

SUPREME COURT OF QUEENSLAND

CITATION: *Altys Multi-Services Pty Ltd v Grandview Modular Building Systems P/L* [2008] QSC 26

PARTIES: **ALTYS MULTI-SERVICES PTY LTD ACN 097 363 470**
(applicant)
v
GRANDVIEW MODULAR BUILDING SYSTEMS PTY LTD ACN 124 190 659
(first respondent)
JOHN L O'BRIEN
(second respondent)
ADJUDICATE TODAY PTY LTD ABN 39 109 605 021
(third respondent)

FILE NO: 7324 of 2007

DIVISION: Trial Division

PROCEEDING: Civil proceeding

DELIVERED ON: 21 February 2008

DELIVERED AT: Brisbane

HEARING DATE: 15 February 2008

JUDGE: Acting Justice Skoien

ORDER: **Application dismissed**

CATCHWORDS: JUDICIAL REVIEW OF ADJUDICATION UNDER BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004; DISADVANTAGES IN REVIEW PROCEDURE; PREFERABILITY OF CURIAL LITIGATION

Building and Construction Industry Payments Act 2004, ss 10, 17, 18, 100
Queensland Building Services Authority Act 1991, s. 42
Judicial Review Act 1991, ss 10, 13

Intero Hospitality Projects Pty Ltd v Empire Interior Pty Ltd [2007] QSC 220
Roadtek, Department of Main Roads v Davenport & Ors [2006] QSC 47
Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering [2006] NSWSC 94 at para [27]
Lucas Stuart Pty Ltd v Council of the City of Sydney [2005] NSWSC 840 at para [13].
Brodyn Pty Ltd v Davenport [2003] NSWSC 1019
Minimax Fire Fighting Systems Pty Ltd v Bremore

Engineering (WA) Pty Ltd [2007] QSC 333

COUNSEL: Mr DJS Jackson QC with him Mr M Ambrose for applicant
Mr S Doyle SC with him Mr MK Stunden for first respondent

SOLICITORS: Phillips Fox for applicant
Ebsworth & Ebsworth for first respondent

- [1] **ACTING JUSTICE SKOIJEN:** This is an application by Altys under s 20 of the *Judicial Review Act* 1991 to review the adjudication of Mr O'Brien ("the adjudicator") made under the provisions of the *Building and Construction Industry Payments Act* 2004 ("the *Payments Act*") that Altys pay to Grandview a sum of money, being a progress payment under a building contract with interest and the adjudicator's fees.

Grounds

- [2] Altys argues that:
- (a) the adjudicator did not have jurisdiction to reach that adjudication;
 - (b) parts of the adjudication were not authorised by the *Payments Act*;
 - (c) the adjudication involved errors of law;
 - (d) there was no evidence or other material to justify making the adjudication.

Background

- [3] Altys had been awarded a contract to construct a mining village in Dysart, Central Queensland. Grandview is a company which specialises in the design, manufacture and supply of construction materials, specifically pre-fabricated, plastic wrapped "flat pack" style modular accommodation systems and successfully contracted with Altys for the supply of modular accommodation units to Dysart. The adjudicated sum is a progress payment under that contract. It consisted of alleged variations of the contract.

Legislation

- [4] The long title of the *Payments Act* describes it as an Act to imply terms in construction contracts and to provide for adjudication of payment disputes in such contracts. Its relevant object (s 7(a)) is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work under a construction contract.
- [5] Construction work is defined in s 10 of the *Payments Act*, primarily in its obvious meaning (construction of buildings) but together with, in subsection (1):

- “(e) any operation that forms an integral part of, or is preparatory to work ... including-
 - (iv) the prefabrication of components to form part of any building whether carried out on-site or off-site.”

and, importantly subsection (2) declares that construction work includes building work within the meaning of the *Queensland Building Services Authority Act* 1991 ("the *Building Act*").

