

SUPREME COURT OF QUEENSLAND

CITATION: *Gisley Investments P/L v Williams & Anor* [2010] QSC 178

PARTIES: **GISLEY INVESTMENTS PTY LTD** (ACN 064 644 033)
(applicant)
v
MICHAEL LLEWELLYN WILLIAMS
(first respondent)
and
THOMAS JONES
(second respondent)

FILE NO/S: SC No 2404 of 2010

DIVISION: Trial Division

PROCEEDING: Application – Injunction and Declaration

DELIVERED ON: 26 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 23 March 2010

JUDGE: Douglas J

ORDER: **The application is dismissed with costs.**

CATCHWORDS: CONTRACTS – BUILDING ENGINEERING AND RELATED CONTRACTS - ADJUDICATION – where the first respondent sent the applicant a payment claim under the *Building and Construction Industry Payments Act 2004* – where the applicant sent an email in response on the same day disputing the amount claimed –whether the applicant’s email constituted a payment schedule under s 18 of the Act

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PERMISSIVE, DIRECTORY AND MANDATORY POWERS – where the first respondent made an application under s 21 of the Act for an adjudication of the dispute, on the basis that no payment schedule had been provided by the applicant – where, if a valid payment schedule was provided by the applicant, the first respondent’s adjudication application was out of time – whether an application made out of time renders adjudication void

Building and Construction Industry Payments Act 2004, s 18(2), s 18(3), s 21(3)(c)(i)

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, followed

Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd [2009] NSWCA 157, followed

Project Blue Sky Inc v ABC (1998) 194 CLR 355, applied
*Minimax Fire Fighting Systems Pty Ltd v Bremore
 Engineering (WA) Pty Ltd* [2007] QSC 333, followed
*Simcorp Developments and Constructions Pty Ltd v Gold
 Coast Titans Property Pty Ltd* [2010] QSC 162, cited
*Surfabear Pty Ltd v JG Drainage & Concrete Construction
 Pty Ltd* [2009] QSC 308, cited
Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd [2010] QSC
 7, distinguished;
Tombleson v Dancorell Constructions Pty Ltd [2007]
 NSWSC 1169, cited

COUNSEL: P G Bickford for the applicant
 S B Whitten for the first respondent

No appearance for the second respondent

SOLICITORS: Quinn & Scattini Lawyers for the applicant
 Mills Oakley Lawyers for the first respondent

- [1] **Douglas J:** The applicant, Gisley Investments Pty Ltd, entered into a relatively informal building contract with the first respondent, Mr Williams in about January 2009. It was a term of the agreement that Mr Williams was entitled to be paid five percent of the construction price of the building and “30% of any saving that you may obtain by ways (sic) of a cheaper quote when employing trades directly to save over a quoted price for similar works.” Mr Gilbert, the sole director of Gisley Investments, explained those words in para 7.2 of his affidavit filed 9 March 2010 by saying that under the contract Mr Williams would be paid “30% of any saving that he would be able to obtain for the construction price. That is, if the actual cost worked out to be cheaper than the quoted price, then he was entitled to 30% of the saving.”
- [2] Mr Williams made a claim for \$127,313.05 on 19 November 2009 which was described on its face as a payment claim under the *Building and Construction Industry Payments Act 2004*. Mr Gilbert, for Gisley Investments, says he sent an email in response on the same day disputing the amount claimed. In his affidavit he says he sent it as a “payment schedule”.¹ That seems surprising given his apparent ignorance of the regime set up under the Act² and his failure to seek legal advice until after he received an adjudicator’s decision in favour of Mr Williams. He was not cross-examined on that statement, however. Mr Williams has since obtained a judgment in reliance on the adjudicator’s decision in his favour.
- [3] This application seeks a declaration that the adjudicator’s decision is void and an injunction restraining Mr Williams from, among other things, taking steps to enforce the judgment obtained in reliance on the decision. The principal issues argued before me were whether the email was a payment schedule for the purposes of the Act and, if it was such a schedule, whether the adjudicator’s decision was void.

¹ Affidavit of Mr Gilbert filed 9 March 2010 at par [21].

² See par 26.

Was the email a payment schedule?

- [4] The first question for me to consider is whether that email was a payment schedule pursuant to s 18 of the Act. The email sent by Mr Gilbert on 19 November 2009 said:

“We do agree that we owe you a final draw for this job however, the job has yet to be finished. Due to the upsetting and threatening conversation I received from you on Tuesday, November 17, my understanding from the outcome of that was that you were blackmailing me. You demanded I pay you, a much larger amount, other than our agreement, in order for you to go ahead with finishing the job.

That was why I sent you the email stating your services were no longer required.

