JUDMENT : Magistrate H Dillon : Local Court of NSW. Downing Centre. 10th February 2006

1. By Notice of Motion, the applicant, Kinsley Constructions Pty Ltd ("Kinsley"), seeks to have set aside a judgment entered against it pursuant to an adjudication under the Construction Industry Security of Payment Act *1999* ("the Act") on the basis that the judgment was entered irregularly: s.63 C*ivil Procedure Act 2005* and Rule 36.15.

2. The applicant contends that the appointed adjudicator was ineligible to adjudicate the claim brought under the Act by the plaintiff, Accrete Constructions Pty Ltd ("Accrete"). It also relies on a number of other grounds to support its application. First, it contends that the adjudicator acted outside the scope of her jurisdiction. Second, it argues that the adjudicator did not form an independent view as to whether the rates and quantities asserted by the plaintiff in its claim were appropriate. The applicant therefore argues that the adjudicator failed properly to exercise her function even if she was within her jurisdiction. Last, the applicant submits that as the adjudicator was not properly appointed under the Act, she had no power to order the applicant to pay the adjudication fees. (This argument is, effectively, part of the first.) On the basis of these contentions, it argued that the judgment entered in the Local Court pursuant to s.25 of the Act was entered irregularly and ought be set aside. See *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.

3. The motion is opposed and all grounds were contested by the plaintiff.

A short history of the matter

4. In March 2005, the parties entered a construction contract for works by the plaintiff on the Old Teachers' College at the University of Sydney by way of a purchase order issued by the applicant to the plaintiff. On 8 September 2005, the plaintiff made progress payment claim upon the applicant in the sum of $53,328.52.

5. On 22 September 2005, the plaintiff applied for an adjudication of the claim pursuant to the Act. The appointed adjudicator was Ms Robyn Brewer. She accepted the adjudication on 26 September 2005. On the same day, the applicant advised that it had not received a copy of the application until 23 September 2005. It provided a response to the application on 30 September 2005.

6. Ms Brewer handed down her 12-page determination of the application on 10 October 2005. In that determination, she awarded the plaintiff an amount of $33,094.22 and ordered that interest be payable on that sum at the rate of 18 per cent per annum. She also ordered that Kinsley pay the adjudication fees of $3850.

7. On 27 October 2005, an Adjudication Certificate, issued under s.24 of the Act, was filed in the Downing Centre Local Court Registry. Pursuant to s.25(1) of the Act, a properly issued Adjudication Certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

The statutory interpretation point

8. Section 18 provides:
   (1) A person is eligible to be an adjudicator in relation to a construction contract:
      (a) if the person is a natural person, and
      (b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.
   (2) A person is not eligible to be an adjudicator in relation to a particular construction contract:
      (a) if the person is a party to the contract, or
      (b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

9. Section 23(2) of the Act provides, "If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date."

10. The applicant's principal submission in relation to s.18 is that the requirements of the section are cumulative and that, in the absence of a regulation prescribing the relevant eligibility criteria, there were no eligible persons able to be appointed to adjudicate disputes in accordance with the Act and that, therefore, any purported exercise of adjudicative powers by someone were void *ab initio* .

11. The respondent contends that s.18(1)(b) is permissive only. It allows for regulations to prescribe eligibility criteria but does not require such regulation or prescription. It argues that until such time as such criteria are prescribed by regulation that the only mandatory qualifications required of a duly appointed adjudicator are that he or she be a natural person and not be a party to the relevant contract.

Findings

12. In my view, the respondent's contention is correct. I was not referred to any authority by either party on the point. If, however, first principles of statutory interpretation, especially the rule that statutes are to be interpreted according to the "grammatical and ordinary sense of the words… unless that would lead to some absurdity" ***Grey v Pearson*** (1857) 10 ER 1216 at 1234 per Lord Wensleydale. Cited with approval by Higgins J in ***Australian Boot Trade Employees' Federation v Whybrow & Co*** (1930) 11 CLR 311 at 341-2 and Dixon J in ***Broken Hill South Ltd v Commissioner of Taxation*** (1937) 56 CLR 337 at 371. , are applied, it seems to me that the ordinary meaning of the words in s.18(1)(b) is that if and when, but not before such time, a regulation prescribes qualifications for adjudicators (beyond those specified or prohibited in s.1891)(a) and (2)), an adjudicator must qualify according to the prescribed criteria to be validly appointed to adjudicate a claim under the Act. Parliament's intention was clearly to allow for the possibility that the Executive may consider it desirable to regulate such qualifications and prescribe them by Regulation but not to require such qualifications. This interpretation seems to me to be the natural way to construe the phrase "as may be prescribed" in s.18(1)(b).

