

SUPREME COURT OF QUEENSLAND

CITATION: *Surfabeat P/L v G J Drainage & Concrete Construction P/L*
[2009] QSC 308

PARTIES: **SURFABEAR PTY LTD ACN 100 375 193**
(applicant)
**GJ DRAINAGE AND CONCRETE CONSTRUCTION
PTY LTD ACN 502 536 921**
(first respondent)
JOHN LOWRY
(second respondent)

FILE NO/S: 5054 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 25 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 28 May, 2 & 11 June 2009

JUDGE: Martin J

ORDER: **THE ADJUDICATION DECISION NUMBER N1095979-68
DATED 17 APRIL 2009 IS DECLARED VOID**

CATCHWORDS: BUILDING AND ENGINEERING CONTRACTS –
ADJUDICATION – CONTRACT – Where respondent
undertook construction work – Where negotiation for work
made with home owners – Where respondent demands
payment for construction work – Where owners deny liability
for payment – Where respondent serves payment claim on
applicant builder – Where applicant denies existence of
construction contract with respondent – Where matter
referred to adjudicator under BCIPA – Where jurisdiction of

adjudicator challenged by applicant – Where adjudicator’s decision in favour of respondent – Where applicant challenges adjudicator’s decision – Whether the adjudicator had jurisdiction to adjudicate – Whether questions should be determined at trial.

Building and Construction Industry Act 2004 (Qld), ss 17, 18, 21, 26, 30, 31.

Corporations Act 2001 (Cth), s 459C(2)(b)

Abacus Funds Management Ltd v Davenport [2003] NSWSC 935

Brodyn Pty Ltd v Davenport & Anor (2004) NSWCA 394

Cooper v Veghelyi and Ors [2005] NSWSC 602

Vis Construction Pty Ltd v Cockburn & Anor [2006] QSC 416

Walton Construction (Qld) Pty Ltd v Salce [2008] QSC 235

COUNSEL: S B Whitten for the applicant

J H Sive for the first respondent

SOLICITORS: Browns Lawyers for the applicant

- [1] The applicant in this case seeks:
- (a) a declaration that an adjudication decision made by the second first respondent dated 17 April 2009 is void, and
 - (b) an injunction restraining the first respondent from enforcing that decision.
- [2] A preliminary issue which arises is whether this is an application “to have the judgment set aside” within the meaning of s 31(4)(b) of the *Building and Construction Industry Act 2004* (“**BCIPA**”) and, if it is, whether the application should be dismissed for failure “to pay into court as security the unpaid portion of the adjudication amount pending the final decision in those proceedings”, as required by that section.
- [3] For the reasons I set out below, I have concluded that:
- (a) the applicant need not pay into court, and
 - (b) the adjudication decision is void.

Background

- [4] Brent Peter Jorgensen is the co-owner of property located at 238 Syndicate Road, Tallebudgera in the State of Queensland (“**the property**”).
- [5] On 10 February 2008, Mr Jorgensen entered into a standard form of a residential building contract as approved by the Master Builders Queensland Association (“**the building contract**”) for the construction of a new dwelling on the property with the applicant company, Surfabeat Pty Ltd (“**Surfabeat**”). Mr Peter Colin Senter is the director of Surfabeat.

