

**JUDGMENT : Einstein J** : Supreme Court of New South Wales : 9<sup>th</sup> May 2006

**The proceedings**

1 These are proceedings brought to restrain the defendant, Classic Group Painting Services Pty Ltd from seeking to enforce a second determination under the *Building and Construction Industry Security of Payment Act (NSW) 1999* ["the Act"].

2 The proceedings raise questions concerning a number of provisions of the Act and significantly s 24 (4) and 13(5) and (6). It is convenient to commence by setting out the terms of these sub sections:

**Section 22 (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,

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

**Section 13**

(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

**Background matters**

3 The plaintiff is a head contractor in respect of a site known as Stage 3 Metro Village Rosebery. The first defendant ["the defendant"] was a painting subcontractor engaged on that site pursuant to a written but undated contract made in about September 2004.

4 The parties fell into dispute in about June 2005 in respect of their respective obligations under the contract and the plaintiff issued a show cause notice dated 27 June 2005 as to why the contract should not be terminated for breach by the defendant.

5 On about 30 June 2005 the parties resolved their differences by an agreement, the terms of which are set out in correspondence. Pursuant to that agreement the plaintiff was to pay an amount of \$16,421 into the trust account of the first defendant's solicitor to be released to the defendant as agreed and the first defendant in turn was to remedy agreed defects items.

6 The respective rights and obligations of the parties under the contract were satisfied, at least to the extent of any obligations upon the plaintiff to pay further moneys to the defendant for works done under the contract, by the 30 June 2005 agreement.

7 The plaintiff paid the moneys in accordance with the agreement but the parties again fell into dispute as to the obligations on the defendant to rectify defects.

8 The subsequent chronology is as follows:

9 August 2005	first payment claim served.
29 August 2005	payment schedule served payment schedule claims contra/set offs of \$59,214.94 and notes amount of \$7,616.76 overpaid by plaintiff.
22 August 2005	adjudication application
29 August 2005	adjudication response
6 September 2005	adjudication determination accepting plaintiff's position on variations and contra charges.
28 February 2006	second payment claim
9 March 2006	second payment schedule served in substantially same terms as first payment schedule and claiming contra/set off of \$65,510.08 ( and amount due to plaintiff of \$13,911.90.
23 March 2006	second adjudication application.
30 March 2006	second adjudication response.
19 April 2006	second adjudication determination in the amount of \$47,785.94,

**Treating with the materials**

9 The Court has before it each of the constituent documents usually admitted into evidence in proceedings such as the present, but in this case comprising the suites of such documents relating to each of the adjudication determinations. It is plainly unnecessary to refer to all of these materials which cover considerable volume.

**The Issues**

10 The substantive issues are in short compass and appear to cover the following matters:

**Contra set off items**

i. Baseline's contention that Mr Michael [who issued the second determination] determined contrary to the requirements of s 22 (4) of the Act, that he was not bound by the initial determination in respect of the contra/set off items;

- ii. Baseline's contention that Mr Michael determined wrongly, that Mr Weyland [who issued the initial determination] had made no finding as to the value of the contra/set off items without any submission that this was so;
- iii. Baseline's contention that Mr Michael then proceeded to determine those items afresh without providing an opportunity to Baseline to make submissions on the matter; [the contention is that Mr Michael found (notwithstanding the submissions of the first defendant as to natural justice), that: "*In the payment schedule, it does not provide any submissions in respect of the Respondent's entitlement to the various "Contra-Charges" that it seeks. The register only provides an item number, a date, an invoice number, the company which carried out the work, the description of the work and an amount. In the adjudication response, it contains reasons which are in my view contrary to section 20(2B) of the Act and for this reason I cannot consider those reasons.*" the contention is that Mr Michael then proceeded to determine those matters without considering in any way the plaintiff's adjudication response submissions concerning them]

**Failure to consider s 13 (5) of the Act and other matters**

- vi. Baseline's contentions that Mr Michael did not consider in any way a number of matters which he was required to consider under s 22 of the Act, namely
  - a) the submissions of the first defendant that the plaintiff should be afforded an opportunity to reply to matters raised;
  - b) the provisions of s.13(5) of the Act;
  - c) the acceptance by the parties of the entitlement of the plaintiff to withhold contra/offset amounts.
  - d) the finding Mr Weyland as to the value of the contra/setoff items.

