

JUDGMENT : BERGIN J : Supreme Court, NSW. Equity Division T&C List. 30th May 2007

1 This is an application by the plaintiff, Kell & Rigby Pty Limited for entry of judgment in the amount of \$1,599,848.27 pursuant to s 15(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 1999* (the Act). The plaintiff and the defendant, Guardian International Property Pty Ltd were parties to a construction contract under which the plaintiff performed building works for the defendant in Paddington, NSW. The plaintiff served a payment claim on the defendant on 25 September 2006. The defendant did not serve a payment schedule within the specified time under s 14(4) of the Act. However, the defendant did serve a payment schedule on the plaintiff out of time (Ex 1).

Background

2 On 24 October 2006 the plaintiff filed an adjudication application with Australian Solutions Centre and served a copy of that Application on the defendant. That Application included the following:

We the claimant make Application pursuant to Section 17 of the Building and Construction Industry Security of Payment Act 1999 (NSW) for the nomination of an adjudicator to determine a disputed payment claim.

3 On 31 October 2006 Australian Solutions Centre advised the plaintiff and the defendant that it had received the adjudication application and that it had been "registered". It also provided to the parties a copy of a Notice of Acceptance of Adjudication Application in which Mr Max Tonkin was identified as the Adjudicator. That Notice included the following:

Following the receipt of an adjudication application made under Section 17 of the Building and Construction Industry Security of Payment Act 1999 I give notice that under Section 19 of the Act I have accepted the appointment of Adjudicator in reference to the below mentioned disputed payment claim.

4 On 2 November 2006 the defendant filed with the Adjudicator an adjudication response and served a copy of it on the plaintiff. That adjudication response included the following:

5. K&R has not given Guardian the notice required by section 17(2)(a) of the Act. Accordingly, K&R has no entitlement to lodge the subject adjudication application. That entitlement can only exist if and when K&R meets the requirements of section 17(2) of the Act.

5 On 9 November 2006 the Adjudicator wrote to the parties referring to the Adjudication Response, in particular to paragraph 5, and requested the plaintiff to provide "a written submission on the applicability of sections 17(2) and 20(2A) of the Act in the present case". On the same day the plaintiff wrote to the Adjudicator, with a copy to the defendant in the following terms:

To date we have not been served with a copy of the Adjudication Response by the Respondent however in light of the matters raised in your fax we have reviewed the adjudication application and agree that as the Payment Schedule served by the Respondent was served outside the 10 business days required under the Act it was not a valid Payment Schedule.

Therefore as the Claimant has not served a notice under 17(2) the present adjudication application is invalid and void as the Claimant has no entitlement under the Act to lodge the Application. We therefore formally withdraw the adjudication application as it is invalid and void and the ASC does not have the power or jurisdiction under the Act to determine the Application.

6 On the same day the defendant wrote to the Adjudicator with a copy to the plaintiff in terms that included the following:

Kell & Rigby is in no position to unilaterally withdraw the submission of this application to you.

Notwithstanding Kell & Rigby's concession that it has not complied with section 17(2) of the Act, Kell & Rigby cannot resile from the fact that it DID submit the matter to you for determination and that Kell & Rigby made a conscious election to refer the matter to adjudication, albeit incorrectly.

You are still bound and are required by fact of that submission to deal with it. The only way in which you can deal with it in light of the admission made by Kell & Rigby is to reject it on the basis that the submission was not properly made.

7 On 13 November 2006 the Adjudicator notified the parties in writing that having regard to the fact that both parties had submitted that the adjudication application did not comply with s 17(2) of the Act he did not propose to proceed with it. On 14 November 2006 the defendant wrote to the Adjudicator in which it made a submission that the Adjudicator's decision not to proceed with the Application was inconsistent with the requirements imposed upon him under the Act. That letter included the following:

Under the Act the powers given to you are to issue a determination where an application has been submitted to you (see sections 21(1) and (3)). Section 22(1) sets out what that determination must contain.

Nowhere in those provisions are you authorised to elect not to proceed with the application once it has been submitted to you.