- [6] “Building work” is defined in Schedule 2 of the *Building Act* and apart from the obvious “erection or construction of a building” includes in paragraph (f) “the preparation of plans or specifications for the performance of building work”. However the definition expressly excludes work which is excluded by regulation, and the *Queensland Building Services Authority Regulation 2003* (“the *Building Regulation*”), in s 5, contains a long list of exclusions.
- [7] The importance of the question whether work is “building work” is seen in s 42 of the *Building Act* which relevantly provides:
- “42 Unlawful carrying out of building work**
- (1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor’s licence of the appropriate class under this Act.
- (2) For the purposes of this section-
- ...
- (c) a person undertakes to carry out building work if that person enters into a contract to carry it out or submits a tender or makes an offer to carry it out.
- (3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
- (4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed----.”
- (and there follow six descriptions of work)
- [8] The right to a progress payment arises on each “reference date” which, if not spelt out in the construction contract, is specified by the *Payments Act* itself in the definition within schedule 2 of the Act. In this case the reference dates were the last day of each month in which the construction work was carried out. A “payment claim” is then served by the contractor on the other party (s 17) for the progress claim which, if it is not accepted by the other party may be challenged by serving on the claimant a payment schedule (s 18). In this case the payment claim served by Grandview in June 2007 was for \$485,061.75. It was wholly rejected by Altys in its payment schedule served in July 2007.
- [9] Grandview then instituted adjudication proceedings under Part 3, Division 2 of the *Payments Act*. The adjudication took place on affidavit evidence and the decision of the adjudicator was handed down on 13 August 2007. In it he decided that Grandview was entitled to be paid the sum claimed, with interest and costs.
- [10] On 22 August 2007 Altys filed this application for judicial review. That such an application was applicable to an adjudication under the *Payments Act* had been accepted in a number of cases, for example *Intero Hospitality Projects Pty Ltd v Empire Interior Pty Ltd* [2007] QSC 220. On 29 August 2007, the *Justices and Other Legislation Amendment Act 2007* included Part 3, Division 2 of the *Payments Act* in Part 2 of Schedule 1 of the *Judicial Review Act*, thus stating it to be legislation to which the *Judicial Review Act* does not apply. However, as the Altys application for judicial review had been filed before the amendment took effect the matter remains for decision by this Court.

[11] Section 10 of the *Judicial Review Act* is:

- “10 **Rights conferred by Act additional to other review rights**
- (1) The rights conferred by this Act on a person to make an application to the court in relation to a reviewable matter are in addition to any other rights that the person has to seek a review of the matter (whether by the court, another court or a tribunal, authority or person).
 - (2) Subject to section 41, the existence of a remedy by way of an application for review does not exclude any jurisdiction of the court to grant other relief.”

[12] Section 13 of the *Judicial Review Act* is:

- “13 **When application for statutory order of review must be dismissed**
- Despite section 10, but without limiting section 48, if-
- (a) an application under section 20 to 22 or 43 is made to the court in relation to a reviewable matter; and
 - (b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person;
- The court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so.”

[13] The provisions of s 100 of the *Payments Act* are:

- “100 **Effect of pt 3 on civil proceedings**
- (1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract-
 - (a) may have under the contract; or
 - (b) may have under part 2 in relation to the contract; or
 - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.
 - (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
 - (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal-
 - (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
 - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate,

having regard to its decision in the proceedings.”

[14] The *Payments Act* lays down very strict guidelines and a very tight schedule for adjudication. Each necessary step must be taken within a mere matter of days of the previous step. In this case only 21 days elapsed from the lodging of the adjudication application to the making of the adjudication. So the adjudicator (who is not a lawyer) was required to act, and did act, very quickly indeed and any criticism which I may make of his decision must be read in the context of the pressure he must have been under to comply with the time constraints.

[15] In the Second Reading Speech of the Building and Construction Payments Bill on 18 March 2004; it was said-

“The underlying object of the” (*Payments Act*) “is to provide for a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis without extinguishing a party’s ordinary contractual rights to obtain a final determination of a payment dispute by a court or tribunal of competent jurisdiction.”

