

JUDGMENT HAMMERSCHLAG J : Supreme Court New South Wales Equity Div. T&C LIST 13th December 2007

- 1 By summons dated 30 November 2007 the plaintiff (as Principal) moves for a declaration that a payment claim ("the payment claim") dated 13 September 2007 which the first defendant (as Contractor) made on the plaintiff under s 13(1) of the *Building and Construction Industry Security of Payments Act 1999* (NSW) ("the Act"), has not been referred to the second defendant (who is an eligible adjudicator) for adjudication under s 17(1) of the Act.
- 2 The matter was heard as a final hearing. Mr F Kalyk of counsel appeared for the plaintiff. Mr M Rudge SC, together with Mr D Weinberger of counsel, appeared for the first defendant. The second defendant did not appear. I was informed of matters which satisfied me that the position of the second defendant is neutral.
- 3 The factual circumstances which give rise to this controversy are as follows.
- 4 On 19 September 2005 the plaintiff and first defendant entered into a contract ("the contract") on terms including those embodied with amendments in General Conditions of Contract AS400-N1997 under which the first defendant, as Contractor, undertook to construct certain works for the plaintiff, as Principal, at a site at 39 Hawkesbury Road Springwood in the State of New South Wales, for a lump sum of \$11,790,958.00 exclusive of GST.
- 5 Clause 20 of the contract provides for the appointment of a Superintendent. Under that clause "the Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all aspects of the role and functions reasonably and in good faith". Simmat & Associates Architects Pty Ltd ("Simmat") was appointed Superintendent.
- 6 Clause 37 of the contract is entitled "Payment" and provides that the Contractor is to claim payment progressively. Provision is made for the submission of progress claims and cl 37(1) provides that "each progress claim shall be given in writing to the Superintendent...".
- 7 Clause 37.2 provides for the issue by the Superintendent to the Principal and the Contractor of Progress Certificates and imposes upon the Principal obligations to make payments in accordance with them. On 25 July 2007 the first defendant made progress claim number 21 addressed to Simmat and copied to the plaintiff.
- 8 On 8 August 2007 there was produced by Simmat a document entitled "Progress Claim 21 Payment Schedule" which commences with the following words:
"In reviewing progress claim 21 as received and attached (attachment FF) we have prepared this payment schedule in response to that progress claim".
The document consists of 14 pages plus tables and attachments.
- 9 On 13 September 2007 the first defendant made a further payment claim (progress claim 22). The claim on its face is stated to be "a payment claim made under the Building and Construction Industry Security of Payment Act 1999 (NSW)". It claimed \$3,217,002.02. The claim was submitted to Simmat.
- 10 On 24 September 2007 there was submitted to the first defendant on Simmat letterhead a document with the heading "Progress Claim 22 Payment Schedule" which commences with the following words:
"In reviewing Progress Claim 22 as received and attached (attachment 1) we have prepared this payment schedule in response to that progress claim. In preparing this payment schedule we have taken the following into account:"
The document consists of 23 pages plus tables and attachments and concludes as follows:
"The valuation of the works as completed is therefore assessed at \$11,688,386.45. Taylor Projects has been paid to date \$12,886,042.36 representing an over payment of \$1,197,655.91 and therefore no monies are due to this claim".
- 11 On 25 October 2007 the first defendant gave notice to the plaintiff in the following terms:
"We refer to our correspondence of 9 October and 23 October 2007 in respect of providing the Bucklands Convalescent Hospital ("Bucklands") with a notice under s 17(2) of the Building and Construction Industry Security of Payment Act 1999 [NSW] Act. This correspondence is intended to be a notice under s 17 (2) of the Act. We confirm that a Payment Plan was served on Bucklands under the Act (payment claim) and a progress claim (NO22) was served on the Superintendent under the contract, both on 13 September 2007. The payment claim was provided to Bucklands under s 13 of the Act and it was for the claimed amount of \$3,217,002.02 (including GST). The due date for payment has elapsed and no payment was received. Since Bucklands failed to provide a payment schedule in accordance with the Act, it follows that Bucklands has five (5) business days in which to provide a payment schedule to Taylor Projects Group Pty Ltd, namely on or before 1 November 2007. If Bucklands fails to provide a payment schedule or pay the claimed amount to us, we reserve our right to proceed to adjudication and seek a determination for the whole amount claimed plus interest and costs".
- 12 On 29 October 2007 the plaintiff responded to the 25 October 2007 letter in terms including the following:
"For reasons detailed in previous correspondence, Bucklands advises that:
1. *It did serve a Payment Schedule in response to progress claim number 22, within the time period prescribed for the service of the payment schedule under the Act.*
2. *Accordingly your notice given under s 17(2) is unnecessary and on that basis probably invalid.*
Notwithstanding and due to the dire consequences prescribed by the Act for not responding to your notice we now enclose our four (4) volume payment schedule by way of service. This document has been prepared by and on behalf of Bucklands, the named respondent on Taylor's payment claim 22 (NO)".