Had Parliament's intention be as the applicant submits it was, one would have expected, first, that the Act would not have commenced until the Regulation had been been prepared for gazettal and that the terms of s.18 itself would have been expressed in the imperative mood. If that it correct, it was Parliament's intention that the requirement of certain qualifications for appointed adjudicators would await that event but that, in the meantime, the only obligatory criteria would be those set out in s.18(1)(a) and (2).

13. That conclusion is buttressed, in my opinion, by the inclusion of s.28 in the Act. It provides that the Minister may grant authority to certain persons to nominate adjudicators for the purposes of the Act. Once authorised by the Minister the nominating authority appoints adjudicators to deal with disputes. It is self-evident that the nominating authority is implicitly required to appoint persons with the relevant expertise and impartiality to determine disputes in relation to progress claims.

14. If there is any absurdity in the ordinary meaning of s.18(1)(b), it would only arise, in my view, if the interpretation contended for by the applicant were to be adopted. That reading requires the interpretation of a discretionary power to regulate qualifications as a mandatory, threshold step holding up, in effect, the operation of the adjudication system until a regulation is enacted. The system has been in operation for the better part of a decade now. If the applicant's argument is correct, every single adjudication decided under the provisions of the Act has been invalid. In one sense, that is an irrelevant consideration. A law is not validated simply because of the inconvenience that might be caused by finding it to be invalid but the point has never been considered before, certainly by a superior court, and, in my view, that is almost certainly for the good reason that there is nothing of substance in it.

15. In my view, the adjudicator was validly appointed under the Act and therefore was also within her powers to order that the respondent pay the adjudication fees.

The contract point

16. The second and more complex contention argued by the applicant is that the adjudicator exceeded the scope of her authority by dealing with a collateral contract rather than confining her attentions to the terms of the original contract between the parties.

17. Before considering the point, it is necessary to outline the background to the contract in greater detail. The original contract was formed between the parties when Kinsley issued a purchase order to Accrete on 30 March 2005. It is common ground that the original contract was for a lump sum of $84,163. At the time of the determination by the adjudicator, one of the areas of dispute between the parties was whether the original contact included a sum for excavation and preparation of foundations or not. Accrete asserted that it did not whereas Kinsley contended that it did. One of the reasons Kinsley had refused to pay the progress claim was because of this disagreement.

18. The adjudicator made a finding that Kinsley's original invitation to tender, issued in October 2004, expressly excluded any provision for excavation and preparation of ground. Accrete issued a tender in the sum of $173,944 on that basis. On 20 January 2005, Accrete provided a "variation price" in respect of excavation and associated works, adding an additional $58,000 or so to the tender price.

19. On 30 March 2005, Kinsley accepted the tender but excluded a sum of $49,567 in respect of "topping works as per original scope of works." The letter of acceptance was "for all concrete construction as per tender and project documentation." It did not refer to the variation offer of 20 January 2005. The adjudicator made a finding of fact that it did not include amounts quoted for the excavation works referred to in the variation offer of 20 January 2005. She found that Accrete's claim was in the sum of $44,380 in respect of excavation, additional to the sum of the original tender.

20. It was common ground that Accrete did the work and that the respondent had required it to be carried out.

21. The adjudicator made a finding of fact that there had been a variation of the original contract rather than a collateral oral contract entered between the parties. In her determination the adjudicator concluded that "this stance [had been taken by the applicant on this motion] because under clause 36.1 of AS 4901 -1998 [the standard form of contract] the claimant was not empowered to vary the contract except as directed in writing."