This job should have been completed three months ago. You serving me paperwork, stating I owe you this outrageous amount of money is shocking to say the least.

As we agreed, we were to pay you 5% of the total cost of the job. If you could save money on any part of the project then you would be paid 30% of that savings. For payment of the 30% savings (of which there were none) I gave you a Toyota Hiace 2002 valued at the time at \$12,000. I have asked you repeatedly over the course of the year to get the road worthy certificate so the vehicle could be transferred into your name. You have yet to do that. Although, I still paid for it’s yearly registration and insurance. There have been traffic infringements incurred by you, of which I have paid as well.

We don’t understand why, when we became so close to finishing, you became so desperate.

If you would like to finish the job, I am happy to pay you the remaining outstanding amount owing as per our agreement. But, whilst the job continues to remain unfinished, final payment is not yet owed.”

- [5] Section 18(2) of the Act requires a payment schedule to identify the payment claim to which it relates and to state the amount of the payment, if any, that the respondent proposes to make. Section 18(3) then provides:

“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.”

- [6] Section 18 has been considered by this court in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*³ in these terms:

³ [2007] QSC 333 referred to with approval by Wilson J in *National Vegetation Management Solutions Pty Ltd v Scekar Plant Hire Pty Ltd* [2010] QSC 3 at [14].

“[17] Before considering the first question, I think, it necessary to remember the purpose of the Act because that purpose will influence the approach one takes to the construction of the 14 December email. As Hodgson JA said in *Brodyn Pty Ltd T/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at 440-1:

‘The Act discloses a 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. The payments themselves are only payments on account of a liability that will be finally determined otherwise The procedure contemplates a minimum of opportunity for court involvement’

[18] Mackenzie J noted in *Roadtek, Department of Main Roads v Davenport & Ors* [2006] QSC 47 at para 16:

‘... the Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information Unless the parties extend time, the decision must be given within 10 days of receipt of the respondent’s response or from the time one could have been received. Further, written submissions may be asked for by the adjudicator The adjudicator may call a conference of the parties ... and make an inspection Any conference called must be held informally. Legal representation is excluded The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection.’

[19] In *Brodyn Pty Ltd t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors* [2003] NSWSC 1019 Einstein J referred to the legislation as:

‘... a fast track interim progress payment adjudication vehicle.’

[20] The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description. To constitute a payment schedule the applicant’s email of 14 December had to:

- (i) identify the payment claim to which it related, and
- (ii) state any amount which the recipient of the payment claim proposed to make in response to it.
- (iii) Importantly, if that amount is less than the amount claimed [in] the payment schedule it must state why it is less.

- [21] If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter.”
- [7] The email was criticised for the respondent, Mr Williams, as having failed to identify the payment claim or to state the reasons for withholding payment. In my view, however, and, adopting the approach described by Chesterman J in *Minimax*, the reference to “paperwork, stating I owe you this outrageous amount of money” can only sensibly refer to the payment claim served that day. There was no other document identified with which it could have been confused. The email makes it clear that the respondent proposed to make no payment then, while the job remained unfinished. That expressed a reason for the respondent withholding payment, namely that the job remained unfinished. Was that sufficient for the purposes of s 18(3)?
- [8] Mr Williams’ reasons for arguing that the email was not a payment schedule for the purposes of the Act related to its relative informality and lack of precision in identifying the claim and the reasons for withholding payment. In that context, I was taken to the decision in *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd*⁴. Fryberg J there agreed with the observations of Chesterman J in *Minimax*. In *Tenix*, however, his Honour had to consider a payment schedule that gave a response saying Magaldi would agree to pay Tenix a particular figure provided Tenix agreed to two conditions. Fryberg J pointed out that the response could not be read either as a statement that nothing would be paid or as a statement that the amount would be paid. He concluded that Magaldi had not stated the amount of the payment the respondent proposed to make, contrary to s 18(2)(b) of the Act.
- [9] I agree respectfully with his Honour’s reasoning and the result in that case, but, in my view, one cannot apply a similar approach here. The email says “whilst the job continues to remain unfinished, final payment is not yet owed.” That is, clearly enough, a statement of the amount of any payment proposed to be made then, namely nothing, and the expression of the applicant’s reasons for that approach, namely that final payment was not then owed, in context because the work was said to be unfinished. In spite of the relative informality of the document it is, in my view, a payment schedule.

