**Timwin Construction P/L v Facade Innovations P/L : Mediate Today P/L t/a Adjudicate Today & Philip Davenport**

**JUDGMENT: McDOUGALL J :** New South Wales Supreme Court : TC List 1st June 2005.

1. In ***Brodyn v Davenport and Anor*** [2004] NSWCA 394, the Court of Appeal (Hodgson JA, with whom Mason P and Giles JA agreed) held that a determination made by an adjudicator under the ***Building and Construction Industry Security of Payment Act* 1999** (the Act) could be set aside and relief granted by way of deprivation and injunction in the following circumstances:
   *(1) Where an adjudicator failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination;*
   *(2) Where the adjudication determination does not amount to an attempt in good faith to exercise the relevant power, having regard to the subject matter of the legislation;*
   *(3) Where the adjudicator denied natural justice to a party (the content and operation of the doctrine of natural justice must take account of the narrow statutory scheme); or*
   *(4) Where the adjudication determination was procured by fraud in which the adjudicator was complicit.*

   If any of those circumstances applied, the Court held, a determination would not be a ***"determination"*** within the meaning of the Act at all, and would be void.

2 The question for decision in these proceedings is whether a determination made by the third defendant (the adjudicator) on 21 April 2005 is void because the adjudicator did not in one respect attempt in good faith to exercise the power given to him.

**Factual background**

3 The plaintiff (Timwin) as builder and the defendant (Façade) as "trade-contractor" or subcontractor are parties to a "trade-contract" or subcontract dated 20 October 2003. It is clear that the work to be performed by Façade pursuant to that contract was construction work, and that the contract itself was a construction contract, in each case within the meaning of the Act.

4 Façade made a payment claim on 14 March 2005. The amount claimed was $498,664. The summary of the claim makes it clear that the great bulk of the amount claimed, $408,897, related to variations.

5 Timwin's payment schedule was dated 29 March 2005. It proposed to pay nothing. It gave the following reasons:
*(1) Because the amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract";*
*(2) It claimed damages for delay to the contract;*
*(3) A payment was made under duress; and*
*(4) An amount of $73,615 had been overpaid (it is unclear whether this is a subset of the previous argument).*

6 Façade submitted an adjudication application to the second defendant and on 11 April 2005 the second defendant referred that application to the adjudicator, who accepted appointment.

7 The adjudication application included detailed submissions in support of the claim. At para 45, those submissions dealt with Timwin's reasons for not paying the amount claimed. Paragraph 45 read as follows (omitting citations):

*"**RESPONSE TO THE PAYMENT SCHEDULE***
*Reasons for Not Paying the Full Amount Claimed*
*45. The Respondent has raised **three reasons** in its Payment Schedule (see **Tab IJ at 1462001411)** for not making payment of the Claimant's Payment Claim. We note that in terms of section 20(2B) of the Act the Respondent cannot include any other reasons in its adjudication response. If it attempts to do so it is submitted that these should be ignored in their entirety. The three reasons upon which the Respondent relies are as follows:*
*(i) The Respondent agreed to the $165,000.00 claim for "additional Costs" under duress and that accordingly the Claimant has been over paid by $73,615.00, (which the Claimant denies and rejects).*
*(ii) The amounts claimed by the Claimant as variations "are amounts that should have been carried out pursuant to the contract".*
*(iii) The Respondent claims damages for delay to the contract."*

8 It will be noted that the first reason given effectively subsumes the third and the fourth that I have set out from the payment schedule in para [5].

9 The submissions then dealt in detail with each of the three reasons that had been summarised. The submissions in relation to the second reason occupy over three pages. Façade submitted that there had been variations authorised in writing, and gave particulars of them. It submitted further that there were variations *"discussed and then communicated to [Timwin] in writing and verbally agreed to by [Timwin]"*. Again it gave details.

10 The submissions referred to *"many verbal instructions to carry out variations"* and to an alleged practice that "*when written instructions were requested [Timwin's representative] would insist that the work be executed and refused or neglected to give a written order. He promised that [Façade] would be paid if the extra work was done"*.

