

15 JANUARY 2010

TIMELY WARNING... A judicial review of a review adjudicator's review

In a recent Supreme Court case, an applicant was successful in having an adjudication determination under the *Building and Construction Industry Security of Payment Act 2002 (SOP Act)* judicially reviewed.

The decision is a timely warning to adjudicators that they can be parties to litigation.

In the case of *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture & Ors [2009] VSC 426*, Justice Vickery examined whether there was a right of judicial review under the SOP Act. The second and third defendants were, respectively, the initial adjudicator and the review adjudicator, whose decisions were the subject of the application.

Grocon Constructors Pty Ltd (**Grocon**) sought a declaration that the determinations of the adjudicator and review adjudicator appointed under the SOP Act be declared void or alternatively quashed. The form of relief sought by Grocon was by way of certiorari and declaration. The determinations of the adjudicator at first instance and the review adjudicator directed that Grocon pay a progress payment to the defendant, Planit Cocciardi Joint Venture Pty Ltd (**PCJV**).

History

The work undertaken by PCJV was the modelling and detailing of structural steelwork for the Melbourne Rectangular Stadium in Batman Avenue, Melbourne. Grocon was the head contractor and PCJV a subcontractor.

There was no written contract. The parties were in dispute about what constituted the construction contract under the SOP Act. Grocon's position was that the construction contract was governed by an unexecuted form of contract emailed on 5 May 2008 from PCJV to Grocon and adopted by the parties, whereas PCJV's position was that the construction contract comprised its tender dated 6 June 2007 and a verbal agreement entered into on 12 September 2008.

PCJV made a claim for a progress payment under the engineering design agreement PCJV had with Grocon. PCJV's position was that the progress payments were due and payable to it under the SOP Act.

The sums claimed by PCJV totalled \$544,841.00. In response, Grocon issued a payment schedule under the SOP Act stating the amount due to



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PCJV was nil and that the amount sought by PCJV was an “excluded amount” under the SOP Act.

PCJV then applied for adjudication under the SOP Act. The second defendant, John O’Brien (**O’Brien**) was appointed as the adjudicator. O’Brien delivered his adjudication determination on 28 May 2008 finding that PCJV was entitled to be paid \$544,841.00 together with costs.

Grocon objected in writing to the O’Brien determination, arguing it was contrary to law, and affected by jurisdictional error and/or breaches of procedural fairness.

The third defendant, Phillip Davenport (**Davenport**) was appointed as the review adjudicator under the SOP Act. Davenport delivered a review adjudication upholding the original O’Brien determination.

The decision

After a detailed examination of case law, Justice Vickery decided that the decision of an adjudicator and a review adjudicator appointed under the SOP Act are prima facie subject to review by certiorari. He held also that after considering the functions of an adjudicator, even on the analysis that an adjudicator is a private body, certiorari will nevertheless have application to his/her determinations because an appointee under the SOP Act performs functions of a public nature. Justice Vickery concluded that, relief in the nature of certiorari, on all of the grounds available under the writ, including error on the face of the record, is not excluded either expressly or by implication under the SOP Act in Victoria. Justice Vickery suggested the main purpose of the SOP Act is as follows:

“...is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. To advance that purpose, the Act sets up a unique form of adjudication of disputes over the amount due for a claimed progress payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided in separate proceedings, either by a Court or by an agreed dispute resolution procedure. But meanwhile the claimant’s entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.” [at 110]

His Honour found that an adjudicator appointed under the SOP Act is a tribunal within the meaning of the *Administrative Law Act 1978 (ALA)* and accordingly, the reasons for the decision of an adjudicator made under the SOP Act are part of the record which may be examined on an application for judicial review.

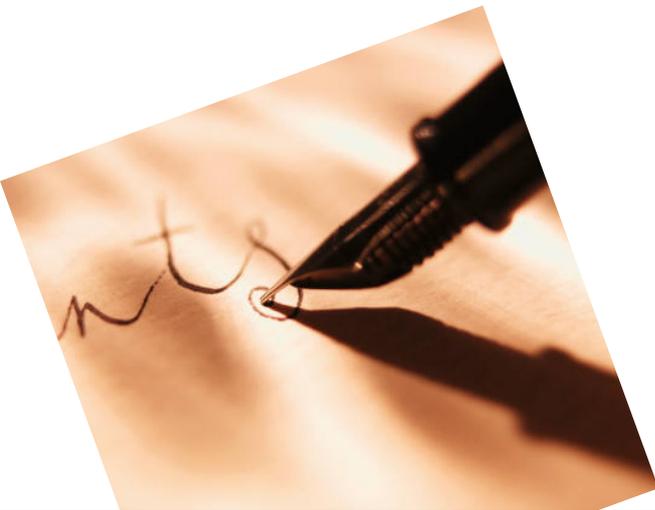
Grocon relied upon 10 grounds for review of the O’Brien determination and 16 grounds of appeal for the judicial review of the Davenport determination. All the grounds Grocon relied upon failed.

Justice Vickery found that there had been no substantial breaches of the rules of procedural fairness sufficient to amount to a denial of the standard required by the SOP Act and thus the application of certiorari. He commented:

“Further, an adjudication review is not an appeal. The process should not be used as such. In particular, an adjudication review should not be used as a basis for a re-evaluation of the findings of fact made by the adjudicator at first instance which were used by the adjudicator in reasoning towards making a finding as to the ultimate fact in question on a review, namely whether or not the payment claim included an excluded amount. On a review, the review adjudicator is bound by the findings of fact made by the adjudicator. The task on review is to determine, on the basis of the facts as found by the adjudicator at first instance, whether the payment claim includes an excluded amount. However, it is not open for a review adjudicator to overturn any of the other findings of fact as found by the adjudicator at first instance, because to do so would introduce a further and impermissible ground of review, namely that the adjudicator at first instance erred in making the findings in relation to those other facts.”

His Honour stated that a review adjudicator must *only* consider the following:

- (a) the provisions of the SOP Act and any regulations made under the SOP Act;



- (b) the provisions of the construction contract from which the application arose; and
- (c) the information provided by the authorised nominating authority which is listed under s.28H of the SOP Act, namely all of the material which was before the adjudicator at first instance and the adjudication determination. (ss.28I (2) and 28H (2))

Conclusion

Justice Vickery's decision demonstrates that a party aggrieved by an adjudication and a review adjudication under the SOP Act may be able to persuade the court to review the adjudicator on the basis that there has been a breach of the rules of natural justice in the course of the adjudication.

However there would need to be clear grounds to dismiss a decision of the adjudicator.

The decision provides a timely warning for adjudicators, that as a result of their role as adjudicators, they can be parties to litigation resulting from their decisions.

It also departs from the position of courts adopted in NSW which have found that adjudications are not subject to judicial review.

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