

JUDGMENT : Douglas J : Trial Division. Queensland Supreme Court, Brisbane. 8th October 2007

- [1] This is an application to review two adjudication decisions made under the Building and Construction Industry Payments Act 2004 ("the Payments Act"). The decisions deal with a contract for the supply of stone work for a construction project, "Jade Apartments", in Surfers Paradise. The applicant is the builder and developer of the project, Bezzina Developers Pty Ltd ("Bezzina"). The first respondent is Deemah Stone (Qld) Pty Ltd ("Deemah"). It appears likely that the original contracting parties were Bezzina and a company associated with Deemah. Deemah's associated company was called Deemah Stone Pty Limited which was said to have originally provided the quotation to Bezzina. By a letter of 8 September 2006, however, it was asserted that the contract had been assigned to Deemah. The first adjudication decision valued the work done at an amount significantly less than the second decision by a different adjudicator who had not been told the result of the first decision.

Background

- [2] During the course of the works Deemah provided Bezzina with 13 progress claims, the first 11 of which were paid. These disputes relate to progress claims numbers 12 and 13.
- [3] When the twelfth claim for \$712,149.58 (excluding GST) was not paid Deemah made an adjudication application. That occurred on 27 February 2007 but it was not served on Bezzina until 5 March 2007. On 28 February 2007 Deemah served its thirteenth claim on Bezzina incorporating a claim for an additional sum of \$971,995.68 excluding GST.
- [4] On 28 March 2007 the third respondent made an adjudication decision in favour of Deemah in the amount of \$218,382.14 (excluding GST). That decision was not released to the parties by the fourth respondent, the authorised nominating authority under the Act, until 13 April 2007 because it was not until then that Deemah paid the fourth respondent the adjudicator's costs for that first decision.
- [5] In the interim, Deemah had made an adjudication application on 28 March 2007 in respect of the thirteenth progress claim. Bezzina had served a payment schedule in respect of that claim but did not serve an adjudication response.
- [6] That dispute was not referred to the adjudicator who had dealt with the twelfth progress claim but to a different adjudicator, the second respondent. On 24 April 2007, the second respondent made his decision in respect of the second adjudication application. It was in favour of Deemah in an amount of \$655,978.91 excluding GST. That decision was not released to the parties until 26 April 2007 when Deemah paid the fourth respondent the second respondent's adjudication costs.
- [7] The second adjudication decision was made in ignorance of the result of the first decision although the second adjudicator (the second respondent to these proceedings) had been told that an adjudication application in relation to the twelfth progress claim had been lodged; see para 13 of the second adjudication decision.

The applicant's complaints

- [8] The first adjudication decision was criticised by Bezzina as having been made in the absence of proper evidence that Bezzina and Deemah were parties to a construction contract. The second adjudication decision is attacked by Bezzina on two bases.
- [9] The first is that the second adjudicator did not value the construction work carried out pursuant to s. 14 of the Payments Act but, in Bezzina's submission, approached the exercise by accepting the claimed price as a given and then by examining whether any of the work performed by Deemah was defective as alleged by Bezzina. It submitted that the valuation of the work should have been done in the first place before any consideration of the cost of rectifying any defect had been entered into. It was notable, however, that no submission was made by Bezzina to the second adjudicator challenging the value of the amount claimed, particularly because of its failure to lodge an adjudication response in respect of that claim.
- [10] The question of the valuation of the construction work by the second adjudicator was, however, important. According to s. 27 of the Payments Act, if an earlier adjudicator has decided the value of any construction work carried out under a construction contract, then the later adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work or the goods and services the same value as that previously decided, unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous decision. The section reads as follows:
- "27 Valuation of work etc. in later adjudication application*
- (1) *Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14, (Valuation of construction work and related goods and services) decided*
- (a) *the value of any construction work carried out under a construction contract; or*
- (b) *the value of any related goods and services supplied under a construction contract.*
- (2) *The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision."*
- [11] The practical problem that arises here is that the second adjudicator was not informed of the result of the first adjudicator's decision and his decision was at variance with hers because she had assessed the sum owing to

Deemah as \$218,382.14 where the claim was \$712,149.58, thus valuing the work at almost \$500,000 less than the claim. The second adjudicator, however, in awarding the first respondent \$655,978.91, had effectively decided, if not in those precise terms, that the value of the work assessed by the first adjudicator had increased, in the absence of any submissions by either Bezzina or Deemah to satisfy him that the value of that work had changed since the first decision. The increase is of the order of \$500,000.

