Timwin Construction Pty Ltd v Façade Innovation Pty Ltd

Adjudicator's failure to exercise powers in good faith

Robert Hunt[1]

In the decisions of the Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport ('Brodyn')*[2] and *Transgrid v Siemens Limited ('Transgrid')*,[3] one basis for setting aside an adjudication determination identified by Hodgson JA (with whom Mason P and Giles JA agreed) was that the adjudication determination does not amount to an attempt in good faith to exercise the relevant power having regard to the object of the legislation.

The decision of McDougall J in *Timwin Construction Pty Ltd v Façade Innovation Pty Ltd*[4] is particularly welcome in addressing, for the first time, whether particular conduct by an adjudicator in fact did not amount to an attempt in good faith to exercise the relevant power having regard to the object of the *Building & Construction Industry Security of Payment Act* 1999 (NSW) ('the Act').

In his judgment, McDougall J set out the adjudicator's determination in the following terms:

> *[14] The determination was a brief document. In dealing with the various reasons advanced for non payment, the adjudicator turned first to the proposition that the amounts claimed as variations "are amounts that should have been carried out pursuant to the contract". He said:*
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>> *This does not make sense. If the respondent meant to say that the variations for which payment is claimed are not variations but work that was required to be carried out under the contract without an instruction to vary the work under the contract, then I would have expected the respondent to demonstrate in the adjudication response where, in the contract, the work for which additional payment is sought was specified. The respondent has not done that.*
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>> *Instead, in the adjudication response the respondent has raised a number of additional reasons for withholding payment for the variations. Section 20(2B) of the Act precludes the raising in the adjudication response of reasons which were not raised in the payment schedule. Therefore, I have not had regard to additional reasons such as that particular variations were not approved.*

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2 [2004] NSWCA 394.

3 [2004] NSWCA 395; [2005] 61 NSWLR 521 (both delivered on 3 November 2004). See also (2004) 23(3) *The Arbitrator & Mediator* 97.

4 [2005] NSWSC 548 (1 June 2005).

> *In the payment schedule the respondent has not disputed that the work comprised in the variations was carried out. The respondent has also not disputed the value placed by the claimant on the variations. In the payment schedule, the respondent has not contended that any variation should have a different value. The respondent merely says, "the amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract". Whatever that means, the respondent has not satisfied me that the respondent has a valid reason for not paying the claimed amounts for the variations.*

[15] The adjudicator then turned to the other suggested defences, namely, the claim for damages for delay, the claim of duress, and the claim of overpayment. He dealt with those matters briefly but gave reasons to show why it was he considered that they did not provide any basis for withholding payment. I interpose that complaint is not now made of the adjudicator's treatment of those matters, nor could it have been, having regard to the limited basis (as explained in Brodyn*) on which this Court can intervene.*

[16] The adjudicator concluded:

> *Since the respondent has not satisfied me that the respondent has a valid reason for withholding payment of any of the amount claimed, I am satisfied that the claimant is entitled to a progress payment of the whole amount claimed, namely, $498,664.*

His Honour then set out the issue and the authorities as follows:

The issue

[18] The fundamental issue is whether the adjudicator, in the way that he dealt with the defence to the payment claim based on the assertion that the variations "are amounts that should have been carried out pursuant to the contract", attempted in good faith to exercise the powers given to him by the Act.

The authorities

[19] In Brodyn *at para [55], Hodgson JA summarised the basis on which the Courts might intervene as follows:*

> *the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid determination … What was intended to be essential was compliance with the basic requirements … 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 … 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 valid determination.*

[20] In para [56], Hodgson JA addressed some of the detailed requirements set out in s 22(2) of the Act. He concluded:

> *In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2) or bona fide addresses the requirements of s 22(2) as to what is to be considered.*

[21] His Honour returned to that theme in the Minister for Commerce v Contrax Plumbing *[2005] NSWSC 142 at 149. He said of s 22, that it:*

> *does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.*

His Honour concluded that the adjudicator had failed to attempt in good faith to exercise his power under the Act, and that the determination was void. He said:

[24] In the present case, I have to say, it might be a little difficult to read the payment schedule, where it states that "amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract", as raising an issue of contractual authorisation. At least conceptually, it seems to me that there may be a number of quite separate arguments relating to variations.

[25] One such argument is that the work for which payment is claimed as a variation was in truth for work comprehended within the scope of works, and therefore in the case of a lump sum contract such as this, to be paid for as part of the lump sum and not separately as a variation. That might be thought to be the more normal reading of the reason given.

