



Supreme Court
New South Wales

Case Name: Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd

Medium Neutral Citation: [2017] NSWSC 1121

Hearing Date(s): 17 August 2017

Decision Date: 24 August 2017

Jurisdiction: Equity - Technology and Construction List

Before: Hammerschlag J

Decision: The adjudication determination of the second defendant dated 2 March 2017 is void. The adjudicator is not entitled to be paid any fees or expenses in connection with the determination.
The second defendant's determination that the plaintiff is to pay his costs and expenses is quashed.

Catchwords: BUILDING AND CONSTRUCTION - Building and Construction Industry (Security of Payment) Act 1999 (NSW) (the Act) – ss 13, 21(3), 29, 31 – Building and Construction Industry (Security of Payment) Regulation 2008 (NSW) (the Regulation) – whether the defendant's payment claim dated 16 December 2016 complied with the requirements of ss 13(7) and (9) as being accompanied by a compliant supporting statement – whether the supporting statement which accompanied the claim complied with the requirements of ss13(7) and (9) and the Regulation – HELD: supporting statement did not comply because the declaration contained in it was made on a date earlier than the payment claim identified as the one it purported to support – HELD: the purported payment claim did not effectively invoke the procedures under the Act – HELD: the adjudication determination of the second defendant void – where notice of acceptance of appointment under s 21(3) was actually received by the

plaintiff but in a manner not expressly provided for by s 31 – HELD: actual receipt was effective notification under s 21(3)(a) – HELD: adjudication determination out of time under s 21(3)(a) but not void – under s 29(4) adjudicator not entitled to be paid any fees and expenses.

Legislation Cited: Building and Construction Industry (Security of Payment) Act 1999 (NSW)
Building and Construction Industry (Security of Payment) Regulation 2008 (NSW)

Cases Cited: Capper v Thorpe (1998) 194 CLR 342
Cardinal Project Services v Hanave Pty Ltd (2011) 81 NSWLR 716
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393
Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC 430
Forrest & Forrest Pty Ltd v Wilson [2017] HCA 30
MPM Constructions v Trepcha Constructions [2004] NSWSC 103
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Texts Cited: Mr Bruce Collins QC, 'Independent Inquiry into Construction Industry Insolvency in NSW: Final Report', November 2012
New South Wales, Parliamentary Debates, Legislative Assembly, 24 October 2013 (Mr Andrew Constance)

Category: Principal judgment

Parties: Mt Lewis Estate Pty Ltd - Plaintiff
Metricon Homes Pty Ltd - Defendant

Representation: Counsel:
Mr S. Robertson with Mr M. Forgacs - Plaintiff
Mr F. P. Hicks with Ms A. J. Carr - Defendant

Solicitors:
Colin Biggers & Paisley - Plaintiff
Moray & Agnew - Defendant

File Number(s): 2017/86514

JUDGMENT

WHAT THIS CASE IS ABOUT

- 1 HIS HONOUR: This is a challenge to the validity of an adjudication determination (the determination) dated 10 March 2017 purportedly made by the second defendant (the adjudicator) in favour of the first defendant (Metricon) against the plaintiff (Mt Lewis) for \$1,830,537.09 pursuant to the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (the Act).
- 2 The adjudicator also purported to determine that Mt Lewis is responsible for 100% of the adjudication fees, including his fees and expenses.
- 3 References to sections are references to the Act.
- 4 There are two grounds of challenge to the determination: the first is that the payment claim was not validly served and did not invoke the machinery of the Act because it was not, as required by s 13(7), accompanied by a supporting statement complying with s 13(9); the second is that it was made outside the time limit prescribed by s 21(3)(a).
- 5 Additionally, Mt Lewis seeks a declaration that under s 29(4) the adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication.

THE ACT

- 6 The Act provides for a claimant to make a payment claim for a progress payment on the person who, under a construction contract, is or may be liable to make the payment (s 13(1)).
- 7 The respondent to a claim may reply by providing a payment schedule, which must indicate the amount of the payment (if any) that the respondent proposes to make (s 14). Where no payment schedule is served, the claimant may recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction, or make an adjudication application in relation to the claim (s 17). It is not uncommon for a respondent to indicate a nil amount.
- 8 The adjudication process entails the making of an adjudication application by the claimant and the appointment by an authorised nominating authority of an

adjudicator. The respondent may lodge an adjudication response (s 20). The Act provides for adjudication procedures (s 21) and for the adjudicator to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant, the date upon which it becomes payable and the rate of interest payable on it (s 22) and the issue of an adjudication certificate (s 24).

