

**JUDGMENT : Nicholas J :** Supreme Court of New South Wales. 5<sup>th</sup> May 2003

1 By its notice of motion the Defendant seeks a declaration that, pursuant to s 23(1)(a) *Building Construction Industry Security of Payment Act 1999* (NSW) (the Act) the Plaintiff must pay to it the sum of \$71,086.52 being the adjudicated amount determined by Mr Adjudicator Tim Sullivan on 24 March 2003, and a declaration that pursuant to s 25(2) of the Act it may recover the amount as a debt due to it from the Plaintiff. It also seeks summary judgment against the Plaintiff pursuant to SCR Pt 13, r 2 for the sum of \$71,086.52 together with interest pursuant to s 94 *Supreme Court Act 1970* (NSW). Ancillary orders are also sought. The Plaintiff opposes the making of the orders and declarations, and asserts that there are a number of triable issues in relation to the claim.

**Background**

2 Pursuant to an agreement evidenced by a proposal dated 8 May 2002 and a Consultancy Deed dated 21 June 2002 the Defendant provided certain services to the Plaintiff in relation to construction work undertaken by the Plaintiff on the development project at 260 Captain Cook Drive, Kurnell known as Serenity Cove.

3 On 10 January 2003 a payment claim of the same date for the amount of \$90,488.23, said to be in accordance with s 13 of the Act, was served on the Plaintiff.

4 On 24 January 2003 the Plaintiff served on the Defendant a payment schedule dated 23 January 2003 in reply to the payment claim pursuant to s 14.

5 By its adjudication application dated 3 February 2003 the Defendant applied pursuant to s 17 for adjudication of the progress payment to be made. The application was made to the Institute of Arbitrators and Mediators Australia which resulted in the appointment on 6 February 2003 of Mr Sullivan as the Adjudicator.

6 On 10 February 2003 the Plaintiff served an adjudication response on the Defendant pursuant to s 20. It served further submissions and evidence on 14 February 2003.

7 On 20 February 2003 the Defendant served its further submission in response.

8 On 24 March 2003 the Adjudicator made a determination pursuant to s 22 of the Act in favour of the Defendant. In accordance with s 22(1) he determined that the adjudicated amount of the progress payment to be paid by the Plaintiff to the Defendant was \$71,086.52, and that the date upon which the amount became payable was 6 December 2002. (A copy of the determination is annexed to the affidavit of David Campbell-Williams of 4 April 2003).

9 On 24 March 2003 the determination was communicated to the Plaintiff and to the Defendant. On 25 March 2003 the Defendant's solicitors delivered to the Plaintiff's solicitors a letter of that date together with a copy of the determination.

10 It is common ground that the relevant date for the purpose of s 25 of the Act was 26 March 2003. It is also common ground that the Plaintiff has failed to pay the whole or any part of the adjudicated amount to the Defendant, and has failed to give security for payment of the whole or any part of that amount to the Defendant.

11 The parties had the benefit of legal representation throughout the adjudication proceedings.

12 On 27 March 2003 the Plaintiff filed the summons in which it claims declarations, inter alia, to the effect that the Adjudicator acted ultra vires in carrying out the adjudication and making the determination, and that the determination is a nullity, and seeks an order that the determination be set aside. On 4 April 2003 the Defendant filed its cross claim in which it claims declarations and orders substantially to the effect of those claimed in the notice of motion presently before the court. As yet, no defence has been filed to the summons.

**The Defendant's contentions**

13 The Defendant's claims that it is entitled to the declarations sought, and to judgment for the amount claimed, were supported by submissions to the effect outlined below.

