

# casewatch



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This is the first edition of our firm's Security of Payment casewatch brochure to assist our clients in the construction industry to better understand some of the issues arising from various court decisions concerning the *Building and Construction Industry Security of Payment Act 1999* ("the Act") and other developments.

In this edition, we have reviewed some of the more significant decisions of the Supreme Court from July 2005 to the present.

For more information in relation to the matters raised in this issue of casewatch or if you require any assistance in relation to the manner in which the Act can help your business, please contact David Glinatsis, Partner or Catherine Lucas, solicitor.

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## COURT CONFIRMS AID IN ENFORCEMENT OF JUDGMENTS

**BARCLAY MOWLEM CONSTRUCTION –V- TESROL WALSH BAY; TESROL WALSH BAY –V- BARCLAY MOWLEM CONSTRUCTION [2005] NSWSC 944**

**Date of Decision: 16 September 2005**

Obtaining a successful outcome in an adjudication application is the first major hurdle for a claimant in the recovery of money. The second hurdle is how that determination can be enforced so that moneys can actually be paid.

There are a number of options available to successful claimants to enforce judgments obtained following successful determinations made by Adjudicators. Sometimes these options are effective, sometimes they are not.

In the decision of *Barclay Mowlem v Tesrol Walsh Bay*, the Supreme Court considered the question as to whether a judgment creditor could serve a subpoena on a bank in support of the enforcement of a judgment obtained on the basis of an Adjudicator's Determination.

The judgment creditor issued a garnishment notice and subpoena on the Commonwealth Bank.

The Supreme Court had also as part of the enforcement of the judgment debt ordered the examination of the officers of the judgment debtor.

It was argued on behalf of the judgment debtor that the Court had no power to issue a subpoena to aid in the enforcement of the Judgment.

The Court disagreed.

Justice Campbell said that the Supreme Court Rules allow for the issue of a subpoena in "any proceedings".

His Honour held that the application before the Court at the time for the examination of the officers of the judgment debtor, were proceedings for the purposes of the Supreme Court Rules.

His Honour said further that as the examination of the officers would investigate the financial affairs of the judgment debtor and what assets it had which might be available to pay the judgment debt, there was:

*"nothing about the bare fact of issue of a Subpoena to the Commonwealth Bank (which I infer was a banker of [the judgment debtor]) which suggests that the issue of the Subpoena was outside the scope of that legitimate forensic purpose."*

The case confirms the ability of a judgment debtor to issue a subpoena on a judgment debtor's bank and potentially other institutions to obtain information of a judgment debtor's financial position to assist in the enforcement of a judgment debt in circumstances where an application has been made to examine the officers of the judgment debtor.

This additional aid can only promote the judgment creditor's prospects of recovering monies.

*"This additional aid can only promote the judgment creditor's prospects of recovering monies"*

## WHAT IS A BONA FIDE ATTEMPT ?

### HOLMWOOD HOLDINGS PTY LTD -V- HALKAT ELECTRICAL CONTRACTORS PTY LTD & ANOR [2005] NSWSC 1129

**DATE OF DECISION: 8 NOVEMBER  
2005**

Since the decision of the Court of Appeal in *Brodyn* there have been a number of decisions of the Supreme Court which dealt with the question of whether the basic and essential requirements prescribed by the Act had been satisfied by an adjudicator.

There have not however been many decisions that have dealt with the question as to what constitutes "good faith" in the exercise of the adjudicator's determination.

That question was recently addressed by His Honour Justice Brereton in the decision of *Holmwood Holdings Pty Ltd -v- Halkat Electrical Contractors Pty Ltd & Anor* which was delivered on 8 November 2005.

#### Facts

The case concerned an application by a respondent for a declaration that the adjudication determination was void and of no effect on three grounds: **First** because the Adjudicator failed to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination and **Secondly** because the determination was not an attempt in good faith by the adjudicator to exercise his powers. **Thirdly** because of an alleged denial of natural justice.

#### The Adjudicator's Determination

In the adjudication response, the respondent challenged the validity of the payment claim on the basis of a contention that the respondent was not a party to the construction contract and that service of the payment claim by an agent was not valid service.

Both of these contentions were rejected by the adjudicator.

The adjudicator determined that both these contentions were "totally lacking in merit" and "nonsense".

In particular the adjudicator stated that the no construction contract contention which was based upon a misnomer of the correct respondent, reflected upon the credit to be given to the respondent's other contentions.

The adjudicator rejected four (4) of the other five (5) grounds advanced by the respondent for withholding payment.

*As to the first ground* the adjudicator reasoned that having been faced with two different assessments of the value of work carried out, he preferred the claimant's assessment because of the respondent's unmeritorious points about the misnomer of the respondent's name, service of the payment claim and the respondent's completely "unjustified deduction of alleged liquidated damages".