A document on Simmat letterhead dated 30 October 2001 headed "Progress Claim 22 Payment Schedule" was included. It ran to 25 pages plus tables and attachments.

13 Section 14(4) of the Act provides as follows:

"(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

14 Section 17(1)(b) of the Act provides as follows:

"(1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:

(a) ...

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount."

Section 17(2)(b) of the Act provides as follows:

"(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) ...

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice."

15 Section 17(3)(c) of the Act provides as follows:

"(3) An adjudication application:

(a) ...

(b) ...

(c) in the case of an application under section (1)(a)(i) - must be made within 10 business days after the claimant receives the payment schedule, and..."

16 Mr Kalyk put the following propositions:

a under s 17(1) of the Act the first defendant was only entitled to make an adjudication application if the plaintiff had failed to provide a payment schedule in response to the payment claim (that is progress claim number 22) within 10 business days of its date;

b the first defendant could only enliven the procedures in s 17(2)(b) of the Act if there had been no such payment schedule provided as contemplated by s 17(1)(b). More than 10 days elapsed after receipt of the payment schedule, being progress claim 22, before an adjudication application was sought to be made. Therefore it was no longer open for one to be made; and

c in the circumstances an essential pre-condition for the existence of the adjudicator's jurisdiction to make a determination had not been met and the adjudicator was without jurisdiction to do so: **Brodyn Pty Ltd t/as Time Cost and Quality v Davenport** (2004) 61 NSWLR 421; **Energetech Australia Pty Ltd v Sides Engineering Pty Ltd** [2005] NSWSC 1143.

17 Mr Rudge accepted that non-service of a payment schedule was a basic requirement under s 17(2)(b) of the Act and that the section only applied if there had been a failure by the "respondent" there referred to, to provide such a schedule within the time allowed by the Act. He accepted that if the plaintiff had (by virtue of the payment claim of 24 September 2007) provided a payment schedule the adjudicator here would not have jurisdiction.

18 However, he put that:

a whether the 24 September 2007 document was a payment schedule was a matter in dispute between the parties;

b the question whether it was or was not involved a dispute of fact; and

c on established authority the existence or otherwise of an essential pre-condition for jurisdiction on the part of a adjudicator is a matter for the adjudicator and not the Court.

19 He cited in support of his submissions the decision of McDougall J in **Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd** [2005] NSWSC 362 and the judgment of Palmer J in **Lifestyle Retirement Projects No 2 Pty Ltd v Paris Homes Pty Ltd** (2005) NSWSC 411.

20 Both **Brodyn Pty Ltd t/as Time Cost and Quality v Davenport** and **Transgrid v Siemens Ltd** (2004) 61 NSWLR 521 at 539 have established that an adjudicator's determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination.

21 It has been held that the existence or otherwise of essential pre-conditions to a valid claim, as well as determination of the parameters of the payment claim, are matters for the adjudicator not for objective determination by a court: **Bitannia Pty Ltd v Parkline Constructions Pty Ltd** (2006) 67 NSWLR 9; **Downer Construction (Australia) Pty Ltd v Energy Australia** [2007] NSWCA 49.