14 As the Adjudicator determined that the Plaintiff must pay the adjudicated amount to the Defendant s 23(1) of the Act applies. It provides:

*"23(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent:*

*(a) must pay that amount to the claimant, or*

*(b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them".*

15 By reason of the failure of the Plaintiff to either pay the amount to the Defendant, or to give security for payment of the amount to the Defendant, pursuant to s 23(1), the Plaintiff is faced with the consequences prescribed by s 25 which provides:

*"25(1) This section applies if, on or before the relevant date, a respondent fails to do one or other of the following:*

*(a) to pay the whole or any part of the adjudicated amount to a claimant,*

*(b) to give security for payment of the whole or any part of the adjudicated amount to a claimant.*

*(2) In those circumstances, the claimant:*

*(a) may recover the unpaid, or unsecured, portion of the adjudicated amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, and*

- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).
- (5) In this section, **relevant date** means:
- (a) the date occurring 2 business days after the date on which the relevant determination is made under section 22, or
- (b) if the adjudicator determines a later date under section 22 (1) (b), that later date".
- 16 The relevant date was 26 March 2003. The Plaintiff failed, on or before that date (or at all), either to make any payment or to give security for payment as referred to in s 25(1)(a) and (b).
- 17 In these circumstances the Defendant, pursuant to s 25(2)(a), may recover in this Court the whole of the amount from the Plaintiff as a debt due to it. Thus, with regard to s 25(4), the Defendant is entitled to judgment because, on the evidence, the court should be satisfied of the existence of the circumstances referred to in s 25(1).
- 18 entitlement to judgment in these circumstances is consistent with the scheme contained in Div 2 of Pt 3 of the Act which establishes a procedure for the adjudication of disputes following service of a payment claim under s 13, and the provision of a reply by way of a payment schedule under s 14, and for the payment of, or giving security for, and a right to recover, any adjudicated amount.
- 19 The underlying legislative intention was described by the Minister in his second reading speech (Hansard: 8 September 1999 Legislative Assembly p 107): "*Adjudication therefore provides the claimant with important benefits: a prompt interim decision on a disputed payment, and the amount in the decision must be either paid to the claimant, or secured and set aside. Failure to comply with either of those matters allows the claimant not only to sue for the adjudicated amount, but also to suspend work.*
- Therefore, if the dispute is not resolved to the satisfaction of both parties by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved. The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal.*
- Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment. However, recourse to a legal or another dispute resolution process does not suspend the operation of the bill or the adjudicator's decision pending a final decision. The respondent must still pay the amount decided by the adjudicator or provide security for payment. Clause 34 states that a provision of any agreement which purports to exclude, modify or restrict the respondent's liability under the bill is void".*
- 20 Thus the Defendant contends it is entitled to summary judgment in respect of the sum of \$71,086.52 pursuant to s 25(2)(a) of the Act.

#### **The Plaintiff's contentions**

- 21 The Plaintiff contends that the court should refuse the claim for summary judgment. Its case is that there are serious issues to be tried in respect of three matters.
- 22 Firstly, the Plaintiff submits that the payment claim was not in respect of "construction work" within the meaning of s 5 of the Act or "related goods and services" within the meaning of s 6.
- 23 Secondly, it was submitted that the payment claim was invalid for the reasons that, on its face, it did not comply with the requirement of each of s 13(2)(a) and (b) in that it did not sufficiently identify the construction work or related goods and services, and did not indicate the amount claimed to be due for the construction work done or the goods and services supplied. It was further submitted that as a consequence of the invalidity of the payment claim the initiation and conduct of the statutory adjudication process was fatally flawed so as to deprive the Adjudicator of jurisdiction to determine the amount to be paid and the date on which it became payable pursuant to s 22(1). In the circumstances, so it was said, the adjudication determination was a nullity.
- 24 Thirdly, it was submitted that on the face of the determination it was demonstrable that the Adjudicator had acted ultra vires s 22(2) of the Act with the result that the adjudication determination was a nullity.