#### The Proceedings

The proceedings raised the following questions:

- the extent to which the failure to consider a provision of the construction contract would invalidate an adjudication application?
- what conduct constitutes an absence of good faith so as to render the determination to be void?
- what is the measure of natural justice required by the Act?

Each of these questions were the subject of an extensive review of the relevant principles of law which provide some helpful amplification of the principles contained in the *Brodyn* decision.

### First ground – failure to comply with basic and essential requirements

The respondent contended that the adjudicator failed to comply with the basic and essential requirements prescribed by the Act in that the Adjudicator failed to consider the provisions of the contract because:

- the entirety of the contract was not before him as he was not supplied with plans and specifications which formed part of the contract.
- the adjudicator made a determination as to the due date when the consideration of the contract would have led to a different result.
- the adjudicator determined amounts to be paid without a consideration of the deduction of retention pursuant to clause 13(a) and by ignoring retentions already deducted.

*"His Honour found that the adjudicator did not address let alone resolve these issues"*

In addressing the question as to the type of errors which would render a decision of an adjudicator to be void and after considering a number of relevant cases, His Honour said at paragraphs 50 and 51:

"...The adjudicator is not required to consider the provisions of the Act or the contract which have no bearing on or relationship to the adjudication application under consideration...I conclude that a failure by an adjudicator to have regard to a provision of the construction contract, which is relevant to an adjudication under consideration is jurisdictional error resulting in invalidity of the determination..."

In applying this principle to the facts His Honour was not satisfied that the plans and specifications were relevant to what the adjudicator had to decide. Accordingly, this first basis of the complaint failed.

As to the second complaint, the court found that the adjudicator made no reference to the terms of the contract in determining the due date.

This was different to an adjudicator considering the relevant provisions of

the contract and the adjudicator wrongly interpreting and applying those provisions so as to err in calculating the due date.

The third basis of complaint was that the adjudicator failed to consider the relevant provisions of the construction contract relating to retention. According to his Honour at paragraph 61 this failure was not a:

"mere error of fact or law in determining whether or not particular provisions were provisions of the contract, or in the interpretation and/or application of those provisions, but a complete failure to have regard to them at all in circumstances where those provisions were relevant to the adjudication under consideration."

Accordingly, on the view taken by His Honour Justice Brereton of the principles set out in *Brodyn*, such failure by the adjudicator invalidated the determination.

### Second ground – good faith attempt

The payment schedule had set out as one of the reasons for withholding payment that although the payment claim is made on the basis of percentages complete, the monetary amounts claimed did not correspond with the percentages of work said to have been completed by the claimant.

His Honour found that the adjudicator did not address let alone resolve these issues and rather, having categorised the respondent's submissions as unmeritorious, the adjudicator decided to prefer the claimant's value of works.

His Honour then embarked on a detailed analysis of the concept of "bona fide" and "good faith".

After reviewing the authorities his Honour concluded at paragraph 110 that:

"recklessness or capriciousness on the part of an arbitrator in the performance of his or her function, such as to establish the absence of a genuine or conscientious attempt to perform the adjudicator's function – short of a wilful and deliberate failure to attempt to perform the function – can amount to a want of good faith."

At paragraph 117, his Honour continued:

“good faith as a condition of validity of the exercise of an adjudicator’s power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation, and it does not admit of capriciousness.”

Applying that test to the facts, his Honour found that the adjudicator did not meet its requirements. His Honour held that the adjudicator was not entitled to fail to evaluate the claim in light of the payment schedule and simply accept it on the basis that other and unrelated submissions made by the respondent were unmeritorious.

His Honour further held that the adjudicator’s ultimate determination was not the product of a good faith attempt at performing his function but of caprice.

Further, the failure by the adjudicator to have regard to the mathematical discrepancy between the percentage of work said to be complete in the payment claim on the one hand and the sum claimed for that work on the other amounted to a fundamental failure to consider the payment schedule in accordance with section 22(2)(d).

On that basis the adjudicator held that the failure to have regard to the payment schedule was a failure to consider at all a submission which the adjudicator was required to consider and not a mere error in the consideration of the submissions. That being the case, the Court found that the determination was also void on that basis.

### **Third ground – denial of procedural fairness**

The first alleged denial of natural justice was that the payment claim was incomplete in that the highlighted drawings referred to in the payment claim were not in fact attached to the claim as served.

His Honour found that the absence of the highlighted drawings at the

payment claim stage did not deprive the respondent of the opportunity of disputing that the claimed percentage of work had been done because at least reference was made in the payment claim to the drawings.

