

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S CI 2015 06199

KRONGOLD CONSTRUCTIONS (AUST) PTY LTD

Plaintiff

v

SR & RS WALES PTY LTD

First Defendant

and

NAVID KING

Second Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 10 MARCH 2016
DATE OF JUDGMENT: 11 MARCH 2016
CASE MAY BE CITED AS: KRONGOLD CONSTRUCTIONS (AUST) v SR & RS WALES
MEDIUM NEUTRAL CITATION: [2016] VSC 94

ADMINISTRATIVE LAW – Judicial review – Adjudication Determination under *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether Adjudication Determination reviewable for jurisdictional error

BUILDING AND CONSTRUCTION – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Payment claim – Whether construction work sufficiently identified – Whether adjudication application made pursuant to the Act

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M A Robins QC with Mr L J Connolly of Counsel	HWL Ebsworth
For the First Defendant	Mr J Gray, Solicitor	Just Law

HIS HONOUR:

- 1 By Originating Motion dated 7 December 2015, the Plaintiff, Krongold Constructions (Aust) Pty Ltd ('Krongold') commenced proceedings in this Court against the First Defendant, SR & RS Wales Pty Ltd ('Wales') and the Second Defendant, Navid King (the 'Adjudicator'), seeking *inter alia*, a declaration that the Adjudication Determination of the Adjudicator dated 30 November 2015 (the 'Adjudication Determination') is null and void, and an order in the nature of certiorari quashing the Adjudication Determination.
- 2 The Adjudicator took no part in the proceeding and was content to abide by the result.
- 3 By Summons dated 7 December 2015, Krongold sought an injunction restraining Wales from enforcing or taking action under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act') in relation to the Adjudication Determination.
- 4 On 7 December 2015, this Court made orders, *inter alia*, that:
 - (a) Until 5 pm on 12 February 2016, Wales is restrained, whether by itself, its servants or agents howsoever, from taking any step to enforce or take action under the Act in relation to the Adjudication Determination;
 - (b) Until 5 pm on 12 February 2016, the Adjudicator is restrained, whether by itself, its servants or agents howsoever, from taking any step to issue an adjudication certification in relation to the Adjudication Determination; and
 - (c) The proceeding be listed for a Directions Hearing before the Judge-in-Charge of the Technology, Engineering and Construction List on 12 February 2016.
- 5 The trial was conducted on 10 March 2016.

Background facts

- 6 Krongold was engaged as head contractor on a project to design and construct a cellar door restaurant facility at a winery located at 882-886 Maroondah Highway, Healesville (the 'Site').
- 7 On or about 8 September 2014, representatives of Wales met with representatives of Krongold in what was styled as a Post Tender Meeting.
- 8 On or about 10 September 2014, Krongold and Wales entered into a written construction contract (the 'Contract'), pursuant to which Wales was to undertake the entire civil works package forming part of the project at the Site for the sum of \$325,000.
- 9 The minutes of the Post Tender Meeting of 8 September 2014 (the 'Post Tender Meeting Minutes') were annexed to the executed Contract. At trial, Mr Robins QC for the Plaintiff conceded that page 3 of the Contract, being page 651 of the Court Book, forms part of the Contract. This had the effect of incorporating the Post Tender Meeting Minutes into the Contract. Further, the Contract established no hierarchy of documents which comprised the Contract by establishing an order of precedence in the event of inconsistency.
- 10 The Post Tender Meeting Minutes relevantly provide:

Period of Progress Claims	To be submitted no later than the 25 th of the Month for month to enable its evaluation and substantiation by Krongold, and inclusion in Krongold progress claim to its principal.
Period of Honouring Payments	Payment of the claim will be made at the end of the following month or as agreed prior to signing the subcontract.

- 11 Other terms in the body of the written Contract also dealt with this subject matter.
- 12 Pursuant to the terms of the Contract:

Any payment claim in respect of a progress payment served on or after the 25th day of any month shall be deemed to have been served on the 25th day of the next month, and shall be payable in that period of payment pursuant to this agreement.

