BACK TO THE DRAWING BOARD WITH SECURITY OF PAYMENTS

Kieran Tapsell[1]

When Parliament makes laws which affect the freedom of parties to make contracts in whatever terms they wish, it is inevitable that there will be litigation to test the limits of the new laws and to iron out any ambiguities. Gradually, the words of the legislation will be covered by a body of jurisprudence built up over a series of cases which will introduce a measure of certainty into legal and commercial practice. This is what happened with the Building and Construction Security of Payments Act (NSW) 1999 which provides for a system of compulsory progress claims for builders and subcontractors in the building industry.

The amount of litigation generated by this Act would suggest that its title might have been the 'Lawyers Security of Payment Act 1999'. But at least, after five years, construction lawyers could advise their clients with some confidence that a challenge in the Supreme Court to the process and result of an adjudication might or might not succeed.

In Brodyn Pty. Ltd, T/as Time Cost and Quality v Davenport & Anor [2] and Transgrid v Siemens Ltd. & Anor,[3] the NSW Court of Appeal[4] turned all this jurisprudence on its head, and has told the ten judges of the Equity Division who had developed it, to go back to the drawing board.

Prior to these two cases, lawyers could be reasonably confident about the following propositions:

1 The Supreme Court could make an order in the nature of certiorari quashing an adjudicator's determination where there was jurisdictional error on the face of the record.[5] These cases found that an adjudication under the Act was, with some qualifications, subject to normal administrative law principles, governed by Anisminic Ltd. v Foreign Compensation Commission [6]

2 The Supreme Court could quash an adjudication award on the grounds of jurisdictional error where

2.1 The payment claim did not adequately identify the work and contain sufficient information to enable the claims respondent to prepare a payment schedule.[7]

2.2 The adjudicator had misunderstood the contract and had not applied the contractual provisions in determining the entitlement to progress claims. [8]

2.3 The adjudicator had wrongly applied the contractual requirements in respect of issuing a progress certificate. [9]

2.4 The adjudicator had wrongly found that liquidated damages under the contract was a penalty. [10]

2.5 The adjudicator had decided that 'time was at large' when in fact, he should have determined what was the entitlement to liquidated damages.[11]

2.6 The adjudicator had made a determination as to delay costs which the contract specifically prohibited.[12]

2.7 The adjudicator made a determination as to progress claims otherwise than by the contractual mechanism.[13]

2.8 The adjudicator did not deal with the question which was remitted for adjudication.[14]

2.9 The adjudicator determined a question not remitted for adjudication.[15]

2.10 The adjudicator did not take into account something which the Act required to be taken into account.[16]

2.11 The adjudication was based upon something which the Act prohibited from being taken into account.[17]

2.12 The adjudicator had found that insufficient reasons for rejecting the claim had been made in the respondent's submission, whereas in fact sufficient reasons were given.[18]

2.13 The adjudicator determined an amount of damages arising from a repudiation of the contract, rather than for work actually done.[19]

2.14 The adjudicator had determined delay costs as damages for breach of contract, as distinct from a claim under the contract which gave an entitlement to delay costs.[20]

2.15 The adjudicator had determined an application arising from multiple payment claims which were made in respect of the one reference date.[21]

3 On the other hand, the following were not jurisdictional errors which would allow the Court to quash the award.

3.1 Mathematical mistakes, because of the existence of section 22(5), which is a form of the slip rule.[22]

3.2 A mistake in the application of the GST to the amount of the determination.[23]

3.3 An erroneous finding that a contractual provision had been waived.[24]

3.4 The adjudicator adopting the valuation submitted by a party, rather than doing his own evaluation.[25]

3.5 The failure by the adjudicator to do a site measure.[26]

3.6 The adjudicator including in his determination, an amount for a variation not agreed to in writing.[27]

3.7 The adjudicator failing to adopt the determination of value by the architect.[28]

3.8 The adjudicator interpreting the contract correctly, but wrongly applying the interpretation to the particular facts.[29]

3.9 The adjudicator not properly calculating the entitlement by reference to the contract price.[30]

3.10 The adjudicator considering a payment claim, part of which is arguably not a claim for work carried out, such as a claim for delay costs.[31]

3.11 The adjudicator allowing an amount for delay costs, as an entitlement under the contract, as distinct from a claim for damages for breach of contract arising from delay.[32]

The NSW Court of Appeal did not think that the Anisminic principles applied.[33] The Court said that the system of adjudication set up under the Act was not an administrative tribunal in the ordinary sense, whose decisions could be quashed for errors of law. Nor was it an inferior court whose decisions are not normally affected by jurisdictional error where it makes errors of law in its judgments. It was more akin to the decision of an expert by whose determination the parties had agreed to be bound. McDougall J, whose approach to the interpretation of the Act had been followed by other first instance judges in the NSW Supreme Court, had said much the same thing in Musico[34] but from there on, the approach of the Court of Appeal differed markedly.

