SUPREME COURT OF QUEENSLAND

CITATION:	*Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2010] QSC 156
PARTIES:	**HANSEN YUNCKEN PTY LTD ACN 063 384 056** Applicant **v** **IAN JAMES ERICSON TRADING AS FLEA'S CONCRETING ABN 86 016 599 870** First respondent **PHILIP DAVENPORT** Second respondent
FILE NO/S:	BS 7864 of 2009
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2010 and further submissions on 16 February 2010
JUDGE:	McMurdo J
ORDER:	**The application to strike out paragraphs 34 to 51 of the amended statement of claim together with the application to strike out from the originating application the words "or voidable or liable to be set aside" and the words "jurisdictional error and/or fraud" is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where an adjudicator upheld the first respondent's claim for a progress payment under the *Building & Construction Industry Payments Act 2004* (Qld) – where the applicant challenges that decision on the basis that it was procured by the fraud of the first respondent – whether an adjudicator's decision procured by fraud may be the subject of judicial review. *Building and Construction Industry Payments Act 2004* (Qld) ss 18, 24(4), 33

Judicial Review Act 1991 (Qld) Sch 1 Pt 2, ss 18(2), 41

Justice and Other Legislation Amendment Act 2007 (Qld) ss 90-91

Supreme Court Act 1970 (NSW) s 69

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] 2 Qd R 495

Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor [2009] QSC 220

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

Cabassi v Vila (1940) 64 CLR 130

Colonial Bank of Australasia & Anor v Willan (1874) LR 5 PC 417

Craig v The State of South Australia (1995) 184 CLR 163

Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2) [2009] VSC 426

Hitachi Ltd v O'Donnell Griffin Pty Ltd & Ors [2008] QSC 135

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

J Hutchinson Pty Ltd v Galform Pty Ltd & Ors [2008] QSC 205

John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd [2004] NSWSC 258

John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205

Kirk & Anor v Industrial Court of New South Wales & Anor (2009) 239 CLR 531

McDonald v McDonald (1965) 113 CLR 529

Monroe Schneider Associates (Inc) & Anor v No 1 Raberem Pty Ltd & Ors (No 2) (1992) 37 FCR 234

Nebmas Pty Ltd v Sub Divide Pty Ltd [2009] 2 Qd R 241

Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors [2010] QSC 95

Owens Bank Ltd v Bracco [1992] 2 AC 443

Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq) & Anor [2010] QCA 7

Spankie & Ors v James Trowse Constructions Pty Limited &

Ors [2010] QSC 29

SZFDE & Ors v Minister for Immigration and Citizenship & Anor (2007) 232 CLR 189

Uniting Church in Australia Property Trust (Qld) v Davenport & Anor [2009] QSC 134

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

Wentworth v Rogers (No 5) (1986) 6 NSWLR 534

COUNSEL: T P Sullivan SC for the applicant

A J Greinke for the first respondent

SOLICITORS: HopgoodGanim Lawyers as town agents for Crawford Legal for the applicant

Mark M Stone for the first respondent

[1] This is a dispute between the applicant, which is a building contractor, and the first respondent Mr Ericson, who was its subcontractor for concreting work performed at the Cairns airport. Mr Ericson's claim for a progress payment of $4,803,866.60 was upheld in full by an adjudicator under the *Building & Construction Industry Payments Act 2004* (Qld) ("the *Payments Act*"). The applicant challenges that decision upon a number of grounds. Mr Ericson says that some of them are bad in law and applies to strike out those parts of the applicant's statement of claim.

[2] In essence, the applicant's case in all respects is one which complains about the evidence which Mr Ericson sent to the adjudicator. The applicant says that it was denied natural justice in two ways. Firstly, there was material sent to the adjudicator which was not copied to the applicant and of which the applicant was unaware. Secondly, there is a complaint that some of the evidence which was served with the adjudication application had not been delivered with Mr Ericson's claim, so that the applicant had made no response to it in its payment schedule.[1] Because s 24(4) of the *Payments Act* restricted the applicant's adjudication response to reasons it had given in its payment schedule, the applicant was thereby deprived of the opportunity of providing reasons to the adjudicator specifically directed to that material and was denied natural justice. That complaint is founded upon the so-called "John Holland Principle", derived from *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd*.[2] The pleading of neither of those complaints is challenged by the present application.

