Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited

[2006] NSWSC 94

David Campbell-Williams[1]

Whether an adjudicator failed to comply with the basic and essential requirements of the Building & Construction Industry Security of Payment Act 1999 (NSW) — whether the provision of related goods and services in Victoria could be claimed in a payment claim otherwise for construction work performed in New South Wales made under the Act — whether adjudicators should make catch all exculpatory statements.

This decision of Justice Bergin is the most significant decision from the Supreme Court of New South Wales in respect of the *Building & Construction Industry Security of Payment Act 1999* (NSW) (Act), since Justice Nicholas' decision in *Energy Australia v Downer*.[2]

The decision is significant because it is another judgment where the amount in issue in the adjudication application was very substantial — more than $11 million — again illustrating the reach of the Act.

The decision is also significant in that it deals with a question of practice, namely whether adjudicators should include statements in determinations to the effect that it should not be assumed that matters not mentioned in the determination have not been taken into account.

More importantly, this is the first major decision to consider expressly, the extra territorial operation of the Act.

The Facts

Mayr's payment claim was in respect of $11,137,998.30 which included as claim items E5.1 to E5.7, 're-imbursement for costs, losses and damages' totalling $6,286,182.00 inclusive of GST. The claim was a 'global claim' stemming from disruption, with quantification based on a 'modified total cost' method. That claim also included a cost component for transporting the constructed modules to Geelong, Victoria from New South Wales.

The adjudicator determined an adjudicated amount of $11,085,693.00 including items E5.1 to E5.7 and the transportation costs.

Shell contended in its summons that the determination was null and void.

The Decision

The heart of the matter was Shell's assertion that:

---

1 David Campbell-Williams, BA LLB Prof Cert Arb MIAMA, is an adjudicator, arbitrator and a principal of Cowley Hearne Lawyers, Sydney.

2 *Energy Australia v Downer* [2006] NSWSC 94.

- the adjudicator determined claims E5.1 to E5.7 of the Payment Claim without considering and determining the merits of such claims (*failure to address the merits*); and
- allowed a claim for transportation of materials to Geelong, Victoria without the jurisdiction to do so (*Transport Claim*)

constituting failures to comply with the *basic and essential requirements* prescribed by the Act rendering the determination void. Under the principles in *Brodyn*,[3] it was necessary for the adjudicator to assess the merits of the defendant's claims in tems E5.1 to E5.7 and determine their value, to comply with the basic and essential requirements of the Act. Shell asserted that he had not done so.

The pivotal pragraph of the determination

The adjudicator had in dealing with items E5.1 to E5.7 included in his determination a paragraph in the following terms:

> *I am satisfied that the respondent did cause delay and disruption and the respondent thereby breached the Contract and caused the claimant to incur some damages of the nature claimed. Had the respondent addressed the claims and come up with a different assessment, then I might have been able to determine an entitlement different to that claimed. As it is, the respondent has not provided information which would enable me to assess the claimant's damages at a lesser amount than the amount claimed. Consequently, for a payment on account, I am satisfied that the claimed amount should be included in the calculation.*[4]

Shell asserted that the only reference to the merits of the claim in terms of value to be found in the determination was the reference to the inclusion of 'some damages of the nature claimed'. Mayr submitted that a proper and reasonable reading of the determination did reveal that the adjudicator did consider the merits of the claim and devalued the amount claimed by the defendant.

Shell contended that the adjudicator had, contrary to the principles in *Brodyn*, failed to '*address the merits*' of the claim, or as expressed in *Pacific General Securities*[5] by Brereton J, the adjudicator had failed to determine 'whether the construction work identified in the payment claim had been carried out and what is its value'.

Shell submitted that the matters relevant to addressing the merits of the claims and determining their value were:

- whether the claimant had established a nexus between delays and costs said to have been incurred;
- if so whether all delay costs were necessarily and reasonably incurred;
- whether the claim included inter-State construction work or related goods and services (the transport claim);
- whether all the rates claimed were reasonable;
- whether the adjudicator agreed with the 'subjective judgment' of the defendant as to its methodology; and

---

3 *Brodyn Pty Ltd t/as Time cost and Quality v Davenport* (2004) 61 NSWLR 421 at para 441, [53]

4 *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94 at paragraph 18.

5 *Pacific General Securities v Soliman* [2006] NSWSC 13

- whether the plaintiff had already paid the defendant amounts referable to delay damages.