- [6] Pursuant to Part J (“Special Conditions”) of the Appendix to the building contract, certain works were listed as being the responsibility of the property’s owners. That part of the contract reads:
- “Owner doing excavation (PS 19700) Supervision of Access.
“Owner supplying water tanks.
supplying wall & floor tiles.
Supplying vanity cupboards & basins.”
- [7] Part B of the Appendix to the building contract lists “Allowances for Provisional Sums”. A description is given for each of the provisional sum items. One such item is described as “Earthworks” and includes a provisional sum allowance of “19700 PS”. The total provisional sum allowance for all of the provisional sum items is “37500PS”.
- [8] Item 9 of the General Conditions of the building contract states that provisional sums are estimates only, and subject to reduction of the contract price if not undertaken.
- [9] Item 11 of the building contract, headed “Finance”, indicates that the contract is conditional on the Owner obtaining loan approval from Wizard Home Loans. No further detail of the prospective loan, or the amount sought, is given in that section.
- [10] Prior to the applicant commencing work on the property in September 2008, Mr Jorgensen entered into negotiations with Mr Gerard Joiner, director of the first respondent company (“**GJ Drainage**”), to undertake earthmoving works on the property.
- [11] GJ Drainage provided a quotation for those works. The quotation, dated 6 March 2008, (“**the quotation**”) was addressed to Mr and Mrs Jorgensen personally. It made no reference to Surfabeare. The quotation was for a total amount of \$18,095.00.
- [12] Pursuant to the quotation provided, GJ Drainage was engaged to undertake the excavation works. Those works commenced on or about 8 August 2008 and were completed on or about 18 August 2008. Some time after the commencement of that work, changes were made to the excavation plans and additional work was undertaken by GJ Drainage as a result.
- [13] Initially, all invoices for the excavation work were sent directly from GJ Drainage to Mr Jorgensen. He would then arrange for payment. One of the payments made was by a cheque from Surfabeare’s account dated 15 October 2008.
- [14] On 31 August 2008, an invoice was sent from GJ Drainage to Mr Jorgensen. It was for a total amount of \$33,730.24, which purported to include \$18,095 for works covered by the quotation of 6 March, plus \$15,635.24 for “extra[s] over job”.
- [15] Mr Jorgensen objected to a number of the “extra over job” charges. A part payment of the invoice, in the amount of \$20,620.45, was made. That amount was said to cover the works initially contracted for (as provided in the quotation) and additional works undertaken with the Jorgensens’ consent. All other works and charges were said to be “unauthorised changes to the original agreement”.

- [16] On 21 November, a letter of demand was sent from the solicitors for GJ Drainage to the Jorgensens, attaching a new invoice and demanding payment of the unpaid balance in the amount of \$11,440.98.
- [17] On 21 November, the Jorgensen's solicitors responded to GJ Drainage's letter, advising that their clients would not pay the additional amount requested and asserting, among other things, that the agreement between the parties was not subject to BCIPA.
- [18] On 16 December 2008, GJ Drainage sent a letter and an invoice for the balance of monies said to be owing, this time addressed to PC and KB Senter Builders trading as Surfabeat. The applicant did not respond to that letter.
- [19] On or about 9 January 2009, the first respondent gave notice of its intention to apply for adjudication under BCIPA.
- [20] On or about 12 January 2009, the applicant provided a payment schedule, as provided for by s 18 of BCIPA. That schedule proposed a payment amount of \$0 on the basis that it was "not a party to the alleged contract".
- [21] On 14 January 2009, the Jorgensens' solicitors wrote to the first respondent's solicitors, noting that the applicant was never a party to a building contract with the first respondent and advising that the purported notice was therefore ineffective.
- [22] On 2 March 2009, the first respondent served a payment claim on the applicant for an amount totalling \$15,711.80 ("**the payment claim**"). That amount included \$13,109.80 for work performed under "the construction contract", interest and the first respondent's reasonable costs.
- [23] On 25 March 2009 the first respondent made an adjudication application under BCIPA to the AIQS Authorised Nominating Authority and on 30 March 2009 that application was referred to John Lowry (registered adjudicator number J1057075) ("**the adjudicator**"), who is the second respondent here. Mr Lowry was thereafter appointed to adjudicate the payment claim.
- [24] The adjudicator delivered Adjudication Decision Number N1095979-68 ("**the adjudicator's decision**") on 17 April 2009, and the first respondent was awarded the sum of \$13,823.71 ("**the adjudicated amount**").
- [25] In his decision, the adjudicator:
1. Identified that the first respondent had performed construction work under a construction contract which he found to exist between Surfabeat and GJ Drainage; and
 2. Identified that the applicant had made payments to the first respondent in the sum of \$20,620.45; and
 3. Decided that the amount of the progress payment due and payable under the construction contract was the sum of \$13,823.71, to which sum would be added interest and the adjudicator's fees.