**The principles**

- 11 The steady progression of case law dealing with the Act continues to inform the proper approach to statutory construction and to natural justice issues of the type raised by applications similar to the present application. Most recently a general overview of those principles is to be found in **Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd** [2006] NSWSC 205 at 10.
- 12 A particular feature of the materials presently before the Court concerns the careful and informed drafting of the second adjudication application. It is unnecessary to do more than to note that this application not only summarised the content of the application, the nature of the project and the relevant contract, but that these submissions included some 15 pages of careful reasoning dealing with the following matters:

**Validity of Payment claim**

- Classic's submissions
- Validity of the Payment claim
- The Reference Date
- The Due Date
- Last Date to Lodge Adjudication Application
- The Payment Claim includes previously certified amounts

**Adjudicator's jurisdiction**

- The Requirements for a Valid Determination
- What constitutes a bona fide attempt by the Adjudicator?
- Statutory Declarations in support of Application
- Requirement of a Valid Adjudication Application and Response
- Classic's Entitlement to Rely upon Statutory Declarations in support of Application
- Limitation on Adjudicator's Jurisdiction
- Jurisdiction of Adjudicator in light of decision of **John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors** [2004] NSWSC 258 ("the John Holland decision")
- Jurisdiction to make a Determination having regard to s 13(4) of the Act
- What constitutes a Valid Payment Schedule?
- Submissions in respect of s22(4) of the Act

**The Payment Schedule**

- Summary of Submissions
- Variation Assessment
- Backcharges
- Reply to Payment Schedule
- Submissions in Relation to S22(4) of the Act
- The *Rothnere* Decision
- In the alternative s22(4) does not apply because there has been a "change"

**The differences in the payment claims**

- 13 It is first appropriate to note the relevant differences between the first and second payment claims:
  - i. The reference date:
    - a) for the first payment claim was 2 July 2005;
    - b) for the second payment claim was 2 February 2006.
  - ii. The amount claimed for the variation for "*touch up building stage 2*":
    - a) by the first payment claim was \$616, including GST;
    - b) by the second payment claim was \$720, excluding GST;

- iii. The amount claimed for the variation for “repaint external texture”:
  - a) by the first payment claim was \$77, including GST;
  - b) by the second payment claim was \$90, excluding GST;
- iv. The amount claimed for the variation for “repaint inside unit”:
  - a) by the first payment claim was \$77, including GST;
  - b) by the second payment claim was \$90, excluding GST;
- v. The amount allowed for defects and backcharges claimed by the plaintiff:
  - a) by the first payment claim was nil;
  - b) by the second payment claim was \$10,156.42, excluding GST.
- vi. The amount allowed for retention monies to be held for the duration of the defects liability period:
  - a) by the first payment claim was nil;
  - b) by the second payment claim was \$6,912.50, excluding GST.
- vii. The total amount claimed:
  - a) by the first payment claim was \$68,051.95;
  - b) by the second payment claim was \$49,496.38.

**General Matters concerning sections 8 and 13 of the Act**

- 14 Section 8 of the Act provides that on and from each reference date under a construction contract, a person who has undertaken to carry out construction work or provide related goods and services is entitled to a progress payment.
- 15 In this case, the reference date for a payment or progress claim was a date determined by or in accordance with the terms of the contract (clause 34 and the schedule to the contract).
- 16 The first defendant was a person who was or who claimed to be entitled to a progress payment as and from 2 February 2006, being the relevant reference date for the payment claim submitted on or about 27 February 2006 (per section 13(1) of the Act).
- 17 The payment claim submitted pursuant to actual or claimed entitlement to a progress payment complied with section 13(2), (3) and (4) of the Act.
- 18 As was held in *Brodyn*:
  - a) successive payment claims do not necessarily have to be in respect of additional work (per section 13(6); paragraph [64]);
  - b) 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 for the adjudicator to decide (per paragraph [66]);
  - c) questions as to whether the document complies in all respects with the requirements of the Act can involve doubtful questions of fact and law and the validity of a determination does not turn on answers to questions of this kind (per paragraph [66]).

