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## Developments In Building And Construction Law

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##### **1. Introduction**

[1] Until recently, it had been thought by many that relief in the nature of *certiorari* would lie against the determination of an adjudicator made under the *Building and Construction Industry Security of Payment Act 1999* ("the Act") on the grounds of denial of natural justice, jurisdictional error of law on the face of the record, or fraud. So much had been established by the decisions in *Musico v Davenport* [2003] NSWSC 977, *Abacus Funds Management v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 and following. This position had become so well established that Barrett J, in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 noted at [4] that the defendant had conceded that the relevant power "had been exercised in so many analogous instances ... that there was no real point in its seeking to make submissions on the matter." The Court of Appeal, however, took a different view in two decisions delivered last November. This paper will discuss the substance and implication of the Court of Appeal's findings in *Brodyn v Davenport* [2004] NSWCA 394 and *TransGrid v Siemens* [2004] NSWCA 395 and their subsequent application in recent first instance decisions.

##### **2. The Court of Appeal Decisions**

###### **A. *Brodyn v Davenport* [2004] NSWCA 394**

[2] At first instance in *Brodyn*, Gzell J considered that the adjudicator's determination before him was infected with a reviewable error of law. His Honour held, however, that relief by way of *certiorari* was unavailable because the adjudication determination had already been filed as a judgment under s 25 of the Act. This, in Gzell J's view, would deprive an order for *certiorari* of its efficacy since "the only utility of an order in the nature of *certiorari* is to ground an application to set aside judgment." The Court of Appeal, whose leading judgment was delivered by Hodgson JA, disagreed. The Court considered that an order of the Supreme Court quashing an adjudication determination could support the setting aside of any judgment already obtained, as well as preclude any further judgment being obtained.

[3] Hodgson JA then proceeded to consider the scope of judicial intervention. His Honour agreed with McDougall J's view in *Musico* that judicial review was unavailable for non-jurisdictional error of law on the face of the record because this ground of review was inconsistent with the legislative scheme set out in s 25(4) of the Act. That scheme displayed an evident policy that disputes concerning progress payments be resolved with a minimum of delay. However, Hodgson JA also considered that the legislative policy weighed against granting relief for jurisdictional error of law on the face of the record. Instead, he concluded that that relief would lie, by way of declaration and injunction, in the following limited circumstances:

1. When an adjudicator has failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination.
2. When the adjudication determination does not amount to an attempt in good faith to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power.
3. When an adjudicator has denied natural justice to a party (the content and operation of this right, however, is dependent upon the relatively limited scheme put forward by the Act for the provision of natural justice).
4. When the adjudication determination has been procured by fraud in which the adjudicator is complicit.

[4] In these circumstances, any purported determination would not be a 'determination' within the meaning of the Act at all and so would be void and not merely voidable. Accordingly, relief would lie by way of a declaration that the adjudication determination was void and an injunction restraining the entry or enforcement of any judgment dependent on that determination. There would be no need for an order of *certiorari* quashing the determination.

[5] Hodgson JA at [53] in *Brodyn* then outlined some, but apparently not all, of the "basic and essential requirements" for a valid determination. These include:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 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).
5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

[6] Finally, his Honour considered some discretionary considerations. In particular, Hodgson JA considered the availability of a stay of a judgment obtained under s 25. And although his Honour concluded at [87] that, just as with any other judgment of the Court, such a judgment could be stayed, it was stressed that the evident policy of the Act, its emphasis on speed and minimal judicial involvement, might weigh against the grant of a stay in a particular case.

### ***B. TransGrid v Siemens [2004] NSWCA 395***

[7] In *TransGrid*, Hodgson JA again delivered the leading judgment. Unsurprisingly, his Honour adhered to the conclusions reached in *Brodyn*. On that basis, he considered whether the adjudication determination complied with the 'basic and essential requirements' as set forth in *Brodyn*. Hodgson JA concluded that the determination did comply with the essential pre-conditions identified in *Brodyn*. His Honour further decided that the failure of the adjudicator to calculate the amount of the progress payment in accordance with the contract, as required by s 9(a) of the Act was not a contravention of a "basic and essential requirement" for a valid determination. While this was an error of law, it was not sufficient to render the adjudication determination void.

### **3. Implications of the Decisions**

[8] The decisions in *Brodyn* and *TransGrid* do not deny the availability of judicial intervention following an adjudication determination. Rather, the decisions change both the basis on which the Court may intervene and the nature of the relief that may be granted.

