

- ORDER:** Application dismissed with costs to be assessed.
- CATCHWORDS:** Administrative Law – Statutory Review : Where applicant sought a review of adjudication of the *Building and Construction Industry Payments Act 2004* (Qld) – where contract concluded before 1st October 2004 – where written contract after 1st October 2004.
- STATUTES :** *Building and Construction Industry Payments Act 2004* (Qld)
- CASES :** *The King v Blakeley: Ex Parte Association of Architects etc of Australia* (1950) 82 CLR 54
Trollope & Colls Ltd & Anor v Nuclear Civil Constructors & Anor (1973) 1 WLR 601

JUDGMENT : Cullinane J. Supreme Court of Queensland at Townsville. 19th June 2006.

1. This is an application for a statutory review of an order of the First Respondent an adjudicator under the *Building and Construction Industry Payments Act 2004*.
2. The order made by the First Respondent was made on the 25th October 2005. it required the Applicant to pay to the Second Respondent the sum of \$34,907.35 together with interest.
3. The nature of the scheme provided for by the legislation and its evident aims do not fall for consideration here.
4. The primary challenge made to the adjudicator's decision is that the contract between the Applicant and the Second Respondent was concluded prior to 1st October 2004 and that being so the First Respondent had no jurisdiction to make any order under the Act. The application preceded upon the basis that this was correct.
5. The Applicant did not place any material before the First Respondent nor did it place any submissions before him.
6. The issue which was raised here was not raised before the First Respondent who made the following finding on the subject of jurisdiction: "5.1. *The construction contract was entered into after the commencement of the Act pursuant to s.3(1) of the Act.*"
7. It was not however contended by the Second Respondent that it was not open to the Applicant to agitate a jurisdictional fact of this nature on an application for judicial review. See also *The King v Blakeley: Ex Parte Association of Architects etc of Australia* (1950) 82 CLR 54
8. The parties entered into a sub-contract in a standard form (MW.SC-12002) commencing at page 24.
9. This contract contains the following clause:
"R.10 Entire Contract
This subcontract contains everything the contractor has agreed with the sub-contractor in relation to the matters it deals with. Neither party may rely on an earlier contract, or on anything else said or done by the other party (or by an officer, agent or employee of the other party) before this subcontract was entered into.
10. The date that the contract was executed was the 9th November 2004.
11. The Applicant here contends that a contract had been earlier concluded in dealings (both written and oral) between the parties and that it had been concluded prior to 1st October 2004.
12. There are a number of affidavits filed on either other side and the deponents were called to give evidence. One of these was John Barei who is a director of the Applicant. A significant part of the first of two affidavits sworn by him was based upon hearsay or is assertive in character and objection was taken to this and upheld.
13. Similarly some parts of the Affidavit of Colin John Schmitzer who was the construction site supervisor of the Applicant at the relevant time were successfully objected to on similar grounds.
14. The Applicant relies upon what is said to be an oral acceptance of a written offer by the Second Respondent. It is said to have been accepted by one Gary Nilsson who at the time was the Applicant's general manager. Mr Nilsson was not called to give evidence and his whereabouts are said to be unknown
15. The result was that the Applicant was ultimately driven to rely upon what is contained in some correspondence and documentation in order to contend for the existence of a contract prior to 1st October 2004.
16. The principal of the Second Respondent one Ian John Hammett was a deponent. He gave evidence. All relevant dealings on behalf of the Second Respondent involved him.
17. On 25th May 2004 the Second Respondent wrote a letter to the Applicant submitting a tender for the works. The works were electrical work to be performed in the course of the construction of a block of apartments described as The Docks at Magnetic Island. The amount tendered related to the works described in that letter and there were also some provisional cost items referred to. There had been an earlier tender by the Second Respondent. At some time after this a further tender was made. The documentation relating to this does not appear to be before the court.
18. By a letter of 17th September 2004 (which appears to have followed some discussions between the parties) the Applicant wrote to the First Respondent in the following terms:
**"THE DOCKS APARTMENTS – MAGNETIC ISLAND
SUBCONTRACT – ELECTRICAL**
In accordance with our discussions we hereby confirm our intention to negotiate a Subcontract Agreement with Hammett Technologies Pty Ltd (quotation date 25/05/04) for the Electrical Trade applicable to the above project. The Contract will be forwarded to you by Friday 24th September 2004.

Contract Particulars are:

- Contract Conditions- ABIC MW-1 2003 Major Works Contract
- Project Commencement Date - Monday 20th September 2004
- Project Completion Date - Thursday 31st March 2005
- CBQ Pty Ltd Project Manager - Gary Cox, Tel 4775 5822
- CBQ Pty Ltd Site Supervisor - Colin Schmitzer, Tel 0418 1823 318
- Site Address - 13-15 Terrace Place

Magnetic Harbour

Nelly Bay

Magnetic Island"

