

Supreme Court
New South Wales

Case Name: Binah Constructions Pty Ltd v PTMG Pty Ltd

Medium Neutral Citation: [2024] NSWSC 872

Hearing Date(s): 15 July 2024

Decision Date: 19 July 2024

Jurisdiction: Equity - Technology and Construction List

Before: Ball J

Decision: (1) Summons dismissed;

(2) Order that the amount of \$48,159.59 paid into Court on 14 June 2024 be paid to the first defendant.

Catchwords: BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — Adjudication — Adjudicated amount — Whether Adjudicator had jurisdiction to award amount in excess of adjudication application — When payment claim quantum exceeds that of adjudication application

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — Adjudication — Judicial review — Whether adjudicator afforded parties procedural fairness under the Building and Construction Industry Security of Payment Act 1999 (NSW)

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

Cases Cited: Demex Pty Ltd v McNab Building Services Pty Ltd [2023] NSWCA 261
Downer Construction (Australia) Pty Ltd v Energy Australia (2007) 69 NSWLR 72; [2007] NSWCA 49
Icon Co (NSW) Pty Ltd v Australia Avenue

Developments Pty Ltd [2018] NSWCA 339

Category: Principal judgment

Parties: Binah Constructions Pty Ltd (Plaintiff)
PTMG Pty Ltd (First Defendant)
Daniel Fitzpatrick (Second Defendant)

Representation: Counsel:
DS Weinberger (Plaintiff)
Submitting Appearance (Second Defendant)

Solicitors:
Vincent Young (Plaintiff)
Lauderdale Law (Second Defendant)

File Number(s): 2024/216696

Publication Restriction: None

JUDGMENT

Introduction

- 1 By a summons dated 12 June 2024, the plaintiff, Binah Constructions Pty Ltd, seeks to quash an adjudication determination of the second defendant (**the Adjudicator**) in favour of the first defendant, PTMG Pty Ltd, under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) in the sum of \$43,059.59. The adjudication determination was made in respect of a payment claim dated 30 April 2024 under a contract dated 6 October 2021 between Binah and PTMG by which PTMG was engaged to provide hydraulic services to Binah in connection with the construction of 25 apartments in Huskisson, New South Wales. Binah was the head contractor for the project.
- 2 There was no appearance on behalf of PTMG at the hearing of the matter. I am satisfied that it was properly served and on notice of the hearing. As is normal in these cases, the Adjudicator filed a submitting appearance.

Background

- 3 On 26 March 2024, PTMG served progress claim PC 25 claiming an amount of \$27,465.07 (including GST). It appears that Binah did not serve a payment schedule in response to that claim within the 10 business days specified in

s 14(4)(b)(ii) of the Act. As a consequence, PTMG had a choice under s 15(2) of the Act. It could have sought to recover the amount of the payment claim as a debt due in any court of competent jurisdiction: s 15(2)(a)(i). Alternatively, it could have made an adjudication application under s 17(1)(b): s 15(2)(a)(ii). It did neither of those things. For reasons that are not explained by the evidence, the amount of \$27,465.07 remains unpaid.

- 4 On 30 April 2024, PTMG served progress claim PC 26. The first page of the progress claim stated that the claim was made under the Act and that the “net payment claimed” was \$15,594.52 (including GST).
- 5 It is apparent from the “claimed contract summary” on the following page that the total amount claimed in respect of the work under the contract was \$608,185.90 of which \$592,591.38 was said to have been approved. It is also apparent from the payment claim that the amount of \$15,594.52 was 50 percent of the retention amount under the contract.
- 6 On 1 May 2024, Binah served a payment schedule showing a scheduled amount of \$0.00. It is apparent from the payment schedule that Binah asserted that PTMG was not entitled to claim any part of the retention amount until it had achieved practical completion and that practical completion had not been achieved. The subcontract summary that formed part of the payment schedule showed that the amount claimed to date under the contract was \$608,185.90 and that the “payment assessment” was \$592,591.38, which obviously corresponded to the figures included in the payment claim.
- 7 PTMG lodged an adjudication application on 14 May 2024. The adjudication application recorded that the claimed amount was \$43,059.59, that the scheduled amount was \$27,465.07 and that the total amount that had been received in respect of the payment claim was \$0.00.
- 8 The submissions in support of the adjudication application gave the following explanation for these figures:
 8. The Claimant provides the following submissions contending that the amount indicated in the Payment Claim is not \$15,594.52, but a greater amount:
 - a. The Payment Claim indicated the amount of the progress payment that was payable. This is different to the amount stated on the first page of the

