SUPREME COURT OF QUEENSLAND

CITATION:	*David & Gai Spankie & Northern Investment Holdings Pty Limited v James Trowse Constructions Pty Limited & Ors* [2010] QSC 29
PARTIES:	**DAVID & GAI SPANKIE & NORTHERN INVESTMENT HOLDINGS PTY LIMITED** Applicants **V** **JAMES TROWSE CONSTRUCTIONS PTY LIMITED** First Respondent **ADJUDICATE TODAY PTY LIMITED** Second Respondent **THOMAS USHER** Third Respondent
FILE NO/S:	BS 8209 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2009
JUDGE:	McMurdo J
ORDER:	**The originating application is dismissed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where errors in the allowance of a progress claim by an adjudicator – whether adjudication void for want of good faith or failure to accord natural justice *Building and Construction Industry Payments Act* 2004 (Qld) *Queensland Building Services Authority Act* 1991 (Qld), s 13, s 26, s 29(2), s 67J, s 99 *Brodyn Pty Ltd t/as Time Cost & Quality v Davenport &*

Anor (2004) 61 NSWLR 421

John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205

Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor [2009] QSC 165

Queensland Bulk Water Supply Authority t/a Seqwater v McDonald Keen Group Pty Ltd (in liq) & Anor [2010] QCA 007

Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam (2003) 195 ALR 502

COUNSEL: Mr M Ambrose for the applicants

Mr D Kelly SC and Mr G Handran for the first respondent

SOLICITORS: Holding Redlich for the applicants

Hemming & Hart Lawyers for the first respondent

[1] This is a challenge to the validity of an adjudication under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act").

[2] The first respondent contracted to perform works at the Homestead Tavern at Boondal for the applicants, who were described in the contract as "the Principal". On 2 June 2009 the first respondent served a payment claim in an amount of $1,426,156.75. The applicants served a payment schedule according to which nothing was payable. The first respondent applied for an adjudication and the third respondent was appointed by the second respondent to be the adjudicator.

[3] By a decision dated 23 July 2009, the adjudicator upheld the progress claim to the extent that the applicants should pay the sum of $883,615.02. The date upon which that payment was to be made was expressed unusually. The due date for payment was specified in the adjudicator's decision as follows:

> "24 June 2009 subject to the Claimant's compliance with the provisions of Clause 38.1 of the Contract on or prior to that date. After 24 June 2009, the due date for payment will arise upon the Claimant's compliance with the provisions of Clause 38.1 of the Contract."

[4] The applicants now accept that the first respondent has complied with cl 38.1 of the contract so that if the decision was valid, the adjudicated amount became payable. An adjudication certificate was issued on 11 August 2009, according to which the due date for payment was 7 August 2009. With the inclusion of amounts for interest and the adjudicator's fees, the total amount owing according to the certificate was $910,601.17. On 11 August 2009 judgment was entered for the first respondent in that sum. On 9 September 2009 it was ordered that the applicants pay that sum into court and that the enforcement of the judgment be stayed pending the determination of these proceedings.

The contract

[5] Before going to the applicants' arguments, it is convenient to discuss the relevant provisions of the contract. The parties adopted, with several amendments, the conditions of contract in the form of AS4000-1997.

[6] Clause 37 provided for payment of progress claims and the final payment. Progress claims were the subject of cl 37.1 which it is necessary to set out in full:

> "**37.1 Progress claims**
>
> The *Contractor* shall claim payment progressively in accordance with *Item 28*.
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> Each progress claim shall be given in writing to the *Superintendent* and shall include details of the value of *WUC* done and may include details of other moneys then due to the *Contractor* pursuant to the provisions of the *Contract*. The progress claim shall annex a statutory declaration from the *Contractor* confirming that the requirements of clause 32 have been met by the *Contractor* and any declaration required by a subcontractor in accordance with the requirements of subclause 9.2.
>
> The *Contractor* shall, as a precondition to payment of any *progress claim* and the *final payment claim*, give to the *Superintendent* and the *Principal* a declaration in the form of Annexure Part D executed by a person authorised to do so on behalf of the *Contractor*, declaring that the *Contractor's* employees, workers, subcontractors and suppliers who at any time have been employed by the *Contractor* on *WUC* have at the date of the claim been paid all money due and payable to them in respect of their employment of *WUC*. If the declaration is not provided or is false, the *Principal* is entitled to withhold payment in full until a true declaration is provided. It is also a precondition to payment of any *progress claim* and the *final payment claim*, to annexe any required declaration in the form of Annexure Part F executed by a person authorised to do so on behalf of the subcontractor in accordance with the requirements of subclause 9.2."

