JUDGMENT : McDougall J : New South Wales Supreme Court : 24th September 2004

1 The question in these proceedings was whether an interlocutory injunction granted by Campbell J on 20 September 2004, effectively restraining the first defendant ("GJ") from enforcing its rights under a determination made by the second defendant ("the adjudicator") pursuant to the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"), should be continued. However, it was agreed that I should hear the proceeding on a final basis. The issue, therefore, becomes whether the determination made by the adjudicator should be quashed.

2 To enable the parties to proceed on a final basis, a factual dispute underlying one of the two arguments propounded by the plaintiff ("Holdmark") was conceded for the purposes of these proceedings in favour of Holdmark.

3 Holdmark relies on two arguments in support of its case that the determination should be quashed. The first proposition is that the payment claim that gave rise to the adjudication application determined by the adjudicator was not authorised by the Act, so that the adjudicator had no jurisdiction to deal with the dispute. The second is that as to one item of the claim, the adjudicator did not value the claim (for materials left on site) as required by the Act.

Background

4 The sub-contract between the parties was made on 19 February 2003. Clause 3(a) dealt with payment claims. It provided as follows: *"The sub-contractor shall send his tax invoice monthly to the office. Payments will be thirty days. All claims must be no more than the proprietors [sic] quantity survey approval."*

5 lause 24(e) dealt with the valuation of materials left on site in the event that the sub-contract was terminated. It provided as follows: *"The sub-contractor agrees that in the event that the agreement between the builder and the sub-contractor is terminated then the sub-contractor will vacate the site imediately [sic] leaving behind the formwork and all materials required to complete the works. The sub-contractor will be compensated with seventy (70%) percent of the material price as referred to [sic] the agreed price list annexed hereto and marked "B". This payment will be made within forty five (45) days of the termination of this agreement."*

6 Annexure B, referred to in clause 24(e), set out a description of the materials including timber, priced at certain rates per linear metre, and items of scaffolding, priced individually. The factual dispute between the parties that was resolved for the purposes of these proceedings was whether or not Annexure B formed part of the contract. The effect of the parties' agreement is that I am to proceed on the basis that it was.

7 It is common ground that the sub-contract came to an end on 12 March 2004. Holdmark says that it terminated the contract for cause. GJ says that Holdmark was not entitled to terminate the contract; that its actions purporting to do so was a repudiation; and that GJ accepted that repudiation as discharging it from further performance. On either view, therefore, the contract has come to an end; and, as I have said, it is common ground that that occurred on 12 March 2004. It is also common ground that no work was performed by GJ after 12 March 2004.

8 GJ left the site when the contract came to an end, and left behind it a substantial quantity of material. The parties agreed that the material left on site constituted related goods and services, as that expression is defined in s 6 of the Act.

9 On 13 March 2004 - the day after the contract came to an end - GJ served what purported to be a payment claim made pursuant to the Act. That document claimed for formwork of various kinds, allowed for amounts paid and retention, and claimed a balance of $1,430,047.78.

10 Thereafter GJ made three further claims purporting to be payment claims made under the Act. The second was made on 3 April 2004 and claimed $424,283.14. The third was made on 28 May 2004 and claimed $1,355,960.50. The fourth, which ultimately became the subject of the challenged adjudication, was made on 27 July 2004 and claimed $6,870,981.09.

11 Each of the payment claims related, of necessity, to the same work. That is because no further work was done under the contract after 12 March 2004. The explanation for the substantial difference between the third and the fourth is, I think, that the third gave credit for a much higher sum said to be for amounts paid by Holdmark on behalf of GJ than did the fourth.

12 Further, the fourth made claim for $1,920,000 worth of material left on site which, pursuant to clause 24(e), was valued at 70 percent, ie a claim of $1,344,000.

13 GJ sought adjudication of the third payment claim. For reasons that are not entirely clear to me, the person nominated to adjudicate it declined to do so. Nothing turns on the reasons given by him.

The Determination

14 As I have said, GJ sought adjudication of the fourth payment claim. It applied to the second defendant, who referred the matter to the adjudicator; the adjudicator accepted that nomination.

15 It is apparent that there was a conference between the adjudicator and representatives of the parties pursuant to s21(4) of the Act. The determination itself was made on 13 September 2004, within the time (extended by agreement of the parties) permitted under the Act. The adjudicator determined that Holdmark should pay GJ a total amount of $3,891,582.19, together with the costs of the adjudication. The amount so determined included an amount of $1,826,407.80, said to be an amount determined in accordance with the contract for the value of

material left on site. It will be seen that the adjudicator under this heading awarded GJ about $500,000 more than it had claimed.