[16] No doubt in many instances adjudication under the *Payments Act* provides not only a speedy decision on a dispute but one which the parties accept. This would no doubt be more likely the more straightforward the subject of the dispute should be. The less complicated adjudication might well be resolved merely in conference or by inspection. However the courts of Queensland and New South Wales (which has similar legislation) have on a number of occasions recognised the difficulties faced by the adjudicator in more complicated cases. Thus:

- (a) ‘the process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection’ *Roadtek, Department of Main Roads v. Davenport & Ors* [2006] QSC 47 per McKenzie J.
- (b) ‘somewhat pressure cooker environment in which adjudicators provide their determinations’ *Shell Refining (Australia) Pty Ltd v. AJ Mayr Engineering* [2006] NSWSC 94 at para [27].
- (c) ‘the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract access to a ‘fast track’ adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures; *Lucas Stuart Pty Ltd v. Council of the City of Sydney* [2005] NSWSC 840 at para [13].
- (d) ‘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 procedure. That claw back route expressly includes the making of restitution orders’ *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019 per Einstein J, cited with agreement by de Jersey CJ in *Intero Hospitality Projects Pty Ltd v. Empire Interior (Australia) Pty Ltd* [2007] QSC 220.

Preliminary point

- [17] Counsel for Grandview raised as a preliminary point the provisions of ss 10 and 13 of the *Judicial Review Act* (cited above in paras [11] and [12] above) and s 100 of the *Payments Act* (cited above in para [13]) and submitted that in the interests of justice I should dismiss the Altys application, leaving the dispute to the ordinary processes of litigation.
- [18] The interests of justice is a well understood concept but one which is often difficult to pin down and to complicate matters the adversaries generally have diametrically differing views on its identification and application.
- [19] Obvious points against Grandview’s application to dismiss are that the adjudication has been made, for reasons which the adjudicator has recorded; the grounds of the Altys application for judicial review have been articulated; both parties have appeared and have argued the substantive issues raised in the application; the result of this review may be accepted by both parties; substantial costs have been incurred in the review process.
- [20] The arguments of Grandview are that the matters in dispute are complicated and depend not just on points of law but also on facts which have not been litigated. These include the identification of any components of Grandview’s work under the contract with Altys which are not “building work” under the *Building Act*; the fact that the contract has not been identified so that evidence of it will be necessitated which can not be supplied by reference to the affidavits before the adjudicator; that there are facts to be found which could not properly be found from the affidavits. Such factual matters were said to include the oral conditions about Grandview’s scope of work and delivery procedure.
- [21] Grandview’s arguments on the interests of justice then raised the potential of the review proceedings to fragment the litigation unnecessarily, with consequent delay and extra expense. Mr Doyle submitted that the entire judicial review process was unnecessary there being the available, preferable, alternative of curial litigation. The decision in these review proceedings is open to appeal. It may be considered necessary to refer matters back to the adjudicator under s 30(1)(b) of the *Judicial Review Act* for further consideration and any further decision of the adjudicator could itself reopen judicial review proceedings with further possible appeal. And, he emphasised, all of this must be seen in the context of the possibility, perhaps likelihood, of the dispute which is the subject of these proceedings, or connected disputes, being litigated in the normal curial way as s 100 of the *Payments Act* allows notwithstanding the review process.
- [22] The fact that costs have been expended in these proceedings, while relevant, does not take the matter very far. If an application fails because it should not have been brought those costs can be the subject of an appropriate order. What is more

important is the utility of the proceedings. Can the issues raised in the proceedings be dealt with in such a way that both parties are likely to regard them as having been fully explored and finally decided?

- [23] Of the matters argued before me (some raised initially were conceded) the central issue was the identification of the work performed by Grandview which the adjudicator dealt with. If it was “building work” within s 42 of the *Building Act* (cited in para [7] above) then the adjudication was erroneous, it being common ground that Grandview did not hold the appropriate licence under the Act.

Grandview’s work

- [24] In the introductory paragraphs of his reasons, under the heading “The Contract”, the adjudicator said the following:

“I have read the sworn affidavits of Andrew Szatlow, a Director of the Claimant, and Norman Neville, who at the relevant time was the National Engineering Manager of the Respondent. Mr. Szatlow says that it was advised by Mr. Neville that the ‘Conditions of Purchase’ terms contained in the Subcontract Agreement were ‘standard conditions that [the Respondent] included in all of its subcontracts’. Mr. Neville, who was a signatory to the subcontract, confirms that, notwithstanding the Conditions of Purchase contained in the subcontract, he ‘understood that [the Claimant’s] scope of work was limited to design, certification and delivery of the materials to the Dysart site’.

