SUPREME COURT OF QUEENSLAND

CITATION:	*Roadtek, Department of Main Roads v Philip Davenport and Ors* [2006] QSC 047
PARTIES:	**ROADTEK, DEPARTMENT OF MAIN ROADS (applicant)** **v** **PHILIP DAVENPORT (first respondent)** **and** **WHITSUNDAY CRUSHERS PTY LIMITED ABN 86 456 328 (second respondent)**
FILE NO:	BS 9682 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 March 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2006
JUDGE:	Mackenzie J
ORDER:	**1. The application is dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – where review sought of decision made by adjudicator under *Building and Construction Industry Payment Act* 2004 – where dispute over supply of road material to the applicant – where applicant took delivery of goods – where applicant claimed defects in goods delivered – where defects disputed by second respondent – where contract contained clauses relating to fitness for purpose of goods – where adjudicator made no findings with regard to compliance of materials – whether adjudicator erred in finding that property in the materials had not passed to the applicant – whether adjudicator's decision was an improper exercise of power stemming from failure to consider that the material was no the property of the applicant *Judicial Review Act* 1991 (Qld) *Building and Construction Industry Payment Act* 2004 (Qld) *Brodyn Pty Limited t/as Time Cost and Quality v Philip*

Davenport and Ors [2003] NSWSC 1019, cited

COUNSEL: M Hinson SC for the applicant
M D Ambrose for the respondent

SOLICITORS: Crown Law for the applicant
Clarke & Kann for the respondent

[1] **MACKENZIE J:** This is an application for a statutory order of review under the *Judicial Review Act* 1991 in relation to a decision under s 26 of the *Building & Construction Industry Payment Act* 2004. The hearing proceeded on the acceptance by both parties that the decision of the adjudicator was an administrative decision to which the Act applied. The adjudicator in accordance with accepted practice took no part in the application. The second respondent appeared to resist the application.

[2] There are two grounds relied on. The first is that the decision involved an error of law in that property in the materials with regard to which the challenged adjudication had been made had not passed to the applicant. The second is that the making of the decision was an improper exercise of power stemming from failure to consider that the material was not the property of the applicant.

[3] The essential history of the proceedings starts with the issuing of an invitation for offers to supply goods to the applicant. Amongst other things, road material described as "sub type 2.2 @ 2% below OMC" was sought. It was common ground that this was within the category of "related goods and services" within the meaning of s 11 of the Act, which is relevant to adjudications under the Act.

[4] In the General Conditions of Supply which formed part of the contract entered into, clause 14 provided that, in the event of the supplier supplying goods that did not comply with the requirements of the specification, the principal was permitted to purchase the goods from other sources. Clause 15 provided that, in the event of any failure by the supplier to comply with the provisions of the agreement or arrangement, the principal was permitted to arrange for the supply and delivery of the relevant goods from an alternative source. Any additional expenses incurred as a result thereof would be a debt due and recoverable from the supplier. These two provisions may overlap. Clause 14 is concerned with the buyer's right to source supplies elsewhere if the goods are not to specification. Clause 15 is concerned with a more general buyer's right where there is non-compliance with the contract.

[5] Clause 19 provided that all goods must be as described in the invitation and fit for the purpose stated in the specifications. If that condition was not complied with, the goods might be rejected and the principal might by written notice to the supplier terminate the agreement. If goods were rejected, the principal might return the goods to the supplier or direct the supplier in writing to collect the goods. It further provided that the principal would have no obligation to pay the supplier any money in respect of the order, whether for the goods, for delivery, for return of the goods or otherwise. Clause 19 therefore requires goods to comply with the invitation and be fit for the purpose intended. It gives a right to terminate the contract. What is envisaged is a right to return the defective goods to the supplier and relieving the buyer of the obligation to pay. The terms of the clause provide for rejection of the goods, but such rejection alone does not terminate the contract. The right to return the goods and not having to pay for them while keeping the contract on foot, and the

right to do that and terminate the contract are alternative rights. It says nothing express about the passing of property;

[6] Clause 6 provided that payment was conditional upon the principal receiving from the supplier an invoice and any necessary supporting documentation. Payment would be made 28 days after receipt of such documents by the principal or at such time that the parties might agree in writing. Its purpose is to establish the documentation to be provided by the supplier as a basis for payment and the time when payment is to be made. It is not concerned with the passing of property; passing of property in goods supplied and evidence needed to obtain payment are two different things.

