Supreme Court

New South Wales

Case Name:	Miller v LMG Building Pty Ltd
Medium Neutral Citation:	[2023] NSWSC 995
Hearing Date(s):	7 August 2023
Decision Date:	23 August 2023
Jurisdiction:	Equity - Technology and Construction List
Before:	Ball J
Decision:	See [31] to [33]
Catchwords:	BUILDING AND CONSTRUCTION — Adjudication — Judicial review — Security of Payment Act (SOPA) — Whether Adjudicator considered relevant material — Where Adjudicator does not consider material filed after payment schedule — Adjudicator committed a jurisdictional error BUILDING AND CONSTRUCTION — Adjudication — Judicial review — Security of Payment Act (SOPA) — Whether Adjudicator considered merits of the claim at all — Where Adjudicator accepts one party's expert findings based on credibility without reference to inconsistent evidence — Adjudicator committed a jurisdictional error
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW)
Cases Cited:	Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd [2018] NSWSC 491 Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140
Category:	Principal judgment

Parties:	Suzanne Miller (Plaintiff) LMG Building Pty Ltd (First Defendant) Christopher Harris (Second Defendant) Adjudicate Today Pty Ltd (Third Defendant)
Representation:	Counsel: D Hume (Plaintiff) P Folino-Gallo (First Defendant) Submitting Appearances (Second and Third Defendants) Solicitors: Hones Lawyers (Plaintiff) Bradbury Legal (First Defendant)
File Number(s):	2023/235082
Publication Restriction:	None

JUDGMENT

Introduction

1 By a summons filed on 24 July 2023, the plaintiff, Ms Suzanne Miller, seeks to set aside an adjudication determination made on 10 July 2023 by the second defendant (***the Adjudicator***) under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (***the Act***), in respect of a payment claim dated 18 May 2023 made by the first defendant, LMG Building Pty Ltd (***LMG***), by which the Adjudicator determined that Ms Miller was liable to pay the sum of $249,516.92 (plus the adjudicator's fees of $16,650) in respect of the claim. Ms Miller also seeks to be repaid the amount of $269,739,38 (which comprises the adjudication determination plus fees) which was garnished from her bank accounts following registration of the adjudication determination as a judgment of the District Court.

Background

2 The payment claim was made under a building contract entered into on 30 July 2021 by which LMG agreed to undertake alterations and additions to the plaintiff's home in Mosman for a fixed price of $2,750,000 (including GST). Under the terms of the contract, LMG was entitled to make progress claims

calculated by reference to the percentage of the work completed under the contract.

3 On 18 May 2023, following termination of the contract by Ms Miller on 4 April 2023, LMG made progress claim No 10. Included in that claim was an amount of $96,250 (including GST) representing 3.5 percent of the total contracted-for sum together with $261,250 (including GST) for contract and provisional sum adjustments to date. Under the contract, the amount of $96,250 was payable on completion of 90.5 percent of the contracted-for work.

4 The payment claim was supported by a report from Canning & Associates Cost Consulting (***CACC QS***), a firm of quantity surveyors, which relevantly stated:

> CACC QS is of the opinion that progress claim #10 reached 90.5% claimed for and appears to comply with the approved design intent.

The report also gave a breakdown of the contract and provisional sum adjustments.

5 On 1 June 2023, Ms Miller served a payment schedule stating that the amount that she proposed to pay in respect of the claim was "$NIL". The payment schedule identified a substantial number of reasons for why the scheduled amount was nil. Relevantly, para 13 of the schedule to the payment schedule stated:

> The Claimant has not undertaken the works or supplied the materials as claimed in the payment claim, nor accounted for defective works, nor accounted for payments or moneys due to the Respondent and so is not entitled to claim or be paid the amounts claimed in the Payment Claim.

6 The payment schedule gave a number of particulars for that assertion including the following:

> (r) The Works are not at 90.5% complete, rather at best they are at 65% in circumstances where the Claimant has been paid for the works based on 87% complete and so the Claimant has been overpaid (the Coutts report at section 3.1 identifies a raft of the incomplete and unstarted works); and
>
> (s) The Payment Claim fails to account for rectification of the Claimants defective works including without limitation, the guttering to the L.3 terrace, the roof (damaged by rust following welding of steel on the roof), the eastern garage façade, guttering incorrectly located within the garage, drainage to the L.3 terrace, ceiling heights to L.2, L.1 BBQ area pergola, waterproofing to L.3 terrace, cladding and window to western terrace, water penetration to wall to entry stairs, covet battens and integrated door and window frame at L.1 to name but a few.