The NSW Court of Appeal ... said that the system of adjudication set up under the Act was ... more akin to the decision of an expert by whose determination the parties had agreed to be bound

...the Court of Appeal had decided to put an end to ... challenges to adjudicators' determinations.

Hodgson JA agreed with McDougall J that non jurisdictional errors of law by an adjudicator could not be reviewed by the Supreme Court.[35] However, he went further than that and said that there was no need to quash a determination by means of an order in the nature of certiorari.[36] A determination, to be valid, must satisfy whatever conditions are laid down by the Act as essential for there to be a determination.

They are five. [37]

'1. The existence of a construction contract between the claimant and the respondent, to which the Act applies. (ss7 & 8)

2 The service by the claimant on the respondent of a payment claim (s.13).

3 The making of an adjudication application by the claimant to an authorized nominating authority (s.17).

4 The reference of the application to an eligible adjudicator, who accepts the application (ss.18 & 19).

5 The determination by the adjudication of this application (ss.19(2) and 21(5)) by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).'

Hodgson JA then said[38] that the other detailed requirements of the section are not matters which are essential to a valid determination. These include the content of payments claims, the time when an adjudication can be made and as to its contents, the time when the adjudication application may be determined and as to matters to be considered by the adjudicator and the provision of reasons. However, he then said that his five essential conditions 'may not be exhaustive'. What is required, in addition to this 'non exhaustive' five essential conditions was

'..a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power…and no substantial denial of the measure of natural justice…'

It seems that the Court of Appeal had decided to put an end to the minor industry that had developed in the Equity Division of the Supreme Court of NSW over the last five years, of challenges to adjudicators' determinations. The ten first instance judges in that Division had developed, with almost complete unanimity, a set of rules for the interpretation of the Act and the rules to be applied by adjudicators if they wanted to avoid judicial review. The Court of Appeal said that these rules had 'cast the net too widely'.[39] Even if that were correct, practitioners had a pretty good idea of when their particular client had a case or should throw in the towel. If a client came in with an adjudication which did show one of the jurisdictional errors in the list above, the solution was quite simple. On the first day of the return of the Summons, a consent order for setting aside the adjudication was made, and within five days the claimant made an application for a new adjudication.[40]

The Court of Appeal might have succeeded in cutting down the number of applications for judicial review had they stuck to their five essential preconditions, and not added the rider that the list 'may not be exhaustive'. In addition, the Court accepted that a denial of natural justice could render a determination void. However, it then put a rider on that. The denial of natural justice had to be 'substantial'.[41] A little bit of denial of natural justice is all right.

One of the arguments raised by Brodyn was that more than one payment claim could not be made by the subcontractor after termination of the contract. This submission was supported by the decision of McDougall J in Holdmark Developers Pty. Ltd. v G.J. Formwork Pty. Ltd.[42] The Court of Appeal overruled this decision, finding that there was no such limitation in the Act. However, Hodgson JA then went on to consider if any defect in the payment claim could render a determination void. He said,

'If there is a document served by a claimant that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide…..however, I do not need to express a final view on this.' (my emphasis)

By putting on these riders and qualifications, the Court of Appeal has ensured that the Act will be the 'Lawyers Security of Payment Act' for some time to come.

The finding by the Court of Appeal that an order in the nature of certiorari is not available does nothing to discourage applications for judicial review. The Court accepted that a party could apply to the Court for an injunction to prevent any action being taken on a void determination, and could even apply to set aside a judgment obtained from such a determination.[43]

Having said that, it does seem that the Court of Appeal has reduced the number of possible challenges to determinations by stating that compliance with the matters stated in section 22(2) of the Act are not preconditions to acting within jurisdiction. That section requires the adjudicator to consider only the following matters

'(a) the provisions of this Act,

(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 duly 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 duly 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.'

It was section 22(2)(b) which provided a very fertile ground for challenges,[44] but (c) and (d) were not far behind. If the adjudicator had misread or misunderstood the contract or its effects, then, prior to the Court of Appeal decisions, the determination could be set aside on the grounds of jurisdictional error. In relation to this section, Hodgson JA said,[45]

'The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be

The finding by the Court of Appeal ... does nothing to discourage applications for judicial review.

The decision of the NSW Court of Appeal ... is likely to reduce the number of applications for judicial review of adjudicator's determinations

considered. To that extent, I disagree with the views expressed by Palmer J in Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140."

CONCLUSION

The decision of the NSW Court of Appeal in Brodyn and Transgrid is likely to reduce the number of applications for judicial review of adjudicator's determinations under the Building and Construction Security of Payment Act (NSW) 1999, if only because it has taken away from judicial review the issue of whether or not the adjudicator has correctly interpreted the contract. However, as often happens, the riders and qualifications which the Court placed on its judgment will ensure that construction lawyers need not start looking for other sources of work just yet.

