

JUDGMENT : HIS HONOUR JUDGE SHELTON. County Court of Victoria at Melbourne. Civil Division : Building Cases. 10th September 2008

1 This is the hearing of a preliminary matter pursuant to an order of Her Honour Judge Kennedy made 13 August 2008, namely whether the plaintiff has made a valid election under s.16 of the Building and Construction Industry Security of Payment Act 2002 ("the BCISP Act").

The Facts

2 The hearing of the application was facilitated by the provision of a document entitled Agreed Facts ("AF"). They are as follows:

"1 On or about 18 September 2007 the plaintiff AC Hall Airconditioning Pty Ltd (ACN 091 308 637) ("ACH") and the defendant Schiavello (Vic) Pty Ltd (ACN 006 778 641) ("Schiavello") entered into a construction contract ("the Contract").

2 Under the Contract ACH agreed to perform air conditioning/ mechanical services works for Schiavello (the "Works") at a project located at Monash University Caulfield, Building H, Melbourne ("the Project") and the original contract sum was \$594,000 (inclusive of GST).

3 The Contract is a contract to which the Building and Construction Industry Security of Payment Act 2002 ("the BCISP Act") applies.

4 During the Works ACH made payment claim PC 4 1584C on 25 March 2008 for \$240,274.05 on Schiavello under the BCISP Act.

5 The due date for payment of ACH's payment claim PC4 under the Contract was 15 May 2008.

6 Schiavello has not paid the amount claimed in full. It made payments of \$66,000 on 28 February 2008 and \$44,254.90 on 3 June 2008.

7 The relevant date for the purposes of section 18 (2) (a) (the 10 business days immediately following the due date for payment) of the BCISP Act was 29 May 2008.

8 By operation of section 18 (2) (b), the last day by which Schiavello could provide a payment schedule was 3 June 2008.

9 On or about 16 April 2008 ACH notified that Schiavello of its intention to apply for adjudication purportedly pursuant to section 18 (2) (a) of the BCISP Act in respect of PC 4.

10 On 21 April 2008, Schiavello sent to ACH a Payment Schedule purportedly in compliance with section 18 (2) (b) of the BCISP Act.

11 On 5 May 2008 ACH lodged a document identified as being an adjudication application with Adjudicate Today Pty Ltd.

12 On 20 May 2008 Schiavello provided a response to the nominated adjudicator in respect of the purported adjudication application.

13 The adjudication application dated 5 May 2008 was purportedly determined on the basis that the due date for payment of the amount under the Contract (15 May 2008) had not expired prior to ACH's purported adjudication application as required by section 18 (1) (b) of the BCISP Act.

14 On 30 May 2008 ACH purported to provide Schiavello with a notice of its intention to apply for adjudication pursuant to section 18 (2) (a) of the BCISP Act in respect of PC 4.

15 On 3 June 2008, Schiavello sent to ACH a Payment Schedule purportedly in compliance with section 18(2) (b) of the BCISP Act.

16 On 10 June 2008 ACH lodged a document identified as being an adjudication application with Adjudicate Today Pty Ltd.

17 On 19 June 2008 Schiavello provided a response to the Second Nominated Adjudicator in respect of the purported adjudication application.

18 On 24 June 2008 the second nominated adjudicator advised the parties that he would not determine the adjudication application dated 10 June 2008."

3 Following the adjudication application of 5 May 2008 referred to in AF 11, the adjudicator appointed, Brett Powell, made a determination dated 22 May 2008 which is indirectly referred to in AF 13. In paragraph 1 of the Determination, he stated:

"1 I determine that the amount of the progress payment to be paid by the respondent (Schiavello) to the claimant (Hall) pursuant to the payment claim the subject of this adjudication is NIL."

4 The reason for this determination is stated by the adjudicator as follows:

"52 Subsection 18(2) states that an adjudication application to which subsection 18(1)(b) applies cannot be made unless:

. . . the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment of the claimant's intention to apply for adjudication of the payment claim; ... (Emphasis added [by adjudicator].)

53 On its own materials and submissions Hall has clearly failed to comply with the time specified in the Act in which its notice of intention to apply for adjudication must be made.

54 The Act required Hall to give Schiavello notice of its intention to apply for adjudication within the 10 day period immediately following the due date for payment of the claim. The due date for payment of the claim in this case -

and this is clear from the contract provisions and the parties agree that this is so - was 15 May 2008. In order to apply for adjudication under s.18(1)(b) Hall was required to give its notice of intention to Schiavello within the 10 business day period commencing on 16 May 2008, and not before.