- [26] The applicant was required to pay the first respondent the adjudicated amount by 30 April 2009. This was not done and the first respondent obtained an adjudication certificate for registration as a judgment under BCIPA with the Magistrates Court at Southport on 5 May 2009.
- [27] Without notice to the applicant, the applicant sought to recover the adjudicated amount by seeking a redirection of debt owed to the applicant. An enforcement warrant was served upon a third person, in accordance with the Rules of Court and BCIPA. The warrant was returned wholly unsatisfied.
- [28] On 14 May 2009, the Applicant filed an originating application in the Supreme Court to have the decision of the adjudicator of 17 April 2009 declared void and to restrain the first respondent from taking any steps to enforce that decision. The second order is only necessary, however, if the matter is not dealt with on this application, but rather at trial.
- [29] Section 17 of BCIPA provides that “a person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*)”.
- [30] Section 21 of BCIPA allows payment claims made in accordance with section 17 to be referred to adjudication where the respondent to such claim fails to pay the amount claimed.
- [31] “Construction contract” is defined in Schedule 2 of BCIPA and is defined to mean “a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party”.
- [32] Section 31 of BCIPA deals with the filing of adjudication certificates as a judgment debt. Sub-section (4) of that section deals with the setting aside of adjudication decisions and provides:
- “If the respondent commences proceedings to have the judgment set aside, the respondent –
- (a) is not, in those proceedings, entitled –
- (i) to bring any counterclaim against the claimant; or
- (ii) to raise any defence in relation to matters arising under the construction contract; or
- (iii) to challenge the adjudicator’s decision; and
- (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings.”
- [33] No money has been paid into the court as security for the unpaid portion of the Adjudicated Amount in this case.

Applicant’s Case

- [34] The Applicant challenges the validity of the adjudicator’s decision on the ground of jurisdictional error. It submits that the adjudicator erred in finding that a contract or arrangement existed between itself and the first respondent, within the meaning of

s17 of BCIPA and, therefore, the adjudicator lacked authority to determine the dispute.

- [35] The applicant submits that s31(4)(b) of BCIPA does not apply because, “if the adjudication is declared void, setting aside the judgment on which it is based should, in consequence, follow as an ancillary order of this court”.

Respondent’s Case

- [36] The first respondent submits that s31(4)(b) of BCIPA does apply to the present proceedings and the applicant, having failed to comply with both the requirements of that section and the objectives of the Act, “should be ordered to pay into court as security the unpaid portion of the adjudicated amount pending the final decision in these proceedings”.
- [37] On the main question of the validity of the adjudicator’s decision, the first respondent argues that the adjudicator’s determination is valid, as the arrangements between the applicant, the respondent (and the Jorgensens) fall within the definition of “construction contract” contained in Schedule 2 of BCIPA. Further, the respondent submits that the applicant falls within the definition of “respondent” contained in s 17 of BCIPA, which deals with payment claims.

Should the application be stayed until the adjudication amount is paid into court?

- [38] On this point, Surfabeat attempts to draw a distinction between its application for the adjudicator’s determination to be declared void and the kind of action mentioned in s 31(4)(b) – that is, an application to have a judgment entered pursuant to such determination set aside .
- [39] The respondent does not acknowledge this distinction. Rather, it relies on the objectives of BCIPA, as explained in the second reading speech and referred to by Gzell J in *Abacus Funds Management Ltd v Davenport*¹ and confirmed in *Cooper v Veghelyi and Ors.*² Abacus Funds, however, contemplated the situation where an applicant sought injunctive relief to restrain the respondent from taking steps to enforce an adjudicator’s determination by seeking to obtain an adjudication certificate or filing such certificate as a judgment debt. As such, while it did refer to the objectives of the New South Wales legislation, it did not consider any provision similar to that contained in s31(4)(b) of BCIPA (Qld).
- [40] *Veghelyi* is equally unpersuasive of the plaintiff’s cause. That case, while dealing with a judgment for debt based on an adjudicator’s decision, and considering the NSW equivalent to s31(4)(b), is not authority for the rule that an application for a declaration of invalidity should be stayed until unpaid judgment monies are paid into court. The applicant in *Veghelyi* expressly sought an order that the relevant judgment be set aside. As such, s 25(4) of the NSW Act was directly applicable. As noted by Patten AJ:³

Whether or not it is appropriate for Ms Cooper to seek that relief in this court is, I think, beside the point as it is in fact the relief which she seeks. *It*

¹ [2003] NSWSC 935, [17]-[18].