The scheme of the Payments Act

- [12] The object of the Payments Act is to enable contractors doing work for a developer or builder pursuant to a construction contract to receive and recover progress payments by serving a payment claim upon the other party. The parties served may respond with a payment schedule which sets out the amount that is admitted to be owed to the contractor and the reasons why that amount is less than the payment claim.
- [13] If a payment schedule is served the contractor may refer the payment claim for adjudication and make submissions in support of its payment claim and against the matters set out in the payments schedule. The other party is entitled to deliver an adjudication response containing its submissions on the payment claim and payment schedules.
- [14] The matter is then determined by an adjudicator whose task is to value the work performed by the contractor and, as I have already indicated, if there is a subsequent adjudication the second adjudicator must give the work the same value as the previous adjudicator unless the party satisfies the adjudicator that its value has changed.
- [15] An adjudicator's decision may be registered in the court in which case it takes effect as a judgment debt. The procedure is summary and very expeditious requiring, for example, an adjudicator to make his or her decision as quickly as possible and, in any case, within 10 business days after the earlier of the date on which the adjudicator receives the adjudication response or should have received that response; s. 25(3)(a). Section 25(4), however, permits an adjudicator to ask for further written submissions from either party.
- [16] Section 100 of the Payments Act, in effect, allows these decisions to be reconsidered in normal civil proceedings and permits the court in those proceedings to make orders for the restitution of any amount paid pursuant to the procedures for recovering progress payments created by part 3 of the Payments Act. Palmer J, in the New South Wales Supreme Court, appropriately dubbed the approach in their equivalent legislation as a "pay now, argue later" solution to the problem of recovery by contractors of progress payments from builders and developers; **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140 at [96].
- [17] It has been recognised, however, that adjudications under the Payments Act are susceptible to judicial review under the Judicial Review Act 1991 ("the JR Act"); see, e.g. *State of Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 at [16]-[35]. That may be about to change as a result of part 17 of the Justice and Other Legislation Amendment Bill 2007. There may also be differing views as to whether s. 100 of the Payments Act is a provision under which an applicant is entitled to seek a review of the matter by another court or tribunal for the purposes of enlivening the power to dismiss an application for a statutory order of review under s. 13 of the JR Act; cf. *State of Queensland v Epoca Constructions* at [36] with *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2007] QSC 220 at [7]-[8].
- [18] For reasons that will appear, however, it seems unnecessary to me to resolve that issue in this decision.

The first adjudication decision - was there a construction contract?

- [19] The submissions for Bezzina in respect of the first adjudication decision were that it had not been established that Deemah was a party to the construction contract because the quotation was submitted by its associated company. Mr Beacham, for Bezzina, submitted that the evidence that the contract had been assigned to Deemah was deficient and not enough to support a finding that it was a party to the construction contract. He submitted that the mere assignment of the benefit of such a contract was not enough to constitute the assignee as a person who had undertaken to carry out construction work under the contract within the meaning of s. 12 of the Payments Act. In other words he submitted the evidence simply established an alleged assignment and did not prove that Deemah was entitled not only to the benefits of the construction contract but also subject to its burdens, namely the performance of the work. From there he argued that the adjudicators did not have jurisdiction to make the adjudication decisions within s. 20(2)(c) of the JR Act or that they erred in law or failed to take into account a relevant consideration in making those decisions.
- [20] He submitted that those were essential conditions to the exercise of jurisdiction under the Act failure to comply with which meant that any adjudicator's determination would be void and not merely voidable; see *Brodyn Pty Ltd v Devonport* (2004) 61 NSWLR 421, 441-442 at [52], [55].
- [21] When one examines the progress claims made by Deemah one sees that they appear on its letterhead and detail the work said to have been done. The fair inference from the making of those claims in circumstances where the contract was said to have been assigned to it is that it was the company that also did the work. The meaning attributed to "construction contract" in Schedule 2 of the Payments Act is "a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to another party" (my emphasis). In this context Mr Bickford for Deemah, drew my attention to the discussion by Nicholas J in *Okaroo Pty Ltd v Fos Construction and Joinery Pty Ltd* [2005] NSWSC 45 at [41] where his Honour said: "With regard to the authorities, and to its context in the Act, in my opinion the term "arrangement" in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements. The distinction in the definition between "a contract" and "other arrangement" is intended by the

legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that "contract" is to be given its common law meaning and that "arrangement" means a transaction or relationship which is not enforceable at law as a contract would be. Accordingly I reject the submission for Okaroo that the term "arrangement" should be understood to mean an agreement which is tantamount to a contract enforceable at law."