7 The payment schedule also included two expert reports. One dated 24 May 2023 was from Quest Associates Pty Limited (***Quest***). That report identified each defect said to exist with the building work and included a description of the defect and a photograph of it. The second report dated 31 May 2023 was prepared by Coutts Cost Consulting (***Coutts***). It set out a detailed description of the work necessary to complete the contracted-for work and the cost of that work in accordance with the contract. It also included photographs showing the uncompleted work. It concluded that the contracted-for work was 75 percent complete and therefore that the costs to complete in accordance with the contract was $646,954 (excluding GST).

8 On 16 June 2023, LMG lodged an adjudication application. In relation to the question whether the work was 65 percent complete as asserted in the payment schedule, the submissions in support of the adjudication application stated:

> 219. The Respondent's eighteenth "particular" is as follows: "*The Works are not at 90.5% complete, rather at best they are at 65% in circumstances where the Claimant has been paid for the works based on 87% complete and so the Claimant has been overpaid (the Coutts report at section 3.1 identifies a raft of the incomplete and unstarted works)*".
>
> 220. The Claimant reiterates its submissions above, in respect of "particular" 13(p), establishing that the Respondent does not have an entitlement to set-off any purported amount towards her "cost to complete" the Works, or any "overpayments" alleged to have been made. Again, this is not a matter which can be set-off under the Act, and ought to be raised by the Respondent in the appropriate forum.

9 In relation to the claim for defective work, the submissions stated:

> 223. Furthermore, the Claimant notes that it has no obligation to "*account for rectification of the Claimants [sic] defective works …*" in its Payment Claim. Rather, it is a matter for the Respondent to satisfy the Adjudicator that these alleged defective works are present, and provide a verifiable cost of rectifying that alleged defect, which is then to be set-off against the Adjudicated Amount.

10 The adjudication application also included an expert report from SJN which was prepared in response to the Quest report. It classified each item as defective works, incomplete works and "non-issue". In the case of defective works and incomplete works, it provided a method of rectification or completion, but not an estimate of the cost of that work.

11 Ms Miller provided her adjudication response on 26 June 2023. The response included a supplementary report from Quest setting out the costs of rectifying each defect it had identified in its previous report. The adjudication response also included a statutory declaration from Mr Nathan Grice, who had acted as superintendent in relation to the contract since September 2022. Mr Grice explained the circumstances in which Ms Miller on her case paid more than the amount owing in respect of previous progress claims.

12 The adjudication response also included a notice given by Mr Grice as architect under cl Q8 of the contract setting out the architect's assessment of the cost to complete the work following termination, which he assessed to be $1,661,900.40.

13 In his determination, the Adjudicator indicated that he was not willing to consider the supplementary report from Quest or Mr Grice's statutory declaration or certificate. He gave the following reasons:

> 76. Clearly, none of the abovementioned documents were in existence at the time of the Payment Schedule, or even at the time of the Adjudication Application. Reliance on these documents amounts to new reasons that cannot be included in the Adjudication Response by way of section 20(2B) of the Act. Accordingly, I have not read those documents (beyond establishing the relevant dates) and will not consider them in this adjudication. I also disregard the statements made by the Superintendent and Mr Hones regarding the content of these documents because they are again not properly made submissions and they also demonstrate wildly different assessments such that neither can be relied upon as credible.
>
> 77. The only reports that can be considered in this adjudication are those attached to the Payment Claim and Payment Schedule, or that were in existence prior to the Payment Schedule and can reasonably be relied upon as being in support of the reports in the Payment Claim and Payment Schedule.

14 As to the costs to complete, the Adjudicator had the reports of CACC QS and Coutts. Faced with the conflicting opinions expressed in those reports, the Adjudicator thought that the best course was to make a choice between the two reports based on their credibility:

> 78. Where reliance is grounded upon the credibility of respective experts, I do not propose to make a determination that neither of them would agree with. In my view, the appropriate course is to determine which expert is the more credible in all of the circumstances, and accept that assessment.

