JUDGMENT : McMurdo J. Supreme Court, Queensland. Brisbane. 3rd October 2008

[1] These proceedings involve a challenge to an adjudicator's decision purportedly made under the Building and Construction Industry Payments Act 2004 (Qld) ("*the Payments Act*"). The applicant argues that the adjudicator had no jurisdiction, so that the decision is void. It seeks a declaration to that effect and orders preventing the enforcement of the judgment which has been obtained in the District Court on the basis of the decision.

[2] The applicant, which I will call Walton, was the builder engaged by the owner to perform work at a child care centre at Kenmore. Walton made a subcontract with Eastwing Contracting Pty Ltd for the carpentry and plastering work. In turn, Eastwing subcontracted the plastering work to the respondent, Mr Salce.

[3] The contest here is between Walton and Mr Salce. The adjudicator (another respondent, Mr Welsh) upheld a claim by Mr Salce for payment by Walton to the extent of $102,227.50. Upon the basis of this decision Mr Salce obtained a judgment in the District Court at Southport which he has sought to enforce. Walton has paid the amount of his claim into court and has been granted an injunction restraining Mr Salce from enforcing the judgment until the determination of these proceedings.

[4] In mid-November 2007 Mr Salce went to work on this site. By 21 December 2007 he had sent three invoices to Eastwing and had received one payment. He was then claiming to be owed a total of $58,650. He says that on this date (21 December) he entered into an arrangement with Walton under which he undertook to perform the remaining plastering work for Walton's undertaking to pay him for that work and the amount he was already owed. On his case, he and Walton thereby made a "*construction contract",* as defined by the Payments Act. It is on the basis of that construction contract that he made his claim and the adjudicator made the decision which upheld it.

[5] Walton says that for many reasons there was no construction contract between it and Mr Salce. Further, it argues that the operation of the Payments Act was excluded because the undertaking by Walton, for which Mr Salce has contended, was to guarantee payment of amounts owing by Eastwing, so that the Payments Act does not apply because of s 3(2)(a)(iii). And there are further alternative arguments advanced by Walton, including that the absence of writing for this suggested contract precludes any recovery under the Payments Act according to what is said to be the proper interpretation of the Queensland Building Services Authority Act 1991 (Qld).[1]

[6] There were extensive submissions going to whether this Court can question the validity of an adjudicator's decision, now that such decisions are within Sch 1 of Pt 2 of the Judicial Review Act 1991 (Qld), so that the Act "does not apply" to them.[2] The argument for Mr Salce challenged the view expressed by Chesterman J, in ***Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor*** [3] and ***J Hutchinson Pty Ltd v Galform Pty Ltd*** [4], that an adjudicator's decision is still susceptible to relief under Pt 5 of the Judicial Review Act. It is unnecessary to consider that question because, as appeared to be ultimately conceded, this Court has jurisdiction to declare void an adjudicator's decision which was given without jurisdiction, quite apart from the operation of the Judicial Review Act. [5] Under the equivalent statute in New South Wales, it is well established that where some necessary precondition of an adjudicator's power has not been satisfied, and an adjudicator has erroneously decided that it has been satisfied, such an error results in the adjudicator's decision being void, and not merely voidable, and it may be declared to be so. In ***Brodyn Pty Ltd v Davenport*** [6], Hodgson JA (with whom Mason P and Giles JA agreed) said that:

"*a court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order [in] the nature of certiorari*". [7]

[7] The operation of the Payments Act depends upon the existence of a construction contract to which the Act applies, as I said in ***Cant Contracting Pty Ltd v Casella***, [8] following what Hodgson JA said in ***Brodyn*** [9]. The term is defined in the Payments Act within Sch 2 as follows:

"*construction contract means 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.*"

[8] Mr Salce has claimed upon the basis that there was a construction contract made by an "*arrangement*", rather than by a contract or agreement. He says that the arrangement was made on 21 December 2007, but his evidence from time to time as to what then occurred has not been entirely consistent.

