

SUPREME COURT OF QUEENSLAND

CITATION: *Thiess Pty Ltd and John Holland Pty Ltd v Civil Works Australia Pty Ltd & Ors* [2010] QSC 187

PARTIES: **THIESS PTY LTD AND JOHN HOLLAND PTY LTD
T/AS THIESS JOHN HOLLAND
ABN 17 438 477 568**
(applicant)
v
**CIVIL WORKS AUSTRALIA PTY LTD
ACN 51 130 654 161**
(first respondent)
and
ADJUDICATE TODAY PTY LTD
(second respondent)
and
PHILIP DAVENPORT
(third respondent)

FILE NO: BS 12229 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 1 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 28 January 2010

JUDGE: Daubney J

ORDER: **1. The originating application will be dismissed.**
2. I will hear the parties as to the orders necessary to perfect this judgment.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NATURE OF HEARING – OPPORTUNITY TO PRESENT CASE – where decision made by adjudicator under the *Building and Construction Industry Payments Act 2004* – where the first respondent wrote a letter to the adjudicator outside the relevant timeframe – where the applicant also wrote a letter contending that the adjudicator was precluded from considering the first respondents letter because it was provided outside the relevant timeframe – where the applicant claims that it should have been given an opportunity to respond to the letter – where the adjudicator expressly disregarded the first respondents letter – whether

this constituted a failure on the part of adjudicator to afford the applicant natural justice

ADMINISTRATIVE LAW – JUDICIAL REVIEW –
 GROUNDS OF REVIEW – RELEVANT
 CONSIDERATIONS – where decision made by adjudicator under the *Building and Construction Industry Payments Act 2004* – where the applicant referred to a number of clauses in the contract in its adjudication response – where these clauses of the contract were not referred to in the payment schedule – whether the adjudicator should have considered these clauses and their effect in making his decision

Building and Construction Industry Payments Act 2004
 (Qld), s 18, s 21, s 24, s 26

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

The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd [2005]
 NSWCA 142, applied

COUNSEL: PJ Hay for the applicant
 D Logan for the first respondent
 No appearance for the second and third respondents

SOLICITORS: Holding Redlich for the applicant
 Budd & Piper for the first respondent
 No appearance for the second and third respondents

- [1] In April 2009, the applicant (“TJH”) and the first respondent (“CWA”) entered into a construction contract for the performance of certain excavation works by CWA. TJH terminated the contract in July 2009. The termination was based on CWA’s alleged failure to provide a subcontractor’s program or to comply with such a program.
- [2] On 15 September 2009, CWA served on TJH a payment claim under Part 3 of the *Building and Construction Industry Payments Act 2004* (“BCIPA”). Leaving aside amounts subsequently not in issue, that claim was for some \$1,367,860 (inclusive of GST), in broad terms for the following:
- (a) Measured contract works in the sum of \$281,550 (exclusive of GST);
 - (b) Variation works in the sum of \$70,655 (exclusive of GST);
 - (c) Day work variation claims of \$891,304 (exclusive of GST).
- [3] On 28 September 2009, TJH served a payment schedule under s 18 of the *BCIPA* which asserted, inter alia, an entitlement on the part of TJH to withhold monies from payment, leading to the “scheduled amount” in the payment schedule allowing for no payment to CWA. As the scheduled amount was less than the amount

claimed by CWA in the payment claim, CWA was entitled, under s 21 of the *BCIPA*, to apply for adjudication of the payment claim. It did so. The matter was referred to the third respondent as an “authorised nominating authority” under the *BCIPA*, and the fourth respondent was appointed adjudicator. TJH (which was, of course, the respondent before the adjudicator) provided its “adjudication response” under s 26 of the *BCIPA* on 21 October 2009.

