

**CATCHWORDS:** Review of decision of adjudication registrar to refuse application for registration as adjudicator.

**LEGISLATION :** *Building and Construction Industry Payments Act 2004* sections 59 and 60

**REASONS FOR DECISION :** Mrs G S pender. Queensland Commercial and Consumer Tribunal. Brisband. 24<sup>th</sup> May 2006.

#### Introduction

1 On 18 November 2004 Mr Mohsen Rahmanian ("the applicant") lodged an application seeking review of a decision made under the *Building and Construction Industry Payments Act 2004* ("the Act") by the adjudication registrar on 6 September 2004 to refuse the applicant's application to be registered as an adjudicator under the Act. Section 8 of the *Commercial and Consumer Tribunal Act 2003* ("the CCT Act") provides that the Tribunal has power to deal with the matters it is empowered to deal with under an empowering Act. The Act is an empowering Act as defined in schedule 2 of the CCT Act.

#### Relevant provisions of Act

2 The sections of the Act which are relevant to this application are the object of the Act as set out in sections 7 and 8, and also sections 56, 59, 60, 92, 93, 95 and 97. Those sections provide as follows:

##### **"7 Object of Act**

*The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—*

- (a) *undertakes to carry out construction work under a construction contract; or*
- (b) *undertakes to supply related goods and services under a construction contract.*

##### **8 How object is to be achieved**

*The object is to be achieved by:-*

- (a) *granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and*
- (b) *establishing a procedure that involves--*
  - (i) *the making of a payment claim by the person claiming payment; and*
  - (ii) *the provision of a payment schedule by the person by whom the payment is payable; and*
  - (iii) *the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and*
  - (iv) *the payment of the progress payment decided by the adjudicator.*

##### **56 Application for registration**

(1) *An individual may apply to the registrar for registration as an adjudicator.*

(2) *The application must--*

- (a) *be in the approved form; and*
- (b) *be signed by or for the applicant; and*
- (c) *be accompanied by the fee prescribed under a regulation for the application.*

##### **59 Criteria for granting application for registration**

*The registrar may grant the application only if the registrar is satisfied the applicant is a suitable person to be registered as an adjudicator.*

##### **60 Suitability of person to be registered**

(1) *A person is not a suitable person to be registered as an adjudicator unless the person holds--*

- (a) *an adjudication qualification; or*
- (b) *another qualification that the registrar considers to be equivalent to an adjudication qualification.*

(2) *In deciding whether an applicant is a suitable person to be registered, the registrar may have regard to the following matters--*

- (a) *whether the person has a conviction for a relevant offence, other than a spent conviction;*
- (b) *whether the person--*
  - (i) *held a registration under this division, or a licence or registration under a corresponding law, that was suspended or cancelled; or*
  - (ii) *has been refused registration under this division or a licence or registration under a corresponding law;*
- (c) *the experience and qualifications of the person;*
- (d) *the matters stated in the application for registration under section 57;*
- (e) *anything else relevant to the person's ability to carry out the person's functions as an adjudicator.*

##### **92 Review process starts with internal review**

(1) *Subject to this division, a person who is given, or is entitled to be given, an information notice for a decision under part 4 (the **original decision**) may apply for a review of the decision under this part.*

(2) *The review must be, in the first instance, by way of an application for internal review under section 93.*

##### **93 Application for review to be made to the registrar**

*The person may apply to the registrar for a review of the original decision.*

##### **95 Review decision**

(1) *After reviewing the original decision, the registrar must make a further decision (the **review decision**) to--*

- (a) *confirm the original decision; or*
- (b) *amend the original decision; or*
- (c) *substitute another decision for the original decision.*

- (2) The registrar must immediately give the applicant notice of the review decision (the **review notice**).
- (3) If the review decision is not the decision sought by the applicant, the review notice must also state--
  - (a) the reasons for the review decision; and
  - (b) that the applicant may apply to the tribunal for a review of the review decision, within 28 days after the person is given the notice; and
  - (c) how to apply to the tribunal for a review; and
  - (d) that the applicant may apply to the tribunal for a stay of the review decision.
- (4) If the registrar does not give the notice within 28 days after the application is made, the registrar is taken to have made a review decision confirming the original decision on the 28<sup>th</sup> day after the application is made.
- (5) If the review decision confirms the original decision, for the purpose of an application to the tribunal for a review, the original decision is taken to be the review decision.
- (6) If the review decision amends the original decision, for the purpose of an application to the tribunal for a review, the original decision as amended is taken to be the review decision.