[9] Within his adjudication application, there was his statutory declaration relevantly in these terms:

> "*9. On or about the 21 December 2007, I was approached by Rob Ellis of the respondent (Walton) to perform variation work. I protested and reminded Mr Ellis of our previous conversations in which I had advised him that I had not been paid for any of the work performed to date. This time, however, I told him that I was going to stop*

1 And in particular its s 67G.
2 s 18(2)(b) of the Judicial Review Act 1991 (Qld).
3 [2008] QCA 83 at [60]-[61].
4 [2008] QSC 205 at [27].
5 See, in particular, upon s 128 of the Supreme Court Act 1995 (Qld).
6 (2004) 61 NSWLR 421.
7 (2004) 61 NSWLR 421 at 441; see also ***TransGrid v Seimens Ltd*** (2004) 61 NSWLR 521 at 539 per Hodgson JA; ***Berem Interiors Pty Ltd v Shaya Constructions (I SW) Pty Ltd*** [2007] NSWSC 1340 at [31] to [33]; ***Hitachi Ltd v O Donnell Griffin Pty Ltd*** [2008] QSC 135 at [49]; ***JHutchinson Pty Ltd v Galform Pty Ltd*** [2008] QSC 205 at [29] to [30].
8 [2007] 2 Qd R 13 at 29, Jerrard JA agreeing at 24.
9 (2004) 61 NSWLR 421 at 441.

work and consider my legal options as a means to protect my investment in the project. Mr Ellis said that he was behind schedule, could not afford for me to stop work and assured and reassured me that the respondent would guarantee the payment of monies to me...

10. I understood Mr Ellis' promise as being an undertaking to me that the respondent was a person liable to make payment to the claimant.

11. Upon hearing the genuiness of Mr Ellis' promise and the urgency of the situation, I decided then and there that the claimant would not stop work and would continue working on the variations as if no problems had occurred. I shook hands with Mr Ellis to consummate the arrangement between the claimant and the respondent."

[10] In his affidavit filed in these proceedings, Mr Salce swore the following:

"9. In this conversation, I advised Ellis that I had not been paid any monies since I had commenced works. I told him I was only a small operation and could not afford to carry the overheads of the labor [sic] and materials that I was continuing to expend. I stated that I planned to stop work in order that I did not incur further costs without payment.

10. Ellis said that Waltons was behind schedule and could not afford for me to stop work. He stated words to the effect:

"Don't worry - Waltons will make sure that you get paid. If Pete [Eastwing] does not pay you then Waltons will pay you direct and hold back payment from Pete [Eastwing]."

11. Ellis repeated that he would ensure I was paid for the works I had done but stressed that the job needed to be done quickly.

12. Based on Ellis' promise to me, I agreed to stay on site and we shook hands in agreement."

[11] To establish the existence of an arrangement said to constitute a construction contract, Mr Salce had to show that he undertook to carry out construction work. It is not clear that this was the effect of the statutory declaration given to the adjudicator. Rather, upon that version, it might appear that the agreement or arrangement was that if Mr Salce stayed on site and did the work, although not undertaking to do so, then Walton would pay him if Eastwing did not. But according to his affidavit, he "*agreed to stay on site*", or in other words, he undertook to do the work. The adjudicator nevertheless concluded that there was within the arrangement described to him a construction contract. The adjudicator had to resolve a conflict between Mr Salce's version and that of Mr Ellis. According to Mr Ellis' statutory declaration, which he confirmed in these proceedings, he did not say anything to the effect that Walton would pay Mr Salce.

[12] As is common ground, the question is whether Walton can now demonstrate that there was no construction contract. There is that conflict of evidence between Mr Salce and Mr Ellis but neither was required for cross-examination. Ultimately Mr Codd, who appeared for Walton, seemed prepared to argue upon the premises of the facts according to Mr Salce's affidavit and I will proceed upon that basis.

[13] Accordingly, there was an undertaking by Mr Salce *"to carry out construction work for ... another party"*. But Walton still argues that there was no construction contract, largely upon the basis of a proposition, said to be derived from the judgment of Jones J in ***Vis Constructions Ltd v Cockburn***,[10] that an arrangement for the payment of a subcontractor's accounts by a person not a party to the subcontract "*does not of itself amount to a construction contract*". That proposition may be accepted. But as Jones J emphasized[11] it is necessary to apply the definition of "construction contract" to the circumstances of the particular case.

