JOHN GOSS PROJECTS PTY LTD V LEIGHTON CONTRACTORS PTY LTD & DAVENPORT [2006] NSWSC 798

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IMPACT

The *John Goss* decision affirmed that under section 22(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') an adverse determination by an adjudicator as to entitlement for payment for work done does not necessarily preclude a determination of the value of the same works in a subsequent claim.

The decision also serves as a cautionary message to contracting parties and their advisors reiterating the potency of the 'No Contracting Out' provisions under section 34 of the Act.

BACKGROUND

John Goss Projects Pty Ltd ('John Goss') and Leighton Contractors Pty Ltd ('Leighton') were parties to a design and construct contract dated 31 July 2003 ('the contract').

On 23 March 2006, John Goss made a payment claim ('the first claim') on Leighton for in excess of $3.2 million including amounts for delay and disruption costs alleged to be payable under the contract. Leighton admitted liability for $132,067 of the first claim and the dispute was referred for adjudication.

The adjudicator, Mr Dutton, determined that John Goss was not entitled to the delay and disruption costs claimed as John Goss had failed to comply with the requirements of clause 45 of the contract. Clause 45 provided that Leighton was not liable to any claim unless John Goss had given it notice of that claim in the time, manner and form set out in clause 45.

On 24 May 2006, John Goss served a further payment claim ('the second claim') on Leighton including the amounts claimed for delay and disruption in the first claim. Leighton's payment schedule denied liability entirely and the second claim was referred for adjudication to Mr Davenport.

INTERPRETATION OF SECTION 22(4)

Mr Davenport found that Mr Dutton had determined the value of the construction work carried out and as there was no suggestion that the value had changed, he concluded that he was bound by section 22(4) of the Act to give to that construction work the same value—nil—as Mr Dutton had assigned to it.

Under section 22(4), where the value of construction work or goods and services has been previously determined, any subsequent adjudicator must give the same value to that work or those goods and services unless the claimant or respondent satisfies the subsequent adjudicator that the value of the work (or the goods and services) has changed since the previous determination.

In deciding the issue, Mr Davenport rejected an approach to section 22(4) outlined by McDougall J in obiter in the decision of Rothnere where it was held that an adjudicator's determination 'under the Act may involve both questions of quantification ... and questions of entitlement; or it may involve one or the other'

Mr Davenport indicated that McDougall J's distinction between quantification and entitlement would lead to 'a proliferation of claims' and that section 22(4) of the Act relates to valuation only.

Mr Davenport's applied this reasoning finding Mr Dutton's determination of the first claim was a previous valuation of the delay and disruption costs, which precluded Mr Davenport's further consideration of the value of the delay and disruption costs in the second claim. Consequently,

Mr Davenport did not value the second claim.

John Goss challenged Mr Davenport's determination in the Supreme Court. In the deciding the matter, McDougall J noted that Mr Davenport had decided the issue on a basis for which neither party had contended and without advising the parties or giving them an opportunity to put submissions on the point. Consequently, as the approach taken by Mr Davenport in deciding the issue was taken without the knowledge of the parties, it was held by the court to be a breach of natural justice voiding the adjudication, consistent with the Court of Appeal's decision in *Brodyn* .

However, while the decision of the court did not turn on whether or not Mr Davenport's approach to section 22(4) was correct, in coming to it's decision the court:

(a) endorsed *Rothnere* in that the court found that Mr Dutton had not determined the value of the works in the first claim, only the entitlement to such a claim;

(b) recognised the difficulties in the 'perhaps unduly brief and somewhat delphic' decision of *Rothnere* with respect to section 22(4); and

(c) did not further consider the distinction between entitlement and valuation in any substantive detail (as Mr Davenport's failure to afford the parties natural justice rendered his determination void) and left it open for debate at a later time.

LIMITS TO THE APPLICATION OF S 34

Section 34 of the Act provides the court with a discretion to void contractual clauses which exclude, modify or restrict the operation of the Act, or purport to do so.

Mr Davenport adopted Mr Dutton's reasoning that the failure by John Goss to comply with the time limit under the contract for making claims was a complete bar to its entitlement to claim delay and disruption costs.

John Goss argued in the proceedings that the clause barring claims by John Goss (if the notice provisions were not followed) was void due to the operation of section 34.

McDougall J held that the clause barring claims did not conflict with the operation of the Act and therefore did not attract the operation of section 34. While the court held that section 34 did not operate in these circumstances, the court recognised that the Court of Appeal is currently split on the application of section 34 and its potential to void the operation of certain time bar provisions.

The Court of Appeal in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* highlighted the competing interests of freedom of contract versus the protection of contractors rights under the Act. Consequently, clauses which potentially infringe section 34 will continue to be the subject of considerable scrutiny and caution should be exercised before adopting such provisions.

CONCLUSION

John Goss is not a panacea to section 22(4) of the Act described recently as an 'obscurely worded... invitation to litigation'. Nor is it a clear exposition of the range of clauses which section 34 may operate to void.

The importance of the *John Goss* decision is its cautionary message to contracting parties and their advisors to continue to be wary of issues relating to ss 22(4) and 34.

REFERENCES

1. *John Goss* per McDougall J at para 21.

2. *Rothnere v Quasar* [2004] NSWSC 1151

3. *Rothnere* at para 43 per McDougall J

4. *Brodyn v Davenport* [2004] NSWCA 394

5. *John Goss*, per McDougall J at para 40

6. [2005] NSWCA 142

7. M Jacobs QC 'Security of Payment in the Australian Building and Construction Industry'(2006), Thomson Lawbook Co, 1st ed, at p141