**Peekhrst P/L v Wallace (Andrew Bruce) : Glenzeil P/L [2007] QSC 159**

**JUDGMENT : Douglas J.** Trial Division. Supreme Court of Queensland at Brisbane. 6th July 2007

[1] These are applications to set aside a statutory demand served by the respondent Glenzeil Pty Ltd on the applicant Peekhrst Pty Ltd on 30 October 2006 or alternatively for an order extending the time for compliance with that demand until seven days after the determination of judicial review proceedings of an adjudication determination made under the Building and Construction Industry Payments Act 2004 ("the Act"). The second application seeks judicial review of that determination. The grounds argued as to why judicial review should occur were that there was no proper service of the adjudication application, no acceptance of the appointment of the adjudicator, that the adjudicator had erred in failing to satisfy himself that there was service of the adjudication application and that the adjudicator demonstrated prejudgment and/or bias or at least failed to maintain impartiality or the appearance of impartiality.

[2] The application to set aside the statutory demand was based on an argument that there was an offsetting claim of $54,000.00 and that substantial injustice would be caused unless the demand was set aside; see s. 459J(1)(b) of the Corporations Act 2001 (Cth).

**Background**

[3] Peekhrst is developing nine units together with a marina at Runaway Bay. Glenzeil was engaged by it as a building contractor. The obligations under the building contract have been performed but a dispute has arisen in respect of the last progress claim which Glenzeil claims from the retention monies whilst Peekhrst maintains that it has a claim for rectification of defects. An adjudication application under the Act was made by Glenzeil through an organisation called Adjudicate Today Pty Ltd which was an authorised nominating authority under the Act. It referred the application to Mr Andrew Wallace as an adjudicator and his appointment was signed on his behalf by an adjudication coordinator called Philippa Rudolph apparently employed by Adjudicate Today. That occurred on 13 September 2006.

[4] A copy of the adjudication application had been delivered to the address of Peekhrst at Unit 1/1296 Horsley Drive, Wetherill Park in New South Wales on 8 September 2006. Mr Peeku of Peekhrst says that the documents did not come to his attention until 13 September 2006. The delay was not caused by anything done by Glenzeil. On 13 September one of Mr Peeku's co-directors also received what he described as a "largely illegible facsimile" from Adjudicate Today on his private facsimile machine. He contacted Adjudicate Today on 14 September 2006 and on that date received a facsimile from it, the notice of acceptance by Mr Wallace signed by Ms Rudolph on his behalf.

[5] On 23 September 2006 Mr Peeku wrote to Mr Wallace disputing Glenzeil's ability to seek adjudication of its payment claim without first asking the adjudicator to make a judgment on the true meaning of certain words in a deed to which he referred which he argued precluded the claim by Glenzeil. He says that at that stage he was not aware of the service and notice requirements of the Act although the facsimile he received on 14 September 2006 made clear what Peekhrst had to do in response to the adjudication application. By 23 September it was too late for Peekhrst to provide an adjudication response and his letter did not deal with the merits of the claim against Peekhrst or the defects claim it argues that it had.

[6] Mr Wallace made a decision on 25 September 2006 which indicated that no response had been received and concluded that an amount of $92,699.13 was owing by Peekhrst to Glenzeil. There was no reference to the letter of 23 September but the argument in it was dealt with by him in the reasons. In those reasons Mr Wallace considered whether the application had been properly referred to him, including whether Glenzeil had served a valid payment claim on Peekhrst, and whether he had caused a notice of acceptance to be served on the parties. He satisfied himself that that had occurred. He also pointed out that Peekhrst had served a payment schedule on Glenzeil but "for reasons known only to itself' did not provide him with an adjudication response in answer to the allegations made in the application. He considered a number of matters raised by Peekhrst in its payment schedule and came to the conclusion to which I have already referred.

**Judicial review application**

[7] Section 23 of the Act provides that if an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by serving notice of the acceptance on the claimant and the respondent. Section 103 provides that a notice authorised or required to be served may be served in the way provided under the construction contract in addition to the modes of service allowed by s. 39 of the Acts Interpretation Act 1954 "or the provisions of any other law about the service of notices". Section 109X of the Corporations Act also provides that a document may be served on a company by leaving it at or posting it to the company's registered office. Section 39 of the Acts Interpretation Act also allows a document to be served by facsimile sent to the head office, a registered office or a principal office of a body corporate.

