

**A R Conolly, E Ramsay & L Mynott t/as A R Conolly & Co v Commercial Indemnity P/L & Johanne**

**JUDGMENT : Master Macready : New South Wales Supreme Court : 29<sup>th</sup> April 2005**

- 1 This is the hearing of the plaintiffs' claim in which they now seek a declaration that a determination made by the second defendant under the **Building and Construction Industry Security of Payment Act 1999** ("the Act") is void. They also seek an order in the nature of certiorari pursuant to section 69 of the **Supreme Court Act 1970** quashing the determination. A Judge of the Court has referred the whole of the matter to me for hearing.
- 2 The plaintiffs who carry on business as A R Conolly & Company engaged the first defendant to carry out construction works which were an office fit-out at the plaintiffs' business premises. The works were carried out between August 2004 and November 2004. There is no written contract and the works were carried out pursuant to an oral agreement between the parties, which did not make any provision for progress payments.
- 3 The matter at issue is an alleged payment claim that was served by the first defendant on the plaintiffs on 14 February 2005. The payment claim or claims were served by facsimile and its form is important. The facsimile was of four pages duration and consisted of three tax invoices dated 14 December 2004. Each tax invoice occupied one page. The fourth page was simply a repeat of the information on the first page. Accordingly it can be put to one side.
- 4 The first page was invoice number 041216 and on its face was for "Variations to the scope of works – various". It specified the amounts and concluded with a statement of the "Amount of Claim" with GST totalling \$4074.40. At the foot of the page there was a notation as required by section 13(2)(c) of the Act in these terms: "*Note: This is a payment claim made under to the Building and Construction Industry Security of Payment Act 1999 NSW.*"
- 5 The second page was invoice number 041214 referring to the job and describing the claim, as "progress claim #3". The total amount claimed was \$57,750 and was otherwise in a similar form with the same notation as the first page. The third page was invoice number 041215 and was on its face for "variations to scope of works -- after hours labour". The amount of the claim including GST was \$16,632. It carried at the foot of the page the same notation.
- 6 The first of the four pages carries a received stamp, which was placed on it on 14 February 2005. Plainly all four pages were received at or about the same time.
- 7 On 1 March 2005 the plaintiffs issued a notice under section 17 (2) of the Act claiming an amount of \$78,456.40. The first defendant did not provide a payment schedule within the time limited by section 14 of the Act and there was no provision of a payment schedule within the time limited by section 17 of the Act.
- 8 The decision of the adjudicator, who was the second defendant, was made on 25 March 2005. The adjudicator considered the question of whether or not the documents served on 14 February 2005 constituted a valid payment claim. In her adjudication the adjudicator said:  
*"The Payment claim*  
*I note that the claimant considers the payment claim, which was served by facsimile on 14th of February 2005, to comprise of three invoices addressed to A R Connolly, L Mynott & E Ramsey T/as A R Conolly & Co dated 14 Dec 2004. Each invoice was individually endorsed under s 13(2) (c) of the act and together totalled \$78,456.40. I*  
*It is noted that there can only be one payment claim in respect of each reference date under a construction contract 13(5) of the act) however I can see no provision in the Act which would prevent the treatment of individually endorsed invoices, served together, to be regarded in their entirety as one payment claim."*