- [4] On 26 October 2009, the fourth respondent made his adjudication decision. That decision, in short, was that TJH pay CWA the sum of \$1,367,860 (inclusive of GST) by 20 October 2009.
- [5] On 2 November 2009, the applicant filed an originating application seeking, inter alia, the following relief:

“1 Pursuant to section 128 of the *Supreme Court Act* 1995, or alternatively the inherent jurisdiction of the Supreme Court, a declaration that the decision of the Third Respondent, registered adjudicator number (J1057876), dated 26 October 2009, delivered 27 October 2009, and issued pursuant to the provisions of the *Building and Construction Industry Payments Act* (the **Act**), in respect of a dispute between the Applicant and the First Respondent (the **Adjudication Decision**), is void or liable to be set aside on the following grounds:

- (a) in breach of section 42(1) of the *Queensland Building Services Authority Act* (Qld) 1991 (the **QBSA Act**), the First Respondent did not hold the correct building license (Piling and anchors license) whilst undertaking at least some of the work the subject of the claim. Accordingly, pursuant to section 42(3) of the **QBSA Act**, the Claimant is not entitled to a progress claim or to issue a payment claim pursuant to the Act for the entire sum claimed or, in the alternative, that part for which the Claimant did not hold the correct building licence;
- (b) the Third Respondent denied the Applicant natural justice by failing to consider submissions duly made in respect of the First Respondent’s failure to hold the necessary building licence;
- (c) by proceeding in the manner set out above, the Third Respondent failed to take into account matters it was required to under sections 26(2)(a), 26(2)(b) and 26(2)(d) of the Act;
- (d) the Third Respondent denied the Applicant natural justice by failing to consider issues raised by the Applicant in its payment schedule and adjudication response;
- (e) the Third respondent denied the Applicant natural justice by considering unsolicited submissions made by the First Respondent in relation to licensing; and
- (f) by proceeding in the manner set out above in paragraph 1(e), the Third Respondent took into account a matter that fell outside s. 26(2) of the Act.

- 2 An order that the Adjudication Decision of the Third Respondent delivered 27 October 2009 be set aside;
- 3 In the alternative of order 2 hereof, that the Adjudication Decision of the Third Respondent delivered 27 October 2009 be permanently stayed;”
- [6] On 3 November 2009, on an urgent application made in that regard, Applegarth J ordered that the adjudication decision be stayed until further order, and also ordered the applicant to pay \$1,382,512 into Court by 6 November 2009. That money was subsequently paid into Court.
- [7] The final hearing of the originating application came before me. At that hearing, counsel for TJH abandoned the relief claimed in paragraphs 1(a) and 1(b) of the originating application “insofar as they relate to CWA’s failure to hold a licence under the *Queensland Building Services Authority Act (Qld) 1991*”.
- [8] Despite abandoning these bases for the declaratory relief sought, TJH persisted with an argument which sought to invoke a failure on the part of the adjudicator to give TJH natural justice. That failure was said to arise in the following way.
- [9] In his decision, the adjudicator said:
- “47] At [34] in the adjudication response the respondent contends that the claimant did not hold the appropriate licence required under s.42 of the QBSA Act. At [46] the respondent says that the consequence is that the claimant is not entitled to any progress claim under the Act. Since this was not a reason raised in the payment schedule, the respondent is precluded from now relying upon it. See s.24(4) of the Act.
- 48] In an unsolicited letter to me dated 22/10/09 the claimant contends that QBSA Regulation 2003 Part 2 provides that both parties do not need to be licensed. On the same date the respondent’s solicitors wrote to me contending that under s.26(2) of the Act I am precluded from considering the claimant’s letter because it has been provided outside the timeframe for the claimant to lodge its adjudication application. The respondent says:
- Accordingly, the submission ought be disregarded by the adjudicator.
- 49] As requested by the respondent, I will disregard the claimant’s letter of 22/10/09. However, I would be denying the claimant natural justice if, without giving the claimant a reasonable opportunity to address the arguments of the respondent, I was to decide that the claimant was required by the QBSA Act to hold a licence, that the claimant did not hold the appropriate licence and that, consequently, the claimant was not entitled to make the payment claim.”