9 Section 13(7) provides:

A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

10 Section 13(9) provides:

In this section:

"**supporting statement**" means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

11 Schedule 1 to the *Building and Construction Industry (Security of Payment) Regulation 2008* (NSW) (the Regulation) is the prescribed form of supporting statement. That form appears as a Schedule to this judgment.

12 Section 21(3) provides, relevantly, as follows:

... an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:

(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or

(b) within such further time as the claimant and the respondent may agree.

13 Sections 29(1) to (4) provide:

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application:

(a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or

(b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).

14 Section 31 provides:

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post addressed to the person's ordinary place of business, or

(d) by email to an email address specified by the person for the service of notices of that kind, or

(d1) by any other method authorised by the regulations for the service of notices of that kind, or

(e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

FACTS

15 By written agreement dated 2 October 2014, Mt Lewis retained Metricon to do construction work in connection with a project involving building 87 villas, for a contract price of \$16.975 million.

16 On 16 December 2016, Metricon, by email, served on Mt Lewis a payment claim claiming \$3,316,584.32. The claim was accompanied by a series of supporting documents.

17 The "supporting statement" which accompanied the payment claim, followed the form in the Regulation. It contained the following:

This statement	2 October	and	8 December	Inclusive (the
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applies for work between:	2014		2016	construction work concerned),
subject of the payment claim dated:	15 December 2016			

18 Beneath this appears a signature identified as that of Simeon McGovern, General Manager New South Wales for Metricon. Adjacent to the signature the following appears:

Date: 13 December 2016

19 On 3 February 2017, Mt Lewis served a payment schedule which stated that the total amount it proposed to pay was nil.

20 On 17 February 2017, Metricon made an adjudication application to an authorised nominating authority, Adjudicate Today.

21 On 23 February 2017, Adjudicate Today sent an email to Metricon notifying it of the adjudicator's acceptance of appointment as adjudicator. On the same day, Adjudicate Today sent an equivalent notification by facsimile to Mt Lewis' solicitor. It tried also to send it by facsimile to Mt Lewis itself, but it had the wrong number. As it happened, Mt Lewis' solicitor passed it on to, and it was received by, Mr David Smedley, a project manager with Mt Lewis, on the same day. Mr Smedley gave unchallenged evidence that it came to his attention on the day that the adjudicator had accepted the appointment.

22 Adjudicate Today also forwarded the notice to Mt Lewis by certified post. Evidence, in the form of an Australia Post tracking receipt, establishes that it was received in the post at Mt Lewis' ordinary place of business on 27 February 2017.

23 On 28 February 2017, Mt Lewis served an adjudication response disputing, amongst others, the adjudicator's jurisdiction on the grounds that the payment

claim was not served for the purposes of the Act as it was not accompanied by the requisite supporting statement. The adjudication response stated that 23 February 2017 was the date upon which Mt Lewis received notice of the adjudicator's acceptance of the adjudication application.

24 On 10 March 2017, the adjudicator made the determination. He determined that Mt Lewis is responsible for the entirety of the adjudication fees being the fees of Adjudicate Today and his fees and expenses.

25 The adjudicator's invoice for \$20,757.00 was paid by Metricon.

26 Mt Lewis has paid the amount of the determination including adjudication costs, fees and expenses into Court.

THE FIRST GROUND OF CHALLENGE – SUPPORTING STATEMENT

27 It is common cause that Metricon was, at all material times a head contractor within s 13(7).

28 It is also common cause that compliance with the requirement imposed by ss 13(7) and (9), that a payment claim by a head contractor be accompanied by a supporting statement, is a jurisdictional prerequisite for the invocation by a claimant of the procedures under the Act.

29 The parties are divided as to whether the supporting statement in this case complies with the requirements imposed by the Act. What the Act requires is a matter of statutory construction.

30 The declaration in the supporting statement here was made on 13 December 2016 but the payment claim is identified as being dated 15 December 2016.

