

KQ NEWSLETTERS

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BUILDING AND CONSTRUCTION: SECURITY OF PAYMENTS

Two decisions given recently by the Court of Appeal; **Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd and John Holland Pty Limited v Roads & Traffic Authority of New South Wales** have further defined the parameters within which adjudicators must act in producing determinations of payment claims under the adjudication scheme contained in the **Building and Construction Industry Security of Payment Act (1999)**. Robert Kalde considers their implications.

HALKAT ELECTRICAL CONTRACTORS PTY LTD V HOLMWOOD HOLDINGS PTY LTD

At First Instance

The decision at first instance made by Brereton J in the Supreme Court voided an Adjudication Determination made under the Act.

In the course of the Adjudication Holmwood made out two sets of arguments in its Adjudication Response:

- That the Adjudicator did not have authority to determine the claim, arguing that (a) there was no contract between the parties as the relevant contract did not properly name Holmwood and (b) Halkat did not serve the payment claim as required by the Act ("the Threshold Arguments"); and
- That Halkat (a) had not in fact completed the percentage of the works it alleged in the payment claim; and (b) had committed some basic mathematical errors when calculating the amount it was due. ("the Valuation Arguments")

The Adjudicator dismissed the Threshold Arguments, stating that they were respectively "totally lacking in merit" and "nonsense". The Adjudicator then determined that these arguments were so "unmeritorious" that they called into question the remainder of Holmwood's arguments and said that these arguments "lacked credibility". Accordingly, he rejected the Valuation Arguments and accepted Halkat's for no other reason: he did not seek any other validation of the percentage of works complete or check the amount of the claim.

Acting for Holmwood in the Supreme Court, KQ Lawyers advanced two successful arguments in seeking to void the determination. The first argument was that in dismissing the balance of the Respondent's submissions based on a finding of credit made adverse to the Respondent because of the Threshold Arguments, the adjudicator did not make a bona fide attempt to carry out his functions under the Act. The second argument was that the adjudicator failed to consider the "basic and essential requirements" set down in s.22 of the Act as they were defined in *Brodyn v Davenport* [2004] NSWCA 394, by failing to consider relevant parts of the contract (involving withholding of retention) or the payment claim (which contained mathematical errors)..

On Appeal

His Honour Giles JA (with whom Santow JA, and Tobias JA agreed) found that section 22 of the Act required the Adjudicator to determine the amount of a progress claim in accordance with the criteria listed in subsection (2). Any purported determination that is not based on those criteria is invalid. In basing his determination on the fact that Holmwood made unmeritorious arguments His Honour said "the adjudicator did not comply with an essential precondition to the existence of a valid determination ... That is sufficient for the disposal of this appeal."

However, His Honour did not agree with Brereton J that the classification of the failure by the adjudicator to consider relevant matters to be jurisdictional error. Rather, the preferred view was that the adjudicator's failures were failures to consider the "basic and essential requirements" as defined by *Brodyn*, rather than jurisdictional error

Giles in effect, sought to characterize the fundamental "vice" of the adjudication determination thus:

"The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters [sic s.22(2)]. But that is what the adjudicator did. He stated expressly in his reasons that he did not have evidence on which he could independently arrive at the value of the completed work, and that he adopted the appellant's valuation in preference to that of the respondent because of the respondent's unmeritorious challenges to the validity of the payment claim." [26] ...continued next page

It is necessary to think out all of the arguments to be raised in any future adjudication (whether these be based on contract, jurisdiction or other) at the time of serving the claim/payment schedule. Lack of precision in defining these arguments may prove costly

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Whether the attempt by an adjudicator be bona fide or not, it would seem that a failure to consider the requirements of s.22(2) of the Act, and nothing less, is the new benchmark for invalidity of adjudication determinations.

JOHN HOLLAND PTY LTD v ROADS & TRAFFIC AUTHORITY OF NSW

In this matter, the court considered the question of what constituted a submission "duly made" by a Respondent under s.22(2)(d) of the Act, and the powers of an adjudicator to determine whether a submission was "duly made".

On behalf of the RTA, the Respondent to a payment claim served by John Holland, an argument was advanced in the Respondent's Adjudication response which was not fully outlined in its Payment Schedule. It is settled law that for a submission to be "duly made" in either an adjudication claim or response, that submission must first be sufficiently advanced in the payment claim or payment schedule so as to be sufficient for the opposing party to understand the case it is being asked to meet at adjudication. (John Holland v Cardno MBK Pty Ltd & Anors [2004] NSWSC 258).

The submission in RTA's Adjudication submission was clearly not raised at first instance in its Payment Schedule, and therefore on its face was a submission not "duly made". The RTA advanced two arguments to circumvent this problem:

- That the reasons being based on the adjudicator's jurisdiction were not "reasons for withholding payment"; or
- That, whether or not they were "duly made" the adjudicator was still obliged to consider them .

Associate Justice Macready rejected the first argument but accepted the second. Hodgson JA (with Beazley JA agreeing), determined that the approach adopted by the Associate judge was incorrect, and that the question of whether a submission is "duly made" was a matter to be determined by the adjudicator and not a matter for the court. It follows that if the adjudicator was incorrect in this classification, it was immaterial whether the court would reach a different conclusion, providing the adjudicator made a bona fide attempt to characterize the submission.

Basten JA giving separate reasons said it was unnecessary for the court to embark on the question of whether a submission was "duly made" as this was a matter to be determined by the adjudicator. His Honour said that an incorrect assessment by an adjudicator in this regard would not invalidate an adjudication determination, even if such a determination ran contrary to the contractual rights of the parties. His Honour stated that there was no inconsistency with such an outcome as s.34 clearly provides that the Act was intended to run under its own statutory scheme, and whilst there are references to the contract throughout the Act, a determination which runs contrary to the contract is not invalid.

THE WAY FORWARD

The Holmwood and John Holland decisions mean a number of things to the authors of payment claims and adjudication submissions, as well as to any party feeling aggrieved by an adjudication determination and wishing to challenge it. It would appear clear that if an adjudicator's error falls something short of a failure to have regard to the "basic and essential requirements" of s.22(2) of the Act, it will not invalidate the adjudicator's decision. In having regard to some of those requirements, the Payment Claim/Schedule and Adjudication Application/Response, it is necessary to think out all of the arguments to be raised in any future adjudication (whether these be based on contract, jurisdiction or other) at the time of serving the claim/payment schedule. Lack of precision in defining these arguments may prove costly. Although there was room allowed for the argument that an unsophisticated payment schedule might be given leniency on the basis that the Act operated for a wide range of person's involved in the building industry (John Holland [41]), it is yet to be seen how much leniency the courts may give, and would be a risky course to follow, particularly for large payment claims.

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