Mr. Szatlow says that, following discussions and on the understanding that the Work Order and Agreement had been accepted by the Respondent and would be executed as part of the contractual documentation to clarify the role and obligations of the Claimant, he signed the Respondent’s Subcontract Agreement dated 5 April 2006. Mr. Neville, who had taken part in the negotiations throughout and continued to have a management role in the project thereafter was a signatory for the Respondent. For whatever reason, the Claimant’s Work Order and Agreement was never signed.

Accordingly, I am of the view that, however deficient it was in truly describing the scope of work required of the Claimant and in fact performed by the Claimant, the Subcontract Agreement, incorporating the ‘Conditions of Purchase’, is the only executed contract document and constitutes the written contract (the Contract) between the parties.” (my emphasis)

- [25] While these paragraphs purport to set out the adjudicator’s express finding of what constituted the contract between Altys and Grandview, they raise more questions than they answer. I do not know whether the adjudicator was there saying that the contract was wholly the Subcontract Agreement incorporating the Conditions of Purchase, or that it was limited to the “design, certification and delivering of the materials to the Dysart site”. Or was the failure to sign the “Work Order and Agreement” the deficiency to which he refers? Or was the written contract deficient in some other respect? Imprecision by the forum in defining what terms constitute

the contract between the parties complicates, perhaps to the extent of impossibility, consideration of the decision of the forum.

- [26] In this preliminary section of his reasons the adjudicator then expresses his satisfaction that the work carried out was construction work within the meaning of s 10(1) and 11(1) of the *Payments Act*. He returns to a more detailed discussion of this later in his reasons under the heading “*Claimant unlicensed under QBSA Act*”.
- [27] Those reasons further confuse his finding on what constituted the agreement between the parties. In the 8th to 10th paragraphs he rejects the application of the “Conditions of Purchase” (although his reasons suggest that both Grandview and Altys had submitted they applied – in which case it is surprising that neither succeeded). This is in contradiction of his earlier finding which I have cited in para [24] above. In fact, on my reading of paragraphs 8-10 it rather seems that the adjudicator excluded the Conditions of Purchase as a contractual document because Grandview was “not required to and in fact never did any of the tasks contained in the Conditions of Purchase”. The phrase “not required to” may mean “not required by contract” but on my reading of this section of the reasons as a whole may mean “was not asked to do it by Altys”.
- [28] Then, in the 7th paragraph of the section the adjudicator said:

“In my view however, the crucial questions are: What was the conduct of the parties? What exactly was agreed and performed? Does the contract truly reflect this?”

That, as well as the matters referred to in paragraph [27] above lead me to conclude that the adjudicator may have decided what the terms of the contract were by reference to what the parties did in its performance which, to me, is a reversal of the proper approach.

- [29] Twice in this section does the adjudicator seem to state what he concludes were Grandview’s contractual obligations. In the 5th paragraph he expressed it as “design, fabricate and deliver the components for construction on site by” (others) “under the supervision of parties other than” (Grandview). In the 9th paragraph he expressed satisfaction that Grandview did “as required in the Scope of Work the ‘design, engineering, certification and supply’ of its products”.
- [30] Although the adjudicator does refer, rather vaguely, to the work “required of it” and to the “actual arrangements between the parties”, he never comes to grips with the fact that the definition of “building work” in the *Building Act* includes:

“(f) the preparation of plans or specifications for the performance of building work”

Nor does he then investigate whether Grandview was simply contractually bound to supply, and did supply the modules “off the shelf” (which would seem to me not to be relevant building work) or whether the contract with Altys required Grandview to draw plans specifically for the Dysart job, or even to modify existing plans for that job (which might arguably be relevant building work). If the latter, would not Grandview want to have the cost of that work valued so that a proper assessment of the recoverable work could be achieved? And the correct classification of that type

of work could well depend on whether one or more of the exclusions in the *Building Regulation* apply. These matters would, I envisage, require evidence.