The transport claim was dealt with separately. Her Honour considered that the pivotal paragraph had to be considered in respect of each item.

1. Did the adjudicator fail to consider whether the plaintiff had established a nexus between delays and costs said to have been incurred?

The adjudicator had sought to cover himself in respect of any future criticism of his determination by including a statement to the effect that he had:

> *considered all the submissions and accompanying documents submitted by the parties and the fact he had not specifically referred to any submission or document in the determination should not be taken as an indication that he had not considered it.*

The adjudicator had qualified this generality by his statement that the reasons that he had not referred to any particular submission or document was that he had not considered it of 'sufficient relevance to warrant specific comment'.

The Court observed that such statement or qualification is not really helpful, regardless of the pressure of producing a determination within a tight timeframe in a large and complex case and where 'certain provisions of the Act have occasioned some difficulty and some differences of opinion among judges'.

In dealing with the question itself as to whether there was a nexus between delays and costs, her Honour took comfort from the adjudicator's reference to Mayr's 'impecable record-keeping' considering that:

> *such observation is an indication that the adjudicator was of the view that the claims made by [Mayr] in respect of the hours that he did spend as a result of the delays incurred were properly documented and ... that the adjudicator considered that the delays were caused by the plaintiff and he accepted that the way in which the defendant had valued its delay costs was a reasonable method of so doing.*[6]

The adjudicator had gone further and referred to the General Conditions of contract and found that the costs claimed appeared to fall within the definition of the contractual definition of Delay Costs.

Her Honour concluded that she was not satisfied that the adjudicator had failed to consider whether the defendant had established a nexus between delays and costs said to have been incurred.

2. Did the adjudicator fail to consider whether all delay costs were necessarily and reasonably incurred?

The determination had referred directly to the relevant clause of the General Conditions and the fact that Delay Costs had to be necessarily and reasonably incurred and calculated or substantiated. Her Honour was not satisfied that the adjudicator failed to consider whether the delay costs were necessarily and reasonably incurred.

---

6 Shell at [29]

3. *Did the adjudicator fail to consider whether all the claims were reasonable?*

The determination did not contain a statement to the effect that the adjudicator regarded the claimed costs as 'reasonable'. Her Honour considered however that it was clear the adjudicator had considered the method of calculation utilised in reaching the claimed amounts and had concluded that such claims were substantiated. Her Honour concluded that the adjudicator's findings were substantiated and that the adjudicator had regarded the claims as reasonable.

4. *Whether the adjudicator agreed with the subjective judgment of the defendant as to its methodology?*

It had been submitted that the methodology for the calculation of the claims required a certain amount of subjective judgment. It was asserted that the adjudicator in addressing the merits of the defendant's claim should have determined whether he accepted or agreed with that subjective judgment.

The Court concluded that this issue was not separate from the consideration of whether the claims were reasonable. Her Honour was satisfied that the adjudicator was well aware of the inclusion within the methodology of an element of subjective judgment and that he accepted that such was a reasonable and acceptable method by which to calculate the amounts claimed.

5. *Did the adjudicator fail to consider whether the plaintiff had already paid the defendant amounts referable to delay damages?*

Shell had claimed before the adjudicator that the defendant had already been paid substantial payments in relation to the delay-related costs. This issue was ventilated in a number of letters before the adjudicator and in fact amounted to an assertion by Shell that it was entitled to a set-off. The adjudicator however found that Shell was not entitled to make the claimed set-off and relied upon a clause in the General Conditions of contract. Her Honour was satisfied that the adjudicator had quite properly taken into account the relevant letter and the Court was satisfied that the adjudicator had considered all the matters placed before him.

Did the pivotal paragraph mean that the adjudicator did not value the defendant's claim and simply allowed it because there was no other assessment provided by Shell?

The Court considered that the issues here were different to those before the Court in *Pacific General Securities v Solimon*.[7] In the present case the adjudicator had in the Court's view considered the claim made by Shell, that Mayr's claim was unsubstantiated. In other words, the adjudicator considered whether the defendant's claim was substantiated, so as to be in a position to reject Shell's claim that it was not substantiated.

Her Honour concluded that the words 'some damages of the nature claimed' do not mean that the defendant had proved only some of its claims. Her Honour was also satisfied that the adjudicator did address the merits of the defendant's claim and concluded that it was substantiated and that the methodology used to calculate the claim was reasonable.