- [22] In my view that is a correct approach to the construction of that word in this context and there was evidence before both adjudicators to satisfy them that the arrangement between Bezzina and Deemah was sufficient to meet the definition of "construction contract" under the Act.
- [23] Deemah also sought, against objection, to prove the written assignment which had been asserted by it in its letter of 8 September 2006 as relevant to these issues. It seemed to me to be admissible if, for no other reason, than to address the issue whether I should exercise any discretion to grant judicial review in the circumstances. It was also admissible to establish the truth of the jurisdictional fact the respondent relied on, namely that it had performed work under a construction contract. I do not see why I should be limited in examining that question to the evidence that happened to be before the adjudicator; cf., e.g., *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428 at [18]-[20]. As Spigelman CJ pointed out in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64:
- "[40] Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts."
- [24] He went on to say at 71:
- "[85] ... facts, even where they are described as 'objective', do not have an existence independent of their identification by some process of human agency. An administrative decision-maker often has to determine jurisdictional facts, but does not do so conclusively. This has been recognised as long ago as *Bunbury v Fuller* (1853) 9 Ex 111 at 140; 156 ER 47 at 60."
- [25] See also *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480 at [59]-[61].
- [26] The tender of the progress claims was also objected to but all but one of them were already in evidence before the adjudicators so there was little point in the objection and, in any event, they were admissible to help me examine the jurisdictional facts said not to exist, namely a construction contract between the applicant and the first respondent. In my view both objections, to paragraphs 2 and 8 of the affidavit of Ms Melham filed by leave on 21 September 2007 should be rejected.

The second adjudication decision - valuation of the construction work

- [27] Had the only argument available to Bezzina been that the second adjudicator did not approach his task properly by valuing the work before considering the defects alleged by Bezzina, I would not have been disposed to interfere with his decision. Bezzina, apart from drawing my attention to the obligation to value construction work in s. 14 of the Payments Act, also relied upon the reasons of Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 where his Honour, at [82]-[86], found that the adjudicator's duty was to come to a view as to what was properly payable on what the adjudicator considered to be the true construction of the contract and the Act and the true merits of the claim. He treated the obligation to determine whether the construction work identified in the payment claim had been carried out and its value as part of the basic and essential requirements of validity. In reaching that conclusion he said that if an adjudicator allowed a claim in full just because a respondent's submissions were rejected, without determining whether the construction work had been performed and without valuing it, that would bespeak a misconception of what was required by an adjudicator, leading to jurisdictional error resulting in invalidity.
- [28] In these circumstances, however, there was no issue raised by Bezzina about whether the work had been performed or about the value claimed by Deemah. Bezzina's submissions focussed more upon the alleged defects. Had that been the only problem associated with the second adjudication decision I would not have been inclined to exercise my discretion to review it. Nor would I have been inclined to grant the extension of time necessary to review the decision under s. 26 of the JR Act in respect of the relief claimed for a statutory order of review under that Act.
- [29] It seems to me, however, to be a significant issue that the exercise apparently required by s. 27(2) of the Payments Act has not occurred, namely the second adjudicator did not give the same value to the work, goods or services as that previously assessed by the first adjudicator. The first adjudicator approached her task as one requiring her to value the work in arriving at her views as to the appropriate progress payments to order; see, e.g., paras 37, 46, 64, 87 and 119 of the first adjudication decision.
- [30] It was argued that the second adjudication did not decide the value of the construction work but examined whether there should be a deduction from the price claimed for alleged defects and some other matters dealt with in detail by the adjudicator. The consequence argued was that his adjudication did not involve "the working out of the value of that work" to use the language of s. 27(2). Reference was also made to the decision of Mullins J in *ACN 060 559 971 Pty Ltd v O'Brien* [2007] QSC 91 at [32]-[34] where her Honour considered two decisions

of the New South Wales Supreme Court dealing with the interpretation of their statute's equivalent section; *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 and *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* [2006] NSWSC 798 ("Goss Projects"). McDougall J in Goss Projects drew a distinction at [40] "between the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work." Her Honour applied that approach, correctly in my respectful view, to conclude that a deduction for liquidated damages, was "distinct from the value of work carried out by the contractor in the performance of the contract"; see at [34].

