

A mountain out of a non existent molehill

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In *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 332 the adjudicator found that the s 17(2) notice was served in accordance with the requirements of the Act. McDougall J incorrectly [for reasons covered below] found that the claimant served the s 17(2) notice outside the 20 business days allowed by s 17(2) and, consequently, the adjudicator made an error. He referred to the Court of Appeal the question of whether, on account of that error, the Supreme Court has power to declare that the adjudicator's determination void.

Five months later, in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, the Court of Appeal, comprising Spigelman CJ, Basten JA and McDougall J, decided that the Supreme Court has that power and referred the matter back to McDougall J to decide.

Section 17(2) of the *Building and Construction Industry Security of Payment Act 1999* NSW provides that when a respondent fails to serve a payment schedule within 10 business days after service of the payment claim, the claimant cannot make an adjudication application unless the claimant has notified the respondent within the period of 20 business days immediately following the due date for payment of the claimant's intention to apply for adjudication of the payment claim and has given the respondent an opportunity to provide a payment schedule within 5 business days.

McDougall J found that the due date for payment was 13 January 2010 and the s 17(2) notice was served on 11 February 2010. In the Court of Appeal at [117] McDougall J said that 11th February 2010 was well outside the 20 business period for which s 17(2)(a) provides. However, this is not so. The 20th business day [as defined in s 3 of the Act] after 13 January 2010 is 11th February 2010. The whole case is based upon this miscalculation.

In the Court of Appeal, with parties allowed to intervene, including the Attorney-General of NSW, there were 8 parties and 8 counsel. Over 100 cases were cited and the judgment comprises 94 pages. The fight was ostensibly over an adjudicated amount of \$115,822 but it was actually a battle over jurisdiction. Who has jurisdiction to determine whether a procedural step in the adjudication process has been satisfied, the Supreme Court or the adjudicator? The answer is important because it goes to the effectiveness of the Act in achieving its object. The answer, at least for the time being, is the Supreme Court. The consequence is that the Act needs amendment if it is to achieve its object.

The Court of Appeal in *Brodyn v Davenport* [2004] NSWCA 394 at [55] decided that exact compliance with the more detailed requirements of the Act was not essential to the existence of a valid determination. The Court identified some basic requirements. Compliance with s 17(2)(a) was not one of them. Now the Court of Appeal in *Chase Oyster Bar* has identified compliance with s 17(2)(a) as a basic requirement.

In *Chase Oyster Bar* at [36] Spigelman CJ held that the Act did not confer on an adjudicator the power to determine whether s 17(2)(a) had been complied with. He acknowledged that compliance with s 17(2)(a) is a matter that the adjudicator may have to consider under s 22(2)(a) as one of the 'provisions of the Act'.

It is strange that an adjudicator can be required to consider whether s 17(2)(a) has been complied with but can't decide whether s 17(2)(a) has been complied with.

Section 17(2) provides that an adjudication application 'cannot be made unless' the claimant has given the s 17(2) notice within the period of 20 business days. The words 'cannot be made unless' make the giving of a s 17(2) notice an essential requirement. At [47] Spigelman CJ says that the time limits set down in the Act are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment.

Basten JA at [97] said that the power to determine compliance with the essential requirements of an adjudication application could lie with the authorised nominating authority, the adjudicator or the Supreme Court. Presently it lies with the Supreme Court but is this an efficient use of the resources of the Court, particularly where the amount in issue is small? Basten JA at [99] says that there is much to recommend the view that the adjudicators should be able to determine whether an adjudication application complies with s 17(2)(a) but that is not how the Act has been written.

The Solicitor General submitted that to enable a challenge on the basis of non compliance with s 17(2)(a) would be inconsistent with the statutory scheme of speedy resolution of progress claims. If the view of the Solicitor General is that of the Government, presumably Parliament will consider amending legislation.

Chase Oyster Bar was removed to the Court of Appeal on the mistaken premise that the Court of Appeal in *Brodyn* decided that determinations of adjudicators are not amenable to orders in the nature of certiorari for jurisdictional error of law. See McDougall J in the Court of Appeal at [112] and Basten JA at [106]. The Court of Appeal did not overrule *Brodyn*. It merely decided that compliance with s 17(2)(a) is an essential requirement for the validity of an adjudication application [a matter not decided in *Brodyn*] and, as *Brodyn* decided, the Supreme Court can declare a determination void when the adjudication application was not valid.

At [147] McDougall J said that the decision in *Brodyn* should be read as denying an order in the nature of certiorari when compliance with s 17(2)(a) is an essential requirement for the validity of an adjudication application. *Brodyn* did not decide that.

The difference between the Court of Appeal's decisions in *Brodyn* and *Chase Oyster Bar* is that in *Brodyn* the Court did not consider that strict compliance with the time in s 17(2) was necessary for the validity of an adjudication application where in *Chase Oyster Bar* it decided that strict compliance was necessary.

At [184] to [198] McDougall J sets out relevant provisions of the Act but the most relevant provision, the definition of 'business day' in s 4 is missing. At [218] McDougall J says, 'It is unlikely that investigation, assessment and decision on the s 17(2)(a) jurisdictional fact will be complex. Nor is it something that is likely to involve particular expertise of adjudicators (beyond an ability to count) or difficult questions of construction'.

The point which he overlooks is that adjudicators cannot make a decision on the s 17(2)(a) jurisdictional fact. The Supreme Court makes that decision. As McDougall J's decision at first instance shows, there were difficult questions of construction as to the due date for payment, the starting date of the 20 day period. McDougall J himself did not correctly count 20 business days.

Under the Act [s 22(1)(b)], it is the adjudicator who determines the due date for payment and even if the adjudicator determines the wrong date, that is an error within jurisdiction. It is not a ground upon which the Supreme Court can set aside the adjudicator's determination. The peculiar thing is that the adjudicator determined that the due date for payment was 6 January 2010 but McDougall J found that the due date was 13 January 2010. It appears from the judgment in first instance that the parties agreed that McDougall J could decide the due date for payment. If the due date had not been re-decided by McDougall J, the s 17(2) notice would have been served too late but as a consequence of McDougall J's decision that the due date was 13 January 2010 the s 17(2) notice was served within time.