#### **97 Who may apply to tribunal for a review**

A person who has applied for the review of an original decision under division 1 and is dissatisfied with the review decision may apply to the tribunal for a review of the review decision."

3 The powers of the Tribunal in a review application are set out in section 104 of the CCT Act which provides relevantly :-

##### **"104 Orders tribunal may make on review hearing**

- (1) In deciding an application for review of a decision, the tribunal may--
  - (a) confirm the decision being reviewed; or
  - (b) set aside the decision and substitute another decision; or
  - (c) set aside the decision and return the matter to the State agency that made the decision with directions that the tribunal considers appropriate."

#### **Statement of Reasons**

4 In its Statement of Reasons for Decision (exhibit 15) provided to the Tribunal, the respondent states as follows:-

"3.1 On 12 July 2004 the Applicant applied to the Adjudication Registry for registration as an adjudicator (SOR-1).

3.2 On 6 September 2004 the Adjudication Registry determined to refuse to grant the Applicant registration as an adjudicator on the following basis:

- (a) Pursuant to section 59 of the Act the Adjudication Registry was not satisfied that the Applicant was a suitable person to be registered as an adjudicator;
- (b) The Adjudication Registry was satisfied that the Applicant was suitable in relation to sub-paragraphs (a), (b) and (c) of the matters referred to in section 60(2) of the Act;
- (c) The Adjudication Registry was not satisfied that the Applicant was suitable in relation to sub-paragraphs (d) and (e) of the matters referred to in section 60(2) of the Act.
  - (i) The Applicant had been a director, secretary and 99% shareholder of MR Group Pty Ltd on 26 August 2003 when that company was placed into administration;
  - (ii) The administrator has made the following statements in the Report to Creditors:
    - "it is my opinion the current predicament of the company is as a result of incurring losses on numerous projects and the effect of the subsequent accumulation of such losses when the business had insufficient working capital to meet same" (at page 3);
    - "I have also identified that a number of payments have been made to the director over several months prior to my appointment. The effect of such payments, amounting to \$40,100, was to increase the company's overdraft facility. This facility is secured against the director's personal property which I understand is in the process of being realized" (at page 7);
    - "I have been able to establish that the company made significant losses in the last 21 months of trading and has also had negative working capital since June 30, 2002" (at page 8);
    - "The director believes the quantum of unsecured creditors to be in the vicinity of \$500,000.00" (at page 9);
    - "In summary, my review of the financial information indicates:-
      - i. the Company was insolvent at the time of my appointment;
      - ii. significant losses have been incurred by the company over the previous 21 months;
      - iii. the company has had negative working capital since at least June 30, 2002..."(at page 10).
    - (iii) The Adjudication Registry formed the opinion that the Applicant's conduct while the director of MR Group Pty Ltd resulted in significant financial harm to unsecured creditors and therefore he was unsuitable to be granted registration as an adjudicator.

(d) On 4 October 2004 the Applicant applied for an internal review of the decision (SOR-11).

