RECENT CASES—IMPLICATIONS FOR ADJUDICATORS

Philip Davenport
Solicitor

This paper considers those Supreme Court of NSW decisions on the *Building and Construction Industry Security of Payment Act 1999* (NSW) that are of particular interest to adjudicators.

The following aspects will be considered:

1. Injunctions
   - preventing an adjudicator from determining the adjudication application; and
   - preventing a claimant from obtaining an adjudication certificate or enforcing judgment.
2. Certiorari
   - jurisdictional error; and
   - natural justice.

INJUNCTIONS

Preventing an adjudicator from determining the adjudication application

The first application to the Supreme Court for an injunction to restrain an adjudicator from determining an adjudication application was *Consolidated Constructions Pty Limited v CPS City Plumbing Pty Limited*, No. 3263 of 2003. Philip Davenport, the adjudicator, was the third defendant. Campbell J, on 12 June 2003, granted an interlocutory injunction purporting to restrain the adjudicator from making a determination before Friday 13 June 2003. The respondent asserted that the adjudicator made a jurisdictional error in accepting the adjudication application. On 13 June 2003, before the time expired for the adjudicator to make his determination, the parties settled their dispute.

Then on 27 June 2003, in *Paynter Dixon Constructions Pty Ltd v Tilston* No. 3516 of 2003, Bergin J granted *ex parte* an interlocutory injunction restraining Ian Hillman, adjudicator and second defendant, from taking any step in relation to the adjudication application until 5pm on 2 July 2003. The payment claim was for $34,463. The claimant claimed that the respondent had entered a contract with the claimant to carry out electrical works (the main works) at the Ex–Services Club in Orange, NSW. The respondent disputed that there was such a contract. The respondent subsequently contracted with another subcontractor to carry out the main works. However, it was common ground that the claimant had, pursuant to an oral request from the respondent, carried out some construction work (the temporary works) and was entitled to payment for the temporary works. The progress claim was for the alleged contract price $158,785 for the main works less a credit for work not carried out, leaving the balance claimed of $30,525. The progress claim also included an amount of $3,938 for the temporary works. The total was $34,463. The respondent's payment schedule was for $2,027.30 for the temporary works. The respondent disputed the existence of any contract for the main works.

The claimant made an adjudication application on 19 June 2003. The respondent then said that the respondent would pay the whole $3,938 for the temporary works. On 25 June 2003, Ian Hillman, adjudicator, notified the parties of his acceptance of the adjudication application. On 27 June 2003, the respondent applied *ex parte* to Bergin J in the Supreme Court for an injunction. Bergin J ordered an interlocutory injunction until 2 July 2003.

On 2 July 2003, the claimant through the claimant's solicitor argued before Bergin J that an injunction should not have been

granted and that the interlocutory injunction should not be extended. The solicitor contended that extending the injunction would effectively mean that the adjudicator could not determine the adjudication application because the time allowed to the adjudicator under section 21(3) would expire before the injunction ceased. He submitted that if, in due course, the adjudication application is found to be null and void, the respondent would not be disadvantaged if the adjudicator proceeded. A void determination could not affect the rights of the respondent. The court should not grant injunctions where there are no rights to be protected. On the other hand, if the adjudication application was ultimately found to be valid, then by granting an injunction the court would be proceeding contrary to the intention of parliament and would be denying the rights of the claimant.

In an unreported judgment of 2 July 2003, Bergin J found that there was no issue that the respondent did request the claimant to carry out the temporary works and that that work was carried out. But she found that, on the balance of convenience, the jurisdictional questions should be decided prior to the adjudicator making his decision. She did not address the most important issue of the time limit on making a decision except in so far as concerns the adjudicator's fees. She decided that:

The term 'fails' within section 29(4) would need to be read in the light of the circumstances of this case. 'Fails' seems to me to suggest a default in the adjudicator or some lack of compliance with his or her obligations. If an adjudicator is restrained, prima facie, it seems to me that the term 'fails' may not be applicable.