55 On its own materials Hall gave Schiavello its notice of intention to apply for adjudication on 16 April 2008. Even if the date of service was 17 April 2008 (as asserted by Schiavello) Hall has clearly not given its notice within the time period it was required to do so under the Act. The notice was clearly given prematurely; by one full calendar month.

56 Hall cannot make this adjudication application. It is precluded from doing so by reason of the time limits set out in the Act.

57 It follows, that it is unnecessary for me to go on to consider Hall's submissions on the merits.

58 The application fails."

5 As appears from the AF 18:

"On 24 June 2008 the second nominated adjudicator advised the parties that he would not determine the adjudication application dated 10 June 2008."

6 The appointed adjudicator, Thomas Uher, advised the parties on 24 June 2008 through his nominating authority:

"I have considered the submissions of the parties of 23 June 2008. Given that the due date for payment was 15 May 2008, a notice under s.18(2)(a) of the Act was required to be served by the Claimant on the Respondent within the period of 10 business days immediately following the due date for payment. In my opinion it should have been served on or before 29 May 2008. Its service on 30 May 2008 does not satisfy a precondition to the making of a valid Adjudication Application. In my opinion, the Adjudication Application is invalid and I have no jurisdiction to adjudicate it."

7 Thus there were two failed attempts by the plaintiff to obtain an adjudicator's determination in its favour. On 2 July 2008, the plaintiff issued this proceeding. By its Amended Statement of Claim which I gave leave to the plaintiff to serve on 27 August last, the plaintiff claims the sum of \$196,020.01, being \$86,240.00, being the balance it alleges is owing under Progress Claim 1584B and \$109,780.04, being the balance which it claims is owing under Progress Claim 1584C, which is the payment claim referred to in AF 4, although slightly differently described.

The BCISP Act

8 Since it is agreed that the contract between the parties was entered into on or about 18 September 2007, amendments made to the BCISP Act by the Building and Construction Industry Security of Payment (Amendment) Act 2006 which came into operation on 30 March 2007, are applicable.

9 I refer to the relevant provisions of the BCISP Act.

10 S.14 provides that a person such as the plaintiff may serve a payment claim which must be in accordance with that section. As appears from AF 4, the plaintiff made a payment claim on 25 March 2008 for the sum of \$240,274.05.

11 S.15 provides that the person upon whom a payment claim is served may challenge it by providing a payment schedule to the claimant. The section sets down the content of such a payment schedule and the time within which it must be provided. It is common ground that no such schedule was provided here. In that event, pursuant to s.15(4), the defendant became liable to pay the plaintiff the amount stated in the payment claim on the due date for payment, 15 May 2008 (See AF 5).

12 S.16 provides:

"16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

..."

13 It is common ground that s.16(1) and (2)(a) is applicable. Further, it is agreed that the word "or" between subparagraph (2)(a)(i) and (2)(a)(ii) is disjunctive. In *Vince Schokman v Xception Construction Pty Ltd* [2005] NSWSC 297, Einstein J stated, at paragraph 27:

"Ultimately the matter is simply one of raw statutory construction. The word 'or' separating s.15(2)(a)(i) and (ii) is used disjunctively." [s.15 in the New South Wales Act corresponds to s.16 in the BCISP Act].

- 14 Specifically, here the issue is whether the plaintiff has made an adjudication application pursuant to sub-paragraph (2)(a)(ii) and is therefore precluded from issuing this proceeding pursuant to sub-paragraph (2)(a)(i).
- 15 S.18 relevantly provides:
“18 Adjudication applications
(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if—
(a) . . .
(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—
(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim; and
(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant’s notice.”
- 16 As appears from AF 5 and AF 7, the period of 10 business days within which the plaintiff was required to notify the defendant of its intention to apply for adjudication ran from 15 May 2008 to 29 May 2008. As appears from AF 9, in fact this notice was given on or about 16 April 2008, clearly not in compliance with s.18(2)(a). The determination of 22 May 2008 states as much.
- 17 As appears from AF 14, the plaintiff gave a further Notice of its intention to apply for adjudication on 30 May 2008, again outside the period stipulated in s.18(2)(a), by one day. The second appointed adjudicator, Uher, states as much in the memorandum dated 24 June 2008 forwarded to the parties by his nominating authority.
- 18 S.23 provides:
“23 Adjudicator’s determination
(1) An adjudicator is to determine—
(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount); and . . .
(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—
(a) the provisions of this Act and any regulations made under this Act;
(b) subject to this Act, 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.
(2A) . . .
(2B) An adjudicator’s determination is void—
(a) to the extent that it has been made in contravention of sub section (2);
. . . .”

