

**JUDGMENT : Campbell J** : New South Wales Supreme Court : 12<sup>th</sup> November 2004

1 The plaintiff asks the Court to quash an adjudication determination which the first defendant made on 18 July 2004 under the **Building and Construction Industry Security of Payment Act 1999** ("the **BACISOP Act**"). The plaintiff also asks that the second defendant be prevented from taking any steps to enforce that adjudication determination.

#### **The Events Leading to this Litigation**

- 2 The second defendant is a development consultant whose field of work includes providing design and engineering services concerning systems for controlling stormwater and floodwater. It was engaged by the plaintiff to carry out work of that type concerning a proposed home unit development at 140-148 Beattie Street, Balmain.
- 3 The second defendant submitted various invoices to the plaintiff for work done concerning that project. Amongst them were invoices dated 1 April 2003, 1 May 2003, 27 August 2003, and 11 December 2003. The plaintiff paid part only of the invoice dated 1 April 2003, and did not pay the remaining three invoices at all.
- 4 On 1 June 2004 the second defendant served on the plaintiff a document purporting to be a payment claim under the BACISOP Act. It identified the project as "*provision of survey and engineering services for 140-148 Beattie Street Balmain*" and claimed an amount of \$128,467.02. It identified that amount as made up of the unpaid portion of the invoice dated 1 April 2003, of the invoices dated 1 May 2003, 27 August 2003 and 11 December 2003, and interest at the rate of 60% per annum on the unpaid part of each invoice, calculated from the date when the second defendant asserted that invoice had become due.
- 5 On 17 June 2004 the second defendant served on the plaintiff a notice under section 17(2) of the BACISOP Act.
- 6 On 8 July 2004 the first defendant, Mr Parnell, was nominated as an adjudicator. On 11 July 2004 he accepted that nomination.
- 7 On 18 July 2004 he issued a determination, awarding the second defendant the total amount it had claimed, and ordering the plaintiff to pay the fees connected with the adjudication.
- 8 The plaintiff contends that Mr Parnell had no jurisdiction to issue his award, because the second defendant had at no time served a valid payment claim. To understand the basis of that submission by the plaintiff, it is necessary to set out certain provisions of the BACISOP Act.

#### **Relevant Provisions of the BACISOP Act**

9 The Act contains the following provisions:

##### **"5 Definition of "construction work"**

(1) In this Act, **construction work** means any of the following work:

- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
- (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,
- (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:
  - (i) site clearance, earth-moving, excavation, tunnelling and boring, and
  - (ii) the laying of foundations, and
  - (iii) the erection, maintenance or dismantling of scaffolding, and
  - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
  - (v) site restoration, landscaping and the provision of roadways and other access works,
- (f) the painting or decorating of the internal or external surfaces of any building, structure or works,
- (g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), **construction work** does not include any of the following work:

- (a) the drilling for, or extraction of, oil or natural gas,
- (b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,
- (c) any other work of a kind prescribed by the regulations for the purposes of this subsection. ...

##### **8 Rights to progress payments**

(1) On and from each reference date under a construction contract, a person:

- (a) who has undertaken to carry out construction work under the contract, or
- (b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment. ...

