TQM Design & Construct P/L v Dasein Constructions P/L (subject to a Deed of Company Arrangement) & National Electrical Communications Association

JUDGMENT : McDougall J : New South Wales Supreme Court : 3rd December 2004

1 The plaintiff ("TQM") and the first defendant ("Dasein") are parties to a construction contract. Dasein made a payment claim under the contract. TQM did not accept the claim. Accordingly, Dasein referred the matter to adjudication. The adjudicator found in favour of Dasein. In doing so, he disregarded (for reasons that I will deal with in detail later) the adjudication response provided by TQM. The question for decision in these proceedings is whether the adjudicator's determination is void.

2 Dasein is in administration. Its administrator is Mr Silvia of Ferrier Hodgson. Much of the work relating to the administration has been handled by Mr Costa Nicodemou, an employee of Ferrier Hodgson, under the supervision of others. In particular, it appears, Mr Nicodemou prepared the payment claim and the adjudication application.

The issues

3 A number of issues were debated in the proceedings but it seems to me that there is a relatively easy road to the conclusion to which I have come. The essential issue of fact is whether the adjudication application was served on or received by TQM on 28 or 29 October 2004. The essential issue of principle is whether the adjudicator, Mr Davenport, denied TQM natural justice by failing to consider its adjudication response. An alternative issue, put impersonally, is whether TQM was denied natural justice because Mr Davenport took into account both evidence and submissions relating to the date of service provided to him by Mr Nicodemou on behalf of Dasein but not provided to TQM or its lawyers.

The legislation

4 Under the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"), an adjudication application may be made in the circumstances set out in s 17(1). When made, it is by s 17(5) to be "served on the respondent concerned". Once a respondent is served, it has an opportunity to furnish an adjudication response. By s 20(1)(a) (which is the relevant paragraph in this case) that is to be done within "five business days after receiving a copy of the application". The significance of that time limit (and for that matter, the alternative time limit in s 20(1)(b)) is that under s 21(2) an adjudicator must not consider an adjudication response unless it is made in time.

5 It will be seen that the Act talks variously of service and receipt. They are not equivalent concepts. It was submitted that I should construe the word "receiving" in s 20(1)(a) as having its ordinary English meaning, namely, taking into one's possession and not as equivalent to "being served" or "having been served". On the view to which I have come it is not necessary to answer that question, but, in particular having regard to the consequences that follow if an adjudication response is not lodged within time, I incline to the view that the distinction between the concept of service and concept of receipt is deliberate and that in s 20(1) the word "receiving" should be given its ordinary English meaning.

The evidence of service and receipt

6 The evidence as to service or receipt is difficult to reconcile. Dasein says that the adjudication application was given (to use a neutral word) to TQM at about 10.55 or 10.58 am on Thursday 28 October 2004. It relies upon the evidence of Mr James Noel Wilson, a courier. Mr Wilson says that he picked up two envelopes (each of which, it has been proved, contained a copy of the adjudication application) from Ferrier Hodgson and that he took one to the second defendant (which was the authorised nominating authority) and the other to premises at 61 Redmyre Road, Strathfield.

7 Mr Wilson's evidence is that he went to 61 Redmyre Road, Strathfield, knocked on the door and, having received no response, went to the rear of the house. He says he did not see anyone in the house or in the backyard. He then says (in his affidavit) that he contacted Ferrier Hodgson and said that he intended to leave the envelope at the rear door and was told this would be all right. Somewhat strangely, Mr Wilson does not say in his affidavit that he then did so. However, a business record which he says he maintained, and which records deliveries made by him, has the notation "left at back door" and the time as "10.55". Mr Wilson said in his oral evidence that that document related to deliveries undertaken by him on 28 October 2004. It should also be noted that Mr Wilson said in oral evidence that he did in fact leave the envelope at the rear of the premises and he expanded upon this, saying that he thought he left it on a seat which he identified by reference to photographs annexed to the affidavit of Mr Maroun Taouk sworn 3 December 2004.

8 The premises at 61 Redmyre Road, Strathfield are the residence of Mr Taouk, the principal of TQM, and his family. They are also the "principal place of business" of TQM, according to the documents lodged with the Australian Securities Commission (as it then was) in connection with its registration as a company. However, at the relevant time, TQM had its ordinary place of business at premises lot 24, 111-121 Underwood Road, Homebush Business Village - a fact known to Mr Nicodemou at the time and stated by him as TQM's ordinary place of business in the adjudication application. It is somewhat mysterious that Mr Nicodemou, knowing that, chose nonetheless to direct that the provision of the adjudication application to TQM be done by sending it to 61 Redmyre Road.