(e) On 2 November 2004 the Adjudication Registrar provided the Applicant with a review notice confirming the original decision to refuse to grant registration as an adjudicator. (SOR - 13)"

#### **Evidence**

**Applicant**

- 5 The applicant relied on his written statement filed on 10 January 2005 (exhibit 1) and he gave evidence and was cross-examined by Mr Eylander who appeared on behalf of the respondent at the hearing. The applicant also relied on written statements, filed on 4 March 2005 and 26 August 2005 respectively (exhibits 11 and 12), of Mr Hendra, a former contract superintendent with the Department of Public Works Queensland, who gave evidence and was cross-examined at the hearing. The applicant further relied on a statement filed on 26 August 2005 (exhibit 13) by Mr Lacin, a contract superintendent with the Department of Public Works, who also gave evidence and was cross examined.
- 6 In his written statement the applicant said that in making his decision the registrar had ignored that fact that he as an individual was not bankrupt. He was a partner with the company MR Group Pty Ltd at the time of the liquidation of the company. The administrator reported in his report to creditors that the company was insolvent at the time of liquidation, but the partnership was solvent. The business was operating as a partnership and he himself was solvent.
- 7 The applicant said that he had been a licensed builder since 1992 and had enjoyed steady and strong growth in his business. About 98% of his construction work was supplied by Project Services which is a unit of the Department of Public Works. He had established a consistent working relationship with Project Services and had constructed numerous projects for them. During 2002 he was successful in tenders for a number of government projects and was persuaded by those involved in the projects to take most of the projects and construct them. At some stage in the process of construction Project Services and he agreed on fortnightly payment for progress claims to assist with his cash flow. He had also issued a number of cost claims to Project Services for various projects. However in about February 2003 he fell critically ill due to the pressure of work and battling with Project Services for the cost claims, and because of the illness he could not effectively operate the business. Project Services had then decided to withdraw its agreement to pay fortnightly because of the number of claims that were disputed by him.
- 8 The applicant said that he was caught in a market where prices, both for labour and materials, escalated without any notice. These costs increased beyond control and above cost allowances in most projects. Some suppliers and sub-contractors would not stand by their contract and as a result pressured the budgets for the projects. Because of this, and because of his illness and the withdrawal by Project Services of its agreement to pay fortnightly, he was forced to appoint administrators.
- 9 The applicant pointed out that the Queensland Building Services Authority ("the QBSA") has determined that he is a suitable person to continue holding a Builders Licence. He said that he had made all attempts to save the business and in the end he had to sell his house, his car and his other property to pay the debts. He did not benefit from the downfall of his business. He was only a victim of circumstances and of government bureaucrats.
- 10 In cross-examination the applicant said that it was not his choice to take on all five projects which he was offered by Project Services in 2002. He said that he told Project Services that he wanted one other project which had more money in it but they refused to give him that project. He agreed to take on five projects at once on the basis that he would be granted extensions of time, but he ended up having to struggle with the projects because the extensions were not granted.
- 11 When questioned as to Mr Hendra's role in the company in late 2002 and early 2003 he said that Mr Hendra was not employed by the company but assisted in advising him on contractual matters. He helped him to clearly understand the contracts and put him at ease. His assistance was beneficial in that he became more aware of what he needed to do. In the Leichhardt project, \$100,000.00 in variations had been ordered and he needed an expert to advise him.
- 12 In his statement (exhibit 11) Mr Hendra said that until early retirement in 2002 he was contract superintendent in Health, Law and Order Portfolio, Project Services within the Department of Public Works. He said that from 1995 until 2002 he worked as superintendent on many jobs with MR Group as his contractor, and during that time his admiration for the applicant grew considerably. He said that the MR Group performed at a level equal to or better than builders within their size range and produced a considerable amount of work at quite low prices.
- 13 Mr Hendra said that in mid 2002, MR Group tendered for and was the lowest tender on five jobs. On the Leichhardt job he thought that they were \$180,000.00 below the next tenderer which is roughly 10% below the market. The applicant thought the company could manage with staggered starts and negotiated a ten week time extension on some of the jobs hoping to delay those starts by ten weeks. This time adjustment was agreed but no appropriate documentation was produced and after acceptance Project Services insisted on immediate starts on all jobs. Mr Hendra said that because the Leichhardt project was priced so low, the client decided to avail itself of the \$180,000.00 to redesign the job. Rather than stop the work and redesign properly, which would have suited MR Group, the client redesigned piecemeal issuing variations in small trade sections. This process prevented MR Group from seeing the full extent of the changes and thus pricing the work properly. Further it compromised their contractual right in regard to proper pricing because such drastic changes resulted in work that MR Group did not need to undertake as part of the original contract. In his view what was built constituted a new contract not variations to the old. He said that in his view the Queensland Government were vastly and unjustly enriched by MR Group and the sub-contractors at Leichhardt, in the order of \$350,000.00, which still remains outstanding and unresolved today.

