

Article Information

Authors: Martin Lovell, Denise Burloff, Gemma Twemlow

Service: Dispute Resolution & Litigation, Projects & Construction

Sector: Infrastructure

Grappling with good faith

The recent New South Wales Court of Appeal decision of *Goodwin Street Developments Pty Ltd v DSD Buildings Pty Ltd* has clarified that the statutory obligation of adjudicators to apply good faith in making their determinations is distinct from a failure to consider the mandatory matters that must be considered by an adjudicator. Good faith is satisfied by an absence of “bad faith” in the decision making process.

Background

Goodwin Street Development Pty Ltd (the owner) entered into a construction contract with DSD Builders Pty Ltd (the contractor) for the construction of three residential boarding houses. Following the termination of the contract by the owner, the contractor submitted a payment claim, and subsequently proceeded to adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act). The adjudicator found in favour the contractor.

Supreme Court

The owner sought to set aside the adjudication determination on the basis that the Adjudicator failed to exercise good faith in circumstances where she failed to apply section 10(1)(b) of the Act (relating to the valuation of works under the contract) when valuing the construction work referred to in the payment claim.

Referring to the decision of *Laing O’Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd*^[i], McDougall J considered that satisfaction good faith obligations required Adjudicators to “turn their minds to, grapple with and form a view on all matters that they are required to ‘consider’”^[ii]

His Honour found that the Adjudicator had complied with this obligation and dismissed the proceedings.

Court of Appeal

The owner appealed the decision at first instance again asserting that the Adjudicator had failed to exercise good faith due to his failure to apply section 10(1)(b) of the Act. The Court of Appeal discussed two issues:

1. The requirements of “good faith”; and
2. The role of the adjudicator.

Interpretation of “good faith”

Basten JA (with whom Leeming and White JJA agreed) rejected McDougall’s J approach to good faith. His Honour stated that the obligation of good faith is not to be defined by whether adjudicators turned their minds to, grappled with and formed a view on all matters to be considered. Instead, Basten JA considered that bad faith was similar to “wilful blindness” or “conscious maladministration”.

Basten JA explained that the kind of language adopted by McDougall J could result in many cases being reviewed. He further noted that, whilst there may be particular matters which may be of greater importance than other issues, he rejected the idea that this ought to be a requirement in all cases. Further, an Adjudicator’s decision not to give weight to a particular issue in section 22(2) of the Act will not mean that the Adjudicator has failed to give consideration to that issue.

Basten JA compared the obligation of good faith with the more restrictive view of bad faith explaining that, “Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith.”^[iii] Instead a party must be able to show that the final decision was taken in bad faith which involves “personal fault” on the part of the Adjudicator.^[iv] There must be an element of dishonesty and not mere error. The Court will also have regard to the reasons provided by the Adjudicator in its decision as to whether an Adjudicator has conducted their role in bad faith.

As such, the Court found that the Adjudicator had not engaged in bad faith and had therefore conducted her role in good faith.

The role of the Adjudicator

The Court held that if the real ground for disputing an adjudication decision relates to a failure of the Adjudicator to have considered a matter in section 22(2) of the Act, then any review of the decision ought to be on that basis.

When considering whether the Adjudicator failed to consider a matter in section 22(2) of the Act Basten JA determined that there will be no obligation for the Adjudicator to arrive at a precise finding where the parties have given little or no evidence to support such a finding. Here the Adjudicator was constrained in her decision making by the material provided to her by the parties, having correctly identified that the Adjudication Response was served out of time. Although Basten JA determined that McDougall’s J reasoning was flawed, he agreed with McDougall’s J conclusion that the Adjudicator had addressed the issues required by s 22(2) of the Act and had come to a decision, taking into account all of the material provided to her.

The existence of bad faith (or absence of good faith) in an adjudication decision is not dependent upon whether or not an Adjudicator has failed to consider a relevant matter for consideration set out in section 22(2) of the Act. A failure to properly consider a matter set out in section 22(2) of the Act is in itself a ground of judicial review on the basis of jurisdictional error of law.

^[i] [2010] NSWSC 818.

^[ii] [2010] NSWSC 818, [34].

^[iii] *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 at [8].

^[iv] *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002]194 ALR 749 at [43].