In a final decision on 25 September 2003, (*Paynter Dixon Constructions Pty Limited v Tilston* [2003] NSWSC 869 revised—26/09/2003) Bergin J found, as she had on 2 July 2003, that the parties agree that there was a construction contract within the meaning of the Act in respect of the temporary works. At paragraph 29 she said:

It seems to me that it is not necessary and, in the circumstances of this case, not appropriate for me to decide whether the whole of the electrical works were awarded to the defendant [the claimant] to decide the real issue in this case. In the circumstances I do not intend to do so.

The respondent claimed that the progress claim did not comply with the Act because it includes a claim for moneys by way of damages or loss of profits rather than a claim for work done. Bergin J followed Nicholas J in *Walter Construction Group Limited v CPL (Surry Hills)* [2003] NSWSC 266 and at paragraph 34 said:

Certainly Nicholas J did find that the inclusion of a disputed claim for delay or disruption costs which was the subject of argument as to whether it could be categorized as 'construction work' or 'related goods and services' did not render the payment claim invalid. I respectfully agree with His Honour's approach and am of the view that the inclusion of the contentious matter of the claim for damages in the payment claim does not render it invalid in circumstances where the parties have agreed that part of the claim was for construction work under a construction contract.

Bergin J found [at paragraph 42] that the adjudicator had been validly appointed and should not

be restrained from proceeding with the adjudication. She assumed, without deciding, that section 21(3) of the Act [limiting the time for an adjudicator to make a determination] had no effect. She discharged the interlocutory injunction. However, Bergin J did not decide the all important question of whether, when before an adjudicator makes a determination, the respondent challenges the jurisdiction of the adjudicator, the court can or should grant an interlocutory injunction to prevent and adjudicator from proceeding to determine an adjudication and, if the court does so, how the adjudicator can make a valid determination after the time limited by section 21(3) of the Act for doing so expires.

The writer's view is that the court does not have power to grant such an injunction and even if the court does have the power, the court, as a matter of discretion, should refuse to exercise the power. If the adjudicator, in fact, has no jurisdiction, then the adjudicator's determination cannot affect any rights of the respondent. On the other hand, if the adjudicator does have jurisdiction then it would be quite wrong for the court to attempt to prevent or delay a statutory process.

After the lifting of the injunction, the adjudicator proceeded to make a determination and determined that the claimant was entitled to a progress payment of the whole amount claimed. The respondent, instead of making an adjudication response, had applied for the injunction and had allowed time for making an adjudication response to run out. Section 21(2) of the Act barred the adjudicator from considering any late adjudication response.

Section 22(2) of the Act precluded the adjudicator from having regard to the judgment of Bergin J or to the affidavit evidence in the case concerning the existence or otherwise of a contract for the main works. The lesson for a respondent who wants to challenge jurisdiction is that unless the respondent is 100% sure that the respondent will succeed in challenging jurisdiction, the respondent should make an adjudication response while expressly disputing jurisdiction.

That covers the first topic, namely, preventing an adjudicator from determining the adjudication application. Subsequent injunction cases have all involved applications to restrain the claimant from taking action in respect of a determination which has already been made by an adjudicator. It still remains for the Supreme Court to decide that it cannot or, as a matter of discretion, will not grant an injunction or interlocutory injunction to prevent or delay the making of a determination by an adjudicator.

Preventing a claimant from obtaining an adjudication certificate or enforcing judgment

Interestingly, the next time an application for an injunction came before Bergin J she took a quite different and more robust approach and exercised her discretion quite differently. The case is *Pasquale Lucchitti t/a Palluc Enterprises and Ors v Tolco Pty Limited and Anor* [2003] NSWSC 1070. On 5 November 2003, the respondent in the adjudication applied for an injunction. On the first return date, 7 November 2003, Bergin J refused the application.