Payment Claim, which states the net amount claimed since the previous claim. The Payment Claim is produced by Payapps. Payapps assumes that, when a Respondent approves an amount of a previous claim, that amount will be paid.

b. On 23 April 2024, the Respondent approved the amount of \$27,465.07 inclusive of GST in respect of the previous payment claim of 26 March 2024 (outside the 10 business days required by the Act.) In that previous payment schedule, the Respondent approved the total amount to date of \$592,591.38. The amount, less payments received to that time, to be paid was \$27,465.07 inclusive of GST. The due date for payment of that amount was 26 April 2024.

c. The Payment Claim claimed for the total amount of work completed to date of \$607,185.90:

...

d. The Payment Schedule indicated that the 'payment assessment' was the same as the previous payment assessment:

...

e. Therefore, the Claimant submits that the Payment Schedule was for the amount of \$608,165.90, less amounts actually paid to date. This amount is \$43,059.59. [footnotes omitted]

9 Binah addressed that argument in its adjudication response. It said:

2.12 In the same section 3.2 ('Payment Claim') of the Adjudication Application submissions, the Claimant contends that the amount indicated in the Payment Claim is not \$15,594.52, but the greater amount of \$43,059.59 on the grounds that:

(a) on 23 April 2024, Binah approved the amount of \$27,465.07 inclusive of GST in respect of PC 25 dated 26 March 2024:

(i) Payment Schedule 25 (set out at A5 to the Adjudication Application) was served outside the 10 business days required by the Act;

(ii) in Payment Schedule 25, Binah approved the total amount to date of \$592,591.38 and listed the amount to be paid to the Claimant as \$27,465.07 including GST; and

(iii) the due date for payment for the \$27,465.07 including GST 26 April 2024; and

(b) as PC 26 indicated the same payment assessment as PC 25, PC 26 was really a claim for the amount of \$43,059.59.

2.13 The difficulty with the Claimant's submissions is that this is clearly not the case as a matter of fact:

(a) PC 25 and PC 26 were served a month apart, in March and April, respectively;

(b) PC 25 clearly claimed \$27,465.07 for subcontract works and variations; whereas

(c) PC 26 clearly claimed \$15,594.52 for 50% of the retention,

i.e., clearly different amounts for different "construction works" or "related goods and services" (to use the terminology of the Act).

2.14 Binah would like to draw the Adjudicator's attention to how it is instructive the Claimant alleges PC 25 and PC 26 should be conflated together as one but makes no submission on PC 25 (and in fact does not actually include it in the Adjudication Application despite including Payment Schedule 25 and incorporating its Claimed Amount into the Pressed Amount). Surely if there is only one claim there can only be one payment schedule: which one is it? Or is it to be presumed that Payment Schedule 25 and Payment Schedule 26 magically conflate?

10 Binah then provided detailed arguments for why PTMG was not entitled to any part of the retention amount.

11 On the question of the amount claimed on the payment claim and the amount the subject of the payment schedule, the Adjudicator said in his adjudication determination the following:

12. In terms of the amount of the claimed progress payment indicated as due, I am satisfied that notwithstanding that the first page of the Payment Claim states the amount of \$15,594.52 incl. GST, that is only the net amount claimed for the period of the previous month, and that the amount indicated as claimed to date on the subsequent pages of the Payment Claim, i.e. \$608,185.90 incl. GST, is the total amount of the progress payment claimed to be due for the purposes of s 13(2)(b) of the Act (**Claimed Amount**), comprised in part of the \$15,594.52 incl. GST for retention moneys.

...