[8] The address to which the adjudication application was delivered was the address for the purposes of the contract and the principal place of business of Peekhrst. Accordingly, the adjudication application was served properly by its delivery to Peekhrst's contractual address and principal place of business. As the acceptance of the adjudication application was sent by facsimile and received by Peekhrst as evidenced by Mr Peeku's affidavit at para 40, there was no substance to the points taken about service either of the adjudication application or the acceptance of it. In those circumstances the adjudicator was entitled and obliged to deal with the matter.

[9] It was also argued that the acceptance of the adjudication application by Philippa Rudolph on behalf of Mr Wallace was a jurisdictional error arising out of an alleged breach of s. 23's requirement that the adjudicator

accept the adjudication application. There is nothing in the section to suggest that an adjudicator may not authorise an agent to accept on his behalf. Given the speed with which these claims are to be dealt with, it may well be the case from time to time that a nominated adjudicator may not be available immediately to sign and serve a notice of acceptance personally. That does not mean that those steps may not be taken by an agent.

[10] Gibbs CJ in ***O'Reilly v State Bank of Victoria Commissioners*** (1983) 153 CLR 1, 11 discussed the situation where power is given by a statute to a designated person to issue a notice and concluded that: *"The notice may be given by the authorized agent of the designated person, whose act will be the act of the principal, unless the statute on its proper construction requires the notice to be issued only by the person who is designated."*

See also per Mason J at 18-19. In a situation such as arises under s. 23 where the function of the adjudicator, in accepting appointment and serving notice of that acceptance, is "*purely routine and non-discretionary, there is a positive presumption in favour of allowing the repository of power to act through servants or agents*"; see Aronson, Dyer and Groves, Judicial Review of Administrative Action (3rd ed., 2004) at p. 307.

[11] Even if the acceptance of the application through an agent constituted a breach of the Act, which I do not accept, there is nothing to suggest that the use of an agent in circumstances like this should lead to invalidity; cf. ***Project Blue Sky v Australian Broadcasting Authority*** (1998) 194 CLR 355, 390-391 at [93]. This conclusion appears to me to be appropriate even where the person signing on behalf of Mr Wallace was an employee of the authorised nominating authority. Although the nominating authority may be paid initially by a party, there is nothing in the Act to suggest that such an authority may take a partisan role in facilitating the resolution of disputes that come under the Act. In fact the contrary appears to be the case; see e.g., s. 46(c) of the Act which provides that, in deciding whether an applicant is a suitable person to be registered as an authorised nominating authority, the registrar may have regard to whether the applicant represents the interest of a particular sector of the building or construction industry and, if so, whether this would make the applicant unsuitable to appoint adjudicators. One might as well argue that the payment of court filing fees by the party initiating an action made the court or the judge appointed to hear the matter biased in its favour.

[12] Where Mr Wallace expressly said that he had satisfied himself that the application had been properly referred to him and there is evidence that service was properly effected I do not think that the assertion that he failed to satisfy himself that there was service of the adjudication application is supported by the evidence. It would be possible, for example, for him to satisfy himself orally by enquiry of Adjudicate Today whether the adjudication application had been served.

[13] The argument that the adjudicator was biased otherwise relied upon a statement in his reasons where Mr Wallace described the assertions in the respondent's payment schedule as *"vague, repetitive and bordering on spurious justifications as reasons to withhold payment*". That was in circumstances where Peekhrst had not served an adjudication response and Mr Wallace, nonetheless, took care not merely to "*rubber stamp*" the claims made in Glenzeil's submissions but examined Peekhrst's payment schedule which had been provided to him and determined that Peekhrst failure to provide Glenzeil with a timely defects list and its failure to substantiate in an adjudication response the alleged defects meant that it was not entitled to withhold any amount on account of them.

