A NEW REGIME FOR JUDICIAL REVIEW OF ADJUDICATION DETERMINATIONS: *BRODYN PTY LTD T/AS TIME COST AND QUALITY V DAVENPORT & ANOR*

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I INTRODUCTION

The resolution of construction disputes, especially those relating to payment, are notoriously time consuming and expensive. These disputes are often founded in, or exacerbated by misunderstandings between the parties as to their respective rights and obligations. There is also often a significant power imbalance between owner and contractor, or contractor and sub contractor.

Prior to the introduction of the *Construction Contracts Act 2004* (WA), (*'WA Act'*) where there had been a dispute over payment for work done or materials supplied, the person who had done the work or supplied the materials was at a distinct disadvantage. They were faced with the prospect of a lengthy and time consuming task in attempting to obtain payment for work for which they were legitimately entitled. In order to redress these difficulties the Western Australian government passed *the Construction Contracts Act 2004* which came into force on the 1st of January 2005. Similar legislation exists in New South Wales, Victoria and Queensland.[1]

II THE OBJECTIVES OF THE ACTS

These various state acts, provide for security of payment in the construction industry through the use of rapid adjudication processes to determine payment disputes. Their provisions apply to both written and oral contracts and provide for implied terms where contracts are silent on terms relating to payment for construction works. The

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1 *Building and Construction Industry Security of Payment Act* 1999 (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (Qld).

provisions further prohibit "paid when paid"[2] clauses in construction contracts and excessive payment periods.

A principal objective of the acts is to provide a means of rapid adjudication of payment disputes arising under construction contracts (with limited grounds for appeal. However, within the New South Wales jurisdiction in the 5 years since the introduction of *the Building and Construction Industry Security of Payment Act 1999* ('*NSW Act*'), there has been considerable judicial consideration as to whether a determination of an adjudication is capable of judicial review.[3]

The recent decision of the NSW Court of Appeal in *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor ('Brodyn')*[4] held that the determinations of an adjudicator made under the *NSW Act* could be judicially reviewed. However the court limited the grounds for review. Since the *NSW Act* is very similar to the *WA Act* it will be very likely that the Western Australian Supreme Court will have the jurisdiction to judicially review determinations of an adjudicator and will be persuaded by the decision in *Brodyn*.

III THE FACTS IN *BRODYN*

In November 2002, Brodyn entered into a contract with Dasein Constructions Pty Ltd ("Dasein") to undertake concreting work required for the construction of 12 townhouses. The contract included the standard form of AS 4305-1995 *'General Conditions of Subcontract for Design and Construction'.* On 13 June 2003 Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein and purporting to accept that repudiation. In response on 27 June 2003, Dasein served on Brodyn a payment claim for an amount of $115,340.39 stating it was a 'final claim' and a payment claim under the *NSW Act* and which set out the items in respect of which the payment claim was made.

By way of counterclaim, Brodyn responded alleging that Dasein should in fact pay Brodyn an amount of $125,695.39 by way of unapproved variations and defects in the work done. Brodyn also alleged that Dasein was indebted to Brodyn for $86,184.00 being liquidated damages for 56 days delay at $1,539.00 per day.

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2 For a discussion of these clauses see, eg, *Trade Indemnity Australia Ltd v Parkinson Air Conditioning Ltd*. (1994) 11 BCL 39; *Iezzi Constructions Pty Ltd v Currumbin Crest Development Pty Ltd*. (1994) 13 ACLR 29.

3 See, eg, *Musico v Davenport* [2003] NSWSC 977; *Multiplex Constructions v Luikens and Anor* [2003] NSWSC 1140; *Transgrid v Siemans* [2004] NSWSC 87.

4 [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004).

On 28 August 2003 Dasein served Brodyn with a further payment claim under the NSW Act. This claim was again noted 'final claim' and contended that the amount due under the contract was in fact $191,800.78. The next day Brodyn responded in writing asserting that Dasein's purported claim was invalid and that no payment was due.

On 28 September 2003 Dasein served Brodyn with a third payment claim for $214,744.90 made up of the $191, 800.78 previously claimed, plus $3,421.86 interest. The same day Brodyn served a further payment schedule on Dasein contending, inter alia, that money should be deducted from any money due to Dasein for incomplete work and for the rectification of defects.

