Transcript of Proceedings

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Date: 17 October, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DUTNEY J

No BS7417 of 2005

J J MCDONALD & SONS ENGINEERING PTY LTD	Applicant
and	
NEIL GALL	First Respondent
and	
RICS DISPUTE RESOLUTION SERVICE QLD BN 19467680	Second Respondent
and	
CEPM PTY LTD	Third Respondent

BRISBANE

..DATE 12/10/2005

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for judicial review. Two issues were argued before me. First, whether the decision sought to be reviewed was a decision of an administrative character made under an enactment. The second concerns the propriety of the decision. The decision maker in this case was an adjudicator appointed under section 23 of the Building and Construction Industry Payments Act 2004.

The Building and Construction Industry Payments Act was enacted with the expressed object of providing for progress payments to contractors or, in this case, subcontractors irrespective of the terms of the contracts entered into. Section 13 of the Act entitles a contractor to progress payments either in an amount calculated under the contract or, if not provided for under the contract, at intervals provided for by the legislation.

In this case the contract provides for progress payments at times referred to in the schedule to the contract. By section 17 of the Act the contractor is entitled to serve a progress claim on the principal setting out the details of the work and the amount claimed. Under section 18 the principal is required to respond with a document entitled a "Payment Schedule" setting out the amount the principal is prepared to pay.

If there is a dispute as to the amount payable the contractor can apply for an adjudication under section 21. That application is made to an authorised nominating authority.

That authority then appoints an adjudicator under section 23. The application for the adjudication must provide particulars of the claim and any submissions in support. When the adjudicator is appointed the principal has an opportunity to respond to the application for adjudication by providing the adjudicator with a document called an "Adjudication Response".

The adjudication response is similar to the application in that it may contain submissions and supporting material. By section 24(4) of the Act, however, it cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.

In considering the respective positions the adjudicator may only consider the matters specified in section 26(2). These include, by paragraph 9(d), the payment schedule, if any, to which the application relates together with all submissions including relevant documentation that may have been properly made by the respondent in support of that schedule.

In this case the progress payment claim was for $175,295.97. The payment schedule in reply admitted an entitlement to an amount of $22,222.84. Relevant to this controversy the payment schedule made the following comment under a heading "Scheduled Amount":

> "We have adopted CEPM rates (as supplied in your letter of 14 May 2005) as the basis for making a fair valuation of the works undertaken on site. Refer to the attached

> Dayworks Valuation June 05. The value of dayworks performed on site for June is $49,862.84."

A little further on the payment schedule refers to the amount of $49,862.84 with the added comment:

> "As per attached Dayworks Valuation Schedule."

The adjudicator found that no dayworks valuation or schedule was attached. The principal is unable to contradict this finding because it has no independent knowledge of that fact. In his adjudication decision at page 6 the adjudicator made the following findings:

> "Having adopted the principle of valuing the variations under clause 21.3 of the subcontract the respondent prepared a daywork schedule which valued the works as being $49,882.84. The payment schedule identifies the value of dayworks performed on site for June as being $49,862.84 and refers to 'attached daywork schedule'. Doubt existed from both the adjudication application and the response as to whether the daywork schedule was attached to the payment schedule issued to the claimant on 19 July 2005. I requested a further submission from the claimant in order to clarify events. The claimant responded with a statutory declaration confirming that the schedule was not attached and further reinforced the point by appending the content of the facsimile which had page numbers printed on the top of the page. None of the three pages of the 3-page document contained the daywork schedule. Despite referring to the attached daywork schedule the respondent failed to attach copy of the schedule to the payment claim which has been confirmed to my satisfaction by the statutory declaration issued by the claimant as requested. The respondent argues in his response that regardless of whether the schedule was attached to the payment claim it can be introduced in the response as it is not new information as it had been specifically referred to in the payment schedule. I disagree with the respondent in this matter. The payment schedule made no attempt to explain why the daywork schedule differed to the claimant's calculation and, as such, failed to satisfy section 18(3) of the Act. No indication was given as to the content of the daywork schedule at the time of the payment schedule, and therefore I have decided that the daywork schedule is

> deemed to be new information and, as such, cannot be introduced at the time of the adjudication response. On the basis that the daywork schedule cannot be considered as it is new information I have decided that the respondent did not satisfy section 18(3) of the Act and, as such, was not entitled to withhold payment against this item."