- [31] I was invited by Senior Counsel for Grandview to look at the exhibited plans of the buildings as constructed using the modules and to form the opinion that they did not constitute plans or specifications for the performance of building work, that is, that there were no instructions on how to erect the modules into buildings. My layman's answer to that is that the proposition may be correct but I think only an expert witness could say so with certainty. It is at least possible that the plans did to some extent dictate how to construct the buildings using the modules that is, that they related to the performance of building work under the *Building Act*.
- [32] On the question whether building work was carried out in Queensland (the modules having been built in New South Wales) the words "or undertake to carry out, building work" could well be vital. Where was the contract made? Is the effect of the Queensland statute to be confined territorially or extend extra-territorially. These questions were aired before me but their resolution is much more likely to be found correctly in ordinary litigation.
- [33] Should the arguments of Altys prevail and it be the fact that Grandview performed unlicensed building work, it would not follow that Grandview would be left completely empty handed. See s 42(4) of the *Building Act*, referred to in paragraph [7] above. Grandview's right to payment for some work and the assessment of the sum of money could not be determined in these proceedings. At the very least it would have to be remitted to the adjudicator and it is much more likely that an accurate decision would be reached in normal litigation *inter parties*.
- [34] As I have noted, the sum in dispute is made up of claimed variations to the contract. Altys has rejected all of the claim. It seems to me to be highly likely that the parties will want to litigate Grandview's right to such a large sum and that must surely turn on the evidence which must be led on the point.
- [35] Finally, it seems to me that both parties, who seem to be in a litigious frame of mind, will want to have a determination of the terms of the contract by which they are bound. That will surely require litigation.
- [36] In *Intero*, (supra) at paras [2]-[4] de Jersey CJ recorded his doubt that the adjudicator had correctly identified the contract between the parties. He cited with approval a passage from the judgment of Einstein J in *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019 which included:

"But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of layer construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision."

- [37] At para [10] the Chief Justice said:

"One very substantial limitation upon my usefully dealing with then now, is that I could not do so definitely – for want of proper evidence tested through the curial process. If I were to conclude that because of the way he went about the determination, the adjudicator erred in law, the most I could do would be to remit the matter for

determination before another adjudicator. The parties' interests would much better be served were those issues left for definitive determination in properly instituted court proceedings of a comprehensive character later in the piece."

And at [15]:

"Judicial review may work where an adjudicator has erred in law, and tis court can rectify things once and for all. But this is not such a case. The difficult questions raised by this challenge can be dealt with, most helpfully to the parties, only through the sort of proceeding contemplated by s 100."

- [38] In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333, Chesterman J expressed very robustly his attitude to the application of Judicial Review proceedings to adjudication under the *Payments Act*. After citing with approval the decision of the Chief Justice in *Intero* he said:

"[53] Cases may arise in which it will not be in the interests of justice to dismiss an application for review because of the existence of s 100 of the Act. There may be cases where the adjudication is tainted by fraud, or where the proprietor was given no notice of the claim for payment, or where the adjudicator was not properly appointed, so that it will not be in the interests of justice to dismiss an application, and it will not be inappropriate for one to continue. But such obvious cases of impropriety apart the court, in my opinion, ought to exercise the powers given by s 13 and s 48 of the *JR Act* to dismiss an attempt to review an adjudicator's decision.

[54] This application is of the 'ordinary' kind. When the subcontract works are complete the applicant may commence proceedings and recover any amounts which it can prove the first respondent should pay it by reason of the contract or its breach. Interest can be awarded. It will suffer no injustice by making the provisional payment required by the Act under the adjudication. That payment was made on account of liabilities to be determined and might be recovered. Section 100 provides another remedy alternative to judicial review and it is the one which the Act contemplates should regulate the obligations of parties to a contract to pay money one to the other. The efficacy of the Act will be diminished, if not destroyed, if judicial review of adjudications is not restricted."

- [39] Finally, I see the decision of the legislature to remove the application of the judicial review process to adjudication under the *Payments Act* as a recognition by the legislative body of the inappropriateness of the proceeding compared with the appropriateness of the curial litigation.

Conclusion

- [40] The complexity of the matters I have discussed (and no doubt matters to which I have not adverted), the improbability that their resolution with certainty and finality will occur in these review proceedings, the likelihood that one of the parties will feel the need to commence normal curial litigation and the obvious disadvantages in the parties pursuing dual proceedings lead me to conclude that it is not in the interests of justice that these review proceedings continue.
- [41] I therefore dismiss the application.