On 2 December 2003 Dasein made an application for adjudication under the *NSW Act* in respect of its claim served on 28 September 2003. The appointed adjudicator, Davenport, determined the claim on 16 October 2003. The determination was that Brodyn was to pay Dasein an amount of $180,059.00. In accordance with the provisions of the *NSW Act,* reasons were given for the decision. However the reasons did not include reference to Brodyn's contention that money should be deducted from Dasein for incomplete work and for rectifying defects. An adjudicator's certificate under the *NSW Act* was issued on 17 October 2003. This certificate was filed in the New South Wales District Court on the same day so as to give it the effect of a judgment, as provided for in section 25 of the *NSW Act*.

Brodyn then applied to the New South Wales Supreme Court for an order in the nature of certiorari quashing the adjudicator's determination on the grounds that the relevant payment claim was invalid (on the basis that only one payment claim can be made after the termination of a contract and cessation of work) and the adjudicator's failure to refer to Brodyn's submissions that money should be deducted for incomplete work and the rectification of defects in the work amounted to a denial of natural justice. The primary judge considered that certiorari was available if the payment claim was not valid but refused relief in the exercise of his discretion because it could not result in the setting aside of the adjudication certificate as a judgment debt in accordance with section 25 of the *NSW Act.* Brodyn then lodged an appeal from that decision.

IV THE COURT OF APPEAL DECISION

The Court of Appeal held, in part, that;

- A District Court judgment constituted by the filing of an adjudication certificate can be set aside on appropriate grounds.
- Relief in the nature of certiorari is not available to quash an

adjudicator's determination which is not void. If a determination is void relief is available by way of declaration and injunction. If the basic requirements of the *Act* are not complied with, or if there is not a bona fide exercise of the adjudicator's powers, or there has been a substantial breach of the rules of natural justice, then a purported determination will be void and not merely voidable

- The adjudicator's failure to refer to Brodyn's submission that money should be deducted for incomplete work and for rectifying defects did not amount to a denial of natural justice nor render the adjudicator's determination void. Whilst a denial of natural justice could render a determination void it had to be a substantial denial.

V REASONS FOR DECISION

Prior to the decision in *Brodyn* it was considered that a determination of an adjudication made under the *NSW Act* was capable of judicial review under the broad definition of jurisdictional error arising from the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [5] ('*Anisminic*').

For example, in *Musico v Davenport* [6] ('*Musico*'), McDougal J held that;

> If such an administrative tribunal falls into error of law which caused it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error is jurisdictional error.

However the Court of Appeal in *Brodyn* rejected the broad definition of jurisdictional error as stated in *Anisminic*.[7] It considered that the position of an adjudicator under the *Act* was not analogous to that of an administrative tribunal. Nor is it similar to that of an inferior court which has authority to decide questions of law as well as questions of fact. Rather, the position of an adjudicator is analogous to that of an expert by whose determination the parties have agreed to be bound as in *Hudson v Legal & General Life of Aust Ltd.* [8] The court held that the scheme of the *Act* appeared strongly against the availability of judicial review on the basis of non-jurisdictional error of law. It was the intention of the Act to ensure that payment disputes were resolved with

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5 [1969] 2 AC 147.

6 [2003] NSWSC 977.

7 *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004) [51] (Hodgson JA).

8 (1985) 1 NSWLR 701.

a minimum of delay with a minimum opportunity for court involvement.

Hodgson JA stated further[9] that for an adjudicators determination to have the legal effect provided by the Act, it must satisfy the conditions established by the *Act* for a valid determination. However if it does not satisfy the conditions the determination will be void and not merely voidable, and a court of competent jurisdiction could grant relief by way of declaration and injunction without the need to quash the determination by means of an order in the nature of certiorari.

The essential conditions for the existence of an adjudicator's determination were stated by Hodgson JA as follows; [10]

1 The existence of a construction contract between the claimant and the respondent to which the *Act* applies (ss7 & 8)

2 The service by the claimant on the respondent of a payment claim (s 13)

3 The making of an adjudication application by the claimant to an authorised nominating authority (s 17)

4 The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19); and

5 The determination by the adjudicator of this application (ss 19(2) & 21(5)), by determining the amount of the progress payment, the date on which it becomes due or became due and the rate of interest payable (s22(1)) and the issue of a determination in writing (s 22(3)(a)). [11]

His Honour then went on to say that in his opinion the exclusion of judicial review on the basis of non jurisdictional error of law justifies the conclusion that the legislature did not intend that exact compliance with all the more detailed requirement (of the *Act*) was essential to the existence of a determination.[12]

What was intended by the legislature to be essential, was compliance with the conditions above (noting that these were not exhaustive), a bone fide attempt by the adjudicator to the relevant power relating to the subject matter of the legislation and that there is no substantial

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9 *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004) [52] (Hodgson JA).

10 *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004) [53])Hodgson JA).

