JUDGMENT McDOUGALL J. New South Wales Supreme Court Equity Division. Friday 4 August 2006

1 The plaintiff (Biseja) carried out a number of property development projects in the region north of Sydney from about 2001 to 2005. The builder on at least three of those projects was the defendant (NSI). At least at the commencement of that business relationship, Mr Malcolm Downie of Biseja and Mr Emade Semaan of NSI were brothers in law.

2 This dispute relates to a project known as the North Entrance Stage 2 Project. NSI's case is that it agreed with Biseja to perform the building work at cost and agreed separately to provide project management services for a fee of 10 percent of the cost of the building works. NSI says further that it was agreed between it and Biseja that the fee could be satisfied by the transfer of three units in the completed development.

3 The factual background suggests that somewhat similar arrangements had been entered into between NSI and Biseja in relation to something called the Swansea Project and something called the North Entrance Stage 1 Project. It is, in any event, NSI's case that this was so.

4 Biseja and NSI fell into dispute in relation to the North Entrance Stage 2 Project and NSI made a claim on Biseja for payment of the Stage 2 project management fee. Whatever else may be in dispute in these proceedings (and it would appear that much is) it is, I think, common ground that the project management services that NSI claims to have provided to Biseja on the North Entrance Stage 2 Project would be "related goods and services" for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 (the Act). NSI's claim was a payment claim for the purposes of the Act.

5 Biseja did not provide a payment schedule in relation to NSI's payment claim. Accordingly, NSI filed an adjudication application. Biseja provided neither a payment schedule (the opportunity to do which it had under s 17(2)(b) of the Act), nor an adjudication response.

6 Mr Robert Hunt (the adjudicator) was nominated as adjudicator and accepted the appointment. He gave his determination on 7 June 2006. He found that NSI was entitled to be paid $1,774,494, compared to its claim of $2,268,095.08 (both inclusive of GST).

7 Biseja's case both before the adjudicator and in this Court is that the Act did not apply to the agreement relied upon by NSI for the provision of project management services. In particular, Biseja relied on s 7(2)(c) of the Act, which relevantly provides that the Act does not apply to: *"a construction contract under which it is agreed that the consideration payable for ... related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of ... the related goods and services supplied."*

8 Thus, Biseja submits, the determination was defective in a fundamental respect, and void, having regard to the decision of the Court of Appeal in ***Brodyn Pty Limited v Davenport*** (2004) 61 NSWLR 421. It will be recalled that Hodgson JA, who gave the leading judgment in that case (Mason P and Giles JA agreeing), said at 441 [52] that for a determination to be valid, *"it must satisfy whatever are the conditions laid down by the Act as essential ..."*. At 441 [53], his Honour identified the first of those *"basic and essential requirements"* as being "*the existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8)."*

9 It is apparent from the determination that the adjudicator was alive to, and turned his mind to, the issue under s 7(2)(c). He addressed this in para 39 of his determination, saying:

"In particular, the fact that the parties agreed that the fee may be paid by the transfer of units in the North Entrance [Stage 2] Project does not mean that the consideration payable is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied (see section 7(2)(c) of the Act)."

10 Mr Corsaro SC, who appeared for Biseja, submitted that the finding made by the adjudicator in para 39 was ambiguous. On one view, he submitted, it might be read as a finding that the agreement was for a consideration of 10 percent of the building cost, that could be acquitted (either completely or pro tanto) by the transfer of three units. Alternatively, he submitted, it could be read as a finding that there was an agreement for a consideration of three units. He submitted that the first view of what the finding was would not have been open to the adjudicator on the facts, and that the second view of it would mean that the agreement for project management services was caught by s 7(2)(c).

11 The only material before the adjudicator was that provided by NSI. The adjudicator referred to a statutory declaration dated 9 June 2006 made by Mr Semaan on behalf of NSI. He set out substantial extracts from that statutory declaration in para 34. It is I think apparent that he accepted, for whatever it proved, what Mr Semaan said; and indeed, given as I have said that there was no material in opposition, it would have been strange if he did not do so.

12 Mr Semaan's evidence, as recounted by the adjudicator, commenced with discussions which apparently took place in about 2001, when Mr Semaan and Mr Downie (the principal of Biseja) agreed that NSI would do building work at cost and would, in effect, recover its profit as a project management fee of 10 percent of the cost of the building works.

13 Mr Semaan then said, in relation to what was known as the Swansea Project, that the 10 percent fee of $590,000 was agreed to be payable by a transfer to NSI of one of the units in that project.

14 Mr Semaan's evidence then turned to the North Entrance Stage 2 Project. Mr Semaan said in substance that he referred back to the agreement made in about 2001 for building work to be done at cost and a 10 percent fee

to be recovered as project management services. He referred to further discussions, in February 2004, in which he says Mr Downie confirmed that arrangement and said, *"Also, I will give you three (3) units to the value of 10 percent of the contract sum. This 10 percent will represent your management fee."* Mr Semaan said that he accepted this.

15 Mr Semaan said that that agreement was re-confirmed in April or May 2004 when Mr Downie said, *"As we agreed, I will give you three (3) units to the approximate value of $1,471,600. This will represent your management fee."*

16 Mr Semaan referred to further discussions to the same effect in about June 2004, and to discussions that he had with an officer of the Commonwealth Bank (that bank apparently funding the project) to the same effect. Thus, Mr Semaan concluded:

"Malcolm had agreed that he would give NSI three (3) units that would be equivalent to the 10 percent management fee."

17 There was then some discussion about the units nominated by Mr Downie as the ones to be transferred to NSI. Mr Semaan said that he considered that those units did not represent 10 percent of the construction cost, and that Mr Downie said that he would need to select units that did.