- [10] TJH submitted before me that, even though the adjudicator said, in terms, that he would disregard CWA's letter of 22 October 2009, nevertheless the adjudicator failed to give TJH the "right to respond" to the letter. To be clear, this alleged failure by the adjudicator occurred after TJH had expressly submitted to him that he was precluded from considering CWA's letter and the adjudicator accepted that submission and expressly stated that he disregarded CWA's letter. And in any event, the subject matter of CWA's letter of 22 October 2009 is now completely moot in light of TJH's abandonment of the relief sought in paragraphs 1(a) and 1(b) of the originating application. In other words, TJH sought to contend that it had been denied natural justice because the adjudicator did not hear it on a matter which it successfully objected to the adjudicator hearing, on a proposition which the applicant has now abandoned. To state TJH's argument in this way demonstrates that it is bereft of merit. In any event, counsel for TJH conceded before me that the adjudicator's decision was not tainted or infected by his (supposed) failure in this regard. TJH therefore fails on this contention that it was somehow denied natural justice.
- [11] The alternative argument put on behalf of TJH was to the following effect. In its adjudication response, TJH referred specifically to a number of clauses in the contract: in paragraph 105 and following of its adjudication response, TJH invoked clauses 2.1, 2.10, 7.1.2 and 7.2 of the contract to support a submission to the adjudicator that CWA had "assumed all risk in relation to the equipment and ground conditions"; in paragraph 125 of the adjudication response, TJH invoked clause 8.3.5 of the contract to contend that, insofar as CWA was proceeding with its claim as a claim for delay, CWA had not complied with the notice obligations under the contract and was now time-barred pursuant to that clause of the contract.
- [12] It was not in issue before me that not only were these clauses of the contract not referred to in TJH's payment schedule, the propositions which it sought to advance by reference to those clauses in the contract were not referred to in the payment schedule.
- [13] The "general reason" given in the payment schedule for TJH withholding money was stated as follows:

"The amount of the Payment Claim is less than the amount claimed because TJH is entitled to withhold monies from the Subcontractor. Without in any way limiting the generality of the foregoing, see **Schedule 1** for further reasons as to why the amount of the Payment Claim is less than the amount claimed."

The "specific reason" stated in Annexure 1 to the payment schedule was:

"Claim is generally outside of the contract, and certain quantities and rates are yet to be verified. Discussions with the Subcontractor in this regard are continuing. Monies are withheld (not rejected) while this process continues."

[14] Despite the fact that neither the specific clauses nor the general propositions advanced in the adjudication response were contained in the payment schedule, TJH submitted before me that these clauses, although not raised by TJH in its payment schedule, could properly be raised by TJH and considered by the adjudicator pursuant to s 26(2)(b) of the *BCIPA*. TJH submits that the adjudicator should have, but did not, consider these clauses and their effect, and accordingly fell into jurisdictional error in making his decision.

[15] Before looking at the terms of the legislation, I note that the adjudicator did have the following to say about TJH's adjudication response. At [21], he said:

“The respondent does not say how many grounds [reasons] the respondent relies upon for withholding payment. In the respondent's 160 paragraphs [21 pages] of submissions in the adjudication response I can see at least 15 additional grounds that were not included in the payment schedule. There are even more grounds included in the statutory declarations included in the adjudication response.”

[16] Towards the end of his adjudication decision, the adjudicator said:

“63] A claimant cannot respond in the adjudication application to allegations raised for the first time in the adjudication response. I would be denying the claimant natural justice if I was to decide the amount of the progress payment on the basis of the respondent's allegations of defective work, breach of contract, unreasonable and inflated amounts, assumption of risk and set off raised for the first time in the adjudication response.

