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Casenote

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To whom can a quashed adjudication determination be
remitted?

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Casenote – Michael Sharkey

Mediation is not a ‘method for resolving disputes’. To whom can a quashed adjudication determination be remitted?

SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631

SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd (No 2) [2015] VSC 680

Vickery J in the *SSC Plenty Road* decisions addressed the question of whether an adjudication determination pursuant to the *Building and Construction Industry Security of Payment Act 2002* (the **Act**) should be remitted to the same or an alternative adjudicator upon the determination being quashed by the Court.

The First Decision, *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631* (**the First Decision**), sets out the facts of the dispute, the adjudicator’s determination and, helpfully, gives a guide as to the task of the adjudicator under the Act. Upon deciding that the determination should be quashed, His Honour then invited the parties to make submissions as to whether the determination should be remitted:

- a) to the same adjudicator; or
- b) to the same authorised nominating authority (ANA); or
- c) to a new adjudicator; or
- d) at all.

The Second Decision, *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 680* (**the Second Decision**), considered the submissions and determined it was appropriate to remit to the same adjudicator.

These decisions are of note because His Honour helpfully sets out the task of the adjudicator under the Act, what might be expected of an adjudicator in issuing reasons for determination and in what circumstances might a determination be remitted to an alternative adjudicator.

Background

SSC Plenty Road Pty Ltd (**SSC Plenty Road**) engaged Construction Engineering (Aust) Pty Ltd (**Construction Engineering**) to design and construct a shopping centre in Reservoir for the sum of \$35,554,985.

The adjudication the subject of the appeal was in relation to a claim purporting to be under the Act dated 1 July 2015 in the sum of \$4,460,815.06.

SSC Plenty Road sought relief by way of certiorari on the ground of jurisdictional error it says was evident in the determination. It relied on 2 grounds, namely that excluded amounts were taken into account by the adjudicator and the adjudicator failed to value the work in accordance with the Act.

His Honour cited clauses of the construction contract, relevantly clause 42 set out the dispute resolution process under the contract which culminated in a mediation.

Ground 1 – Excluded Amounts

The Adjudicator determined that mediation under clause 42 of the contract was not a method of resolving disputes under s 10A(3)(d)(ii) of the Act. As a result the disputed variations claimed in the disputed payment claim were allowable class 2 variations.

SSC Plenty Road submitted that the adjudicator had made, either, made an error of law or fell into jurisdictional error in making these findings. The adjudicator's determination was therefore void pursuant to ss 23(2A) and (2B) of the Act.

Construction Engineering disputed SSC Plenty Road's submissions, relying on the decision of *Branlin Pty Ltd v Totaro* [2014] VSC 492 (***Branlin***).

His Honour accepted and adopted the reasoning in *Branlin* that the basic requirements for a construction contract to provide a 'method for resolving disputes' were:

- a) a process which could be described as a 'method' of dispute resolution;
- b) a process which is capable of resulting in a binding resolution of the dispute; and
- c) a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

His Honour gave a useful description of the various methods which might satisfy the Act, concluding:

These approaches to dispute resolution have an element in common, which brings them within s 10A(3)(d)(ii) of the Act. They are mandatory steps prescribed by the construction contract which result in the production of a binding decision by a third party appointed under the contract for the resolution of the dispute.

Ascertaining the method for resolving disputes under the contract is essential. Whether or not the second class of variations in s 10A(3) of the Act are to be taken into account when calculating amount the claimant is entitled to turns on whether a compliant method of resolving disputes exists. If it does, the Act directs the parties to use that process in relation to the second class of variations. If it does not, the adjudicator, "if appointed, is obliged to assume the task of determining and valuing the variation as a claimable variation in the second class."

His Honour stated that while "a mediation is capable of, and often does, result in a binding resolution of a dispute between the parties, unless agreement is achieved, it will not result in this outcome. A mediation ... is at best a facility [for] structure negotiation."

A mediation is not a method within s 10(3)(d)(ii) of the Act and, accordingly, this ground failed.

Ground 2 – Failure to value the work in accordance with the Act

SSC Plenty Road contended that the adjudicator fell into jurisdictional error:

- a) by not making a bona fide attempt to exercise the valuation power conferred upon him;
- b) by failing to fulfil the basic and essential requirement of the Act that he value the amount of the claim by determining the work that was done and valuing the work; and
- c) by making his determination when there was no evidence before him on which he could base his determination.

