JUDGMENT : Fryberg J. Trial Division. Supreme Court of Queensland at Brisbane. 10th July 2007.
This is an application to review the decision of an adjudicator appointed under the Building and Construction Industry Payments Act 2004.

The decision was that the applicants pay a progress payment to the first respondent in the sum of $43,533.82, and the total adjudication fees and expenses.

The second respondent is the adjudicator and the third respondent the appointing authority, and they have not appeared because they are abiding the decision of the Court.

The applicant, as owner, entered into a building contract with the first respondent on a Queensland Master Builders Association Standard Form on the 8th of February 2005. The contract provided for the first respondent, Rubikcon, to construct for the applicants, the Doolans, eleven new townhouses at Scarborough.

The work apparently proceeded and trouble arose only toward the end of the job. The detail of how the trouble arose does not matter for present purposes. It suffices to say that it related to the making of a final inspection and issue of a certificate and whether or not all works had been done which needed to be done.

There were also some questions, I gather, about defects but that does not matter for present purposes.

Rubikcon sought payment of a claim which it styled "Final Claim" for the amount to which I have already referred. The Doolans did not pay that claim.

The contract provided for progress payments. They were to be paid in accordance with a schedule which in the standard form provided two alternatives. The alternative selected by the parties was under the heading "Method B". It stated in handwriting under the sub-heading "Name of Stage or Description of Stage of Works": "Proforma and tax invoice issued on or near to 20th of each month. Proforma to be a trade breakdown and percentages of work completed shown."

That is a rather opaque way of expressing what is supposed to be set out in the form (that is, the percentages of the contract price and amounts payable at the completion of each stage) and it does not sit happily with Cl 11.6 of the contract under which it is made, however nothing turns upon that in the present proceedings and no argument has been based upon it.

The money not having been paid, Rubikcon sought the appointment of Mr Hillman as adjudicator under the Act. That was done.

Mr Hillman dealt with the case and determined that the money should be paid. He decided on the 2nd of April this year that the Doolans should be liable to Rubikcon for that amount and that under the Act that amount became payable on the 27th of February 2007.

Since then Rubikcon has, in accordance with s 31 of the Act, filed an Adjudication Certificate in this Court as a judgment for debt and accompanied it with the necessary affidavit.

The Doolans now seek judicial review of Mr Hillman's decision. They submit that it is wrong in a number of respects. They submit that there has been an error of law and that there have been breaches of the rules of natural justice, but as the matter was developed before me, at least, the former category essentially included the latter. Three distinct arguments were developed but in view of my assessment of the first of them it is unnecessary that I deal with the others.

The amount of the final claim has been claimed twice and that is the fact which is at the heart of the first point raised by the Doolans. It was first claimed in a document called a tax invoice, sub-headed "Final Claim", and dated 15 November 2006.

That claim became the subject of an attempted adjudication under the Act, but the adjudication failed and was treated as a nullity by an adjudicator who wrote to the parties on the 15th of February 2007 advising that, because the timing of Rubikcon's notice was outside the period contemplated by the Act, he would not provide a decision pursuant to s 25 of the Act.

The parties accepted that outcome in respect of that referral, but on the 16th of February 2007 invoice. Apart from the date it invoice. The date was stated as underneath it appeared the words It was, as I have said, otherwise identical to the earlier invoice.

Rubikcon issued another tax was identical to the first 15 November 2006, but then "*Reissued 16 February 2006*".

I turn to the legislation. The Act is based on the provisions of a New South Wales Act, the Building and Construction Industry Security of Payments Act 1999.

It is apparent from a reading of the Act that its purpose is to secure to builders prompt payment of progress claims. No doubt the mischief at which it was aimed was owners who place financial pressure on builders by withholding payment improperly.

It provides for a quick and cheap way of having disputes about progress claims adjudicated without finally determining the rights and wrongs of the dispute. If the adjudicator makes a finding that the amount is payable, then the Act requires it to be paid. Cross-claims, defences in the nature of other contractual claims and so forth cannot be raised as matters of set-off or counterclaim.