This is the first complaint made by the applicant concerning the decision. The applicant submits that even if the valuation was not attached to the payment schedule it was not precluded from including it in the documentation supporting the adjudication response. It was submitted that it could not be treated as an additional reason for withholding payment but was, rather, merely particulars of the reason already advanced. This is submitted to be a reviewable error under the Judicial Review Act.

While on the decision of the adjudicator it is convenient to refer to the second complaint which arises from page 7 of the reasons. There the adjudicator said:

> "The respondent has stated that the costs associated with this item have been valued in their assessment of the daywork schedule. For reasons detailed in item 7 above I believe this argument to be flawed. The claimant has based his valuation of the works based upon a lump sum offer he submitted at the request of the respondent."

A chronology then follows, after which the adjudicator said:

> "Based upon the time scale between the issue of the lump sum offer and the respondent's rejection of the offer I do not consider that the respondent has acted in a fair and reasonable manner, and that there is an implied contract between the claimant and the respondent to complete the variation works for a total of $262,000."

This is also submitted to be a reviewable error. It was submitted that the adjudicator could not have found that the offer of the lump sum price could be deemed accepted because of unfairness on the part of the principal in delaying its response by four weeks.

Before coming back to these complaints I should complete my review of the statutory provisions. When the adjudicator has reached a decision it must be in writing and accompanied by reasons (section 26(3)). By section 29 the principal is required to pay the adjudicated amount. If the amount is not paid the contractor can ask the authorised nominating authority to whom the application for the adjudication was made to provide an adjudication certificate.

The adjudication certificate may then be filed in a Court of competent jurisdiction and enforced as if it was a judgment for a debt (section 31). The contractor may also suspend carrying out the work. Finally, section 100 preserves the interim nature of the progress payments by preserving all contractual rights or rights in relation to the works. They have no effect on civil proceedings so that in any proceedings under the contract the principal must be given credit for the amounts of any progress payments made.

It is in the light of these statutory provisions that I must consider the two issues debated before me. The power to determine the amount of the progress payments is a power conferred by the Building and Construction Industry Payments

Act notwithstanding that the contract provides for progress payments. Under the contract it is the principal who determines the quantum of the progress payment.

While, by section 100 of the Building and Construction Industry Payments Act, the adjudication is of an interim and not final nature, it does have a material effect on the parties. The fact that a certificate of adjudication can be lodged with the Court and take effect as a judgment is sufficient on its own to afford the determination of the adjudicator sufficient finality in the sense described in Australian Broadcasting Tribunal -v- Bond (1990) 170 CLR 321 at 337.

The argument for the respondent focussed on the lack of final effect given to a determination. It does not alter the contractual arrangements between the parties. It does not finally determine any issue concerning the adequacy or progress of the works the right to determine which is left by section 100 to the contract the parties actually entered into.

The test was stated by the majority in Griffith University -v- Tang (2005) 213 ALR 724 at 746 [89] as follows:

> "The determination of whether a decision is 'made...under an enactment' involved two criteria:
>
> First, the decision must be expressly or impliedly required or authorised by the enactment and, secondly, the decision must itself confer, alter or otherwise effect legal rights or obligations and, in that sense, the decision must derive from the enactment.

> A decision will only be 'made...under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to effect or alter existing rights or obligations and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise.
>
> Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derive from the general law or statute will suffice."