The validity of the adjudication

- [10] The next question to consider is the validity of the adjudication that followed this exchange of payment plan and schedule on 19 November 2009. Because of the informality of the contract between the parties it did not provide what should happen next. The Act provides, therefore, in s 21(3)(c)(i) that such an application should be made within ten business days after the claimant receives the payment schedule, in this case, by 3 December 2009. Mr Williams did not make such an application until 1 February 2010. He did so on the assumption that the email was not a payment schedule, no doubt because of the criticism levelled at its form on his behalf in this application. Acting on that view, that Gisley Investments had failed to serve a payment schedule and had failed to pay any part of the claimed amount by

⁴ [2010] QSC 7.

the due date for payment⁵, Mr Williams gave notice of his intention to make an adjudication application pursuant to s 21(2)(a) of the Act on 8 January 2010.⁶

- [11] Gisley Investments then had five business days after 8 January 2010 in which to serve a payment schedule but did not do so. Mr Gilbert said he did not do so because he believed he had already served a valid payment schedule. Mr Williams then had ten business days in which to make the adjudication application. He did that on 1 February 2010, within time under the Act, had he been correct in regarding the email as not a valid payment schedule.
- [12] Gisley Investments received the adjudication application on 2 February 2010 but did not respond to it because Mr Gilbert did not believe that his company had to pay any money to Mr Williams, did not know the legal consequences of not lodging a response, was away overseas from 9 February 2010 until 16 February 2010 and did not seek legal advice until after the adjudicator's decision ordering the payment of \$127,313.05 by Gisley Investments to Mr Williams.
- [13] The adjudicator took the same view as I have, that the email was a payment schedule. He also identified the dates of the payment claim, the payment schedule and the adjudication application but did not address the issue now raised here for the first time that, if the email was a payment schedule, then the application before him was made too late and should not have been dealt with by him.
- [14] It may also be relevant that he made a comment about the email with which I agree:⁷

“I am satisfied that the claimant served a payment claim under the Act on the respondent on 19 November 2009. Mr. Gilbert sent an email response to the claimant that same date.

The claimant submits that this email is not a payment schedule because it does not satisfy the basic requirements set out in section 18 of the Act. Specifically, the claimant says that the respondent's email does not satisfy the requirements of section 18(2)(a) and (b) of the Act because it fails to properly identify the payment claims and fails to state the amount that the respondent proposes to pay.

I do not agree with this submission. I am satisfied that the email identifies the payment claim and is a direct response to it, if for no other reason than that it was sent on the same date as the payment claim. As to subsection (b), while the email could have been more clearly expressed, it is tolerably clear to me that the respondent was not proposing to make a progress payment to the claimant until it was satisfied that the work under the construction contract was finished. I am satisfied that the scheduled amount was \$Nil.”

⁵ The due date for payment being 3 December 2009; see s 15(1)(b).

⁶ This was an appropriate date within 20 business days immediately following the due date for payment because of the variation to the meaning of “business day” in schedule 2 of the Act which does not include 27, 28, 29, 30 or 31 December in that definition.

⁷ See the annexures to the affidavit of Mr Gilbert filed 9 March 2010 at p. 632.

- [15] One way of posing the question I now have to face is whether Gisley Investments should be permitted to criticise the validity of the process leading up to the adjudication decision when it seems tolerably clear that Mr Williams' behaviour was dictated by the not unreasonable view that the email was not a valid payment schedule and where Gisley Investments has ignored the later notices given to it designed to encourage it to take part in the adjudication. When asked in that fashion, the question suggests its own answer, particularly when one bears in mind that the declaratory and injunctive relief sought, if available, is still discretionary.
- [16] It is also possible, however, to approach the question as an exercise in statutory construction by asking whether the failure to seek the adjudication earlier, because the email should have been regarded as a payment schedule, makes the later application, premised on the absence of a valid payment schedule, invalid. To use the language in *Project Blue Sky Inc v ABC*⁸ was it a purpose of the legislation that an act done in breach of s 21(3)(c)(i) should be invalid?
- [17] There are statements in this court, including ones by me, to the effect that "failure to adhere strictly to the statutory regime has been held to preclude reliance on the special statutory rights available under the Act."⁹ That does not mean, however, that an adjudicated decision should, necessarily, be treated as invalid. As McMurdo J said in *Nebmas Pty Limited v Sub Divide Pty Ltd*¹⁰:

"[20] In *Brodyn*, Hodgson JA listed five 'basic and essential requirements' for a valid determination, which he compared with certain 'more detailed requirements' of the legislation which were not essential. However, this particular requirement, that which is within s 21(2) of the Queensland statute, was not referred to in either category. Hodgson JA noted that his list of the basic and essential requirements might not have been exhaustive. Hodgson JA said:

"The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

⁸ (1998) 194 CLR 355, 390 at [93].

⁹ See the cases collected in *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162 at [26] fn 4.

¹⁰ [2009] QSC 92 at [20] –[25] footnote omitted.

In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination.’

