

Adjudications and the curate's egg

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Can an adjudicator's determination be bad in part yet parts be excellent?¹

If only part of an adjudicator's determination is bad, must the claimant lose the whole of the adjudicated amount? Opposite views of the judiciary are illustrated in *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Fleas Concreting* [2011] QSC 327 [*Fleas Concreting*] and *Watpac Construction v Austin Corporation* [2010] NSWSC 347 [*Watpac No.2*]. In the former case McMurdo J allowed the claimant approximately half of the adjudicated amount of \$4.8 million. In the latter case McDougall J allowed the claimant nothing.

As I said at p 232 of my book *Adjudication in the Building Industry* [3rd edn 2010 Federation Press], since the court has a discretion to make a declaration that an adjudicator's determination is void, the court can refuse to exercise the power to declare the determination void until the respondent pays part of the adjudicated amount. That is effectively what the Court did in *Fleas Concreting*. The issue is not the power of the Supreme Courts but the willingness of individual judges to exercise the power.

In *Katherine v The CCD Group* [2008] NSWSC 131 the Court allowed the claimant to enforce judgment for the adjudicated amount but for a lesser rate of interest than that determined by the adjudicator, namely, 180 per cent per annum.

In *Holdmark v Melhemcorp* [2009] NSWSC 305 the Court, without declaring the adjudicator's determination void, granted an injunction restraining the claimant from entering judgment for more than a specific portion of the adjudicated amount.

In *Watpac Construction v Austin Corporation* [2010] NSWSC 168 [*Watpac No.1*] the point upon which the Court found that the adjudicator had denied the respondent natural justice only went to the issue of the respondent's claim of set off. The adjudicator did not allow the set off but, even if he had, the claimant would still have been entitled to a substantial progress payment.

In *Watpac No.1* the question arose of whether the Court could allow the claimant the untainted portion of the adjudicated amount. McDougall J at [179] said, "In this case, it is at least arguable that the denial [of natural justice] affects a discrete part of the claim, or, more accurately, a discrete aspect of the quantification debate. It is, perhaps, arguable that in those circumstances the consequences of denial of natural justice should be limited to the extent of the denial, on the basis that to leave otherwise unchallengeable conclusions enforceable is more consistent with the objective of the Act" He directed the parties to make written submissions on the point.

The argument was decided by McDougall J *Watpac No.2*. McDougall J decided the issue against the claimant. The claimant received nothing. At [29] McDougall J said, "[I]f the court were to strike down part only of the determination, it would be, in effect, rewriting it. That would usurp the function entrusted by the Act to adjudicators". He found that the whole egg was bad. Although nearly 40 cases were cited in *Fleas Concreting*, the *Watpac* judgments were not cited.

The Supreme Court proceedings in *Fleas Concreting* arose out of an adjudication decision in which the adjudicator determined that the claimant [*Fleas Concreting*] was entitled to a progress payment of \$4,803,866 for concreting work on the redevelopment of the Cairns

¹ The catchphrase 'curate's egg' comes from a *Punch* cartoon, Vol 109 November 1895. The cartoon shows a timid young curate at his bishop's breakfast table. "I'm afraid you have a bad egg Mr. Jones." "Oh no, my Lord, I assure you. Parts of it are excellent!" [*Brewer's Dictionary of Phrase & Fable*].

Airport. The respondent was very surprised by the decision and promptly applied to the Supreme Court to restrain the claimant from enforcing the adjudicator's decision. The respondent then set about a thorough investigation of the claimant's documents from which the respondent built up a fraud case. The fraud case was that actual labour costs were less than the claimant put forward in the payment claim and that the claimant had claimed for some workers who did not work on the job on the relevant day or days.

McMurdo J found at [124] that the adjudicator had been induced to accept that the claimant's actual labour costs were the amounts claimed. The alleged costs had been exaggerated. McMurdo J found that there was fraud but at [146] he found that the fraud related to a discrete component of the claim and the impact of the fraud upon the amount of the claim could be precisely proved. He found that it would be unjust for the claimant to lose the whole of the benefit of the adjudication.

The respondent argued that the Court should simply set aside the adjudicator's determination. The claimant argued that if the Court did that, then the Court should require the adjudicator to reconsider the matter.

The original payment claim was served on 29 September 2009. The judgment was given on 4 November 2011. By that stage, it would have been too late for the claimant to serve another payment claim [see s 17(4) of the *Building and Construction Industry Payments Act 2004* Qld]. McMurdo J at [144] decided that there was doubt as to whether the Court had the power to refer the matter back to the adjudicator and whether, if it did, a further determination by the adjudicator would be valid. He decided that it was preferable that the matter not be sent back to the adjudicator.

The claimant submitted that the court should order, as a condition of setting aside the adjudicator's decision, that the respondent pay the claimant "the undisputed portion" of the adjudicated amount. That was the adjudicated amount less the overcharges for labour costs.

At [150] McMurdo J considered the policy behind the Act. He said:

Thus, where most of this claim is unaffected by the fraud, it is no small thing to deprive Mr. Ericson [the claimant] of the substantial benefit of the adjudicator's decision. To say that he can be left to an ultimate determination of all issues by a court is to disregard the policy behind and the intended effect of the statutory scheme. Moreover, the unsuccessful party, Hansen Yunken, has not sought since the adjudication to litigate the threshold question, and to thereby establish that according to the ultimate merits, nothing is owing to Mr. Ericson.

McMurdo J accepted the solution submitted by the claimant and ordered that upon the respondent paying to the claimant \$2,363,619 and interest the claimant would be restrained from taking any steps to enforce the adjudication decision.

There would be less work for the Supreme Courts if all judges followed McMurdo J and had regard to what is just and the policy and intended effect of the statutory scheme.