[7] Item 28, within the Schedule to those conditions, was completed so that relevantly it was as follows:

"Times for progress claims	28th day of each month for WUC [work under the contract] done to the end of that month"

[8] Clause 38 concerned the payment of workers and subcontractors. It included these provisions:

> "**38.1 Workers and subcontractors**

The *Contractor* acknowledges that any labour docket signed by either the *Principal*, the *Principal's Representative*, the *Superintendent* or the *Superintendent's Representative*, does not constitute an approval for a *variation*, or that the day labour costs contained therein are approved. The *Contractor* acknowledges that the signing off is merely the acknowledgement of receipt of the document as a record of hours worked and materials used and that assessment and approval is subject to the terms of the *Contract.*

The *Contractor* shall give in respect of a progress claim, and as a precondition to payment, documentary evidence of the payment of moneys due and payable to:

a) workers of the *Contractor* and of the subcontractors; and

b) subcontractors,

in respect of *WUC* the subject of that claim.

If the *Contractor* is unable to give such documentary evidence, the *Contractor* shall give other documentary evidence of the moneys so due and payable to workers and subcontractors.

Documentary evidence, except where the *Contract* otherwise provides, shall be to the *Superintendent's* satisfaction.

38.2 Withholding payment

Subject to the next paragraph, the *Principal* may withhold moneys certified due and payable in respect of the progress claim until the *Contractor* complies with subclause 38.1.

The *Principal* shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to subclause 38.1 as due and payable to workers and subcontractors."

[9] Clause 45.2(a) provided that for the purposes of the Act, the "reference date" in respect of this contract would be:

> "… the date referred to in *Item 28* and subclause 37.1 for the making of progress claims provided that the *Contractor* has submitted a progress claim in accordance with subclause 37.1 and provided the *Superintendent* with the information and other things required by subclause 19.2, 37.1 and 37.4 and this clause …"

[10] Clause 20 required the applicants as the Principal to ensure that at all times there was a Superintendent and to endeavour to ensure that the Superintendent fulfilled "all aspects of the role and functions reasonably and in good faith".

[11] Clause 5 required the first respondent to provide security for its performance as specified in the schedule, which required the provision of an unconditional bank guarantee as to 2.5 per cent of the contract sum and a "cash retention" as to a further 2.5 per cent. Clause 5.2 provided that the applicants might have recourse to that security:

> "…
>
> (a) where an amount due to [the applicants] under the *Contract* or otherwise remains unpaid after the time for payment; and
>
> (b) in respect of any claim for payment (liquidated or otherwise) that party may have against the other under the *Contract* or otherwise,
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> on the giving of written notice to the other party."

As the adjudicator discussed, the first respondent provided two bank guarantees totalling $204,800, and that amount was demanded by the applicants who gave notice, as required by cl 5.2 and also s 67J of the *Queensland Building Services Authority Act* 1991 (Qld). The amount demanded was paid to the applicants on 26 May 2009.

[12] Clause 32 contained a number of provisions concerning the programming of the works. In particular it required provision of a construction program by the Contractor and from time to time certain reports and updated programs. It also required the Contractor to adhere to the construction program.

The applicants' grounds

[13] The applicants seek to have the adjudicator's decision declared void and the judgment set aside upon effectively three grounds. The first is that he did not undertake the adjudication in good faith. For that argument, the applicants suggest that there were certain errors in his reasoning which could not be consistent with a bona fide attempt to adjudicate according to the Act and to the contract.

[14] One of those alleged errors is in relation to monies paid under the bank guarantees. The adjudicator decided that they had been wrongfully demanded so that credit should be given in favour of the first respondent, by adding them to the amount of the progress payment. The applicants argue that this also gives rise to the second ground, which is that the adjudicator decided a question for which he had no power. It is said that he was to decide only the value of that work which had been performed under the contract for which the first respondent had not been paid.