REFERENCES

1 LL.B(Hons), Special Counsel, Watkins Tapsell, Solicitors and Barristers 161 Oak Road, Kirrawee, NSW, email: kierant@wattap.com.au

2 (2004) NSWCA 394 (3 November 2004)

3 (2004) NSWCA 395 (3 November 2004)
4 Hodgson JA, with whom Mason P and Giles JA agreed.

5 Musico v Davenport (2003) NSWSC 1019, Abacus Funds Management v Davenport (2003) NSWSC 1027, Multiplex Constructions Pty. Ltd. v Luikens (2003) NSWSC 1140, Transgrid v Walter Construction Group (2004) NSWSC 21.

6 (1969) 2 AC 147 per Lord Reid at 171.

7 Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 at [64]-[69] per Nicholas J, Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited [2003] NSWSC 1103 (3 December 2003) per Einsten J at 52.

8 Musico & Ors v Davenport & Ors [2003] NSWSC 977 (31 October 2003), McDougall J at 76 and 119.

9 Ibid at 86 - 89.

10 Ibid at 96.

11 Ibid at 96-98.

12 Abacus v Davenport & Ors [2003] NSWSC 1027 (14 November 2003), McDougall J at 53.

13 Ibid.

14 Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140 (4 December 2003) per Palmer J at 34.

15 Ibid at 34.

16 Ibid at 34.

17 Ibid at 34.

18 Ibid at 72-81.

19 Quasar Constructions v Demtech Pty Ltd [2004] NSWSC 116, Barret J.

20 Kembla Coal & Coke v Select Civil & Ors [2004] NSWSC 628 (23 July 2004) at 111 - 112 per McDougall J.

21 Holdmark Developers Pty Ltd V G J Formwork Pty Ltd [2004] NSWSC 905 (9 September 2004), McDougall J at 40 – 43

22 Musico & Ors v Davenport & Ors [2003] NSWSC 977 (31 October 2003), McDougall J at 121.

23 Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors [2003] NSWSC 1019, Einstein J at 10 - 16.

24 Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140 (4 December 2003) per Palmer J at 84.

25 Transgrid v Walter Construction Group (2004) NSWSC 21 (18 December 2003), McDougall J at 43, Quasar Constructions v A J Stockman Pty Ltd [2004] NSWSC 117, Barrett J .

26 Ibid at 85.

27 Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors [2003] NSWSC 1019, Einstein J at 10-16, Transgrid v Siemens & Anor [2004] NSWSC 87, Master Macready at 74.

28 Abacus v Davenport & Ors [2003] NSWSC 1027 (14 November 2003), McDougal J at 38.

29 Pasquale Lucchitti Trading as Palluc Enterprises and Ors v Tolco Pty Limited and Anor [2003] NSWSC 1070 (7 November 2003),

30 Quasar Constructions v A J Stockman Pty Ltd [2004] NSWSC 117, Barrett J

31 Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 at 64 - 69 per Nichols J; Paynter Dixon Construction Pty Ltd v JF & CG Tiltson Pty Ltd [2003] NSWSC 869 at 34 per Bergin J

32 Kembla Coal & Coke v Select Civil & Ors [2004] NSWSC 628 (23 July 2004) at 111 - 112 per McDougall J.

33 Brodyn Pty. Ltd, T/as Time Cost and Quality v Davenport & Anor (2004) NSWCA 394 (3 November 2004) at 51, per Hodgson JA.

34 Musico & Ors v Davenport & Ors [2003] NSWSC 977 (31 October 2003), McDougall J at 51.

35 Brodyn Pty. Ltd, T/as Time Cost and Quality v Davenport & Anor (2004) NSWCA 394 (3 November 2004)at 52 per Hodgson JA.

36 Ibid at 52.

37 Ibid at 53, see also Transgrid v Siemens Ltd. & Anor (2004) NSWCA 395 (3 November 2004) at 30.

38 Ibid at 54

39 Ibid.

40 Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140 at 99-103, Quasar Constructions v Demtech Pty Ltd [2004] NSWSC 116 at 38 per Barrett J, Emergency Services Superannuation Board v Robert Sundercome & Anor [2004] NSWSC 405 (9 September 2004) at 23 per Bergin J.

41 Brodyn Pty. Ltd, T/as Time Cost and Quality v Davenport & Anor (2004) NSWCA 394 (3 November 2004)at 55 per Hodgson JA.

42 (2004) NSWSC 905

43 Ibid at 61.

44 Transgrid v Siemens Ltd. & Anor (2004) NSWCA 395 (3 November 2004), Musico v Davenport (2003) NSWSC 1019, Abacus Funds Management v Davenport (2003) NSWSC 1027,

45 Ibid at 56.