SUPREME COURT OF QUEENSLAND

CITATION:	*David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No. 2)* [2010] QSC 166
PARTIES:	**DAVID & GAI SPANKIE & NORTHERN INVESTMENT HOLDINGS PTY LTD** Applicants **v** **JAMES TROWSE CONSTRUCTIONS PTY LTD** First Respondent **ADJUDICATE TODAY PTY LTD** Second Respondent **DAMIAN MICHAEL** Third Respondent
FILE NO/S:	BS 12739 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2010
JUDGE:	McMurdo J
ORDER:	**It is declared that the decision of the third respondent dated 2 November 2009 in respect of the dispute between the applicant and the first respondent is void.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NATURE OF HEARING – OPPORTUNITY TO PRESENT CASE – where an adjudicator upheld the first respondent's claim against the applicants under the *Building and Construction Industry Payments Act 2004* (Qld) – where the applicants allege that the adjudicator decided a substantial part of the claim upon a basis which neither the applicants nor the first respondent had addressed – whether the adjudicator's decision is void for want of natural justice.

Building and Construction Industry Payments Act 2004 (Qld) s 25(4)

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421
David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors [2010] QSC 29
John Goss Projects Pty Ltd v Leighton Contractors & Anor (2006) 66 NSWLR 707
John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205
Musico v Davenport [2003] NSWSC 977
Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd [2006] NSWSC 205
Shorten v David Hurst Constructions Pty Ltd [2008] NSWSC 546
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2008] NSWSC 399

COUNSEL: M D Ambrose for the applicant
G Handran for the first respondent

SOLICITORS: Holding Redlich Lawyers for the applicant
Hemming + Hart Lawyers for the first respondent

[1] This is a challenge to an adjudication decision purportedly given in accordance with the *Building and Construction Industry Payments Act 2004* ("the *Payments Act*"). The applicants' case is that they were denied natural justice because the adjudicator decided a substantial part of the claim upon a basis which neither side had addressed. As I will discuss, the outcome here depends upon the view taken of the adjudicator's reasons. The first respondent says that upon a proper reading of those reasons, in the relevant part of the decision the adjudicator simply accepted an argument which was put to the adjudicator.

[2] Before going to those reasons it is necessary to say something of the facts and the respective arguments put to the adjudicator. The first respondent contracted to perform works for the applicants at the Homestead Tavern at Boondall. A previous claim and adjudication from this contract was the subject of an unsuccessful challenge by the applicants earlier this year[1], as a result of which most of the grounds set out in the present application have been abandoned. The present ground did not arise in the previous case.

[3] The progress claim relevant to this matter was made on 31 August 2009 for the sum of $539,194.57. In their payment schedule delivered on 15 September 2009, the applicants said that nothing be paid. Within that document, one of the matters they alleged was an entitlement to liquidated damages for delay. They referred to the relevant provisions of the contract, which entitled them to damages in the amount of $1,000 per day from the agreed date for practical completion, which they said had become 6 July 2009. They alleged that as at the date of their payment schedule they

---

1 *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors* [2010] QSC 29.

were entitled to $49,000 for liquidated damages which should be set off against the builder's claim.

[4] In its adjudication application, the first respondent denied that the applicants were entitled to withhold any amount for liquidated damages. It denied that:

> "[p]ractical completion has not been reached because completion with respect to the construction works the subject of the Contract and the handing over of the Site to the Respondents occurred on 6 July 2009."

It added that:

> "[t]he only reason the superintendent has not certified that practical completion has been reached is because the superintendent is refusing to carry out his duties under the Contract until such time that there has been a determination of [the previous proceedings between the parties in this court]."

The first respondent attached the correspondence in that respect with the Superintendent's solicitors. It submitted to the adjudicator that there was no entitlement to claim liquidated damages

> "in circumstances where the reasons for the Claimant purportedly not reaching practical completion is [sic] due to the superintendent refusing to carry out his duties under the contract, including to provide certification of works performed and stages of construction completed, as evidenced by [that correspondence]."

[5] Clause 34.7 of the contract provided for liquidated damages, relevantly, as follows:

> "If [the work under the contract] does not reach practical completion by the date for practical completion, the Superintendent shall certify, as due and payable from the Contractor to the Principal, liquidated damages in Item 24 for every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking [the work under the contract] out of the hands of the Contractor. …"

The "date of practical completion" was defined by the contract to mean:

> "a) the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or
>
> b) where another date is determined in any expert determination or litigation as the date upon which practical completion was reached, that other date".