#### **The issues considered**

- 25 As to the Plaintiff's first submission, namely that the payment claim was not in respect of construction work or related goods and services within the meaning of s 5 and 6 of the Act respectively, it is understandable that it was but faintly pressed, and thus may be disposed of briefly. The Consultancy Deed of 21 June 2002 was in evidence. Its terms make plain that it is a construction contract within the meaning of s 4, being a contract under which the Defendant undertook to supply related goods and services which I find to be within the meaning of s 6. The construction work was the development of the project at Serenity Cove. Also in evidence was the adjudicator's determination, para 17 of which stated:

"17 The work required to be carried out or services to be provided by the Claimant under the Fee Proposal of 8 May and under the Consultancy Agreement is consultancy work and there is no issue that the consultancy work is not related goods and services in relation to construction work within the meaning of the Act".

26 In my opinion the submission is without substance and I reject it.

#### The payment claim

27 The payment claim dated 10 January 2003 was in evidence as part of the adjudication application dated 3 February 2003 (Ex 1). It consisted of a cover sheet, a schedule which details 7 invoices dating from 31 May to 11 December 2002 and the amounts claimed thereby, and copies of the invoices listed in the schedule. It is unnecessary to recite the contents of these documents in full. It is sufficient to note only some of the matter contained in them:

(a) The cover sheet was headed as follows:

"Building and Construction Industry Security of Payment Act 1999 Section 13.

#### PAYMENT CLAIM"

It included information which identified the project as "260 Captain Cook Drive, Kurnell (Serenity Cove)", the payment period as "Work Completed to 30 November 2002", and the total amount of "this Payment Claim: \$90,488.23".

It also contained a statement in these terms: "The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the Payment Claim are set out in the Schedule to this Payment Claim and the attached copies of the Tax Invoices listed in the Schedule".

(b) The invoices detail amounts claimed to be due in respect of cost management services (6961/1) and project management services (6961A/1-6) provided to the Plaintiff in respect of the Serenity Cove project.

28 The principles relevant to the question of compliance with s 13(2) were discussed in *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* (2002) NSWCA 136 par 20; *Beckhaus v Brewarrina Council* (2002) NSWSC 960 para 73-76; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003) NSWSC 266 paras 63-65; 81-85. It must be clear on the face of the document(s) which constitute the statutory payment claim that the information conveyed meets the requirements of s 13(2). "The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning" (*Walter Construction Group Pty Ltd* para 82).

29 In my opinion the payment claim dated 10 January 2003, when read as a whole by a reasonable person, clearly fulfils the requirements of s 13(2)(a) and (b), and I so find. Accordingly the Plaintiff's submission on this issue must fail.

30 This conclusion renders it unnecessary to deal with the submission that the effect of the invalidity of the payment claim was to deprive the Adjudicator of jurisdiction to determine the adjudication application pursuant to s 22. However, in deference to the Plaintiff's submission, it is appropriate that I shortly state my response to it.

31 Although it may be said that, by service of a payment claim under s 13 on the person who under the contract is liable to make the payment, the claimant has set in train the procedure for recovery of payment established under Pt 3 of the Act, it is not correct to say that the payment claim is the foundation of the jurisdiction of the Adjudicator. By s 19(2), upon acceptance of a claimant's adjudication application under s 17, the Adjudicator is taken to have been appointed to determine the application. The Adjudicator's powers and functions in respect of the adjudication procedures and determination are prescribed in s 21 and s 22. These provisions of the Act are the source of jurisdiction. In my opinion the Plaintiff's submissions on this issue were misconceived.

32 These matters were referred to by the Minister in the second reading speech thus: "Clauses 21 and 22 detail the powers and functions of the adjudicator. After receiving the initial submission from the parties, the adjudicator can call for further submissions, view the site and hold a conference. The process is not judicial, the provisions of the Commercial Arbitration Act 1984 do not apply and there is no power to call for witnesses or to give evidence under oath. The adjudicator must decide the amount, if any, owed by the respondent to the claimant in respect of the payment claim and the date on which the amount became or will become payable. This date will be the date for payment prescribed by the construction contract or, if no date is prescribed, two weeks after the payment claim was made, as provided for under clause 11. The adjudicator must give brief reasons, if so requested by either party prior to making a decision.