9 The evidence from Mr Taouk and his family is that the envelope in question was not at their home, 61 Redmyre Road, on 28 October 2004. In particular, Mr Taouk's sisters, Ms Madeline and Ms Helen Taouk, have both sworn that they went into the backyard of the premises on a number of occasions during the evening of 28 October 2004 to smoke. They both said that the backyard has sensor lights so that, when someone walks out there, "the

whole of the porch and backyard is lit up". They both said had there been any package "in front of any of the doors or anywhere on the rear porch" they would have noticed. They have both said there was no such package there on the evening in question.

10 I am satisfied that if either Ms Madeline or Ms Helen Taouk had noticed such a package at the rear of the premises on the evening in question they would have given it to Mr Maroun Taouk.

11 Ms Madeline Taouk was cross-examined on her affidavit. Ms Helen Taouk was not. Having paid careful attention to the cross-examination of Ms Madeline Taouk, I see no reason not to accept what she said in her affidavit. Equally, Ms Helen Taouk not having been challenged, I should accept what she said. Although I accept as a matter of possibility that the envelope could have been left somewhere where they did not see it, and as a matter of possibility that they did not see it on the occasions when they went outside to smoke, I take the view, having heard them, that the balance of the probabilities strongly favours the view they would have noticed the envelope had it been there, and that there was no envelope there to their observation.

12 I am comforted in that view by the evidence of Mr Taouk's wife, Mrs Manal Taouk. She said in her affidavit that she was "up and about" from about 9 am on 28 October and she was home for the entire day. She said that when she is home she leaves open the back door on to the verandah. She said she did this on the day in question. She said that no one rang the doorbell and no one, to her observation, came to the backyard or near the back doors. Further, she said, she was outside "on at least half a dozen occasions" during the day; that had there been a package she would have seen it; and that there was no such package.

13 Ms Madeline Taouk was not cross-examined on her affidavit. Again, I think I should accept her evidence.

14 Accordingly, and notwithstanding that in cross-examination Mr Wilson stuck substantially to his story, I think that the balance of probabilities and the balance of the evidence strongly favours that the view that he did not, as he said, leave the envelope at the rear of the premises on 28 October 2004.

15 Mr Taouk said that he found the envelope on the front porch of the premises "when I came home from work at about 6 pm the next day, Friday 29 October 2004". He said it had not been there when he left the house at 9 am that day. I accept that evidence. His wife confirms that the envelope was not there when she left the house at about 12.30 pm on that day.

Correspondence between the parties

16 When Mr Taouk received the envelope and found what it contained, he acted promptly, on the next business day, to write to both Mr Nicodemou and to Mr Davenport stating that the adjudication application was received "on the afternoon of 29 October 2004 at the end of the business day and week". I have no doubt, having heard Mr Taouk, that had he received the document the preceding day he would have taken that action (ie, writing to Mr Nicodemou and Mr Davenport) on 29 October 2004. It was suggested in the course of submissions that Mr Taouk may have failed to do so deliberately, in effect to gain more time to put on TQM's adjudication response. That proposition was not put to Mr Taouk in cross-examination and I do not accept it.

17 Mr Davenport wrote on 1 November to TQM and Dasein notifying them that he accepted the adjudication application and saying that, unless advised otherwise, he would assume "that the adjudication application was served on the respondent on 27 October 2004". It is not clear whether that letter (which was dispatched by facsimile transmission) was sent before or after Mr Taouk's message of 1 November 2004 (which was also dispatched by facsimile transmission), but I would incline to the view that Mr Taouk's transmission followed Mr Davenport's one.

18 What is clear is that Mr Nicodemou was galvanised into action by the receipt of Mr Taouk's transmission. He wrote to Mr Davenport by facsimile transmission on 1 and 2 November 2004. The first of those transmissions referred to the TQM transmissions and said: *"I advise that the Adjudication Application was couriered to both NECA and TQM on the morning of the 28th October 2004 (Thursday). The application was sent to TQM's registered office as follows:*

Attention Maroun Taouk
61 Redmyre Road
Strathfield NSW
I advise that I have contacted the courier company responsible for the delivery and requested a confirmation receipt. This will be forwarded to your office once received."

