Broad Construction Services (NSW) P/L v Michael Vadasz [2008] Adj.L.R. 08/21

JUDGMENT : McDOUGALL J : Supreme Court New South Wales. Equity Division, T&C List. 21st August 2008

1 The plaintiff (Broad) and the first defendant (Mr Vadasz) made a subcontract on 6 September 2007. By that subcontract Mr Vadasz agreed to design, supply and install piling for a project at Kempsey known as the Riverside Plaza Supermarket Project. That contract has now been executed. Mr Vadasz claimed to be entitled to an amount of $534,600 for costs (including, I think, delay costs) associated with what he says were latent conditions on the site. Broad disputed that claim. It was referred to adjudication under the provisions of the *Building and Construction Industry Security of Payment Act* 1999 (the Act). The second defendant (the adjudicator) gave a determination in favour of Mr Vadasz. Broad complains that the adjudicator's determination is void because, it says, he denied it natural justice or, alternatively, failed to exercise the powers given to him by the Act in good faith. The complaint is based upon the adjudicator's refusal to consider, as a ground for rejecting the claim, a report made by Douglas Partners, a firm of geotechnical engineers, on 24 April 2008.

The issues

2 The essential issue is, as I have said, whether the adjudicator denied an appropriate measure of natural justice to Broad because he failed to consider the Douglas Partners' report. The adjudicator took the view that he could not consider the report because it advanced reasons for withholding payment that had not been included in Broad's payment schedule.

3 The issue has two aspects. One is a question of principle. The other is a question of fact.

4 The issue of principle is whether, assuming that the adjudicator were wrong in the view that he took, his erroneous decision on the point invalidated the determination. In my view, that issue of principle turns on, and must be resolved adversely to Broad by, the decision of the Court of Appeal in ***John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*** (2007) 23 BCL 205. I shall explain later why this is so.

5 The second issue is one of fact. It is, whether the adjudicator was correct, or erroneous, in reaching the view that he did about the Douglas Partners' report. It is not necessary to consider that issue of fact. I am, however, prepared to proceed on the basis that the Douglas Partners' report contained material that would have been relevant to, and might have influenced, the adjudicator's consideration of the latent conditions claim had he decided that it was open to Broad to rely upon that report.

Background

6 The developer of the project was a company known as Parmac Property Pty Limited (Parmac). Parmac entered into a head contract with Broad for the construction of the project. As I have said, Broad subcontracted the design, supply and installation of the piling works to Mr Vadasz. Mr Vadasz carried on business under the name of "*Australasian Piling Contractors*".

7 Parmac had retained Douglas Partners to carry out a geotechnical investigation of the site. In May 2007 and thereafter during the life of the project, Douglas Partners reported to Parmac about various geotechnical matters. Those reports were provided to Mr Vadasz. There is no doubt that they were relevant to the work to be undertaken by Mr Vadasz. That is because they provided information about site conditions that was relevant to the design of a suitable piling system.

8 Between October and December 2007, Mr Vadasz, having carried out his work of design, installed a large number of major and minor piles: the distinction apparently lying in the degree of loading that the piles were intended to carry. In the course of performing that work, Mr Vadasz formed a view that the site conditions were relevantly different to those that could reasonably be inferred from the material contained in the reports and other information provided by Douglas Partners. He thus made a latent site conditions claim on 23 January 2008. That claim was rejected by the superintendent on 5 February 2008. Upon the claim being rejected, Mr Vadasz made the payment claim to which I have referred. Broad responded by a payment schedule which assessed the amount of the claim at "*nil*".

The legislative scheme

9 There is no doubt that the subcontract between Broad and Mr Vadasz was a "*construction contract*" to which the Act applied. Thus, by s 8, Mr Vadasz had a right to progress payments, which right he could enforce through the mechanism set out in Pt 3 of the Act.

10 By s 13 of the Act, a person who is or claims to be entitled to a progress payment may serve a payment claim. By s 14, a person on whom a payment claim is served may reply to it by providing a payment schedule to the respondent. Where there is a dispute constituted by the payment claim and payment schedule (i.e. where the scheduled amount in the latter is less than the claimed amount in the former), then by s 17 of the Act the dispute may be referred to adjudication. That is done by the making of an adjudication application. If an adjudication application is made, then, by s 20, the respondent may lodge with the adjudicator an adjudication response.