**Parameters of the payment claim, payment schedule and the respective submissions**

- 19 The payment schedule in answer to the second payment claim noted:
  - i. the claim as the “Adjusted Final Payment Claim”;
  - ii. the claim as received on 28 February 2006;
  - iii. the due date for payment as 14 March 2006.
- 20 The relevant reference date for the entitlement [or claimed entitlement] to a progress payment asserted by the second payment claim was 2 February 2006, as stated in the adjudication application and determined by or in accordance with the terms of the contract (clause 34 and the schedule to the contract).
- 21 The plaintiff asserted that second payment claim was issued in respect of the same reference date as the first payment claim because the second payment claim was “only different in a cosmetic sense” and “ostensibly (sic) the same as the claim considered by Adjudicator Weyland on 6 September 2005” (per paragraph 1.4 of its adjudication response).
- 22 In its submissions by way of the adjudication response, the plaintiff asserted that the adjudicator: “must find the value of the construction work claimed under the subject payment claim [i.e. the payment claim submitted on 27 February 2006 contingent upon the reference date of 2 February 2006] to be the same value as determined by Adjudicator Marcel Weyland in his determination dated 6 September 2005, namely Nil, by operation of s.22(4) of the **Building and Construction Industry Security of Payment Act**” (per paragraph 1.1 of its adjudication response).

**Precise content of particular documents**

- 23 There are a number of very close matters for consideration as to the precise content of the second payment schedule and the second adjudication response.
- 24 One such issue concerns whether or not a letter of 9 March 2006 was part of the second payment schedule. The letter was in the following terms:  
“Re: Metro Stage 3–5 Queens Street, Rosebery  
Subcontract: Painting  
Dear Sir,  
Reference is made to your payment claim dated 27th February 2006, received at our office 28th February 2006, in relation to the Subcontract Works for painting at the abovementioned project. We note this claim is a payment claim

submitted under the **Securities of Payment Act 1999**, and subsequently provide a payment schedule, attached herewith, in response to the claim.

We have based our payment schedule on our understanding that the items listed in this claim, in particular items listed under '**Variations**', represent the same items listed in your previous claim dated 23/06/05, numbered 2005/final, and although the description of the claims have been simplified, they represent the same matters as previously claimed. We are therefore of the opinion that there are no new items that you are claiming under this claim, and it is a re-submission of the previous claim with revised values." [emphasis added]

- 25 Ex facie the letter did not purport to be 'the payment schedule'. It only referred to that schedule. Dealings with the Act are technical in the extreme for reasons concerned with the fast track approach taken by the Act. There is no time for argument over what is and is not part of a payment schedule. In my view the letter of 9 March 2006 was not part of the second payment schedule.
- 26 That the second adjudicator regarded the letter as forming part of the second payment schedule may be understandable for the simple reason that the adjudication application [which enclosed many documents including the second payment schedule] happened to include the letter behind the tab which enclosed the second payment schedule. However a reading of the letter would itself make plain that it simply was not part of the second payment schedule.

#### **Dealing with the issues**

- 27 The defendant has submitted that s 22 (4) of the Act does require a subsequent adjudicator to assess:
- i. whether or not an adjudicator has, in determining an earlier adjudication application, in accordance with s 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.
  - ii. if affirmative to i, where the subsequent adjudication application involves determination of the value of that work or of those goods and services, to do the work or the goods and services the same value as previously determined, unless the claimant or respondent satisfies the subsequent adjudicator that the value of the work or the goods and services has changed since the previous determination.
- 28 The issue raised by i is one of the proper construction of s 22 (4).
- 29 In my view the proper construction of s 22(4) requires a subsequent adjudicator to treat an *attempt* by an earlier adjudicator to determine the value of any construction work or related goods and services, as having been successful, and as having been compliant with s 10.
- 30 The matter is one of impression taking into account the whole of s 22 [and indeed taking into account the whole of the Act and its purposes as generally now chronicled in the decisions earlier referred to]. The legislation properly construed does not authorise a subsequent adjudicator to act in fashion akin to hearing an appeal from an attempt by an earlier adjudicator to determine the subject values in accordance with s 10.
- 31 As will appear from what follows the second adjudicator erred in his holding that the initial adjudicator had not valued the respondent's "contra-charges" in accordance with section 10 of the Act.
- 32 Section 10 (1) deals with construction work carried out or undertaken to be carried out under a construction contract and the mode of valuing such work. It is clear that the estimated cost of rectifying defective work may be an integer in the valuation exercise.