16 There are a number of matters that need to be referred to in the determination. One is the way in which the adjudicator dealt with what he called a "prior adjudication application". This is referred to in paragraph 10(b) at pages 10-11 of the determination. Another matter is the adjudicator's consideration of payments made by Holdmark to others apparently at the request of GJ. That is dealt with in paragraph 17 at pages 23-24. It is followed by some consideration, in paragraph 18, of GJ's solvency. The last matter that requires reference is the adjudicator's treatment of the valuation of the materials left on site. This is dealt with in paragraphs 33 and 34 at pages 33 and 34.

17 To understand the propositions that Holdmark puts, it is necessary to have regard to certain provisions of the Act. I refer in particular to the definition of progress payment in s 3 of the Act; to the provisions of s 8, giving a right to progress payments; to ss 9 and 10, which deal with the amount of progress payments and valuation of construction work and related goods and services comprised in them; to s 13, dealing with the content of payment claims; and to s 22, dealing with the matters to be taken into consideration by an adjudicator.

Analysis: first argument

18 Before I turn to the submissions, I should note that it was not put to me that determinations made by adjudicators under the Act are not, in principle, susceptible to judicial review.

19 In substance, the error alleged was there had been more than one payment claim made in respect of the one reference date, in contravention of s 13(5) of the Act. For Holdmark, it was submitted that each of the payment claims that had been made, and to which I have referred, must be taken to be final payment claims. However, on this analysis, there were three, and perhaps four, payment claims relating to the one reference date.

20 Mr M G Rudge SC, who appeared with Mr D Sibtain of Counsel for Holdmark, submitted that periodic payment claims could only be made during the currency of the contract. That, he said, meant they could only be submitted whilst work was being performed. Further, he submitted, they could only be made in respect of reference dates determined either under the contract or pursuant to s 8(2)(b).

21 Thereafter, Mr Rudge submitted, a final payment claim could be made but there could not be more than one. (I interpolate that those submissions must be understood in the particular facts of this case whereby, amongst other things, it was agreed, as I have indicated, that no work had been done after 12 March 2004).

22 Mr M Sahade of Counsel for GJ submitted that periodic payment claims could be made at each reference date occurring in the 12 months occurring after cessation of the contract. He submitted there could be more than one claim made in that time. He submitted that characterising the claims in question as final payment claims distracted attention from the real issue, which is the nature of the entitlement that the Act gave.

23 The starting point is to determine the relief reference date. I think that the better view of clause 3(a) of the sub-contract is that it does provide for a reference date. I think, on its proper construction, that the clause makes the end of each month a reference date - that is to say, the last day of each month.

24 Alternatively, if clause 3(a) does not have this effect, then in that event s 8(2)(b) takes over. The same result would follow, namely, that the end of - the last day of - each month would be a reference date.

25 The next matter to consider is the effect of the termination or cessation of work. In principle, and subject to any relevant provision of the contract (it was not submitted that any provision was relevant under this sub-contract), it should not matter why termination occurred or why work ceased. That could be because the work was complete; or because the contract had been terminated for breach; or because of accepted repudiation; or indeed for some other reason.

26 In some cases, contracts make provision for the occurrence of reference dates after termination or cessation of work. As I have indicated, those cases may be put to one side. Where there is no provision, then, in my view, there is but one more reference date. That is the reference date that, according to either the contractual or statutory scheme, occurs (or would have occurred) next after termination or cessation of the work. The builder, in my judgment, may make a final payment claim by reference to that date. It may do so within 12 months after cessation of work.

27 I do not think there is a successive reference date monthly (or at any other intervals fixed by the contract) thereafter. If there were, the builder could harass the proprietor with a series of claims for the same work, or parts of the same work. It is obvious that, in many cases, payment claims are complex and detailed. It is obvious that a proper response may often require a very great amount of work. If the response is inadequate, or if the proprietor for whatever reason omits to respond, then the mechanisms of the Act are engaged. That may have at least potentially very serious consequences for the proprietor.

28 Mr Sahade submitted that it was in accordance with the objects of the Act that a builder should be allowed to make a series of payment claims, after a termination but within the relevant limitation period (12 months or whatever the contract allows, whichever is the greater). I do not agree. The policy of the Act is equally served if the builder takes a little time and care to provide a claim that is complete and detailed and accurate once the contract has come to an end. If the builder chooses to fire off an unconsidered or incomplete claim, it brings upon itself the consequences. Further, Mr Sahade's submission to some extent overlooked the interim nature of the scheme for which the Act provides. On the construction that I favour, the builder loses nothing if the final payment

claim is prepared carefully; if for whatever reason it is not, all the builder loses is the right to an interim claim. The builder may, nonetheless, seek to vindicate its full claim in litigation to that end.