[14] That does not seem to me to evidence of bias in the adjudicator. Rather it evidences care by him in reaching his conclusion as fairly as he could on the material even though Peekhrst had not provided him with an adjudication response. By the stage he wrote those words he was, in any event, making a decision, not conducting a hearing.

[15] Accordingly in my view, there is no reason why the decision by the adjudicator should be judicially reviewed. Such a course was also resisted on the other discretionary grounds that it would have required an application for an extension of time and because the Act contained its own system of review and a provision to enable a party to bring civil proceedings at a subsequent time. It is unnecessary for me to decide those issues because of my views about the lack of merit of any substantive application for judicial review.

**Statutory demand**

[16] The Act provides what has been described as a "*fast track interim progress payment adjudication vehicle*"; ***Brodyn Pty Ltd v Davenport*** [2003] NSW SC 1019 adopted by Mackenzie J in ***Roadtek, Department of Main Road v Davenport*** [2006] QSC 47 at [17].

[17] As Einstein J went on to say in ***Brodyn*** at [14]: "*What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That claw back route expressly includes the making of restitution orders.*"

[18] In the interim, however, an adjudicator's certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction. Mackenzie J went on to say at [18]: *"Section 31(4) refers to `proceedings to have the judgment set aside' and what is within the scope of such an application. In particular, no counterclaim can be brought against the claimant; no defence in relation to matters arising under the contract can be raised; and the adjudicator's decision cannot be challenged. The reference to setting the judgment aside and the limitation on what can be raised in such proceedings makes the challenge dependent on the existence of grounds for setting aside a judgment other than those enumerated.*"

[19] It is against this background that one needs to consider the arguments by Peekhrst that the statutory demand based on the judgment debt Glenzeil obtained should be set aside on the ground that it is an abuse of process. The argument relies upon assertions that there are defects. There is evidence that certain defects were shown to Glenzeil's employees which were said to have been rectified. Glenzeil had asked on a number of occasions that Peekhrst commit to writing a list of defects pursuant to the terms of the contract but no such list was received during the defects period which was said to have expired on 10 August 2006. Peekhrst, however, contends that Glenzeil cannot now claim that the defects period did expire on 10 August 2006, arguing that the parties had agreed to vary the contract in respect to the defects liability period.

[20] If there is validity in such a submission, however, it is my view that it is a topic which can be raised by Peekhrst in subsequent proceedings. It does not seem to me to constitute an abuse of process for Glenzeil to pursue its judgment debt with a statutory demand when it has adopted the procedure available to it under the Act which is designed to achieve swift and early progress payments.

[21] In this case the defects on which Peekhrst relies were not notified until the process was instituted before Mr Wallace. He dealt with them in his reasons. There has been no application to set aside the judgment obtained by Glenzeil, a course available under s. 31(4) of the Act, nor had Peekhrst commenced civil proceedings available to it pursuant to s. 100 where allowance might be made for any amount paid by it as a consequence of the filing of an adjudication certificate under the Act.

[22] Although recourse to the use of a statutory demand may be oppressive, for example, in the pursuit of a tax debt which is disputed by a tax payer who has objected and is seeking a review of the assessment, it does not seem to me that this regime should necessarily apply to an attempt to rely upon a statutory demand in circumstances such as these. The intention of the Act is clear in seeking to *"fast track"* progress payments even where it is likely that the parties will continue to dispute the decision made by an adjudicator. Where the party against whom judgment has been given has not sought to set it aside nor commenced civil proceedings pursuant to its rights under s. 100 and where, as here, has delayed in identifying and quantifying the alleged defects, it does not seem to me to be an oppressive use of a statutory demand made in reliance upon the judgment obtained under the Act. In my view, it is a different situation from that which applies when the demand is used in support of a tax debt clearly still the subject of a genuine dispute; cf. ***Re Softex Industries Pty Ltd*** [2001] QSC 377 and KW & KM Quinn Investments Pty Ltd v DCT [2003] QSC 336 at [4].

**Order**

[23] Accordingly I shall dismiss both the judicial review application and the application to set aside the statutory demand. I shall hear the parties as to costs.

CD Coulsen for the applicant instructed by Tucker & Cowen
KS Howe for the respondents instructed by Hoy & McCormack