13 Further, pursuant to the terms of the Contract, the period of payment is:

30 Days after the last business day of the month that the payment claim is made, or deemed to be made under this agreement.

14 On 25 August 2015, Wales served on Krongold what it purported to be a payment claim under s 14 of the Act in the amount of 72,533.33 (incl. GST) (the 'Payment Claim').

15 Krongold did not serve a payment schedule in response to the Payment Claim.

16 On 8 October 2015, Wales sent an email to Krongold, which it contends is a notice under s 18(2) of the Act (the 'S 18(2) Notice'). The email reads:

Dear Jon,

We refer to our invoices 2682 and 2683 dated 24th August 2015 and note you haven't paid them.

Please do so within 2 days else we will apply for an adjudication on the matter pursuant to the Building & Construction Industry Security of Payment Act 2002.

Kind regards,
Steve Wales
Director
S.R. & R.S. Wales Pty Ltd.

17 On 8 October 2015, Krongold sent an email responding to the S 18(2) Notice as follows ('Krongold's Email'):

Sarah, I have been liaising with Allison on this matter. Obviously there is a disconnect between the two of you.

To simplify things moving forward, can you please confirm whom is the appropriate person to resolve this matter with.

My request for further financial reconciliation has been ignored now for two weeks. I forwarded this request with supporting information to Allison yesterday yet again received a dismissive or noncompos response.

If the matter proceeds to adjudication I will immediately hand the file to our counsel at HWL Ebsworth, and we will be seeking full compensation under the terms of the contract. To avoid this I stress again that it is best we work together toward a fair resolution in the best interest of Steve and Geoff.

Jon Greaves
General Manager.

- 18 On or about 16 October 2015, Wales applied for adjudication of the Payment Claim (the 'First Adjudication Application').
- 19 On 9 November 2015, the Authorised Nominating Authority, Adjudicate Today, served a notice on Wales and Krongold stating that the appointed adjudicator had not made a determination within the time required by s 22(4)(a) of the Act.
- 20 On 12 November 2015, Wales applied for adjudication of the Payment Claim for a second time (the 'Second Adjudication Application').
- 21 On 17 November 2015, the Adjudicator accepted the Second Adjudication Application and notified Krongold and Wales accordingly.
- 22 On 24 November 2015, the Adjudicator delivered the Adjudication Determination pursuant to s 23 of the Act.
- 23 The Adjudicator determined that the amount of the progress payment to be paid by Krongold to Wales is \$72,533.33 (incl. GST), being the entire claimed amount.

Krongold Submissions

- 24 Krongold submits that the Adjudication Determination ought to be set aside on the basis that it:
- (a) Was contrary to law and failed to satisfy the basic and essential elements of the Act for a valid determination;
 - (b) Demonstrated an error of law on the face of the record; and
 - (c) Was affected by jurisdictional error.
- 25 At trial, Krongold proceeded under four grounds, each of which is briefly summarised below. Included in the summary is a brief description of the response on the part of Wales.

1. Validity of the Payment Claim

- 26 The Payment Claim is constituted by an email sent on 25 August 2015 and containing two invoices, being Invoice 2682 and Invoice 2683, and supporting documentation, being eight pages of attachments.
- 27 Krongold submitted that the Adjudicator erred in finding that the Payment Claim complied with the basic and essential requirements of s 14 of the Act, on the basis that the Payment Claim was lacking in detail, such that it was not possible for Krongold to understand what construction work or related goods and services Wales was claiming payment for. Krongold pointed to Invoice 2682, included in the Payment Claim, which reads 'August Penultimate Claim supporting documents attached' and noted there to be no description of what construction work or related goods and services were performed or supplied by Wales. The observations of Finkelstein J in *Protectavale Pty Ltd v K2K*¹ were relied upon.
- 28 Wales submitted that the sufficiency of description of the works in the payment claim documentation requires, in the case of civil construction or earthworks, specialist evaluation by an Adjudicator, on the basis that it is inherently difficult to describe with precision each segment of work and is not capable of judicial review.
- 29 In the alternative, Wales submitted that, if the sufficiency of description of the work is reviewable, the Payment Claim sufficiently identified the works on the basis that:
- (a) In relation to the contract balance claim of \$44,012.44 Krongold was in a position to ascertain whether Wales had completed its scope of works and the site supervisor engaged by Krongold, Mr Beau Briscoe, was on site at all times;
 - (b) In relation to the variations claim of about \$25,000.00, Krongold had in its possession work dockets signed by Mr Briscoe and corresponding rock delivery dockets, both of which described the work done;

¹ [2008] FCA 1248 (*Protectavale*).