29 The construction that I favour is supported by the structure of s 8(a). A right to a payment claim is given to someone who has undertaken to carry out construction work, or supply related goods and services under a construction contract. It is a right that arises on and from each reference date.

30 A reference date is either one fixed by the contract as the date on which a claim may be made for work carried out, or a date determined by reference to the first performance of the work. (I omit, for convenience, reference to related goods and services.)

31 Thus, where the contract fixes the reference date, it is fixed in relation to work carried out. Once work ceases to be carried out, then, by definition, there will be no more reference dates. It would be odd if a different regime were intended to apply under the alternative.

32 When s 13(5) fixes (in the absence of any contractual specification) a period of 12 months within which payment claims may be made, it is not, in my judgment, extending the concept of reference date. It is limiting the time within which, by reference to whatever reference date has last accrued, a claim may be made.

33 I therefore conclude that the entitlement to serve a payment claim is one that may be exercised on and from a reference date, and that reference dates do not (absent contractual provisions to the contrary) continue to occur once the contract has been terminated, or once work has ceased to be performed. In those circumstances then, subject again to any contractual provision to the contrary, there is one more reference date - that occurring next after the date of the termination - by reference to which one more payment claim - which is in substance a final payment claim - may be made.

34 I do not regard this as being discordant with the statutory purpose. On the contrary, I do not think that the legislature intended that the principal or head contractor could be hounded by multiple payment claims made during the 12 months following the termination of the contract. The diversion of resources to deal with such claims (a matter to which I have already referred), and the drastic consequences of ignoring them (another matter to which I have referred) support this view. So too, by analogy at least, does s 13(5). Indeed, in my view, s 13(5) reflects the legislative policy to limit the number of payment claims that may be made. In this context, I think it is significant that s 13(5) was inserted into the Act by the *Building and Construction Industry Security of Payment Amendment Act* 2002. That is also the Act that amended the definition of payment claim so that it included a final payment claim. Before then it had not, as Austin J pointed out in *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395.

35 In substance, I think, the scheme as it now stands is that periodic payment claims may be made while the contract is current and work is being carried out, and a final payment may be made at, or within 12 months after, the termination of a contract or cessation of the work.

36 In some ways it is a little difficult to accommodate the concept of a final payment claim to the requirement that payment claims should relate to a reference date. But that difficulty exists whatever construction is adopted.

37 The reference date in relation to which a final payment claim is made is, therefore, the reference date next following the date on which the contract is terminated or work ceases unless the contract provides otherwise. Alternatively, it may be a date at the end of the month (or other interval prescribed by the contract) in which termination occurs.

38 In the present case, if (as I think is the better view) clause 3(a) of the subcontract does provide for the determination of a reference date, then it may be, in the event that has happened, that the reference date for the purposes of a final payment claim is 30 April 2004. I do not express a concluded view because even if that be so, there were two purported payment claims made in relation to one reference date.

39 The first three payment claims did not state what was the reference dates to which they related. Neither did the fourth. However, the adjudication application stated that the reference date for the fourth was 27 July 2004.

40 In my judgment, GJ was not entitled to serve the fourth payment claim. That is because s 13(5) prevents a claimant from serving more than one payment claim in respect of any one reference date under the contract. I therefore conclude that the adjudicator had no power to determine the application. The existence of a reference date in relation to which a payment claim is made there is a jurisdictional matter: ***Isis Projects v Clarence Street Limited*** [2004] NSWSC 222 at [33]. Alternatively, the adjudicator had no power because of the provisions of s 13(5). On either basis, therefore, there is jurisdictional error.

41 There is another reason why this is so. On no view of the Act and the subcontract is 27 July 2004 a reference date; yet that is the date that GJ nominated as the reference date to which the payment claim related.

42 Mr Sahade submitted that the point that I have dealt with had not been taken. However, I think it is sufficiently clear from the adjudicator's reasons at paragraph 10(b) that it had. It may not have been framed as clearly as it was framed in argument before me. But the structure of the proposition is there and it was dealt with by the adjudicator.

43 No doubt because the matter was raised before and dealt with before the adjudicator, Mr Sahade did not submit that the point had not been raised in the payment schedule so that it was not available either before the adjudicator or before me: see ***John Holland Pty Limited v Cardno MBK (NSW) Pty Limited*** [2004] NSWSC 258.

Analysis: second argument

44 On the view to which I have come, it is not necessary to deal with the second argument. However, I will express my reasons briefly.

45 By ss 9 and 10 of the Act, the amount claimed in respect of material left on site was to be calculated by reference to the contract unless the contract made no provision for that.