[3] In *John Holland*, Einstein J held that a decision of an adjudicator who relied upon evidence which had not been included in the original claim was reviewable, not only for a denial of natural justice, but also for jurisdictional error.[3] That is the basis for paragraphs 34 to 36 of the statement of claim which plead that the adjudicator's determination with regard to material which was not with the original claim involved a jurisdictional error. Mr Ericson applies to strike out paragraphs 34

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1 Delivered under s 18 of the *Payments Act*.

2 [2004] NSWSC 258.

3 Ibid, [41].

to 36. Yet there are no facts pleaded in support of that case which are not also pleaded as constituting a denial of natural justice and as I have said, there is no challenge to the pleading of that case. Therefore, the striking out of paragraphs 34 – 36 would have no utility in respect of the length or expense of these proceedings. I will return to that part of Mr Ericson's application after dealing with the issue which is of more practical importance.

[4] The applicant's other ground for challenging the adjudicator's decision is that it was procured by the fraud of Mr Ericson. It is alleged that he put evidence before the adjudicator which he knew was untrue. In particular he provided documents to the adjudicator, which were not copied to the applicant, which on their face proved Mr Ericson's employees had worked a certain number of hours and at certain rates. The applicant alleges that the actual hours worked and paid for by Mr Ericson were less than he represented, as were the hourly pay rates which Mr Ericson paid.

[5] For Mr Ericson it is argued that an adjudication determination is not invalid by reason that it was procured by fraud, save where the adjudicator is also involved in that fraud. There is no suggestion that this adjudicator was fraudulent. The applicant's case is that the adjudicator was himself defrauded by Mr Ericson.

[6] The argument for Mr Ericson cites *Brodyn Pty Ltd v Davenport & Anor.*[4] It was there held that the relevantly identical statute in New South Wales impliedly precludes relief in the nature of certiorari to quash a determination of an adjudicator and that the court's jurisdiction was limited to relief in the case of a determination which is void, rather than voidable. For a void determination, it was held that a declaration or injunction to prevent effect being given to the determination could be granted and a judgment entered on the basis of a void determination could be set aside. And it was held that a determination would not be void simply for some jurisdictional error by the adjudicator; it would be void only where the essential conditions laid down for the existence of an adjudicator's determination were not satisfied. In the principal judgment, which was given by Hodgson JA (with whom Mason P and Giles JA agreed), those essential conditions were said to include the existence of a construction contract to which the statute applies, the service by the claimant on the respondent of a payment claim, the making of an adjudication application by the claimant, the reference of the application to an eligible adjudicator who accepts the application, the decision by the adjudicator by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of that determination in writing.[5] To those express requirements of the statute, Hodgson JA added the implied requirements of a bona fide attempt by the adjudicator to exercise the relevant power and the provision of the measure of nature justice which the statute requires.[6] Absent satisfaction of these requirements, Hodgson JA said, a purported determination would be void and not merely voidable. The possibility that other express requirements of the statute might be considered essential in this way was left open.[7]

[7] The jurisdiction of the Supreme Court of New South Wales to grant relief in the nature of certiorari is expressed within s 69 of the *Supreme Court Act 1970* (NSW)

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4 (2004) 61 NSWLR 421.
5 Ibid, [53].
6 Ibid, [55].
7 Ibid, [54].

which is in relevantly the same terms as s 41 of the *Judicial Review Act 1991* (Qld) ("the *JR Act*"). It was that jurisdiction which was held to be excluded, not by the terms of the *Supreme Court Act 1970*, but by necessary implication from the New South Wales equivalent of the *Payments Act*. The implication was required by an evident

> "legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay".[8]

