

**GILES JA; SANTOW JA; TOBIAS JA;** New South Wales Court of Appeal. 28<sup>th</sup> February 2007

**Judgment : GILES JA:**

- 1 The respondent was the proprietor of a building project. The appellant was the contractor for the electrical works. A payment claim by the appellant was referred for adjudication under the *Building and Construction Industry Security of Payment Act 1999* ("the Act"), and the adjudicator determined that \$116,598.35 was to be paid by the respondent. This is an appeal from the decision of Brereton J (*Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129) that the determination was void.
- 2 The trial judge held that the adjudicator's determination was void because -
  - (a) the adjudicator failed to have regard to relevant contractual provisions;
  - (b) the adjudicator did not make a bona fide attempt to determine the matter referred to him for adjudication; and
  - (c) the adjudicator failed to pay regard to the respondent's payment schedule.
- 3 In my opinion the determination was void and the trial judge correctly so decided, although the reasons for my decision do not wholly accord with those of his Honour.

**The adjudicator's determination**

- 4 The appellant served its payment claim on 3 June 2005. It claimed \$180,808.17 less \$53,401.50 already received, a balance of \$127,406.67, all plus GST. The contract had been earlier terminated by the respondent, prior to completion of the works. The claim had the four components of contract work, variations, "interest due to delayed payments ... from termination date of 31/03/05 ...", and "loss of margin due to wrongful termination".
- 5 As to contract work, the contract provided that claims "must relate to the contract price", and must identify and relate to the work done by the appellant and properly value the work "with reference to the contract price" (cl 10(a), (c)). The payment claim identified, for each of a number of elements of the works, the contract sum attributable to that element, the percentage claimed to have been completed to date and the amount claimed. In several instances the amount claimed did not mathematically reflect the percentage of the contract sum attributable to the relevant element.
- 6 The contract provided that payments were to be made to the appellant "on the date determined by reference to the **Schedule Point D**" (cl 11(a)), by which claims were to be made by the appellant on the 30th of each month and were to be paid "*within 30 days of claim*"; but also that if a payment claim was submitted after the 30th of a month, payment was postponed to the next payment period (cl 10(f)). The contract also provided for ten per cent retention to a maximum of five per cent of the total amount payable to the appellant (cl 13). The payment claim did not specifically refer to these provisions, although it stated that "release of retention" was included in the claimed components of contract work and variations.
- 7 The respondent served its payment schedule on 21 June 2005. The payment schedule included, as one of the reasons for withholding payment, that the claim had been made on the basis of percentages of the contract sum but that the amounts claimed did not reflect the percentages claimed by the appellant to have been completed. It set out different, and sometimes lesser, percentages completed which the respondent was prepared to allow, and the value of the completed work on that basis. It deducted from the total amount allowed "contra charges", including for liquidated damages and rectification work, and the retention sum from previous progress payments. The result, according to the payment schedule, was that the appellant owed the respondent \$83,265.50.
- 8 The payment schedule also did not specifically refer to the contractual provisions concerning the date of payment and retention, although it clearly recognised a retentions regime.
- 9 The appellant made the adjudication application on 27 June 2005. The adjudicator accepted referral of the adjudication on 1 July 2005.
- 10 The respondent's adjudication response, served on 5 July 2005, relied on an assessment by Mr Dann and a report of Enginuity as to the value of the completed work. The respondent's submissions included in the adjudication response also raised two so-called jurisdictional issues, namely -
  - that there was no construction contract between the parties because in the contract the proprietor was named "Homewood" not "Holmwood"; and
  - that the payment claim was not validly served because it was served by the appellant's solicitor and not by the appellant personally.
- 11 The submissions included in the adjudication application and the adjudication response did not specifically refer to the provisions concerning the date of payment and retention.
- 12 The adjudicator's determination was dated 7 July 2005 and issued on 29 July 2005. He determined that the respondent should pay \$116,598.35 to the appellant, that the date upon which the payment became due was 21 June 2005 and that the rate of interest was the rate payable on unpaid judgments of the Supreme Court.
- 13 The adjudicator said as to the two jurisdictional issues, and it was not submitted in this Court that he was in error in the lack of merit he saw in them -

*"The respondent claims that there is no construction contract between the parties. The respondent points to the fact that the written contract states, 'Name of Principal – Homewood Holdings P/L' whereas the respondent is Holmwood*

Holdings Pty Ltd. The respondent says that 'the Claimant is now estopped from contending that the contract contained an error in the principle's (sic) name'. The respondent has not contended that there is any company called 'Homewood Holdings P/L' or that the contract was intended to be with anyone other than the respondent. The respondent has not disputed that the construction work was carried out by the claimant for the respondent.

