman could be raised in any such subsequent court proceeding.

[10] One very substantial limitation upon my usefully dealing with them now, is that I could not do so definitively - for want of proper evidence tested through the curial process. If I were to conclude that because of the way he went about the determination, the adjudicator erred in law, the most I could do would be to remit the matter for determination before another adjudicator. The parties' interests would much better be served were those issues left for definitive determination in properly instituted court proceedings of a comprehensive character later in the piece.

[11] Mackenzie J referred to the difficulty of an adjudicator's definitively determining issues of this character in ***Roadtek, Department of Main Roads v Davenport and Ors*** [2006] QSC 47: *"Part 3 Division 2 of the Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information... Section 25 provides that unless the parties extend time, the decision must be given within 10 days of receipt of the respondent's response or from the time one could have been received. Further, written submissions may be asked for by the adjudicator... The adjudicator may call a conference of the parties ... and make an inspection of any matter to which the claim relates... Any conference must be held informally. Legal representation is excluded... The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection."*

[12] In ***Brodyn Pty Ltd v Davenport*** [2003] NSWSC 1019, Einstein J covered similar ground, and referred to the avenue for appropriate curial intervention, here section 100, in the following passage: "*What the legislature has*

effectively achieved is a fast track interim progress payment adjudication vehicle. The vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing. It is also because of the constraints imposed upon the adjudicator ... and in particular by ... denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of larger construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That claw back route expressly includes the making of restitution orders." (emphasis added)

[13] I agree with all of those observations

[14] Ms Hindman sought to impugn the adjudicator's decision on a number of other grounds, to which I will now briefly refer.

1. She submitted that the adjudicator erred in considering the issue of duress, because of the constraints set up by ss 24(4) and 26(2)(d). Duress was not raised until the submissions made to the adjudicator, because the following statutory process established, as the issue between the parties, only the question whether the purchase order, or the later executed subcontract, applied. The "*payment schedule*" and "*adjudication response"* documents emanated from the applicant. It was only in the submissions to the adjudicator that the first respondent had, for the first time, the opportunity to raise the matter of duress.
2. Ms Hindman submitted that the subject claim had previously been made, and relied on s 17(5) for its exclusion of more than one claim in relation to each "*reference date*" under the contract. I accept the submission of Mr Ambrose, for the first respondent, that the relevant payment claim, issued on 21 February, did not clash with the payment claim issued in March, because they were issued under different reference dates.
3. Another submission was that the adjudicator made his determination under a *"reference date"* for which neither party had contended, and that that was contrary to s 26(2). The adjudicator selected as the applicable date the last day of the month. That was in fact the date for which the first respondent had contended. The adjudicator adopted a reason different from that advanced by the first respondent, but that did not invalidate his approach.
4. Finally, there was a submission the adjudicator rejected a claim of set off by reference to an inapplicable statutory provision - it had been amended. The first respondent accepts that. But the point cannot now avail the applicant, on the adjudicator's approach, because what the adjudicator held to be the contractual documents did not make any provision for set off. Set off could be agitated in a subsequent proceeding within the ambit of s 100.

[15] Judicial review may work where an adjudicator has erred in law, and this court can rectify things once and for all. But this is not such a case. The difficult questions raised by this challenge can be dealt with, most helpfully to the parties, only through the sort of proceeding contemplated by s 100.

[16] For these reasons, the application must be dismissed, with costs to be assessed.

M H Hindman for the applicant instructed by Clayton Utz
M D Ambrose for the first respondent instructed by DLA Phillips Fox. No appearance for the second respondent