The decision of the adjudicator satisfies both limbs of the test. It is plainly authorised by the statute. Secondly, it has the effect of conferring, altering or affecting legal rights. If nothing else, it creates a new right in the contractor to receive payment of the certified amount and, in doing so, affects the parties' rights under the contract they entered into.

It follows from these conclusions that I consider this is a decision made under an enactment and subject to judicial review. In so finding, I should express my view that unless decisions under this legislation are excluded from the operation of the Judicial Review Act the benefit of prompt periodic payments to contractors, which is the stated purpose of the Act, is likely to be defeated by applications for review which serve the purpose of preventing the contract to taking early advantage in a favourable determination. Despite this concern, it is not a matter which can be permitted to influence my conclusion as to the present applicability of the remedy the Judicial Review Act provides.

The first complaint about the decision relates to the finding I have already quoted concerning the introduction of new reasons into the adjudication response. These findings may be summarised as follows:

While the applicant nominated a different figure for the day work schedule, it provided no reasons for the difference in the absence of a valuation. Therefore, by section 24(4), those reasons could not be introduced into the adjudication response. As a construction of the Act, that is a correct approach in my view.

What might be subject to debate, however, is whether the reference to the unattached valuation in the payment schedule is sufficient to introduce a reason which is later enlarged upon by the production of the valuation. Whether the reference to the valuation without attaching it is enough to constitute providing a reason for the withholding of payment seems to me to be a question of fact.

There is nothing technical about the words used in section 24(4) whether something is a new reason or not in this context is a question of fact in the sense I recently discussed in Ritek Building Systems -v- Cairns City Council (2005) QCA 347 at paragraphs 17 and 18.

Despite the grounds for review listed in the originating applications, the only arguable ground, on the material before me, was that the adjudicator made an error of law. There is

no evidence of any breach of the rules of natural justice, any misunderstanding of the statutory requirements or failure of the adjudicator to comply with any professional requirement.

The second error complained of is slightly different in characterisation. The error, if it be one, was in finding an acceptance by conduct of the respondent's offer of a lump sum price for variations. There was evidence to support such a finding. There was a period of four weeks' silence between the making of the offer and its ultimate rejection notwithstanding the fact that the lump sum offer was invited by the principal (see statutory declaration of Campbell at paragraph 15) and had not been responded to by the time the payment claim was lodged and was only responded to at the time the applicant lodged the payment schedule.

The works appear from the documents relied on before me to have been ongoing at the time of the adjudication. Even though the letter requesting the lump sum price indicated that further negotiations would be required prior to approval or acceptance of the lump sum, no such negotiations were entered into and the silence from 26 June until 19 July was inordinately long in the timeframe of this contract.

These facts may also give rise to an estoppel preventing the applicant from resiling from rejection of the lump sum offer, at least, prior to formal notice of the rejection on 19 July 2005. The claim only relates to work done up to 30 June 2005.

Depending on the view of the facts taken by the adjudicator it might be well open to him to conclude either an estoppel or an acceptance by conduct. Others might take a different view. No witnesses were called before me. It is not demonstrated that the adjudicator was wrong in his application of the relevant law neither is it demonstrated that his conclusion, based upon his findings of fact and the application of the law to those facts, is plainly wrong so as to enliven the ground of error of law and entitle the applicant to set the decision aside. This assumes that the error is one of law rather than merely a finding of fact, a view I prefer.

It is not appropriate for me to express or substitute any view I may hold as to the correctness of the conclusion. It was not argued by the applicant that insufficiency of reasons as opposed to error in the reasons, was itself, a relevant error of law. The end result of this discussion is that, while I am persuaded that the decision is reviewable, I am not persuaded that any relevant error is demonstrated. In the result, the application is dismissed.

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HIS HONOUR: I order that the applicant pay the third respondent's costs of the application to be assessed on a standard basis. I make no order in respect of the costs of the other respondents.

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HIS HONOUR: Including reserved costs, if any.