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3 August 2015

## **Bulletin – Recent Developments in the Law – This Practise Successfully Defended the Determination of an Adjudicator in the Supreme Court and Created a Most Important Precedent**

See: *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd* [2015] NSWSC 955 (9 July 2015) (***Broadview Windows***)

The plaintiff, Broadview Windows sought to have the Supreme Court overturn or quash an adjudication determination of John Goggins made under the Building and Construction Industry Security of Payment Act 1999 (**BCISOPA**). The defendant, Architectural Project Specialists (**APS**), had to decide whether to defend the action and risk liability for substantial legal costs if it lost. On our advice, APS instructed us to defend the action and appear (without counsel) for APS in the Supreme Court.

The plaintiff (respondent) challenged the adjudication determination on the principle in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 (***Grid Projects***) that - in circumstances where the construction contract makes no provision for when payment claims can be made (no provision for reference dates) then after completion of works; only one reference date remains available to a claimant from which to make a payment claim under the BCISOPA. That case was authority for the proposition, in effect, that only one payment claim may be validly issued for completed work, after completion of the work.

The facts of the matter before the adjudicator were that all the work under APS's contract was completed by 31 August 2014. APS made a payment claim on 24 November 2014 attaching invoices dated 10 and 12 August 2014. APS made an adjudication application but the first and second adjudicators withdrew, presumably because they thought that the adjudication application was invalid. APS made another payment claim on 23 February 2014 again attaching the invoices of 10 and 12 August 2014. The third adjudicator (John Goggins) decided that he had jurisdiction and determined that APS was entitled to the whole of the claimed amount, interest and adjudication fees.

We successfully argued and His Honour Justice McDougall followed our submissions and applied the full court authority of the Court of Appeal in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 (***Brodyn***) that: "s 8 (2) (b) provides a starting reference date but not a concluding one. McDougall J held that the adjudication determination was valid. The only non-contractual limit to the occurrence of reference dates is that which flows from the (12 month) limit in section 13 (4)." McDougall J held that the only non-contractual limit to the occurrence of reference dates is that which flows from the (12 month) limit in section 13 (4) of the BCISOPA.

His honour made comments on the apparent error in the *Grid Projects* case that it was based on a misconstruing of the term "named month" in the definition of *reference date* in the BCISOPA. He noted that that error flowed from the parties' failure to place an authoritative definition of *named month* before his honour Stevenson J, whose conclusion naturally and logically flowed from that failure.

McDougall J also made comments on the dicta of President Allsop in the important Court of Appeal case of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 (***Dualcorp***) (in which the principal of this practice was instructing solicitor in the proceedings in the lower court pre the appeal) and expressed a view to the effect that it should be construed to mean that only one payment claim may be made in relation to each reference date. The broader interpretation of the dicta of President Allsop in *Dualcorp* as found in *Grid Projects* (at [36]) that: *later decisions of single judges' in the [Supreme] Court appear to favour acceptance of the views expressed by Allsop P, [to those of Hodgson JA in Brodyn]* has been squarely rebuffed it would seem.

McDougall J also made comments on an email, which the plaintiff sought to say might amount to a payment claim. However his honour considered it was not a payment claim because: "all that the email asked was

that the respondent review previous invoices and either pay them or indicate what dispute it had with paying them.” That comment may give both claimants and respondents some comfort to the effect that accidental emails might not necessarily amount to an inadvertent issuing of a payment claim under the new amended BCISOPA (notwithstanding that the amended Act has removed the requirement for the endorsement that: “this is a payment claim made under the Building and Construction Industry Security of Payment Act 1999”; unless the claim is connected with an exempt residential construction contract.))

The decision is of great importance. Claimants and their lawyers need no longer worry that earlier invoices issued after cessation of work will rob them of the opportunity to use the BCISOPA in relation to subsequent payment claims issued prior to the section 13 (4) limitation period.

Termination of a contract by completion of work is no longer a bar to making payment claims under the BCISOPA where the construction contract is silent on reference dates.

The often-cited *Grid Projects* constraint on payment claims has now been removed and the intention of the legislature as decided by the full Court of Appeal in *Brodyn* has been restored. However, it is important to bear in mind that in *Broadview Windows* the construction contract did not expressly provide for reference dates. If a construction contract does make express provision for reference dates, then the contract may legitimately limit the number of payment claims that can be made both pre and post completion - see the judgment of McDougall J in *Trustees of the Roman Catholic Church v Wollam* [2012] NSWSC 1559. In *Broadview Windows* he distinguishes that case on the facts.

### **Lessons From the Matter**

The following lessons are apparent from the *Broadview Windows* judgment and our preparation for the matter.

#### For practitioners

Good (sharp, concise, precise and tactful) written submissions carry significant power in court (and in adjudication applications and responses) noting that oral submissions were not required from RGCL in the Supreme Court. The judge was content to rely on our extensive nine pages of written submissions, which proved to cover the field, and obtained the desired end.

The need to engage a practitioner who is experienced in BCISOPA law, noting our client’s initial legal advice was that it did not have a case. And the benefit of deeper analysis of and looking through and beyond lower court judgments in preparation for such a matter.

The importance of placing the correct authorities before the court noting that McDougall J attributed the error in *Grid Projects* to the parties’ failure to place an authoritative definition of *named month* before the judge in that case.

#### For claimants and preparers of adjudication applications

The importance of placing the right authorities before the adjudicator and of making clear, succinct and precise submissions on the right issues as informed by case law and the general provisions of the BCISOPA.

#### For Respondents

Very real advantages can be made by engaging a practitioner who is up to date with the law and who can place the right authorities before the adjudicator; and who can accurately advise on prospects of success with respect to a court challenge to an adjudication determination. You should have us prepare or vet your contracts or subcontracts to truncate the claimant’s right to claim post termination or post completion of work.

#### For Adjudicators

In circumstances where there is an issue about jurisdiction, and where one party’s submissions support

jurisdiction under the BCISOPA and are based on superior court authority, (as was the case on the papers placed before John Goggins in this matter); adjudicators should follow to the higher court authority supporting jurisdiction, over a lower courts 'reinterpretation' of superior court authority denying jurisdiction.

**Judgment for *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd***

The full judgment of McDougall J in *Broadview Windows Pty Ltd v Architectural Project Specialists* [2015] NSWSC 955 (9 July 2015) may be viewed at:

<http://www.austlii.edu.au/au/cases/nsw/NWSC/2015/955.html>

**This bulletin is not intended as legal advice. We must review the particular facts of any matter you may have and then provide you with specific advice.**

Yours faithfully,  
Richard Green B Eng LLB (Hons) solicitor  
Richard Green Construction Lawyers