11 Section 20(2B) of the Act provides that:

The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

12 Section 22(1) of the Act sets out the matters that the adjudicator is to determine. Section 22(2) sets out the matters that the adjudicator is to consider in making the determination. It is plain that s 22(2) is mandatory, both in requiring the adjudicator to consider the five matters referred to in paras (a) to (e) (the last only if it is factually relevant) and in preventing the adjudicator from going beyond those matters.

13 Section 22(2)(c) requires the adjudicator to consider the relevant payment claim "*together with all submissions (including relevant documentation) that have been duly made...in support of the claim*".

14 Section 22(2)(d) requires the adjudicator to consider the relevant payment schedule (if any) "*together with all submissions (including relevant documentation) that have been duly made...in support of the schedule*".

The authorities

15 In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421, Hodgson JA (with whom Mason P and Giles JA agreed) considered what was required by the Act for there to be a valid and effective determination by an adjudicator. His Honour said at 441 [52] that if a document were to be an effective determination under the Act, "*it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination*". His Honour said that if the document did not satisfy those conditions, then it would not be a determination at all within the meaning of the Act and would be void.

16 His Honour set out at 441 [53] five "*basic and essential requirements*" which his Honour thought the Act laid down for the existence of an adjudicator's determination. Those requirements (which were stated in a non-exhaustive way) were:

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)).

17 At 442 [55] his Honour noted that in addition to the basic and essential requirements, the adjudicator must:

(1) make an attempt in good faith to exercise the powers given by the Act in a manner reasonably capable of reference to them and to the statutory objectives; and

(2) must give the parties in substance such measure of natural justice as the Act requires to be given.

18 Again, his Honour said, a failure to make an attempt in good faith to exercise the powers, or a substantial denial of the measure of natural justice required to be given, would mean that the determination was void.

19 At 442 [56] his Honour turned to the requirements of s 22(2) of the Act. He said that he did not think that compliance with those requirements had been made pre-conditions to the existence of authority to make a determination. That is because a number of those matters, including in particular the matters referred to in paras (c) and (d), "*could involve extremely doubtful questions of fact or law*". Thus, his Honour said, "*[i]t is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2) or bona fide addresses the requirements of s 22(2) as to what is to be considered*".

20 Section 22(2) of the Act was considered again by the Court of Appeal in ***John Holland***. The adjudicator in that case did not consider submissions on jurisdiction made by the respondent (RTA). He did not consider them because he took the view that they were not submissions "*duly made*" in support of RTA's payment schedule. The adjudicator in due course found in favour of John Holland and determined that it was entitled to receive a substantial sum of money. The primary judge concluded that the adjudicator had denied natural justice to the RTA. Accordingly, he concluded that the adjudicator's decision was void.

21 The first question considered by the Court of Appeal was whether the submissions in questions had been "*duly made*". Hodgson JA (with whom Beazley JA agreed) concluded that they were not duly made. His Honour dealt with this issue at 215 [29] and following and concluded at 217 [42] that "*the submission was in breach of s 20(2B) and was not duly made*".

22 Having reached that view, his Honour, nonetheless, turned to consider whether, on the assumption that the submissions had been duly made or otherwise were required to be considered, there was a denial of natural justice or a want of good faith in the ***"Brodyn"*** sense. It will be seen that his Honour's consideration at this point was obiter dictum, having regard to his conclusion that the submissions had not been duly made.

23 At 219 [55] his Honour looked at the requirements of s 22. He summarised it as requiring that an adjudicator "*consider the provisions of the Act, the provisions of the contract and submissions duly made*". His Honour said that if an adjudicator did consider those matters, then "*an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract or a particular submission*" would not invalidate the determination. His Honour said that there were two different ways of reaching that conclusion:

(1) an accidental or erroneous omission does not amount to a failure to comply with s 22(2) so long as the specified matters are addressed; or

(2) the intention of the legislature could not have been that a mistake of this kind should invalidate the determination.

24 At 219 [56] his Honour referred back to what he had said in ***Brodyn*** at 442 [56]: see at [19] above.

25 Thus, his Honour returned to the question at 220 [63]. He said that if the submissions in question had not been duly made, then "*plainly there was no denial of natural justice*". However, his Honour said even if the submissions had been duly made, there was still no denial of natural justice. That was because:

[t]he legislature plainly entrusts to the adjudicator the role of determining whether submissions are or are not duly made and thus of determining whether a submission contained in an adjudication response is one that should not be there because of the effect of s 20(2B). If an adjudicator addresses that question and comes to a conclusion that the submission was not duly made, I cannot see that the adjudicator has then failed to afford the measure of natural justice contemplated by the Act.