The copy of the written contract produced by the claimant is dated 16/9/04 and appears to be signed by both parties. The copy produced by the respondent is dated 24/11/04 and appears to be signed only by the respondent. Otherwise the copies appear to be the same. The contract is between Tricon Projects Pty Ltd and the claimant. Tricon is the 'Construction Manager'. The contract states, 'The Construction Manager is the disclosed agent of ('The Principal')'. The contract appears to have been prepared by Tricon, signed by Tricon for the Principal and sent by Tricon on 20/9/04 to the claimant for signature.

I have no doubt that there was a construction contract between the claimant and Tricon's principal. The respondent has submitted a copy of the construction management contract between the respondent and Tricon appointing Tricon as construction manager. The respondent has not denied that Tricon was the respondent's agent and that as agent of the respondent, Tricon contracted with the claimant for the carrying out of the construction work the subject of this adjudication application. There is no suggestion that there was a company with the name 'Homewood Holdings P/L'. The respondent has produced nothing to show that the respondent was not a party to a construction contract with the claimant. The mere fact that the name of the respondent was not correctly spelt on the written contract prepared by Tricon is no bar to the claimant making this payment claim. The respondent has produced nothing to show that there is any estoppel. This 'defence' is totally lacking in merit and the fact that the respondent raises it reflects upon the credit to be given to the respondent's other contentions.

The respondent contends that the payment claim does not comply with the requirements of section 13(1) of the Act. The respondent contends that service of the payment claim on the respondent by the claimant's solicitor is a 'fatal matter'. This is nonsense. A claimant can use an agent to serve the claimant's payment claim. The payment claim is clearly the claimant's document. Section 13(1) has been complied with."

14 When he came to the value of the completed work, the adjudicator said -

"The claimant assesses the value of work completed at \$152,000. The respondent assesses the value at \$59,376 before deducting 'contra charges' of \$90,707. I am faced with two quite different assessments of the value of work carried out. The respondent relies upon the assessment of Mr Dunn [para 26 and following of his statutory declaration]. Mr Dunn says that the report of Enginuity has been prepared to provide an assessment of the value of work completed. I find that report of no assistance. It is based upon the assessment of Yorkshire Electrical Services [dated 13/6/05] of outstanding work and remedial work allegedly required. That assessment is merely Yorkshire Electrical's 'approximate breakdown of hours spent on rectification of works'. I don't consider that the time allegedly spent by Yorkshire Electrical on 'rectification works' is a valid method of assessing the value of work carried out by the claimant.

The report of Enginuity is also said to be based upon an assessment of the payment claim by Tricon Projects dated 14/6/2005. This appears to be the assessment of Mr Dann. It seems to me that the report of Enginuity cannot be said to be an independent assessment of the value of work carried out by the claimant. In assessing the value of work completed, I have the assessment by the parties but I do not have evidence upon which I could independently arrive at a value.

In deciding whether to adopt the assessment of the claimant or that of the respondent I am mindful of the respondent's unmeritorious challenges to the validity of the payment claim [the allegation that the respondent was not a party to the construction contract and that service by an agent is not valid service] and the respondent's completely unjustified deduction of alleged liquidated damages of \$89,100. In the light of these matters, I am more inclined to believe the claimant rather than the respondent and I will adopt the claimant's valuation of \$152,000 in preference to the respondent's valuation of \$59,376 for the value of completed work before adding the amount for variations."

15 The adjudicator continued -

"The claimant has assessed variations at an additional \$7,635. The respondent has assessed the claimant's entitlement with respect to variations at \$7,400. The difference [\$235] is in respect of an item 'Installation of conduit for lift supply'. Mr Dann in his statutory declaration [para 53] says that this work is contractual work and is therefore not a variation. In the submission accompanying the adjudication application the claimant makes no reference to this item. The claimant has failed to satisfy me that the claimant is entitled to this \$235. Therefore, in calculating the amount of the progress payment I will include the agreed amount of \$7,400 for variations but not the disputed amount of \$235.