[6] Clearly the claimant advanced two arguments to the adjudicator as to liquidated damages: the first that in fact the work was practically complete on the agreed date of 6 July 2009 and the second that there was no certificate evidencing that as the date of practical completion because the Superintendent had refused to consider the question.

[7] In their adjudication response, dated 7 October 2009, the applicants made these submissions about liquidated damages:

> "104 The adjusted "date for practical completion" under the Contract is 6 July 2009.

105 As at the date of the payment schedule practical completion had not yet been reached by the claimant and the superintendent had not certified that practical completion had been reached. Certification occurred on 30 September 2009 and a copy of the notice of practical completion is annexed to the statutory declaration of Spiro Dimopoulos dated 7 October 2009.

106 Accordingly, practical completion was not attained until 25 September 2009, which is 25 days after the payment claim was served.

107 Pursuant to clause 34.7 and Item 24 of Annexure Part A of the Contract the respondent is entitled to liquidated damages from the claimant in the amount of $1,000 per day.

108 Liquidated damages is payable from 6 July 2009 to 25 September 2009 at a rate of $1,000 per day. The amount of liquidated damages as at the date of the payment schedule was $49,000."

[8] The adjudicator's decision was given on 2 November 2009. He decided that the applicants should pay $288,983.98. He disallowed any set off for liquidated damages, reasoning as follows:

"(59) The issue of liquidated damages did not arise in the First Adjudication Application, so it is an issue, which I am able to decide. The Respondents are claiming a set off of $49,000.00 for liquidated damages "as at the date of the payment schedule". Both parties agree that the date for practical completion was 6 July 2009.

(60) The Claimant submits that practical completion was reached on 6 July 2009, because that was when the Site was handed over to the Respondents. Furthermore, the Claimant alleges that the Superintendent did not certify that practical completion was reached at the time the payment claim and adjudication application were lodged, because the Superintendent was refusing to carry out his duties under the Contract until there was a determination of the proceedings in the Supreme Court of Queensland. The letter sent by the Superintendent's legal representative on 10 August 2009 stated, '*Our present instructions are that our client will not be taking any further step in its role as superintendent, at least in as far as such step may relate to the decision, until the matter is heard by the Court on 18 August 2009.*' The Superintendent was therefore refusing to perform its role under the Contract until the court proceedings were finalised.

(61) In the Respondents' payment schedule, it submits that practical completion had not yet been reached and that the Superintendent had not certified the date of practical completion. On 9 July 2009, the Superintendent had notified the Claimant that further requirements be met in order for practical completion to be achieved. In fact, it was not until 30 September (which is the date after the adjudication application was lodged) that the Superintendent certified that practical completion was reached on 25 September 2009.

(62) Under clause 35.7 of the Contract, liquidated damages are due and payable for '*every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking WUC out of the hands of the Contractor.'*

(63) There has been evidence that the works were not taken out of the hands of the Claimant until after 24 September 2009 when it installed a water hydrant on the Site. It also does not appear that the Contract was terminated prior to this date either.

(64) As the Respondents admitted in its payment schedule that the date of practical completion had not been obtained at the time of its payment schedule it cannot claim liquidated damages in its adjudication response. I am therefore satisfied that under clause 35.7 of the Contract, liquidated damages cannot be claimed by the Respondents, as the date of practical completion had not been achieved at the time the payment schedule was made."

[9] By an order dated 10 November 2009, the first respondent was restrained from applying for an adjudication certificate or otherwise enforcing the adjudication decision until further order and pursuant to that order the applicants paid the adjudicated amount and the adjudicator's fee, totalling $312,182.98, into court.

[10] There is no dispute within the present arguments as to the application of *Brodyn Pty Ltd v Davenport*[2], in so far as it was there held that a "substantial denial of the measure of natural justice that the Act requires to be given" would invalidate an adjudicator's decision such that it could be declared void.[3] Nor is there any debate as to the applicability of several judgments in the Supreme Court of New South Wales, thoroughly analysed and applied by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd*[4], which have held that there is a substantial denial of natural justice in this sense where an adjudicator has decided a dispute on a basis for which neither party had contended, unless it can be said that

---

2 (2004) 61 NSWLR 421.
3 (2004) 61 NSWLR 421, 441-442.
4 [2009] QSC 205.