26 Basten JA, who agreed with Hodgson JA that the appeal should be allowed, gave separate reasons. His Honour did not consider whether the relevant submission was duly made. He turned, instead, to what he saw as a false premise in the argument underlying the RTA's position. His Honour said at 221 [71] that:

[t]he false premise is that the scope of the payment schedule and the identification of submissions "duly made" by the respondent in support of the schedule are matters to be objectively determined by this court. In my view they are not: they are matters to be determined by the adjudicator.

27 Thus, his Honour concluded in the same paragraph:

So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.

28 Against that background I turn firstly to the determination in this case and, secondly, to the argument as to its validity.

The determination

29 The determination was made on 7 May 2008. It is, on its face, a reasoned consideration of the claim and the reasons given in the payment schedule for opposing it. There is one peculiarity which perhaps should be mentioned but can then be set aside. In para 5 of the determination, the adjudicator noted that he had not been furnished with a copy of the payment claim. He concluded, however, that he could, nonetheless, proceed to determine the adjudication application. He said:

> *5. **Payment Claim** – Before moving to other matters it is appropriate to observe that neither party provided a copy of the Payment Claim in their submissions. I have closely considered this omission and have determined while it is unusual, it does not invalidate the application or compromise this determination. I have found this because neither party has an issue with the quantum claimed, the date of the claim, the validity of the service, that the claim was endorsed appropriately or any other matter. In summary, there is no issue between the parties as to the form of the Payment Claim, nor can I locate any requirement of the Act, in section 17(3) or elsewhere that requires that document to be provided to me.*

30 The adjudicator dealt with the Douglas Partners' report of 24 April 2008 in paras 9 and 10 of the determination. He noted that Douglas Partners had provided pre-construction geotechnical analysis. However, he said their report had not been given as part of a payment schedule and it seems to have been provided for the first time in the adjudication response. Thus, the adjudicator said, the report fell foul of s 20(2B). He noted in addition that to allow Broad to rely upon it would constitute a significant denial of natural justice to Mr Vadasz unless he were given an opportunity to comment and perhaps reply: something that the time frame within which adjudications were to be conducted would not allow. Thus, the adjudicator said, he had not considered the report.

31 I set out paras 9 and 10:

> *9. **Douglas Partners – Further report of 24 April 2008 –** The Adjudication Response includes a further specialist report of Douglas Partners. Douglas Partners are the firm that provided the pre construction geo technical analysis and are acknowledged experts in the field. That report however has not been provided as part of the Payment Schedule and appears to have been provided for consideration for the first time in the Adjudication Response. In my view this document is not a reason provided in the Payment Schedule and is precluded by section 20(2B). Additionally, were it to be considered it would be a significant denial of natural justice unless the Claimant was given the opportunity to comment and seek an expert appraisal of the report. This process is precluded by the time allowed for adjudications.*
>
> *10. I have not considered the report.*

32 Before moving to the submissions, I will say two things. The first is that the absence from the material given to the adjudicator of the payment claim was not relied upon as a ground of invalidity of the determination. Thus, it is unnecessary to consider whether s 22(2)(c) has anything to say in these circumstances.

33 The second is that although the adjudicator said in para 10 that he had not "*considered*" the Douglas Partners' report of 24 April 2008, I do not take that to mean that he had not read it. On the contrary, I think it is clear from para 9 that he had read it. He could not have reached the view that he set out in para 9 unless he had considered the contents of the report. I think that what the adjudicator was saying in para 10 is that he was not considering the report for the purpose of determining the claim.

Denial of natural justice

34 Mr Kostopoulos of counsel, who appeared for Broad, submitted that the adjudicator had denied natural justice to Broad because he had excluded from his consideration the Douglas Partners' report. Underlying that submission was the proposition that the report could be considered as a "*submission...duly made*" in support of the payment

schedule. It is to be noted that there is nothing in s 22(2) that requires an adjudicator to consider the adjudication response (or, for that matter, the adjudication application). Presumably, if those matters are to be considered, it must be because they are submissions, including relevant documentation, duly made in support of the payment schedule or the payment claim respectively.

35 As Hodgson JA pointed out in *John Holland* at 215 [31], the reference in s 22(2)(c) and (d) to "*duly made*" must be a reference back to s 20(2B). Thus, as his Honour says, "*[a] submission included in an adjudication response contrary to the requirements of s 20(2B) is not "**duly made**" within s 22(2)(d)*".