John O'Brien was the adjudicator and was the second defendant. The construction contract involved roofing of a partly completed home unit that the respondents had purchased. The progress claim was for $35,327. The respondent claimed that the respondent had paid all the respondent was liable to pay and that the claimant was not entitled to seek adjudication because the claim had not been made within the 12 months required by the Act. The adjudicator found that the claim had been made on the last date possible. Bergin J did not decide whether the claim was made in time or not.

The respondent claimed that the adjudicator made a jurisdictional error when he decided, 'I cannot have regard to paragraphs 1 and 2 as these reasons are not included in the payment schedule'. Bergin J was of the opinion that, notwithstanding that statement, the adjudicator did consider the matters in paragraphs 1 and 2 but, even if she was wrong (and the adjudicator did not have regard to the paragraphs), she was not persuaded that it was a jurisdictional error.

The respondent also contended that, in failing to identify the terms of the contract and failing to value the contract, the adjudicator failed to comply with his duty under the Act and that these were jurisdictional errors. The respondent also claimed denial of natural justice. Bergin J found that the adjudicator had not failed to consider the matters and said [at paragraph 32]:

What the plaintiffs' claim here is that he decided against them inappropriately. If that was an error it is not a jurisdictional error.

She found that the adjudicator had regard to the matters which by section 22 he was obliged to have regard to. At paragraph 35, Bergin J said:

I am not satisfied on the balance of probabilities that there is a serious issue to be tried on these matters

and at paragraph 40 she said:

Even if there had been a serious issue to be tried on a balance of convenience I would not be persuaded that I should restrain the defendant [claimant] in this matter. The amount in issue between the

parties ($30,000) in respect of the contractual dispute suggests that this matter should be litigated in the Local Court.

Bergin refused the application for an injunction and ordered the respondent to pay the claimant's costs.

In this case Bergin J was dealing with an application for an injunction after the adjudicator had made a determination. Her decision that, '*even if there had been a serious issue to be tried on a balance of convenience I would not be persuaded that I should restrain the defendant [claimant] in this matter. The amount in issue between the parties ($30,000) in respect of the contractual dispute suggests that this matter should be litigated in the Local Court*' is quite different to her decision in *Paynter Dixon v Tilston*. It seems that if faced with another case with the facts in *Paynter Dixon v Tilston*, Bergin J might not now be so ready to exercise her discretion in favour of granting an interlocutory injunction.

The reason for the difference in approach is that between 2 July 2003 (when Bergin J granted an interlocutory injunction in *Paynter Dixon v Tilston*) and 7 November 2003 (when Bergin J refused to grant an injunction in *Pasquale Lucchitti v Tolco*) there were a number of Supreme Court cases in which the Act was considered.

On 20 October 2003, Gzell J granted an interlocutory injunction to a respondent but only on condition that the respondent pays the claimant the adjudicated amount $819,769 together with interest less $564,585 and pays into court or a solicitor's trust fund the $564,585. The case is *Abacus Funds Management Ltd v Phillip Davenport & Ors* [2003] NSWSC 935.

The respondent sought a permanent injunction restraining the claimant from applying for an adjudication certificate and restraining the authorised nominating authority, Adjudicate Today, from issuing a certificate. The adjudicator and Adjudicate Today filed appearances consenting to any order of the court except an order as to costs.

The respondent sought relief in the nature of certiorai to quash the adjudicator's determination dated 3 October 2003. On 14 November 2003, McDougall J dismissed the summons and discharged the injunction granted by Gzell J [see *Abacus Funds Management Ltd v Phillip Davenport & Ors* [2003] NSWSC 1027]. The respondent claimed that the adjudicator had made errors of law. At paragraph 32 McDougall J said:

For reasons that I gave in Musico at paragraphs 46 to 54, an adjudicator under the Act is entitled in the course of making his or her determination, to make mistakes of law as long as those mistakes do not cause the adjudicator either to exercise a jurisdiction that he or she does not possess, or to decline to exercise jurisdiction that he or she does possess.

He found that the adjudicator had not erred in a jurisdictional sense and dismissed the summons. He ordered the respondent to pay the claimant's costs.

