

**JUDGMENT : Campbell J** : New South Wales Supreme Court : 11<sup>th</sup> July 2005.

- 1 This is an application to set aside a statutory demand. The plaintiff is a proprietor, for whom the defendant did building work under a building contract made on 30 June 2003. The plaintiff has alleged that the work was completed on 18 February 2004.
- 2 The defendant served a Payment Claim relating to the work on 4 March 2005, in response to which the plaintiff served a Payment Schedule on 18 March 2005. That resulted in the resulting dispute being referred for adjudication, and a determination being made by the adjudicator on 29 April 2005. That determination was to the effect that the plaintiff should pay the defendant a sum of a little over \$151,000.
- 3 On 16 May 2005 a statutory demand for that sum was executed. It is not quite clear when it was served, but it was served at least on or prior to 19 May 2005. On that date the plaintiff's solicitors wrote a letter to the defendant's solicitors indicating that they would make an application to set aside the determination.
- 4 On 3 June 2005 the plaintiff started proceedings for a declaration of the invalidity of the determination made by the adjudicator. On the same day the plaintiff also started the present proceedings, seeking to set aside the statutory demand.
- 5 At some stage comparatively recently the determination has been filed in the District Court, in consequence of which the District Court has now issued a judgment for the amount of the determination in favour of the defendant against the plaintiff. That District Court action was stayed, on 1 July 2005, pending the determination of the proceedings in this court.
- 6 Today, the application to set aside the statutory demand comes before me. The basis for setting aside the statutory demand is that it is alleged that there is a *bona fide* dispute as to the existence of the debt. That *bona fide* dispute relates to whether or not the adjudicator's determination is void.
- 7 The particular source of the alleged voidness is the allegation that the work to which the payment claim related had been completed more than twelve months before the payment claim was served. Section 13 of the **Building and Construction Industry Security of Payment Act 1999** provides:

**"13 Payment claims**

- (1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant" ) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
  - (2) A payment claim:
    - (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
    - (b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and
    - (c) must state that it is made under this Act.
  - (3) The claimed amount may include any amount:
    - (a) that the respondent is liable to pay the claimant under section 27(2A), or
    - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
  - (4) A payment claim may be served only within:
    - (a) the period determined by or in accordance with the terms of the construction contract, or
    - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.
  - (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
  - (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."
- 8 In the application of section 13(4) to the facts of this case, it is common ground that sub-para (a) does not apply. Thus, the only integer upon which the question of whether section 13(4) has been complied with, is whether the period of twelve months after the construction work to which the claim relates was last carried out was exceeded.
  - 9 The point, that the payment claim was made outside that twelve month period, is one which was taken before the adjudicator. Indeed, it was one of the grounds relied upon by the plaintiff in the payment schedule which it served on 18 March 2005. That payment schedule relied on various grounds for disputing the payment claim, but the ground that it was too late was given particular prominence by also being referred to in the covering letter which the plaintiff sent to the defendant.
  - 10 There was evidence before the adjudicator, in which the plaintiff put forward the factual basis upon which it contended that the payment claim was made late, and the defendant put forward the factual basis of its contention that the payment claim was not made late. The adjudicator, in a portion of his reasons for his adjudication, dealt with this matter as follows:

**"(iii) The works were completed by the Claimant prior to 18 February 2004 (item 2 in 'Attachments'):**

*In the Payment Schedule the Respondent asserts that all the construction works under the Contract were completed prior to 18 February 2004. In the Adjudication Response the Respondent submits that the Claimant's*

works under the Contract were directly linked to the Hornsby Shire Council Development Consent Number DA 2407/00. The Respondent points to the consent conditions 38 through 48 inclusive of the Development Consent, which define conditions upon which the Hornsby Shire Council would provide a Subdivision Certificate.