> *...in so deciding, the adjudicator placed a value on the claim in the amount as claimed in the 8 August claim and adjusted by the two later letters to which he referred in the determination. Having done that, the adjudicator observed that the plaintiff had not*

7 [2006] NSW SC 13.

> *provided information that would enable him to assess the claim at less than that amount. In my view that observation does not mean that the adjudicator did not address the merits of the defendant's claim. I am satisfied that the adjudicator did address the merits of the defendant's claim and placed a value on it equivalent to the amount claimed as adjusted....* [8]

The Transport Claim

It was common ground that the adjudicator allowed in his determination, costs of transporting the modules by road from New South Wales to Geelong. The transport claim raises an interesting issue in respect of the extra territorial operation of the legislation.

The New South Wales Act contains a limit on the extra territorial application of the Act, in s 7(4).[9]

The Court concluded that the transporting of the modules to Victoria could be characterised as the provision of goods and services in relation to construction work that was carried out in New South Wales and thus did not offend s 7(4) of the Act. In reaching this conclusion, the Court adopted a purposive, rather than literal approach to construction of s 7(4).

The common law rule of construction is that a legislature must clearly show the necessary intention for a statute to have extra territorial effect, however this does not mean that the legislature has the necessary authority to enact the statute with such effect.

The Court undertook an analysis of authority including an extensive analysis of the decision in *Goliath v Bengtell*.[10]

Her Honour referred with approval, to the dissenting judgment of McHugh JA (as he then was) in *Kingston v Keprose*[11] in which his Honour had favoured a purposive and not a literal approach to statutory construction.

Her Honour concluded:

> *... it seems to me that on a reading of the Act as a whole and in particular the provisions of section 7(4) of the Act, the legislative intention is that progress claims and payment for the provision of goods and services in Victoria in respect of construction work carried out in New South Wales are not excluded from the Act.*

The Court noted that Victoria had a legislative scheme operating in a complementary manner with that in New South Wales.

Her Honour then turned to considering whether it was possible to enable a purposive construction of the Act having regard to the three pre-requisites referred to by Lord Diplock in *Wentworth Securities v Jones*.[12]

---

8 Shell at [51].

9 '...this Act does not apply to a construction contract to the extent that it deals with:
(a) construction work carried out outside New South Wales, and
(b) related goods and services supplied in respect of construction work carried out outside New South Wales...'

10 *Goliath Portland Cement Co Limited v Bengtell* (1994) 33 NSWLR 414 at 426(d) to 429(f) per Kirby P (as he then was).

11 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423.

The Court considered that the industry with which the Act deals included professionals and tradespersons who provide services across borders. One of the purposes of the Act is to ensure that the person who provides related goods and services in respect of construction work in New South Wales is able to have the benefit of the Act for the prompt recovery of progress payments. Her Honour concluded:

> *...it seems to me that the purpose of the Act would be defeated if persons who provided related goods and services outside New South Wales in respect of construction work carried out in New South Wales were excluded from the Act ... I do not think that this outcome is to read up the provisions of the Act and so expand the operation of the Act. Rather it seems to me that the provisions of the Act anchor the jurisdiction to the construction contract and construction work carried out in New South Wales and related goods and services anchored to, or in respect of, that construction work, irrespective of whether they are provided within New South Wales.*[13]

The Importance of the Decision

The approach taken by her Honour was to consider the determination read as a whole, regardless of the fact that the claim was a global claim.

The extra territorial issues dealt with in the judgment are of particular interest and reminds practitioners of the clear distinction between construction work and related goods and services. There is no suggestion in the judgment that construction work can occur anywhere other than in New South Wales. However as is evident, related goods and services can occur elsewhere yet fall within the ambit of the Act.

---

12 *Wentworth Securities Limited v Jones* [1980] AC 74.

13 The pre-requisites as applied in *Shell v Mayr* were:

- whether it is possible from a consideration of the Act read as a whole to determine the mischief the Act was to remedy;
- the eventuality that may be seen to have been overlooked is the provision outside New South Wales of related goods and services in respect of construction work carried out in New South Wales. The eventuality needed to be dealt with to ensure the purpose of the Act is not defeated;
- the additional words that Parliament would have approved had attention been drawn to the oversight are identifiable. (see Shell at [76] at [79]).

14 Bergin J at [80] and [81].