SUPREME COURT OF QUEENSLAND

CITATION:	*Northside Projects P/L v Trad & Anor* [2009] QSC 264
PARTIES:	**NORTHSIDE PROJECTS PTY LTD ACN 105 629 589** (applicant) **v** **MICHAEL MOHAMMAD TRAD** (first respondent) **ANDREW BRUCE WALLACE** (second respondent)
FILE NO/S:	1176 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2009
JUDGE:	Martin J
ORDER:	**IT IS DECLARED THAT THE ADJUDICATION DECISION ISSUED BY ANDREW WALLACE DATED 17 DECEMBER 2008 IN RESPECT OF ADJUDICATION APPLICATION NUMBER 1057877_777 MADE BY MICHAEL TRAD AGAINST NORTHSIDE PROJECTS PTY LTD IS VOID.**
CATCHWORDS:	BUILDING AND ENGINEERING CONTRACTS – ADJUDICATION – Where the first respondent issued two identical payment claims with the same reference date – Where the applicant issued payment schedules in respect of both payment claims – Where the second identical claim was referred to an adjudicator - Where the applicant challenged the validity of the payment claim – Where the adjudicator held the payment claim was valid – Whether the second identical payment claim was valid for the purposes of the Building and Construction Industry Payments Act 2004 (Qld) — Authorities and principles discussed – Whether the adjudicator erred in interpreting cases – Whether adjudicator had jurisdiction to determine dispute. *Building and Construction Industry Payments Act* 2004 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006]

NSWSC 1
Doolan v Rubikcon (Qld) Pty Ltd [2008] 2 Qd R 117
Impulse Electrical (Aust) Pty Ltd v Mother Natures Chermside Pty Ltd [2007] QDC 23

COUNSEL: R A Holt SC and E Longbottom for the applicant
M P Van der Walt for the first respondent

SOLICITORS: McCullough Robertson Lawyers for the applicant
Haisam Farache Lawyers for the first respondent

[1] The applicant ("Northside") seeks a declaration that the adjudication decision ("the adjudication") by the second respondent ("the adjudicator") of 17 December 2008 in favour of the first respondent ("Trad") is void.

[2] Northside argues its application on the following basis:

(a) the adjudicator did not perform the task required by the *Building and Construction Industry Payments Act* 2004 ("BCIPA") in that he did not make his determination having regard to the requirements and provisions of BCIPA as interpreted by the Supreme Court of Queensland; and

(b) there was no bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of BCIPA and reasonably capable of reference to this power; and

(c) the payment claim served by Trad was not capable of founding the jurisdiction of the adjudicator.

Background

[3] In July 2007 Northside and Trad entered into a contract ("the contract") under which Trad was to provide building works in respect of a residential unit development at Cooee Bay.

[4] Trad served a number of payment claims upon Northside. The first and second payment claims are not relevant to this application.

[5] On 26 June 2008, Trad served a payment claim ("the third payment claim") in the amount of $346,500 on Northside. Northside issued a payment schedule in response to the third payment claim.

[6] On 3 October 2008, Trad served another payment claim ("the fourth payment claim") on Northside. The fourth payment claim was in the amount of $346,500 and carried the same reference date as the third payment claim. Northside issued a payment schedule in respect to the fourth payment claim.

[7] On 31 October 2008, Trad referred the fourth payment claim to adjudication pursuant to the BCIPA.

[8] In its adjudication response of 19 November 2008, Northside raised, among other things, a jurisdictional issue, namely, whether the service of two identical payment claims for a single reference date meant that the claim relied on by Trad (that is, the fourth payment claim) was invalid.

[9] On 3 December 2008, the adjudicator asked Northside and Trad to provide submissions on the following matters in relation to the effect of the identical payment claims:

(a) the relevance of the decisions in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*[1]and *Impulse Electrical (Aust) Pty Ltd v Mother Natures Chermside Pty Ltd*[2] (a decision of the District Court which followed *Brookhollow*); and

(b) how those decisions might have impacted (sic) on the decision of Fryberg J in *Doolan v Rubikcon (Qld) Pty Ltd*[3].