The Respondent further submits that the Claimant was required to complete all the construction works in accordance with the Development Consent prior to the issue of a Subdivision Certificate by Hornsby Council. The Respondent concludes that because Hornsby Shire Council issued a Subdivision Certificate on 18 February 2004, all the Claimant's works under the Contract must have been completed by that date. And since the Claimant's Payment Claim was served on 4 March 2005, the Respondent asserts that pursuant to s 13(4)(b) of the Act the Payment Claim is out of time.

I am of the opinion that the issue of a Subdivision Certificate by Hornsby Shire Council does not in itself prove completion on or prior to that date of all work under the Claimant's Contract with the Respondent. Moreover, the Respondent has not provided me with any evidence, which would verify that the Contract between the Claimant and the Respondent has come to an end at the time when a Subdivision Certificate was issued.

Attached to the Adjudication Application is a statutory declaration of Mr Nader Zoljalali, the secretary and sole director of the Claimant's organisation, dated 5 April 2005 in which Mr Zoljalali states that the Claimant continued to carry out work under the Contract after Hornsby Shire Council had issued a Subdivision Certificate until around April 2004. To that statutory declaration the Claimant has attached an invoice from Taipe Excavations to the Claimant dated 21 April 2004 for 'earthworks and removal of materials' as the evidence of the Claimant's work under the Contract. The invoice is addressed to 'Parisi Homes Pty Limited (the business name of the Claimant), site 21 Thompson Close, Pennant Hill'. In my opinion, Taipe Excavations' invoice in itself is not a proof of work under the Contract being carried out on or before 21 April 2004. However, if it is a monthly invoice, then the work performed by Taipe Excavations for the Claimant under the Contract would probably have been carried out some time in March 2004.

In Mr John Edwards James' statutory declaration dated 26 April 2005, which is attached to the Adjudication Response, Mr James states that since 5 May 2004 the title of lots 1, 2 and 3 of the land on which the Claimant has carried out subdivisional works under the Contract was registered in the name of EDPI Pty Limited, of which Mr Nader Zoljalali is the sole director and that lot 3 was assigned a house number '21'. Mr James then asserts that the earthworks carried out by Taipe Excavations was not work under the Contract, rather it was work carried out for EDPI Pty Limited. I have noted that while the invoice from Taipe Excavations refers to '21 Thompson Close', it is addressed to Parisi Homes Pty Limited (the Claimant), not to EDPI Pty Limited.

In consideration of the submissions before me by the parties on this matter, I may be wrong but I am more inclined to accept the Claimant's submission. It seems to me that it is highly probable that the Claimant has carried out some work under the contract, to which the Payment Claim relates, within a statutory period of 12 months of the date of the Payment Claim. I am satisfied that the Payment Claim was served by the Claimant within a period allowed by the Act in compliance with s 13(4)(b)".

- 11 It is clear enough that there was a real issue before the adjudicator about the question of whether the payment claim was made late, and that he determined it in light of the evidence before him and the submissions made to him.
- 12 Following the decision of the Court of Appeal in **Brodyn Pty Limited t/as Time Cost and Quality v Davenport** (2004) 61 NSWLR 421, the law has been clarified about the circumstances in which a court can hold that something which purports to be an adjudicator's determination is in fact not such a determination, but rather is void. In that decision Hodgson JA, with whom Mason P and Giles JA agreed, said at [52] – [55]:
- 52 However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.
- 53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
  2. The service by the claimant on the respondent of a payment claim (s 13).
  3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
  4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).
  5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss 22(1)) and the issue of a determination in writing (ss 22(3)(a)).
- 54 The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these

requirements has the effect that a purported determination is void, that is, 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.