[26] Another dispute that is commonly seen relating to variations is that there is a statutory regime for payment and contractual regime for payment. Such contractual regimes commonly include an element of written approval or authorisation. The reason for that is clear: to prevent the principal from being subjected to claims for variations that it has had no opportunity to consider and no opportunity to approve.

[27] ***The adjudicator referred to those words in the payment schedule in the way that I have indicated. He said that they do not make sense. Later, when he came back to them, he emphasised his difficulty of understanding, using the words "whatever that means" in relation to them.***

[28] ***That is a somewhat strange approach because it appears that the claimant, Façade, had no difficulty in understanding and arguing the issue that was raised.*** *I have referred already to para [45] of its submissions and to the elaboration in its submissions of its response to this particular aspect of the payment schedule.*

[29] ***If the adjudicator were seeking to understand what was meant by this portion of the payment schedule, one might have thought that he would have referred to the apparent understanding, and rebuttal, given by Façade in its submissions. He did not do so. Instead, he appears to have turned to the submissions in response made by Timwin in its adjudication response, and treated those submissions as falling***

within s 20(2B), and therefore as matters that he could not take into consideration.

[30] It is commonly the case, as Palmer J observed in Multiplex Constructions Proprietary Limited v Luikens *[2003] NSWSC 1140, that parties in the payment claims and payment schedules use a kind of shorthand and that an understanding of the issues that they seek to raise has to be obtained having regard to the background with which they are familiar and the relevant contractual terms.*

[31] ***In this case, para [45] of the submissions in support of the adjudication application makes it quite clear that Façade had extracted three reasons for non payment from the payment schedule. It made it clear that those were the only reasons that Timwin could rely upon: because it said "in terms of s 20(2B) … [Timwin] cannot include any other reasons in its adjudication response."***

[32] As to what was meant by the second of those reasons (the one that is relevant to the proceedings before me), some enlightenment can be gained as to Façade's understanding by looking at what it said in paras [54] to [73] of its submissions.

[33] In argument before me, Mr Doyle, who appeared for Façade, submitted that Façade was merely seeking to anticipate and rebut the arguments that Timwin might raise pursuant to its payment schedule. I am not sure that this is correct; but even if it is correct, it does not seem to me to answer the particular point, which is that ***the content of the dispute can be understood from what Façade said.***

[34] In setting out the nature of its response to the issue – that the variations were either authorised in writing or that there was a course of conduct from which the adjudicator could infer that Timwin had waived the requirement for writing – Façade was articulating its response to this aspect of the payment schedule. It may be noted that Façade did not suggest that an argument based on want of writing, or want of compliance with the requirements of clause 7 of the contract, was excluded by s 20(2B). Rather, it said, any other reason other than those summarised in para [45] and elaborated in its responses in paras [46] to [82] could not be relied upon.

[35] ***In my judgment, reading that section of the submissions in totality, the clear inference is that Façade understood what the dispute was – as one relating to compliance with clause 7 of the contract – that it so defined the dispute for the adjudicator; that it told the adjudicator that no other dispute could be considered; and that, at least by implication, it accepted that the dispute as understood by it could be considered.***

[36] As to this, it may be noted that the reference to s 20(2B) in para [45] is repeated in each section of the submissions where Façade attempts to rebut the defences, and again in the summary of its attitude: see paras [78], [80] and [87].

[37] ***The adjudicator referred to none of this. Insofar as one can gather from reading the determination, he appears not to have read the submissions at all. He certainly does not indicate that he has gained any enlightenment as to the argument in relation to variations from Façade's submissions.*** *Further, when dealing with the*

other reasons given by Timwin in support of its claim that it was not liable to pay, he dealt only with the arguments raised in the payment schedule.

[38] There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in Brodyn*. Clearly, I think, his Honour was not referring to dishonesty or its opposite.* ***I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function:*** *see, for example, the speech of Lord Sumner in* Roberts v Hopwood *[1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer".*

[39] That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see Zhang v Canterbury City Council *(2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

[40] ***As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made.*** *His Honour relied on the tests expounded in* The Queen v Hunt; ex parte Sean Investments Proprietary Limited *(1979) 180 CLR 322 (Mason J) and in* Evans v Marmont *(1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq).*

[41] ***In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.***

[42] ***It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.***

[43] ***I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.***

[44] ***I will note that Timwin did not put its case on the basis of denial of natural justice, but it would follow from what I have said that, in disregarding Timwin's submissions for the reason that he gave, the adjudicator denied it natural justice.*** (emphasis added)