SUPREME COURT OF QUEENSLAND

CITATION:	*Ware Building Pty Ltd v Centre Projects Pty Ltd & Anor (No 1)* [2011] QSC 424
PARTIES:	**WARE BUILDING PTY LTD** **ACN 003 503 035** (applicant) **v** **CENTRE PROJECTS PTY LTD** **ACN 063 976 303** (first respondent) **THOMAS WILSON** (second respondent)
FILE NO:	BS 3812 of 2011
DIVISION:	Trial
PROCEEDING:	Civil
DELIVERED ON:	13 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13-14 October 2011
JUDGE:	Fryberg J
ORDERS:	**1. Application dismissed;** **2. Costs to be assessed; and** **3. Liberty to apply.**
CATCHWORDS:	Contracts – Building, engineering and related contracts – Remuneration – Statutory regulation of entitlement to and recovery of progress payments – Payment claims – Adjudication order – Injunction *Building and Construction Industry Payments Act 2004*
COUNSEL:	L Bowden for the applicant G J Handran for the respondent
SOLICITORS:	Nicholas Radich Solicitors for the applicant Tucker & Cowen Solicitors for the respondent

HIS HONOUR: I have before me an application for a declaration that an adjudication, by an adjudicator appointed under the *Building and Construction Industry Payments Act 2004*, is void and of no effect, and an injunction restraining the first respondent from attempting to enforce the adjudication decision.

The matter arose in this way. The applicant is a builder. In 2009 it entered into a contract to complete the construction of a building at Coolangatta. The building was partially-completed but because a previous builder had left the job, it remained unfinished. Its shell had been constructed and much of the carpentry had been completed. Units numbers 7 to 13 had been substantially lined; units 1 to 6 had no lining. There was a number of other pieces of work outstanding.

The applicant entered into a subcontract with the first respondent effectively in respect of plastering work. It did so in two stages. First, it made a contract which did not deal with the question of fire rating, or more accurately, fire rating remediation. That was because at the time the contract was made in February 2010, a report was still awaited from a company which was expert in advising on fire protection. It was envisaged in the contract that fire rating remediation which was required in units 9 to 13 would be added to the contract at a subsequent date by an agreed variation value.

A month later the parties executed another document which was

in the form of a quotation from the respondent to the applicant. It purported, on its face, to create a new contract on different terms. However, the parties have, at all material times, treated the new contract as if it were simply a variation ordered in accordance with the provisions of the original contract, and I shall do so also.

The original contract was to perform work to units 1 to 6 which was quite substantial work, and in relation to units 7 to 13, to repair holes and tidy up the work which had already been done in those units by the previous builder. The report on the fire protection was received at about the time the second contract was entered into, probably shortly before it. The second contract, or variation if you like, provided for the installation of a fireboard into units 9 to 13 and was for an amount of $58,590. The first contract was for an amount of $76,604.

The contracts were on various terms which were attached to the first contract, including some terms of trade which included a variation clause. The variation clause provided that the applicant could, by giving a written direction, require the first respondent to carry out a variation. It further provided that the price of a variation was that agreed by the parties, or, failing agreement, an amount reasonably decided by the applicant. It further provided that the contract price was to be adjusted by the price of the variation at the next payment.

The respondent proceeded with the work. Disputes arose. The

applicant contended that the respondent had, in effect, worked too fast; that it had gone ahead and covered up areas which then had to be uncovered to allow other trades access. It also contended that the respondent had been relieved of the need to carry out repair work in respect of units to which the fire board was to be applied - that is, 7 through to 13, as the board would cover the damage to the existing walls and therefore the work became unnecessary.

A document prepared by the respondent in the form of a quotation put the value of the work of repair to those units at $28,000. The respondent contended that that document was not, in fact, a variation order, as it appeared to be on its face, but simply a quotation for the owner to use for insurance purposes. It seems that the damage had been done by vandals and the owner had a claim against its insurance company. In any event, the document was some evidence of the value of the repair work.

The other area of dispute in relation to variations was whether they were properly ordered. A number of site instructions were issued in writing by the applicant's on-site manager. The applicant contended and still contends that he had no authority to order variations. The site instructions which he issued did not include any amount and it is contentious whether the instructions were instructions to carry out new work.

The respondent, in any event, proceeded to carry out the work,

and during 2010 rendered invoices for it. Most of them were issued in May and June of 2010, but there was one subsequent one late in the year. They were not paid in full, and particularly, very little was paid for the variations. The invoices were not all in the form of payment claims under the *Building and Construction Industry Payments Act*. Indeed, only about half of them were in that form.

When the dispute arose toward the end of 2010, the applicant invoked the procedures in the contract to have the matter referred to arbitration. This stimulated the respondent to activity under the Building and Construction Industry Payments Act. It submitted a further two invoices, clearly under the Act, in respect of work already done and invoiced, and the purpose of that was to remove any doubt about the existence of a proper payment plan for the work.

The purpose appears to have failed, because when in response the applicant took the point that there was not two contracts but only one, the respondent acceded to the argument, withdrew the claim and substituted a fresh one in early 2011, setting out all of the claims in one claim.

The applicant made a response by way of payment schedule, and in due course the matter was referred to the second respondent for adjudication. It is the second respondent's decision which is now challenged by the applicant.