18 Against that background, the adjudicator stated the following in para 36 of his determination:

"*36. I am satisfied, from the paragraphs of Mr Semann's statutory declaration extracted above, and the documents referred to in those paragraphs, that:*

(1) In 2001, there was an oral agreement between Mr Emade Semann and Mr Malcolm Downie for the provision of project management services by the Claimant to the Respondent in respect of development projects to be undertaken by the Respondent, for which the Respondent would pay the Claimant a fee of 10% of the construction cost of the particular project plus GST.

…

(5) Pursuant to the oral agreement in 2001, the Claimant and the Respondent further agreed on about 23 February 2004 that the Claimant would provide project management services in respect of construction of Stage 2 of the North Entrance Project.

(6) It follows from (1), (4) and (5) above that the ***"Management Agreement"*** *in respect of the North Entrance Project, to which the Payment Claim relates, was made orally in 2001 (at some time relatively shortly before 2 March 2001), on or about 5 February 2002 and on or about 23 February 2004.*

…

(9) The agreement to provide project management services in respect of Stage 2 of the North Entrance Project was in addition to a written building contract between the Claimant and the Respondent for performance of the building works involved in Stage 2 of the North Entrance Project, a copy of which was provided behind Tab 3 in the Adjudication Application in matter ADJ10267. In that building contract, the ***'work to be done at the site'*** *is described as* ***'construction of seventy nine (79) units over basement parking'****."* *(emphasis in original)*

19 The adjudicator concluded that the project management services to be provided were related goods or services. As I have said, the parties do not contest this.

20 The adjudicator turned to the s 7(2)(c) question in para 39, the essence of which I have already set out.

21 In my view, it is plain that the adjudicator found that the project management fee (ie, the consideration for the related goods and services) was to be quantified at 10 percent of the construction cost. That is apparent from what he said in para 36(1) and (6). Thus, when he said in para 39 "*that the parties agreed that the fee may be paid by the transfer of units",* he was using the word *"paid"* to mean discharged or acquitted. The fee was not anything other than the 10 percent; the three units that might constitute its acquittal (in whole or in part) were the discharge of the obligation, not its quantification.

22 In other words, I think, para 39 is to be read in the first of the senses suggested by Mr Corsaro, as referred to above.

23 If that is a correct reading of para 39, then it follows inevitably that the adjudicator was correct in concluding that the agreement for provision of project management services was not caught by s 7(2)(c) of the Act. That is because the parties agreed that the value of those project management services was 10 percent of the cost of the building works. It matters not that they agreed that this value could be paid in a particular way.

24 The question then is whether it was open to the adjudicator to reach this factual conclusion. In my view, it was. It was open to him to take into account both the earlier dealings between the parties (particularly bearing in mind Mr Semaan's unchallenged evidence that the agreement for the Stage 2 Project was part of a connected series of agreements and that the parties in substance regarded their relationship as that first established in 2001). It was also, in my view, open to the adjudicator to conclude (as I have found he did), in para 39 of his determination that the agreement was clearly one for a 10 percent fee, but payable, whether in whole or in part does not for present purposes matter, in kind. Indeed, I think, on the material to which the adjudicator referred coming from Mr Semaan's statutory declaration, any contrary finding would have verged on the capricious.

25 On that basis, it must follow that the adjudicator did not fall into reviewable error in concluding that the contract between NSI and Biseja for the provision of project management services on the North Entrance Stage 2 Project was vitiated by error of a kind that would enable this Court to intervene.

26 I therefore do not find it necessary to consider the other bases on which the parties suggested that the decision of the adjudicator might be, as the case may be, assailed or upheld. In particular, the conclusion to which I have come makes it unnecessary to consider Biseja's alternative formulation of its case that the adjudicator displayed a want of good faith (in the ***Brodyn*** sense) in coming to the conclusion to which I have referred.

27 Although this matter came before me by way of notice of motion, suggesting that the application should be treated as interlocutory, the parties agreed that it was appropriate to deal with the precise question, with which I have dealt, on a final basis. Mr Corsaro said, I think correctly, that the point was not going to get better by repetition at a subsequent hearing. If the parties remain of that view, then the appropriate course is to formulate the question that I have decided as a separate issue, to answer it in the manner that I have indicated, and to order that the amended notice of motion filed in Court today be dismissed. However, if the parties on reflection think that for some reason that course may be inappropriate, they will need to address me on the relief that should follow from the conclusions that I have expressed in these reasons.

28 Before I hear the parties on costs, I will note that one of the prayers for relief in the amended notice of motion sought an order in the nature of *certiorari* to quash the adjudicator's determination. Mr Corsaro made a formal submission that in this respect the decision in *Brodyn* was wrongly decided. For obvious reasons, I can do no more than record that submission.

29 There being a concern that the narrow ground on which I have decided the particular point may create any unintended estoppel in relation to the balance of the issues in the proceedings, the parties are agreed that, to give effect to my reasons, I should finalise the matter with which I have dealt as follows, and I will do so:

(1) I note that the plaintiff, by senior counsel, undertakes to the Court that it will not seek to advance any other challenge to the determination of the adjudicator.

(2) I order that the amended notice of motion filed in Court on 4 August 2006 be dismissed.

(3) I order the applicant to pay the respondent's costs of that notice of motion.

(4) I order that the injunction granted by Bergin J on 27 July 2006 whereby the defendant was restrained from taking any steps to enforce the adjudicator's determination be dissolved.

F C Corsaro SC (Plaintiff) instructed by L Capolupo & Co
G A Moore/F P Hicks (Defendant) instructed by William Cotsis & Associates