- 22 In *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* Palmer J considered that disputes whether a payment claim had been served within the time prescribed under the Act and whether a payment schedule had been served within the time prescribed by the Act were matters properly for the determination of an adjudicator. The present situation is to my mind analogous to that being considered there by his Honour.
- 23 The existence of a payment claim under the Act is clearly a jurisdictional requirement for an adjudicator to validly exercise the jurisdiction conferred under the Act. Palmer J, following McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*, held that whether such a fact existed was a matter within the competence of the adjudicator to determine.
- 24 Mr Kalyk cited the decision of Bergin J in *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554 where her Honour held that s 17(2) of the Act imposed a mandatory condition and that in the absence of fulfilment of it the adjudication application upon which it depended was a nullity. The situation there is in my view distinguishable from that here. There does not appear to have been any dispute before her Honour that the mandatory condition there had not been complied with.
- 25 In this case the defendant disputes that the 24 September 2007 document purporting to be a payment schedule is a payment schedule because, and only because, Simmat did not have authority to deliver it (or for that matter make it) on behalf of the plaintiff. It submits that this is a matter of fact. It no doubt includes matters of fact although the ambit of factual dispute is very narrow.
- 26 It also involves a question of law. However, in my view, the question here is a matter for the adjudicator to determine. If he fails to comply with a basic requirement of the Act in determining it or to afford natural justice or makes no bona fide attempt to determine it, the Court will intervene.
- 27 Mr Kalyk submitted that a consideration favouring the conclusion for which he contended, namely that the Court should determine here and now the factual and legal question of Simmat's authority, is to be derived from the provisions of s 15 of the Act which provides as follows:
- "(1) This section applies if the respondent:*
- (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and*
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.*
- (2) In those circumstances, the claimant:*
- (a) may:*
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant in any court of competent jurisdiction, or....".*
- 28 Support was to be derived from this provision, it was put, in that if the claimant exercised the option to move a court of competent jurisdiction for judgment in debt, the question (if there was a dispute) whether a payment schedule had been provided would be a matter of fact inevitably to be determined by the court. That may be so, but that is when the claimant opts for that procedure.
- 29 Here the claimant has opted for the adjudication procedure.
- 30 It is not appropriate (albeit that the matter was conducted on a final basis), for me to make any findings as to whether Simmat was authorised or not authorised on behalf of the plaintiff to deliver or make the payment schedule which is in dispute.
- 31 I consider, however, that it is appropriate to record the contentions which were put by Mr Rudge in that regard and to express a view on the law without intruding on the adjudicator's function to decide the matter for himself on the facts.
- 32 Mr Rudge put that the only basis upon which lack of authority on the part of Simmat was asserted was that it was not possible for it to have been clothed with authority on behalf of the plaintiff because Simmat held the office of Superintendent under the contract, a position which was inimical to it performing the function of an agent of one of the parties for the purposes of making or delivering a payment schedule.
- 33 It is clear that all other things being equal a principal may clothe an agent with authority to provide a payment schedule on the principal's behalf in accordance with the Act. So much is clear from *Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation* [2007] NSWCA 9 at 31 and following.
- 34 Mr Rudge relied on the decision of Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 in which a submission was made that a certificate by a Superintendent acting under provisions of a contract relevantly indistinguishable from those here was not a payment schedule for the purposes of s 14 of the Act. In that case the Superintendent, his Honour found, (at par 105) was not even aware of the payment claim. The facts are accordingly distinguishable. At par 107 of the judgment Einstein J referred to a submission made to his Honour in reliance on a passage in the decision of Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 at 50. The passage is to the effect that the better view is that when exercising certifying functions in respect of which the Superintendent must act honestly and impartially, the Superintendent is not acting as the owner's agent in the strict legal sense. However the question there being considered is not the question which arises here.

- 35 The question which arises here, it seems to me, is whether in the circumstances Simmat was exercising function under the contract. Whether it was or was not is a matter of fact. As a matter of law it does not seem to me that a person who is a Superintendent under a contract and who has certifying functions under it is incapable of being appointed as agent to respond to a payment claim under the Act.
- 36 In the circumstances, the summons is to be dismissed.

F. G. Kalyk (Plaintiff) instructed by KQ Lawyers

M.G. Rudge SC with D.S. Weinberger (Defendant) instructed by Avendra Singh Strati & Kam Lawyers