In those circumstances, under the Act you have not discharged your function and Guardian requires you to issue a determination that complies with section 22(1).

The fact that compliance with section 17(2) cannot be demonstrated is simply a procedural failure on the part of the Claimant and a matter for you to take into account when considering the application. The failure by the Claimant to

comply with this procedural step does not change the fact of the submission of the application to you, which under the Act you are obliged to deal with in the manner the Act requires you to do.

- 8 On 14 November 2006 the Adjudicator advised the parties that the defendant's letter had not caused him to change the position he had indicated to them the previous day and that he did not propose to proceed with the adjudication.
- 9 The plaintiff filed its Summons on 12 December 2006 and the defendant filed its Commercial List Response on 16 February 2007. The issue between the parties is very confined. The defendant claims that the plaintiff is precluded from bringing these proceedings because it elected to pursue the adjudication option under s 15(2)(a)(ii) of the Act instead of pursuing the curial option under to s 15(2)(a)(i) of the Act.

These proceedings

- 10 These proceedings were heard on 30 May 2007 when Mr MR Elliott appeared for the plaintiff and Mr JB Simpkins SC appeared for the defendant.
- 11 The Act was amended in 2003 to introduce s17(2). Prior to that amendment a party who served a payment claim to which there was no responsive payment schedule was entitled under s 15(2)(a) of the Act to recover the unpaid portion of the amount as a debt due in any court of competent jurisdiction. The amendment introduced a regime that provided the party who had served a payment claim to which there was no responsive payment schedule, the option of making an adjudication application under s 17(1)(b) of the Act: s 15(2)(a)(ii). It is not clear why such an option was thought appropriate when the regime then in place of seeking entry of judgment in a court was an efficient and final mechanism for payment, albeit on an interim basis. The explanatory note relating to the amending Bill simply referred to the object of providing claimants with the "option of having their payment claims adjudicated under the Act rather than having to take court action to recover the amount owing". It may be that the legislature presumed that the process of adjudication would be more streamlined than filing proceedings and awaiting the entry of judgment, however a successful claimant in the adjudication process has to obtain a certificate and then file it with a court for the purpose of recovering the debt if the respondent is unwilling to pay the amount determined without such process.
- 12 Under the present regime, if a party adopts the option of making an adjudication application it is required, prior to doing so, to notify the respondent within the period of 20 business days immediately following the due date for payment of the amount in the payment claim of its intention to apply for adjudication of the payment claim: s 17(2)(a) of the Act. The respondent is then given a fresh opportunity to provide a payment schedule to the claimant within 5 business days of receiving the claimant's notice of its intention to apply for adjudication: s 17(2)(b) of the Act.
- 13 There is no issue that the plaintiff did not provide a notice to the defendant under s 17(2)(a) of the Act. The defendant failed to provide a payment schedule in response to the payment claim and became liable to pay the claimed amount to the plaintiff under s 14(4) of the Act. In those circumstances s 15 of the Act applied. Section 15(2) of the Act provides relevantly:
- (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*
- (ii) *make an adjudication application under section 17(1)(b) in relation to the payment claim,*
- 14 "Adjudication application" is defined to mean "an application referred to in section 17": s 4 of the Act. Section 17 provides relevantly:

17. Adjudication applications

- (1) *A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:*
- ...
- (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*
- (2) *An adjudication application to which subsection (1)(b) applies cannot be made unless:*
- (a) *the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and*
- (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 The plaintiff submitted that the words "cannot be made" in s 17(2) of the Act are emphatic words (**Z v NSW Crimes Commission** (2007) 233 ALR 17 per Kirby and Callinan JJ at 20 par [14]) which prohibit the making of any adjudication application unless the matters referred to in s 17(2) of the Act are complied with. It was submitted that by reason of the plaintiff's failure to give the notice the adjudication application was invalid or a nullity. Accordingly the plaintiff could not have exercised any right under s 15(2) of the Act by the lodgement of an invalid adjudication application.
- 16 Mr Simpkins SC submitted that the absence of the word "valid" from s 17(2)(a)(ii) suggests that the legislature intended that even if an 'invalid' adjudication application is filed the party who files it is bound by it and has elected for the adjudication option under s 17(2)(a)(ii) rather than the curial option under s 17(2)(a)(i).