² [2005] NSWSC 602.

³ *Ibid*, [17].

might well be otherwise if she merely contented herself with seeking a declaration that the adjudication was void (emphasis added).

- [41] Earlier in his judgment, Patten AJ refers to the reasons of Hodgson JA (with whom Mason P and Giles JA agreed) in *Brodyn Pty Ltd v Davenport & Anor*, which states:⁴

Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s25(4): this wording assumes that there is a determination which is challenged.

- [42] While the objective of BCIPA in ensuring that a person entitled to progress payments under a construction contract is able to receive such payments promptly is well established, those objectives do not override the plain and ordinary meaning of its provisions. Section 31(4)(b) makes express reference to "proceedings to have the judgment set aside" when requiring unpaid adjudicated amounts to be paid into court. Other types of proceeding, such as the application made in this case, do not fall within the ambit of that section. No payment into court is required in the present case and the present application need not be stayed.

Should the adjudicator's determination be declared void?

- [43] On this question, both parties refer to *Brodyn's Case*,⁵ in particular, the statement of Hodgson JA, speaking for the Court of Appeal, that:

"[52] However, it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order [in] the nature of certiorari."

- [44] One of the "basic and essential requirements" laid down for the existence of an adjudicator's decision is "the existence of a construction contract between the claimant and the respondent, to which the Act applies".⁶ Schedule 2 of BCIPA defines "construction contract" as "a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party".

- [45] The court's authority to conduct a review on this point is explained by PD McMurdo J in *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235:⁷

⁴ (2004) NSWCA 394

⁵ *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394.

⁶ *Ibid*, [54].

⁷ At [6].

“...this Court has jurisdiction to declare void an adjudicator’s decision which was given without jurisdiction, quite apart from the operation of the Judicial Review Act. Under the equivalent statute in New South Wales, it is well established that where some necessary precondition of an adjudicator’s power has not been satisfied, and an adjudicator has erroneously decided that it has been satisfied, such an error results in the adjudicator’s decision being void, and not merely voidable, and it may be declared to be so.”

- [46] In determining the standard by which the adjudicator’s decision should be scrutinised, the respondent sought to rely on s 26 of BCIPA. Sub-section (2) of that section reads:

“In deciding an adjudication application, the adjudicator is to consider the following matters only—

- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
- (b) the provisions of the construction contract from which the application arose;
- (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
- (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”

- [47] On its reading of s26(2), the first respondent submits:

“[A]n adjudicator is required to consider certain issues. As long as it discharges his duties under section 26 or at least addresses the requirements of section 26 in a bona fide way as to what is to be considered, an error on these matters does not render the determination invalid. *The Minister for Commerce (Formerly Public Works and Services) v Contraz Plumbing (NEW) Pty Ltd and Ors* [2005] NSWCA 142 at [49].”

- [48] I do not accept this submission. Section 26(2) does limit the matters which an adjudicator must consider in deciding an adjudication application. However, the factors included therein support the conclusion that s 26 is only relevant where jurisdiction of the adjudicator is already established. Section 26(2)(b), for example, requires the adjudicator to consider “the provisions of the construction contract from which the application arose”. This provision assumes the existence of a valid construction contract. Where the preliminary issue of whether such a contract exists is in dispute, section 26 does not apply and the court should scrutinize the adjudicator’s decision according to the same standards as it would otherwise consider applications for judicial review. As put by the applicants, the relevant question to be decided here is where, “on the balance of probabilities, no reasonable adjudicator could have been reasonably satisfied that the respondent had satisfied its

onus of showing that a construction contract existed as between it and the applicant”.

[49] In finding that there was a construction contract, the adjudicator relied primarily on three factors:

- That respondent’s assertion that such a contract existed.
- That the contract between the applicant and Mr Jorgensen allowed a Provisional Sum for earthworks.
- That the applicant made part payment of an amount owing to the respondent in September 2008.