[9] The consequence of the change in the nature of relief is, as Palmer J pointed out in *Co-ordinated Construction P/L v J M Hargreaves P/L* [2004] NSWSC 1206, that the "dire and irretrievable consequences thought to attach to the filing of an adjudication certificate prior to the decision in *Brodyn*" do not apply. The Court of Appeal has made it clear that judicial intervention is available both before and after an adjudication determination has been filed as a judgment under s 25 of the Act. Consequently, there is no longer any unanswerable need for an urgent injunction to prevent the filing of an adjudication certificate since the right to relief will not be lost thereby.

[10] The consequence of the change in the nature of the relief is more profound because the available grounds of relief have been narrowed. However, the list of "basic and essential requirements" provided by Hodgson JA in *Brodyn* was not intended to be exhaustive. As the subsequent case law shows, it is on this point that disgruntled recipients of adjudication determinations have seized.

### **4. Recent Developments**

[11] There have been three broad developments of interest since the Court of Appeal's decisions last November. The first has been an attempt to expand the list of "basic and essential requirements" for a valid adjudication determination. The second development is the continuation of attempts, in spite of

the effect of the decision in *Brodyn*, to restrain either the filing of adjudication certificates as judgments or the initiation of the adjudication process altogether. The third development has revolved around the ambiguity of the Act's requirements for service – one of the basic and essential requirements for a valid adjudication determination.

#### A. Attempted Expansion of the List of “Basic and Essential Requirements”

[12] This is the most dominant of the three developments identified. It seems that, in substance, a number of applications that would previously have sought an order for *certiorari* on the grounds of jurisdictional error of law have simply been amended to argue that an adjudicator's determination ought to be declared void for failure to comply with some “basic and essential” requirement. Of these applications, the majority have sought to expand the five categories listed by His Honour. In each case to date, the attempt has been rebuffed.

[13] The first application of *Brodyn* was the Court of Appeal's decision in *TransGrid*, where, as mentioned above, Hodgson JA considered that the requirement under s 9(a) of the Act to calculate the amount of the progress payment in accordance with the contract was not a “basic and essential requirement” for a valid determination. The Court of Appeal also held in *The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 that compliance with the fifth ‘basic and essential requirement’ set forth in *Brodyn*, namely the making of an adjudication determination, does not involve compliance with s 9 of the Act. Similarly, in *Rothnere v Quasar* [2004] NSWSC 1151, McDougall J considered that compliance with s 22(4) of the Act was not a “basic and essential requirement” for a valid determination.

[14] In *Coordinated Construction Pty Limited v J M Hargreaves Pty Limited* [2005] NSWSC 77, McDougall J was asked to consider whether an adjudication determination was void because the adjudicator had determined that the defendant was entitled to be paid, as part of a progress payment, an amount of ‘delay damages’ claimed under an express provision of the subcontract. McDougall J decided that, irrespective of whether delay damages and interest thereon could be included in a determination of the amount of a progress payment, any error would not render the determination void. This was because His Honour considered at [45] that all the various formulations presented by the Court of Appeal which guide the search for reviewable error suggest “strongly that the factors to be considered are anterior rather than interior: matters that must exist before there can be an adjudication at all.” Accordingly, whether or not the inclusion of an amount of delay damages in an adjudicated amount was an error of law, there was no failure to comply with a basic and essential requirement for a valid determination.

[15] His Honour also held, at [48], that s 13(1) speaks of the entitlement to serve a payment claim by someone “who is or **who claims to be** entitled to progress payment” (his Honour's emphasis). Accordingly, a payment claim that is entirely comprised of, or includes, an amount that is not “for” construction work may be the subject of a valid determination by an adjudicator. That is because “the jurisdiction entrusted by the Act to adjudicators includes the power to determine whether ... a particular amount claimed is “for” construction work.” (McDougall J at [50]). This reasoning also disposed of the plaintiff's alternative argument that each determination should be set aside on the basis that it was made in contravention of the relevant provisions of the Act, and was thus unlawful. His Honour similarly concluded at [58] that even had an error been made by an adjudicator's including an amount for an extension of time in an adjudication determination, such an error would not amount to a breach of an essential precondition for a valid determination.

[16] Bergin J, in *Coordinated Construction Co P/L v Climatech (Canberra) P/L* [2005] NSWSC 312, considered an application brought by the plaintiff seeking to restrain the defendant from obtaining an adjudication certificate under s 24 of the Act. This dispute involved many of the same issues as McDougall J's decision in *Coordinated Construction v J M Hargreaves* (indeed, the defendants unsuccessfully submitted that this case was a re-run of *Coordinated Construction v J M Hargreaves*). The application was put on the basis that, in allowing in the adjudicated amount an amount for delay damages arising from extensions of time under the construction contract, the adjudicator had breached a ‘basic and essential’ requirement for a valid determination because this was not an amount ‘for’ construction work. Bergin J, at [39], concluded that the extension of time claims had been allowed on a proper basis as a ‘related service’ under s 6 of the Act. Her Honour also held that, although the adjudicator had erred in allowing a variation, this did not render the determination void as a failure to comply with a ‘basic and essential’ requirement.