64] I have dealt with most if not all of the additional reasons which the respondent has raised for the first time in the adjudication response. In the submissions in the adjudication response and the three statutory declarations included in the response, the respondent makes allegations which are or are intended to support reasons which the respondent is not entitled to raise. It is not a simple matter to distinguish reasons for withholding payment from allegations in support of reasons. I am satisfied that any reasons or allegations in support of reasons which allegations or reasons I have not expressly canvassed are irrelevant for the purpose of deciding the issues which I am required to decide. It would unnecessarily increase the cost of this adjudication if I were to further canvass the multitude of allegations made or relied upon by the respondent.”

[17] Section 24 of the *BCIPA* regulates the provision and content of adjudication responses. It provides:

“24 Adjudication responses

(1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the *adjudication response*) at any time within the later of the following to end -

(a) 5 business days after receiving a copy of the application;

- (b) 2 business days after receiving notice of an adjudicator's acceptance of the application.
- (2) The adjudication response -
 - (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) may contain the submissions relevant to the response the respondent chooses to include.
 - (3) The respondent may give the adjudication response to the adjudicator only if the respondent has served a payment schedule on the claimant within the time specified in section 18(4)(b) or 21(2)(b).
 - (4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.
 - (5) A copy of the adjudication response must be served on the claimant."

[18] Despite the patent prohibition in s 24(4) on TJH including in its adjudication response reasons for withholding payment which had not been included in the payment schedule served on CWA, TJH submitted that the adjudicator should nevertheless have had regard to the contractual provisions to which it referred because of the operation of s 26(2) of the *BCIPA*. Section 26 provides:

"26 Adjudicator's decision

- (1) An adjudicator is to decide -
 - (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the *adjudicated amount*); and
 - (b) the date on which any amount became or becomes payable; and
 - (c) the rate of interest payable on any amount.
- (2) In deciding an adjudication application, the adjudicator is to consider the following matters only -
 - (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
 - (b) the provisions of the construction contract from which the application arose;

- (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
 - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's decision must -
- (a) be in writing; and
 - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision."

[19] TJH's argument was that s 26(2)(b) required the adjudicator to have regard to the provisions of the construction contract, and specifically clauses 2, 7 and 8. TJH, indeed, submitted that s 26(2)(b) "required" the adjudicator to consider the provisions of the construction contract, regardless of the stage of the adjudication process at which they are raised. TJH relied in that regard on the judgment of the New South Wales Court of Appeal in *The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142. The Minister in that case had entered into a contract with Contrax for certain building works to be carried out by Contrax at a public hospital. On 5 June 2004, Contrax submitted a payment claim under the *Building & Construction Industry Security of Payment Act 1999* (NSW), which is in similar terms to the *BCIPA*, seeking payment of some \$2,622,645. The Minister issued a payment schedule under the Act indicating that the amount proposed to be paid in respect of the progress claim was nil. The reasons cited in the payment schedule included reasons based on certain specified clauses of the contract. Contrax referred the matter to adjudication. In its adjudication application, Contrax asserted that it was entitled to payment despite the particular terms of the contract invoked by the Minister because each of those specified clauses was rendered void by s 34 of the Act (the "no contracting out" provision similar to s 99 of the *BCIPA*). The adjudicator issued a determination under the Act determining the amount to be paid by the Minister to Contrax as some \$1,500,000. The Minister then applied to the Supreme Court of New South Wales seeking orders quashing the adjudicator's decision. That application was dismissed at first instance, and the Minister appealed.

[20] Against that general background, Hodgson JA outlined the proceedings which had taken place before the adjudicator as follows:

"ADJUDICATOR'S DETERMINATION

23 In his payment schedule, the Minister had contended that Contrax was not entitled to additional moneys unless certain contractual preconditions

were satisfied, including, in the case of additional costs, agreement as to the amount of such costs or determination under Cl.46 of the amount of such costs.

24 Contrax asserted in its adjudication application that s.34 of the Act rendered parts of the contract void, so that it was entitled to a progress payment in respect of additional costs notwithstanding non-fulfilment of certain conditions precedent to entitlement to payment of such costs specified by the contract.