Musico & Ors v Davenport & Ors [2003] NSWSC 977 is not a case of an injunction. The claimant actually filed an adjudication certificate in the Supreme Court on 4 August 2003 and obtained judgment for the adjudicated amount of $712,757 determined by the adjudicator on 18 July 2003. However, on 7 August 2003, the respondent applied for an interim preservation order under Part 28 of the Supreme Court Rules to prevent the claimant from enforcing the judgment. In an unreported decision, James J found that section 25 of the Act [which provides that if the respondent commences proceedings to set

aside the judgment, the respondent is required to pay into court as security the unpaid portion of the adjudicated amount] is limited to proceedings to set aside judgment and does not apply to an application to stay enforcement of a judgment. He granted a stay.

Then on 31 October 2003, McDougall J decided that the adjudicator had made jurisdictional errors and had committed fundamental breaches of natural justice. McDougall J quashed the adjudicator's determination. That decision is now on appeal to the NSW Court of Appeal.

CERTIORARI

Jurisdictional error

Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd [2003] NSWSC 903 illustrates a jurisdictional error. Ian Hillman purported to make an adjudication determination on 19 June 2003. He decided that the adjudication application had been served on the respondent on 4 June 2003. Einstein J found that the respondent had, in fact, not been served with the adjudication application until 12 June 2003. The respondent had five business days from then in which the serve an adjudication response [section 20(1)] and the adjudicator was not empowered to make a determination until the time for lodging a response had expired [section 21(1) of the Act]. The last day of the period was 19 June 2003. The adjudicator purported to make his determination on 19 June 2003. Consequently, he contravened section 21(1) of the Act and his determination was invalid.

Amflo Constructions Pty Ltd & Anor v Anthony Jefferies & Anor [2003] NSWSC 856 (judgment on 17/9/03) illustrates the opposite. The adjudicator, Anthony Jeffries, was faced with an argument that the adjudication application was not made within time and therefore he had no jurisdiction. He found that the application had been made in time and proceeded to make his determination. The respondent applied to the Supreme Court for a declarations that the adjudication application had not been made in time and that Mr Jefferies had no jurisdiction. Campbell J agreed with Mr Jefferies that the adjudication application had been made within time and he dismissed the respondent's summons with an order that the respondent pay the claimant's costs.

In *Parist Holdings Pty Ltd v WT Partnership Pty Ltd* [2003] NSWSC 365, Nicholas J was called upon to decide the validity of a determination by Tim Sullivan made on 24 March 2003 for an adjudicated amount of $71,086. The respondent submitted that the adjudicator had acted *ultra vires* in that he found that the contract had an oral term and implied terms and it obliged the respondent to pay GST. The respondent argued that the adjudicator stepped outside his powers insofar as he resorted to 'findings of law' in interpreting the contract.

Nicholas J found that it was important that the respondent was unable to show that any conduct said to be *ultra vires* was relevant to or affected the determination of any component of the adjudicated amount. Had the adjudicator breached section 22(2) and considered matters which he should not have considered? Apparently not. Nicholas J came to the conclusion that it was within the adjudicator's powers to consider and come to a view about the existence of implied terms, an oral term and the obligation with respect to GST. The case was decided on 5 May 2003 and was based upon the Act as it was before the amendments which commenced on 3 March 2003.

Next there is a trilogy of cases challenging determinations of Mr Davenport, adjudicator. In the first, *Musico & Ors v Davenport* [2003] NSWSC 977, McDougall J on 31 October 2003 quashed the adjudicator's decision. That case is on appeal. A week later, Einstein J in *Brodyn v Davenport & Ors* [2003] NSWSC 1019 held that the respondent [Brodyn] had failed to sustain any of its challenges to the adjudicator's determination. A week after that, McDougall J in *Abacus v Davenport* [2003] NSWSC 1027 similarly held that none of the matters complained of by the respondent [Abacus] constituted a jurisdictional error.

