

JUDGMENT Einstein J : New South Wales Supreme Court : 4th April 2005

The proceedings

- 1 The proceedings before the court seek an order declaring an adjudication determination made by the second defendant on 12 August 2004 void, on the grounds that:
 - the relevant payment claim was invalid as it failed to identify the construction work to which it related in breach of s 13 of the *Building and Construction Industry Security of Payment Act 1999* ("Act").
 - the s 17(2) notice was served outside the 20 business day period in breach of the Act and was otherwise not a proper and valid notice as it failed to make any reference to the Act.
 - accordingly, the adjudication application was made outside the prescribed period under s 17(3)(e) of the Act.

The relevant background

The contract

- 2 On 3 March 2003, the first defendant ["Xception"] entered into a contract with the plaintiffs [together referred to as "Schokman"] for the carrying out of construction work at Stotts Street, Bilambil Heights in New South Wales. The consideration payable under the contract was \$8,750,000.
- 3 The contract provided that:
 - an architect be appointed to administer the contract (Clauses A5 and A6);
 - provision be made for the making of progress payments for the submission of a claim to the architect by the last day of each month (Clause N3.1 read with Item 24 of Schedule 1);
 - the architect be required to assess the claim for a progress payment and issue to Xception and to Schokman a progress certificate setting out the payment due within 10 working days after receiving the claim for a progress payment (Clause N4.1);
 - upon receipt of the progress certificate, Xception was required to prepare a tax invoice equal in value to the progress certificate and was required to present both documents to the owner for payment (Clause N7.1);
 - the amount stated as owing in any progress certificate was required to be paid within 15 working days after delivery of the certificate and the tax invoice (Clause N8.1 read with item 4 of Schedule 1);
 - before issuing the progress certificate, the architect was required to obtain a certificate from a quantity surveyor appointed by the owner as to the valuation of the work completed and value of materials and equipment delivered to the site and was prohibited from issuing a progress certificate for any amount greater than the certificate issued by the quantity surveyor (Schedule 2 of Special Conditions, Clause N4).

The disputed steps leading to the adjudication determination

- 4 The relevant events may be conveniently taken from the chronology presented to the Court by the plaintiffs complemented by the addition of certain material:
 - 3 March 2003 - Construction Contract [(VS 1, Schokman aff 20.9.04)];
 - 31 March 2004 - the architect certified that the works had reached the stage of practical completion (Affidavit of Mark Derbyshire sworn 18 November 2004, Exhibit MD-4);
 - 2 April 2004 - Maurice Liussi, the architect, issued Progress Claim No. 14 certifying that an amount of \$757,964.38 was payable to Xception with an adjusted contract sum of \$8,397,138.24 (Affidavit of Mark Derbyshire sworn 18 November 2004, Exhibit MD-6);
 - 5 April 2004 - the parties entered into an agreement (Affidavit of Vincent Schokman sworn 20 September 2004, Exhibit VS-2) under which, inter alia:
 - 7.1 Xception agreed to pay to Schokman deductions not to exceed \$65,000 (Clauses 2 and 3);
 - 7.2 Schokman agreed to pay Xception \$500,000 by 4.00 pm on Tuesday, 6 April 2004 (Clause 3);
 - 7.3 There would be no variations to the final contract sum of \$8,397,148.24 apart from a final assessment of that amount by quantity surveyors, Napier & Blakeley.
 - 6 April 2004 - Xception received \$495,654.35 from Schokman being part payment under Clause 3 of the April agreement (refer to paragraph 16 of Affidavit of Mark Derbyshire sworn 18 November 2004);
 - 5 May 2004, Xception served upon Schokman, Progress Claim No. 15 together with a tax invoice endorsed "this is a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW)" (these documents are said to have constituted the payment claim), reference to Affidavit of Vincent Schokman sworn 13 September 2004, Exhibits VS-3A and VS-3B;
 - no Payment Schedule issued – plaintiffs allege due under the Act on 19 May 2004
 - no Progress Certificate issued – plaintiffs allege due under the Contract on 19 May 2004;
 - the plaintiffs contend that an amount became due and payable on 19 May 2004;
 - section 17(2) Notice – Intention to apply for adjudication 6 July 2004 (VS 5, Schokman aff 20.9.04);
 - adjudication application dated 15 July 2004 [Received between 17-19 July 2004 (Schokman aff 20.9.04, para 17; MD 10, Derbyshire aff 18.11.04)];
 - On 30 July 2004, the second defendant, O'Mara, faxed and sent by post to Xception, Notice of Acceptance of the Adjudication Application under s.19 of the Act (paragraphs 4 and 21 of Affidavit of Mark Derbyshire sworn 18 November 2004, Exhibit MD-1);
 - letter from the Master Builders Association dated 27 July 2004 advising that a Mr O'Mara had been nominated as adjudicator and that "...He will be in contact with you to advise of the carriage of the matter..". [Received on 31 July 2004 (Schokman aff 20.9.04, para 18, VS 7)];