#### **The approach taken in the second determination**

- 33 Subparagraph 3.6.9 of the second determination was in the following terms:
- 3.19 *The previous determination canvasses issues concerning the Respondent's claim for "Contra-Charges", but does not refer to any particular item that the Respondent claims in respect of this matter. Rather, Mr Weyland provides a totality figure which in all respects seems ambit and is in relation to a purported estimate for the completion of defect rectification.*
  - 3.20 *In my view, Mr Weyland's determination concerning the Respondent's "Contra-Charges does not provide any conclusive finding in respect of a value of the work, albeit setoffs or not. I consider that Mr Weyland did not value the Respondent's "Contra-Charges in accordance with section 10 of the Act. Therefore, I am satisfied that I am not bound by section 22(4) of the Act in respect of determining a value that was apparently not there.*
  - 3.21 *If I am wrong in this view, I consider that Mr Weyland determined that the Respondent was entitled to a value of \$15,000 in respect of its "Contra-Charges". The Respondent has now conceded to the value changing in respect of the "Contra-Charges" previous to this determination. I further accept the Respondent's concession on the basis of the material before me. I am therefore satisfied that I can appropriately determine a value different to the value of the previous determination.*
  - 3.22 *I determine either way that section 22(4) of the Act is not restrictive upon me insofar as determining the same value as the previous determination in relation to the "Contra- Charges".*
- 34 Notwithstanding that the second adjudicator had erred in his finding that the initial adjudicator had not valued the plaintiff's contra charges in accordance with s 10 of the Act, the second adjudicator was entitled to give the work a *different* value to that previously determined if either of the parties satisfied the adjudicator that the value of the work had changed since the previous determination. That is precisely what here occurred. The second adjudicator considered that the value of the contra charges for alleged defects had changed since the previous

adjudication. Not only was he correct in this finding but the second adjudication response, upon which he was entitled to rely, had expressly conceded that the value of the respondents contra charges had changed subsequent to the initial adjudication.

- 35 Each of the following submissions by the defendant are of substance and are adopted:
- i. The adjudicator plainly considered the various submissions and contentions advanced by the plaintiff in respect of the previous determination dated 6 September 2005.
  - ii. The adjudicator had regard to the previous adjudication even though, as a matter of fact, it *had not* been raised by the plaintiff in its payment schedule. The adjudicator was concerned to ensure natural justice and to have regard to all relevant matters, howsoever he came to know of them (see paragraph 3.2 of the adjudication).
  - iii. The adjudicator determined, in accordance with his function and power, that the value of the contract works and all of the variations claimed by the first defendant had not changed since the previous adjudication and therefore allowed the same amount as determined by the previous adjudication (see paragraphs 3.8 to 3.18 of the adjudication).
  - iv. The adjudicator determined, in accordance with his function and power and the submissions of the plaintiff, that the value of the “*contra charges*” (i.e. backcharges for alleged defects), had changed since the previous adjudication and therefore he was not bound to allow the same amount as determined by the previous adjudication (see paragraphs 3.7, 3.8, 3.19 to 3.22 of the adjudication).
  - v. It is clear upon a reading of the whole of the determination of the adjudicator that he considered the provisions of section 22, sought to afford natural justice to the parties and bona fide sought to consider all matters relevant and raised by the parties.
  - vi. Further, the adjudication plainly comprises a thorough and detailed analysis of the issues raised by the parties, including the matter of the previous adjudication. The adjudicator gave careful consideration to the matter of the previous adjudication.
  - vii. An oversight in respect of some provision of the Act or a particular submission only renders an adjudication determination void where it demonstrates “*that the adjudicator’s oversight results from a failure overall to address in good faith the issues raised by the parties*” (*Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1, paragraph [57]).
  - viii. Where there is no express reference made in the reasons to any particular provisions of the Act or of the contract, notwithstanding the close and careful consideration of the matters raised by the adjudicator, it may legitimately be assumed that, in examining the payment claim, the adjudication application and any supporting material for a fatal flaw manifestly apparent on their face, the adjudicator has found none (*Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1, paragraphs [66] and [68]).
  - ix. In this case, any alleged “oversight” or lack of express reference in respect of section 13(5) of the Act does not demonstrate any failure to *bona fide* exercise the function and power of the adjudicator under the Act given that:
    - (a) the plaintiff did not assert any “bar” or invalidity by reference to section 13(5) of the Act;
    - (b) the adjudicator thoroughly and carefully addressed the issue of the previous determination in the context and course of exercising his power and function under the Act, such that it cannot be concluded “*that the adjudicator’s oversight results from a failure overall to address in good faith the issues raised by the parties*”.
- 36 In relation to the matter dealt with in ix (a) it is appropriate to interpolate that:
- i. the defendants supplementary submissions had included (at [16]) the following: “*The plaintiff never asserted that the adjudicator did not have jurisdiction to determine the payment claim by adjudication under the Act by reference to section 13(5) or any other matter – the plaintiff submitted only that the adjudicator was bound by operation of section 22(4) to allow the same amount in respect of the claim.*”
  - ii. During oral address Mr Kalyk, counsel appearing for the plaintiff, was asked whether the defendants above submission was in dispute. His answer [transcript 18 .33] was as follows: “*We accept we didn’t refer to 13(5) in its terms, but we don’t accept that we didn’t refer to the facts which trigger a reference to 13(5) and the necessity that it be considered*”
- 37 Section 14 (3) provides that if the scheduled amount is less than the claimed amount, the payment schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent’s reasons for withholding payment. However once it is clear that the second payment schedule did not include the letter of 9 May 2006 which has been set out above, such basis (if any) as may have been put forward as grounding the plaintiff’s claim to a denial of natural justice, falls away completely. For that reason it is strictly unnecessary for the Court to treat with the question of whether or not, had the payment schedule referred to s 13 (5), the adjudicator would have been required to deal [in fashion otherwise than he did], with the plaintiffs adjudication response submissions concerning the various contra charges.

