

**TIMWIN CONSTRUCTIONS PTY LTD v FAÇADE INNOVATIONS PTY LTD
[2005] NSWSC 548**

Supreme Court of New South Wales – 1 June 2005

FACTS

Timwin Constructions Pty Ltd ('Timwin') as builder, entered into a subcontract with Façade Innovations Pty Ltd ('Façade') as the subcontractor for construction works. Façade made a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') in the sum of \$498,664, the majority of which was for variation work. Timwin provided a Payment Schedule proposing to pay nothing and claimed damages for delay and an amount of \$73,615 allegedly over-paid. Façade submitted an Adjudication Application and the Adjudicator ultimately determined in favour of Façade. The Adjudicator in his determination stated that: "The respondent merely says, "the amounts claimed in the payment claim as variations are amounts that should have been carried out pursuant to the contract". Whatever that means, the respondent has not satisfied me that the respondent has a valid reason for not paying the claimed amounts for the variations". Timwin in these proceedings submitted that on the basis of the Adjudicator's treatment of its reasons for rejecting the value of the variations, the adjudication determination should be void as the adjudicator had failed to exercise his powers in good faith.

ISSUES

Did the adjudicator attempt in good faith to exercise the powers given to him by the Act?

FINDING

The Court referred to the decision in *Brodyn v Davenport and Anor* [2004] NSWCA 394 in which the Court of Appeal held that a determination made by an Adjudicator under the Act could be set aside and relief granted by way of deprivation and injunction where, the Adjudication Determination does not amount to an attempt in good faith to exercise the relevant power. The Court accepted that it might be difficult to read Timwin's Payment Schedule in respect of its stated reason for non-payment of the variations. However, the Court concluded from Façade's submissions in its response to the Payment Schedule, that Façade understood the nature of the dispute in regard to the variations. The Court also concluded from its reading of the Adjudicator's Determination, that the adjudicator had not properly turned his mind to the submissions of both parties. The Court therefore held that the Adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was – hence the determination was void.

QUOTE

McDougall J at paragraphs 38 held: "There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in *Brodyn*. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in *Roberts v Hopwood* [1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."

Further, McDougall J at paragraph 41 held "In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute."

IMPACT

In determining an Adjudication Application, it is wise for an Adjudicator to consider all submissions, even in the alternative, because to not do so may leave an Adjudicator open to the decision that he or she did not exercise his or her powers in good faith.

© DoYLES Construction Lawyers 2005

This publication is intended to be a topical report on recent cases in the construction, development and project industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com