

Construction Alert

Severing invalid amounts from payment claims and adjudications

Decisions under Security of Payment legislation

August 2011

The Supreme Court of Queensland was recently asked to determine whether a part of an adjudication decision, made under the Building and Construction Industry Payments Act 2004 (Qld) (BCIPA), which was found to be invalid for jurisdictional error, could be severed from the rest of the decision.

The Court in *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors* [2011] QSC 145 (Trowse) found that the common law doctrine of severance did not apply, and accordingly there was no mechanism available to sever that part of an adjudication decision infected by jurisdictional error from the remainder of the decision. As a result, the entire decision was set aside by the Court. This position is different to the position adopted in other states such as Victoria.

Accordingly, a party in Queensland issuing a payment claim should ensure that all parts of its claim are valid to prevent the ultimate adjudication determination being set aside, particularly where the vast bulk of the claim has succeeded. Further, adjudicators should be vigilant in critically reviewing payment claims and adjudication applications and excising out invalid parts, or suffer the consequence of their entire decisions being set aside.

The Decision in Trowse

The applicant, James Trowse Constructions Pty Ltd, applied to have an adjudication decision set aside on the basis of jurisdictional error, that being that the adjudicator's decision was tainted by an absence of good faith and/or a breach of natural justice.

The Court found that a part of the adjudication decision concerning a particular variation, number 24, (Variation 24) was decided by the adjudicator on a basis not contended by either party and was therefore invalid.

The total amount claimed in the adjudication application was \$205,861.77. The amount determined by the adjudicator as payable was \$167,522.32. Included in the amount determined by the adjudicator was an amount of \$27,957.75 for Variation 24. This represented approximately 16.5% of the adjudication decision.

Severance

ASAP Plasterers Pty Ltd argued that the part of the adjudication decision relating to Variation 24 could be severed from the rest of the adjudication decision.

ASAP Plasterers Pty Ltd relied on a Victorian decision of *Gantley Pty Ltd v Phonex International Group Pty Ltd* [2010] VSC 106. In that matter, the Court held that severance would operate to achieve the objectives of the Victorian Security of Payment Act and that an adjudicator should be able to assess the valid parts of a progress claim and provide a determination for that part of the claim which does not comply. As a result, the Victorian Supreme Court determined that the common law doctrine of severance could apply to a payment claim made under the Victorian equivalent of BCIPA which included an amount which was not validly claimed.

However, the Court in Trowse held that BCIPA provides for an adjudication decision for one amount only, which then becomes a statutorily created sum binding on the parties. The adjudicated amount can then be the subject of an adjudication certificate and thereafter a judgment registered with the court capable of enforcement against the respondent.

The Court found that, as there was no provision in BCIPA to provide for the correction of a decision, there is no mechanism available to sever any unlawful finding from an adjudicated amount.

Discussion

There have been only a very limited number of cases in which severance of part of a payment claim or adjudication decision has been considered. In the Queensland decision of Trowse, the Court declined to follow the Victoria decision in Gantley.

Accordingly, the current law in Queensland following the decision in Trowse is that the Court will not sever an adjudicator's determination.

Whilst the decision in Trowse concerned a jurisdictional error by the adjudicator, the same outcome could occur if a claimant claims for matters to which it has no entitlement and the adjudicator errs in awarding such a claim in the adjudication decision.

Tips for Claimants

Whilst claimants cannot be responsible for adjudicator errors, to be successful in an adjudication, claimants

should ensure that payment claims do not include any claims for payment not supported by a proper entitlement under the contract, or include work which is not covered by BCIPA.

Tips for Respondents

Respondents should now critically and carefully scrutinise payment claims and validly raise in a payment schedule all reasons why a particular claim is unlawful or invalid. They should ensure that in any ensuing adjudication the adjudicator must excise and find against the claimant on any part of the claim that is invalid, or face the risk of the entire decision being set aside.

Tips for Adjudicators

Adjudicators need to be vigilant in excising from any payment claim and adjudication application, parts of a claim and application which are invalid, or face the possibility that their entire determination will be set aside.

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