11 The submissions stated that Façade acted in good faith and in reliance on the promise to pay, and that in the circumstances Timwin had waived the contractual provisions relied on. They then set out a number of alternative bases on which, despite those contractual provisions, Façade had an entitlement to be paid.

12 Timwin's adjudication response was dated 19 April 2005. It dealt, among other things, with the matters that Façade had raised in its submissions in answer to the proposition that the claim included *"as variations … amounts that should have been carried out pursuant to the contract."*

13 It referred, in some detail, to the history of variations approved and not approved, and to the relevant contractual provisions.

**The determination**

14 The determination was a brief document. In dealing with the various reasons advanced for non payment, the adjudicator turned first to the proposition that the amounts claimed as variations *"are amounts that should have been carried out pursuant to the contract"*. He said: *"This does not make sense. If the respondent meant to say that the variations for which payment is claimed are not variations but work that was required to be carried out under the contract without an instruction to vary the work under the contract, then I would have expected the respondent to demonstrate in the adjudication response where, in the contract, the work for which additional payment is sought was specified. The respondent has not done that. Instead, in the adjudication response the respondent has raised a number of additional reasons for withholding payment for the variations. Section 20(2B) of the Act precludes the raising in the adjudication response of reasons which were not raised in the payment schedule. Therefore, I have not had regard to additional reasons such as that particular variations were not approved.*

*In the payment schedule the respondent has not disputed that the work comprised in the variations was carried out. The respondent has also not disputed the value placed by the claimant on the variations. In the payment schedule, the respondent has not contended that any variation should have a different value.*

*The respondent merely says,* ***"the amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract".*** *Whatever that means, the respondent has not satisfied me that the respondent has a valid reason for not paying the claimed amounts for the variations."*

15 The adjudicator then turned to the other suggested defences, namely, the claim for damages for delay, the claim of duress, and the claim of overpayment. He dealt with those matters briefly but gave reasons to show why it was he considered that they did not provide any basis for withholding payment. I interpose that complaint is not now made of the adjudicator's treatment of those matters, nor could it have been, having regard to the limited basis (as explained in *Brodyn*) on which this Court can intervene.

16 The adjudicator concluded: *"Since the respondent has not satisfied me that the respondent has a valid reason for withholding payment of any of the amount claimed, I am satisfied that the claimant is entitled to a progress payment of the whole amount claimed, namely, $498,664."*

**Relevant provisions of the contract**

17 Timwin relied in particular on clause 7 of the contract, which dealt with variations, and on clause 4(d), which appeared among the provisions dealing with payment claims and payment terms. I set them out:

*"4. …*

*(d) A payment claim does not include nor does the contract price an amount for a variation unless the price or amount of the variation has been agreed. Payment claims are to strictly comply with this requirement. …*

*7. (a) The Trade-Contractor will vary the works as reasonably required by the Builder but will not be entitled to claim payment for any variation not authorised in writing by the Builder and agreed as to price, costs or amount.*

*(b) The Builder is to provide written instructions regarding any variations to the works which the Builder requires. In addition the Builder must, if applicable, adjust the construction period to allow for the variation.*

*(c) The agreed price of any variation will be added to or deducted from the Contract price and can be included in a payment claim. Refer to clauses 4(a) and 4(d). The contract price does not include an amount for variations where the price or amount payable for the variation has not been agreed or determined.*

*Should the parties not agree upon a price the Builder may require the Trade-Contractor to execute the variation and the matter of price is to be referred to dispute resolution under this contract. The Builder may at his option have the variation carried out by another person, in which case the Trade-Contractor will allow access to such person and his employees as required.*

*(d) If the Trade Contractor carries out work, which he considers to be a variation, in the absence of written instructions from the Builder, then the same will be at the Trade-Contractor's sole risk. Refer to clauses 7(a), 7(c), 4(d) and 4(f)."*

**The issue**

18 The fundamental issue is whether the adjudicator, in the way that he dealt with the defence to the payment claim based on the assertion that the variations "are amounts that should have been carried out pursuant to the contract", attempted in good faith to exercise the powers given to him by the Act.