- 17 In *Schokman v Xception Construction Pty Limited* [2005] NSWSC 297, Einstein J dealt with an application for a declaration that an adjudication determination was void by reason of, inter alia, a notice under s 17(2) of the Act having been served outside the stipulated 20 business day period. His Honour held that the adjudication determination was void. In dismissing the cross-claim filed by the defendant, his Honour said:
21. *I am able to deal with the cross-claim shortly. The holding is that upon the proper construction of section 15(2)(a) the sub-section makes provision for two separate and distinct alternatives that may be adopted by a claimant.*
22. *The whole of the relevant scheme is clearly to provide a fast track approach leading to a result but importantly never operating to the exclusion of “any other entitlement that a claimant may have under a construction contract” [section 4(a)]. Hence it cannot have been the intention of the legislature to permit a claimant [in a circumstance where no payment schedule has been provided] to make an adjudication application in relation to the payment claim and later in the event that the adjudication miscarried, to pursue curial proceedings to recover the unpaid portion of the claimed amount from the respondent as a debt. This would expose a respondent not to one set of interim procedures and at a swift (albeit interim) result, but to two such interim sets of procedures.*
- ...
24. *It should also be recalled that nothing in s 14(4) requires the respondent to serve a payment schedule only if the payment claim is “valid”.*
- ...
27. *Ultimately the matter is simply one of raw statutory construction. The word “or” separating section 15(2)(a)(i) and (ii) is used disjunctively.*
- 18 In *Rojo Building Pty Limited v Jillicris Pty Limited* [2006] NSWSC 309 a notice under s 17(2) had been served within time, however there was an issue as to whether the payment schedule that had been provided the day after the s 17(2) notice had been given was in response to that notice or in response to the payment claim that had been served. Einstein J referred to his decision in *Schokman* and said:
36. *Once Rojo had served its s 17(2) notice of intent to make an adjudication application ..., Jillicris became entitled to exercise its statutory right to provide a payment schedule within five business days of service of the notice of intent to apply for adjudication. In those circumstances Rojo having elected:*
- i. *not to proceed by the route provided for in s 15(2)(a)[vide by proceeding to recover the unpaid portion of the claimed amount as a debt by curial process],*
- ii. *instead to make an adjudication application under s 17(1)(b).*
- became disentitled from restoring the position ante.*
37. *Rojo’s election had now triggered a statutory right in Jillicris. That step having been taken Jillicris was entitled to exercise that statutory right.*
38. *The effect of Rojo’s solicitors communication of 23 December 2005 [advising that Rojo did not propose to proceed to make an application for adjudication and that accordingly, Jillicris was not required to provide a payment schedule in accordance with s 17(2)(b)]:*
- i. *was not to restore the position to that which it had been prior to Rojo having made the election provided for in s 15(2)(a) as between the two inconsistent routes;*
- ii. *was that Rojo had waived its anterior rights to proceed by curial process to recover the unpaid portion of a claimed amount as a debt.*
- The strictures imposed by the Act**
39. *Many of the authorities have focused upon the strictures imposed by the Act and upon the need for formal compliance with the provisions of the Act. The scheme of the Act is unforgiving in terms of the technicalities which require to be observed. There is no room for a claimant to approbate and reprobate. There is another party to be considered. There is no room for a claimant to leave a respondent in any form of doubt as to precisely what course is being followed by the claimant. Nor is there room for a respondent to leave a claimant in any form of doubt as to precisely what course is being followed by the respondent.*
- 19 In *Rojo Building v Jillicris* [2006] NSWSC 649 McDougall J referred to Einstein J’s judgment in *Rojo Building Pty Ltd* and at [31] observed that the point on which Einstein J had found that Rojo failed was “that it had made an election to proceed down the adjudication path”. McDougall J referred to the plaintiff’s submission that Einstein J had erred in dealing with the concept of election (at [50]) but did not need to deal with this matter and, indeed, suggested that it was more appropriate to be dealt with by the Court of Appeal (at [51]-[52]).
- 20 Mr Simpkins submitted that I should follow Einstein J’s decision in *Schokman* unless I was satisfied that it was clearly wrong: *Segal v Waverly Council* (2005) 64 NSWLR 177 per Tobias JA, with whom Beazley JA and Basten JA agreed, at 193 par [57]. He submitted that the facts in this case are not distinguishable from the facts in *Schokman* in that, in each case, the adjudication application was invalid because of the non-compliance with s 17(2)(a) of the Act. He submitted that I should find, as Einstein J did in *Schokman*, that notwithstanding the invalidity of the adjudication application, the plaintiff’s actions in making it was an election for the adjudication process rather than the curial process and it should not now be permitted to make an election to pursue the curial process.