- (c) The work dockets were signed by Mr Briscoe for Krongold and included a description of the work performed, the dates, hours in action, and were only used for variations work;
- (d) The Payment Claim had considerably more detail in the associated documentation compared to previous payment claims served by Wales, which Krongold accepted;
- (e) Krongold maintained control of the Site and Mr Briscoe was on site at all times, while the works were carried out;
- (f) The nature of the works undertaken by Wales, being earthworks and continuous machinery activity working with earth, makes it difficult to describe with precision each segment of works;
- (g) The documents associated with the Payment Claim are documents which are typically relevant to such a claim;
- (h) The Adjudicator's specialist knowledge in this area and his acceptance of the Adjudication Application suggests an understanding of the matters in issue.

2. Validity of the s 18(2) Notice

30 Krongold submitted that it was not open for Wales to proceed to apply for adjudication in circumstances where there was no payment schedule and no valid s 18(2) Notice had been served.

31 Section 18 of the Act provides, by subsections (1) and (2) that:

- (1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if –
 - (a) the respondent provides a payment schedule under Division 1 but –
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

- (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
- (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless –
 - (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

32 Krongold submitted that Wales served the s 18(2) Notice prematurely on 8 October 2015 and the Adjudicator erred in finding that Wales had served a valid notice under s 18(2) of the Act. The earliest Wales could have validly served the s 18(2) Notice, it was submitted, was on 2 November 2015.

33 Wales submitted that the Post Tender Meeting Minutes contained in the Contract provide that the due date for payment was the end of the month subsequent to the serving of a payment claim, provided that the payment claim was served by the 25th day of the month. Wales referred to Payment Claim No. 6 of 25 May 2015 as an example. This was paid on 30 June 2015.

3. Failure to give Krongold opportunity to provide Payment Schedule in response

34 Krongold submitted that the s 18(2) Notice of 8 October 2015 gave no opportunity to Krongold to provide a payment schedule in response. It merely demanded payment within two days.

35 Wales submitted that it complied with its obligations under s 18(2) of the Act. The existence of a previous set of payment claims put Krongold on notice as to the applicability of the Act.

4. Failure by Wales to provide Adjudicator with all relevant documentation

36 Krongold submitted that Wales did not provide to the Adjudicator all of the documentation which comprised the Payment Claim. In considering the material before him, the Adjudicator did not have before him, and did not have regard to the complete Payment Claim.

37 Wales conceded that some documents associated with the Payment Claim were omitted by error from the Adjudication Application but submitted that these documents are summaries of other documents that were in possession of Krongold and provided to the Adjudicator. Further, Wales submitted that the Adjudicator made no request for further or clarifying documents or submissions and the omission of several documents did not operate to the detriment of Krongold.

38 I make the following findings.

Construction of the Contract

39 Krongold and Wales advanced opposing interpretations of the terms of the Contract, particularly as to the question as to when payment claims served are payable under the terms of the Contract. A conflict between the written part of the agreement and the incorporated Post Tender Meeting Minutes was in issue.

40 I apply the following principles of construction.

41 In *Reardon Smith Line Limited v Yngvar Hansen-Tangen*, Lord Wilberforce stated:²

What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seems to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.

42 In *S.I.A.T. di Dal Ferro v Tradax Overseas SA*,³ Donaldson J said:

² [1976] 1 WLR 989, 997.

³ [1978] 2 Ll. Rep. 470.

A contract is not made in a vacuum, but against a backdrop of present and past facts and future expectations and (...) its terms, and indeed the consensus itself, are to be gathered not only from expressed words, but also from conduct viewed against that background.

