

John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors

[2004] NSWSC 258 (20 April 2004- Einstein J) Supreme Court of New South Wales

Adjudication- Payment Claims – submissions in Adjudication Application not duly made in support of the Payment Claim – Adjudication Application tied to Payment Claim – jurisdictional error – denial of natural justice.

David Campbell-Williams¹ and Graeme Robinson²

This judgment concerns a challenge to an Adjudicator's determination under the *NSW Building and Construction Industry Security of Payment Act 1999* (the Act). The key issues in the case concern the construction of the payment claim, the ambit of submissions and documentation permitted in the consequent adjudication application, and the consequences for a determination.

Background to the NSW Act

Justice Einstein outlined the background to the Act and his assessment of the status of the numerous recent decisions in proceedings to quash determinations under the Act.

The Act requires that an adjudication response is relevantly tied to the payment schedule. A respondent is expressly prevented from including in the adjudication response any reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant - section 20(2B).

It follows that the Adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application, which fall outside the scope of the claim and materials comprising the payment claim.

An applicant cannot raise for the first time in its adjudication application, heads or grounds of claim which had not been included in the payment claim, as a respondent could not have been expected to deal with those heads or grounds in its payment schedule. A respondent would thus be unable to respond to such additional heads or grounds in its adjudication response, by reason of the prohibition in section 20(2B) of the Act.

There is no express provision to be found in section 17 (dealing with adjudication applications), equivalent to section 20(2B).

Justice Einstein considered that the adjudication application should be relevantly tied to the payment claim such that the adjudication application cannot include reasons supporting the payment claim unless those reasons had been included in the payment claim. However, the Act does not expressly require any form of reasons for the making of a payment claim, to be included in the payment claim.

1. Solicitor, Arbitrator and Adjudicator.

2. Engineer, Arbitrator and Adjudicator.

The issues

The broad issues addressed in this case are whether

- the adjudication application made to the adjudicator contained submissions which were not duly made in support of the payment claim for the purposes of 17(3)(h) and 22(2)(c) of the Act;
- the adjudicator relied on submissions in the adjudication application which were not duly made in support of the payment claim contrary to section 22(2)(c) of the Act;
- the adjudicator committed a jurisdictional error or otherwise committed an error justifying an order in the nature of *certiorari* quashing the determination; and
- the plaintiff was denied natural justice in the adjudication.

The only issues which the respondent is entitled to agitate in the adjudication response are those issues dealing with reasons for withholding payment which have been indicated in the payment schedule in accordance with s.14 (3);³

The purpose of s 13(1) and (2), s 14(1), (2) and (3), and s 20(2B) is to require the parties to define clearly, expressly and as early as possible, the issues in dispute between them;⁴

These are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s 22.⁵

The content of payment claims was addressed in *Multiplex*:

*A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute.*⁶

Section 13 of the Act does not expressly require the payment claim to include reasons for the claimed entitlement to a particular progress payment. The sole requirements found in subsection 13(2), are that a payment claim:

- (a) must identify the construction work (or related goods and services) to which the progress payment relates;

3. Einstein J in *John Holland v Cardno MBK* at paragraph 12 citing *Multiplex Constructions Pty Limited v Luikens & Ors* [2003] NSWSC 1140 (Palmer J) at paragraph 67.

4. *Ibid.*

5. *Ibid.*

6. Einstein J in *John Holland v Cardno MBK* at paragraph 14 citing Palmer J in *Multiplex* at paragraph 76.

- (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
- (c) must state that it is made under the Act.

Justice Einstein held the view that a payment claim clearly is a claim to an entitlement to be paid a progress payment. It required as an *essential condition* that the document by which the payment claim was put forward, *include*, sufficient information to identify *what the claim is*. For a claim to be *valid*, the statutory regime requires the claim to be comprehensible by the respondent; that the claim is supported by the relevant documentation.

This argument was based on the requirement in Section 14(3), that the respondent indicate *why* the scheduled amount is less than the claimed amount and to give the respondent's reasons for withholding payment. This requirement can only be justified by the proposition that the payment claim will identify in a fashion comprehensible to a respondent, just what the claim is. Section 22(2)(c) requires that the application must '*relate*' to the payment claim.