- 21 The facts in this case are slightly different from those in *Schokman*. In that case a notice under s 17(2) was provided, albeit out of time. In the present case no notice was given. However it is true that in both cases the adjudication application was invalid by reason of the failure to comply with s 17(2). There are further differences between the two cases. In *Schokman* the parties appear to have argued that the adjudication process “miscarried” rather than approaching the matter on the basis that it was a nullity. In this case the plaintiff has submitted that the adjudication application was a nullity and therefore the plaintiff could not be taken to have made an election. Additionally there was apparently no argument before Einstein J that the notice under s 17(2), as opposed to the adjudication application, was itself a nullity. The fact that the notice under s 17(2) was provided, albeit out of time, was a matter that Einstein J regarded as important in determining whether the plaintiff in that case had elected for the adjudication process. That is not a matter for consideration in this case because no notice was provided. Whether an election has been made will depend upon the facts of the particular case.
- 22 In this case the plaintiff relied upon the words “cannot be made” in s 17(2) of the Act, in support of the submission that the adjudication application was a nullity. It appears that this argument may not have been raised before Einstein J in *Schokman*. In all the circumstances I am satisfied that I am not constrained by *Schokman*.
- 23 In *GJ Coles & Co Ltd & Ors v Retail Trade Industrial Tribunal & Ors* (1986) 7 NSWLR 503 McHugh JA said at 525:
One of the basic doctrines of common law jurisprudence is the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependant on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine
- 24 I am satisfied that the absence of the word “valid” before the words “adjudication application” in s 15(2)(a)(ii) of the Act does not mean that the legislature intended that a party could make an invalid application. This is particularly so having regard to the rights that are triggered when an adjudication application is made, including the right of the respondent to receive notice of the intention to make the application and the right of the respondent to have the fresh opportunity to file a payment schedule.
- 25 I am of the view that the adjudication application was a nullity by reason of the plaintiff’s failure to comply with the mandatory condition imposed by s 17(2) of the Act. Accordingly the act of filing and serving that document was incapable of creating legal consequences, including the legal consequence of the making of an election under s 15(2) of the Act. I do not need to deal with the common law of election as this case depends upon the construction of the statute. This was the only issue that has been argued at the hearing.
- 26 I am of the view that the plaintiff is not precluded from commencing these proceedings. Although in its List Response the defendant denied that it is liable to pay the plaintiff the amounts claimed or at all (par 17), this denial has not been supported by any argument or evidence during the hearing. It is necessary to be satisfied of the existence of the circumstances referred to in s 15(1) of the Act before judgment for the plaintiff may be entered: s 15(4)(a) of the Act. Those circumstances are that the defendant became liable to pay the claimed amount under s 14(4) of the Act as a consequence of having failed to provide a payment schedule within the stipulated time (s 15(1)(a)); and that the defendant has failed to pay the whole or any part of the amount claimed (s 15(1)(b)). I am satisfied of both of those matters.

Orders

- 27 There will be judgment for the plaintiff in the amount claimed with costs. I grant leave to the plaintiff to enter judgment.

Mr MR Elliott (plaintiff) instructed by Horton Rhodes

Mr JB Simpkins SC (defendant) instructed by Avendra Singh Strati & Kam Lawyers