



Update

Construction & Infrastructure

1 March 2010

Security of Payment and adjudication decisions – Now even harder to set aside!

The Building and Construction Industry Payments Act was described at its inception as the most important piece of legislation in the construction industry in 20 years. It has been described by Judges as “rough and ready justice” with a motto of “pay now, fight later”.

The saving grace for many an unsuccessful Respondent was the (limited) ability to apply to the Supreme Court for a declaration that the adjudication decision was void as a result of:

- a denial of natural justice by the adjudicator; and/or
- a failure by the adjudicator to make a bona fide attempt to determine the adjudication.

Despite there being two competing thoughts as to the strictness of the test to be applied to determine whether an adjudicator made a bona fide attempt, it was generally thought (and probably hoped) that the courts would adopt the broad view; that being that an adjudicator must make a real attempt and/or effort to determine the adjudication.

The competing narrow view, was that provided the adjudicator did not determine the matter fraudulently or evidence some mala fides in the decision, the decision would not be declared void.

Whilst not ultimately being determined, two members of the Court of Appeal in *Queensland Bulk Water Supply Authority t/as SEQ Water v McDonald Keen Group Pty Ltd (in liquidation) & Anor* [2010] QCA 7 indicated that, in their opinion, the narrow view was

the better approach.

This view was also applied by the Supreme Court, in *Spankie v Northern Investment* [2010] QSC 29 the effect of which was that an adjudication decision was held to be valid despite errors in relation to fact, law and jurisdiction.

It is extremely unlikely any single judge of the Supreme Court will now apply the broader, less stringent test, when determining whether an adjudicator has failed to make a bona fide attempt.

In case any further prompting was necessary (given the success rate for Claimants at adjudication) this decision again reinforces the importance for potential Respondents of:

- understanding the Act, its nuances, and the tips, tricks and traps which exist within the Act;
- ensuring contracts are up to date and contain appropriately drafted preconditions to payment, time bars, clauses dealing with extensions of time and reference dates (to name but a few); and
- ensuring Project Managers and Contract Administrators understand the importance of responding to payment claims within the requisite time frame and the amount of detail required to be put in a payment schedule.

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