11 These sections refer to the *NSW Act*. They are "mirrored" in the *WA Act*.

12 *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004) [55] (Hodgson JA).

denial of natural justice.

VI COMMENT

At first sight it appears that the decision may put an end to the large number of appeals relating to adjudicator's determinations. Prior to the decision in *Brodyn* it was well established that the Supreme Court could make an order in the nature of certiorari quashing an adjudicators determination where there was jurisdictional error on the basis that an adjudication was generally subject to the administrative law principles as stated in *Anisminic*. The application of the *Anisminic* principles had led to the development of a very large number of situations where an adjudication could be declared void. This clearly was not the intention of the legislation.

The difficulty with the decision however is the comment by Hodgson JA that the five basic requirements 'may not be exhaustive' and that 'no substantial denial of the measure of natural justice that the Act requires be given.'[13] While a strict adherence to the five criteria listed by His Honour may have closed the floodgates, the two additional comments have again opened them. A critical issue is what is meant by a "substantial" denial of natural justice? While the general principles relating to natural justice[14] may be well understood by both legal practitioners and adjudicators, what is meant by a 'substantial' denial is not.

Perhaps some guidance may be found in the *Trade Practices Act 1974* (Cth) where the term is used widely in the context of a "substantial" lessening of competition.[15] In *Cool and Sons Pty Ltd v O'Brien Glass Industries Ltd*.[16] The court stated that the term means 'real or of substance as distinct from a lessening that is insubstantial, insignificant or minimal.'[17]

In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*[18] the court stated that substantial means 'considerable or large'.[19] In *Tillmans Butcheries Pty Ltd v Australasian Meat Industries Employees Union*[20] Deane J (as he then was) said that the term meant 'real or of substance as distinct from

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13 *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Unreported Mason ,Giles, Hodgson JJA, 1,3,14 October, 3 November 2004) [55] (Hodgson JA).

14 See, eg, *Ridge v Baldwin* [1964] AC 40; *Durayappah v Fernando* [1967] 2 AC 337*; Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.

15 See, eg, *Trade Practices Act 1974* (Cth) ss 45, 46, 50.

16 (1981) 35 ALR 445.

17 *Cool and Sons Pty Ltd v O'Brien Glass Industries* (1981) 35 ALR 445, 458.

18 (1982) 44 ALR 557.

19 *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557, 563.

20 ATPR 40-138.

21 18,500.

ephemeral or nominal'[21] However at the same time His Honour noted that; 'The word "substantial" is not only susceptible to ambiguity, it is a word calculated to conceal a lack of precision.'[22]

Similarly reference to decisions relating to appeals from arbitrators determinations under the *Commercial Arbitration Act 1987* (WA) do not appear to be helpful. Section 42 of this *Act* allows an appeal where there has been misconduct on the part of the arbitrator. Misconduct is defined in section 4 of the *Act* to include a breach of the rules of natural justice. However the courts have consistently held that even the most technical breach of the rules will result in the overturning of an arbitrator's award.

For example in *Shirley Sloan Pty Ltd v Merril Holdings t/a Airen Constructions*[23] an arbitrator was required to determine if timber used in a construction had been kiln dried. Lengthy submissions were made by the parties and their experts. The arbitrator subsequently determined that the timber used was dry and in his award referred, by way of comment, to the provisions of a relevant Australian Standard. This Standard had not been cited by either of the parties in their submissions and on appeal the award was overturned on the principle that where an arbitrator takes into account matters that have not been raised by the parties, in determining the award, no matter how insubstantial, it is incumbent on the arbitrator to refer these matters to the parties for comment before handing down the award.

What would appear to be an example of a substantial breach of the rules of natural justice is noted by Hodgson JA at paragraph 57 in *Brodyn*. His Honour states that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions, by way of reply, and this confirms that natural justice is to be afforded to the extent of the relevant provisions in the *Act*.[24] Consequently where there is a failure by the adjudicator to receive and consider submissions from the parties the determination will be a nullity. As to other situations which will give rise to a substantial breach of natural justice we will have to wait and see.[25]

The decision of the Court of Appeal in *Brodyn* will do little to deter parties from seeking judicial review of an adjudicator's determinations. While the five conditions as stated by Hodgson JA at first sight would appear to restrict the grounds available for judicial review, this list may not be exhaustive and that further a denial of natural justice (albeit a substantial denial) could render a determination void, whilst not being definitive with respect to what constitutes a substantial denial, may do

22 18,500.

23 [2000] WASC 99.

24 Sections 17(1), and (2), 20, 21, 22(2)(d).

25 At the time of writing no adjudications have been carried out under the *WA Act*.

little to reduce the number of applications for judicial review.