- 14 Mr Hendra said that he joined MR Group for three months in late 2002 to assist with their administration and that he soon realised their state of difficulty with poor valuation and late payments. He worked voluntarily just to get the company back on its feet and managed to find about \$1,200,000.00 of contractual claim value which was unrecognised and unclaimed. He said that this money, claimed more than 18 months ago, is still unpaid by the Queensland Government.
- 15 Mr Hendra further said that in June 2003 MR Group won the Sparkes Street contract in Chermide and the applicant asked him to set up his systems. However at the outset they found that ground conditions were different from those flagged in the tender and they needed instructions before they could proceed. However the job languished for two weeks without decision and the delay left an open excavation exposed to heavy damaging storms. The superintendent failed to order and value the variation to the foundations properly and failed to arrive at a reasonable measure of time and value in accordance with the contract. The agreed fortnightly payments system that the MR Group had negotiated was also withdrawn. The combination of change to the payment system and payment undervaluation combined to bring about the collapse of the company.
- 16 In his second statement (exhibit 12) Mr Hendra expanded on his criticism of the way in which the Leichhardt contract had been administered. He said that the variations were not ordered as required by the contract and as the applicant was trying to administer five jobs the imposed workload was impossible to execute efficiently and effectively. Mr Hendra was also critical of the superintendent's actions on the Chermide project which also contributed significantly in his view to the demise of the company. He re-iterated that the Queensland Government was unjustly enriched in its dealings in 2002 and 2003 with the company and that, as a result, the Queensland Government should not now prevent the applicant from obtaining adjudication registration.
- 17 In cross-examination Mr Hendra said that he believed that the applicant was correct in quoting for the five jobs which he took on in 2002 because he did not know how many would be offered to him. He agreed that the applicant did have the right to withdraw if offered all five jobs but he said that Project Services had said to the applicant in effect "you take all or you take none".
- 18 When asked whether the applicant's bookwork must have been deficient in order to have missed due payments of \$1,200,000.00, Mr Hendra said that the applicant was too reliant on Project Services carrying out their responsibility to value variations properly.
- 19 In his character reference provided in the proceedings (exhibit 13) Mr Lacis said that he had known the applicant for some ten years, during which time he worked with him on many building projects in his capacity as contract superintendent with Project Services. The applicant always tried to please and to provide quality work within a low cost framework.
- 20 In his evidence at the hearing Mr Lacis said that he did not consider that the applicant's contract administration had been deficient although he may have misunderstood the delay cost on a few occasions. He said that he believed that the applicant had been treated differently from another company which had been paid fortnightly at the same time as the applicant's fortnightly payments were stopped.
- 21 In cross-examination Mr Lacis agreed that setting the price of a tender is a commercial decision and the decision to accept a project is also a commercial decision. However he believed that Project Services had adopted a very tough attitude towards the applicant on the basis on rumours he had heard that Project Services had told the applicant that if he did not take one particular project he could not have the others.