43 I am mindful of the observation of Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB* where his Lordship said:⁴

If a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

44 In *M.L.W. Technology Pty Ltd and Martin Yui v Roger Thomas May (M.L.W Technology)*,⁵ Gillard AJA, with whom Winneke P and Buchanan JA agreed, said:⁶

The court, in construing contracts between businessmen and also their actions, should proceed in a common sense, non-technical way.

45 His Honour cited Isaacs J's reasons in *Cohen and Co v Ockerby and Co Ltd*:⁷

The expressions, and particularly any elliptical expressions, in a mercantile contract are to be read in no narrow spirit of construction, but as the Court would suppose two honest businessmen would understand the words they have actually used with reference to their subject matter and the surrounding circumstances.

46 Most recently, in *Electricity Generation Corporation (t/as Verve Energy v Woodside Energy Ltd)*,⁸ a plurality of the High Court observed:⁹

This court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd (in rec)*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties (...) intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

⁴ [1985] AC 191, 201.

⁵ [2005] VSCA 29 ('*M.L.W. Technology*').

⁶ *M.L.W. Technology Pty Ltd and Martin Yui v Roger Thomas May* [2005] VSCA 29 [76].

⁷ (1917) 24 CLR 288.

⁸ [2014] HCA 7 (French CJ, Hayne, Crennan and Kiefel JJ).

⁹ *Electricity Generation Corporation (t/as Verve Energy v Woodside Energy Ltd* [2014] HCA 7 [35].

47 In this case, the terms of the Contract, when read together with the Post Tender Meeting Minutes are capable of producing a businesslike regime with no conflict. In both cases the submission of a progress payment claim is to be made on the 25th of the month.

48 I do not accept Wales' submission that the terms of Contract, when read together, require a payment claim served on the 25th date of the month is to be payable 30 Days after the last business day of the month that the payment claim is made.

49 I find that the Payment Claim served by Wales on 25 August 2015 was deemed to have been served on 25 September 2015 and was duly payable on 30 October 2015.

50 It follows that the s 18(2) Notice served by Wales on 8 October 2015 was premature and of no legal effect.

Invalidity of the Payment Claim

51 Section 14 of the Act provides:

Payment claims

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim –
 - (a) must be in the relevant prescribed form (if any); and
 - (b) must contain the prescribed information (if any); and
 - (c) must identify the construction work or related goods and services to which the progress payment relates; and
 - (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
 - (e) must state that it is made under this Act.
- (3) The claimed amount –
 - (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
 - (b) must not include any excluded amount.

52 In *Protectavale*, Finkelstein J observed that, while the requirements of the Act are not overly demanding and should not be approached in an unduly technical manner:¹⁰

[N]onetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule[.]

53 *Protectavale* was cited with approval by this Court in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* ('*Gantley*') where it was added:¹¹

What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

54 The Payment Claim served by Wales comprised two Invoices, Invoice No 2682 and Invoice No 2683 and some eight pages of supporting documentation.

55 I am not satisfied that the invoices and supporting documentation identify the construction work to which the payment claim related with sufficient clarity, as required by s 14 of the Act and in light of the principles outlined in the decisions in *Protectavale* and *Gantley*.

56 A principal in the position of Krongold, even with familiarity with the work being undertaken on site, is entitled to a payment claim which describes the work claimed for, before the advantages conferred on the contractor by the Act are invoked. Further, a sufficient description of the work claimed for is an important element in informing an adjudicator of the claim and facilitating the proper administration of the adjudication process under the Act.

¹⁰ [2008] FCA 1248 [12] (Finkelstein J).

¹¹ [2010] VSC 106 [51].

Valuation process of the Adjudicator

57 An Adjudicator making a determination under the Act is bound to comply with the Act and the important requirements for an adjudication, which include ss 11, 22 and 23 of the Act.

58 In this instance, in undertaking the assessment task, the Adjudicator proceeded in the following manner.

59 The Adjudicator first considered Krongold's email of 8 September 2015 and whether it constituted a valid payment schedule for the purposes of the Act. He concluded that Krongold failed to provide a valid payment schedule to Wales within the time required by the Act.

