

When can part of an Adjudicator's decision be severed from the whole?

Introduction

In the recent decision of *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor¹*, in determining an application to set aside an adjudication decision made under the *Building and Construction Industry Payments Act 2004* (Qld) (BCIP Act), the Supreme Court of Queensland was required to consider whether the Applicant was denied natural justice and the First Respondent defrauded the adjudicator.

Facts

In August 2007, the Applicant was engaged as the head contractor for the redevelopment of Cairns Airport (the Project). The Applicant subsequently engaged the First Respondent a month later to undertake the concreting works for the Project. In mid 2008, a dispute arose between the Applicant and the First Respondent which resulted in the First Respondent leaving the Project site.

On May 2009, the First Respondent issued a payment claim to the Applicant for the sum of \$4,803,866.60. The Applicant subsequently delivered a payment schedule to the First Respondent on 5 June 2009, proposing to make no payment. The First Respondent proceeded to make an adjudication application on 22 June 2009. The Applicant delivered an adjudication response on 30 June 2009, again stating that the First Respondent was not entitled to any payment.

On 2 July 2009, the Adjudicator (the Second Respondent) handed down his decision accepting the First Respondent's claim in full. The decision was largely constituted by a discussion on what constituted the relevant contract. The Adjudicator had rejected the Applicant's assertion that there was a lump sum contract and found that the parties had proceeded without a written contract.

On 23 July 2009, the Applicant obtained orders restraining the First Respondent from taking steps to enforce the adjudication decision on condition that the Applicant lodge bank guarantees to secure the adjudicated amount.

The Applicant then applied to the Supreme Court of Queensland to have the decision set aside on the following bases:

1. The Applicant was denied natural justice because a letter provided to the adjudicator was omitted from the adjudication application served on the Applicant and;

2. The First Respondent defrauded the adjudicator by:
 - a. claiming amounts for employees who did not work on the Project; and
 - b. inflating the "actual cost" of labour claimed in the adjudication application.

Decision

Denial of Natural Justice

Justice McMurdo found that it was more probable than not that the letter was not included in the copy of the adjudication application served on the Applicant. However, His Honour determined that the omission of the letter did not have any practical consequences for the adjudication application. Accordingly, Justice McMurdo stated he would refuse relief to the Applicant on the basis that the Applicant had been denied natural justice by reason of the missing letter.

Fraud

As mentioned above, the Applicant's case that the First Respondent defrauded the Adjudicator had two parts, each relating to labour costs.

Justice McMurdo first considered the Applicant's claim that the First Respondent represented his labour costs as "actual costs" incurred, in circumstances where the First Respondent's actual costs were in fact much lower. The Applicant contended that the First Respondent had sought to defraud the Adjudicator as he "*could not have believed that the amounts he put forward in his claim were accurate or, at least, a reasonable estimate of his actual costs*" [at 39]. The First Respondent argued that he innocently misrepresented the "actual costs" by misconceiving the meaning of the term.

Respondent's argument that he honestly believed that "labour charge-out rates, discounted as he claimed they were here, were a reasonable estimate of his actual costs in the true sense of that term" [at 85]. His Honour's reasoning was that:

- (a) even though the First Respondent added profits and overheads to the charge-out rates in his claim, he understood that charge-out rates ordinarily include a component for profits and overheads;
- (b) the First Respondent failed to provide evidence that his claim for costs overall correlated with his "so-called charge-out rates" [at 87];

¹ [2011] QSC 327



- (c) the First Respondent's claim was substantially greater than the costs for the job which he had asserted prior to preparing the claim.

Accordingly, Justice McMurdo found that the First Respondent had "fraudulently represented that the amounts claimed for on site labour were his actual costs" [at 89]. Accordingly, Justice McMurdo determined the Applicant had established an equitable jurisdictional basis for relief on the fraud claim.

Justice McMurdo then considered the second part of the fraud case, in which the Applicant claimed the First Respondent sought to defraud the Adjudicator by claiming costs for some employees who did not work on the Project.

Although Justice McMurdo drew an inference from the evidence that the First Respondent was aware of some uncertainty as to whether some employees referred to in the claim had worked on the Project, His Honour considered that "proof of some uncertainty is not sufficient to establish a reckless indifference constituting fraud" [at 100]. Justice McMurdo observed "the compilation of this claim was a substantial and detailed exercise, performed by people with no special training and in circumstances of urgency. It would be remarkable if no innocent error was made" [at 102]. Justice McMurdo determined that simple carelessness (rather than recklessness) was a more probable explanation for the inclusion of the claim for costs of several employees who had not worked on the Project. Ultimately, Justice McMurdo determined that second part of the fraud case did not meet the recklessness requirement to constitute fraud.

Justice McMurdo considered whether the fraudulent element of the First Respondent's case "should disturb the outcome" [at 125]. His Honour acknowledged the principle that a final judgement may only be set aside where the truth could not have been found by the exercise of reasonable diligence by the other party to the dispute. However, as the Applicant had no entitlement to see the First Respondent's documents prior to the adjudication application being made, his Honour concluded that the condition of "reasonable diligence" to set aside a decision was irrelevant in the circumstances. Further, his Honour rejected the First Respondent's argument that the Applicant knew or ought to have known that the claim represented the charge-out rates rather than the actual rates.

While the First Respondent submitted that the matter should be referred back to the adjudicator, the Applicant contended that the matter should be referred back to the adjudicator,

the Applicant contended that the First Respondent should be left to his rights to payment under general law. However, his Honour acknowledged that "in the present case, the fraud of which was alleged and proved relates to a discrete component of the claim and the impact of the fraud upon the amount of the claim has been precisely proved. This suggests that it would be unjust for [the First Respondent] to lose the whole benefit of this adjudication." [at 146]. Thus, Justice McMurdo held that while "equity should not look kindly on a fraudulent claimant" [at 151], to deprive the First Respondent of the benefit of the adjudication entirely would penalise him.

Accordingly, Justice McMurdo found that subject matter of the fraud could be easily severed from other parts of claim and granted the application in part on account of the fraud. Justice McMurdo ordered the Applicant pay the First Respondent the amount of \$2,363,619.29 with interest, being the balance of the adjudicated amount once the fraudulent subject matter had been deducted.

Implication of the Decision

The omission of documents in an adjudication application served on a respondent will not necessarily result in a denial of natural justice if no practical consequence arises from the omission. A Court may take into consideration the training of the persons responsible for preparing a payment claim and the circumstances of urgency when determining whether an error in a payment claim is innocent or reckless.

However, fraudulent sections of a payment claim may not render the entire claim void and a claimant may recover the balance of the adjudicated amount.

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