#### **The respondent**

- 22 The respondent relied on the Statement of Reasons (exhibit 15) and on the written statement (exhibit 14) of Mr Chesterman, the adjudication register who made the decision under review. Mr Chesterman gave evidence and was cross-examined by the applicant who represented himself at the hearing. The respondent also relied on a written statement filed on 14 October 2005 (exhibit 16) of Mr Giles, who is the Assistant Director (Contracts), Legal and Contractual, of the Queensland Department of Public Works. The statement of Mr Giles was admitted into evidence by consent. Mr Giles was not able to attend the hearing.
- 23 In his written statement Mr Chesterman said that a decision of the QBSA to classify a person as "*a permitted individual*" is not relevant to his consideration of whether that person is a suitable person to be appointed as an adjudicator. He said that he considered that the suitability requirement for adjudicators should be interpreted such that adjudicators are seen to be completely independent and are to be held in high regard in the Queensland construction industry. In his opinion, because of the tremendous responsibility which is bestowed upon adjudicators to make very significant monetary decisions which are not appealable in a direct legislative sense, it is incumbent on any person wishing to be registered as an adjudicator that they can demonstrate in their own recent business dealings that their actions have not caused or contributed to the financial loss of other persons.
- 24 Mr Chesterman further said that this opinion was based on comments made in the explanatory notes to the Building and Construction Industry Payments Bill and also upon his knowledge of the New South Wales system of adjudication which he studied prior to the Act commencing operation in Queensland. He said that his observations of the New South Wales model are:
1. That adjudicators can be dealing with single progress payment claims from small amounts up to claims for millions of dollars. The largest determined claim in New South Wales is \$39,000,000.00;
  2. That the Court of Appeal in New South Wales has interpreted the legislation applicable in that State to mean that the decisions of adjudicators are not subject to interference by a Court unless the decision is not a valid

- decision; or that the adjudicator has not afforded the parties natural justice; or that the decision has been procured by fraud.
- 25 Mr Chesterman said that he considered that a person who in their own recent business operations has been the cause of or contributed to the failure of contracted third parties to be paid for work done or services supplied is not a suitable person to be registered as an adjudicator. The suitability criterion for adjudicators is not in place to deny persons any livelihood prospects. Typically persons seeking registration as adjudicators are emanating from a diverse range of employment backgrounds where they are seeking to only complement their current work related activities, not work full time as an adjudicator. For example, builders, lawyers, project managers, architects, engineers, superintendents, arbitrators have all sought to be registered as adjudicators. Mr Chesterman said that he was unaware of any person applying to be registered that had expressed a desire to earn a living full time as an adjudicator. Therefore any person refused registration as an adjudicator is still able to continue earning a living as they have always done.
- 26 In his evidence at the hearing Mr Chesterman said that he had designed the application form for registration in order to tease out things of a commercial nature such as bankruptcy which he considered were relevant to suitability. Adjudicators have great power invested in them and he wanted to ensure that the bar for registration was set quite high. He wanted to ensure that adjudicators were of the highest standard.
- 27 Mr Chesterman said that 90 adjudicators had been registered to date and of those about 12 get regular work.
- 28 In cross-examination Mr Chesterman agreed that he had not taken into consideration a letter written to the QBSA on the applicant's behalf by his lawyers dated 21 October 2003, which is attachment 3 to exhibit 1. He said that he only saw that letter when it was attached to the applicant's application to the Tribunal. However he said that that letter does not provide evidence of a cash return having been made by the applicant to unsecured creditors of the company.
- 29 In his statement (exhibit 16) Mr Giles said that he disagreed with the applicant's statement that he was persuaded by those involved in Project Services to take five projects in 2002. He said that the projects in question which were awarded to the applicant were as follows:
- (a) Leichhardt – new community centre;
  - (b) Wynnum – apartments at Selina Street;
  - (c) Inala – houses at Abelia Street;
  - (d) Norman Park – apartments at Dickens Street; and
  - (e) Ormiston – units at MacKenzie Street
- 30 Mr Giles said that the applicant had the opportunity to withdraw one or more tenders if he thought that his company was or would be financially overstretched or otherwise unable to complete a project. The applicant had such an opportunity in respect of each of the projects listed above.
- 31 Mr Giles said that there was no agreement between the principal and the applicant for fortnightly payments on the Chermide project which was construction of apartments at Sparkes Street, and which was awarded to MR Group Construction, a partnership involving the applicant and the applicant's company on or about 28 May 2003. These contracts were awarded after all of the five other projects had reached practical completion or were near to practical completion. On the Chermide project, the superintendent acted outside his authority in agreeing to fortnightly payments and the principal stopped those fortnightly payments on 1 August 2003.
- 32 With respect to Mr Hendra's statement that he had found approximately \$1.2 million worth of contractual claims, Mr Giles said that all additional claims submitted to the Department by the applicant were found to have no contractual basis and were rejected accordingly. He said that the amount of \$1.2 million is not due to MR Group Construction and does not remain unpaid.
- 33 With respect to the complaint by Mr Hendra to the Crime and Misconduct Commission with respect to the alleged impropriety of Mr Powell as superintendent of the Sparkes Street project, Mr Giles said that no adverse findings were made by the Commission against Mr Powell. Mr Giles refuted Mr Hendra's assertions that the administration of the various contracts was unfair, improper, or in some way directed at disadvantaging MR Group Pty Ltd or the applicant for the benefit of the principal.