[14] Mr Salce had made a construction contract with Eastwing but, on his evidence, he made a construction contract with Walton when he undertook to Walton to carry out effectively the same work. That was work to be carried out for *"another party"* to the contract, agreement or arrangement (Walton), in that the performance of Mr Salce's work became Walton's performance of that work under its head contract. Mr Salce's work was *"for"* Walton in the same way as it was *"for"* Eastwing under their subcontract.

[15] Accordingly, Walton's first argument, that there was no construction contract between it and Mr Salce, fails.

[16] Walton then relies upon s 3(3) which provides as follows:

"(3) This Act does not apply to a construction contract to the extent it contains -

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes -

(i) to lend an amount or to repay an amount lent; or

(ii) to guarantee payment of an amount owing or repayment of an amount lent; or

(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract."

[10] [2006] QSC 416.
[11] [2006] QSC 416 at [54].

In particular, Walton relies upon para (c)(ii) and argues that upon Mr Salce's case, Walton undertook to guarantee payment of any amount owing by Eastwing. As I have set out above, Mr Salce's affidavit in these proceedings attributes to Mr Ellis words to the effect that Walton would make sure that he was paid and that *"if [Eastwing] does not pay you then Walton will pay you direct..."*. And in the statutory declaration which was given to the adjudicator, Mr Salce said that Walton "*would guarantee the payment of the monies owed to me*".

[17] In response to this argument, Ms Moody for Mr Salce argued that it is not demonstrated that Walton's promise to pay was in the nature of a guarantee. She further argued that Walton cannot say that it undertook to guarantee payment of any amount consistently with its denial that it made any undertaking in Mr Salce's favour. Thirdly, it was argued that in this case there was an "arrangement", which may be something less than a binding contract, whereas a guarantee has contractual force so that this was not a guarantee. Ms Moody referred to the discussion of the nature of a guarantee by Mason CJ in ***Sunbird Plaza Pty Ltd v Maloney***. [12] Mason CJ there said [13] :

"Discussion of the question must begin with the proposition, established by the cases on s 4 of the Statute of Frauds 1677 (UK) that a contract of guarantee is, subject to any qualifications made by the particular instrument, a collateral contract to answer for the debt, default or miscarriage of another who is or is contemplated to be or to become liable to the person to whom the guarantee is given..."

[18] According to Mr Salce's evidence to the adjudicator and in these proceedings, there was no termination of his contract with Eastwing. That contract remained on foot but by a collateral contract or arrangement, Walton agreed to pay him if Eastwing did not. If the construction contract was constituted by an arrangement which was something short of a contract, it was nevertheless the subject of undertakings by each party, and in my view, an undertaking by Walton in terms of s 3(3)(c)(ii). Further, Walton is entitled to put its case in the alternative, and to argue that if there was a construction contract, it contained a provision of this kind.

[19] Ms Moody also referred to the obiter dicta of McDougall J in ***Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd***.[14] as to the equivalent provision in New South Wales, which is s 7(3)(c)(ii) of the Building and Construction Industry Security of Payment Act 1999 (NSW). McDougall J had to decide whether another provision, the equivalent of s 3(2)(a) of the Queensland statute,[15] applied and, in particular, what was meant by *"forms part of"* within that provision. In discussing those matters, McDougall J compared the two provisions, holding that *"subsection 2(a) excludes the operation of the Act where, by some process, it may be said that the construction contract forms part of the loan agreement"*, whereas *"the converse situation is dealt with by subs 3(c) [where], in effect, what might be described as a loan agreement forms part of the construction contract"*. [16] However, his Honour was not intending to comprehensively define the range of circumstances which might engage subsection 3(c), but was instead illustrating the way in which the two provisions would work together where the parties had contracted in terms which resulted in both a loan agreement and a construction contract. The operation of s 3(3)(c), unlike that of s 3(3)(b), does not depend upon the existence of a loan agreement in the cases described in subparagraphs (ii) and (iii).