[15] Thirdly, it is argued that there was a breach of the requirements of natural justice because of the way in which the adjudicator decided a certain question, without giving the applicants an opportunity to make submissions about it.

Good faith

[16] In *Brodyn Pty Ltd v Davenport*[1], Hodgson JA (with whom Mason P and Giles JA agreed) held that an adjudicator's determination under the equivalent statute in

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1 (2004) 61 NSWLR 421 at 441.

New South Wales has certain basic and essential requirements for its validity, such as the existence of a contract to which the Act applies. Hodgson JA said further that in assessing whether a purported determination by an adjudicator is void, the court should not ask whether there was a jurisdictional or non-jurisdictional error but rather whether the adjudicator failed to observe a requirement which was intended by the legislature to be an essential pre-condition of the existence of an adjudicator's determination.[2]

[17] He then discussed the necessity for the exercise of good faith (and the provision of natural justice) as follows:[3]

> "What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."

[18] As Applegarth J recently discussed in *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors,* this reasoning has been adopted in several cases in Queensland.[4]

[19] In *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor*[5], P Lyons J rejected a submission that to be valid, an adjudicator's decision must also be reasonable.[6] In his view, the statement of Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72 at [87] that "a reasonable but erroneous decision by the adjudicator does not invalidate the decision" is not authority for the proposition that reasonableness is required. In the view of P Lyons J, it may be correct to say that a decision which displays "an extreme degree of unreasonableness" in a *Wednesbury* sense would not be a decision for the purposes of s 26 of the Act. In the present matter, counsel for the applicants did not argue that there was any requirement of reasonableness. At times during his oral argument, counsel referred to the unreasonable conclusions of the adjudicator. But he made it clear that this was submitted as a basis for inferring a

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2 (2004) 61 NSWLR 421 at 441.
3 (2004) 61 NSWLR 421 at 442.
4 [2009] QSC 205 at [20]-[21].
5 [2009] QSC 165.
6 [2009] QSC 165 at [27]-[33].

lack of good faith, in the sense of the absence of a genuine attempt to decide the questions according to the Act and the contract.

[20] In the same case, P Lyons J compared what was described as the broad test for good faith with the stricter approach argued there by the respondent. Under the broad test, what was required was a genuine attempt to exercise the power, and specifically in relation to a consideration of the contract, a genuine attempt to understand and apply that contract.[7] Under the approach argued by that respondent, an absence of good faith would be established only by a conscious and wilful disregard of the adjudicator's statutory duty. Under this approach mere recklessness in the exercise of the power might not be sufficient.[8] His Honour found it unnecessary to resolve that debate although he favoured the former approach.[9] In dismissing an appeal against this judgment, Holmes JA preferred the latter approach.[10] In the present matter, the same argument was not made for this respondent. It is common ground here that the applicants must establish no more than that the adjudicator did not make a genuine attempt to apply the Act and to understand and apply the contract. I go then to the alleged errors of the adjudicator, which are said to demonstrate the absence of good faith in that sense.

The reference date

[21] Section 12 of the Act provides that from each reference date under a construction contract, there is an entitlement to a progress payment. The term "reference date" is defined within Schedule 2 of the Act as follows:

> "(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
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> (b) if the contract does not provide for the matter –
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> (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later named month."

[22] I have set out the relevant parts of cl 45.2(a) and Item 28 of the Schedule to the contract. The applicants' argument was as follows. Clause 45.2 contains a proviso that the Contractor must have submitted its progress claim according to cl 37.1. That clause, which is set out above, required the Contractor to provide various statutory declarations with its progress claim. They included a declaration in the terms of Part D of the Annexure. It was and is common ground that this reference to Annexure Part D was a typographical error, and that it should be read as a reference to Annexure Part E. The declaration in Part E was to be made by the Contractor. It was to be to the effect that all employees, workers, subcontractors,

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7 [2009] QSC 165 at [33].
8 [2009] QSC 165 at [64]-[65].
9 [2009] QSC 165 at [75].
10 [2010] QCA 007 at [51].

etc had been paid in full up to the date of the submission of the claim. Clause 37.1 also required a declaration from the Contractor that the requirements of cl 32 had been met.