#### Submissions

- 34 Mr Rahmanian submitted that he has always acted honestly and that the demise of his business was contributed to by Project Services who acted unfairly when they stopped fortnightly payments to him. He said that the registrar has victimised a person who has become insolvent because of other persons' actions, and that every person has a second chance to conduct a business.
- 35 He argued that the registrar has not considered all the facts presented to him and that the QBSA has decided that he is a fit person to carry on business as a licensed builder.
- 36 The applicant submitted that he relied on the matters set out in the letter written on his behalf by his solicitor dated 21 October 2003 to QBSA, which resulted in his being categorised as a "permitted individual" pursuant section 56AD(8) of the *Queensland Building Services Authority Act 1991*, and in which it was pointed out that he had taken all reasonable steps to relieve the company's financial strain and avoid the administration and subsequent litigation in that he
- "(a) obtained a bank loan and overdraft facility for the company, secured against his house;

- (b) paid suppliers and subcontractors by way of personal credit card payments;
  - (c) injected his own money into the company's account to make payments to suppliers, subcontractors, employees and other creditors;
  - (d) deposited his own personal tax refund into the company's account to make payments to suppliers, subcontractors, employees and other creditors;
  - (e) secured personal loans from friends and injected same into the company's account to make payments to suppliers, subcontractors, employees and other creditors;
  - (f) never disavowed or divorced himself from the company's financial obligations to its suppliers, subcontractors, employees and other creditors;
  - (g) took positive steps and incurred enormous personal debt (all of which has largely been repaid) in an attempt to ensure the company of its continued prosperity and trading future; ..."
- 37 In his submissions on behalf of the respondent, Mr Eylander said that the applicant's behaviour as sole director, only employee and 99% shareholder of MR Group Pty Ltd in knowingly trading at a loss, resulted in financial detriment to sub-contractors and suppliers to the tune of half a million dollars. The BDO Kendalls report had shown that during the 2002 financial year, the company made a net loss of \$364,977.80 which is a loss of more than \$7,000.00 per week. For the nine month period prior to the appointment of the liquidator, the net loss was \$409,500.18 which is a loss of more than \$10,500.00 per week.
- 38 Mr Eylander submitted that the limited correspondence and material supplied by the applicant in support of his version of events demonstrate his poor bookwork and understanding of the various contracts.
- 39 It was submitted that the applicant's conduct is the antithesis to the objects of the Act in that
- (a) The applicant failed to ensure appropriate bookkeeping was maintained by MR Group Pty Ltd;
  - (b) MR Group Pty Ltd failed to make progress payments to sub-contractors;
  - (c) MR Group Pty Ltd failed to ensure that sub-contractors and suppliers were paid prior to issuing the next progress payment; and
  - (d) MR Group Pty Ltd failed to ensure payment for related goods under the Project Services contracts.
- 40 Mr Eylander submitted that should the applicant become an adjudicator, the scheme would be held in disrepute by contractors and sub-contractors with knowledge of the applicant's default.
- 41 Mr Eylander further submitted that it was relevant to the current review application that the applicant had failed to comply with three Directions to Rectify and/or Complete resulting in insurance claims and the QBSA had sought recovery from the applicant of insurance claims in the amount of \$9,650.00. The applicant had sought review of the decision of the QBSA to approve these insurance claims, and the Queensland Building Tribunal in a decision on 3 July 1998 substituted the amount of \$6,065.00 as the quantum of the claims.<sup>[1]</sup> It was submitted that the applicants blasé attitude to these three Directions to Rectify and/or Complete are demonstrative of the contempt the applicant holds towards the building and construction regime in Queensland and demonstrates a recalcitrant attitude to his legal obligations as a licensed builder.