- there has become no need to determine a factual dispute referred to in the evidence between the parties as to whether Mr O'Mara faxed and sent by post to Schokman the same s.19 Notice on 30 July 2004 -the plaintiffs have not pressed their submissions relating to section 19 of the Act ;
- the first plaintiff contacted Sofia Mackow of the 2 August 2004 Master Builders Association and requested all further communications were to be directed to the plaintiffs' solicitors (Schokman aff 20.9.04, para 19; C Schokman aff 1.3.05, para 3);
- adjudication determination 12 August 2004 (VS 9, Schokman aff 20.9.04);
- letter from the adjudicator dated 12 August 2004 advising that an adjudication of the disputed payment claim had been completed [Received on 14 August 2004 (Schokman aff 20.9.04, para 20, VS 8)];
- the first plaintiff's evidence that he had contacted the Adjudicator on 16 August 2004 and said to him: "How could the adjudication have proceeded when we had no opportunity to present our case?" is likewise of no relevance, the section 19 attack on the validity of the adjudication having been withdrawn (Schokman 20.9.04, para 21; Schokman 27.9.04, para 2; C Schokman aff 1.3.05 Para 5-6; Cf O'Mara aff);
- letter from the adjudicator enclosing 17 August 2004 the adjudication determination [Received 21 August 2004 (Schokman aff 20.9.04, para 22)].

Dealing with the issues raised

The validity of the payment claim

- 5 Substantial written and oral submissions were addressed by both parties to the question of whether or not the payment claim was invalid. The matter is of some complexity. The issue is particularly complicated because of some vagueness in the 5 April 2004 agreement. Certainly the payment claim was sparse compared with earlier claims [for example compare the extensive detail given in MD 5 and 6]. I have grave reservations in relation to the contention that the payment claim identified the construction work to which the progress payment related so as to satisfy the dictate of section 13 [cf also a comparison of (1) the claimed 'previous payment' and (2) the April 2 Progress Certificate No. 14 document with annotated date paid stamps for 2 and 6 April 2004]. However, in the view which I take on the other issue dealt with below it is not necessary that the validity of the payment claim be determined.

Whether the section 17 (2) Notice was sent outside of the 20 statutory business days allowed

- 6 This issue concerns:
- the plaintiffs claim that the payment claim, if valid, was due and payable on 19 May 2004;
 - the defendants claim that the payment claim was due and payable on 9 June 2004
- 7 The relevant scheme of the Act is as follows:
- section 11 of the Act defines "due date for payment" as the date provided under the Contract, or if the Contract makes no express provision, on the date occurring 10 business days after a payment claim is made;
 - under s 14(4), if a payment claim is served and no payment schedule is provided within 10 business days after the payment claim is served or within the time required by the contract (also 10 working days), whichever expires earlier, the respondent becomes liable to pay the claimed amount. Section 15 sets out the consequences of not paying and the options available in pursuing the payment, either as a "debt" or via the adjudication process;
 - as already observed it is common ground that no payment schedule was provided under the Act;
 - under the Act, an adjudication application cannot be made unless pursuant to s 17(2):
 - the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
 - the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- 8 The defendant's contentions were as follows:
- the expression "due date" is defined by s.11 which focuses upon the due date for payment of a "progress payment under a construction contract".
 - section 11(1) makes it clear that a progress payment becomes due and payable on the date on which the payment becomes due and payable "in accordance with the terms of the contract". Section 11(1)(b) only operates where there is "no express provision" with respect to the matter.
 - the contract makes express provision for the date on which progress payments become due and payable and the position is therefore to be analysed as follows:

The progress claim and payment claim were each made on 5 May 2004;

The architect is required to assess the claim and issue a progress certificate within 10 working days after receiving the claim for progress payment (Clause N4) so that therefore under the contract, the architect is required to assess the claims by 19 May 2004;

The amount so certified was then required to be paid within 15 working days (Clause N8 read with Item 4 of Schedule 1), so that 9 June 2004 became the due date for payment;

The 20 business day period therefore is to be calculated from 9 June 2004, which would therefore extend the period to 8 July 2004.