Hodgson JA referred also to the fact that the payments were on account of a liability and that the adjudication did not involve a final resolution of the parties' rights. And referring to the remedy of the suspension of work for an unpaid progress payment, conferred by the equivalent of s 33 of the *Payments Act*, he said that:

> "[i]f the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under [s 33] would be prohibitive, and [s 33] could operate as a trap."[9]

[8] Before an amendment to the *JR Act* in 2007, in a number of cases in this court relief had been granted to review the decision of an adjudicator under Part 3 of that Act. By that amendment[10], Schedule 1, Part 2 of the *JR Act* was amended to include a reference to the *Payments Act*. Accordingly, the *Payments Act* became subject to s 18(2) of the *JR Act*, which provides:

> "18(1) …
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> (2) However, this Act does not –
>
> (a) …
>
> (b) apply to decisions made, proposed to be made, or required to be made, under an enactment mentioned in schedule 1, part 2."

[9] There is a difference of opinion within subsequent judgments as to the effect of that amendment. The issue has been whether the amendment precludes the availability of relief under Part 5 of the *JR Act*. The relevant cases were canvassed by White J in *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan*[11], where her Honour concluded, as had Fraser JA in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd*[12], that the 2007 amendment applied to exclude the operation of the whole of the *JR Act* in respect of an adjudicator's decision. Chesterman J expressed a contrary view in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd*[13] as did Daubney J in *Uniting Church in Australia Property Trust (Qld) v Davenport*[14], who said that the policy of certainty and expedition within the *Payments Act* was

> "a far cry from suggesting that citizens should be precluded from having recourse to the courts to seek orders in the nature of prerogative remedies or which otherwise lie generally within the

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8 Ibid, [51].
9 Ibid.
10 Made by *Justice and Other Legislation Amendment Act 2007* (Qld) ss 90-91.
11 [2009] QSC 220, [9]-[21].
12 [2008] 2 Qd R 495, [75] referring to footnote 25.
13 [2008] QCA 83, [61].
14 [2009] QSC 134, [41].

> inherent discretion of the Court without an express legislative exclusion."[15]

The respective sides of that controversy have been adopted in the arguments here. At least three things might be noted about this question.

[10] Firstly, thus far there does not appear to have been a consideration of the impact of *Brodyn* on this question. If *Brodyn* is to be followed in Queensland, it is by force of the *Payments Act* that relief in the nature of prerogative remedies for jurisdictional error is unavailable, quite apart from the 2007 amendment to the *JR Act*. *Brodyn* has been applied in a number of judgments in the trial division (although not on this question): *Hitachi Limited v O'Donnell Griffin Pty Ltd*[16]; *Walton Construction (Qld) Pty Ltd v Salce*[17]; *J Hutchinson Pty Ltd v Galform Pty Ltd*[18]; *John Holland Pty Ltd v TAC Pacific Pty Ltd*[19]; *Nebmas Pty Ltd v Sub Divide Pty Ltd*[20]; *Spankie v James Trowse Constructions Pty Limited*[21] and *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*[22]. And it appears to have been followed by the Court of Appeal in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq)*[23].

[11] Secondly, there appears to have been no discussion of whether s 18 of the *JR Act*, by providing that the *JR Act* does not apply, might have the effect of thereby qualifying the operation of s 41(1), so that the embargo upon the issue of the prerogative writs would not apply in relation to decisions under the *Payments Act*. Section 18 is not in terms that certain decisions cannot be judicially reviewed under that Act; it is in terms that the Act as a whole does not apply to them.