- [31] It seems to me, however, that the exercise engaged in by the second adjudicator here of examining the possible deduction of claimed defects from the price claimed for work done does involve the "working out of the value of that work" to use the words of s. 27(2). Here the only evidence of value was the price claimed which was not itself put in issue and alleged defects in that work, if established, must be matters that are involved in working out its value.
- [32] It is difficult to criticise the second adjudicator for his omission to give the work examined by him the same value as that given to it by the first adjudicator because the parties did not bring the result of the first adjudication to his attention. Bezzina argued that it was circumscribed in doing so because of the limitations placed on it in respect of the provision of reasons for withholding payment unless the reasons have already been included in the payment schedule served on Deemah; see s. 24(4).
- [33] The limitations on the adjudicator in deciding an adjudication application under s. 26(2) were also drawn to my attention. An adjudicator is entitled to consider certain matters only, namely:
"26(2) In deciding an adjudication application, the adjudicator is to consider the following matters only
(a) *the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
(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 properly 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 properly 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."*
- [34] Nonetheless, however, the second adjudicator had been informed of the making of the first adjudication application and, in taking into account the provisions of the Act pursuant to s. 26(2)(a), had the power to ask for further written submissions from either party under s. 25(4)(a) to deal with his potential duty to apply s. 27. I appreciate that he was acting under severe constraints of time imposed by the Act, but the practical result of the failure to inform him, or of his failure to inquire about the result, of the first adjudication application was that he failed to give the same value as that previously decided to the value of the work being "worked out" in the application before him. That seems to me to be a failure to comply with an important provision of the Act in circumstances where, as here, a very different result would have occurred if the obligations imposed by the Payments Act had been met.
- [35] One issue canvassed in argument on this issue was whether s. 27(2) of the Payments Act should be construed to apply only to the results of previous adjudication decisions of which a later adjudicator had been informed. The adjudicator's power under s. 25(4)(a) to call for further written submissions, his knowledge of the earlier reference to adjudication and the apparent purpose of the provision in s. 27(2) as one designed to discourage "forum shopping" among adjudicators suggest to me that this is not necessarily a case where parliament has failed to deal with this eventuality in such a way as to permit me to read such words into the Act; see, e.g., *Birmingham v Corrective Services Commission (NSW)* (1988) 15 NSWLR 292, 302 and *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113. Parliament may just as well have expected that the later adjudicator, in carrying out the task of valuing the work under s. 14 or of giving the work the same value as that previously decided under s. 27, would have taken steps to inform himself or herself of whether there had been such a decision and of the value attributed to the work by the earlier adjudicator.
- [36] As Hodgson JA said in Minister for *Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [35] the sections requiring the adjudicator to consider the provisions of the Payments Act and the provisions of the construction contract entitled and indeed required the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thought relevant to the construction of that Act, the construction of the contract, and the validity of terms of the contract having regard to the provisions of the Act.
- [37] As a result it seems to me that there are good reasons for concluding that the second respondent failed to take into account s. 27 of the Payments Act and its effects on his obligation to value the work the subject of the payment claimed before him by giving it the same value as that previously decided in the first adjudication application. That failure to comply with the statutory procedure involved an error of law sufficient to allow me to exercise jurisdiction under s. 20(2)(f) of the JR Act.
- [38] There is an argument that it does not constitute a jurisdictional error invalidating the decision apart from that Act canvassed in *Coordinated Construction Co Pty Ltd v JMHargreaves (NSW) Pty Ltd* (2005) 21 BCL 312; [2005] NSWSC 77 at [57]-[58]. It seems to me, however, to constitute a jurisdictional error, pursuant to the decision in

Craig v South Australia (1995) 184 CLR 163, 179, as a failure by the adjudicator to take into account a relevant consideration, namely his statutory obligation to give the same value to the work as that previously decided. That would also enliven my jurisdiction to grant declaratory and/or injunctive relief and to set aside the judgment already obtained.

[39] Because of the failure to apply s. 27 of the Act it seems to me that it is not appropriate to refuse relief because of the existence of s. 100 of the Payments Act. Any re-examination of the entitlements of the parties at that later stage will not deal with this defect in the application of the Payments Act at this stage which has resulted in a significant departure from the result intended to be achieved by the statutory process.

Extension of time under JR Act

[40] The seriousness of the consequences of this error to Bezzina, its explanation for its delay in bringing the application for a statutory order of review because of its ignorance of the time limits under the JR Act for such relief, its payment into Court of the money in dispute and the absence of significant evidence of prejudice to Deemah unassociated with the merits of the dispute, encourage me to grant any necessary extension of time under s. 26 of the JR Act for the making of a statutory order of review.

Orders

[41] I shall hear further submissions as to the form of any order and as to costs.

Mr G D Beacham for the applicant instructed by Holding Redlich

Mr P Bickford with Mr A Wallace for the respondents instructed by Moray Agnew Solicitors