### 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. ...
- (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."
- 10 The plaintiff contends that later provisions in the BACISOP Act which enable an adjudication application to be made, an adjudicator to be appointed, and an adjudicator to make a determination, are dependent upon the service of a valid payment claim. For the purposes of this judgment I shall accept, without deciding, that that contention is correct.
- 11 The plaintiff contends that the document which the second defendant served on 1 June 2004 is not a valid payment claim because, insofar as it claims payment of the invoice issued on 1 May 2003, and of the part of the invoice issued on 1 April 2003 which is unpaid, it is served outside the period of twelve months which section 13(4)(b) BACISOP Act requires. This error, the plaintiff submits, makes the entire payment claim invalid.
- 12 When one is deciding what is "*the construction work to which the claim relates*", within the meaning of section 13(4)(b) it is necessary to take into account both the definition of "*construction work*" in section 5 of the BACISOP Act, and also the terms of the claim itself. The definition of "*construction work*" in the Act is cast in very broad terms, by reference to the types of tasks which can be carried out in the course of building and engineering work. When one is examining the claim to identify what is the "*construction work to which the claim relates*" in the present case, where the alleged payment claim proceeds by reference to four identified invoices, it is to the terms of those four invoices that one must turn.
- 13 Each of the invoices is in a common form. It states the period of time to which it relates (respectively, 17 December 2002 to 31 March 2003, 1 April 2003 to 30 April 2003, 1 May 2003 to 1 August 2003, and 2 August 2003 to 10 December 2003). Each invoice identifies numerous tasks which were carried out. At least some of the tasks in any particular invoice were ones which were not repeated in any later invoice. In particular, there are some tasks in the invoices dated 1 April 2003 and 1 May 2003 which were not repeated in any later invoice.
- 14 In *Estate Property Holdings Pty Limited v Barclay Mowlem Construction Limited* [2004] NSWCA 393 at [18], Hodgson JA (with whom Mason P and Giles JA agreed) held that "*construction work ... to which the claim relates*" in section 13(4)(b) BACISOP Act is "... the construction work for which payment is claimed in the claim; and accordingly, the requirement of s 13(4)(b) is that some of that construction work be carried out in the relevant twelve month period." His Honour continued, at [19]: "However, in my opinion ss. 13-15 of the Act do not provide any basis for dividing up the construction work to which the claim relates into items which may be considered discrete, and asking in respect of each such item whether some work was carried out in the twelve month period. Section 13(2)(b) refers to "**the amount**" of the progress payment, s. 14(4) refers to liability to pay "**the claimed amount**", and s. 15(4) refers to "*the unpaid portion of the claimed amount*": these provisions weigh against the idea that separate consideration should be given to individual items that make up the claimed amount."
- 15 Even though the payment claim in the present case is made up of work comprised in four invoices, there is only a single payment claim. Further, as is common in relation to claims for payment under building contracts, it relates to the performance of a multitude of different types of tasks. For the purpose of section 13(4)(b) BACISOP Act, it is necessary to identify a *single* time which is the time at which "*the construction work to which the claim relates was last carried out*". That requires the construction work for which the claim seeks payment to be considered as a whole. If any task for which payment is sought by a payment claim was carried out within twelve months before service of the payment claim, then the entirety of the payment claim is within time.
- 16 For these reasons, I reject the submission that Mr Parnell had no jurisdiction to make the adjudication determination.
- 17 Some submissions were made about whether Mr Parnell had acted correctly in himself expressing views about whether he had jurisdiction. The basis for the criticism of him was that he had taken into account arguments on the topic of his jurisdiction which were presented in a written submission which the plaintiff made to him, which had not been foreshadowed in any payment schedule served by the plaintiff. In deciding whether an adjudicator has acted within jurisdiction, the Court considers the question of jurisdiction afresh, and makes its own mind up concerning that topic quite independently of anything which the adjudicator might have decided. It is not necessary to consider whether Mr Parnell made any error in the particular course of reasoning by which he concluded that he had jurisdiction.
- 18 Neither is it necessary to consider the counter-argument which was put that, even if Mr Parnell had made an error, the Court should in its discretion decline to quash his determination.

### Orders

- 19 I therefore make the following orders:
1. Summons dismissed.
  2. Plaintiff to pay costs of defendants.

**Property & Equity Developments P/L v John Parnell & Bowdens Groups Australia P/L [2004] Adj.L.R. 11/12**

D M Loewenstein – Plaintiff : instructed by R J Thomas  
Submitting appearance - First Defendant  
C Harris - Second Defendant instructed by Matthews Folbigg Pty Ltd