31 I interpolate that there is no payment claim in existence dated 15 December 2016. The payment claim is actually dated 16 December 2016. Mt Lewis, for reasons which it did not articulate, does not take the point that the supporting statement is invalid by reason of this discrepancy.

32 Mt Lewis argues that the Act and Regulation require the declaration to speak as at the time at which the payment claim is made. It puts that the declaration cannot be made on a date earlier than that of the payment claim itself.

- 33 Metricon argues, as it must, that the Act permits the declaration to be made prospectively in relation to an anticipated but not yet made payment claim.
- 34 I record that the point which Mt Lewis now takes was not taken in its payment schedule but it was taken in its adjudication response and dealt with by the adjudicator. Metricon did not argue that the point cannot be taken now. It argued the point on the merits.¹
- 35 Mt Lewis' construction is correct, both textually and contextually.
- 36 As to text, the prescribed form of supporting statement requires the payment claim to which it relates to be identified both by reference to the work it covers and by date. The supporting statement itself must be signed and the signature must be dated.
- 37 A payment claim, under s 13(1), is a document. Section 13(2) requires that document to identify the construction work to which it relates and to indicate the claimed amount.
- 38 The declaration in the supporting statement must be made in relation to "the matters that are contained in this supporting statement". Section 13(9) requires the supporting statement to declare that all subcontractors have been paid all amounts that have become due and payable "in relation to the relevant construction work concerned". This is a reference to the construction work the subject of the payment claim to be identified by date.
- 39 There is no room to read the words of ss 13(7) and (9) and the prescribed form as requiring anything other than a declaration which relates to a payment claim, that is a document, which is in existence at the time the declaration is made and which identifies the work to which the claim relates. The declarer must have something before her or him with respect to which she or he can make the supporting declaration.
- 40 Neither logically nor rationally can a declaration be made that all amounts *have been paid* to subcontractors in relation to a payment claim which has not yet been made.

¹ Section 20(2B) provides: The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

- 41 As to context, ss 13(7) and (9) were introduced following the final report in November 2012 of the NSW Government Independent Inquiry into Construction Industry Insolvency in NSW (the Inquiry).
- 42 Prior to their introduction, the standard position was that under their building contracts, head contractors were obliged to provide a statutory declaration with progress claims, that subcontractors had been paid. The Inquiry made a finding that such statutory declarations were often false, not enforced and frequently amended to convey the appearance that what was due and owing to a subcontractor was no longer an amount owed by the head contractor.
- 43 The Inquiry reported that some head contractors employed persuasive methods to ensure that what is due and payable to subcontractors at a certain time under the contract becomes due and payable at some later time "so transforming a lie into a convenient truth". As part of a package of reforms the Inquiry recommended that the Act be amended to include a provision that made it essential to provide a statutory declaration and made it an offence to declare a false oath and for the provision to be enforced by the agency administering the legislation.
- 44 The Second Reading Speech which was given on 23 October 2013 records the following:

These provisions introduce an element of transparency into payment practices that operate in the industry and provide a clear incentive for head contractors to pay subcontractors what is due and payable. The supporting statement requirement simply provides that a head contractor declare they have paid subcontractors what they are owed under contract. The requirement does not bring forward or create a new obligation to pay subcontractors. ***If at the time a head contractor makes a payment claim to a principal under a construction contract an amount is owed to a subcontractor or supplier then the provisions require the head contractor to confirm that these payments have been made*** [emphasis added].

- 45 The emphasised passage makes it clear that the declaration was intended to pertain to the time of the payment claim.
- 46 To read the sections as permitting the declaration to be made in advance (indeed well in advance) of a payment claim and to speak as at the earlier time when the declaration is made rather than when the payment claim is made, would facilitate the precise vice which the sections were introduced to avoid,

namely, a head contractor claiming money for work carried out by subcontractors whose claims have become due and payable for that work and who have not been paid.