#### Findings

- 42 In reviewing the registrar's decision I stand in the shoes of the registrar but with the benefit of the additional evidence given at the Tribunal hearing. The discretion to be exercised is a broad one. The matters which maybe taken into account as set out in section 60(2) of the Act include in sub-paragraph (e) of section 60(2) "anything else relevant to the person's ability to carry out the person's functions as an adjudicator".
- 43 The applicant holds an adjudication qualification and I find that he is a suitable person in the light of the matters to which I may have regard as listed in sub-paragraphs (a), (b) and (c) of section 60(2).
- 44 The primary reason for the rejection by the registrar of the application was the fact of the applicant's company having been placed into liquidation in August 2003. The applicant argues that the registrar failed to take into account the circumstances of the company going into liquidation and that, if he had given proper weight to those circumstances, he would have reached the conclusion that the failure of the company was not in any way the result of financial mismanagement by the applicant.
- 45 I consider that the fact of the insolvency in the recent past of the company of which an applicant is a director and the only full time employee is a relevant factor to be taken into account. I consider however that the circumstances of that insolvency must also be taken into account and I have heard extensive evidence from the applicant and his witnesses in that regard.
- 46 I agree with Mr Chesterman that a heavy responsibility is placed upon adjudicators to make very significant monetary decisions and it is incumbent on any person wishing to be registered as an adjudicator that in their own recent business dealings their actions have not caused or contributed to the financial loss of other persons.
- 47 The nature of the functions of an adjudicator is explained in the following comments contained in the explanatory notes to the Building and Construction Industry Payments Bill:
- "The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency. ..."*

*Rapid adjudication will be conducted by an independent adjudicator with relevant expertise. If the decision of the adjudicator is in whole, or in part, in favour of the applicant, the respondent is required to pay the specified amount directed by the adjudicator to the applicant. Decisions by the adjudicator are enforceable as a judgment debt. ...*

*The adjudication process will cover all forms of construction contracts other than contracts for the carrying out of domestic building work where an ordinary "resident owner" is a party to the contract. ..."*