19 That is what Mr Nicodemou did on 2 November 2004 when he wrote again to Mr Davenport. He said, among other things: *"Please find attached receipt from courier confirming the delivery of the adjudication application to both NECA and TQM on Thursday 28 October 2004 ...*

I note that the delivery to TQM was placed at the back door at 10.55 am, as there was no answer at the premises."

20 Neither of those communications was copied to TQM, and TQM was not informed, either by Mr Nicodemou or by Mr Davenport, that they had been sent and received.

21 Mr Taouk consulted TQM's solicitors, speaking to Mr Anthony Riordan of Colin Biggers and Paisley. Mr Riordan wrote to Mr Davenport, with a copy to Mr Nicodemou, on 3 November 2004. He said, among other things (after referring to Mr Davenport's letter of 1 November 2004): *"We are instructed that the adjudication application was received by the respondent by post on the afternoon of 29 October 2004."*

22 Neither Mr Nicodemou nor Mr Davenport saw fit to convey to Mr Riordan a copy of Mr Nicodemou's communications of 1 and 2 November 2004.

23 There was a conversation between Messrs Nicodemou and Riordan on 4 November 2004. Mr Nicodemou asserts that he told Mr Riordan both that he had confirmation of "receipt" and that he had sent it to Mr Davenport. Mr Riordan denies that. I prefer Mr Riordan's account of the conversation. I do so not because I have a particular view that Mr Nicodemou is an unreliable witness (I do not), but because I have no doubt that Mr Riordan, an experienced solicitor, would have appreciated the implications of the adjudicator being given, for the purpose of acting upon material that had not been copied to his client. It is abundantly clear, from the way Mr Nicodemou acted, that he had no such appreciation. I have had no doubt that Mr Riordan would have remembered had he been informed of those matters because he would have appreciated their significance. I therefore find, to the extent that it may be relevant, that Mr Nicodemou did not indicate to Mr Riordan in the course of the conversation that the adjudication application had been couriered to TQM and that he had sent a copy of the confirmation receipt relating to that to Mr Davenport.

24 Mr Nicodemou did not stop there. On 8 November 2004, he wrote again to Mr Davenport. He put submissions to Mr Davenport to the effect that he could not consider TQM's adjudication response because it was out of time. (I interpose that the adjudication response was sent to Mr Davenport by e-mail at about 4.30 pm on Friday 5 November 2004 and by courier at some time thereafter on the same afternoon.) Again, and extraordinarily, Mr Nicodemou did not see fit to send a copy of that submission either to TQM or to Mr Riordan.

The adjudicator's decision

25 When Mr Davenport came to consider the matter, he referred to the problem that the adjudication response was said to be out of time. He said in the course of his reasons: *"According to the claimant, a copy of the adjudication application was served on the respondent at 10.55 am on 28 October 2004. The respondent's adjudication response was delivered to me by courier at 5.30 pm on Friday 5 November 2004.*

The claimant submits that the adjudication response is out of time and should not be considered. The claimant has sent me a copy of a report by courier, which the claimant says he did at the time of service. The respondent's solicitors say, "We are instructed the adjudication application was received by the respondent by post on the afternoon of 29 October 2004" but produced nothing to verify the time of service. I accept the claimant's contention that a copy of the adjudication application was served on the respondent on 28 October 2004. Consequently, it appears to me that the adjudication response was not served within time. The effect of s 21(2) of the Act is that I cannot consider the later adjudication response."

26 A number of things may be said about this. Firstly, it makes it clear that Mr Davenport regarded as significant (and not unnaturally so) the courier company records that were said to provide proof of the time of service. Secondly, he appears to have regarded as important the fact that there was "nothing to verify the time of service" produced from TQM. In other words, it appears, he ignored the direct evidence in Mr Taouk's facsimile transmission of 1 November 2004. Thirdly, the adjudication response to which he referred, but to which he said he could not have regard, included a statutory declaration from Mr Taouk which set out in detail the matter relating to the time of service or receipt.

27 The consequence was that Mr Davenport, as he said, did not consider the adjudication response. He did, however, go on to consider matters raised by TQM in its payment schedule.