- 55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf **Project Blue Sky Inc v Australian Broadcasting Authority** (1998) 194 CLR 355 at 390–91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. **R v Hickman; Ex Parte Fox and Clinton** (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.
- 13 The principles there stated have been applied by the Court of Appeal on later occasions in **Transgrid v Siemens Limited** (2004) 61 NSWLR 521 at 539-541, and in **Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd** [2005] NSWCA 142 at [45] - [46].
- 14 In **Brodyn Pty Limited v Davenport** at [54], Hodgson JA held that, in particular, the detailed requirements of section 13(2) as to the content of payment claims did not necessarily need to be complied with before a determination was a determination within the meaning of the Act. Of particular relevance is the passage where his Honour held, at [55], that: “the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf **Project Blue Sky Inc v Australian Broadcasting Authority** (1998) 194 CLR 355 at 390-391. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power...and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with...then in my opinion a purported determination will be void...If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance”.
- 15 Dr Birch, for the defendants, says that the requirements of section 13(4) are not ones which are “basic requirements” for the existence of a determination, at least in the circumstances where the question of whether that requirement has been complied with has been raised, and decided, by the adjudicator. In that situation the adjudicator is, he submits, in a situation where he or she has the jurisdiction to go wrong, and if he or she does go wrong he has nevertheless made a determination within the Act.
- 16 Dr Birch submits that the question of whether the requirements of section 13(4) are “essential basic requirements” is a question of law of narrow scope, not requiring any additional factual material, which is capable of being decided on an application such as the present, and should be decided. He refers me to the decision of Cohen J in **Delnorth Pty Ltd v State Bank (NSW)** (1995) 17 ACSR 379 at 384, where his Honour said: “Section 459H(1) refers to the court finding that there is a genuine dispute. The parties have argued this case on the issue of whether the proper construction of the agreement and the facts results in the plaintiff owing money to the defendant. The facts were not in dispute and there was thus no question of whose evidence would be accepted on a final hearing. Under the previous legislation, when there was a claim that there was a bona fide dispute on substantial grounds as to the debt claimed, the court could decide that dispute if it arose from a question of law or was of short compass. See, for example, **Offshore Oil NL v Acron Pacific Limited** (1984) 2 ACLC 8.
- I consider that under the Corporations Law the same approach can be taken.”
- 17 It is also appropriate to take that approach under the **Corporations Act 2001** (Cth), the relevant provisions of which are not materially different to those of the **Corporations Law**. The legal question raised in the present case is one which, in my view, is capable of being determined on an application such as the present.
- 18 It must immediately be noted that the language of section 13(2) is in one sense mandatory, in stating what a payment claim “must” do. By different verbiage, section 13(4) is likewise, in that same sense, mandatory by saying that the payment claim “may be served only within” a particular period of time.

- 19 In my view, consistently with *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391, the question of what was intended to be essential for compliance with the basic requirements of a determination is not decided solely by these textual matters. The fact that the language of section 13(4) is in one sense mandatory shows that it sets out a “requirement”, but not that it is a basic and essential requirement. Rather, the question of what is essential needs to be decided, bearing in mind the object and purpose of the legislation. It is concerned with providing a quick and relatively easy way in which an obligation to make a payment on account of what ultimately might be found to be due can be established. Viewed in that light, I do not find that precise compliance with section 13(4) is a basic requirement which is essential to a purported determination actually being a determination under the Act. Rather, section 13(4) is one of the “more detailed requirements”, which Hodgson JA held exist in the Act. When there has been a document which purports to be a Payment Claim served, the fact (if it were a fact) that the construction work to which the claim relates was last carried out more than 12 months before the payment claim was served does not mean that the “basic and essential requirement” of “service ... of a payment claim (s.13)” has not been complied with. And even if it turned out that the adjudicator was mistaken in deciding that section 13(4) had been complied with, that would not mean that his determination was void, when he has addressed in a *bona fide* way the question of whether section 13(4) has been complied with. In those circumstances, I find that there is no *bona fide* dispute as to the existence of the debt claimed.
- 20 I extend the time for compliance with the statutory demand to Wednesday, 27 July 2005. I dismiss the application and I order the plaintiff to pay the defendant’s costs.

M Loewenstein – Plaintiff instructed by Davidsons Solicitors  
Dr C Birch SC – Defendant instructed by Barclay Benson Solicitors