

Errol Investments P/L v Taylor Projects Group P/L, Ted Smithies, Philip Martin, Mediate Today P/L t/a Adjudicate Today

JUDGMENT : Windeyer J : New South Wales Supreme Court : 4th November 2005

- 1 In this matter by summons filed on 11 October 2005 the plaintiff seeks declarations that two adjudication determinations made pursuant to the Building and Construction Industry Security of Payment Act 1999 are void. The grounds on which this is argued is that, first, there was a denial of natural justice or procedural fairness on the part of each adjudicator and, secondly, that there was a failure to comply with s22(2) of that Act. Section 22(2) sets out the matters which the adjudicator is to consider in making his determination. These include under s22(2)(c): "The payment claim ... together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim." and (d): "The payment schedule together with all submissions that have been duly made by the respondent in support of the schedule."
- 2 It is, of course, s22(2)(d) to which the arguments of the plaintiff in this matter is directed, but I think it can be fairly stated that the two grounds upon which the determinations are challenged really are one ground and can be incorporated into an argument that neither adjudicator considered material in the form of a statutory declaration put forward as part of the submissions of, in this case, the plaintiff company. Whether or not a payment claim is a payment claim complying with the requirements of the Act is a matter for the adjudicator to determine. If, however, in coming to that determination, the adjudicator fails to afford natural justice to the respondent to the payment claim, then, on the authorities, the determination of the adjudicator will be void. In the same way if the adjudicator does not have regard to submissions put forward by the respondent to the claim, then there will be a denial of natural justice and the determination will be void.
- 3 What is said, in respect of each claim, is that the adjudicator did not have regard to a statutory declaration of Mr Norman Barnes, in identical form in each case, put before him, to support a claim in the payment schedule that there was an invalid payment claim because the respondent could not "in any meaningful manner assess all parts of the claim being made."
- 4 There was, in addition to the statutory declaration of Mr Barnes, a statutory declaration of a David Collins, who worked with Mr Barnes in assessing the payment claims. This declaration by Mr Collins was referred to the adjudicator in 2005 ADST 203 who said that, following the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, it was unhelpful for the purposes of the Act. From that statement and the fact that that declaration was mentioned, the plaintiff in these proceedings wishes the court to take a step which, in my view, involves an impermissible jump to reach a conclusion or to infer that, because the declaration of Mr Collins was referred to and the declaration of Mr Barnes was not, then the adjudicator failed to take into account material placed before him by way of submission in the payment schedule, which failure brought about a denial of natural justice making the determination void.
- 5 In my view there is no basis upon which that conclusion could be reached, nor could it be reached in an adjudication where neither declaration was mentioned. I should say that the declaration of Mr Barnes was clearly put before the adjudicator in support of the respondent's claim, that the entire payment claim was invalid. The adjudicator came to a firm conclusion as to this and as to compliance with the requirements of s13(2) of the Act. In essence, what the declaration of Mr Barnes said was that the progress claim relied upon differed from many previous claims in respect of the same building contract and that either it was impossible for him to assess it in a reasonable way or, later, that the claim was difficult to assess. But, nevertheless, as he said, he went on to endeavour to do so.
- 6 I do not think that there is any basis upon which the court could come to the conclusion that the adjudicators did not consider the declaration of Mr Hughes. The fact that one rejected the statutory declaration of Mr Collins yet did he not refer to that of Mr Barnes, could just as well lead to an inference that he considered it, he read it, but did not think that it carried the day in an argument as to the validity of the payment claim. In those circumstances, it seems to me that the plaintiff's claim must fail and, therefore, the summons should be dismissed, and I propose to so order.
- 7 Order the summons be dismissed with costs. The exhibits can be returned.
- 8 Order that, of the moneys paid into court by the plaintiff, the sum of \$771,000 be paid to the defendant and the balance be paid to the plaintiff.

Mr M Christie with him Mr M A Izzo (Plaintiff) instructed by
Mr D S Weinberger (First Defendant) instructed by Deacons (Plaintiff) Avendra Singh Strati & Kam (First Defendant)
No appearance (Second to Fourth Defendants)