

JUDGMENT : Associate Justice Malpass : New South Wales Supreme Court : 13th September 2005

- 1 The second defendant is a painting contractor. It entered into contractual arrangements with the plaintiff for the performance of painting work at the Chatswood Telephone Exchange. It seems that disputes arose between the parties concerning the quality of certain of the work.
- 2 The second defendant moved to employ the procedures provided by the Building and Construction Industry Security of Payment Act 1999 (the Act) for payment of moneys under the contract.
- 3 On 13 December 2004, it served a payment claim on the plaintiff in respect of the sum of \$32,734.00. On 15 December 2004, the plaintiff replied by providing a payment schedule. The latter indicated that the plaintiff did not propose to make any payment to the second defendant. The payment schedule specified the basis of the rejection of the payment claim ("because they are rectification works due to poor preparation and finishing of the contract works").
- 4 The second defendant applied for adjudication of its payment claim. The application was made on 16 December 2004. An adjudicator (the first defendant) was requested by Adjudicate Today to determine the adjudication. She accepted the appointment.
- 5 The second defendant submitted additional material on 4 January 2005. It was not received by the plaintiff until 10 January 2005.
- 6 On 7 January 2005, the plaintiff received by facsimile a document entitled "Notification of acceptance of adjudication application" (the notification), which was dated 7 January 2005.
- 7 The notification advised of the adjudication application and enclosed a copy of the same. It also advised of the first defendant's acceptance of the appointment as adjudicator.
- 8 It contained, inter alia, the following:-
ADJUDICATION SCHEDULING
 5. The Adjudicator may decide to conduct a conference of the parties and/or inspection. If the Adjudicator has advised Adjudicate Today of a decision to conduct any conference or inspection, the scheduling details are set out hereunder:
 - 5.1 Conference of the parties
At:
Date: TBA
Time:
 - 5.2 Inspection
At:
Date: TBA
Time:
- 9 It also contained, inter alia, the following:_
THE FOLLOWING INFORMATION IS PROVIDED FOR THE ASSISTANCE OF PARTIES
 10. The Adjudicator may:
 - a. request further written submission from either party and must give the other party an opportunity to comment on those submissions;
 - b. set deadlines for further submissions and comments by the parties;
 - c. call a conference of the parties; and
 - d. carry out an inspection of any matter to which the claim relates.
 11. The Adjudicator in making a determination can consider only those matters referred to in section 22(2) of the Act, being:
 - a. the provisions of the 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 to which the application relates, together with all submissions (including relevant documentation) that has 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.
- 10 On 7 January 2005, the plaintiff made a response to the adjudication application. It contained the following:-
We are in receipt of your Adjudication Application dated 7 January 05 and would like to offer the following response.

The claimant's original contract value was \$43,000.00, this price was tendered for acceptance after the claimant having been issued with a complete set of Architectural drawings and specifications to quantify the Scope of Works, to which Ishtar Painting Pty Ltd accepted the "works", the final contract value rose to in excess [sic] of \$100,000.00 an increase of approximately 55% on the original value, at which point an agreement was reached on the 21st July 04 via a handshake in our offices that all remaining works would be completed at nil costs.

Subsequent to this Gentlemen's agreement, additional invoices were submitted for payment for the finalisation of incomplete works at the same project contrary to what was agreed.

A payment schedule was forwarded to the claimant within the required time bar advising him that there were nil monies outstanding due to works carried out were either defective or incomplete works due to poor quality workmanship, bad preparation of works prior to painting and subsequently defected by the Architect and Client and as per the agreement that these works would be completed at nil costs. [Annexure D affidavit Francis Ang 31 March 2005]