**The plaintiffs' claims**

- 9 In support of the plaintiffs' claim that the determination was void the plaintiffs raised the following matters:
1. That the second and third invoices were not valid payment claims as they breached the provisions of s13 (5) of the Act;
  2. That the adjudicator's decision to the contrary constituted a failure to comply with an essential requirement under the Act and made the adjudicator's determination void;
  3. Even if the adjudicator's decision was not void, there had been a contravention of the Act which would lead to an injunction to restrain any action on the adjudication.
- 10 Apart from disputing the plaintiffs' claims the first defendant raised a discretionary defence, namely, that the matter could have been dealt with in the District Court.
- 11 The plaintiffs also made a claim for certiorari. In support of their claim they said in submissions: "*The Plaintiff also seeks relief in the nature of certiorari pursuant to section 69 of the Supreme Court Act but only does so for the purposes of preserving this position; until the decisions of the Court of Appeal in Brodyn Pty Limited v Davenport [2004] NSWCA 394 and Transgrid v Siemens Limited [2004] NSWCA 395 are overturned, certiorari is not available in such circumstances.*"
- 12 In these circumstances is it is not necessary for me to address this form of relief in any detail but to merely refuse such relief.
- 13 Having regard to the nature of the plaintiffs' claims in this matter, as a condition of granting interlocutory relief, McDougall J on 1 April 2005 required the plaintiff to pay into Court the sum of \$4,074.40. This was done and at the hearing before me the plaintiffs consented to this being paid to the first defendant. I made an appropriate order at the conclusion of argument before me to enable this to happen.

**The validity of the payment claims**

- 14 The plaintiffs submitted that in the present case the second and third purported payment claims are not valid payment claims because they fail to comply with section 13. Section 13(5) provides: "A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract."
- 15 Both parties agreed that the contract did not provide a reference date determined by or in accordance with the terms of the contract (section 8(2)(a)), and thus the reference date was 31 January 2005: section 8(2)(b). Implicit in this argument was of course the concession that the first page of the facsimile constituted a valid payment claim.
- 16 The plaintiff's submission that the first three pages of the facsimile were three separate payment claims is founded upon:
1. The fact that there were three separate documents which would have been received out of the facsimile machine at separate times.
  2. The express words which are found identically in each document, namely, the identification of the amount of the separate claim in each document and the note at the foot of each document.
- 17 On the second point the documents were clearly self-contained and the language which is used is not language applicable to a combined document. It is appropriate language for each one to be regarded as an individual claim.
- 18 All of the three documents, having regard to the definition of progress payment, probably were for such a payment. A payment claim is not defined in the Act and section 13 (2) provides:
- "(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."
- 19 It was pointed out in submissions that the requirements do not require a total to be stated. All that is necessary is that there be an indication of the progress payment which the claimant claims to be due. As appears from s 13(6) a payment claim may contain different amounts. What s 13(2)(b) requires is an indication of the amount claimed. If one regarded the first three pages of the facsimile as one document or a combination of documents then there would be compliance with the requirements of the section.
- 20 The timing is something which was emphasised in the first defendant's submissions. Having regard to the numbering which appears on each of the pages of the facsimile I would infer that pages two and three were received immediately after the preceding page. Thus the documents were received at a close point in time and as part of the one facsimile transmission. This has to be contrasted with an example of three separate invoices being delivered on successive days. In such circumstances clearly there would be a breach of the provisions of the Act.
- 21 The prohibition which is contained in s 13 (5) of the Act is against serving "more than one payment claim in respect of each reference date". Are three documents, each of which complies with the requirements of the Act, served practically at the same time one payment claim, or are they three payment claims? I should consider the mischief that the Act is seeking to avoid in this provision. Plainly, responding to a payment claim imposes burdens of time and effort in its response. The provisions of the Act have clearly specified how often such a claim could be made. Monthly claims in cases of contracts which do not have their own provisions are clearly what is permitted.
- 22 In this case the person receiving the payment claim would be immediately aware, on receipt of all documents, that the contractor was claiming the total of the amount shown in the documents. All were received on the same day and plainly refer to the period up to 31 January 2005. All documents were in respect of progress claims which on their face covered three separate items of building work. The first related to three variations, the second to what are traditionally referred to as progress claims and the third to a claim for after hours labour costs.
- 23 Turning to the language, and having regard to the description of the different types of work, it seems to me that the three documents constituted one payment claim as it is clear to the recipient what was being claimed. In these circumstances the remaining questions do not arise but I should refer to them in case a different view is taken of the result to which I have come.