Discussion and Conclusion

- 19 It is not in issue that the first notification by the plaintiff of its intention to apply for adjudication of the payment claim given on 16 April 2008 was given before the period of 10 business days referred to in s.18(2)(a) had commenced and that the notification of intention to apply for adjudication given on 30 May 2008 was given after the expiration of the 10 business days period. What is the effect of this upon the adjudication applications made on 5 May 2008 and 10 June 2008?
- 20 Considerable time was spent on the hearing of this application and in written submissions lodged by the parties in consideration of New South Wales decisions upon comparable legislation there. I note that in **Abbey Group Contractors Pty Ltd v River Street Developments Pty Ltd** [2006] VSC 425, Habersberger J, at paragraph 28, stated that decisions on the New South Wales Act were “highly persuasive”. I follow this approach, particularly noting that a considerable body of jurisprudence has developed in the New South Wales Supreme Court over recent years with respect to the comparable legislation there.
- 21 In **Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd** [2007] NSWSC 554, Bergin J, under the comparable New South Wales Act, considered an adjudication application made under the equivalent of s.18(1)(b) where the plaintiff had failed to give notification of its intention to apply for adjudication under the equivalent of s.18(2)(a).
- 22 Her Honour stated, at paragraph 7:
“. . . the Adjudicator notified the parties in writing that having regard to the fact that both parties had submitted that the adjudication application did not comply with s.17(2) of the Act he did not propose to proceed with it.”
and at paragraphs 21, 22, 23 and 25:

[21] The facts in this case are slightly different from those in **Schokman**. In that case a notice under s.17(2) was provided [similar in all relevant respects to s.18(2) of the BCISP Act], albeit out of time. In the present case no notice was given. However it is true that in both cases the adjudication application was invalid by reason of the failure to comply with s.17(2). There are further differences between the two cases. In **Schokman** the parties appear to have argued that the adjudication process 'miscarried' rather than approaching the matter on the basis that it was a nullity. In this case the plaintiff has submitted that the adjudication application was a nullity and therefore the plaintiff could not be taken to have made an election. Additionally there was apparently no argument before Einstein J that the notice under s.17(2), as opposed to the adjudication application, was itself a nullity. The fact that the notice under s.17(2) was provided, albeit out of time, was a matter that Einstein J regarded as important in determining whether the plaintiff in that case had elected for the adjudication process. That is not a matter for consideration in this case because no notice was provided. Whether an election has been made will depend upon the facts of the particular case.

[22] In this case the plaintiff relied upon the words 'cannot be made' in s. 17(2) of the Act, in support of the submission that the adjudication application was a nullity. It appears that this argument may not have been raised before Einstein J in **Schokman**. In all the circumstances I am satisfied that I am not constrained by **Schokman**.

[23] In **GJ Coles & Co Ltd & Ors v Retail Trade Industrial Tribunal & Ors** (1986) 7 NSWLR 503 McHugh JA said at 525:

'One of the basic doctrines of common law jurisprudence is the failure to perform a mandatory condition imposed by statute invalidates the doing of any act dependant on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine.'

...

[25] I am of the view that the adjudication application was a nullity by reason of the plaintiff's failure to comply with the mandatory condition imposed by s.17(2) of the Act [s.18(2) of the BCISP Act]. Accordingly the act of filing and serving that document was incapable of creating legal consequences, including the legal consequence of the making of an election under s.15(2) of the Act [s.16(2) of the BCISP Act]"

23 It will be noted that the adjudicator there took a similar approach to the second adjudicator here.

24 In **JAR Developments Pty Ltd v Castlepex Pty Ltd** [2007] NSWSC 737, a case decided on 10 July 2007, six weeks after **Kell & Rigby**, Rein AJ stated, at paragraphs 47 and 48:

"Although **Kell & Rigby** is authority for the proposition that failure to adhere to time constraints set out in the Act will render an adjudication application void, **Kell & Rigby** was a case in which the adjudicator had refused to proceed (for that very reason) and the Court therefore did not have to consider what would be the effect of an adjudication in which an error as to compliance with the time limit was made. It is therefore not inconsistent with **Schokman** and **Taylor**.