- 11 The adjudicator did not request any further submissions. She did not call a conference or carry out any inspection. There was no further contact between her and the plaintiff prior to the adjudication.
- 12 The adjudicator's determination was made on 19 January 2005. She determined that the amount of \$32,733.80, together with interest, be paid by the plaintiff.
- 13 Her reasons referred to the additional material. In those reasons she said "*I have proceeded on the basis that the date of the application for adjudication is 4 January 2005*". She concluded that the application had been made within the prescribed statutory period of 10 business days.
- 14 The plaintiff did not pay the adjudicated amount. The Nominating Authority issued an adjudication certificate. The second defendant filed the adjudication certificate in the Local Court (pursuant to s25 of the Act). Under that provision, it is filed as a judgment for a debt in that Court.
- 15 The second defendant proceeded to execute the judgment (by way of garnishee order). This brought about a satisfaction of the judgment by way of payment from the plaintiff's bank account. An unsuccessful stay application was made thereafter. The court has been told that the Local Court took the view that it was functus officio.
- 16 The plaintiff then commenced these proceedings. Relief was sought by way of declaration and injunction.
- 17 The hearing of the summons took place on 25 August 2005. The only relief now sought is as follows:-
A Declaration that the Adjudication is void and of no effect upon the grounds that;
 - a. *The Adjudication does not comply with section 17(1)(a)(i) and section 17(3)(c) of the Act in that the payment schedule was supplied by the Plaintiff to the Defendant on 16 December 2004 and the Second Defendant provided further information constituting additional material by a document bearing date 4 January 2005 but pursuant to section 319(2) of the Act not received by the Plaintiff until 10 January 2005 which is 14 working days after the receipt of the payment schedule by the Second Defendant and contrary to the requirements of the Act aforesaid and the application for adjudication thereby being incompetent and the First Defendant was without jurisdiction; and/or*
 - b. *The Plaintiff was denied Natural Justice alternatively Procedural Fairness in that the document entitled "NOTIFICATION OF ACCEPTANCE OF ADJUDICATION APPLICATION 2004ADJT247" and bearing date "7 January 2005" contained within it the express provision "ADJUDICATION SCHEDULING, 5.1 'Conference of the parties TBA'" which was understood by the Plaintiff to mean 'To Be Advised' and further understood by the Plaintiff to mean that it would be afforded the further opportunity to present its response, such Conference of the parties was not held by the First Defendant and the Plaintiff was not notified that such Conference would not be held and did not know such Conference would not be held until the Plaintiff received the Adjudication on 19 January 2005; and/or*
 - c. *The Plaintiff was denied Natural Justice alternatively Procedural Fairness in that the document entitled "NOTIFICATION OF ACCEPTANCE OF ADJUDICATION APPLICATION 2004ADJT247" and bearing date "7 January 2005" contained within it the express provision "ADJUDICATION SCHEDULING, 5.2 'Inspection TBA'" which was understood by the Plaintiff to mean 'To Be Advised' and further understood by the Plaintiff to mean that it would be afforded the further opportunity to present its response, such Inspection was not held and the Plaintiff was not notified by the First Defendant that such Inspection would not be held until the Plaintiff received the Adjudication on 19 January 2005.*
- 18 At the commencement of the hearing, I raised the question of whether or not the proceedings now had any utility. Whilst there was no agreement between the parties on the question, it was never fully addressed and the hearing proceeded.
- 19 What was ultimately pressed really boiled down to two questions. One concerned denial of natural justice. The other concerned a matter of alleged statutory invalidity (which was said to go to jurisdiction).
- 20 A denial of natural justice or procedural fairness is not an area in which a code of principles may be found. Natural justice is a flexible concept involving fairness. Each case may turn on its own particular facts.
- 21 Mr Ang (the managing director of the plaintiff) has sworn three affidavits. In that material, he has deposed to his understanding of matters that appear in the notification. He said that he understood "TBA" to mean "To be advised". He further deposed to an understanding that a conference and/or inspection would be held at a future date and that he would then have the opportunity to take the adjudicator through the actual problems with the painting and explain why he did not believe that further payments were warranted.
- 22 In my view, what a reading of clause 5 of the notification does disclose is that it informs the recipient that the adjudicator may decide to conduct a conference and/or inspection and that the adjudicator had not at that time advised Adjudicate Today of a decision to conduct any conference or inspection.
- 23 Also, I do not consider that the contents of either paragraphs 10 and 11 thereof afford any assistance to the case for the plaintiff. This material does no more than provide information for the assistance of the parties. It provided

information as to what the adjudicator may do as part of her role (including calling a conference). It also provided information as to the matters that an adjudicator can consider in making a determination (which included the results of any inspection).