**Is the adjudication void**

- 24 Assuming for the purpose of this question that the adjudicator's decision that the three individually endorsed invoices served together, [may] be regarded in their entirety as one payment claim is wrong it is necessary to consider whether the decision is void.
- 25 It is necessary to address some recent authority from the Court of Appeal and in particular *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394. The Court held that there was no jurisdiction to quash the determination for jurisdictional error. At paragraph 51 and following Hodgson JA, who gave the decision of the Court, said:
- "51 I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss.3(3), 25(4). The remedy provided by s.27 can only work if a claimant can be confident of the

protection given by s.27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s.27 would be prohibitive, and s.27 could operate as a trap.

- 52 However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.
- 53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
  2. The service by the claimant on the respondent of a payment claim (s.13).
  3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
  4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
  5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).
- 54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.
- 55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman*; *Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."
- 26 If the argument before me was whether the service of multiple documents simultaneously meant that legally no payment claim was served at all then a finding by the adjudicator that such multiple documents constituted a claim may well be amenable to review. But that is not the present case.
- 27 In the circumstances of this case there has been service by the claimant on the respondent of a valid payment claim. So much is conceded by the plaintiffs' argument and their payment of the first invoice. What is in dispute is whether the adjudicator's decision as to the extent and content of that payment claim is one which it is essential for there to have been a determination.
- 28 The Court of Appeal also considered the more detailed requirements of the Act, including s 13(2) governing the content of payment claims and s22 governing the matters to be considered by the adjudicator, at [54]. The Court of Appeal found that the legislature did not intend that compliance with these requirements was essential to the existence of a determination. Instead, the Court of Appeal found at [55] that: "If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."
- 29 In this case the adjudicator addressed the relevant question and decided it adversely to the plaintiffs. The plaintiffs' complaint effectively is that the adjudicator made a wrong decision on the point. In *Brodyn* the Court

considered the invalidity of a payment claim in the circumstances which are referred to by the Court at paragraphs 62 to 65. It then commented as follows:

*"66 There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this."*

30 This case is a clear one where the determination of the contents of a payment claim involves very arguable questions of fact and law. Apart from the matters to which I have already referred when considering the matter, the first defendant in submissions, after referring the above paragraph of the Court's reasons, suggested that there were a myriad of factual permutations which may be considered in determining whether a particular document is a payment claim. It suggested a number of variations on the present factual matters to illustrate the point:

1. Three invoices are served by one facsimile transmission, together with a facsimile cover sheet, which states, "Please find attached invoices."
2. Three invoices are served by one facsimile transmission, together with a facsimile cover sheet, which states, "Please find attached payment claim."
3. Three invoices are served by one facsimile transmission, but only one has the required note that "This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW"

31 One can go on with any number of permutations and combinations that could arise in this context. However, it seems to me that the determination of this question is not one that is essential in the sense referred to by the Court of Appeal. In these circumstances, even if I had formed a contrary view as to what comprised the payment claim, I would not have declared the determination void.

#### The alternative claim for injunctive relief

32 The plaintiffs sought injunctive relief preventing the first defendant from taking any further steps in relation to the adjudication determination even if (contrary the plaintiffs' submissions) the adjudication determination is not void. Their submissions on this aspect were as follows:

"2. In *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, the Court of Appeal held that the Court would not set aside an adjudication determination unless it was void, and referred (at [55]) to *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391. In *Project Blue Sky* the High Court drew a distinction between the validity of an act, and subsequent steps taken on the basis of such act. The High Court (McHugh, Gummow, Kirby and Hayne JJ) held (at 393 [100]):

*'[100] In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance on the conduct of, the ABA. Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision 'may in particular cases be punishable'. That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.'*

3. Central to the passage in *Project Blue Sky* quoted above is that although there may have been a breach or contravention of the relevant Act, there is the distinction to be drawn between such breach or contravention on the one hand and the determination being rendered void on the other.

4. The fact that the determination is not void does not deprive the contravention or breach of the Act of any legal effect. Indeed, in *Project Blue Sky* itself, although the relevant decision was not void, the High Court declared it to be unlawfully made. (See the orders made at 184 CLR at 393 [101]).