As the respondent's submission must be confined to reasons, amounts and grounds for withholding payment which were stated in the payment schedule and any related issues raised in the claimant's submission, the ambit of the dispute to be decided is fixed by two documents, namely, the payment claim and the payment schedule. Provided that the adjudicator actually decides the dispute evidenced by these documents, there is ample judicial authority to show that the courts will not interfere with or set aside a decision of an adjudicator".

33 From reading ss 13, 14, 17(2), 20(2), 21, 22(2)(c) and (d) of the Act it is evident that, as the Minister said, the payment claim and the payment schedule serve to delimit the issues to which the submissions of a claimant and a respondent may refer.

- 34 Furthermore, the evidence shows that at no time either before the Adjudicator provided his determination on 24 March 2003, or on or before 26 March 2003 (the relevant date under s 25(1) and (5)(a)) did the Plaintiff put in issue the validity of the statutory payment claim. It did not do so until it filed the summons on 27 March 2003.
- 35 By its payment schedule dated 23 January 2003 the Plaintiff disputed the payment claim. In the course of the adjudication proceedings it invited the Adjudicator to determine the dispute in its favour by upholding its submissions in relation to the payment claim and accordingly holding that the amount payable to the Defendant was nil. The Plaintiff thereby availed itself of the benefit of the statutory process which enabled the speedy determination of the dispute which, had it been successful, would have relieved it of liability to pay the amount claimed. Its conduct evidences its submission to the jurisdiction of the Adjudicator to determine the amount, if any, payable under the payment claim whether or not it complied with the requirements of s 13(2). (Compare, for example, *Cowlin Construction Limited v CFW Architects (a firm)* [2002] EWHC 2914 (TCC) paras 59-67)
- 36 Furthermore, in *Liftronic Pty Ltd v Unver* (2001) HCA 24; (2001) 75 ALJR 867 at para 44, McHugh said: *"It is an elementary rule of law that a party is bound by the conduct of his or her case. As six justices of this court said in University of Wollongong v Metwally (No 2):*
- Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so".* (See also: *Coulton v Holcombe* (1986) 162 CLR 1 at pp 8-11; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at pp 252-254.)
- The application of this principle is not limited to curial proceedings. Contrary to the Plaintiff's submissions, they apply to adjudications under the Act.
- 37 It seems to me wrong in principle that in these circumstances and where, after communication of the determination, the Plaintiff failed to comply with the requirement of either s 23(1)(a) or (b) of the Act it should be open to it to assert that the payment claim was invalid as a ground for refusal of summary judgment in these proceedings. In my opinion the submissions should be rejected.