It follows therefore that the Notice was received within the relevant period, namely, on 6 July 2004. The s.17(2) notice received on 6 July 2004 gave 5 business days notice of the claimant's intention to apply for an adjudication of the payment claim, that is, by 13 July 2004. No payment schedule was served in response. The adjudication application was made on 15 July 2004, that is, within the 10 business days after the end of the 5 day period of notice as required by s.17(3)(e) of the Act.

It cannot matter in this case that the architect failed to issue a certificate as required by the contract either because the architect's engagement had been terminated or because of a failure to comply with the contractual requirements. That would in every case thwart the intent of s.11 and related sections, including s.14(4)(b)(i) which are intended to apply the express provisions of the contract for the purpose of determining when progress payments under the contract become due and payable.

This is emphasised by the express words used in s.11(1) "payment in accordance with the terms of the contract".

Decision

- 9 The contract [Exhibit VS 1 to the affidavit of the first plaintiff of 20 September 2004] provides in clauses N 3, N4, N5 and N8 as follows:

N3 Progress payments – procedure for contractor

1. The contractor may submit to the architect a claim for a progress payment by the date of each month shown in item 24 of schedule 1. If no date is shown, the date is the 15th day of each month. The claim must set out the contractor's valuation of the work completed and the value of materials and equipment delivered to the *site and incorporated in the *works up to and including the day of the claim. The claim must identify any amount of *GST that has been included in the claim. The claim must be supported by any information shown in item 25 of schedule 1 and a declaration made by the contractor that:
 - all wages and other entitlements including building industry superannuation and long service leave levies due at the date of the statutory declaration have been paid to or on behalf of all employees of the contractor
 - all monies due to subcontractors at the date of the declaration have been paid
 - all insurances required to be maintained by the contractor are in force.

N4 Progress payments – procedure for architect

1. The architect must assess a claim for a progress payment and issue to the contractor and the owner a progress certificate setting out any payment due within 10 *working days after receiving a claim for a progress payment.
2. When assessing a claim for a progress payment the architect must take account of each of the following:
 - the proportion of the *contract price representing the value of the work completed up to and including the day of the claim, provided title has passed to the contractor
 - an allowance for cash retention where clause C2 applies
 - where applicable, any claim by the owner for a set off of monies due under this contract
 - the owner's entitlement to liquidated damages, calculated up to the date of the progress certificate in accordance with clause M11
 - any other matter to be taken into account in accordance with this contract
3. The certificate must identify the amount of *GST that has been included and the architect must give written reasons for any difference between the (*GST exclusive) amount certified and the (*GST exclusive) amount claimed.
4. If the architect reasonably needs additional information to assess the claim, the architect must ask the contractor for it. If that information is needed to assess only part of the claim, the architect must assess the rest of the claim.

· *GST.

N5 If the architect fails to issue progress certificate

1. If the architect fails to issue a progress certificate on time the contractor may issue a notice in writing requesting the architect to issue the certificate. If the architect fails to issue the certificate within 5 *working days of issue of the notice, the contractor may suspend the *works under clause Q12.

N8 Progress Certificates

1. The amount stated as owing in any progress certificate must be paid within 5 *working days or the period shown in item 4 of schedule 1, after delivery of the certificate and the *tax invoice.

- 10 Clearly these provisions upon their proper construction apply and apply only where the architect issues a progress certificate. They may be compared to the AS 2124 – 1992 Australian Standard General Conditions of Contract to which both counsel adverted in argument which provides:

"42 CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to

be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issue pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable."

- 11 Hence this provision stipulates expressly that where the Superintendent fails to issue a payment certificate the principal is to pay the amount of a claim for payment within 28 days after receipt by the Superintendent of such a claim.
- 12 The contract between the parties to these proceedings is silent as to when an amount under the payment claim is due and payable where no progress certificate has issued. Accordingly, the Act steps in to fill that gap: **Beckhaus Civil Pty Limited v Council of the Shire of Brewarrina** [2002] NSWSC 960 at [60].
- 13 Of course as has already been observed the architect never did issue a progress certificate nor assess the claim the subject of these proceedings.
- 14 The correct analysis of what occurred is as follows:
 - the payment claim was made on 5 May 2004;
 - 10 business days thereafter took the material date when the payment claim became due and payable to 19 May 2004.