SSC Plenty Road submitted that the construction contract did provide a method of calculating the amount of progress payments payable in respect of variations as contemplated by s 10 and s 11(1)(a) of the Act.

It was further submitted that the adjudicator was obliged to act in accordance with the terms of the contract alongside the provisions of the Act.

Alternatively, it was put, if the adjudicator was correct in finding that the contract provided no means of calculating the works, then the adjudicator was required by the Act to value the work himself.

SSC Plenty Road submitted that the adjudicator did not carry out this “basic and essential” valuation task. Rather, he merely adopted Construction Engineering’s assessment.

The adjudicator, it was submitted, asked an irrelevant question in considering whether SSC Plenty Road had established a basis for withholding payment, rather than assessing whether the works had been done and valuing accordingly. The adjudicator, therefore, made an error of law.

His Honour, following his extensive review of the role and obligations of the adjudicator, found that the contract did not actually provide a means of valuing the works which accorded with s 11 of the Act. In carrying out this review, His Honour noted that the task of an adjudicator is substantial, subject as it is to the Act’s imposition of strict time constraints within which the adjudicator is required to deliver a determination following consideration of complex legal and factual issues.

His Honour, however, did find that the adjudicator did not demonstrate in his determination that he undertook a process of assessment of the claim other than merely adopting the amount claimed by Construction Engineering and, as a result, fell into jurisdictional error in relation to 33 variation claims.

Further, His Honour found that the adjudicator had erred in imposing on SSC Plenty Road an onus to establish a sufficient basis for deducting amounts and then finding that SSC Plenty Road had failed to do satisfy this onus. In doing so, the adjudicator did not demonstrate any process of assessing the value of the claim.

His Honour concluded by finding that SSC Plenty Road had succeeded in its claim for relief by way of certiorari on the ground of jurisdictional error.

Remitting back to the Adjudicator

In the Second Decision, His Honour considered the parties submissions as to the orders he ought to make to give effect to the order of certiorari. The preliminary consideration being that the usual form of relief is to quash the decision and remit it back to the tribunal for reconsideration according to law.

SSC Plenty Road submitted that the matter should be redetermined by an adjudicator other than that adjudicator who’s determination was the subject of this proceeding. It was put that the errors identified give rise to a perception that the instant adjudicator “might not bring an impartial mind to any remitted issues.”

Construction Engineering opposed remittal to anyone other than the instant adjudicator.

His Honour considered two frequently cited cases, *Body Corporate Strata Plan No. 4166 v Stirling Properties (No. 2)* [1984] VR 903 and *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39, stating:

As may be seen then, the question of whether or not it is appropriate for a different decision-maker, or a differently constituted decision-making body, from the original to determine the issues on remitter is necessarily a context-dependent inquiry.

His Honour also adopted the principal identified in *Vegco Pty Ltd v Gibbons* [2008] VSC 363:

For the Court to be persuaded to order remittal to a differently constituted primary decision maker, good reason for doing so, based on established principles, must be shown by the party seeking such an order. The guiding principle is that remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful party to give the appearance of unfairness to that party ... if the matter were remitted to the same decision-maker or where it would be impracticable for the same primary decision maker to redetermine the matter.

In this matter, His Honour did not consider that the species of error evident in the determination spoke to how the adjudicator might approach the task on remittal. Nor was there reasonable foundation for any apprehension that the adjudicator would not act in good faith nor in accordance with the adjudicator's functions set out in the principal judgment.

The matter was remitted to the original adjudicator.

Appeal

The matter is presently subject to an appeal to the Court of Appeal listed to be heard in April 2016.

SCC Plenty Road has appealed His Honour's decision on grounds that His Honour erred in finding that:

- a) mediation is not a method for resolving disputes pursuant to s 10A(3)(d)(ii); and
- b) an adjudicator is not permitted to rely on a superintendent's certificate issued pursuant to a contract in valuing the works as such reliance contravenes the adjudications functions as set out in the Act.

Should the matter be granted leave the decision will have important ramifications for the conduct of both construction contracts and adjudications in Victoria.