36 Accordingly, there could be no denial of natural justice if it were correct to regard the Douglas Partners' report of 24 April 2008 as something going beyond the reasons for non-payment advanced in the payment schedule. That, however, is a question of fact: the second aspect of the issue which, as I have said, I do not propose to consider. It is sufficient to proceed on the assumption, that I have said I will make, that the report in question was relevant to the arguments advanced by Broad, so that if the adjudicator were required to consider it and failed to do so, there would have been a significant denial of natural justice.

37 The immediate obstacle to Broad's position is the point established by the authorities to which I have referred: in particular, *John Holland*. That point is, of course, that it is a matter for the adjudicator to decide, in terms of s 22(2)(d), whether a submission has been "*duly made*" in support of a payment schedule. It is not a matter for the Court to determine on the basis of some objective test. Thus, unless that decision is to be regarded as incorrect or distinguishable, it governs the outcome of these proceedings.

38 For the reasons that I have given, I regard the relevant aspect of the decision in ***John Holland*** as obiter dictum. Nevertheless, when one considers that the decision is a reserved decision of the Court of Appeal and that the particular point attracted the support of all three members of the Court, I do not think that it is open to me to say that I need not follow it, simply because it is, on this point, obiter dictum. If the reasoning is incorrect - and to the extent that my view is relevant, I would respectfully say that it is not - that is a matter for the Court of Appeal and not for me.

39 Mr Kostopoulos submitted that the decision in ***John Holland*** could be distinguished. He noted that Hodgson and Basten JJA each talked in terms of the relevant question being whether submissions were or were not duly made (see Hodgson JA at 220 [63] and Basten JA at 221 [71]). However, Mr Kostopoulos submitted, in this case, the adjudicator had talked not of submissions duly made but of reasons "*precluded by s 20(2B)*."

40 To my mind, that is a distinction without a difference. As I have already observed, the concept of "*duly made*" in s 22(2)(d) is inextricably linked with s 22(2B). A reason for non-payment that is precluded by s 20(2B) cannot be a submission duly made in support of the payment schedule for the purposes of s 22(2)(d). Thus, the way in which the adjudicator expressed himself is simply stating an alternative formulation of the requirement that the submission be "*duly made*".

41 Indeed, I would go further and say that in my view the adjudicator directed himself correctly by referring back to s 20(2B). It was necessary for him to consider that subsection to determine whether the relevant report could be considered as a submission "*duly made*" in support of the payment schedule. He may have fallen into error had he not taken into account the requirements of s 20(2B).

42 Thus, on the principal point, I think that the outcome is, as I have said, governed by the decision in ***John Holland***.

43 Mr Kostopoulos referred to the adjudicator's fortifying reason given in para 9: that permitting Broad to rely on the report would deny natural justice to Mr Vadasz. This, he submitted, was error compounding error.

44 Firstly, for the reasons that I have given, I do not think that there was an error to be compounded. Secondly, I do not think that the consideration in question was itself erroneous. If the submission was not one duly made, then plainly a consideration of it could deny natural justice to Mr Vadasz, for the very reason given by the adjudicator.

45 Mr Kostopoulos submitted that the payment schedule, or submissions properly made in support of it, did articulate reasons for rejection of Mr Vadasz's latent conditions claim and that the Douglas report of 24 April 2008 did no more than give support to those submissions. Thus, he submitted the report was something that could (and indeed should) have been taken into account; and the failure to take it into account constituted a denial of natural justice.

46 In my view, that submission is no more than an attempt to frame, in different words, the question of whether or not it was open to the adjudicator to reach the conclusion that he did. In circumstances where the legislature has entrusted that function to the adjudicator and not to the Court, it would not matter if the submission were correct. It could still not lead to the conclusion that there had been what might be called a reviewable error in this case.

Conclusion and orders

47 Broad's attack on the validity of the determination fails. I make the following orders:

(1) Order that the summons be dismissed.

(2) Order the plaintiff to pay the first defendant's costs of the proceedings.

(3) Order that the amount of $310,313.27 paid into court by the plaintiff, together with interest thereon, be paid out to the first defendant.

(4) Order that the exhibits remain with the papers for twenty-eight days and thereafter they be dealt with in accordance with the rules.

A Kostopoulos (Plaintiff) instructed by Kreisson Legal : S Goldstein (First Defendant) instructed by CCS Legal Pty Limited