[23] The adjudicator found that the first respondent had complied with the requirement to give a declaration in the form of Part E. But it was common ground that it had not provided a declaration as to its compliance with cl 32. The applicants' argument was that the proviso in cl 45.2(a) had not been satisfied, so that the "reference date" was not according to that in Item 28.

[24] The adjudicator accepted the argument then made for the first respondent, that if the contract had imposed this requirement for provision of declarations under cl 37.1 as a condition to making a progress claim, it would have had the effect of excluding, modifying, restricting or otherwise changing the effect of the Act so that it would be void pursuant to s 99. However, the adjudicator appears to have considered that the Contractor's failure to provide a declaration as to cl 32 did not make the claim ineffective, so that s 99 was not engaged. But in his view this failure did affect the reference date. His ultimate reasoning was as follows:

> "I am satisfied that the reference date of the present Payment Claim is to be calculated with regard to Item 28 of Annexure Part A and Clause 37.1 of the Contract. Because by its own admission the Claimant has not complied with the requirements of Clause 37.1, I am of the opinion that the reference date cannot be calculated under the terms of the Contract. Instead it is to be calculated pursuant to Schedule 2 of the Act as "*the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract*". It would mean that the reference date of the present Payment Claim is 31 May 2009. Therefore, the Respondent's submission on the matter of the reference date must fail."

That reasoning is fairly open to criticism. As the applicants submit, what the adjudicator has done is to identify a date as the relevant date according to the contract, identify a condition precedent to payment (the provision of the declaration under cl 32) and then to conclude that because that condition was unfulfilled, no reference date under the contract could be calculated.

[25] However, I am not persuaded that this reasoning could have been the result only of the lack of a genuine attempt to exercise the adjudicator's power in accordance with the Act. Whilst the reasoning might not have been correct, what the adjudicator has written demonstrates that he was attempting to decide the question.

Payment of subcontractors

[26] It is convenient to consider together what the applicants submitted constituted the so called second and third errors of the adjudicator. These relate to the declaration required in the form of Annexure Part E. As I have said, the first respondent provided such a declaration. However, the present applicants' provided the adjudicator with evidence from some subcontractors that they were each owed in excess of $100,000. This evidence thereby called into question the truth of the Contractor's statutory declaration (that all subcontractors had been paid).

According to cl 37.1, if a declaration was provided but was false, the Principal was entitled to withhold payment in full until a true declaration was provided.

[27] The adjudicator identified the conflict between these declarations. He then wrote:

> "While I am required pursuant to s 26(2) of the Act to consider the provisions of the construction contract from which the Adjudication Application arose, there is nothing in the Act that would require me to investigate, whether some or all of the Claimant's declarations and the Statutory Declarations provided by the Respondent are false or what weight, if any, I should give to them."

[28] The adjudicator reasoned that the provision of a *true* statutory declaration in the form of Annexure Part E was not an essential requirement of a valid *claim*. His apparent view was that the provision of such a statutory declaration, true or false, would suffice for that purpose.

[29] Then he turned to the argument that the first respondent had failed to comply with the preconditions as to payment within cl 38 of the contract. The first respondent had submitted to the adjudicator that there was an inconsistency between the requirements of clauses 37 and 38, insofar as evidence of the payment to subcontractors was concerned, such that in some way neither condition could be relied upon. It had alternatively submitted to the adjudicator that cl 38 was void by reason of s 99 of the Act, as placing a precondition to the right to a progress payment not found in the Act and with the potential to unfairly delay the receipt of a progress payment. The adjudicator rejected each of those arguments.

[30] But he then returned to the argument that a false statutory declaration in the form of Annexure Part E did not suffice for cl 37.1 of the contract, and wrote this:

> "Having carefully analysed Clause 37.1 of the Contract, I am of the opinion that in order to meet a precondition to payment in respect of a declaration in the form of Annexure Part E, the Claimant is required to
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> (i) actually provide such a declaration and
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> (ii) provide a declaration, which is not false.
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> I have previously expressed a view that there is nothing in the Act that would require me to investigate whether or not some or all of the declarations and Statutory Declarations provided by the parties on this matter are false. On that basis I accept that the claimant has met the preconditions to payment in regard to Clause 37."

This was immediately followed by this passage:

> "In summary, the Claimant has not satisfied me that it met the precondition for payment required of Clause 38.1 of the Contract. The Respondent is therefore entitled to withhold payment in respect of the present Payment Claim until those requirements are met by the Claimant."