60 On the basis of this determination, the Adjudicator deemed Krongold's Adjudication Response of 19 November 2015 to be invalid and did not consider it in making the Adjudication Determination.

61 The determination of the Adjudicated Amount is undertaken at paragraphs [32]-[35] of the Adjudication Determination:

[32] Since the Respondent has failed to provide a valid payment schedule to the Claimant, this matter is undefended. Nevertheless, in making my determination, I have considered the relevant provisions of the Act, the relevant provisions of the Contract, the Claimant's submissions and the Claimant's supporting documentation. (...)

[34] The Claimant has assessed the value of the relevant works to be \$72,533.33 (including GST). Based on the documents which I am required to consider under the Act, it does not appear to me that the Claimant's valuation is incorrect, unreasonable or excessive. Therefore, in the absence of any alternative valuation duly provided by the Respondent for my consideration, I am prepared to accept the Claimant's valuation in full.

[35] For these reasons, I determine that the amount of progress payment to be paid by the Respondent to the Claimant is \$72,533.33 (including GST), being the entire claimed amount.

62 In *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* ('*SSC Plenty Road*'), where it was found, *inter alia*, that the adjudicator had not demonstrated in his adjudication determination any process of assessment of the value of 33 of 37

variation claims other than simply adopting the amounts claimed by the claimant in the payment claim, this Court observed:¹²

In taking this course in relation to the Disallowed Variation Claims, the Adjudicator did not demonstrate in his Adjudication Determination any process of assessment of the value of the claim other than merely adopting the amount claimed by the claimant. Although the Adjudicator provided sufficient reasons as required under s 23(3) of the Act as to the basis upon which the amounts determined were decided, the process of reasoning followed by the Adjudicator, as disclosed in the Adjudication Determination, with respect, is not countenanced by the Act.

63 There is a difference between the circumstances of the *SSC Plenty Road* case and the present proceeding. In *SSC Plenty Road* there was a contested position between the claimant and the respondent and a payment schedule that was considered. However, the distinction is one without a difference.

64 I am not satisfied that the valuation process adopted by the Adjudicator in this proceeding meets the requirements of the Act. This failure was no doubt engendered by the lack of definition of the work which was the subject of the claim in the Payment Claim itself, which rendered the task of valuation assigned to the Adjudicator at best problematic, at worst impossible.

65 In these circumstances, it follows that in his assessment of the Adjudicated Amount, the Adjudicator fell into jurisdictional error.

Payment Claim before the Adjudicator Incomplete

66 The Payment Claim before the Adjudicator did not include the full content of the Payment Claim which had been submitted to Krongold. Attachments were omitted which dealt with the variations. These accounted for nearly one third of the payment claim, and included construction of a helipad, piping relating to an amphitheatre and other work.

67 I do not accept that these omissions were substituted by dockets which were placed before the Adjudicator. The dockets made no reference to the variations and did not describe the work comprised in the variations.

¹² *SSC Plenty Road* [2015] VSC 631 [135].

68 Section 23(2)(d) of the Act provides that:

In determining an adjudication determination, the adjudicator must consider the following matters and those matters only –

- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim.

69 By reason that the Adjudicator had before him only part of the Payment Claim, it follows that he was not in a position to comply with the mandatory requirement of s 23(2)(c) of the Act. This too gives rise to invalidity in his determination.

Orders

70 The Adjudication Determination was made in contravention of the Act, which rendered it subject to jurisdictional error. Accordingly, the Plaintiff succeeds in its claim for relief by way of certiorari on the ground of jurisdictional error by the Adjudicator.

71 I will hear the parties as to the form of the orders to give effect to these reasons, and as to the question of costs.

72 It is to be noted that, by operation of s 47 of the Act, nothing affects the right of Wales under the Contract to issue and prosecute proceeding in a court of competent jurisdiction, or other tribunal permitted by the Contract, to recover monies claimed to be due on a proper basis under the Contract.