The common feature in all three judgments is the finding of law, namely, that the Supreme Court has jurisdiction to quash a determination of an adjudicator, that the court will not do so merely for an error of law by the adjudicator but may do so for a jurisdictional error, denial of natural justice or fraud [see Einstein J in *Brodyn v Davenport* at paragraph 19].

Einstein J eloquently expressed the position [at paragraph 14 of *Brodyn v Davenport*] as follows:

What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That 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 by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because of the nature and range of issues legitimate to be raised, particularly

in the case of large construction contracts, are such that it often could never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or 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 clawback route expressly includes the making of restitution orders.

The three judgments were on determinations by the same adjudicator. The facts were similar and the adjudicator's process of reasoning was similar. Why in *Musico* alone was the adjudicator's determination quashed?

In *Musico* the determination was quashed because the adjudicator was found to have denied the respondent natural justice [paragraph 109] and fallen into jurisdictional error [paragraph 119].

At paragraph 119, McDougall J said:

In my opinion, Mr Davenport did fall into jurisdictional error. By sections 9(a) and 10(1)(a) of the Act, the adjudication in this case was to be carried out by reference to the relevant provisions of the contract. As Mr Davenport recognized, the relevant provision was, on the face of things, clause10.02. That directed his attention to the architect's certification. But because of the errors in approach that I have identified in paragraphs 72 to 84 above, and because of the additional errors that I have identified in paragraphs 86 to 100 above, Mr Davenport failed to have regard to the relevant provisions of the contract. He therefore failed to carry out the task that the Act requires to be carried out in the manner that the Act requires it to be carried out. It must follow that Mr Davenport failed to exercise the jurisdiction given to him by the Act.

The adjudicator decided that there was no valid progress certificate [paragraph 85] and that consequently the contract had no express provision for valuing the progress payment. He purported to determine the value of the progress payment under section 9(b) of the Act. However, McDougall J found that the adjudicator had misinterpreted the contract and 'was obliged to assess the progress claim in accordance with the contract, and not under section 9(b)' [paragraph 100].

Two weeks later McDougall J upheld the validity of the adjudicator's determination in *Abacus v Davenport*. The contract conditions in both matters were almost identical [JCC–F–1994 in *Abacus* and JCC–D–1994 in *Musico*]. In both cases the adjudicator found that the architect's certificate was not binding on the adjudicator. In both cases the adjudicator found that the respondent was not entitled to liquidated damages. In both cases the adjudicator assessed the amount of the progress payment. In both cases the adjudicator failed to satisfy the requirements of natural justice identified by McDougall J in *Musico*. And the determination in each case was seven pages long.

The essential difference appears to be that in *Abacus* the adjudicator made no mention of the section [9(a) or (9b)] under which he was valuing the progress payment and the respondent did not claim that the adjudicator had denied the respondent natural justice. In *Musico* the claimant claimed $1,544,181 and the scheduled amount was $nil. The adjudicator arrived at the amount of the progress payment by applying sections 9(b) and 10(1)(b) of the Act. He took the adjusted contract price, added the agreed amount for variations and deducted the amount of progress payments already paid, thereby arriving at $712,757.

In *Abacus*, the claimed amount was $1,750,844. The scheduled amount was $372,038. The adjudicator arrived at an amount of $819,769 for the progress payment by examining the reasons given by the respondent for not paying various items in the progress claim. Having decided that certain reasons were not sustainable, the adjudicator added the amount of those items to the scheduled amount to arrive at the amount of the progress payment.

In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 Palmer J on 4 December 2003 quashed a determination by Jan Luikens, adjudicator, for jurisdictional error. The respondent challenged the determination for eleven alleged errors. Only one was found to be a jurisdictional error. Palmer J found [at paragraph 69] that in the payment schedule the word 'rejected' against a claimed item is not a reason within the requirements of section 14(3) of the Act but [at paragraph 79] that 'back charge' and 'contra charge' were reasons and that the adjudicator was in error in concluding that he was precluded by section 20(2B) of the Act from considering the evidence produced by the respondent in the adjudication response with respect to the back charges.