22. She went on to note that the defendant (the applicant on this motion) "has not raised this contract provision as a reason for withholding payment. In my view, such a reason would not be consistent with [the defendant's] contention that the work was part of the original contract."

23. The applicant now contends that the adjudicator had no authority to deal with what it calls "the collateral contract" and that, insofar as she purported to do so, her determination is void. That is because, according to the applicant, the claimant's application for adjudication had been made in respect of the original contract only and the adjudicator's jurisdiction was confined to claim brought in respect of that contract alone.

24. The respondent contends, first, that the original contract was varied but that, in any event, whether or not the contract was varied or a collateral contract was entered in respect of the excavation works, it does not matter because, either way, the adjudicator was required to determine the dispute between the parties in respect of what no one asserts was anything but a construction contract falling within the scope of the provisions of the Act. That the terms of the contract, however, characterised constituted a construction contract was sufficient, according to the respondent, to give Ms Brewer jurisdiction to determine the dispute.

Analysis and findings

25. To determine the question raised here, some of the provisions of the Act need to be closely considered.

26. There is no question that the contract or contracts between the parties were a construction contract or contracts.

27. Section 7 of the Act provides that the Act applies to any construction contract whether oral or in writing or partially oral and partially written. Section 8 provides for an entitlement to progress payments to persons doing construction works under a contract. Section 9 to 12 flesh out the details of that general entitlement.

28. Part 3 of the Act then deals with the procedure for recovery of progress payments, and, in the event of a dispute between the parties, the determination of the dispute.

29. The starting point is s.13 which provides:

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:
(a) must identify the construction work (or related goods and services) to which the progress payment relates, and
(b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and
(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:
(a) that the respondent is liable to pay the claimant under section 27 (2A), or
(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:
(a) the period determined by or in accordance with the terms of the construction contract, or
(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
(c) whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

30. If a claim is made by a contractor, and the other party fails to meet the claim, the contractor may, pursuant to s.17 of the Act, seek an adjudication of the dispute.

31. Critically, the application must be made in writing and "*must identify the payment claim and the payment schedule (if any) to which it relates*": Section 17(3)(f).

32. Once the application is made, an adjudicator is appointed by the nominating authority. The adjudicator's duties and obligations are set out in s.22:

(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
(b) the date on which any such amount became or becomes payable, and
(c) the rate of interest payable on any such amount.

(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.

(3) The adjudicator's determination must:
(a) be in writing, and
(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
(a) the value of any construction work carried out under a construction contract, or
(b) the value of any related goods and services supplied under a construction contract,
(c) the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

(5) If the adjudicator's determination contains:
(a) a clerical mistake, or
(b) an error arising from an accidental slip or omission, or
(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
(d) a defect of form,
(e) the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

33. If, after a claim has been determined by an adjudicator, the respondent to the claim fails to pay a successful claimant, the claimant may, pursuant to the terms of s.24 of the Act, request an adjudication certificate which may then be filed, pursuant to s.25, in the Local Court as a judgment debt. The Local Court cannot look behind the determination except in very limited circumstances, such as when an allegation is raised, as it is here, that the judgment was entered irregularly. There is no appeal to the Local Court from the determination of an adjudicator and no hearing de novo to re-determine the claim in the Local Court.

34. The applicant's contention is that the adjudicator correctly identified the contract to which the claim related but then went on to determine the claim in respect of a collateral contract which was not the subject of the claim. This Court has not been favoured with the papers from the original application for adjudication and I am therefore reliant on the determination itself and the affidavit filed by the solicitor for the applicant on the motion for my understanding the contract(s).

35. Section 1 of the determination is headed "The Contract". The adjudicator then stated that the adjudication application had annexed a copy of the purchase order of 30 March 2005 from Kinsley to Accrete. The determination states that the contract was for "concrete construction" at the Old Teachers College and was based on the standard form of contract AS4901-1998.

36. She then identified the payment claim and payment schedule. These had been served upon Kinsley.

37. At section 7 she discussed the various considerations she had taken into account in valuing the claim. At sections 7.2, 7.3 and 8 she closely analysed the dispute between the parties in respect of what she characterised as the variation of the original contract in respect of excavation works. She also gave close consideration to the reasons proffered by Kinsley for withholding payment but ultimately rejected them.