[10] Both Northside and Trad provided submissions in response to that request.

[11] On 22 January 2009, the adjudication decision was released to Northside and Trad.

[12] In that decision, the adjudicator found that the third and fourth payment claims were in all respects identical and held that, had Fryberg J been aware of the decisions in *Impulse Electrical* and *Brookhollow*, he would not have come to the conclusion he did in *Rubikcon.* The adjudicator went on to hold that the fact that a subsequent payment claim involves the same scope of works and claims and the same amount of money as a previously served payment claim does not constitute a valid reason for withholding payment.

[13] The adjudicator said:

> "*Identical Payment Claims*
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> 22. In my view, there is no doubt that the Payment Claim served on the Respondent on 3 October 2008 is in all respects identical to that served on 26 June 2008. It is identical in the scope of works performed and identical in the monies claimed.
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> 23. The Respondent argues that because the Payment Claim is identical to the payment claim dated 26 June 2008, it is void. The Respondent relies upon the decision of Fryberg J in *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC 168.
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> 24. In *Rubikcon*, Fryberg J agreed with Hodgson JA's reasoning in *Brodyn* at paras [63] and [64]. However he said at pages 12 to 13:

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1 [2006] NSWSC 1
2 [2007] QDC 23
3 [2008] 2 Qd R 117

'However it is in my judgment reasonably clear that his Honour in saying that successive payment claims do not necessarily have to be in respect of additional work was not saying that successive payment claims may be identical. That is because payment claims may include not only work but claims for goods and services and also claims for liability under s 33(3). His Honours (sic) point was that the mere fact that work had ceased did not mean that new claims in respect of new reference dates could not arise. That, in fact, seems to have been what happened in that case.

The various claims were not identical. There is, therefore, in a situation such as that scope to apply both sub-s (5) and sub-s (6) of s 17. Such a construction is, in my judgment, also consonant with s 12 of the Act. That section relates each reference date to an entitlement to a progress payment.

This construction accords with the text of *s* 17(6) which permits a previous claim to be included in a later one. It seems to me that there is a one to one relationship between the claim made and the reference date on which it is made.

…Subsection 17(6) permits also the inclusion of an amount which has been the subject of a previous claim but that does not mean that a previous claim can be the sole item included in the later claim.

No case has been cited to me where such a claim was permitted. To allow it seems to me to fly in the face of the words of ss 12 and 17.' (Emphasis added).

25. One wonders whether His Honour would have reached a different conclusion if he was aware of the decision in *Impulse Electrical (Aust) Pty Ltd v Mother Natures Chermside Pty Ltd* [2007] QDC 023 per Forde DCJ at [10]. In *Impulse Electrical*, His Honour referred to the New South Wales Supreme Court decision of *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 per Palmer J. In *Brookhollow* 'R&R, had issued Claim No 8 and subsequently issued Claim No. 9. The latter covered the same work as Claim No 8. No further work was performed after Claim No 8 was made. *Brookhollow* did not serve a payment schedule in relation to Claim No 9 in accordance with the relevant provision of New South Wales legislation, s 14(4). …It was argued in *Brookhollow* that Claim No 9 was a second payment claim in respect of the same reference date, and so as Claim No 8 related to the same reference date, Claim No 9 was prohibited by *s* 13(5) of the relevant provision which is s 17(5) in Queensland. A similar argument was adopted in the present case. What was said

by Palmer J. was that the payment claim, that is Progress Claim 2, does not need to demonstrate whether it is prohibited by s 17(4) or (5). That is, all that is required is that s 17(2) has been complied with.'

26. Both the Claimant and the Respondent in their further submissions argued that the decisions in *Brookhollow* and *Impulse Electrical* would not have impacted upon Fryberg J's decision in *Rubikcon*. Both parties have dismissed the importance of the decision in *Impulse Electrical*, as a decision of an inferior court and the Respondent submits that *Brookhollow* was not binding on Fryberg J. Both submissions are of course correct, but in my view they unmeritoriously downplay the significance that they would have had upon His Honour's decision, had he been aware of them. Of course, neither the parties nor I, will ever know whether they would have impacted upon His Honour's decision, but the point is, that His Honour appeared to be labouring under the misapprehension that there were no authorities on this point.