The grounds of the challenge are numerous, but many seem to

overlap or simply to be different ways of expressing the same complaint. The first ground, however, is discrete. It is that the payment claim which was the subject of the adjudication was invalid. That submission relied upon my decision in *Doolan v. Rubicon Queensland Proprietary Limited* [2008] 2 QdR 117. I there held that, on the proper construction of section 17, successive claims in respect of different payment dates which were identical were not permitted by the Act.

It is I think unnecessary for me to explore the reasoning for that decision or the dicta which surrounded it because in my judgment the reasoning has been effectively overruled by the decision of the Court of Appeal in *Spankie v James Trowse Constructions Proprietary Limited* [2010] QCA 355. As I read the decision there is no basis upon which the first ground argued by the applicant today can succeed. Mr Bowden, for the applicant, did not press it strongly in argument before me but explicitly reserved his position on the point in case the matter should go further.

The second ground in Mr Bowden's outline was not pressed. The third ground asserted that there had been non-compliance with section 26(2) by the adjudicator. That section provides that in deciding an adjudication application the adjudicator is to consider only the matters listed in the sub-section. It may be assumed that the sub-section not only limits the matters to be considered but mandates the consideration of those which are listed.

The complaint which is made on behalf of the applicant is that contrary to section 26(2)(d) the adjudicator failed to consider the submission put before him by the applicant. In particular that submission was related to the proposition that the scope of the work was varied when the second contract the (fire rating variation) was made. It was submitted that at that point, the scope of the work was reduced to the delete the need for repair work to the walls in units 7 to 13, that the adjudicator failed to consider that argument and that consequently there had been a breach of that provision.

It seems to me that that argument cannot succeed simply because one cannot identify it anywhere in the submissions made on behalf of the applicant to the adjudicator. The applicant initially advanced a case in its payment schedule which it now concedes is untenable. Before the adjudicator it contended that the work which it asserted was no longer within the scope of the contract had actually not been done and that there should have been a reduction in the price accordingly. The difficulty with that proposition is that it was not advanced in the payment schedule and therefore was not open for consideration by the adjudicator by reason of the provisions of section 24(4) of the Act.

Another way of putting a similar proposition was that the applicant had, in the schedule, asserted that the work was beyond the scope of the work and that it did not matter whether or not the respondent had done the work, it did not

deserve to get paid for it because the work had been withdrawn from the scope of the contract. The difficulty with that argument was that the applicant did not, at any point, issue a variation order to remove that work from the scope of the work nor was there any evidence of an agreement between the parties for such removal. That being so the matter was plainly something that which could not have led to any beneficial outcome before the adjudicator.

The same dispute in relation to the reduction in the scope of work was covered by grounds 5 and 6 argued before me today where the matter was characterised as an argument relating simply to the scope of works and alternatively as an argument relating to failure to provide natural justice or lack of bona fides as it was put. I do not think those grounds require a separate consideration.

Ground 8 of the grounds advanced was the second major area relied on by the applicant. That ground drew attention to the fact that the respondent's material submitted to the adjudicator, that is, to the use the jargon in the Act, the respondent's submissions on the adjudication application, contained an annexure called annexure "N" which raised new reasons for payment.

The applicant complained that because of the prohibition from which it suffered under section 24(4) allowing the respondent

to put in fresh material in its role as applicant before the adjudicator put the applicant in the position of being unable to get natural justice, because it was unable to respond to the new material.

There might be some force in that submission if there were any evidence that the adjudicator had relied upon the fresh material. There is, in fact, nothing to show. I was taken to nothing which would suggest that he did so rely. Moreover, I note that when the applicant received the respondent's submissions to the adjudicator, it did not make any protest to him about the inclusion of annexure "N", and did not urge him to disregard it.

The applicant was not prohibited by section 24(4) from complaining about breaches of procedural fairness. On the contrary, section 25(4) gave it scope to ask the adjudicator to request further written submissions on the question. But there was no complaint of any sort either drawing attention to section 25 or independently of it.

Finally, the applicant contended that, in any event, once the adjudicator decided that the variations should be allowed, he ought to have paid attention to the provisions of the contract which required the pricing of the variations to be determined reasonably by the applicant.

I have already referred to the provisions of the variations clause in the contract.

The difficulty with that submission is that the applicant contended that, almost without exception, there were no variations and had not contended, at any stage, for an alternative result of the sort which it now complains it did not get. In other words, it had not submitted that if it was otherwise unsuccessful, the adjudicator ought not to determine the quantum but rather should allow the processes of the contract to take place.

In the circumstances, it is hardly surprising that the adjudicator took the course he did.

It seems to me, therefore, that none of the arguments advanced by the applicant demonstrates error on the part of the adjudicator of the type which might lead this Court to intervene.

The grounds for relief sought in the application have not been made out. The application, is, therefore, dismissed.

MR HANDRAN: Your Honour, in my submission, there's no reason why costs shouldn't follow the event and I press for costs.

MR BOWDEN: I can't oppose that sort of order, your Honour.

HIS HONOUR: The application is dismissed with costs to be assessed. Liberty to apply in relation to money in court.

THE COURT ADJOURNED AT 4.23 P.M.