38. In my view, it is not clear whether the original contract was varied or whether a collateral contract was entered by the parties in respect of excavation. Even if the applicant is correct in theory that the adjudicator was not entitled to deal with a collateral contract not identified in the adjudication claim, it has not proven on the balance of probabilities that this was in fact a collateral contract rather than a variation of the original contract and fails on that point for that reason.

39. Nevertheless, even if this was a collateral contract, the adjudicator was, in my view, entitled to deal with it. Her primary obligation as an adjudicator was to resolve the dispute between the parties in respect of the *progress claim* . Whether that claim arose under the original contract or under a secondary contract was immaterial. True it is that she appeared to identify the contract in question as that created by the purchase order of 30 March 2005 but she was at all times dealing with the progress claim. It was with the merits of that claim that she was concerned. Whether the claim arose under the contract of 30 March 2005 or under a later collateral contract was a matter of historical interest only. She took the view, on the basis of material that I have not seen, that the original contract had been varied. That was a finding open to her to make. The point seems to have been argued with her and, in any event, did not go to the essence of the dispute which she was adjudicating. There was no denial of natural justice and no such assertion is no made. That the progress payment was the issue between the parties was always transparent to all concerned in the process. The process is meant to be quick, cheap and efficient to enable those entitled to progress payments to obtain their rightful dues quickly rather than becoming mired in litigation in courts. The speed and efficiency of the process is also, for obvious reasons, advantageous to respondents to claims as well.

40. In my view, for the reasons I have given, what I have called "the contract point" does not succeed.

The valuation point

41. The final point made by the applicant is that the adjudicator failed properly to exercise her powers in valuing Accrete's claim. At page 9 of the determination, when dealing with the respondent's reasons for withholding payment, adjudicator stated, "*the payment schedule does not include as a reason for withholding payment that the amounts claimed for the various items of work were not reasonable. I will therefore base my valuation on the quantities and rates offered by the claimant.*"

42. In ***Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd,*** in obiter dicta, Hodgson JA remarked [2005] NSWCA 228 at [52]-[53]. :

The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not

mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see ***The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Ltd****. [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.*

Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.

43. The applicant asserts that just a situation arose in this case, namely, that the adjudicator did not subject the merits of the claim to scrutiny but simply accepted the claimant's case in respect of valuations and quantities without further ado.

44. The respondent's arguments are that there is abundant evidence in the determination which demonstrates on its face that the merits of the claim were subjected to scrutiny and that the adjudicator was confined, in any event, to considering the evidence placed before her by the parties.

45. In my view, the determination appears to have been carefully and scrupulously carried out. Hodgson JA's remarks are obiter dicta but, of course, carry great persuasive weight. What he appears to have been concerned with is a situation where an adjudicator effectively " *rubber-stamps*" a claim simply because a respondent did not contradict its contents. He analysed the requirements of s.22 as being far more stringent than that. For what it is worth, I agree with him.

46. Here, however, there can be no suggestion of a "rubber-stamp" being applied to the claim. The adjudicator carefully described the evidence placed before her, weighed the various considerations, including those relating to the valuation of the work, noted that the respondent did not contest the values and quantities asserted by the claimant despite having contested other aspects of the claim and implicitly concluded that the claim was reasonable in those respects.

47. In my opinion, Hodgson JA's comment that, "*The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent…*" (provided that there is an adequate and reasonable attempt to address the question on its merits) is apt in the circumstances obtaining here. In my view, the adjudicator very likely found in favour of the claimant because no relevant material from the respondent was placed before her contradicting the claim in respect of rates and quantities. In any case, the applicant has not proven on the balance of probabilities that this was not so and its contention fails accordingly.

Conclusion

48. For the reasons given above, the application fails.

Orders

49. The motion is dismissed.

50. The applicant is to pay the respondent's costs of disposal of the motion in a sum agreed or assessed.

Mr J.W Dodd (Counsel) instructed by Hills Legal for applicant
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