Payment Schedule

14. On 1 May 2024, via Payapps, the Respondent provided the Payment Schedule. The Payment Schedule (following a corresponding format to the Payment Claim) states on the front page, in respect of the "Net Payment Claimed" a "Scheduled Amount" of \$0.00 and on the second page states the Respondent's Payment Assessment in respect of the Claimed Amount is \$592,591.38 incl. GST. I am satisfied that this is an indication that the Respondent proposes to pay \$592,591.38 incl. GST of the Claimed Amount (**Scheduled Amount**) of \$608,185.90 including GST, leaving the balance of \$15,594.52 including GST claim for retention moneys in dispute, with the reasons: "*Retention cannot be released until Binah have achieved PC*". Accordingly, having regard to its terms, I am satisfied that the Payment Schedule complies with s 14(2) of the Act and has been served within the period contemplated by s 14(4) of the Act.

...

DETERMINATION OF ADJUDICATED AMOUNT

Agreed Amounts

23. Of the total Claimed Amount of \$608,185.90 incl. GST I am satisfied that, having regard to parties agreement that \$565,126.31 incl. GST of this amount has been paid prior to the date of the Payment Claim, that the amount of \$565,126.31 incl. GST should be allowed in the calculation of the adjudicated amount.

24. In respect of the balance of the total Claimed Amount, being \$43,059.59, I am satisfied, having regard to the Scheduled Amount, that the only amount of this balance in dispute is \$15,594.52 incl. GST, i.e. the difference of \$27,465.07 is agreed by the parties. Therefore, the total amount of the Claimed Amount that is agreed by the parties, and which I am satisfied should be allowed in the calculation of the Adjudicated Amount, is the Scheduled amount of \$592,591.38 incl. GST.

Consideration

- 12 Binah submits that the Adjudicator did not have jurisdiction to award more than the amount of the payment claim. That much may be accepted. However, it is not a complete statement of the limitation on the jurisdiction of the Adjudicator and it is not an accurate description of what happened in this case.
- 13 The jurisdiction of an adjudicator appointed under s 19 of the Act is to adjudicate the payment claim which is the subject of an adjudication application that has been referred to the adjudicator for adjudication by the authorised nominating authority to whom the adjudication application was made: see ss 17, 19. Although s 17(2) of the Act requires the adjudication application to contain certain information, it is the payment claim and not the application that is to be determined by the adjudicator. Consequently, it is the payment claim and not the adjudication application that defines the issues to be determined by the adjudicator.
- 14 However, the proper interpretation of the payment claim and accordingly the issues raised by it are matters for the adjudicator. As Giles JA (with whom Santow and Tobias JJA agreed) said in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 (**Downer**) at [87] in a passage approved in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [17]:

In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination. In the present case, in determining the amount of the progress payment (if any) to be made it was for the adjudicator to decide whether the water ingress fell within latent conditions for the purpose of the contract, and the parameters of the payment claim in that respect. He did so. As to both, it could not be said that the adjudicator's decision was without foundation, and if the adjudicator addressed the matters and came to his decisions, even if other decisions could have been come to, he did what the Act required – he determined the adjudicated amount. ...

- 15 Binah submits that this passage must be understood as being limited to the scope of the work the subject of the payment claim and cannot justify the Adjudicator awarding an amount in excess of the payment claim. The second half of this proposition is correct. But it does not alter the fact that the scope of the payment claim is a matter for the adjudicator; and it is unclear why the amount claimed in the payment claim is not as much a part of the scope of the payment claim as the nature of the work covered by it.
- 16 In some cases, there may be a question whether what the adjudicator has done has come to a conclusion, albeit possibly erroneous, about the scope of the payment claim including the amount claimed or has in truth made a determination that goes beyond the payment claim. The first does not involve a jurisdictional error. The second does.
- 17 It is perhaps with that distinction in mind that Giles JA commented in *Downer* that “it could not be said that the adjudicator’s decision was without foundation.” If it were without foundation, that would strongly suggest that the adjudicator had gone beyond the payment claim rather than simply made a determination within jurisdiction about its scope. However, putting that possibility to one side, it is a matter for the adjudicator to determine the amount claimed.
- 18 In this case, the Adjudicator determined that the amount claimed was the total amount due under the contract — that is, \$608,185.90. He interpreted the payment schedule in a similar way — that is, as accepting that of the total amount claimed \$592,591.38 was not disputed, although \$27,465.07 of the undisputed amount had not been paid.
- 19 There may be a question whether this is a correct interpretation of the payment claim and payment schedule and it might be thought that it is an interpretation that has caused unnecessary complexity and expense. After all, if the adjudicator had simply determined the claim for \$15,465.07, it would have been clear that PTMG would be entitled to judgment for that amount under s 23 of Act and judgment for the \$27,465.07 under s 16(2)(a)(i) of the Act. But that is beside the point. The question is whether the approach that the Adjudicator adopted was open to him. In my opinion, it was.