no submission could have been made to the adjudicator which might have produced a different result.[5]

[11] The question in this case is not as to the correctness of those principles. Rather it is whether the adjudicator did in fact decide the liquidated damages question on a basis which the parties had not addressed. The applicants argue that the adjudicator reasoned in this way: upon the proper interpretation of cl 34.7[6], there was an entitlement to liquidated damages only upon the arrival of the earliest of the date of completion, the date of termination of the contract or the date of the principal taking the works out of the hands of the contractor. As the applicants had conceded in their payment schedule, none of those dates had arrived at the time of the payment schedule so that there was then no entitlement to liquidated damages for delay. Accordingly, nothing was able to be set off against the claim at the time of delivery of the payment schedule, so that nothing should be allowed as a set off in the adjudication.

[12] If that was the adjudicator's reasoning, it involved a basis for his conclusion upon a substantial part of the dispute which had not been addressed by the arguments. In particular it involved an interpretation of cl 34.7 which neither party had advanced. And there was no argument here for the first respondent that such an interpretation of cl 34.7 would be so clearly correct that had the applicants made a submission to the contrary, it could have made a difference.

[13] The first respondent argues that the adjudicator's reasoning was somewhat different. It points firstly to paragraph 60 of the decision, where the adjudicator began by setting out its submissions to him. The adjudicator there set out the terms of the letter from the Superintendent's solicitors which said that the adjudicator would not be taking any further step pending the litigation then existing between the parties. In that paragraph of the decision, the adjudicator wrote "the Superintendent was therefore refusing to perform its role under the Contract until the court proceedings were finalised". On one view that was simply a recital by the adjudicator of part of the argument by the present first respondent. On another view, which I would accept, it constituted a finding by the adjudicator.

[14] The first respondent says that the adjudicator, having clearly identified the two submissions which it had made on this subject, accepted the second of them within paragraph 64 of the decision. By his references to the date of practical completion as not having been "obtained" or "achieved" (at the time of the payment schedule), it is said that the adjudicator meant that the date had not been fixed by a certificate of the Superintendent. Considered in the context of the arguments which had been put to him, the adjudicator was accepting the submission that cl 34.7, properly construed, did not allow the principal to claim for liquidated damages when the Superintendent had refused to make a decision about practical completion. The first respondent says that the position is clearer for the fact that the applicants had made no submission to the adjudicator specifically directed to such a construction of cl 34.7.

---

5 *Musico v Davenport* [2003] NSWSC 977; *John Goss Projects Pty Ltd v Leighton Contractors & Anor* (2006) 66 NSWLR 707; *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399; *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 546.

6 Wrongly referred to as clause 35.7 in paragraph (64) of his decision.

[15] I accept that the adjudicator's reasons should be read in the context of the documents which had been put to him, particularly the respective submissions. However, I am unable to accept the interpretation of the adjudicator's reasons which is advanced by the first respondent. It seems to me to be clear that the adjudicator reasoned as the applicants claim: i.e. rather than accepting either of the arguments put to him by the present first respondent, he interpreted cl 34.7 as not providing any entitlement to liquidated damages for delay until the arrival of the earliest of the alternative dates referred to in cl 34.7. The adjudicator reasoned that because none of those dates had arrived by the time of the payment schedule, and particularly because the applicants themselves had said that practical completion had not then been reached, there was no entitlement to set off any amount for liquidated damages.

[16] That was a question upon which the adjudicator should have sought submissions, as he was permitted to do by s 25(4) of the *Payments Act*. The adjudicator thereby denied the applicants natural justice, by denying them an opportunity to persuade him that his interpretation of cl 34.7 was incorrect. As is apparently conceded, it is unnecessary in this context for the applicants to demonstrate that they would have persuaded the adjudicator. In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*[7] McDougall J said in this context that:

> "[i]t must be at least arguable that meaningful submissions could have been put if an opportunity to put them had been afforded: i.e., that there was something to be put that might well persuade the adjudicator to change his or her mind."[8]

[17] It follows that the purported adjudication is of no effect, because it did not satisfy an essential condition for a valid determination which was that the adjudicator provide the measure of natural justice which the Act requires to be given. It will be declared that the decision of the third respondent dated 2 November 2009 in respect of the dispute between the applicants and the first respondent is void. I will hear the parties as to further orders, including costs.

---

7 [2008] NSWSC 399 see also *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 546 and *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205.

8 [2008] NSWSC 399, [45].