15 Of the two reports, the Adjudicator preferred the CACC QS report. After giving some examples of what were said to be discrepancies in reports prepared by Coutts in relation to progress claim No 10 and earlier progress claims, the Adjudicator said:

> 97. Overall, the above demonstrates a disconnect between the Superintendent and Coutts Cost Consulting, and also inconsistencies in the assessments of both and with the ongoing "cost to complete" exercises. I do not find those assessments reliable.
>
> …
>
> 99. In contrast, I do not find the same inconsistencies between the Claimant's progressive claims, and between the Claimant's progress claims and the opinion of its Quantity Surveyor regarding the current Payment Claim.

The Adjudicator concluded:

> 104. I have determined that the Canning report is to be relied on for the contract works, with the Coutts assessments demonstrating ongoing internal inconsistency and inconsistency with the Superintendent's assessments.

16 On that basis, the Adjudicator thought LMG was entitled to recover the whole of the $87,500 plus GST (that is, $96,250) claimed for work under the contract.

17 For similar reasons, he concluded that LMG had not been overpaid:

> 249. The Respondent included a list of missing features. However, this list did not appear in the Coutts report that the Respondent relied on for this reason, so these are new reasons that cannot made by way of section 20(2B) of the Act. I take the reference to "Grand Designs" as being made for illustrative purposes rather than as a submission to be considered.
>
> 250. I have already made a determination on the stage of completion above, and do not see any cause to alter that determination as a result of these submissions. I decline the offer of an inspection, particularly where it appears that a new building contractor has been appointed.

It followed LMG was also entitled to recover the additional amount it claimed for contract and provisional sum adjustments.

18 In relation to defects, the Adjudicator concluded that he could not consider the defects because no costing had been provided with the payment schedule and he could not consider the costings included with the adjudication response:

> 263. By now claiming an offset based on costings that did not exist at the time of the Payment Schedule or even at the time of the Adjudication Application, the Respondent is giving a new reason for non-payment. It cannot do so by way of section 20(2B) and I cannot consider those submissions.
>
> 264. I have briefly perused the Quest Report to establish that it does not include any costings. My perusal of the SJN Report is briefer, and I have not

> looked at the Quest report of 9 June 2023 at all because it is not a submission that can be made. I have not attempted to reconcile the items and costings listed by the Respondent with either Quest report or the SJN Report because to do so would be to consider new reasons. I therefore make no determination on the existence of defects or otherwise.

Consideration

19 In my opinion, the Adjudicator made two jurisdictional errors in adopting the approach that he did.

20 First, it was a jurisdictional error for the Adjudicator to refuse to consider any material produced after the date of the payment schedule. Section 22 of the Act relevantly requires the Adjudicator to consider "the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule". Submissions (including relevant documentation) are not duly made if they are not made within the time period specified in the Act (which is not the case here). In addition, s 14(3) of the Act provides:

> If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

21 Section 20(2B) of the Act 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.

22 Consequently, an adjudication response is not "duly made" to the extent that it includes a reason for refusing payment that was not included in the payment schedule. However, there is nothing in the Act that prevents a respondent from including as part of its submissions documentation (including expert reports) prepared after the date of the payment schedule provided that documentation does not raise a reason for refusing payment that was not included in the payment schedule. An adjudicator who refuses to consider submissions (including relevant documentation) that have been duly made fails to perform the task required of the adjudicator under the Act and therefore makes a jurisdictional error.

23 The Adjudicator appears to have taken the view that reliance on material created after the payment schedule necessarily amounts to reliance on new

reasons. That is not correct. The logical conclusion of that line of reasoning is that the adjudication response could do nothing more than repeat what was said in the payment schedule. That cannot be right. The Act clearly draws a distinction between the reasons for refusing a payment claim and the material that might be advanced in support of those reasons. Conceptually, they are different things, although the precise dividing line between them may on occasions be difficult to draw. In drawing that dividing line, it is relevant to bear in mind that a respondent is only required to "indicate" in the payment schedule the reasons for withholding payment. The word "indicate" suggests that a detailed explanation is not required: *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [78] per Palmer J. Material that falls within what has been indicated, therefore, cannot be a new reason. Also relevant are principles of natural justice. An important question in drawing the dividing line will be whether the claimant was sufficiently on notice of the reason for refusing to pay the claim that it could, if it wished, make submissions and produce material directed at answering that reason in its adjudication application.

