



## CONSTRUCTION LAWYERS

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### **TRANSGRID V WALTER CONSTRUCTION GROUP [2004] NSWSC 21 Supreme Court of New South Wales – 6 February 2004**

#### **FACTS**

Transgrid and Walter Construction Group ('Walter') entered into a construction contract for electrical and associated works for the Haymarket Tunnel Project. Walter served a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') in the amount of \$12,991,145.00 plus GST (a major component of which was for delay costs). Transgrid responded with a Payment Schedule under the Act in the amount of \$925,439.05 plus GST. The matter proceeded to Adjudication and Mr. Timothy Sullivan was appointed Adjudicator. Mr. Sullivan determined that Walter was entitled to \$5,010,433.00 including GST.

In general the construction contract provided for the method of calculating and valuation of the works completed. Specifically Clause 42.3 of the construction contract stated that:

*"The amount certified by the Superintendent as due to the Contractor at the time of a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract for breach of contract less –*

- (a) amounts which the Principal is entitled to deduct under Clauses 42.4 and 42.11;*
- (b) amounts already paid or certified under the Contract."*

Transgrid submitted that Mr. Sullivan was bound by the certificates of the Superintendent and the only remedy available was to submit the dispute to the dispute resolution procedures set out in the contract. Mr. Sullivan concluded that the certificate was not binding. Further, Transgrid submitted that on the basis of clause 42.1 there was no entitlement to be paid for work if it had not been approved in writing, or had not been valued or agreed by the Superintendent. Additionally, Transgrid submitted that Walter had no entitlement to variations. Mr. Sullivan rejected those arguments.

Transgrid then sought judicial review of the determination of Mr. Sullivan. Transgrid submitted that Mr. Sullivan had "failed to apply the terms of the contract in determining the value of the payment" and that he should have given Transgrid an opportunity to put further submissions and supply further material.

#### **ISSUES**

- Is the determination of an Adjudicator under the Act in principle amenable to judicial review?
- Did Mr. Sullivan fall into "jurisdictional error"?
- Specifically, was Mr. Sullivan obliged to apply the determination of the Superintendent made pursuant to the relevant provisions of the contract, or was he entitled to re-examine the matter for himself and form his own view of Walter's entitlement?
- Did Mr. Sullivan deny Transgrid natural justice?

#### **FINDING**

The Court repeated the views expressed in *Musico* and *Abacus* that judicial review is in principle available for jurisdictional error of law and denial of natural justice.

In relation to variations, the Court found that if Mr. Sullivan had made an error that it was clearly an error in applying the terms of the contract which was an error within jurisdiction. Accordingly, Walter was entitled to the reasonable value of the variations.



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The Court held that an adjudicator was entitled to exercise his or her own judgment, and was not bound by the determination of the Superintendent or someone occupying the position of Superintendent. Mr. Sullivan had therefore not erred.

Mr. Sullivan had not denied natural justice to Transgrid as Mr. Sullivan could have called for material pursuant to section 21(4) of the Act, however he was not bound to do so. Further, there was no suggestion for example that Transgrid had put its position on the express basis that if Mr. Sullivan rejected the primary criticisms, it would seek to put forward further material in reply.

The Court concluded that none of the challenges advanced by Transgrid to Mr. Sullivan's determination has been made out.

### QUOTE

McDougall J at paragraphs 52 and 53 held:

"52 I do not think that the legislature intended that the scheme that it sought to construct should be dependent upon an assumption that a person is bound (either as a matter of express stipulation or implication) to act reasonably, and in good faith. Nor do I think that it intended that the process of adjudication for which it provided could be set at nought by an honest but manifestly wrong exercise of contractual power of certification.

53 Finally, if the legislature intended the decision of the Superintendent (or someone in the Superintendent's contractual position) to be determinative in any case to which sections 9(a) and 10(1a) applied, there would be no utility whatsoever in putting in place the mechanism for adjudication. That is because, by hypothesis, the claimant would have a contractual right to the amount of the payment and the determination of the adjudicator could do no more than recognise that right. The only benefit from the adjudication process would follow from the ability to register the adjudication certificate in a Court of competent jurisdiction and thereby obtain a judgment. However, on the hypothesis under consideration, the claimant could equally well sue for the payment and recover summary judgment."

### IMPACT

Despite provisions in a construction contract as to valuation and calculation of works by a Superintendent, the Adjudicator is not bound by the Superintendent's certification.

However, it should be noted that this issue is not finally determined. In the subsequent decision of *Transgrid v Siemens*, Master Macready indicated that his preferred construction of the Act was "*that the adjudicator does not step into the shoes of the superintendent*".