Justice Einstein noted that there are no words within Section 13(2) which required the claimant to do otherwise than:

- to identify the subject construction work to which the progress payment relates [subsection (2)(a)];
- to indicate the amount of the progress payment that the claimant claims to be due [subsection (2)(b)]; and
- to state that the claim is made under the Act. [subsection (2)(c)].

Approaching the question in terms of Section 20(2B)

Justice Einstein addressed several issues arising from the terms of Section 20(2B) and considered that:

Whilst a claimant which provides the most minimal amount of information in its payment claim may even so, be seen to technically comply with section 13, such a claimant will expose itself to an abortive adjudication determination if it be that:

- *the respondent is simply unable to discern from the content of the payment claim, sufficient detail of that claim to be in a position to meaningfully verify or reject the claim: hence not then being in a position to do otherwise than to reject the whole of the claim on the basis of its inability to verify any part of the claim;*
- *the claimant then elects to include the missing detail in the adjudication application with the inexorable consequence that the respondent is barred by section 20 (2B) from dealing with that detail/matter in its adjudication response;*
- *the adjudicator relies in determining the adjudication application upon the detail supportive of the payment claim which first emerged as part of the adjudication application (emphasis added).⁷*

7. *John Holland v Cardno MBK* at paragraph 22

Justice Einstein went on to observe:

For those reasons whilst it is not permissible to construe section 13 as providing that in order to be a valid payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.⁸

Justice Einstein addresses the question in terms of the adjudicator's power:

*An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside **the ambit or scope of] the materials which were provided in the payment claim**, for the reason that the adjudicator only has power to make a determination based upon:*

- *The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see section 22 (2) (c)] (emphasis added).⁹*

It is suggested that his Honour's use of the word 'materials' here is significant and indicates the importance of ensuring the documentation supporting the payment claim goes beyond merely identifying the 'issues' of 'claims' raised.

This also suggests that at a practical level at any rate, the observations in paragraph 76 of Justice Palmer's judgment in *Multiplex* quoted above, must be read closely. There is, on Justice Einstein's analysis, real risk in relying upon a cryptic payment claim, if one is to be confident that, in Justice Palmer's words, there is 'precision and particularity ... reasonably sufficient to apprise the parties of the real issues in dispute'.

It is crucial that all possible grounds for the claim or head of claim, are identified in the payment claim.

The same applies to the payment schedule. Any submissions (and relevant documentation) furnished in the adjudication response, have to have been 'duly made by the respondent in support of the (payment) schedule'.

Both sub paragraphs (c) and (d) of sub section 22(2) refer to submissions 'duly made'.

Justice Einstein explains:

The emphasis upon submissions "duly made" makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served ... The adjudication application will relate to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot constitute a payment

8. *John Holland v Cardno MBK* at paragraph 23.

9. *John Holland v Cardno MBK* at paragraph 24.

*claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot constitute a payment schedule or part of it.*¹⁰

The limitation upon additional submissions

Justice Einstein considered whether shortcomings in documentation may be addressed by the adjudicator requesting further written submissions from either party. His Honour observed (as obiter) that:

*... it would seem unlikely that the legislature would have intended the provisions of section 21 (4) (a) and (b) to permit a radical departure from the statutory scheme described above. Rather it seems likely that these sub-sections are to be read as permitting no more than additional submissions which clarify earlier submissions: those earlier submissions being constrained in the manner above described (emphasis added).*¹¹

Where the adjudication application contains parameters not telegraphed in the payment claim

His Honour drew a distinction between circumstances:

- *where the claimant for the first time advances a new contractual basis for a payment claim in the adjudication application; and*
- *where the claimant for the first time seeks to deploy in the adjudication application, supporting documentation of one type or another (emphasis added).*

New contractual basis

His Honour considered that an ‘... abortive adjudication determination likely to result from the advancing [within the adjudication application] of a new contractual basis for a payment claim.’

Supporting documentation

The position in respect of new documentation is far less clear. His Honour observed that:

The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says

10. *John Holland v Cardno MBK* at paragraph 25.

11. *John Holland v Cardno MBK* at paragraph 26.

as much in the payment schedule [only later to receive as part of the adjudication application, the supporting documentation which should have been earlier supplied in order to permit a meaningful payment schedule response], will be otherwise than barred by section 20 (2B) from including in its adjudication response reasons for withholding payment arising by reference to the later supporting documentation. It could not be said that those reasons were already included in the payment schedule provided to the claimant. A complaint about inability to verify a claim because of insufficient information is not synonymous with reasons for dealing with a properly supported claim (emphasis added).