- 47 The penalties attendant upon the making of a false declaration are a significant feature of the Act, intended to ensure honest declarations.
- 48 On Metricon's approach, the head contractor could safely make a declaration that all amounts then due and payable to subcontractors had been paid knowing that amounts not then due and payable were to become due and payable between the date of the declaration and the date of the payment claim yet to be made. This would have the consequence that a head contractor could make a payment claim for work done by subcontractors, without having to ensure that those subcontractors had been paid – even though they are entitled to be paid – before the payment claim is actually made. This would be inimical to the policy behind the provisions.
- 49 Although it is not suggested in this case that Metricon had this motivation, it is to be observed that on its proposed construction, the supporting statement is compliant even though amounts due to subcontractors for work done between 2 October 2016 and 8 December 2016, could become due and payable on 14, 15 or 16 December 2016 and not be covered by the declaration. Significantly the reference date under the head contract was the 15th of each month.
- 50 A symptom of the unsoundness of Metricon's argument is that the declaration refers on its face to a non-existent payment claim.
- 51 Having regard to the vice which the sections are intended to avoid, as with provisions of the Act upon which the effectiveness of the decision-making process under it depends, punctilious compliance is required: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [47]-[48], [96] and [213]-[229].

THE SECOND GROUND OF CHALLENGE – VOID AS BEING OUT OF TIME

- 52 This ground of challenge is that the determination is void because it was not made within the time prescribed by s 21(3).

- 53 Having regard to my conclusion that the machinery of the Act was not successfully invoked by Metricon from the start, it is not strictly necessary to deal with this ground of challenge. I will, however, deal with it, but briefly. I would not uphold it.
- 54 The point was considered by McDougall J in *MPM Constructions v Trepcha Constructions* [2004] NSWSC 103. In a considered and detailed judgment, His Honour concluded, following the approach mandated by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, that it was not the legislative purpose of s 21(3) that a late determination is automatically void by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of it.
- 55 In *Cardinal Project Services v Hanave Pty Ltd* (2011) 81 NSWLR 716 (*Hanave*), the point was considered by two judges in the Court of Appeal.
- 56 After *Hanave*, McDougall J had occasion to consider the point again in *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430. His Honour said the following of the decision in *Hanave*:

[65] I should note that the point was considered, although briefly, by the Court of Appeal in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716.

[66] Basten JA, who dissented in the outcome, suggested at [49] that the requirements of s 21(3) were not jurisdictional. Tobias AJA, who with Macfarlan JA formed the majority, suggested at [115] that they were. Macfarlan JA, who gave separate reasons, did not deal with the point.

[67] In circumstances where: there is a division of opinion; the point was not as I see it material to the view to which Tobias AJA came; and my decision in *MPM Constructions* (for whatever it may have been worth) was not put before their Honours for consideration; I do not regard the views of Tobias AJA as requiring me to abandon the view that I formed in *MPM Constructions*; and, with great respect to his Honour, I do not think it takes account of the points that I raised both in those reasons and, briefly, in the reasons I have just given.

- 57 My attention was drawn to the recent decision of the High Court in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 in which *Project Blue Sky* was considered in the context of the *Mining Act 1978* (WA). The question was whether non-compliance with certain provisions of that Act invalidated exercises of jurisdiction to progress and grant applications for a mining lease.

The provisions under consideration there were significantly different from those under consideration by McDougall J.

- 58 The point is not without its complexity.
- 59 In the absence of clearer appellate guidance to the contrary of McDougall J's holdings, I would follow His Honour. I consider his conclusion to be correct.
- 60 In *MPM Constructions* at [19], His Honour made reference to s 29(4) noting that it says nothing about the validity of any determination or purported determination outside the time limit.
- 61 Added to the considerations against invalidity identified by McDougall J – and Basten JA in *Hanave* – is the following: under s 31, an adjudicator is exempt from liability for anything omitted to be done in good faith. This would undoubtedly extend to a failure to deliver on time. If the time limit in s 29(4) is a guillotine, the obligation on an adjudicator to deliver a determination, whilst it may have been breached, would come to an end with no redress against her or him unless the failure was not in good faith. The adjudicator would be relieved of the burden of producing, albeit that she or he could not charge for work done. If a later adjudication is nevertheless valid, the adjudicator's duty would continue and the sanction of not being paid is more real. This position is more conducive to the prompt delivery by adjudicators and fulfilment of the overall objects of the Act.
- 62 I record that Metricon did not concede that the adjudication was out of time. It argued that the 10 business day period specified in s 21(3) only commenced on 27 February 2017 when Mt Lewis received the postal version of the notice of acceptance. It argued that the facsimile transmission to Mt Lewis' solicitor was not notice to Mt Lewis itself and that the facsimile transmission from its solicitor to Mt Lewis was not a method of service expressly authorised by s 31. This point is without merit.
- 63 Absent some relevant statutory expansion or limitation of the notion, a document will, in the ordinary meaning of the word, be served if the efforts of the person who is required to serve it have resulted in the person to be served

becoming aware of the contents of the document: *Capper v Thorpe* (1998) 194 CLR 342 at 352.