[21] Neither *Multipower* nor *JAR Developments Pty Ltd* concerned the effect of a failure to give the notice required by the New South Wales equivalent of s 21(2). In each case the question was whether the making of the adjudication application out of time had the result that the adjudication was void. In the latter case, Rein AJ distinguished *Kell & Rigby* on the basis that the failure to meet a time limit imposed by the Act was established ‘at the adjudication’. In the present case, as discussed, the adjudicator decided that the notice was within time.

[22] In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*, Basten JA discussed the effect of non-compliance with the equivalent of s 17 of the Act, which refers to payment claims. He held that it was not possible to construe the equivalent of s 17(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims but that it did not follow that the court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements. Basten JA said:

‘44. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker’s opinion in that regard: see *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is ‘the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact’: *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 72 (Spigelman CJ).

45 In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well

require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.

46 In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in *Brodyn*, should be understood as giving effect to these principles.

47 It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], was to the following effect:

‘If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide. Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that it must be undertaken in good faith, but that is not a sufficient condition of validity.’

[23] Much of that reasoning applies to the present question. This requirement of s 21(2) ‘relates to a procedural step in the claim process, rather than some external criterion’. And the overall purpose of this legislation would appear to be better served by permitting an adjudicator to decide what will usually be the factual question of whether the required step has been taken. In some cases (although not in the present one) that factual issue might involve the use of the adjudicator’s specialist knowledge.

[24] As that judgment makes clear, the conclusion in *Kell & Rigby*, that the requirement for a notice under s 21(2) is mandatory, does not answer the present question, which is whether the adjudication is void where the adjudicator has decided, albeit wrongly, that there had been compliance with that provision. The judgment of Hodgson JA in *Brodyn* indicates that this requirement for a notice under s 21(2) is not an essential requirement, in the sense that it was an essential precondition of the existence of an adjudicator’s determination. With regard to the purpose of this legislation, there is no reason why this requirement within s 21(2) should be an essential requirement although, for example, the time limit within s 21(3) should not be essential: cf *Project Blue Sky Inc v Australian*

Broadcasting Authority. Of course s 21(2) provides that an adjudication application ‘can not be made’ unless there is such a notice and these precise words are not replicated in s 21(3). Nevertheless, s 21(3) provides that an adjudication application ‘must be made’ within the times there set out. In each case the words are ‘emphatic’, and in my view there is no basis for distinguishing between the two provisions on the basis of this difference in words.

[25] Accordingly, the fact, as I have found, that there was non-compliance with s 21(2) does not have the result for which the present applicant contends. The declaratory relief which it seeks must be refused. It also follows that the interlocutory injunction restraining the first respondent from filing the adjudicator’s certificate should be discharged.”

- [18] Here, although the adjudication decision should have been made pursuant to an earlier notice, Mr Williams’ failure to give such a notice seems to have been caused by the imprecision of Gisley Investments’ own email in failing to identify itself as a payment schedule explicitly on its face. The consequence of the delay was that Gisley Investments had a further opportunity to provide a payment schedule and a later notification of the adjudication application that it decided to ignore. In either case, the real objects of the Act of providing notice of the claim and an opportunity to respond by provision of a schedule and by appearing before the adjudicator have been met and there is no good reason why the adjudicator’s decision should be treated as a nullity.
- [19] In my view, there has been a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and one which was reasonably capable of reference to the power with no substantial denial of the measure of natural justice the Act requires to be given.¹¹ It is also relevant that this particular question was not addressed before the adjudicator as Gisley Investments chose not to make submissions to him.¹²

Section 31(4) of the Act

- [20] There was also some debate before me about the effect of s 31(4) of the Act and as to whether these were proceedings to have the judgment obtained in reliance on the adjudication certificate set aside. If this application were properly characterised as an application to have the judgment set aside then the section would require the applicant to pay into court as security the unpaid portion of the adjudicated amount pending the final decision in the proceedings. The judgment obtained is in the District Court and would require separate proceedings to have it set aside in that Court, which the parties appeared to recognise.
- [21] Martin J has treated an application similar to this one in *Surfabear Pty Ltd v JG Drainage & Concrete Construction Pty Ltd*¹³ as not one to have the judgment set aside. Submissions were made by the respondent seeking to distinguish that

¹¹ See *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, 442 at [55].

¹² See *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 at [62], [107] referring to the situation that applies if the question is addressed before an adjudicator as compared to when it is not.

¹³ [2009] QSC 308.

decision, partly in reliance on *Tombleson v Dancorell Constructions Pty Ltd*¹⁴. Because I shall refuse the application for declaratory and injunctive relief, however, there is no need for me to resolve this issue.

Orders

[22] Accordingly, the application is dismissed with costs.

¹⁴ [2007] NSWSC 1169 at [19] and [25].