[17] These cases indicate that the Courts have been reluctant to expand the list of ‘basic and essential’ requirements for a valid determination as set forth in *Brodyn*. At the heart of this reluctance lies the Court's interpretation of the policy of the Act. Ultimately, all the arguments put in these cases were

based on the view that the adjudicator had made an incorrect decision, not that some fundamental building block for a valid decision was missing.

## B. Injunctions

[18] This development is not a new occurrence. It is better described as the consequence of an apparent failure of some practitioners to comprehend fully both the procedural impact of the decision in *Brodyn* and the way in which the Court has, post *Brodyn*, interpreted the policy of the Act. The result is the making of applications either to restrain the filing of an adjudication certificate under s 25 of the Act following an adjudication determination or to restrain a claimant from proceeding with the adjudication process. Both types of application have been looked upon unfavourably.

[19] Dealing with the first sort of application, Palmer J noted at [8] in *Co-ordinated Construction P/L v J M Hargreaves P/L* [2004] NSWSC 1206 that the Act was designed to ensure “prompt and timely progress payments under building contracts”. Because an injunction granted by the Court “is not the only chance which a party has to prevent enforcement of an adjudication determination which is said to be void for non-compliance with an essential requirement of the Act ... [t]he dire and irretrievable consequences thought to attach to the filing of an adjudication certificate prior to the decision in *Brodyn* should no longer be invoked in an endeavour to induce this Court to intervene where a party, at the last moment, seeks an *ex parte* injunction to restrain the filing.” His Honour emphasised that bringing such an application, especially at the eleventh hour, “requires the Court to act under the suggestion, almost under a threat, that unless the Court grants the injunction irretrievable consequences will follow immediately. I do not think this sort of application should be encouraged.”

[20] Although Palmer J granted the injunction sought in that case, his Honour noted at [10] that “the profession should be made aware that if an *ex parte* application of this character is made to this Court at such a late stage, the applicant runs the risk that it will be refused out of hand and that it will be left to set aside a judgment entered pursuant to s 25(1) in the appropriate court, if it can.”

[21] Palmer J’s warning was acted on by McDougall J in *Soliman v BNS Landscapes* (17 December 2004, unreported). His Honour noted that the plaintiff had sought injunctive relief after the “period of grace” flowing from the combined effect of ss 23, 24 and 25 of the Act; and that there had been no explanation of the plaintiff’s delay. His Honour relied on:

- that delay;
- the lack of evidence that payment of the adjudicated amount would cause hardship to Soliman or that if the amount were paid, BNS would be unable to repay it if required;
- the circumstance that a judgment based on the certificate could be set aside if it were void for the reasons discussed in *Brodyn*; and
- the statutory intention to maintain cash flow to support the conclusion that interlocutory relief should be refused.

[22] It is correct to say that, if interlocutory relief restraining the filing of an adjudication certificate as a judgment is refused, and the judgment debtor is left to seek to have the judgment set aside (including on *Brodyn* grounds) then, by s 25(4)(b), the judgment debtor would be required to pay into Court as security the unpaid portion of the adjudication amount. That is the price of delay, not a reason to grant even a tardy applicant urgent *ex parte* interlocutory relief. Further, the legislative policy underlying s 25(4)(b) – that the claimant should have the money or security for it – may well mean that even applications brought promptly should be refused, or that relief should be granted only on a condition of payment in. That is a matter to be worked out on a case by case basis.

[23] The second aspect of the problem involves the attempts made to restrain a claimant from proceeding with an adjudication application at all. In *Australian Remediation Services P/L v Earth Tech Engineering P/L* [2005] NSWSC 362, it was argued that the first defendant should be restrained from proceeding with an adjudication application because the payment claim was beyond the adjudicator’s power to determine because the relevant work was not “for” construction work or related goods and services. McDougall J, after considering the impact of *Brodyn*, noted at [12] that since “review on the basis of jurisdictional error of law on the face of the record is not available, ... adjudicators must be understood to have power to consider whether claims, or components of claims, comprised in adjudication applications can, or cannot be awarded under the Act.” An application of this sort also ignores, as McDougall J noted at [14], the fact that the legislature has made it clear that it is adjudicators under the Act who are the primary organs for the resolution of disputes about payment claims, whereas the power of the Court operates at a later stage. Accordingly, the Courts ought to

“think long and hard before interfering in the implementation, in a particular case, of that statutory scheme.”