**The authorities**

19 In ***Brodyn*** at para [55], Hodgson JA summarised the basis on which the Courts might intervene as follows: *". . . the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid determination … What was intended to be essential was compliance with the basic requirements … 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, 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 valid determination."*

20 In para [56], Hodgson JA addressed some of the detailed requirements set out in s 22(2) of the Act. He concluded: "*In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2) or bona fide addresses the requirements of s 22(2) as to what is to be considered.*"

21 His Honour returned to that theme in the *Minister for Commerce v Contrax Plumbing* [2005] NSWSC 142 at 149. He said of s 22, that *it "does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.*"

**The legislative scheme**

22 The legislative scheme has been referred to in very many decisions and I do not propose to set it out in detail in these reasons. Of particular relevance in the present case are the provisions of s 20, dealing with adjudication responses; in particular ss (2B). That subsection reads as follows:

"*(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless* those reasons have already been included in the payment schedule provided to the claimant."

23 Section 22 deals with the contents of a determination and, in ss (2), the matters to which an adjudicator must refer. Subsection (2) provides:

"*(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 (if any) 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.*"

**Analysis**

24 In the present case, I have to say, it might be a little difficult to read the payment schedule, where it states that *"amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract",* as raising an issue of contractual authorisation. At least conceptually, it seems to me that there may be a number of quite separate arguments relating to variations.

25 One such argument is that the work for which payment is claimed as a variation was in truth for work comprehended within the scope of works, and therefore in the case of a lump sum contract such as this, to be paid for as part of the lump sum and not separately as a variation. That might be thought to be the more normal reading of the reason given.

26 Another dispute that is commonly seen relating to variations is that there is a statutory regime for payment and contractual regime for payment. Such contractual regimes commonly include an element of written approval or authorisation. The reason for that is clear: to prevent the principal from being subjected to claims for variations that it has had no opportunity to consider and no opportunity to approve.

27 The adjudicator referred to those words in the payment schedule in the way that I have indicated. He said that they do not make sense. Later, when he came back to them, he emphasised his difficulty of understanding, using the words *"whatever that means"* in relation to them.

28 That is a somewhat strange approach because it appears that the claimant, Façade, had no difficulty in understanding and arguing the issue that was raised. I have referred already to para 45 of its submissions and to the elaboration in its submissions of its response to this particular aspect of the payment schedule.

29 If the adjudicator were seeking to understand what was meant by this portion of the payment schedule, one might have thought that he would have referred to the apparent understanding, and rebuttal, given by Façade in its submissions. He did not do so. Instead, he appears to have turned to the submissions in response made by Timwin in its adjudication response, and treated those submissions as falling within s20(2B), and therefore as matters that he could not take into consideration.

30 It is commonly the case, as Palmer J observed in ***Multiplex Constructions Proprietary Limited v Luikens*** [2003] NSWSC 1140, that parties in the payment claims and payment schedules use a kind of shorthand and that an understanding of the issues that they seek to raise has to be obtained having regard to the background with which they are familiar and the relevant contractual terms.

31 In this case, para 45 of the submissions in support of the adjudication application makes it quite clear that Façade had extracted three reasons for non payment from the payment schedule. It made it clear that those were the only reasons that Timwin could rely upon: because it said *"in terms of s 20(2B) … [Timwin] cannot include any other reasons in its adjudication response.*"

32 As to what was meant by the second of those reasons (the one that is relevant to the proceedings before me), some enlightenment can be gained as to Façade's understanding by looking at what it said in paras 54 to 73 of its submissions.

33 In argument before me, Mr Doyle, who appeared for Façade, submitted that Façade was merely seeking to anticipate and rebut the arguments that Timwin might raise pursuant to its payment schedule. I am not sure that this is

correct; but even if it is correct, it does not seem to me to answer the particular point, which is that the content of the dispute can be understood from what Façade said.

34 In setting out the nature of its response to the issue - that the variations were either authorised in writing or that there was a course of conduct from which the adjudicator could infer that Timwin had waived the requirement for writing – Façade was articulating its response to this aspect of the payment schedule. It may be noted that Façade did not suggest that an argument based on want of writing, or want of compliance with the requirements of clause 7 of the contract, was excluded by s 20(2B). Rather, it said, any other reason other than those summarised in para 45 and elaborated in its responses in paras 46 to 82 could not be relied upon.