[12] Thirdly, the availability of relief in the nature of the prerogative remedies would have to be considered now by reference to the recent judgment of the High Court in *Kirk v Industrial Court of New South Wales*[24], where in the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ[25], it was held that the supervisory jurisdiction exercised by State Supreme Courts to enforce the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Courts cannot be removed by legislation and that a statute affecting the availability of such remedies is effective only in the exclusion of the remedies in cases of non-jurisdictional error. In a thorough analysis undertaken by Vickery J in respect of the Victorian equivalent of the *Payments Act* in *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2)*[26] it was held that an adjudicator is amenable to certiorari as a public body exercising "governmental powers" as that concept was used in *Craig v The State of South Australia*.[27] If that is accepted, then the exclusion of relief in the nature of the prerogative remedies, either by the *Payments*

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15 Ibid.
16 [2008] QSC 135.
17 [2008] QSC 235.
18 [2008] QSC 205.
19 [2009] QSC 205.
20 [2009] 2 Qd R 241.
21 [2010] QSC 29.
22 [2010] QSC 95.
23 [2010] QCA 7.
24 (2009) 239 CLR 531.
25 Ibid, [99]-[100].
26 [2009] VSC 426.
27 (1995) 184 CLR 163, 174-175: see [2009] VSC 426, [35]-[81].

Act or by s 18(2) of the *JR Act*, in cases of jurisdictional error would seem to be invalid.

[13] In *Kirk*, fraud (being an established ground for relief in the nature of certiorari) was specifically put on one side[28], although the joint judgment applied a passage from *Colonial Bank of Australasia v Willan*[29] to the effect that a privative clause in a statue will not preclude the grant of a certiorari "upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."[30] Accordingly, so it was argued for the applicant, the exclusion of the equivalent of certiorari in cases of fraud would be invalid.

[14] In my conclusion, the impact of *Kirk* need not be decided within the present application and nor is it necessary to otherwise resolve the controversy as to the availability of relief under the *JR Act* against an adjudicator's decision. The reason is that there a jurisdiction to defeat what would otherwise be the effect of an adjudicator's decision procured by the fraud of the claimant, quite apart from the prerogative remedies. That jurisdiction was recognised by Hodgson JA in *Brodyn* where he said:[31]

> "If there is fraud of the claimant in which the adjudicator is also involved, the determination will be void because the adjudicator has not bona fide attempted to exercise the power. *If the determination is induced by fraud of the claimant in which the adjudicator is not involved, then I am inclined to think that the determination is not void but voidable; and it is liable to be set aside by proceedings of the kind appropriate to judgments obtained by fraud*."

The first of those propositions, involving fraud in which the adjudicator is also involved, is accepted by the argument for Mr Ericson. The second of those propositions, relevant to this statement of claim, is rejected within that argument. In effect, it is argued that the evident policy of expedition and certainty within the *Payments Act* would be unduly compromised by the availability of that remedy.

[15] That argument is apparently inconsistent with what Holmes JA, with the concurrence of Fraser JA and Fryberg J, said in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd.* In rejecting a submission that the jurisdiction had been too *widely* defined in *Brodyn*, Holmes JA said:[32]

> "Counsel for MKG argued that in seeking a declaration that the adjudicator's decision was void, QBWSA had mounted an impermissible collateral attack on the judgment obtained by filing the adjudicator's certificate. Indeed, there was also a question as to whether the application to set the judgment aside was properly made; although s 31(4) appeared to contemplate the bringing of such an application, there was no obvious source of power for a trial judge to set the judgment aside. (The latter submission lost what small attraction it might have had when, in the course of argument, counsel conceded that, following it to its logical conclusion, even a judgment

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28 (2009) 239 CLR 531, 567.
29 (1874) LR 5 PC 417, 442.
30 The passage is set out at (2009) 239 CLR 531, [97].
31 (2004) 61 NSWLR 421, [60].
32 (2010) QCA 7, [36].

> based on an arbitration decision obtained by fraud would be unassailable.)"

The reference to "an arbitration decision" in that passage was apparently intended to be to "an adjudication decision". There is then a clear recognition within that judgment of a jurisdiction to set aside a judgment based upon an adjudication decision which had been obtained by fraud.