[7] Three deliveries of material purporting to be of the description in the contract were made on 14, 18 and 19 July 2005. On 21 July 2005, after use of the material had begun and problems had been encountered, the applicant advised the second respondent that tests had shown that the material was unacceptable. On 26 July 2005, the second respondent took issue with the allegation. On 28 July 2005, the applicant gave written notice under clause 13 of the General Conditions of Supply of a dispute. Two other things should be noted about this letter. The first is that it did not expressly terminate the contract. The second is that it said that "the material was accepted in good faith by us based on the compliance tests submitted" (by the second respondent), and that subsequent testing carried out for the applicant identified that the material did not meet specifications. This will be referred to later in connection with the applicant's principal submission that property did not pass to the applicant.

[8] According to a document prepared by the applicant in connection with the claim, non-conforming material already laid was removed from 27 July 2005 to 3 August 2005. Subsequently, correspondence ensued about removal of the material by the second respondent and liability for the expense that would be incurred in doing so. The material was taken away on 16 and 17 September 2005, but according to the second respondent there were about 668 tonnes less removed than delivered. Payment of almost $11,000 was requesting for that amount pending resolution of the dispute with respect to the remainder.

[9] The applicant's "claim for non-compliance with contract" document summarised why the applicant concluded that the material did not meet the specifications. It also commented critically on the second respondent's claim that the applicant's storage procedures had caused deterioration in the quality of the material.

[10] The following passage from the adjudication summarises the issue raised:

> "It is common ground that the claimant supplied 4,155.70 tonnes of type 2.2 base material to the respondent's stockpile between 14 and 19 July 2005. In the adjudication response, the respondent says, 'Roadtek agrees that the Subtype 2.2 materials were delivered as described by WSC with the quality as indicated by WSC's (Roadtest) test reports'. Delivery of further material was suspended by the respondent when the respondent discovered problems in the placing of the material. The essence of the dispute is that the claimant claims that when delivered to the respondent's stockpile the material conformed to the requirements of the contract. The respondent disputes this. It is not disputed that had the materials conformed to

> the requirements of the Contract, the value would have been $67,322 plus GST."

[11] In the next paragraph of the adjudication, the adjudicator makes the finding that is attacked by the applicant. It is as follows:

> "It appears to me that the construction contract was written and included the respondent's General Conditions of Supply. Those conditions do not appear to address the question of when materials supplied become the property of the respondent or who owns materials removed by the claimant on the direction of the respondent. It appears to me that materials supplied become the property of the respondent when they are delivered by the claimant to the respondent. I don't think it can be said that the materials placed by the claimant in the respondent's stockpile remain the property of the claimant until the claimant is paid.
>
> Consequently, it appears to me that the respondent became the owner of the 4,155.70 tonnes delivered to the respondent's stockpile between 14 and 19 July 2005."

[12] The critical issue of law, according to the applicant, is exposed in those passages. It may also be noted in passing that, as was understandable and orthodox, the adjudicator said he was unable to resolve the question whether the material was in fact defective, given the differing test results relied on by the parties. He said:

> "Since the respondent contends that the material delivered was defective, the claimant has the onus of satisfying me that the material delivered was not defective. I note the contentions of the parties with respect to test reports and the validity thereof. In the absence of further evidence or cross examination, I am unable to be satisfied that the respective reports prove the respective contentions of the parties. I am not satisfied that the material provided was not defective … ."

[13] If onus is relevant in the kind of inquiry he was carrying out, the second respondent was applicant before him and had included in its material testing results in support of compliance with the specifications. To say it had the onus of proving positively that there had been compliance seems unduly favourable to the respondent in those proceedings, the present applicant. In any event, it is plain enough that the crux of what he was saying was that he could not resolve the issue of compliance or non-compliance on the papers. The converse that the present applicant had not proven that the material was non-compliant was equally true.

[14] The time at which the property passed became important to the applicant's argument because, under s 14(3), the only material that may be included in the valuation of goods under s 14 is that that has become or, on payment, will become the property of the party or other person for whom the construction work is being carried out. If property does not fit that description the goods are not to be included in the valuation. There is a finding, however, that property passed on delivery. While the adjudicator does not elaborate on the reason for this, it does not seem consistent with the terms in which the reasons are couched that it was argued that, by operation of the rules in the *Sale of Goods Act* 1896, the goods were unascertained goods, and acceptance by the buyer became a relevant factor. In this

context, it will be recalled that the letter of 28 July 2006 spoke of acceptance in reliance of certain test results provided by the second respondent. If it is to be said that that is equivocal and that there had been no acceptance, it is indicative of the factual issues that remain unresolved and why, perhaps, the adjudicator found as he did. At the least, if, as appears from the terms of the adjudication, it may have been argued that the property passed only on payment, having regard to clause 6 of the General Conditions of Supply, it may be doubted whether it has that effect.