Palmer J quashed the adjudicator's determination and in doing so he discusses the discretionary nature of the remedy. Although the adjudicator's jurisdictional error related to only one item in many, Palmer J found that it was not possible to set aside only portion of the determination. The whole determination had to be set aside. Interestingly, at paragraph 103

Palmer J was of the opinion that the claimant could, within five business days of the quashing of the determination, make a new adjudication application. With respect, he has misinterpreted section 26 of the Act.

Natural justice

In *Musico v Davenport*, McDougall J identified two aspects of natural justice which an adjudicator must comply with [paragraph 31]. They are (1) that a party must be afforded a reasonable opportunity of learning what is alleged against him and of putting forward his own case to answer it, and (2) absence of personal bias. There was no suggestion of breach of the second aspect.

At paragraph 58 McDougall J said that Musico relied upon the statement of McHugh J in *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 989 [123] as follows:

Natural justice requires a person whose interests are likely to be affected by an exercise of power to be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power.

At paragraph 59 McDougall J said:

Where, after considering an adjudication application and an adjudication response, an adjudicator comes to the view that there was some matter, not traversed in them, that might cause him or her to deal with the application in a manner adverse to one or other party, the principle enunciated by McHugh J would ordinarily require that the adjudicator request further written submissions and comments thereon. But whether or not this principle is enlivened in a particular case must, necessarily, depend on an analysis of the 'matter', and of its significance to the determination ultimately made by the adjudicator.

At paragraph 109 McDougall J said:

In my opinion, therefore, the complaints of denial of natural justice asserted in paragraphs 3(a), (b), (c) and (d) of the summons are made out.

These paragraphs are not set out in the judgment. Those paragraphs in the summons are as follows:

The plaintiffs claim:

3. Further, or in the alternative, orders in the nature of certiorari to quash the determination on the ground of breach of natural justice in that the first defendant reached conclusions in the course of the determination that were not raised by the second defendant in its submissions and without any notice to the plaintiffs in the following respects:

(a) in determining that the termination of the contract between the plaintiffs and the second defendant determined the operation of the provisions for valuation of progress claims by the architect;

(b) in determining that it was necessary that a progress certificate be signed by the architect;

(c) in determining that, in the circumstances as found, the architect had abrogated his role; and

(d) in determining that the architect's progress certificate dated 23 June 2003 was void.

McDougall J found that by deciding these matters without first giving the respondent the opportunity to make submissions on them, the adjudicator had breached the requirement for natural justice and consequently the adjudicator's determination would be quashed.

In the writer's experience, the time constraints upon an adjudicator make it impossible for an adjudicator to comply with such stringent requirements. By the time the adjudicator receives the adjudication response, the adjudicator has about five business days in which to make the determination. It is only in the course of writing the reasons that the adjudicator will know whether the adjudicator proposes to rely upon a reason or reasons which one or other party has not raised. The adjudicator can only request written submissions. If the adjudicator asks one party to make a further written submission on any matter, the adjudicator must give the other party an opportunity to comment on the submission [section 21(4)(a)]. Parties do not always have a fax address. In *Musico* the submissions of both parties were prepared by solicitors. However, that is the exception. Most submissions are very scant and often fail to address issues which are important in determining the amount of a progress payment.

Interestingly, section 41 of the New Zealand *Construction Contracts Act 2002* specifically provides that an adjudicator must comply with the principles of natural justice. That Act has provision for adjudication which is similar to that in NSW but the adjudicator has considerably more time in which to make a determination and has limited power to extend the time.

CONCLUSION

The basic error which the various judges have made when entertaining certiorari is to overlook that the adjudicator is determining the progress payment due. The adjudicator is deciding an amount of money, not a dispute. The judges have made the mistake of considering the adjudicator as a decider of the issues between the parties, just like a judge or tribunal, rather than as a certifier. Certiorari is not appropriate for dealing with errors of a certifier. It remains for the court properly categorise the role of the adjudicator.