Nonetheless, although the adjudicator does not finally determine rights, and in the event that he makes a mistake and a payment is made pursuant to his ruling, the money can be recovered if it is subsequently determined that the owner was not obliged to make the payment, the adjudicator's decision is subject to judicial review.

That much, at least, was common ground between the parties today. It was accepted by the parties that subject to the discretion provided by the Judicial Review Act, the Court is entitled, indeed obliged, to consider whether the adjudicator has, among other things, erred in law in reaching his decision.

One of the matters before the adjudicator was the question of whether Rubikcon was entitled to issue a second claim identical to the first and to found proceedings before the adjudicator upon that claim. As to that argument, the adjudicator's response was, "As the contract reference date as described above is on or near to 20th of each month, I am satisfied that the claimant has not served two payment claims in relation to the one reference date". Presumably the adjudicator meant that the reference date for the second claim was a different reference date from that for the first claim. That is the way the argument has developed before me and it is a question of construction of the Act as to whether that is an acceptable approach.

The starting point in considering the provisions of the Act is section 12. That section provides: "*For each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work or supply related goods and services under the contract.*" There is no doubt that the contract in issue in the present case was a construction contract within the meaning of that section, or that Rubikcon had undertaken to carry out construction work under the contract.

"*Reference date*" is defined in the Act to mean,

"*(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out or related goods and services supplied or undertaken to be supplied under a contract, or*

(b) ….."

Both parties accept that paragraph (a) of the definition is the part which applies in the present case.

I quoted the contract provision relating to the date of payment earlier. The argument developed on behalf of the Doolans had two limbs. The first made no distinction between whether the payment in question was a final payment or not. The second had reference to the fact that it was a final payment. I will revert to that second argument a little later.

Section 17 of the Act provides that a person mentioned in s 12 who claims to be entitled to a progress payment, may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

Payment claim in defined simply as a claim referred to in s 17. The section nominates what the claim must include and specifies that it may include not only work or related goods and services to which it relates, but also liabilities of the respondent under s 33(3) of the Act. That relates to losses and expenses incurred as a result of the removal by the respondent of any part of the work or supply.

Subsections 5 and 6 are the critical provisions for present purposes:

(5) A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.

(6) However, (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

For Rubikcon, Mr Bickford submits that (5) provides that a claimant cannot serve more than one payment claim in relation to each reference date. It does not say that a claimant cannot, on multiple reference dates, make the same payment claim. Consequently in his submission, Rubikcon was entitled to do what it did and was entitled to base a subsequent reference to adjudication on the second claim. Consequently in his submission, Rubikcon was entitled to do what it did and was entitled to base a subsequent reference to adjudication on the second claim.

In support of that submission reliance was placed on the decision of the New South Wales Court of Appeal in ***Brodyn Pty Limited v. Davenpor***t (2004) 61 NSWLR 421 and in particular to a passage in the judgment of Justice Hodgson at pp 443 to 444.

There the Court pointed out that the equivalent provision in the New South Wales legislation did not provide that reference dates cease on termination of a contract or cessation of work. Mr Bickford submitted that that was the position in the present case. He submitted that at the date when the second tax invoice was submitted there was simply a new reference date and the invoice with the claim embodied in it was a legitimate payment claim under the Act.

What Justice Hodgson said bears quotation:

"*63 However, s.8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s.8(2)(a) if the contract so provides but not otherwise; while s.8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s.13(4): reference dates cannot support the serving of any payment claims outside these limits.*

64 In my opinion, as submitted by Mr Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively."

I would respectfully agree with that passage. Subject to the alternative argument to which I have yet to refer the present was a contract where reference dates continued to occur. It was therefore a case where the only non contractual limit to

occurrence of reference dates was that which flowed from s 17(4) of the Act, the equivalent of the New South Wales s 13(4).

However, it is in my judgment reasonably clear that his Honour in saying that successive payment claims do not necessarily have to be in respect of additional work was not saying that successive payment claims may be identical. That is because payment claims may include not only work but claims for goods and services and also claims for liability under section 33(3).