Denial of natural justice

28 Against that background, it seems to me that there has been a significant denial of natural justice. That has occurred in two ways. Firstly, the adjudicator was given material (including both evidence and submissions), both the fact and the content of which were withheld from TQM. It is clear that the adjudicator found that at least some of that material was of extreme significance on the question that he considered. Secondly, and accordingly, the adjudicator did not consider the adjudication response provided by TQM on 5 November 2004. If so, he failed to have regard to a matter that, by s 22(2), is one of the things to which he is required to have regard.

29 It is clear that, to the extent that the statute requires or permits, natural justice must be given to parties to adjudication applications. That was confirmed by the Court of Appeal in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394. See the judgment of Hodgson JA (with whom Mason P and Giles JA concurred) at [57]. His Honour said that a failure to accord natural justice will result in the determination being liable to be found to be a nullity or void.

30 It was submitted for Dasein that Mr Davenport had in any event considered the payment schedule provided by TQM, so that (because of s 20(2B) of the Act) he had in substance considered its case. I do not accept that submission. It is correct to that, by s 20(2B), a respondent cannot include in its adjudication response any reason for withholding payment that has not been included in its payment schedule. However, it would be open to a respondent to argue, either in greater detail or with perhaps more supporting evidence, reasons that had been advanced. If it were intended that an adjudication response should do no more than mirror, word for word, a payment schedule, then there is little point to the ability under s 20(1) for a respondent to lodge an adjudication response. In that context, it may be noted that an adjudication response by s 20(2)(c) "may contain such submissions relevant to the response as the respondent chooses to include". That must be qualified by subs (2B) so that the submission is not only relevant to the response but also in amplification of reasons earlier given; but it is a clear indication that the adjudication response may do more than parrot the terms of the payment schedule.

31 It therefore seems to me that the determination is a nullity or void.

32 The case was also argued in terms of non-compliance with essential requirements of the Act (another matter addressed by Hodgson JA in *Brodyn*). In view of the conclusion to which I have come, I do not propose to deal with that alternative of the plaintiff's case.

Relief

33 The relief claimed includes a declaration that the determination is void and an order permanently restraining the defendants from taking any further steps in relation to it. I indicated at the outset of the proceedings that, if I concluded that the determination was void, I would not make a declaration to that effect because Mr Davenport is not a party. I have since been informed that Mr Davenport has indicated that, if served, he will file a submitting appearance. In the circumstances, I think, the appropriate course is to make an order in terms of prayer 3 of the summons on a final basis, and to stand the proceedings over for a suitable time, with leave to the plaintiff to amend so as to include Mr Davenport as a defendant, so that, once he has filed his submitting appearance, a declaration in accordance with prayer 2 can be made. At the same time, a minor amendment to correct the naming of Dasein can also be undertaken.

(Counsel addressed on costs.)

34 The plaintiff seeks an order for its costs. That is opposed upon the basis that Dasein thought in substance that it was doing the right thing and that it had done what was required to effect service, or notification of the adjudication application.

35 However, on the view to which I have come, a major cause of the problem was Mr Nicodemou's acts in sending to Mr Davenport, without copying to TQM or (once he became aware of Mr Riordan's involvement) Mr Riordan, material that Mr Davenport had at least found persuasive.

36 I do not see in the circumstances relied upon by Dasein any reason to depart from the usual order as to costs.

Orders

37 I therefore make the following orders:

38 (1) I order that the first and second defendants be permanently restrained from taking any further steps under the *Building and Construction Industry Security of Payment Act* 1999, other than by withdrawing the application pursuant to s 26(2)(a) of the Act or making a fresh application pursuant to s 26(2)(b) of the Act if in either case it is open to it to do so, in relation to or in consequence of the adjudication determination at 24 November 2004, or in seeking to enforce that as a judgment.

(2) I order the first defendant to pay the plaintiff's costs of the proceedings.

(3) I make no order as to the costs of the second defendant.

(4) I grant the plaintiff leave to amend its summons so as to join Mr Phillip Davenport as third defendant and so as to correct the spelling of the name of the first defendant; the amended summons to be filed and served by 4 pm on Monday 6 December 2004.

(5) I stand the proceedings over to the directions list on Friday 10 December 2004 for the making of a declaration in accordance with prayer 2 on the assumption that Mr Davenport has by then filed a submitting appearance.

(6) Exhibits are to be retained and handed out in accordance with the Rules

D T Miller (Plaintiff) instructed by Colin Biggers & Paisley (Plaintiff)
P G Fisher (First Defendant) instructed by Paul Bard (First Defendant)
Submitting Appearance (Second Defendant)