[50] These factors were accepted as sufficient to justify a finding that a contract existed between Surfabeare and GJ Drainage within the meaning of BCIPA despite the following:

- Statements given by Mr Senter of the applicant and Mr Jorgensen, the property owner, that no contract existed. It should be noted that those statements of Mr Jorgensen were made against his own interests.
- Condition 9 of the contract stating that provisional sums are subject to reduction off the contract price if not undertaken, and the fact that Part J of the contract provided that the owner was ‘doing’ the excavations.
- Mr Senter giving evidence that Surfabeare’s part payment of the invoice of GJ Drainage was made on the instruction of Mr Jorgensen, as his agent, because the financier had paid the applicant the first draw down, which included an allowance for those sums; and despite Mr Jorgensen confirming the respondent’s invoice was presented to him by the respondent upon the completion of the works, and the relevant amount was paid.

[51] With respect to this payment, the adjudicator stated:

“Whatever arrangements for the Respondent made with the owner, for their convenience, with respect to arranging and supervising the earthworks contract and for the purpose of satisfying the requirements of the owners financiers, the effect was that the earthworks was included in the Respondent’s contract works by way of a Provisional Sum and the Respondent demonstrated its acceptance of this arrangement and its contract with the Applicant by making payment for the contract works.

I am satisfied that a construction contract was formed, partly in writing and partly oral between the parties for the construction earthworks.”

[52] In its submissions, the first respondent seeks to justify this conclusion by referring to the broad definition of contract given in Schedule 2 and stating:

“the distinction in the definition between ‘contract’ and ‘other arrangement’ is intended by the legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between

these relationships the legislature intended that ‘contract’ would be given its common law meaning and that ‘arrangement’ would mean a transaction or relationship which is not enforceable at law as a contract would be.”

- [53] Whether that is so or not, I need not address. Even if one does accept that the definition of “construction contract” contained in BCIPA includes “arrangements” that are not legally binding, then, in order to be within the ambit of that provision, the “arrangement” in question still needs to be between the parties in dispute. That is not the case here. Accepting for the moment that a non-legally enforceable arrangement existed between Surfabeare and the Jorgensens for the payment of expenses related to excavations, it cannot be said that DJ Drainage was a party to that arrangement. It was not a party to the building contract, nor did it have any entitlement to payment under the loan agreement. While DJ Drainage did, in fact, receive part payment as a result of the arrangement, such payment was incidental to the arrangement between Surfabeare and the Jorgensens and not the result of any direct agreement or relationship between the applicant and the respondent.
- [54] Rather than accept the proposal that an “arrangement” existed between the applicant and respondent, in the sense proposed in Schedule 2, I accept the more plausible submission of the applicant that the circumstances described, at most, go to show that there was some loose form of understanding under which the applicant was to pay the respondent. *Walton Construction (Qld) Pty Ltd v Salce*⁸ is authority for the proposition that s 3(3)(c)(ii) excludes the application of BCIPA in such a circumstance.
- [55] This case appears to be in the same category as *Vis Construction Pty Ltd v Cockburn & Anor*,⁹ where Jones J declared an adjudicator’s decision void on the basis of the adjudicator’s erroneous findings of an arrangement involving the builder, subcontractor, and resident owner that involved a process of reasoning not supported in fact. While it is true that, in that case, there was no payment from the applicant to the respondent, the circumstances of this case are sufficient for me to be satisfied that a similar treatment is justified.
- [56] I accept Surfabeare’s submissions that, at its highest, the evidence presented to the adjudicator on the existence of a contract was equivocal and cannot support the finding against the applicant.
- [57] The applicant raised other arguments relating to fraud and the merits of awarding an interlocutory injunction. Based on the findings made, consideration of these matters is not required.

Orders

- [58] The Adjudication Decision Number N1095979-68 dated 17 April 2009 is declared void.
- [59] I will hear the parties on costs.

⁸ [2008] QSC 235.

⁹ [2006] QSC 416