The second alleged denial of procedural fairness was the adjudicator’s determination of the competing assessments of the value of the completed work by what the respondent characterised as “credit”.

It was contended that the adjudicator should have given the parties notice that he was contemplating making a determination of one of the party’s assessment of completed works in preference to the other’s.

In respect of this contention, the Court held that the adjudicator’s decision to prefer the claimant’s assessment to the respondent’s assessment of the extent and value of works completed was sufficiently within the scope of the dispute described by the payment claim and payment schedule, against the adjudicator application and response. That being the case, there was no further requirement by the adjudicator to provide notification to the parties.

Although it was noted that an Adjudicator should give notice to the parties if he/she intends to make a determination which neither party has contended.

Whilst the Court rejected the denial of procedural fairness, the Court did declare the determination of the adjudicator to be void on the grounds that the adjudicator had failed to satisfy the good faith and bona fide requirements.

### **Comments**

The case confirms the onus placed upon adjudicators to have proper regard to the relevant provisions of the construction contract. An adjudicator must not act capriciously and must perform their function in a manner that amounts to a “genuine” and “conscientious attempt”. Failure to do so may result in the determination being void.

*“[Good faith] requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation, and it does not admit of capriciousness.”*

## REFERENCE DATES AND PRINCIPAL'S RIGHTS

### Shellbridge Pty Limited –v- Rider Hunt Sydney Pty Limited [2005] NSWSC 1152

**Date of decision: 14 November  
2005**

This is another case in which a plaintiff applied for a declaration that an adjudication under the *Building & Construction Industry Security of Payment Act 1999* ("the Act") was void.

The various contentions relied upon by the plaintiff in support of the application were unsuccessful. The case however contains some helpful comments by the Supreme Court as to the role of the "reference date" and also the rights available to respondents to institute proceedings after an adjudicator's determination.

#### Reference Date

At paragraph 28 of the decision, His Honour Justice Barrett digressed from the main issue and stated that the expression reference date played a direct role in the system of claim notification provided for in section 13 of the Act.

Section 13(5) of the Act says that a claimant cannot serve more than one payment claim in respect of each reference date.

In the case of cumulative claims, His Honour expressed the view that although section 13(5) of the Act precludes service of more than one payment claim in respect of any one reference date the section did not preclude the cumulation of amounts in successive payment claims.

As a result His Honour said that if a claim in respect of a first reference date is \$10,000.00 which is not promptly paid and there is a subsequent claim for \$25,000.00 (inclusive of the first \$10,000.00) in respect of the second reference date,

there is no overstepping of the limit allowed by section 13(5) of the Act.

#### Principal's Rights

In the decision His Honour also made the observation that an application to declare an adjudicator's determination void is often approached on the basis that the section 25 result (ie, the filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs.

His Honour pointed out that this should not necessarily be the case as a principal has a right to make a claim for defective work or can show that work charged for was not done or that there was some other breach of contract or other actionable wrong. In such a case the principal is free to pursue that claim in the ordinary way and this is so regardless of the findings of the adjudicator.

At paragraph 37 His Honour stated that:

"The principal might, if thought fit, institute proceedings seeking not only to advance the claim requested but also, perhaps, to obtain by reference to a right of set off, a stay of the judgment that section 25 has had the effect of creating."

His Honour stated further that:

"The section 25(4) limitations do not apply to an application for a stay as distinct from an application to have a judgment set aside."

His Honour further commented that these points should be kept in mind by principals or proprietors who consider themselves to have good claims on the contract or other grounds outside of the Act and who suffer an adverse determination by an adjudicator involving a modest sum.

*"the principal is free to pursue that claim in the ordinary way and this is so regardless of the findings of the adjudicator."*

# NATURAL JUSTICE—LACK OF BONA FIDE, ILLEGALITY AND INJUNCTIONS

**GLEN EIGHT –V- HOME BUILDING PTY LTD (IN LIQ)[2005] NSWSC 907**

**Date of Decision: 6 September 2005**

In this decision, the Court revisited the circumstances in which an injunction would be granted to restrain a successful claimant under the Act from applying for an Adjudication Certificate.

The proprietor challenged the determination of the Adjudicator on the basis that the determination: **firstly** failed to comply with the essential requirements of the *Building and Construction Industry Security of Payment Act* and **secondly** on the basis that any payment pursuant to the Adjudicator's determination would have led to an illegality.

## Natural Justice

As to the first basis, it was alleged that the determination failed to satisfy the essential requirements for a valid determination because there was a breach of natural justice as well as a failure by the Adjudicator to give a bona fide consideration to the relevant question that was to be determined.