- 24 The onus rests with the plaintiff to demonstrate denial of natural justice. In my view, that onus has not been discharged. To assist the parties, I shall briefly add some further observations concerning this aspect of the matter.
- 25 It seems to me that the plaintiff was given a reasonable opportunity to respond to the adjudication application. It did in fact respond and provide the adjudicator with material additional to that provided in the payment schedule. A reading of all that material suggests that the plaintiff did put before the adjudicator the nature of the opposition to the application. If there was any additional material that it may have wanted to put before the adjudicator, it could have done so. If that be the position, it is a case of the plaintiff failing to take advantage of the opportunity that it was given. If there was misunderstanding, I do not see it as being attributable to the contents of the notification. For completeness, I should add that the response made no mention of the matters of a conference and an inspection. It was open to the plaintiff to ask for a conference and/or inspection.
- 26 Section 17(1)(a) of the Act provides that a claimant may apply for adjudication of a payment claim if the respondent provides a payment schedule. Section 17(3)(c) provides that an adjudication application must be made within 10 business days after the claimant receives the payment schedule. Section 31 deals with the service of notices. Subsection (2) of that section provides that service of a notice that is sent to a person's ordinary place of business is taken to have been effected when the notice is received at that place.
- 27 Section 17(5) provides that a copy of the adjudication application must be served on the respondent. No time is prescribed for the service of that document.
- 28 The additional material submitted on 4 January 2005 (which was in the form of either Exhibit A or Exhibit 2) was a document headed, "Payment claim".
- 29 The provisions of the Act have generated considerable caselaw. One of the more recent authorities is the decision of the Court of Appeal in *Brodyn Pty Limited v Davenport* (2004) 61 NSWLR 421. It was an authority that was referred to by both parties.
- 30 This part of the plaintiff's case is dependent upon the plaintiff successfully arguing that the additional material was required to complete the adjudication application and that service of the application must also take place within the prescribed period of 10 business days. This contention is a matter of dispute between the parties.
- 31 Whilst it is a question that does not need to be determined in the particular circumstances of this case, I am of the view that the plaintiff's contention is untenable.
- 32 Indisputably, the application was made within the prescribed period. Even if service of it took place outside that period, I consider that to be a matter of no significance. The prescribed period did not apply to service of the copy application.
- 33 In making these observations, I do not wish to be misunderstood as suggesting that delay in service is a matter to be commended or encouraged.
- 34 In *Brodyn*, a distinction was drawn between an essential precondition for the existence of an adjudicator's determination and the more detailed requirements.
- 35 Even if a different view was taken on the question of service, I do not consider that any alleged non-compliance with provisions of the Act would fall within the former category. Rather, it would be no more than one non-compliance with the detailed requirements and not be essential to the existence of the determination.
- 36 I should also refer to the observations made in paragraph 61 of *Brodyn*. These observations were relied on by both parties. They are as follows:- *Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above (at 437 [41] and [42] supra), it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination.*
- 37 Leaving aside the matters that have been earlier considered in this judgment, there seems to me to be other formidable problems confronting the plaintiff. These were matters that the plaintiff did not fully address.
- 38 Whilst it was open to the plaintiff to either act prior to the entry of judgment or to apply to have set aside after entry (subject to the restrictions to be found in s25 of the Act), neither course was taken. Instead, the judgment became satisfied before the taking of action. In the circumstances, it may be that no action can now be successfully taken to have the judgment set aside.
- 39 The purpose of the Act has been said is to obtain prompt interim payment on account pending final determination of all disputes. In the present case, the payment sought by the second defendant has been effected. The purpose of the Act would appear to have been exhausted in relation to it.
- 40 In the circumstances, I am not satisfied that there can be any utility in the present proceedings. This is not to say that the plaintiff is without remedy. It retains its contractual rights (these are preserved under s32). Any remedy that it may have in relation thereto remains available to it and can be pursued in other proceedings.

Air Dynamics Control & Services Contracting P/L v Durham & Ishtar Painting P/L [2005] Adj.L.R. 09/13

- 41 The plaintiff bears the onus of satisfying the court that the relief sought should be granted. In my view, I am not satisfied that it has demonstrated any entitlement to relief.
- 42 The summons is dismissed. The plaintiff is to pay the costs of the summons (such order to include the costs of the interlocutory proceedings before Studdert J). The exhibits may be returned.

Mr I George (Plaintiff) instructed by J P Gould (Plaintiff)

Mr P G Fisher (Second Defendant) instructed by Philip Davenport (First Defendant) & Turnbull Bowles Lawyers (Second Defendant)