25 In its adjudication response, the Minister submitted that Contrax was not entitled to raise s.34 in its adjudication application, because s.34 had not been raised in its payment claim; and in support of that submission the Minister referred to *John Holland Pty Limited v. Cardno MBK (NSW) Pty Limited* [2004] NSWSC 258.

26 The adjudicator, in his reasons, said he excluded from his consideration the submission of the Minister based on *John Holland*, because of s.20(2B) of the Act, and he concluded that s.34 rendered void certain provisions of the contract because of the cumulative effect of the definition of contract price and the provisions of cls.42.1, 42.2 and 46. On that basis, he arrived at the adjudicator's amount indicated above."

- [21] In the Supreme Court at first instance, the Minister contended, amongst other things, that the adjudicator had erred by basing the determination on a matter raised for the first time by Contrax in its adjudication application. This was said to be contrary to the principles enunciated in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258. Hodgson JA noted:

"29 In relation to the Minister's reliance on *John Holland*, the primary judge expressed the view that this case was authority for the proposition that where a claimant did not provide sufficient details in its payment claim to enable a respondent to verify or reject the claim, these missing details could not be included in the adjudication application. The reliance by Contrax on s.34, raised for the first time in its adjudication application, did not mean that its adjudication application raised details or materials that were outside its payment claim: it merely amounted to submissions to answer an argument raised by the Minister in his payment schedule. Accordingly, the primary judge rejected this contention of the Minister."

- [22] After identifying the numerous grounds of appeal relied on by the Minister, Hodgson JA dealt with the so-called *John Holland* point as follows:

“WHAT CAN THE ADJUDICATOR CONSIDER?”

33 The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s.34, when that matter had not been raised in its payment claim. This contention relied on *John Holland*, and also on a suggested anomaly arising from the prohibition in s.20(2B) on a respondent relying on reasons not included in its payment schedule.

34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration *under that paragraph*, reasons included in the adjudication response that were not included in the payment schedule.

35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).

36 Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s.34, when considering matters under paragraphs (a) and (b), even if that contention could not be taken into account under paragraph (c).

37 However, I agree with the primary judge that the circumstance that s.34 was not mentioned in the payment claim, and was mentioned for the first time in the adjudication application, does not have the consequence that it cannot be considered under paragraph (c) of s.22(2). I agree with the primary judge that this is not an addition to the payment claim or a departure from it that could be affected by the considerations given weight to in *John Holland*.²³

[23] That case was, however, quite different from the present. In that case, the circumstances which gave rise to consideration of the “no contracting out” section of the New South Wales legislation were not circumstances which were not otherwise before the adjudicator; on the contrary, they were the very circumstances on which the *Contrax* claim was based. In the present case, however, neither the submission that CWA had assumed all risk, with the corresponding references to clauses 2 and 7, nor the submission about the delay claim being time-barred, with reference to clause 8, were circumstances or arose out of matters which were otherwise before the adjudicator. They were new and independent assertions made for the first time only in the adjudication response. Accordingly, even if s 26(2) of the *BCIPA* had the same generously broad interpretation given to it as its cognate section was by the New South Wales Court of Appeal in the *Contrax* case, it would still not have provided authority in the present case for the adjudicator to have regard to the contractual provisions to which TJH referred. Accordingly, I consider that the adjudicator committed no error by not considering those clauses, and I would therefore reject the submission that the adjudication decision is void for jurisdictional error on the part of the adjudicator.

- [24] Rejection of these arguments advanced by TJH means necessarily that the originating application will be dismissed. It also necessarily follows that the stay of the adjudicator's decision, ordered on 3 November 2009, should now be lifted, and the monies paid into Court, together with accretions, should be paid out to CWA. There is also no reason, so far as I can see, why costs should not follow the event.
- [25] I will hear the parties as to the orders necessary to perfect this judgment.