[15] There is nothing in the written material that I can find that expressly raises the precise point relied on by the respondent in a timely way. According to s 24(4), the respondent cannot 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. Because of my view of the nature of the proceedings, expanded on in the following paragraphs, the reason why such a restriction is imposed, requiring grounds for non-payment to be stated explicitly at an early stage of proceedings, is clear. The reason why points not raised then in a way that clearly identify them as a discrete reason for non-payment cannot be subsequently raised, is inherent in the nature of the process. Given the peremptory nature of the adjudication process, a pedantic approach to the sufficiency of expression of reasons for non-payment is inappropriate. Nevertheless, reasons that are clearly not raised should subsequently be excluded from consideration. Nor, in principle, should it be permissible to raise, in judicial review proceedings, an issue of law affecting the value of the claim which could have been raised in the way contemplated by the Act, but was not, even if the adjudicator is arguably wrong. I say that as a general proposition, not necessarily with reference to the challenged decision.

[16] Part 3 Division 2 of the Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information (s 21(3) – especially s 21(3)(f); s 24(2)(c)). Section 25 provides that 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 (s 25(4)(a)). The adjudicator may call a conference of the parties (s 25(4)(c)) and make an inspection of any matter to which the claim relates (s 25(4)(d)). Any conference called must be held informally. Legal representation is excluded (s 25(5)). The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection.

[17] In *Brodyn Pty Limited t/as Time Cost and Quality v Davenport* [2003] NSW SC 1019, Einstein J summarised the nature of the process in the similar New South Wales legislation in the following paragraph:

> "What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. The vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator …… and in particular by …… denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the

> case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution *critically* does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That claw back route expressly includes the making of restitution orders."

[18] Two other matters should be noted. The first is that under s 31(1) the adjudicator's certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction. Section 31(4) refers to "proceedings to have the judgment set aside" and what is within the scope of such an application. In particular, no counterclaim can be brought against the claimant; no defence in relation to matters arising under the contract can be raised; and the adjudicator's decision cannot be challenged. The reference to setting the judgment aside and the limitation on what can be raised in such proceedings makes the challenge dependent on the existence of grounds for setting aside a judgment other than those enumerated.

[19] The second matter is one adverted to in *Brodyn.* It is that s 100 of the Act provides that nothing in Part 3 affects the right that any party to the construction contract that they may have under the contract or may have to progress payments, or may have apart from the Act, in relation to anything done or omitted to be done under the Act. Further, nothing done under or for Part 3 affects any civil proceedings arising under the construction contract, except that the court must make allowance for any amount paid to a party under Part 3 and may make orders for restitution of any amount so paid, having regard to the courts decision. It may be that the present case is replete with issues that can be definitively resolved in proceedings in a court of competent jurisdiction. If that process is availed of, any moneys ultimately found not to be due, despite the finding in the adjudication, can be the subject of adjustment in those proceedings.

[20] In this matter, the adjudicator seems to have accepted, as would be essential with a jurisdictional fact, that property had passed, at the time of delivery. He at least had the statement in the letter of 28 July 2005 that the goods had been accepted on the basis of the test reports supplied by the supplier, which were later disputed. It cannot therefore be said that there was no basis for a finding, in the kind of proceeding he was obliged to conduct under the Act, that the goods were amenable to an adjudication. The case is one where there are a number of unresolved factual issues. There is potential for them to be relevant in the event that the independent right to litigate, preserved by s 100, is exercised. The most fundamental of them is probably whether the materials met the specifications or not. If they did not, Clause 19 would presumably operate, irrespective of whether property had passed or not. The question whether there had been a sufficient act of acceptance of the material would probably not be of great consequence.

[21] To argue, in those circumstances, that the adjudicator erred in law in finding that property had passed on delivery and should have taken a different view of what was essentially a jurisdictional fact under s 14(3) where the issue of compliance with the

specifications that was crucial to the applicant's argument could not be resolved by him because of conflicting evidence, cannot succeed. The same may be said of the related second ground. The application is dismissed with costs.