First defendant out of time in notification of intent to apply for adjudication application

- pursuant to s 17(2) (a) the statutory 20 business days allowed for the first defendant to notify the plaintiffs of its adjudication application should have been served on or before 16 June 2004 under the Act;
- the s 17(2) (a) Notice was issued on 6 July 2004, 20 days late.

Respondent's entitlement to be given opportunity to provide payment schedule

- pursuant to s 17(2)(b) an adjudication application could not be made unless the respondent was given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice [bearing in mind the above timetable this opportunity would have had to have been for the period on or before 23 June 2004 (being 5 business days from 16 June 2004)].

Adjudication application out of time

- pursuant to s 17(3)(e) an adjudication application under subsection 1(b) required to be made within 10 business days after the end of the 5 day period referred to in subsection (2)(b), that is, on or before 7 July 2004: *Amflo Constructions Pty Ltd v Anthony Jefferies* [2003] NSWSC 856 at [41], [42].
- the adjudication application was made on 15 July 2004, 8 days out of time.

- 15 In **Brodyn Pty Limited t/as Time Cost and Quality v Davenport** [2004] NSWCA 394 Hodgson JA [with whose reasons for judgement Mason P and Giles JA agreed] held that particular basic and essential requirements had been laid down by the Act such that a particular measure of natural justice could be seen to have been the legislative intent as a pre-condition of validity. His Honour relevantly referred (at [54]) to section 17 and (at [57]) said: "The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions [sections 17 (1) and (2), 20, 21 (1), 22 (2) (d)] confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intent that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity."

Whether the section 17 (2) Notice was improper in form

- 16 The plaintiffs have also submitted that the purported s 17(2) Notice was merely a letter dated 6 July 2004 from the first defendant to the plaintiffs and that it made no reference to the Act to alert the plaintiffs of a statutory scheme in operation: Schokman 13.9.04, para 14, Annexure "VS 5": see *Amflo* at [4]. The contention is that the notice was improper in form.
- 17 Bearing in mind the above holding it becomes unnecessary to deal with this contention.

The cross-claim

- 18 The cross-claim pursued by Xception seeks judgment pursuant to section 15 (2) (a) of the Act upon the basis that by reason of the plaintiffs failure to present a payment schedule in accordance with section 14 of the Act, Xception became entitled to recover the sum of \$78,986.60 as a debt due to it under this section.
- 19 The scheme of section 15 applies where no payment schedule has been served by the respondent and where pursuant to section 14 (4), the respondent has become liable to pay the claimed amount as a consequence of having failed to provide a payment schedule within the time allowed.
- 20 In those circumstances section 15 provides that the claimant:
"(a) may:
(i) recover the unpaid portion of the claimed amount from the respondent as a debt to the claimant, in any court of competent jurisdiction, or
(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim..."
- 21 I am able to deal with the cross-claim shortly. The holding is that upon the proper construction of section 15(2)(a) the sub-section makes provision for two *separate and distinct* alternatives that may be adopted by a claimant.
- 22 The whole of the relevant scheme is clearly to provide a fast track approach leading to a result but importantly never operating to the exclusion of "any other entitlement that a claimant may have under a construction contract" [section 4 (a)]. Hence it cannot have been the intention of the legislature to permit a claimant [in a circumstance where no payment schedule has been provided] to make an adjudication application in relation to the payment claim and later in the event that the adjudication miscarried, to pursue curial proceedings to recover the unpaid portion of the claimed amount from the respondent as a debt. This would expose a respondent not to one set of interim procedures aimed at a swift (albeit interim) result, but to two such interim sets of procedures.
- 23 It is important to recall that the scheme of the Act is to set up what has been termed a "dual railroad track system" in which the statutory mechanisms operate in addition to, and not in derogation of, any similar procedure provided for in a construction contract.
- 24 It should also be recalled that nothing in s 14(4) requires the respondent to serve a payment schedule *only if the payment claim is "valid"*.
- 25 Further the provisions permitting new applications to be made should be borne in mind.
- 26 The decisions cited by Mr Nicholls appearing for Xception are of no assistance where this particular fast dual railroad track legislation has no commonality with legislation dealt with in other fields of discourse.
- 27 Ultimately the matter is simply one of raw statutory construction. The word "or" separating section 15 (2) (a) (i) and (ii) is used disjunctively.
- 28 The present is of course not a final hearing on the merits.
- 29 For those reasons it is appropriate to dismiss the cross-claim.

Ms V Culkoff (Plaintiffs) instructed by David Campbell-Williams
Mr NA Nicholls (First Defendant) instructed by MBA Lawyers (