[24] The same approach was taken by Palmer J in *Lifestyle Retirement Projects No 2 P/L v Parisi Homes P/L* [2005] NSWSC 411. In that case, the plaintiff contended that the defendant had not served its payment claim within the time period laid down by the Act. The plaintiff also argued that it had served its payment schedule within the Act's allotted timeframe and thus the defendant was not entitled to apply for adjudication. The plaintiff argued that if either fact were found in its favour, then a necessary element for the adjudication's validity would be lacking and, so, the Court should restrain any adjudication pending the resolution of the issues put forward by the plaintiff. Palmer J agreed with the decision in *Australian Remediation Services* and refused relief, noting at [4] that “the existence of a fact necessary for the validity of an adjudication is a matter within the competence of the adjudicator to determine.”

[25] The Court's attempts to arrest this development underscore two elements of the decision in *Brodyn*. The first is the procedural impact brought about by the change in the nature of relief available and the finding that judicial review is available even after an adjudication certificate is filed as a judgment. This is a positive development because it means that parties are no longer forced to rush to court to seek to restrain the filing of an adjudication certificate. The extension, so to speak, of the period in which judicial intervention is available and effective should allow parties more time to consider whether seeking to set aside an adjudication determination is an appropriate course of action.

[26] This last consideration is especially important given the second of the two elements highlighted by the Court's attempts to arrest the progress of this development. That element is the way in which the courts have interpreted the policy of the Act. Palmer J has pithily described the object of the legislative scheme as ‘pay now, argue later’. This approach has been reinforced by the narrow approach to judicial review taken by the Court of Appeal in *Brodyn*. The legislative scheme is also based upon the idea that, as the Court of Appeal has mentioned in *Falgat Constructions P/L v Equity Australia Corp P/L* [2005] NSWCA 49 at [13], the remedies provided in the Act supplement the parties' rights at common law. Accordingly, attempts to interfere with the adjudication process for progress claims need to be carefully considered.

[27] One matter to be borne steadily in mind, in considering such attempted interference, is the legislative insistence on certainty of cash flow. As mentioned in para [22] above, that is reinforced by s 25(4)(b). It is clear that the legislature either intended that the credit risk should be transferred from claimants to respondents (because of the “pay now argue later” philosophy) or that it was alive to, and not deterred by, that commercial consequence of the legislative scheme. On either basis, an approach that minimises judicial intervention is consistent with that scheme. Again, the consequences of this analysis are something to be worked at on a case by case basis.

### **C. Service and Receipt**

[28] This final development serves as a warning to both adjudicators and parties to an adjudication application. One of the grounds for judicial intervention is denial of natural justice. Further, a basic and essential requirement of a valid adjudication determination is the service by the claimant of a payment claim upon a respondent. Both emphasise the importance of the requirement for service under the Act. In the rush to comply with the tight timeframes laid down by the Act, parties and adjudicators must be careful to comply strictly with the Act's requirements for service lest any determination be rendered void.

[29] In *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232, McDougall J noted at [42] the distinction that the Act appears to draw between provision and receipt. So, if a letter “was posted, it may have been ‘provided’...for the purposes of s14(1), (4)b, even though...it was not received.” His Honour also considered at [49] that “whatever ‘provide’ may require in the context of s14(1), it must require at the least that the process of delivery be initiated – that the document be posted, or given to a courier for deliver, or that whatever means of transmission is chosen be put into operation.”

[30] In *Pacific General v Soliman & Sons* [2005] NSWSC 378, McDougall J again considered the distinction that the Act draws between service and receipt and noted that under both s 20 and s 31(1) (c) the “operative concept...is receipt.” His Honour stated at [27] that “the verb ‘receive’ in its ordinary meaning denotes the taking of something into one's hand or possession, of something given or delivered, or having something delivered or brought to one.” He saw “no reason why the word ‘receive’, and its cognate forms in the Act, should not be given that ordinary English meaning.” In that case, unchallenged evidence, including evidence of ordinary business practice or system, was conclusive.

[31] These cases should remind claimants and respondents in adjudication disputes, as well as adjudicators themselves, of the importance of service. It is essential to the validity of any determination that service be correctly effected. As the decision in *Pacific General v Soliman* shows, this can often be a difficult evidentiary matter. The establishment and maintenance of a reliable business practice or 'system' for dealing with the service and receipt of the various documents contemplated by the Act is a sound precaution for dealing with any potential dispute. See, as to the significance of evidence of practice, cases such as *Martin v Osborne* (1936) 55 CLR 367; *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713; and *Olga Investments Pty Ltd v Citipower Ltd* [1998] 3 VR 485.

#### END NOTES

\* A Judge of the Supreme Court of New South Wales. The views expressed in this paper are mine, and should not necessarily be attributed either to my colleagues or to the Court.

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