27. The Respondent in its further submissions attempted to distinguish *Impulse Electrical* and *Brookhollow* from the factual circumstances at hand. It argued that both cases 'entertain the possibility that, had the respondent been put in a position to challenge the validity of an identical payment claim, the payment claim may have been found invalid.'

28. I reject the Respondent's submissions. If the payment claims in both *Brookhollow* and *Impulse Electrical* were identical to those issued previously, then, provided the Respondent's submissions are correct, this would represent a jurisdictional issue which would invalidate the payment claims. The presence of a valid payment claim is the second of the five basic and essential requirements of a valid adjudication according to Hodgson JA in *Brodyn*. It would therefore be irrelevant whether the respondents in those cases had not issued payment schedules. If the payment claims were identical, and both Palmer J and Forde DCJ were of the view that identical payment claims result in invalidity, then they would have had no other option but to declare them void.

29. It follows in my view from *Brookhollow* and *Impulse* that the issue of 'identical payment claims' is not of such a fundamental nature as Fryberg J considered it to be. I appreciate that the decision of Forde DCJ is not binding on Fryberg J, nor for that matter is the decision in Brookhollow. But both cases lead me to the conclusion, with the greatest respect, that *Rubikcon* should have been decided differently had Fryberg J been made aware of them. In my

> respectful opinion, it is too great a leap to suggest that the reference to the term 'including' in *s* 17(6) should be construed as invalidating a subsequent payment claim that involves the same scope of works and claims the same amount of money as a previously served payment claim. This is not a valid reason for withholding payment."

[14] Northside criticises the adjudicator for the manner in which he approached the task of determining the question of the validity of the fourth payment claim. It was put that, in determining the validity of that claim, he disregarded sections 12 and 17 of the BCIPA as they had been interpreted by Fryberg J.

[15] The adjudicator approached the issue in a curious way. He sought to divine what Fryberg J might have done had he been aware of the decisions in *Brookhollow* and *Impulse Electrical*. Ordinarily, an adjudicator should interpret the provisions of this Act in a manner consistent with relevant decisions of this Court.

[16] In this case the adjudicator thought he was facing the problem of a single judge in this State and a single judge from another jurisdiction arriving at different answers to the same question. He was not. In *Rubikcon,* Fryberg J had before him a case in which the amount of a final claim had been claimed twice. It had first been claimed in a document dated 15 November 2006 which became the subject of a failed adjudication. The adjudicator treated it as a nullity because the timing of Rubikcon's notice was outside the period contemplated by the Act. On 16 February 2007 Rubikcon issued another tax invoice. Apart from the date it was identical to the first invoice.

[17] It was argued before Fryberg J that, under s 17(5) of the BCIPA, while a claimant cannot serve more than one payment claim in relation to each reference date, it can, on multiple reference dates, make the same payment claim. This argument was dismissed by Fryberg J. He considered the reasons in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [4] and, with respect to the reasons of Hodgson JA, agreed with the passage at [63] and [64] of that decision:

> [64] In my opinion, as submitted by Mr Fisher for Dasein, this view is supported by s 13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s 13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s 27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s 13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.
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> [65] There is a possible point of distinction between the present case and Holdmark, in that in Holdmark it was common ground that the contract was at an end, whereas in the present case Dasein

[4] (2004) 61 NSWLR 421

> did not concede this. However, in circumstances where the document provided by Dasein on 27 June 2003 referred to its "final claim", it seems strongly arguable that, if Brodyn was not entitled to terminate, Dasein did by this document accept the repudiation that the purported termination would in these circumstances constitute. In any event, in my opinion Holdmark was wrongly decided, and it is not necessary to distinguish it.

[18] Justice Fryberg concluded that, as the second claim was identical to the first and related to the same reference date, it was not capable of founding the jurisdiction of the adjudicator and, therefore, the order made by him was invalid.