[16] This jurisdiction to impeach a judgment obtained by fraud is "equitable in origin and nature", as Kirby P said in *Wentworth v Rogers (No 5)*.[33] But because of the importance of the finality of a judgment, any attempt to re-open litigation on the ground that a judgment was obtained by fraud, must to be confined within "very restrictive limits", as Lord Bridge of Harwich said in *Owens Bank Ltd v Bracco*.[34] In *Cabassi v Vila*[35], Williams J said that it was only in "very exceptional cases" that perjury would be a sufficient ground for setting aside a judgment and that he had been unable to find any case in which a judgment had been set aside "where the only fraud alleged was that the defendant or a witness or witnesses alone or in concert had committed perjury". That was cited by Windeyer J in *McDonald v McDonald*[36] and in the joint judgment in *SZFDE v Minister for Immigration and Citizenship*.[37] The history and nature of this jurisdiction were extensively discussed by the Full Court of the Federal Court (Spender, Gummow and Lee JJ) in *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)*.[38] The Full Court said that an application to set aside a judgment on this ground must be based upon evidence which was discovered only after the trial, could not have been found by the time of trial by the exercise of reasonable diligence, was so material that its production at the trial would probably have affected the outcome and must be so strong that it would reasonably be expected to be decisive at a rehearing and if unanswered would have that result.[39] In *Wentworth v Rogers (No 5)* Kirby P said that it must also be shown that the successful party was responsible for the fraud which taints the judgment under challenge.[40]

[17] Each of those requirements is apparently addressed by the applicant's statement of claim. There is no submission from Mr Ericson that these allegations should be struck out as lacking a proper factual foundation; nor is it submitted that together they would be insufficient to provide a basis for setting aside this decision had it been a judgment. Instead, the argument is to the effect that this jurisdiction cannot co-exist with the intended operation of the *Payments Act*, having regard to its evident policy of expedition and certainty. As I have discussed, that submission is inconsistent with the judgments of Courts of Appeal in this State and in New South Wales. Undoubtedly the evident policy of the *Payments Act* will be relevant for the management and disposition of litigation such as the present. In each case it will be necessary to consider the particular facts and circumstances, including the strength of the case of the party seeking to impugn the adjudicator's decision, in considering whether the operation of the *Payments Act* should be

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33 (1986) 6 NSWLR 534, 538.
34 [1992] 2 AC 443, 489.
35 (1940) 64 CLR 130, 147-148.
36 (1965) 113 CLR 529, 544.
37 (2007) 232 CLR 189, 196.
38 (1992) 37 FCR 234, 238-243.
39 Ibid, 241.
40 (1986) 6 NSWLR 534, 539.

effectively suspended whilst such a challenge is made. In this case Mr Ericson has not yet filed an adjudication certificate as a judgment, because he was restrained by an order of Byrne SJA from taking any steps to obtain such a certificate or from otherwise enforcing the adjudication decision, until further order of the court (upon the applicant's providing bank guarantees to secure the entirety of the sum awarded to Mr Ericson). In the present application the question is whether the allegations of fraud and the consequent claim that the adjudication is voidable are bad in law so that this part of the applicant's case could not succeed.

[18] If there is a jurisdiction to set aside a judgment which might have resulted from this adjudication decision, it is apparently accepted in the argument for Mr Ericson that there would be a like jurisdiction to give relief against the consequences of an adjudication decision obtained by fraud, such as by setting aside that decision and restraining any step to enforce it.

[19] In my conclusion, the basis argued for striking out the fraud case (which is pleaded in paragraphs 37 to 51) cannot be accepted.

[20] I return to the pleading, in paragraphs 34 to 36, of jurisdictional error. There is no utility in deciding within this application whether there is a jurisdiction to grant judicial review of a decision of an adjudicator upon that ground, because as already noted, that component of the applicant's case does not add to the facts which are pleaded as involving a denial of natural justice. It is preferable that this legal question be decided, if necessary, when the facts are found at a trial.

[21] Accordingly, the application by Mr Ericson to strike out paragraphs 34 to 51 of the amended statement of claim together with the application to strike out from the originating application the words "or voidable or liable to be set aside" and the words "jurisdictional error and/or fraud" will be dismissed. I will hear the parties as to costs.