His Honours point was that the mere fact that work had ceased did not mean that new claims in respect of new reference dates could not arise. That, in fact, seems to have been what happened in that case.

The various claims were not identical. There is, therefore, in a situation such as that scope to apply both sub-s (5) and sub-s (6) of s 17. Such a construction is, in my judgment, also consonant with s 12 of the Act. That section relates each reference date to an entitlement to a progress payment.

This construction accords with the text of s 17(6) which permits a previous claim to be included in a later one. It seems to me that there is a one to one relationship between the claim made and the reference date on which it is made.

That is not to say that the claim must include all work done up to that date. If something is omitted from a claim, not withstanding that it could have been claimed on a particular reference date, there is no reason why it cannot be claimed on the next reference date. Likewise anything further which gives rise to a claim after the first of such reference dates, may also be included in the next claim. Subsection 17(6) permits also the inclusion of an amount which has been the subject of a previous claim but that does not mean that a previous claim can be the sole item included in the later claim.

No case has been cited to me where such a claim was permitted. To allow it seems to me to fly in the face of the words of ss 12 and 17.

I do not read the judgment of the Court of Appeal in ***Falgatt Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** [2006] NSWCA 259 as departing from ***Brodin*** in any way.

In **Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd** [2005] NSWSC 1152 Justice Barrett said of the equivalent sections: *"It is thus clear that section 13(5) precludes the service of more than one payment claim in respect of any one reference date but does not seek to preclude cumulation of amounts in successive 'payment' claims. As a result, if, in a case within section 8(2)(b), the claim in respect of the first reference date is for $10,000, which is not promptly paid, and there is then a claim for $25,000 (inclusive of the first $10,000) in respect of the second reference date, there is no overstepping of the limit allowed by section 13(5)."*

That is the situation to which I have referred as permissible and I respectfully agree with what his Honour has said. What distinguishes the present case in my judgment is the fact that the second claim was identical to the first.

In my judgment therefore, the claim was not capable of founding the jurisdiction of the adjudicator and consequently the order made by him was invalid.

The alternative argument advanced on behalf of the Doolans was that in any event clause 17.1 of the contract dealt expressly with the question of a final claim. It was a section in the contract which did terminate the running of reference dates. Consequently, once a claim had been made in respect of that clause, no further claim under the Act was possible, there being no further reference dates occurring.

That argument is attractive on its face. Mr Bickford, for Rubikcon, submitted that it failed because clause 17.1 was inconsistent with the schedule setting out method B to which I have referred or, if not inconsistent when read with that schedule, meant that the time for the final claim had to be calculated in accordance with method B with the result that there could be repeated reference dates.

It is unnecessary, finally, to determine the correctness of that argument. I do not see the provisions of the contract as being inconsistent with the Act in that regard.

I will hear the parties on the question of the form of the order and also in relation to what should happen with regard to the filing of the adjudication certificate in this Court.

ORDER:

1) Pursuant to section 30(1) of the Judicial Review Act 1991, the decision of the Second Respondent dated 2 April 2007 (a copy of which is exhibit "SPD-19" to the affidavit of Stephen Patrick Doolan filed in these proceedings on 12 June 2007) is set aside, with the effect from the date thereof.
2) The judgment entered by the First Respondent against the Applicants on 16 May 2007 in proceedings 4145/07 of this court is set aside
3) The amount of $43,533.82 (Forty-three thousand, five hundred and thirty-three dollars and eighty-two cents) is to be paid into court by the Applicants within 45 days to abide the outcome of the proceedings referred to in the First Respondent's undertaking recorded above, to be paid out (together with any accretions thereon) upon further order of this court, whether made by consent of the Applicants and the First Respondent pursuant to Rule 666, or otherwise
4) The First Respondent pay the Applicant's costs of and incidental to this application on the standard basis
5) No order as to the costs of proceedings 4145/07
6) Each party have liberty to apply on three (3) clear days notice in writing

G I Thompson instructed by Answorth Lawyers for the applicant
P Bickford instructed by Warlow Scott Solicitors for the first respondent
Second Respondent: no appearance Third Respondent: no appearance