19. In a further letter of 21st September 2004 the Applicant wrote to the Second Respondent stating that it had previously issued a letter of intent for the project which "as previously discussed is to incorporate the removal of reference to L.P.C. sums." It went on to ask for the Second Respondent's response to this.
20. The Second Respondent provided this in a letter dated 21st September 2004. By a letter dated 22nd September 2004 the Second Respondent referred to the Applicant's letter of 17th September and pointed out that the Second Respondent had re-tendered for the project since the tender of 25th May 2004 referred to in the Applicant's letter and the re-tendered amount was considerably higher.
21. By a letter of 22nd October 2004 the Applicant forwarded to the Second Respondent a number of documents essentially being the subcontract agreement in standard for subsequently executed and associated documents.
22. In response the Second Respondent wrote on 25th October 2004:
"With reference to the above document I would like to advise that we are not in a position to sign this document in its current form. The sub contract document received make reference to our initial tender submission dated May2004. You may not be aware we forwarded to Gary Nilsson our revised bid for this project on the 21st September 2004 which was verbally accepted a few days later. Please amend your current sub contract agreement to reflect this latest offer and reforward to our office at your earliest convenience. Should you wish to discuss this matter further please do not hesitate to contact me at your earliest convenience."
23. The Applicant relies upon what is contained in this letter is evidence that there has been a concluded contract constituted by Mr Nilsson's acceptance of "our revised bid for this project." Reliance was also placed upon a document which is exhibited to the Affidavit of Mr Schmitzer called a daily project report of 28th September 2004. It related that an electrician had attended on the site to check on a layout. At the same time a document described as "general information and site rules" was signed by Mr Hammett. A copy of this is exhibited to the second Affidavit of Mr Barei.
24. The effect of evidence for the Applicant was that the Second Respondent would not have been allowed to enter upon the premises except for the purposes of carrying out work for which he had already been engaged. There was evidence that it was the practice of the Applicant to have subcontractors sign the "general information and site rules" document.
25. Mr Hammett acknowledges that he was on the site on 28th September but says that it was for the purposes of looking at provisional sum of some items so as to "firm the price". He says that Mr Nilsson had wanted fixed sums for these items and that he was still in negotiations with Mr Nilsson about these matters as at 1st October.
26. It is common ground that shortly after 1st October the Second Respondent was on site performing certain works and that these works were the subject of the contract. Mr Hammett said that he had been asked to commence these works by the Applicant and that they were done in anticipation of a written contract being concluded.
27. There are it seems to me three difficulties about the Applicant's claim that the court should be satisfied that the parties had concluded the contract prior to the 1st October 2004 and that, as the argument must go, the subsequent formal contract did no more than record an agreement already in place.
28. The first difficulty is the evidence of Mr Hammett, that he and Mr Nilsson were still negotiating in relation to what had been provisional cost items as at 1st October and that it was in relation to these that he went on the site on 28th September. I thought he was an honest and reliable witness and his account was not at odds with the documentary evidence. In fact it seems to me to be consistent with the letter from the Applicant to the Second Respondent on 21st September 2004 and some following correspondence.
29. On this basis there was no concluded contract prior to 1st October notwithstanding that (I infer) Mr Nilsson may have been content with the altered tender price.
30. Secondly as will be seen by reference to the correspondence (a letter from the Applicant to the Second Respondent dated 17th September 2004 and the letters passing between the parties on 22nd October 2004 and 25th October 2004) the parties clearly contemplated the execution of a formal written contract. In my view the proper conclusion to draw is that they intended to be contractually bound by the execution of such a document, a conclusion which is not affected by the fact that work was performed in anticipation of this occurring. See *Trollope & Colls Ltd & Anor v Nuclear Civil Constructors & Anor* (1973) 1 WLR 601.

31. Finally there is clause R.10 of the contract. On the fact of it it amounts to an acceptance by both parties that it is the written contract which provides for the parties' rights and obligations and not any prior dealings. In many if not most cases a written contract would be preceded by an agreement of some kind. Clause R10 expressly precludes reliance upon any agreement but the written one.
32. The primary challenge to the order made therefore must fail. The only remaining ground relates to an alleged failure on the part of the adjudicator to allow the Second Respondent to make further submissions.
33. In his adjudication the First Respondent relates at clause 4.2:
*"Pursuant to section 25(4)(a) of the Act, I requested further written submission from the claimant in respect of confirmation that the adjudication application had been served on the respondent. Pursuant to section (25(4)(b) of the Act a deadline of 17th October 2005 was set for the further submission, with a deadline of 18th October 2005 set for the respondent's comments. The claimant made the requested further submission on 17th October 2005, comprising the following:-
Facsimile from Wilson Ryan Grose Lawyers dated 17th October 2005
-Statutory Declaration of Helen Louise Harbourne."*
34. The first sentence I am told relates to confirmation sought by the First Respondent that the adjudication application had been served on the Applicant. It goes on to relate that a deadline for further submissions by both parties was then set.
35. The Applicant did not place any material before the First Respondent nor make any submissions.
36. Mr Barei swears that he cannot find any record of having received any notification of a further deadline for submissions. He referred in his evidence to "a missing document which we weren't able to find".
37. Simply to state that no document can now be found cannot constitute a basis for a positive conclusion that the Applicant was not given an opportunity to make further submission. I repeat the Applicant had previously chosen not to place any material or submissions before the First Respondent.
38. The application must fail.
39. I order that the application be dismissed with costs to be assessed.

Mr D. Morzone for the Applicant instructed by Boulton Cleary Kern Lawyers
Mr A.T. Moon for the Respondent instructed by Wilson Ryan Grose Lawyers