35 In my judgment, reading that section of the submissions in totality, the clear inference is that Façade understood what the dispute was - as one relating to compliance with clause 7 of the contract - that it so defined the dispute for the adjudicator; that it told the adjudicator that no other dispute could be considered; and that, at least by implication, it accepted that the dispute as understood by it could be considered.

36 As to this, it may be noted that the reference to s 20(2B) in para 45 is repeated in each section of the submissions where Façade attempts to rebut the defences, and again in the summary of its attitude: see paras 78, 80 and 87.

37 The adjudicator referred to none of this. Insofar as one can gather from reading the determination, he appears not to have read the submissions at all. He certainly does not indicate that he has gained any enlightenment as to the argument in relation to variations from Façade's submissions. Further, when dealing with the other reasons given by Timwin in support of its claim that it was not liable to pay, he dealt only with the arguments raised in the payment schedule.

38 There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in ***Brodyn.*** Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in ***Roberts v Hopwood*** [1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."

39 That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see ***Zhang v Canterbury City Council*** (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).

40 As his Honour emphasised, the requirement to "*have regard to*" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in ***The Queen v Hunt; ex parte Sean Investments Proprietary Limited*** (1979) 180 CLR 322 (Mason J) and in ***Evans v Marmont*** (1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq).

41 In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.

42 It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.

43 I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.

44 I will note that Timwin did not put its case on the basis of denial of natural justice, but it would follow from what I have said that, in disregarding Timwin's submissions for the reason that he gave, the adjudicator denied it natural justice.

**Conclusion**

45 I therefore conclude that the determination is void. It follows, no discretionary considerations having been advanced save for one to which I will turn, that Timwin is entitled to the relief sought in its summons.

46 The discretionary consideration to which Façade referred was that the summons does not claim relief by way of setting aside a judgment entered in its favour pursuant to s 25 of the Act. Thus, it submitted, the relief claimed goes nowhere.

47 However, the judgment was entered in separate proceedings. No doubt, Timwin will apply to have that judgment set aside; and no doubt the Court to whom that application is made will have regard to my reasons and the orders that I am about to make in determining that application (if it is not dealt with by consent).

48 Timwin asks for its costs of the proceedings. Façade opposes an order for costs, relying on the circumstance that it itself has done nothing wrong and that this is a test case.

49 I am conscious that the question of (in effect) attempting in good faith to exercise the power given by the Act has not been the subject of prior judicial exposition. However, the relevant question is one that was argued for the direct benefit of Façade and not merely as a service to the industry. In those circumstances, I see no reason why the usual order for costs should not be made.

50 Façade also asked that I make an order referring the matter back to the adjudicator to be dealt with according to law. I do not propose to do so, in circumstances where the time for the making of a determination has long since expired and where Façade's rights are preserved under s 26 of the Act. In that context, and unless it is not crystal clear, I should say that the view to which I have come has nothing to do with the merits of the case, and does not prevent the present or any other adjudicator from determining a further adjudication application, based on the same payment claim, according to law.

51 Finally, Timwin asks that the balance of the money paid by it into Court as the price of obtaining interlocutory relief be paid out to it. Some of that money has been paid out by consent already to Façade in satisfaction of an admitted liability. I think that Timwin is entitled to have the money, but that in case Façade wishes to appeal there should be some stay of the order for payment out. Timwin does not oppose a stay for a relatively brief time.

**Orders**

52 I therefore make the following orders:

(1) I make a declaration in terms of prayer one of the summons filed on 2 May 2005.

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

(3) I order that the balance of the money paid into Court by the plaintiff, together with any interest accrued thereon, be paid out to it.

(4) I stay order 3 up until and including 4 pm on Monday 6 June 2005.

Ms V Culkoff (Plaintiff) instructed by David Campbell-Williams (Plaintiff)
Mr J P Doyle, Solicitor (Defendants) instructed by Doyles Construction Lawyers (Defendants)