- 48 I accept the evidence of the applicant, as corroborated by Mr Hendry and Mr Lacin, that he was pressured by Project Services to accept 5 projects at one time in 2002. But I do not accept that improper pressure was placed on him. In my view he made a commercial decision to accept the 5 projects and he must have known there was a real risk that his company might be placed in a position of financial distress as a result. I accept the evidence of the applicant, again supported by the evidence by Mr Hendra and Mr Lacin, that the fact that he was not given reasonable extensions of time and was not paid fortnightly on the Sparkes Street project were contributing factors to the demise of his company, but the root cause of the problems which the company encountered was the fact that it took on too many projects at one time. The exercise of sound financial judgment would in my view have caused the applicant to resist pressure to undertake all of the projects which he was offered.
- 49 All the evidence points to the fact that the applicant is an honest, decent person, but I am satisfied that in agreeing to undertake 5 jobs at once in 2002 he made a commercial decision which was imprudent. The evidence establishes that the applicant is committed to repaying if possible as opposed to avoiding debts but the serious debts would not have arisen if he had not allowed himself to be pressured into accepting too many jobs.
- 50 Annexure "SOR-6" to exhibit 15 is the administrator's report by Mr Owen of BDO Kendalls dated 12 September 2003, detailing the results of the administrator's investigation of the company's business, property and financial affairs and circumstances. At page 3 of the report the administrator said: *"It is my opinion the current predicament of the company is as a result of incurring losses on numerous projects and the effect of the subsequent accumulation of such losses when the business had insufficient working capital to meet same."*
- 51 A summary of the company's trading performance is set out at page 5 of the report which shows that there was a net loss of \$364,997.80 in the year ended 30 June 2002, and a net loss of \$409,500.18 in the nine month period from 1 July 2002 to 31 March 2003.
- 52 At page 8 of the report the administrator said: *"I have been able to establish that the company made significant losses in the last 21 months of trading and also had negative working capital since June 30 2002"*. At page 9 of the report, the administrator states *"The records of the company indicate the unsecured creditors of the company total \$471,202.96 at the date of the administrator's appointment. The director believes the quantum of unsecured creditors to be in the vicinity of \$500,000.00. To date, 27 Proof of Debts have been received totalling \$310,245.98."*
- 53 I accept the unchallenged evidence of the administrator as to the trading performance of the applicant's company in the period from 1 July 2001 to 31 March 2003, and as to the fact that the money owed to unsecured creditors as at 12 September 2003 was approximately \$500,00.00. There is no evidence before me that the applicant has made any cash return to the unsecured creditors up to the date of this hearing.
- 54 The applicant is in my view a competent and honest business manager but he lacks the high level of skills required of an adjudicator. I am satisfied that there were shortcomings in the applicant's contract management and bookwork, and I find in particular that he was not wellskilled in negotiating variations in contracts, as evidenced by the situation which arose with respect to the Leichhardt contract. In the public interest, the holder of the office of adjudicator needs to be perceived as having an exemplary background in business management. His or her record in meeting financial obligations in his or her business operations must be exemplary if he or she is to sit in judgment on others with respect to their financial obligations. It is an irrefutable fact that the applicant has in his own business operations caused hardship to creditors by failing to pay for construction work or for the supply of goods or services.
- 55 The parties to the disputes which an adjudicator must decide need to have full confidence in the ability of the adjudicator to undertake complex adjudications which affect their monetary position. I think that there would be a public perception that the applicant lacked the ability to undertake complex adjudications because of his own flawed financial record.
- 56 Having given full weight to the extenuating circumstances surrounding the insolvency of his company, I am not satisfied that the applicant possesses the high level of skill in financial management that I consider is properly required of an adjudicator. For that reason I am not satisfied in terms of section 59 of the Act that the applicant is a suitable person to be registered as an adjudicator.
- 57 In the circumstances I will order that the decision of the registrar to refuse to register the applicant as an adjudicator be confirmed.
- Costs** The respondent seeks its costs of the proceedings on the District Court scale. Having regard to the factors referred to in section 71 (4) of the CCT Act, I take into account firstly that the outcome of the proceedings is that the respondent has been successful. With respect to the merits of the proceedings I consider that it was unrealistic for the applicant to apply to be an adjudicator within twelve months of the liquidation of his company which resulted in the loss of approximately \$500,000.00 to unsecured creditors. In the circumstances I consider that the interests

of justice require that the respondent be awarded its costs and I will order accordingly. I am satisfied that the appropriate scale is the District Court scale applicable to claims of less than \$50,000.00 on the standard basis.

**Orders**

58 The Tribunal makes the following orders

1. The decision of the adjudication registrar made on 4 September 2004 to refuse to register the applicant as an adjudicator is confirmed
2. The applicant will pay the respondent's costs of and incidental to the proceedings on the District Court scale applicable to claims of less than \$50,000.00 on the standard basis as agreed, or failing agreement, as assessed.
3. If the parties fail to agree as to a costs assessor, costs will be assessed by Hickey and Garrett, Legal Costs Consultants.
4. The costs are to be paid by the applicant to the respondent within 14 days of the costs being agreed or assessed

Mr Eylander, in-house counsel for respondent.