20 Section 13 of the Act relevantly provides:

- (5) Except as otherwise provided for in the construction contract, a claimant may only serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in that month.
- (6) Subsection (5) does not prevent the claimant from—
 - (a) serving a single payment claim in respect of more than one progress payment, or
 - (b) including in a payment claim an amount that has been the subject of a previous claim, or
 - (c) serving a payment claim in a particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in a previous named month.

Consequently, it was open to PTMG to serve a payment claim that included all previous progress claims.

21 Section 17(1) relevantly provides:

Adjudication applications

- (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

...

Consequently, it was open to PTMG to apply for adjudication of its whole claim, notwithstanding that only part of the claimed amount was disputed and only part of the claimed amount was unpaid.

22 Against that background, it is unclear how it could be said that the interpretation of the payment claim adopted by the Adjudicator involved a jurisdictional error. It was apparent from the payment claim that the total amount claimed by PTMG for the work that it had done was \$608,165.90 and the Adjudicator treated that amount as the amount of the claim. The effect of his determination is that the undisputed amount, which related to PC 25, must be paid and the full amount of the disputed amount, which related to PC 26, also must be paid. Once the Adjudicator's interpretation of the payment claim is

accepted, it was clearly open to the Adjudicator to make the determination he did.

23 Binah submits that the approach taken by the Adjudicator was not raised by either party and that the Adjudicator therefore failed to accord Binah procedural fairness, which itself involved a jurisdictional error: see *Demex Pty Ltd v McNab Building Services Pty Ltd* [2023] NSWCA 261 (**Demex**) at [9]ff per Kirk JA (with whom Mitchelmore and Adamson JJA agreed).

24 As the adjudication application makes plain, PTMG did not contend that the payment claim was for the whole amount due under the contract. Rather, it asserted that properly interpreted its payment claim was for \$43,059.59 and that the scheduled amount was \$27,465.07. It was that contention that Binah addressed in its adjudication response. Consequently, Binah was denied procedural fairness because it was not given an opportunity to address the argument accepted by the Adjudicator.

25 I do not accept that submission.

26 As Kirk JA explained in *Demex* at [32]:

“... generally a conclusion of invalidity would only be reached if there was a significant departure from what would ordinarily be the requirements of procedural fairness for a person exercising a statutory power, and where that departure could be characterised as leading to substantial practical injustice in all the circumstances”.

27 Here, the approach taken by the Adjudicator did not lead to a substantial practical injustice. It was plain that PTMG was entitled to be paid the \$27,465.07. As a result of the Adjudicator’s determination, it was also entitled to be paid the \$15,594.52. Binah understood that PTMG asserted that both amounts were claimed in its payment claim because both amounts were included in the total amount it claimed. Binah was given an opportunity to address that argument and did so. Its argument was rejected by the Adjudicator. But even if it had been accepted, as I have explained, the practical result would have been the same. As a consequence, no substantial practical injustice arises in this case.

Conclusion and orders

28 It follows that the summons must be dismissed. In circumstances where PTMG did not appear at the hearing no order for costs should be made in its favour. The amount paid into court should be paid to PTMG.

29 Accordingly, the orders of the Court are:

- (1) Summons dismissed;
- (2) Order that the amount of \$48,159.59 paid into Court on 14 June 2024 be paid to the first defendant.

[Redacted signature area]