

**JBK ENGINEERING PTY LIMITED V BRICK & BLOCK COMPANY PTY LIMITED
[2006] NSWSC 1192
Supreme Court of New South Wales – 14 November 2005**

FACTS

Brick & Block Company Pty Ltd (“Brick & Block”) entered into contracts with JBK Design & Construction Pty Ltd (“JBKD”) and JBK Engineering Pty Ltd (“JBKE”) to design and manufacture respectively raw materials conveyors at its Port Kembla plant. JBKE and JBKD both served payment claims pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”) on Brick & Block. Brick & Block provided payment schedules in response to each claim proposing to make no payment.

JBKE and JBKD each made adjudication applications in respect of their claims, and Mr Phillip Davenport was appointed as adjudicator for each application. Mr Davenport determined that both JBKE and JBKD were entitled to the full amount claimed. Each JBK company filed Adjudication Certificates obtained in respect of the determinations as judgments in the Supreme Court.

JBKE later submitted another payment claim and adjudication application, which was determined by Ms Helen Durham in the same amount as the first JBKE determination.

Brick & Block made an application to the Supreme Court to have the judgments set aside on the basis that the Mr Davenport had allowed each claim simply because he rejected Brick & Block’s reasons for withholding payment without considering the merits of the claims themselves, and in doing so had not made a determination for the purposes of the Act. Brick & Block argued that if the first JBKE determination was held to be void, the determination of Ms Durham should also be void.

ISSUES

Had the first adjudicator, Mr Davenport, given adequate consideration to each of the claims?

FINDING

The Court observed that the adjudicator’s task is to resolve the issues between the parties. The Court found that Mr Davenport’s reasons in each determination demonstrated that he had considered the progress claims and whether there was a reason for not allowing the claim.

Accordingly, the first two determinations of Mr Davenport and the later JBKE determination of Ms Durham, which was based on the first, were all held to be valid.

QUOTE

Einstein J held at [21] to [22] that:

[21] B&B faces the obstacle posed by s 20 (2B) of the Act which provides that a respondent cannot include in the adjudication response, any reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant. As Hodgson JA observed in *Coordinated Constructions* (at [24]), the task of the adjudicator is in substance to determine the claimant's entitlement within *the framework of the dispute that was propounded by the parties*.

[22] Albeit that B&B now puts forward the contention that both the payment claim [and the subsequent adjudication application] were defective in failing to include particular classes of invoices or otherwise proof that costs claimed by the JBK companies in invoices sent to B&B in truth represented costs actually incurred by the JBK companies, the fact is that B&B simply failed to put forward any such allegation in its payment schedule. The adjudicator made the point that the respondent had not in its payment schedule raised any issue concerning the amount paid. There was nothing untoward in the adjudicator having required strict compliance with s 20 (2B) of the Act.

IMPACT

This case stands for the proposition that an Adjudicator is only required to consider an application based on the arguments raised by the parties. Respondents to payment claims should ensure they include all reasons on which they wish to rely in their payment schedule.

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