

**BRODYN PTY LTD T/AS TIME COST AND QUALITY V DAVENPORT & ANOR [2004] NSWCA 394**

Supreme Court of New South Wales – 3 November 2004

**FACTS**

Brodyn Pty Ltd T/as Time Cost and Quality ('Brodyn') entered into a construction contract with Dasein to undertake concreting work for twelve townhouses at 37 River Road, Wollstonecraft. Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein and purporting to accept that repudiation. Dasein then served Brodyn with a document stated to be a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') and Brodyn responded with a Payment Schedule, contending that money should be deducted for incomplete work and for rectifying defects and that Dasein had breached cl.43 of the Contract by not furnishing a statutory declaration as to payment of workers. The matter proceeded to Adjudication and the Adjudicator made his determination in favour of Dasein in the sum of \$180,059.00, giving reasons which did not refer to the parties' contentions. Brodyn applied to the Supreme Court for an order to quash the Adjudicator's Determination on the grounds that the Payment Claim was invalid, and that there had been a denial of natural justice. The judge at first instance considered that a determination could be quashed but refused to grant relief on discretionary grounds. Brodyn then appealed to the Court of Appeal.

**ISSUE**

Whether or not an Adjudicator's Determination can be quashed on grounds of validity of the Payment Claim or a denial of natural justice.

**FINDING**

Musico v Davenport [2003] NSWSC 977 and the cases which followed it are incorrect, to the extent that they hold that relief is available to quash a determination which is not void. If a determination is void, relief is available by way of declaration or injunction. If the basic requirements of the Act are not complied with, or if a purported determination is not a bona fide attempt to exercise the power granted under the Act, or if there is a substantial denial of the measure of natural justice required under the Act, then a purported determination will be void and not merely voidable.

The payment claim in this case was valid. The decision in Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd [2004] NSWSC 905 is incorrect, to the extent that it decides that only one payment claim can be made after termination of a contract and/or cessation of work.

In this case, the Adjudicator's failure to refer to Brodyn's submissions as to deductions did not amount to a denial of natural justice nor render the determination void.

**QUOTE**

Hodgson JA stated at paragraph 52:

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*“... 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 the nature of certiorari.”*

His Honour continued at paragraph 53:

*“What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:*

*The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*

*The service by the claimant on the respondent of a payment claim (s.13).*

*The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*

*The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*

*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 (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).”*

Further, at paragraph 55 his Honour stated:

*“In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law existence of a determination: cf. Project Blue Sky Inc. v. Australian Broadcasting*

*Authority (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. R v. Hickman; Ex Parte Fox and Clinton (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.”*

Additionally, at paragraph 61 his Honour stated:

*“Where the adjudicator’s determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above in pars. [41] and [42], it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator’s determination.”*

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## **IMPACT**

The consequence of the Court of Appeal's approach is that judicial review, pursuant to Section 69 of the Supreme Court Act, is no longer available to parties seeking relief from an erroneous decision by an adjudicator under the Act, except in limited circumstances, namely for some non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination.

Consequently, the Court now appears to favour of a policy shift towards a regime with "minimum of opportunity for court involvement".

Further, where a summary judgment has been entered and the Adjudicator's determination is not within the meaning of a determination under the Act, i.e. due to non-compliance with the "basic and essential" elements, then proceedings to set aside the judgment are not contrary to section 25(4) of the Act.

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