64 It is not in dispute that the contents of the notice came to the actual attention of Mt Lewis on 23 February 2017. It was delivered to Mt Lewis personally, albeit through an intermediary. In any event, section 31(1) is facultative. It permits notice to be given in a series of ways. They are not exclusive. The notice of acceptance was actually notified to Mt Lewis on that date as a consequence of the adjudicator sending it in the first instance to Adjudicate Today. I hold that that is the date upon which the adjudicator notified Mt Lewis and Metricon as to his acceptance of the application.

65 Although it plays no part in this finding, it is appropriate to record that the adjudicator wrote the following email to Adjudicate Today on 21 March 2017:

The Respondent's lawyers are correct in arguing that the adjudication determination is out of time. I made a mistake in stating that the determination was due on 10 March 2017. It was in fact due on 9 March 2017.

I normally double check the dates so I am baffled as to how this may have happened.

Please accept my apology,

Tom

THE ADJUDICATOR'S FEES

66 During the course of submissions, Metricon indicated that it did not contest that if the adjudication was not made within the time limit in s 21(3), the adjudicator is not entitled to be paid any fees or expenses in connection with it. The adjudicator filed a submitting appearance save as to costs.

67 I have found that the 10 day period in s 21(3) commenced on 23 February 2017. It follows that the determination was out of time.

68 Section 29(1) gives an adjudicator an entitlement to be paid for adjudicating an adjudication application. Section 29(2) provides that the claimant and respondent are jointly and severally liable to pay his fees and expenses.

69 Section 29(3) gives the adjudicator power to determine the proportions in which each shall be liable to contribute to the payment of his fees and expenses. This is a power in addition to that given to an adjudicator under s 22 to determine in

an adjudication determination the amount of a progress payment, the date at which it becomes payable, and the rate of interest payable.

- 70 The power to make a determination under s 29(3) presupposes an entitlement on an adjudicator's part to be paid fees and expenses. Here, there was no such entitlement because of the late determination.
- 71 It follows further that the adjudicator had no power to determine that his fees and expenses should be paid by Mt Lewis.
- 72 Metricon's entitlement, if any, to recover what it has paid in the form of the adjudicator's fees and expenses is a matter which does not arise here.

CONCLUSION

- 73 Having regard to the fact that no valid payment claim was served, the machinery of the Act was not successfully invoked by Metricon with the consequence that the determination is void. There should be a declaration to that effect.
- 74 There should also be a declaration that the adjudicator is not entitled to be paid any fees or expenses in connection with the determination and there should be an order in the nature of certiorari quashing his determination that Mt Lewis pay his fees and expenses.
- 75 The parties are to bring in Short Minutes reflecting this outcome.
- 76 The monies in Court are forthwith to be paid out to Mt Lewis.
- 77 I will hear the parties on costs should it be necessary.
- 78 The exhibits are to be returned.

SCHEDULE

SCHEDULE 1 – Form of supporting statement

(Clause 19 (1))

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

Head contractor: [*business name of head contractor*]

ABN: [*ABN*]

* 1. has entered into a contract with: [*business name of subcontractor*]

ABN: [*ABN*]

Contract number/identifier: [*contract number/identifier*]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* [*Delete whichever of the above does not apply*]

This statement applies for work between [*start date*] and [*end date*] inclusive (the construction work concerned), subject of the payment claim dated [*date*].

I, [*full name*], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: Date:

Full name: Position/Title:

Supporting statement by head contractor regarding payment to subcontractors

Attachment

Schedule of subcontractors paid all amounts due and payable

Subcontractor	ABN	Contract number/identifier	Date of works (period)	Date of payment claim (head contract or claim)

Schedule of subcontractors for which an amount is in dispute and has not been paid

Subcontractor	ABN	Contract number/identifier	Date of works (period)	Date of payment claim (head contract or claim)

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