Adding the value of work completed \$152,000 (before adding variations) and the value of variations \$7,400. I calculate the total value of work completed by the claimant at \$159,400 plus GST. When I deduct the amount paid, I arrive at the amount of \$105,998.50. For reasons following, this plus GST [a total of \$116,598.35] is the amount of the progress claim to which the claimant is entitled."

16 The adjudicator declined to allow the claimed amounts for interest and loss of profit; it is not necessary to go to his reasons for doing so. He rejected some other matters on which the respondent relied to withhold payment. He then said -

**"Due date for payment**

Neither party has made a submission as to the due date for payment of the progress payment. Therefore, applying s 11(1)(b) of the Act, I determine that it is 10 business days after the payment claim was served. Since there is a dispute over the date of service, I will, for the purpose of calculating interest, treat it as 6 June 2005. That makes the due date for payment 21 June 2005."

#### The trial judge's decision

- 17 The trial judge directed himself in accordance with the decision of this Court in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, relevantly that an adjudicator's determination will be void if there was not compliance with "basic and essential requirements" laid down by the Act and a bona fide attempt by the adjudicator to exercise the statutory power (see *Brodyn Pty Ltd v Davenport* at [53]-[56]).
- 18 His Honour noted the respondent's submission that the adjudicator failed to consider the provisions of the construction contract (see s 22(2)(b) of the Act) and that in determining an adjudication application the adjudicator "is to consider the following matters only ... (b) the provisions of the construction contract from which the application arose". He concluded that such a failure "is jurisdictional error, resulting in invalidity of the determination" (at [51]). He discussed this in some detail, with reference also to the subsequent decisions of this Court in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142, *Co-ordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 and *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, when failure to pay regard to a provision of the contract relevant to the adjudication constituted non-compliance with a basic and essential requirement of the Act.
- 19 From the absence of reference to the contractual provisions concerning the date of payment, while arriving at a due date for payment applying s 11(1)(b) of the Act (which applies "if the contract makes no express provision with respect to the matter"), and from the absence of consideration of retentions already deducted and inclusion of retained sums in the amount to be paid by the respondent, the trial judge considered that there had not been "mere error in consideration of the provisions of the contract, but a failure to consider a relevant provision at all" (at [57], [60]). Thus he concluded -
- "61 It follows that in my opinion the adjudicator failed to have regard to relevant provisions of the construction contract, and in particular clause 10, Part D of the Schedule, and clause 13(a). This was not a mere error of fact or law in determining whether or not particular provisions were provisions of the construction contract, or in the interpretation and/or application of those provisions, but a complete failure to have regard to them at all, in circumstances where those provisions were relevant to the adjudication under consideration.
- 62 On the view which I take of *Brodyn*, such a failure invalidates the adjudication. ... "
- 20 The trial judge began his consideration of a bona fide attempt to exercise the statutory power in the following terms:
- "64 The payment schedule set out, as one of the reasons for withholding payment, that while the payment claim was made on the basis of percentages complete, the monetary amounts claimed did not correspond with the percentages of work said by Halkat to be complete. The payment schedule put in issue both the percentage of works said to be complete, and the monetary entitlements on a mathematical basis if Halkat was found to have completed as much of the work as it claimed to have. The adjudication response repeated that the claim contained numerous mathematical errors, and emphasised reliance on 'point 7 of the payment schedule and the tables contained therein', which had raised these issues.
- 65 As is apparent from the passage from the adjudicator's reasons set out earlier in this judgment, the adjudicator did not attempt to address, let alone, resolve, these issues. Rather, having (understandably) characterised some of Holmwood's submissions as unmeritorious, he decided to prefer Halkat's assessment of the value of works done to Holmwood's. This involved resolving in favour of Halkat the disputes as to what percentage of the works it had completed, and the mathematical application of those percentages to the contract value, by reference to the merits of Holmwood's submissions on unrelated technical points. Given the issues raised by the payment schedule and adjudication response in this respect, this was an entirely illogical and inappropriate approach. In effect, the adjudicator, having been unimpressed by the merits of the two "jurisdictional" points taken by Holmwood, decided to prefer Halkat's claim on the main issue without examination either of its merits or of the defects in it which had been pointed out by Holmwood. This was not a case in which such examination was difficult: the adjudicator could have inspected the works to see how much had been completed, and the mathematical issue was self-evident on the papers. The position is analogous to a judge, having rejected a party's objection to jurisdiction as unmeritorious, then proceeding to reject that party's case on other issues, without examination of the merits, because of the unmeritorious jurisdictional point. Mr Davie, responsibly, did not attempt to justify the logicity of the adjudicator's reasoning in this respect.
- 66 The question, then, is whether this amounts to a want of a "bona fide attempt by the adjudicator to exercise the relevant power": cf *Brodyn*, [55]. This requires consideration of what is involved in the concept of 'good faith' as a criterion of the valid exercise of a discretionary power."
- 21 After extensive consideration of good faith, his Honour concluded -
- "117 Accordingly, good faith as a condition of validity of the exercise of an adjudicator's power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.