5. The matter is dealt with in Aronson et al, *Judicial Review of Administrative Action*, (3rd Edition, 2004, at p.631) where the learned authors state in relation to *Project Blue Sky*:

*'Davies J as first instance granted a declaration that the regulator's breach of the Act meant that the standards were a nullity, but he ordered that nullification be prospective only, and not commence for another five months. He clearly wanted to give the regulator time to fix or revoke its impugned standard. A High Court majority agreed that the standard breached the Act, but thought that the error was not jurisdictional. The court nevertheless gave the challengers a declaration of the Act's breach, and liberty to apply for an injunction to stop the standard's future enforcement if the regulator did not fix or revoke the standard. In terms of outcome, there was a complete convergence between the original order based on a jurisdictional flaw and the appellate order based on a non-jurisdictional error of law.'* (Emphasis in original.)

6. It is thus respectfully submitted that even if the adjudication determination is not void (because the contravention is not of an essential requirement under the Act) – a proposition which the Plaintiff rejects – there has been nonetheless a contravention of the Act. In context, the term "unlawful" in the relevant passage in the *Project Blue Sky* means no more than that. (Cf *Coordinated Constructions Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd* [2005] NSWSC 77 at [55])."

- 33 A similar argument was put to McDougall J in *Co-ordinated Constructions Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) NSWSC 77. His Honour was considering a case where the question was whether a determination also included an amount that was not for construction work. He dealt with the submission in these terms:  
“55 I do not think that this submission should be accepted. I do not think that it was relevantly unlawful for Messrs Parnell and Sarlos to decide this question as they did. In saying this, I continue to make the assumption that each determination included an amount that was not “for” construction work, and that, as Coordinated submitted, it was not open to Messrs Parnell and Sarlos to include such amounts in the adjudicated amount of the respective progress payments.”
- 34 If it must be remembered that what the High Court was concerned with in *Project Blue Sky* was a breach of section 160(d) of the **Broadcasting Services Act** 1992 which required the Australian Broadcasting Authority to perform its functions in a manner consistent with Australia's obligations under any agreement between Australia and a foreign country. The High Court decided that that it was a mandatory direction. It is thus not surprising that a breach was considered unlawful.
- 35 In the present case, if the decision by the adjudicator is wrong, I would not consider it to be unlawful. In the circumstances, and leaving aside any discretionary aspects, I would not have granted an injunction.

**Discretionary reasons for refusing relief**

- 36 The discretionary contention by the first defendant was that this application could have been made more effectively and conveniently in the District Court. They pointed to the fact the amount in issue in this case is \$75,456.40.
- 37 In *Brodyn* the Court of Appeal held that a judgment could be set aside, notwithstanding s 25 of the Act, on the basis that there was no adjudicator's determination supporting the judgment. That is, the plaintiffs could argue that a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act. Such an argument would not be a challenge to an adjudicator's determination within the meaning of s 25(4) of the Act since the wording of s 25(4) assumes that there is a determination that is to be challenged.
- 38 The Court of Appeal further held that the availability of that remedy in the District Court to set aside a judgment was itself conceivably a reason to refuse relief in the Supreme Court. Hodgson JA stated: “Conceivably, the availability of that remedy [to set aside a District Court judgment] could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied upon by the primary judge.
- 39 It has long been established that courts may refuse to grant relief for judicial review where an equally effective and convenient remedy is available. I have referred to a number of the cases on this matter in *Transgrid v Siemens* [2004] NSWSC 87 at [91] to [100] concerning certiorari.
- 40 The plaintiffs resisted this on the grounds that the District Court could not grant an injunction and there may be some doubt as to whether the filing of a certificate was a proceeding in the District Court. This doubt, it was submitted, may mean that there would not be power to stay the execution of the judgment. Although submissions were made there was not full argument on this point before me. Accordingly, given my earlier decision, I do not think it is necessary or appropriate to indicate my views on this aspect.
- 41 Accordingly I dismiss the summons with costs.

Mr M Christie for plaintiff instructed by A R Conolly & Company

Mr S Balafoutis for 1st defendant instructed by Bryan Gorman & Co for 1st defendant