24 Relevantly, in the present case, two reasons were advanced in the payment schedule for refusing to pay the claim. One was that the percentage work completed under the contract was such that, not only was the progress claim not due, but in fact having regard to the percentage of work that had been done, the claimant had been overpaid. The other was that the work was defective and that consequently the amount LMG was entitled to recover should be reduced to take account of that defective work.

25 In that context, Mr Grice's statutory declaration did not introduce a new reason for refusing to pay the claim. Rather, it gave an explanation for the overpayment that Ms Miller had identified in the payment schedule and in doing so sought to answer any suggestion that the payments that had been made were evidence that the work had been done. Moreover, whether or not there had been an overpayment was something that LMG could and did address in the material it submitted with its adjudication application.

26 Similarly, the supplementary report from Quest did not introduce a new reason for refusing the claim. The Quest report provided with the payment schedule

set out each defect that Ms Miller relied on. The supplementary Quest report simply gave additional information in relation to those defects – that is, the costs of rectification. That was plainly additional material in relation to a reason that had already been indicated as a reason for not paying the claim. It is true that LMG did not know the quantum of the claim in respect of defects at the time it made its adjudication application. However, that did not prevent it in its adjudication application from putting material before the Adjudicator addressing the defects relied on by Ms Miller and, if it accepted some of those defects, material concerning the costs of rectification with a view to establishing that, despite those costs, the amount it claimed, or some lesser amount, was payable under the contract. The fact that it could have done that reinforces the conclusion that the supplementary Quest report was not a new reason.

27 The second jurisdictional error made by the Adjudicator is that he failed to carry out his statutory task of addressing the merits at all of LMG's claim.

28 As Stevenson J said in *Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd* [2018] NSWSC 491 at [1]:

> An adjudicator making a determination under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") has a "duty…to come to a view as to what is properly payable" on, relevantly, the "true merits of the claim" (Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228 at [52] (Hodgson JA) (Ipp and Basten JJA agreeing))

29 In the present case, an essential task of the Adjudicator was to come to a view on whether the work performed by LMG was 90.5 percent complete so as to entitle it to the amount claimed in its payment claim or whether the work was substantially less complete, with the consequence that LMG had in fact already been paid for the work that was the subject of its claim. The Adjudicator was given material from which to make that assessment which consisted of the reports of CACC QS and Coutts, which included photographs of the unfinished work.

30 However, instead of considering the matter for himself, the Adjudicator sought to resolve the conflict in the opinions expressed by CACC QS on the one hand and Coutts on the other by making an overall assessment of which report was more credible having regard to reports they had produced in respect of

previous progress claims and, in particular, apparent inconsistencies between the work certified by the Superintendent and reports prepared by Coutts in respect of those claims. In my opinion, in adopting that approach the Adjudicator failed to undertake the task required of him, which was to make his own assessment based on the material before him. As part of that process the Adjudicator was entitled to form an opinion on the credibility of the reports before him. But he was not entitled to substitute that task for the task he was required to undertake. That error was compounded by the Adjudicator's refusal to take account of the statutory declaration of Mr Grice (who acted as Superintendent at the time). That statutory declaration explained the circumstances in which previous claims had been certified and, to some extent at least, provided an explanation for the inconsistencies identified by the Adjudicator.

Orders

31 It follows that the adjudication determination must be quashed, the judgment obtained in the District Court must be set aside and LMG must repay to Ms Miller the amount it received as a consequence of enforcing that judgment together with interest on that amount. There is no apparent reason why LMG should not pay Ms Miller's costs. It will, however, be necessary for the amount owing to Ms Miller to be calculated. In addition, the parties did not make submissions in relation to costs.

32 In those circumstances, it is appropriate to direct that the parties bring in short minutes of order that give effect to these reasons for judgment and to give the parties an opportunity to make submissions in relation to costs if they cannot agree on the order that should be made.

33 Accordingly, the orders of the Court are:

(1) Direct that within seven days of today's date, the parties bring in short minutes of order to give effect to these reasons for judgment;

(2) Direct that, if the parties cannot agree on the terms of the short minutes of order, each of the parties within a further seven days provide to my Associate and serve on the other party a form of orders that that party seeks and submissions not exceeding three pages in support of those orders;

(3) Direct that the parties within a further seven days provide to my Associate and serve on the other party submissions not exceeding one page in reply;

(4) Direct that any outstanding issues between the parties be determined on the papers.

****