- 118 Applying that test to the present facts, the arbitrator did not meet its requirements. He was entitled to be critical of Holmwood for having advanced the unmeritorious submissions which it did about misnomer and service. He was entitled to conclude that the reports relied upon by Holmwood were of no assistance to the extent that they proceeded on an inappropriate basis of valuation. He was also entitled to find those reports to be other than independent (although the same surely had to be said of Halkat's assessment). But left with Halkat's claim and Holmwood's assessment, he was not entitled to fail to evaluate the claim in the light of the payment schedule, and instead simply to accept it on the basis that other and unrelated submissions made by Holmwood were unmeritorious. A judge who rejected a party's submissions on the ground that other unrelated submissions made by that party were unmeritorious would rightly be criticised for acting capriciously, and an adjudicator is in no different plight. It is not correct to say, as Mr Davie submitted, that an adjudicator has to decide these matters on bare assertion by one party against bare assertion by another: the 'bare assertions' can be evaluated against such evidence as is submitted in the adjudication application and adjudication response, and the adjudicator is given powers and procedures (including to require further submissions [s 21(4)(a)], to convene a conference [s 21(4)(c)], and to conduct a site inspection [s 21(4)(d)] which, albeit within tight constraints of time, are provided for the purpose of assisting an adjudicator sufficiently to inform himself or herself so as to be able to make a soundly-based decision.
- 119 In my opinion, when the adjudicator concluded that he was unable to decide for himself the extent and value of work completed, and instead would adopt Halkat's assessment because Holmwood had made some unmeritorious submissions unrelated to this issue (rather than evaluating the adjudication application and response and the arguments advanced in them, or convening a conference and/or conducting an inspection which might have resolved at least some of those issues), he ceased to make a genuine or conscientious attempt to perform the function entrusted to him of assessing the payment claim, and substituted caprice for conscientious judgment. The quality of his determination in that respect did not differ from one based on a mere like or dislike of a party, based on unrelated conduct of the party. His ultimate determination, which depended upon acceptance in that way of Halkat's claim, was therefore not the product of a good faith attempt at performing his function, but of caprice."
- 22 The trial judge went on to say, in the alternative, that the adjudicator's reasons did not address the respondent's submission as to the discrepancy between the percentages of work said to be complete and the amounts claimed. He said -
- "122 The only explanation for the absence of any reference to this submission in the adjudicator's reasons is that he did not consider it. This amounts to a fundamental failure to consider the payment schedule 'together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule', as required respectively by s 22(2)(d).
- 123 For the reasons set out above in respect of the failure to have regard to the provisions of the contract, I would hold that this failure to have regard to the payment schedule was a failure to consider, at all, a submission which the adjudicator was required to consider, and not a mere error in consideration of the submission. On this basis too, the adjudication determination is void."
- 23 The trial judge relevantly ended his reasons, under the heading "Conclusion" -
- "139 However, the amount of the adjudicator's ultimate determination made no provision for retention and required repayment of earlier retentions. The adjudicator did not consider, at all, the provisions of the construction contract in this respect, and thereby failed to consider provisions which he was required to consider. A failure by an adjudicator to have regard at all to a provision of the construction contract which is relevant to the adjudication under consideration (as distinct from an error in considering such a provision) is jurisdictional error, resulting in invalidity of the determination. Accordingly, the determination is invalid.
- 140 Moreover, in adopting Halkat's assessment because Holmwood had made some unmeritorious but unrelated submissions, without embarking on any course (such as convening a conference or conducting an inspection) which might have illuminated the issue, and thereby failing to address the issues raised by the payment schedule as to the quantum of work completed and its value, the adjudicator's determination was capricious and did not amount to a genuine and conscientious attempt to perform the adjudicator's function. Accordingly, the ultimate determination was not the result of a good faith attempt by the adjudicator to perform his function, and is void. Alternatively, it is void by reason of the adjudicator having failed to have regard, at all, to one of the main submissions made by Holmwood in its payment schedule, adjudication response and supporting submissions."