46 Clause 24(e) clearly does make provision. As I have said, it was accepted for the purpose of the hearing before me that Annexure B did form part of the contract.

47 The adjudicator paid no attention to clause 24(e) and Annexure B - perhaps because of the way the contract was put before him in the adjudication application. Whilst it included clause 24(e), it did not include Annexure B.

48 The adjudicator, therefore, did not value the material as required by clause 24(e). Indeed, as I have noted, he valued it at an amount about $500,000 higher than claimed by GJ. It is a little difficult to see why the adjudicator did not inquire as to the discrepancy, particularly because the payment claim expressly made reference to clause 24(e). However, I do not need to pursue this.

49 In my judgment, for the reasons that I gave in ***Musico v Davenport*** [2003] NSWSC 977 at [100], the adjudicator fell into jurisdictional error by not valuing materials left on site in accordance with the applicable contractual provision.

50 Because there is but one adjudicated amount, that error infects the entire determination. If this were the only basis on which relief were to be granted, it would be necessary to consider the imposition of terms. In the circumstances, I do not need to follow this through.

51 There are two other matters to be noted in relation to the second argument. Firstly, Mr Sahade did not submit that s 34 invalidated clause 24(e) of the subcontract. Secondly, he submitted that I should withhold relief on discretionary grounds because on any view GJ was entitled to be paid for material left on site. I do not need to express a concluded view on this, for the same reason as I did not need to express a concluded view on the imposition of terms as to the grant of relief.

Discretion

52 Mr Sahade submitted that, having regard to the objects of the Act, I should withhold relief on discretionary grounds. He relied on the circumstances that the adjudicator had found that GJ had a very substantial entitlement; that it was only on "technical" grounds that Holdmark sought to quash the determination; and that despite claiming that GJ was indebted in a large sum for breach of the contract and other matters, Holdmark had not commenced proceedings to vindicate its rights.

53 Mr Rudge relied on the approach taken by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [93] and following. Mr Rudge further pointed to evidence showing that GJ was in a parlous financial condition. He submitted that if the determination were enforced, notwithstanding the defects in it to which he had referred, the prospects of repayment (should Holdmark's position as to GJ's liability be vindicated) were slight.

54 In my judgment, the approach taken by Palmer J in *Multiplex* is the one that I should adopt in this case. His Honour, at [96], stated that a weighty factor to be taken into account was that the scheme of the Act requires a respondent to "pay now argue later". Thus, his Honour concluded, where withholding relief on discretionary grounds would produce no great hardship, the scheme of the Act might dictate that the relief should be withheld. Equally, if there were alternative means for the dispute to be addressed, then relief might be withheld on discretionary grounds. However, his Honour said, where the amount at issue was large, and where there was no indication that there could be a speedy final determination, then relief should not be withheld on discretionary grounds. In the case before his Honour, the amount at stake was $100,000. In the present case, of course, it is very much greater. His Honour, in the circumstances before him, declined to withhold relief on discretionary grounds because of the balancing exercise to which he referred.

55 I respectfully agree with his Honour's analysis. I accept that the policy of the Act is, as Mr Sahade said, to promote cash flow. I accept that it is unfortunate that technical objections may mean that the statutory policy is thwarted but, on the other hand, the Act makes very substantial inroads into freedom of contract. It is in a sense draconian - as to its time limits and consequences among other things. Further, in a very real sense, GJ has been the author of its own misfortune.

56 I am also persuaded, on the evidence before me, that I should conclude that GJ's financial position is indeed parlous. The adjudicator, at paragraph 17 of the determination, catalogued numerous payments made by Holdmark at the request of GJ. I infer that these payments were made because GJ could not afford to make them itself.

57 That inference, and my view as to GJ's financial position, is supported by GJ's bank statements. They show that cheques, often for very substantial amounts, and direct debits had been dishonoured on numerous occasions during the currency of the contract.

58 As I have noted, the adjudicator dealt further, at paragraph 18, with GJ's solvency. He expressed some doubt. What he said is supported by the fact that, in 2003 and 2004, there have been two separate proceedings brought against GJ to wind it up.

59 I therefore do not propose to withhold relief on discretionary grounds.

Conclusion and orders

60 In my judgment, Holdmark has made good its challenges to the determination. The determination is liable to be quashed on the ground of jurisdictional error of law. I do not propose to withhold that relief on discretionary grounds.

61 I therefore make order (1) as sought in the summons. I order the defendants to pay the plaintiff's costs of the summons; otherwise, I make no order as to costs. The exhibits may be handed out in accordance with the Rules.

M G Rudge SC/D R Sibtain (Plaintiff) instructed by Corrs Chambers Westgarth
M V Sahade/D A Doyle (Defendants) instructed by The Builders' Lawyer