This explains the way in which the adjudicator specified, or purported to specify, the due date for payment, which was that it would be upon the claimant's compliance with cl 38.1.

[31] In all of this, it is said that the adjudicator made two errors which are irreconcilable with a genuine attempt to decide the claim according to the Act and to the contract. The first was his failure to decide the factual question of the truth or otherwise of the respondent's statutory declaration that all subcontractors had been paid. The second was his conclusion that any requirement for a true declaration had been satisfied, upon the apparent reasoning that this could be assumed.

[32] Certainly in that latter respect, his reasoning was erroneous. However, I am not persuaded that it was so flawed as to warrant the inference that this was not a bona fide attempt to genuinely exercise the power under the Act. Rather it is equally consistent with a misunderstanding of the terms of the contract.

[33] Ultimately, the adjudicator was conscious of the requirement that all subcontractors be paid before the Contractor received a progress payment. That is why he specified the due date for payment according to the Contractor's compliance with cl 38.1. In the apparent view of the adjudicator, the securing of payments to subcontractors was what mattered, rather than the truth or otherwise of a statutory declaration made at the time of presentation of the claim.

[34] I also accept the argument for the applicants that the adjudicator should have decided, as best he could within the time constraints upon him, whether the statutory declaration provided by the Contractor was false. But the absence of an investigation of that factual question did not have the result that he failed to genuinely decide what the Act required. What he was required to decide according to s 26(1), was the amount of the progress payment (if any), the date on which any amount became or would become payable and the rate of interest payable on any amount. There was no argument here to the effect that the adjudicator failed to decide the date on which the progress payment would become payable, by his making the payment contingent upon compliance with cl 38. Without the benefit of argument, I will not offer a view as to that point except to note that it would be affected by s 29(2), which provides that if the adjudicator decides "a later date under section 26(1)(b)", then the respondent must pay the amount to the claimant on or before that date. Section 29(2) could be seen to provide some indication that under s 26(1)(b), the adjudicator must specify a certain date, rather than making that date ascertainable by the occurrence of future events.

[35] But that point aside, the adjudicator has decided each of the three matters required of him by s 26(1). His reasoning can be criticised, but that is not to say that there was not a genuine attempt to apply the Act to the contract and the facts.

[36] The adjudicator's reasons emphasised the importance of ensuring that:

> "the claimant's workers and subcontractors are paid the monies due and payable, which is vital for achieving the required rate of progress of the works and the required quality of the works."

But in his ultimate opinion, under this contract the Contractor would be entitled to a progress payment once there was compliance with cl 38.1, by the furnishing of documentary evidence, to the satisfaction of the Superintendent, of the payment of monies due and payable to workers and subcontractors. That was not a curious way

for the contact to operate, or plainly inconsistent with the broader intentions of the parties. Errors in his construction of the contract before arriving at this result do not suggest that he acted other than in good faith.

The bank guarantee

[37] The claim included an allowance for the monies which had been paid to the present applicants under the guarantees. This was claimed by deducting the monies which had been paid under the guarantees from the progress payments already made. At page 13 of his reasons, the adjudicator observed that by comparing the amounts paid to date in the present claim ($3,434,718.99 excluding GST), and in the then present progress certificate ($3,639,550.81 excluding GST), it appeared that the amount of $204,800 (as the money paid under the guarantees) was being pursued.

[38] In section 10 of his reasons, the adjudicator rejected an argument that the inclusion of this component affected the validity of the entire claim. He there wrote:

> "Whether or not a claim for the refund of security is a claim for construction work is irrelevant for as long as the other items of the Payment Claim can be said to be claims for construction work carried out under the Contract. This clearly is the case in respect of the present Payment Claim, in which the Claimant is claiming for construction work carried out under the Contract and for variations."

[39] In section 14 of his reasons, the adjudicator returned to the subject of the bank guarantees. Referring to other parts of his decision, he said that if the present applicants had suffered any "damages" (for any breach by the Contractor) he was unable to assess the extent of those damages. He said that in some way it followed that the applicants had not been entitled to draw upon the bank guarantees. And he added that in any case, cl 5.2(b) of the contract "could be construed to be a penalty clause".