[20] This case, according to Mr Salce's evidence, is clearly within s 3(3)(c)(ii) with the result that the Payments Act does not apply to Walton's undertaking to pay him. The result is not inconsistent with the objects of this Act. Walton's undertaking is in the nature of a guarantee because it was a collateral undertaking to answer for the debt or default of Eastwing, against which Mr Salce retained his contractual right to payment, and his statutory right to progress payments according to the Payments Act. On the other hand, if s 3(3)(c)(ii) did not apply to exclude the operation of the Act in Walton's case, the result would be that Mr Salce would be entitled to progress payments and to the regime of adjudication, against different parties and under different construction contracts, but for the same work. Similarly, Walton could be subjected to simultaneous claims for progress payments by Mr Salce and Eastwing for the same work, and to different adjudications. (Apparently this has occurred here). It is unremarkable then that according to s 3(3)(c)(ii), the guarantor should be obliged to pay only what and when the principal debtor must pay, and should not be subject to progress claims or an adjudication by which the guarantor's liability could be different.

[21] The result is that the adjudicator did not have jurisdiction and the decision is void. Unfortunately the adjudicator appears to have overlooked this argument about s 3(3)(c) although Walton had raised it.

[22] It is unnecessary then to consider the further arguments advanced for Walton. But should it become relevant, I mention one of them to record the factual position. Mr Codd argued that if the Payments Act otherwise applied, it did not apply to the work performed by Mr Salce prior to the making of the construction contract. On Mr Salce's case, Walton agreed to guarantee payments both for work already performed and work to be performed. The argument for Walton was that the Act would apply only to the latter, because of the terms of s 3(2)(c) and the definition of "*construction contract*" within Sch 2. The result for which Walton argued seems to be correct, although in my view it comes mainly from other provisions and particularly s 12 to s 14, which define the right to progress payments in terms of construction work carried out or undertaken to be carried out "*under the contract*". Work which was not carried out under the contract, because it preceded the making of the contract, would appear to be outside the operation of the Act. Mr Salce issued three invoices prior to 21 December 2007, the third of them

12 (1988) 166 CLR 245.
13 (1988) 166 CLR 245 at 254.
14 [2004] NSWSC 110, (2004) 20 BCL 373.
15 See s 7(2)(a) of the NSW Act.
16 [2004] NSWSC 110 at [31] to [32].

dated 20 December. By 21 December there had been one payment, which was in the amount of $20,000. Subsequently, he issued a further invoice (which is dated 20 January 2007, but was sent on or about 20 January 2008). I infer that this related to work all of which was done on or after 21 December 2007 and which on Mr Salce's case, was work done under the contract. In his claim, Mr Salce added components of $7,512.46 for interest and $3,400 for "*reasonable costs"* incurred by reason of the failure by Walton to make "timely payment". The adjudicator did not allow the interest claim but allowed this *"reasonable costs*" claim. But there is no basis for attributing this amount or a certain part of it to work done after 21 December 2007. Accordingly, I find that on the adjudicator's findings, $40,177.50 of the amount allowed was for work done after the relevant date and *"under the contract"*.

Orders

[23] In proceedings number S9057 of 2008 it will be declared that the decision made by the second respondent dated 28 August 2008 is void and of no effect.

[24] In proceedings number S9051 of 2008 Walton seeks an order restraining Mr Salce from proceeding with an enforcement warrant upon the judgment in the District Court and an order restraining the second respondent to those proceedings, National Australia Bank Limited (which has taken no active part in the proceedings) from paying monies to Mr Salce. At present there are injunctions in place to that effect. [17] They are interlocutory injunctions for which Walton gave the usual undertaking as to damages. Walton is entitled to final relief. It will be ordered that the applicant be discharged from the undertaking as to damages given on 15 August 2008 and there will be final injunctions corresponding with those within paragraphs 1, 2 and 3 of that order. It would follow from this judgement that the judgment of the District Court should be set aside, but Mr Codd said that he would seek an order in that respect from the District Court. It will be ordered that the monies paid into court in these proceedings, together with any accretions, be paid out to the solicitors for the applicant.

[25] Subject to any further submission Mr Salce should pay the costs of each other party to these proceedings.

Mr B E Codd for the applicant instructed by Dibbs Abbott Stillman
Ms S Moody for the respondents instructed by Salerno Law.

[17] Granted on 15 August 2008.