

SUPREME COURT OF QUEENSLAND

CITATION: *Skinner v Timms & Anor* [2009] QSC 46

PARTIES: **DESMOND JOHN SKINNER**
(applicant)
v
**GREG ASHLEY TIMMS TRADING AS ARTWORK
PAINTING SERVICE**
(first respondent)
CALLUM CAMPBELL
(second respondent)

FILE NO/S: 13510/08

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 10 March 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 6 March 2009

JUDGE: Wilson J

ORDER: (a) a declaration that the decision of the second respondent on adjudication application no 1057877_794 is void;
(b) an order staying the execution of the enforcement warrant in proceeding 0000245/08 between Greg Timms (t/as Artwork Painting Services ABN 65 212 668 989) and Desmond Skinner (t/as DJ Skinner Builders ACN 011021695) in the Magistrates Court at Noosa (also numbered M127/08 in the Magistrates Court at Emerald);
(c) an order that the first respondent pay the applicant's costs of the application to be assessed on the standard basis.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY – where applicant is a builder who undertook construction of a house – where first respondent was applicant's painting subcontractor – where first respondent issued a tax invoice in the amount of \$13,550.31 to applicant – where applicant did not pay and first respondent sought an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld) – where second respondent was the adjudicator and made an adjudication decision in first respondent's favour – where applicant challenges the validity of the adjudication decision – whether adjudicator had

jurisdiction to make the decision – whether declaratory relief under s 128 of the *Supreme Court Act 1995* (Qld) should be granted

Building and Construction Industry Payments Act 2004 (Qld), ss 7, 8, 12, 17, 18, 21, 24, 26

Judicial Review Act 1991 (Qld), schedule 1 part 2

Supreme Court Act 1995 (Qld), s 128

Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd [2007] NSWSC 1340, cited

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] QCA 213, cited

Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport (2004) 61 NSWLR 421, cited

Hitachi Ltd v O'Donnell Griffin Pty Ltd [2008] QSC 135, cited

Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, cited

J Hutchinson Pty Ltd v Galform Pty Ltd [2008] QSC 205, cited

TransGrid v Seimens Ltd (2004) 61 NSWLR 521, cited

Walton Construction (Qld) Pty Ltd v Salce [2008] QSC 235, applied

COUNSEL: MH Beirne (solicitor) for the applicant
The respondent appeared in person

SOLICITORS: Barclay Beirne Lawyers for the applicant

- [1] **Wilson J:** The applicant Desmond John Skinner is a builder who undertook the construction of a house at Clermont. The first respondent Greg Ashley Timms was his painting subcontractor.
- [2] On 29 October 2008 Mr Timms issued a tax invoice in the amount of \$13,550.31 addressed to Mr Skinner. Mr Skinner did not pay it, and on 13 November 2008 Mr Timms sought an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld).
- [3] The second respondent Callum Campbell was the adjudicator. On 1 December 2008 he made an adjudication decision in Mr Timms' favour. Mr Timms then obtained an adjudication certificate, which he filed in the Magistrates Court at Noosa. An enforcement warrant was issued, but it has not been executed.
- [4] In this application, which was filed on 24 December 2008, Mr Skinner challenges the validity of the adjudication decision.

[5] In the past, decisions made under the *Building and Construction Industry Payments Act* were frequently challenged under the *Judicial Review Act 1991* (Qld). However by an amendment which came into effect on 28 September 2007, schedule 1 part 2 of the *Judicial Review Act*, which sets out decisions to which that Act does not apply, was amended to include decisions under the *Building and Construction Industry Payments Act 2004*.¹

[6] Mr Skinner has sought declaratory relief under s 128 of the *Supreme Court Act 1995* (Qld) which provides -

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

[7] In *Walton Construction (Qld) Pty Ltd v Salce*² PD McMurdo J said³ -

"...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*. 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*,⁴ 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'." ⁵

I respectfully concur with His Honour.

[8] The operation of the *Building and Construction Industry Payments Act* depends upon the existence of a construction contract to which the Act applies. It provides for progress payments to contractors (whether or not the relevant construction contract makes provision for them), and it establishes a procedure for making and

¹ In *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] QCA 213 at para 75 fn 25 Fraser JA observed in *obiter dicta* that the effect of the amendment is to exclude both statutory orders of review and prerogative orders, although in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at para 61 Chesterman J took the view that prerogative orders may still be made.

² [2008] QSC 235.

³ [2008] QSC 235, at [6].

⁴ (2004) 61 NSWLR 421.

⁵ (2004) 61 NSWLR 421 at 441; see also *TransGrid v Siemens Ltd* (2004) 61 NSWLR 521 at 539 per Hodgson JA; *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340 at [31] to [33]; *Hitachi Ltd v O'Donnell Griffin Pty Ltd* [2008] QSC 135 at [49]; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205 at [29] to [30].

recovering such claims and their speedy adjudication where they are disputed.⁶ Relevantly, it provides for -

- (a) a payment claim;⁷
- (b) a response called a payment schedule;⁸
- (c) an adjudication application;⁹
- (d) an adjudication response;¹⁰ and
- (e) an adjudicator's decision.¹¹

[9] In this case the adjudicator found that there was a "construction contract" between the parties and -

- "14. The Claimant served a Payment Claim on the Respondent in the amount of \$13,550.31 inclusive of GST on the Respondent, claiming 95% completion on the project and variations.
- 15. I am satisfied that this is a valid Payment Claim in accordance with the Act.
- 16. The Respondent issued a Payment Schedule for \$Nil, stating in effect that the project works were only 60% complete and that variations were not their responsibility.
- 17. The Respondent requested the Claimant to vacate the site and the project.
- 18. On 13 November 2008, the Claimant served its Adjudication Application on Adjudicate Today. I am satisfied that it is a valid Adjudication Application in accordance with the Act.
- 19. No Adjudication Response has been made."¹²

[10] The solicitor for Mr Skinner submitted that the invoice issued on 29 October 2008 was not a "payment claim", because -

- (a) Mr Timms was not entitled to a progress payment;
- (b) It was described as a "tax invoice" and did not state that it was a payment claim made under the Act.¹³

There is substance in the first point, but not in the second.