#### **Natural justice**

- 38 Each of the following submissions put by the defendant is of substance and is adopted:
- i. First, the plaintiff was allowed the opportunity to make further submissions on all matters raised in the payment claim and the submissions in support of the adjudication application. It did so by the adjudication response served on 30 March 2006.
  - ii. Secondly, the first defendant never “*recognised that a new matter had been raised by it*” in its adjudication application.

- iii. Thirdly, the plaintiff did not raise the matter of the previous determination in its payment schedule, as stated at paragraph 3.28 of the first defendant's submissions in support of the adjudication application.
- iv. Fourthly, the first defendant submitted to the adjudicator that the previous adjudication had not valued the asserted backcharges at paragraphs 4.14 to 4.20 of the submissions in support of the adjudication application. The plaintiff answered these submissions at paragraphs 3.28, 3.29 and 4.14 to 4.20 of its submissions by way of an adjudication response. A reading of these paragraphs makes this clear.
- v. Fifthly, the plaintiff had no entitlement to make further submissions to the adjudicator as to the determination upon the plaintiff's claims for "*contra charges*" in circumstances where:
  - a) the first defendant had raised the matter of the previous adjudication and its status in the context of the adjudication upon the second payment claim;
  - b) the plaintiff had already been given, and taken, the opportunity to put all of its submissions upon these matters by its adjudication response; and
  - c) certain submissions as to the "*contra charges*" were not accepted by reference to section 20(2B) of the Act, such that further submissions would have otiose in any event.

#### **Ultimate finding**

- 39 The finding is that the adjudicator has exercised the function and power as required by the Act in the determination of the adjudication application.
- 40 The finding is that the adjudicator thoroughly and carefully addressed the issues and matters raised by the parties such that it cannot be concluded "*that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties*".
- 41 Further, the alleged "*oversight*" concerns the validity of the payment claim pursuant to section 13(5) in circumstances where:
  - i. that provision of the Act was never mentioned by the plaintiff in its payment schedule or adjudication response;
  - ii. it was never suggested that 2 February 2006 was not a proper and valid referenece date pursuant to section 8 of the Act and clause 34 of the contract;
  - iii. it was never suggested that the payment claim was invalid or that there was a "*bar*" to any determination of the payment claim by the adjudicator.

It is appropriate to note in this connection the observations made by Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [46] to the effect that it is open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar as for example that service of the claim is prohibited by s 13 (4) or (5). As his Honour observed a respondent to a payment claim may have reason for electing not to raise such a defence. His Honour continued:

*"48 In my opinion, the scheme of the Act in general and of s 13 and s 14 in particular requires that a defence in bar to a payment claim founded on s 13 (4) or s 13 (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s 15 (4) of the Act."*

- 42 There is no substance in the abuse of process claim. The circumstances are quite different from that which would obtain in the event that a claimant served more than one payment claim in respect of each reference date under a construction contract and/or proceeded following one determination, to serve precisely the same payment claim and to then seek to have a competing determination by a new adjudicator.
- 43 The adjudicator has properly considered each and all of the matters which inform the exercise of function and power under the Act, as set out in section 22(2) of the Act or has *bona fide* addressed the requirements of subsection 22(2) as to what is to be considered (*Brodyn* at [56]).

#### **Short minutes of order**

- 44 The parties are to bring in short minutes of order on which occasion costs may be argued.

Mr F Kalyk (Plaintiff) instructed by KQ Lawyers (  
Mr F Hicks (First Defendant) instructed by Kreisson Legal