Kell & Rigby deals with the consequences where failure to meet time limits imposed by the Act is established at the adjudication. It is implicit that the adjudicator has no power to excuse or waive a failure to meet a time limit imposed by the Act: . . . **Brodyn** at [53]–[55] is however dealing with the question of the effect of an erroneous determination by an adjudicator that time limits or other detailed requirements (as opposed to basic and fundamental requirements) have been met.

Given that both McDougall J and Einstein J (although obiter in **Taylor**) have concluded that the reasoning in **Brodyn** leads to the conclusion that an adjudication in which the adjudicator erroneously but bona fide and in accordance with the rules of natural justice determines, that a requisite time limit has been met, will not thereby be rendered void, and since, with respect, I am not persuaded that they are wrong to so conclude, it is appropriate that I follow **Multipower**."

25 Two days later, on 12 July 2007, McDougall J delivered his judgment in **Rojo Building Pty Ltd v Jillcris Pty Ltd** [2007] NSWSC 880. He, too, cited with approval, at paragraphs 39 to 42, the decision of **Kell & Rigby**.

26 These three decisions analyse in some detail earlier decisions of the New South Wales Supreme Court and, to some extent, endeavour to distinguish them. So far as the second adjudication is concerned, the facts are virtually identical to **Kell & Rigby**. The fact that here the notice was given out of time and there the notice was not given is, in my view, immaterial. In both cases the notice did not comply with the mandatory condition imposed by s.17(2) of the New South Wales Act and s.18(2) of the BCISP Act. I follow **Kell & Rigby** and hold that the adjudication application dated 10 June 2008 is a nullity. It therefore does not preclude the issue of this proceeding.

27 I turn to the first adjudication application lodged on 5 May 2008.

28 It appears that both Bergin J in **Kell & Rigby** and Rein AJ in **JAR Developments** were at pains to distinguish **Schokman**, **Taylor** and **Brodyn**, cases which were referred to me in the course of submissions. Rein AJ in particular refers on three occasions in the above extract to an adjudication where an erroneous determination was made by the adjudicator as to time limits. That is clearly not the situation here, and it was not so submitted. It is clear that the determination made 22 May 2008 correctly concludes that the Notice of Intention to Apply for Adjudication was not given within the time limits stated in s.18(2)(a).

- 29 Further, in the determination of 22 May 2008, the adjudicator reached his determination that no monies were payable by the defendant solely on the basis of the s.18(2)(a) notice being given out of time. In paragraph 57 he confirms that he did not consider the plaintiff's submissions "on the merits".
- 30 S.23(2)(c) requires an adjudicator to consider the payment claim to which the application relates. Clearly, the adjudicator has not done so. As a result, pursuant to s.23(2B), his determination is void. This distinguishes the present matter from the factual situations referred to in the cases cited by Rein AJ, apart from *Kell & Rigby*
- 31 In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, a case which was relied upon heavily by the defendant, a determination was made by the adjudicator on the merits.
- 32 I conclude that the adjudication application lodged on 5 May 2008 is also a nullity.
- 33 In short written and oral submissions, Mr Dosser, who appeared for the defendant, submitted that the plaintiff should be estopped from continuing to pursue the current proceeding so far as it related to Progress Claim PC 4 1584C. In *The Commonwealth v Verwayen* (1990) 170 CLR 394, at 413,
- Mason CJ stated:
- "... The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption."*
- and at page 416:
- "Each case is one of degree. Reliance upon an assumption for an extended period may give rise to an estoppel justifying a court in requiring that the assumption be made good. The same result may follow from substantial and irreversible detriment suffered in reliance upon the assumption or from detriment which cannot satisfactorily be compensated or remedied. . . ."*
- 34 Here, in relation to both adjudications it was the defendant, in submissions to the adjudicator, which asserted that in each instance the notification given under s.18(2)(a) was given out of time. In such a situation it is difficult to see what assumption the plaintiff has induced the defendant to hold and what reliance there was. I further note, so far as "detriment" is concerned that in respect of the first determination dated 22 May 2008, the adjudicator required his fees to be paid in full by the plaintiff.
- 35 In all the circumstances, it is my view that the doctrine of estoppel is not applicable to the matter before me.
- 36 Since both adjudication applications were nullities, it follows that the plaintiff has not made a valid election under s.16 of the BCISP Act and I so determine.

Mr B Reid For the Plaintiff instructed by Pilley McKellar Pty Ltd
Mr B Dosser For the Defendant instructed by Bradley Colin Dosser