[11] Section 17 subsections (1) and (2) of the Act provide -

⁶ *Building and Construction Industry Payments Act 2004* (Qld), ss 7, 8

⁷ *Building and Construction Industry Payments Act 2004* (Qld), s 17

⁸ *Building and Construction Industry Payments Act 2004* (Qld), s 18

⁹ *Building and Construction Industry Payments Act 2004* (Qld), s 21

¹⁰ *Building and Construction Industry Payments Act 2004* (Qld), s 24

¹¹ *Building and Construction Industry Payments Act 2004* (Qld), s 26

¹² See Adjudication Decision 1057877_794 ex "DJS-7" to the Affidavit of Desmond John Skinner filed 7 January 2009 (Court document number 3).

¹³ See Submissions of the Applicant of 5 March 2009, p.10.

- "(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).
- (2) A payment claim –
- (a) must identify the construction work or related goods and services to which the progress payment relates; and
 - (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
 - (c) must state that it is made under this Act."

[12] Under s 12 Mr Timms was entitled to a progress payment "from each reference date" under his contract with Mr Skinner. "Reference date" is defined in schedule 2 of the Act as follows -

- "(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
- (b) if the contract does not provide for the matter –
- (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each later named month."

[13] In this case paragraph (b)(ii) of the definition is applicable. Mr Timms last carried out construction work referred to in the tax invoice on 21 October 2008, so that the reference date for the work claimed was 30 October 2008. In other words, Mr Timms had no right to serve a payment claim as at 29 October 2008.

[14] In my view the tax invoice satisfied the requirements of s 17(2); in particular, contrary to the submission advanced on behalf of Mr Skinner, it included these words (albeit in small print) -

"This invoice is made under the Building and Construction Industry Payment Act 2004."

But it was nevertheless an invalid claim because when it was served Mr Timms was not entitled to a progress payment.

[15] Mr Skinner challenges the adjudicator's finding that he issued a payment schedule. Section 18 subsections (1), (2) and (3) provide -

- "(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
- (2) A payment schedule –
- (a) must identify the payment claim to which it relates; and
 - (b) must state the amount of the payment, if any, that the respondent proposes to make (the *scheduled amount*).
- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment."

[16] Page 1 of the adjudication decision sets out particulars of the decision in tabular form. It includes -

"Payment Schedule: 30 October 2008 for \$Nil."¹⁴

The only communication from Mr Skinner to Mr Timms dated 30 October 2008 before the adjudicator was an email which was part of an exchange of emails in rather vituperative terms. It did not satisfy the requirements of any of subsections (1), (2) or (3) of s 18 and was not a payment schedule. The adjudicator erred in finding that it was.

[17] Where a respondent to a claim fails to serve a payment schedule and fails to pay the whole or any part of the claimed amount by the due date, under s 21(2) the claimant cannot make an adjudication application unless -

- "(a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- (b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice."

[18] Mr Timms did not comply with these requirements, thereby depriving Mr Skinner of notice of his intention to make an adjudication application and of a second chance to respond to the payment claim by serving a payment schedule. In the circumstances he had no entitlement to bring an adjudication application, and the application he purported to bring did not enliven the jurisdiction of the adjudicator.

[19] I am satisfied that the adjudicator did not have jurisdiction to make the adjudication decision and that the adjudication decision is void because -

¹⁴ See Adjudication Decision 1057877_794 ex "DJS-7" to the Affidavit of Desmond John Skinner filed 7 January 2009 (Court document number 3).

- (a) Mr Timms was not entitled to a progress payment when he purported to make a progress claim;
- (b) even if the progress claim was valid, Mr Skinner did not serve a payment schedule;
- (c) in the absence of a payment schedule, Mr Timms was not entitled to make an adjudication application without giving Mr Skinner a second chance to serve a payment schedule in accordance with s 21(2);
- (d) Mr Timms did not give Mr Skinner such a second chance;
- (e) there was no valid adjudication application upon which the adjudicator could make an adjudication decision.

[20] It is not necessary to consider Mr Skinner's further argument that he was not denied natural justice.

[21] The Court should make the following orders -

- (a) a declaration that the decision of the second respondent on adjudication application no 1057877_794 is void;
- (b) an order staying the execution of the enforcement warrant in proceeding 0000245/08 between Greg Timms (t/as Artwork Painting Services ABN 65 212 668 989) and Desmond Skinner (t/as DJ Skinner Builders ACN 011021695) in the Magistrates Court at Noosa (also numbered M127/08 in the Magistrates Court at Emerald);
- (c) an order that the first respondent pay the applicant's costs of the application to be assessed on the standard basis.