#### The appeal

- 24 The thrust of the appellant's submissions was that the trial judge was in error -
- (a) in holding that an adjudicator's determination was void if the adjudicator failed to have regard to relevant contractual provisions;
  - (b) in concluding that the adjudicator failed to have regard to relevant contractual provisions;
  - (c) in concluding that there had not been a bona fide attempt by the adjudicator to exercise the power conferred by the Act; and
  - (d) in concluding that the adjudicator had failed to consider the submission as to the discrepancy between the percentage of work said to be complete and the amounts claimed.

- 25 As to (c), a faint challenge to *Brodyn Pty Ltd v Davenport* as “misplaced” in its reference to bona fides was expressly not maintained. The submissions asserted that the absence of a bona fide attempt was “with respect to an alleged mathematical discrepancy”, that is, the discrepancy between the percentages of work said to be complete and the amounts claimed. This was not correct. The trial judge found the absence of a bona fide attempt in the adjudicator’s failure “to evaluate the claim in the light of the payment schedule, and instead simply to accept it on the basis that other and unrelated submissions made by Holmwood were unmeritorious” (at the trial judge’s [118], above). The trial judge considered that in doing so the adjudicator “ceased to make a genuine or conscientious attempt to perform the function entrusted to him of assessing the payment claim, and substituted caprice for conscientious judgment”, and that the determination “was therefore not the product of a good faith attempt at performing his function, but of caprice” (at the trial judge’s [119], above).
- 26 With respect to the trial judge, I consider that the fundamental vice in the adjudicator’s determination can be shortly explained without embarking on an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a bona fide attempt to exercise the statutory power. Section 22 of the Act required that the adjudicator determine an adjudicated amount (s 22(1)) by considering particular matters (s 22(2)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant’s valuation in preference to that of the respondent because of the respondent’s unmeritorious challenges to the validity of the payment claim.
- 27 On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination “to believe the claimant rather than the respondent”: the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.
- 28 That is sufficient for the disposal of the appeal, and it is not necessary to consider failure to have regard to relevant contractual provisions or failure to have regard to the payment schedule. I should not be taken to approve by silence all that the trial judge said.
- 29 It should be said, however, that the substance of the trial judge’s reasoning, in line with the respondent’s submission as to considering “the provisions of the construction contract”, was that the adjudicator failed to pay regard to relevant provisions of the contract at all, which may more readily be classed as a non-compliance with a basic and essential requirement of the Act than a failure to pay regard to a particular provision or provisions of the contract. It should also be said that in describing failure to pay regard to a provision of the contract relevant to the adjudication as jurisdictional error (at his [51], see above, and elsewhere), the trial judge appears to have departed from the basis for invalidity of a determination adopted in *Brodyn Pty Ltd v Davenport*, see in particular at [54] –
- “A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, not in truth an adjudicator’s determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination.”*

#### Orders

- 30 In my opinion, the appeal should be dismissed with costs.
- 31 **SANTOW JA:** I agree with Giles JA.
- 32 **TOBIAS JA:** I agree with Giles JA.

A: M Christie / R Hardcastle instructed by Nicholas G Pappas & Co, Sydney  
R: G Watson SC / F Kalyk instructed by KQ Lawyers, Bowral