Challenges based on jurisdictional error and denial of natural justice

John Holland challenged the determination on the basis that it was a jurisdictional error for the adjudicator to rely on matters which were the subject of the adjudication application, which had not previously been raised in Cardno MBK's payment claim.

John Holland also asserted that it was denied natural justice by the adjudicator not providing it with an opportunity to adequately respond to the claim in its Payment Schedule and accordingly it was not able to present an adequate defence to this claim in its adjudication response (by reason of section 20(2B)).

Dealing with the challenges

John Holland challenged the determination in respect of four heads of Cardno MBK's claim. Only three of the four challenges were pressed at the hearing, each based on both jurisdictional error and denial of natural justice.

Variation claim 6

In what his Honour regarded as the clearest of the three cases, Cardno MBK had in its adjudication application changed its ground, by putting an alternative contractual basis, to that put in the payment claim in respect of this particular head of claim.

It followed that John Holland's payment schedule did not address the alternative contractual basis, and on his Honour's analysis, section 20(2B) operated to preclude John Holland from dealing with the alternative contractual basis in its adjudication response.

Critically, the adjudicator accepted Cardno MBK's alternative contractual basis for that head of the payment claim as determinative of Cardno MBK's entitlement. In doing so, his Honour held that the adjudicator not only fell into jurisdictional error, there was a denial of natural justice.

Had the adjudicator invited John Holland to make further submissions in respect the alternative contractual basis, his Honour observed that this could have cured the denial of natural justice.

Progress claim 39 – construction stage services timesheets

Cardno MBK's payment claim had included a claim for consulting engineering services in a period before the payment claim had been made. The claim was based on professional time spent during the construction phase of the project. The payment claim had neither attached nor specifically referred to timesheets, although Cardno MBK's invoices, which were attached to the payment claim did particularise the time spent and identify the personnel involved.

The payment claim had not outlined the contractual basis for this head of claim.

John Holland's payment schedule rejected the head of claim on the basis that it was not supported by approved timesheets, in accordance with the agreement between the parties.

The adjudicator determined Cardno MBK was entitled to some \$29,767.13 in respect of this work, which was supported in the adjudication application, by unapproved timesheets and contentions as to the contractual basis of the head of claim. The adjudicator undertook an inspection of the site and concluded that the time sheets generally supported the labour hours claimed. The issue was thus determined on timesheets which had not formed part of the payment claim.

His Honour held:

Whilst the matter is certainly not clear beyond doubt my own view is that in this particular state of affairs it was impermissible for the claimant to raise these matters for the first time in the adjudication application. Had the respondent sought to treat with these issues in its adjudication response, it would have been in breach of section 20 (2B).¹²

In result the adjudication miscarried – for the same reasons as have been given in relation to challenge 4. It was also a denial of natural justice ...

Progress claim No 8 – construction stage services timesheets

The payment claim did not expressly refer to, identify or particularise a head of its claim as derived from Progress Claim 8. The amount of \$59,370 claimed *in the adjudication application* under this head was (by deduction), a component of an amount described in a reconciliation attached to the payment claim as 'Total invoiced (up to 5/9/03)'. The contractual basis of the head of claim and particulars of the calculation of the time expended were however only given in the adjudication application.

John Holland had nevertheless responded to this head of claim in its payment schedule, rejecting the claim by reason of the lack of timesheets.

12. *John Holland v Cardno MBK* at paragraphs 47 and 48.

In addition to the additional (and fatal) issue of lack of identification in the payment claim, this head of Cardno MBK's claim was also confronted by the same obstacles as raised in the other two challenges.

Justice Einstein observed:

In those circumstances I do not see that the relevant provisions of the Act were enlivened at all in relation to this item ...

The adjudicator determined the whole of the item the subject of [the] challenge ... upon the mistaken assumption that the Act had been enlivened. The determination clearly miscarried in relation to the item ...

The payment claim was defective. The determination was misconceived. The claim was invalid and effectively "writ in water".¹³

13. *John Holland v Cardno MBK* at paragraphs 56 to 58.

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