[40] He concluded as follows:

> "While I am satisfied that the Respondent was not entitled to cash the bank guarantee, the question remains as to how to reinstate the bank guarantee as Contract Security. It would seem that an appropriate approach may be to add the amount of the bank guarantee to the progress payment due. Thereafter, in compliance with the Contract, the Claimant will be required to reinstate the bank guarantee.
>
> Based on the above analysis, I am satisfied that the Claimant is entitled to have the bank guarantee in the amount of $204,800, which was cashed by the Respondent, included in the calculation of a progress payment due."

[41] As is argued for the applicants, the adjudicator was confined to the task of deciding the matters prescribed by s 26(1). Relevantly for this question, he was confined to deciding the amount of the progress payment consistently with s 13 of the Act, which requires the amount of a progress payment to be in the amount calculated under the contract or, if the contract does not provide for that amount, the amount calculated upon the basis of the value of construction work carried out or undertaken to be carried out under the contract. Under this contract, the amount of the progress payment is to be according to cl 37.1, which meant that it was to be

according to "the value of WUC done" and also "other moneys then due to the Contractor pursuant to the provisions of the Contract." The amounts paid under the guarantees did not go to the value of the construction work which had been carried out. Nor in my view were they the monies then due to the Contractor pursuant to the provisions of the contract.

[42] The adjudicator did not identify any provision of the contract which was said to be relevant to the recovery of these monies. More probably than not, the adjudicator was not alert to the distinction between a *contractual* entitlement to the payment of these monies and an entitlement having some other legal basis. But that is not to say that the adjudicator was conscious that he was including within this progress claim something not as described in cl 37.1 of the contract. It appears that his error was in misinterpreting the contract insofar as it provided for the calculation of the amount of a progress payment. Ultimately I am unpersuaded that this error, whether considered alone or with the other matters discussed, proves that this decision was not the result of a genuine attempt to understand and apply the contract according to the Act.

Conclusions on good faith ground

[43] The first ground, which is that this was not a decision reached in all respects in good faith, is not established. The ground is not established by reference to the adjudication decision itself, which runs to some 47 pages and involves an apparently close analysis of what might be called the nuts and bolts issues of variations and the like. And there was no attempt to establish by other evidence that, in truth, this was not a genuine attempt by the adjudicator. Nor was the adjudicator required by the applicants to give oral evidence.

Natural justice

[44] The complaint in this respect is in relation to the adjudicator's reasons in relation to the truth or otherwise of the statutory declaration that all subcontracts, etc had been paid. It is submitted for the applicants that if the adjudicator was minded to conclude that he was not obliged to determine whether the declaration was true, or if he was minded to assume that it was true, he was obliged to give the parties an opportunity to make further submissions.

[45] His apparent assumption that the statutory declaration was true was inconsequential. This was because it did not put paid to the adjudicator's expressed concern to see that all subcontractors were paid before the respondent received its progress payment. The view which the adjudicator reached was that the applicants' interests would be protected by requiring compliance with cl 38 as a condition to that payment being made. His aim was to ensure that subcontractors, if unpaid at the time of the adjudication, would be paid. Had he sought and received the further submissions which the applicants say they would have made on this matter, there is no real prospect that he would have done any more than to require a further statutory declaration by the respondent to the effect that the subcontractors had been paid, coincidently with the provision of the evidence as to such payment according to cl 38. This was because the adjudicator had concluded that a true declaration under cl 37.1 was not a precondition of a valid progress claim, as distinct from the Contractor's entitlement to payment.

[46] In short, the applicants cannot say that any failure to revert to them on this subject had a practical consequence which was adverse to them. They had the protection of a decision which required them to make a progress payment only on the superintendent's satisfaction with the evidence to be provided under cl 38.

[47] In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam*[11], Gleeson CJ said that procedural fairness is not an abstract concept but is instead "essentially practical" and that "the concern of the law is to avoid practical injustice". Accordingly, I am not persuaded that the adjudicator was bound to revert to the parties and ask for submissions concerning the declaration under cl 37.

Conclusion

[48] It follows that none of the grounds for impugning this decision has been established. The originating application must be dismissed. I will hear the parties as to costs and other orders.

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[11] (2003) 195 ALR 502 at [37].