The natural justice allegation concerned a contention that the Adjudicator adopted a particular construction of the contract and made a *"fundamental decision of law without either party knowing the Adjudicator might adopt that construction"*.

The Court said that:

*".....there is a serious question to be tried about whether the particular point which the Adjudicator took is one which is so important that it ought in fairness have been put to the parties."*

## Lack of Bona Fide

The lack of bona fide contention was based upon an allegation that the Adjudicator had failed to give a bona

fide consideration to the correct question.

The proprietor submitted that there was a kind of deficiency in the reasoning process of the Adjudication which showed that the Adjudicator did not make an adequate effort to understand and deal with the issues he was required to address in order to discharge his statutory functions.

It was submitted by the proprietor that when the Adjudicator stated he would exercise his statutory function in a particular way – namely by considering the merit of the claims one by one, he did not follow his own prescription which according to the proprietor *"shows that there has not been a bona fide attempt to exercise the statutory power."*

The Court was satisfied that these submissions established a serious question to be tried for the purposes of granting the injunction.

## Illegality

The proprietor also contended that the Defendants were precluded under the *Home Building Act 1989* from receiving any payments because one of the Defendants was not licensed to carry out home building work and also because a Certificate of Insurance was taken out only in the name of the Second Defendant.

Again, and despite submissions by the Defendants that the requirements of the *Home Building Act* were adequately met, the Court was satisfied that there was still a serious question to be tried.

Although the decision dealt with relief on an interlocutory basis, the decision is helpful as it reviews some of the principles relevant to the setting aside of an Adjudicator's determination.

*".....there is a serious question as to whether the particular point which the Adjudicator took is one which is so important that it ought in fairness be put to the parties."*

## ADJUDICATOR CAN CONSIDER TIME RELATED CLAIMS

The question of whether a claimant can claim delay damages under the Act was considered by the Supreme Court in *Co-ordinated Construction Co. v JM Hargreaves & Ors* [2005] NSWSC 77 (“Hargreaves”) and *Co-ordinated Construction Co. Pty Ltd v. Climatech (Canberra) Pty Ltd* [2005] NSWSC 312 (“Climatech”) in the context of the principles set out by the Court of Appeal in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394.

Both decisions which were delivered in July 2005 dealt with the much debated question as to whether delay damages were construction works so to be properly claimable under the Act.

In *Hargreaves*, His Honour Justice Hodgson expressed the opinion that any amount that a construction contract requires to be paid as part of the total price of construction work is generally an amount due for that construction work, even if the contract labels it as “damages” or “interest.”

His Honour stated however that any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

In this case, delay damages were payable only if an extension of time was for a compensable cause, that is, some act or omission of the head contractor or the superintendent or the sub-contract superintendent.

His Honour expressed the view that delay damages were not of their nature damages for breach but rather additional amounts which may become due and payable under the contract. That being the case, His Honour found that delay damages were prima facie within section 9(a) of the Act.

As a result of *Hargreaves* and *Climatech* the previous uncertainty as to whether delay damages are construction works has now been resolved.

The decision affirms that position that the Adjudicator has jurisdiction to determine delay claims and extension of time claims under section 9(a) and other provisions of the Act and under the contract.

## WARNING TO RESPONDENTS FOR NOT ISSUING A PAYMENT SCHEDULE

In the decision of the Supreme Court in *Walter Constructions Group Ltd -v- CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, the Supreme Court upheld the strict requirements of the Act and determined that the Plaintiff was entitled to summary judgment in the sum of \$13.96 million because the Defendant failed to provide a Payment Schedule within the time provided by the Act.

More recently, in the decision of *Lucas Stuart Pty Limited v Council of the City of Sydney* [2005] NSWSC 840 (“*Lucas Stuart*”) decided in August 2005, His Honour Justice Einstein also upheld the strict provisions of the Act with respect to the failure to serve a Payment Schedule.

In *Lucas Stuart* the Council of the City of Sydney failed to serve a payment schedule on the builder within the time specified in the Act.

The Builder, Lucas Stuart Pty Ltd, commenced proceedings in the Supreme Court seeking an order for summary judgment against the Council pursuant to section 15 of the Act for the total amount of its payment claim of \$3,952,474 (incl GST).

His Honour Justice Einstein, awarded the Builder an order for summary judgment of the total amount of the payment claim once satisfied that the pre-conditions of section 14 and 15 of the Act had been satisfied.

*Lucas Stuart* confirms that the Act is a very powerful tool that can be used by contractors in recovering moneys payable pursuant to a construction contract.

*Lucas Stuart* also confirms that the effect of sections 14 and 15 can be used very effectively in making an application for summary judgment, as opposed to the more common use of the Act, in the making of Adjudication Applications.

***The content in this publication is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice.***