#### Ultra vires

- 38 It was submitted that the Adjudicator acted ultra vires s 22(2)(b) in that:
- (a) in the course of construing the contract he made a finding in para 11 of his reasons concerning the existence of implied terms;
  - (b) he made a finding in para 26.12 of his reasons that the contract included an oral term;
  - (c) he made a finding in para 25.17 of his reasons that, upon its proper construction, the contract obliged the Plaintiff to pay GST.
- 39 At the conclusion of his oral submissions to the court Mr Newton, counsel for the Plaintiff, summarised the questions as to ultra vires this way (T.page 46):
- (a) *The Adjudicator stepped outside his powers insofar as he resorted to "findings of law" in deciding the existence or otherwise of oral or implied terms of the contract.*
  - (b) *He acted ultra vires in that he received, and ruled upon, evidence in relation to the existence or otherwise of the terms of the contract.*
  - (c) *He acted ultra vires in that, in effect, he acted as a tribunal of fact in dealing with evidence concerning the appropriate rate or rates to be applied in respect of some parts of the claim and in making findings based upon his preference of "one set of evidence against another where he had no power to do so".*
  - (d) *He made a finding of law as to the date on which an obligation to make payments fell due.*
- 40 Importantly, during the hearing Mr Newton acknowledged that he was unable to show that any conduct said to be ultra vires was relevant to, or affected, the determination of any component of the adjudicated amount. It was not put that in reaching his decision the Adjudicator illegitimately took into account matters outside the issues arising from the payment claim, the payment schedule and the submissions. To the best of my understanding the gravamen of the complaint as elicited in arguendo was that it was not open to the Adjudicator to decide whether or not the contract contained an implied term, and it was not open to him to construe the provisions of the contract to determine whether the Plaintiff was obliged to pay GST.
- 41 The Adjudicator's powers are found in s 22(2) of the Act which provides:
- "22(2) In determining an adjudication application, the adjudicator is to consider the following matters only:*
- (a) the provisions of this Act,*
  - (b) the provisions of the construction contract from which the application arose,*
  - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,*
  - (d) the payment schedule to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,*
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates".*
- 42 Thus, in the process of determining an adjudication application the Adjudicator is, at least, obliged to consider the provisions of the relevant contract (s 22(2)(b)), the payment claim and submissions and relevant documentation in support (s 22(2)(c)) and the payment schedule and submissions and relevant documentation in support (s 22(2)(b)). From these provisions it is perfectly clear that the legislature envisages that parties will raise disputed issues, and

requires the Adjudicator to resolve them in the course of making a determination of the amount and date pursuant to s 25(1).

- 43 It is impossible to accept that the proper exercise of power and discharge of function would not ordinarily require an adjudicator to interpret contractual documents and/or evidence as to the existence of an oral contract or oral terms, and/or to make findings as to the existence and effect of contractual provisions whether express, implied, written or oral. (In passing, it is to be observed that by s 7 the Act applies to any construction contract, whether written or oral, or partly written and partly oral). It seems clear enough from the Minister's statement referred to in para 32 above, and as a matter of plain common sense having regard to the terms of s 22, these are likely to be necessary steps to be taken in the course of deciding a dispute the ambit of which is evidenced by the payment claim and the payment schedule. Acceptance that the process is not judicial and that there is no power to call for witnesses or to give evidence under oath provides no support for the Plaintiff's submissions.
- 44 In my opinion it was properly within the Adjudicator's powers and functions to consider, and to come to a view about, each of the matters relied upon by the Plaintiff as being conduct ultra vires, and the submission must be rejected. In any event, the acknowledgement that none of these matters affected the determination of any component of the adjudicated amount is tantamount to an acknowledgment that the ultra vires question raises no triable issue.

#### Conclusion

- 45 Having regard to s 25(4) of the Act, I am satisfied as to the existence of the circumstances referred to in subs (1) that:
- (a) the Plaintiff has failed to pay the whole or any part of the adjudicated amount to the Defendant; and
  - (b) the Plaintiff has failed to give security for payment of the whole or any part of the adjudicated amount to the Defendant.
- 46 For the reasons given I hold that the Plaintiff has failed in its opposition to the relief sought in the notice of motion. I am satisfied that the Defendant is entitled under s 25(2)(a) to recover the whole of the adjudicated amount from the Plaintiff as a debt due to it, and is entitled to summary judgment pursuant to Pt 13 r 2 for the sum of \$71,086.52.
- 47 I expect the parties to agree on the amount of interest, if any, payable in respect of the claim. In the circumstances it is appropriate that I direct the Defendant to bring in short minutes of orders which give effect to the reasons for decision. The parties may also address me in relation to costs. Directions may also be given in relation to the further conduct of the issues arising on the summons and the cross claim. Arrangements should be made with my Associate by 9 May 2003 for the relisting of this matter.

R K Newton – Plaintiff instructed by Summit Law.  
M Christie – Defendant instructed by Deacons