[19] In this case, the adjudicator took the view that *Brookhollow* reached a different conclusion. That was an error. The decision in *Brookhollow* was with respect to a different question. In that case, R & R served a payment claim upon Brookhollow on 2 December 2003 for work up until 31 August 2003. No proceedings were brought to enforce that claim. Later, R & R served Brookhollow with a second payment claim on 9 November 2004. The work for which that payment was claimed was the same as that in the earlier claim and it was upon the second claim that the adjudicator determined that the whole of the amount claimed was payable. In that case, Palmer J considered whether or not the payment claim, on its face, complied with the requirements of s 13(2) of the New South Wales legislation (the cognate provision of s 17(2) of BCIPA). He then considered the question of whether or not such a claim needed to demonstrate, on its face, that it was not barred by a reason under s 13(4) [s 17(4) of the BCIPA] or s 13(5) [s 17(5) of the BCIPA]. He likened the payment claim to a statement of claim in which a party needs to set out the facts essential to demonstrate a cause of action. That, he said, will be satisfied if the equivalent of s 17(2) of BCIPA is satisfied. His Honour went on to say that in order for a party to be able to rely upon the fact that the claim is a second claim for the identical work for the same reference date, it would need to raise that in a payment schedule. In the case before him, there was no payment schedule. This decision was the subject of a note in (2006) 18(3) ACLB 30. The authors of that note described the effect of the decision in a way with which I respectfully agree:

> "A payment claim which on its face, purports reasonably to comply with the requirements of s 13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act and, if the respondent wishes to object that the claim does not in fact comply so that it is a nullity for the purposes of the Act, the respondent must serve a payment schedule and an adjudication response in which that objection is taken. Furthermore, it was for the respondent to decide which defences to raise, and if a defence based on s 13(4) is not raised, then that defence may not be relied upon to restrain enforcement of the adjudication determination. Finally, under s 22(2) of the Act, the adjudicator is not required to play 'devil's advocate' on behalf of the absent respondent. The adjudicator is required only to address, in good faith, such issues arising from the need to conform with the provisions of the Act and of the contract as they appear on the face of the payment claim.

[20] Rather than *Brookhollow* being contrary to the decision in *Rubikcon*, Palmer J expressly recognised that the recipient of a payment claim which was rendered contrary to the provisions of s 17(5) could argue that it was invalid and could not ground the necessary jurisdiction for an adjudication. He held that, in order to mount such an argument, the failure to comply with either s 17(5) or s 17(6) would need to be set out in a payment schedule delivered in accordance with the requirements of the Act.

[21] In the adjudication before this adjudicator, the validity of the fourth payment claim was specifically raised in its payment schedule and in its adjudication response.

[22] In Schedule 2 of the BCIPA, payment claim is defined as "a claim referred to in section 17". Sub-section (2) sets out what a payment claim must include. Sub-section (3) sets out what the claimed amount may include. Sub-section (4) tells the claimant when a payment claim may be served. Sub-section (5) provides that not more than one payment claim in relation to each reference date may be served by a claimant. As s 17(5) only allows for the service of one payment claim in relation to each reference date, anything else which is purportedly served in relation to the same reference date cannot be a "payment claim" within the meaning of the BCIPA.

[23] An adjudicator faced with an objection as to validity must determine whether or not the payment claim before him or her is a payment claim within the meaning of the Act. In this case the adjudicator did address the correct question but misunderstood the decisions to which he referred and came to the wrong conclusion. That is an error which goes to the heart of his capacity to make an adjudication. Without a valid payment claim there is nothing upon which an adjudication can take place. In this case, there was no such valid payment claim and the adjudicator should not have proceeded.

[24] Northside Projects seeks a declaration that the decision by the adjudicator is void. It is appropriate that I make that declaration. The other grounds advanced by Northside need not be considered.

Orders

[25] It is declared that the adjudication decision issued by Andrew Wallace dated 17 December 2008 in respect of adjudication application number 1057877_777 made by Michael Trad against Northside Projects Pty Ltd is void. I will hear the parties on costs.