JUDGMENT : Palmer J : Supreme Court of New South Wales. 31st January 2006

Introduction

1 The Plaintiff ("Brookhollow") seeks a declaration that an adjudication determination made by the Second Defendant, Mr Davenport, under s.22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") is void. The Plaintiff seeks a permanent injunction restraining the First Defendant ("R&R") from taking any action to enforce the determination.

2 The validity of the determination depends essentially on whether:
– a payment claim was valid for the purposes of invoking the provisions of the Act;
– the adjudicator gave consideration to the matters which s.22 of the Act required him to consider.

The facts

3 The relevant facts are in short compass and are not in dispute.

4 On or about 9 July 2002, Brookhollow entered into a sub-contract with R&R whereby R&R would perform certain demolition and excavation work ("the Contract").

5 On 29 September 2003, R&R left the site and did no further under the Contract.

6 On or about 2 December 2003, R&R served on Brookhollow a payment claim under the Act. The claim was entitled "Final Claim" and was for contractual work up to 31 August 2003. After adjustments for variations and other allowances, the amount claimed was $169,494.25. For convenience, I will call this "Claim No 8".

7 It is clear that the parties were in dispute at the time of the delivery of Claim No 8. However, no proceedings to enforce this payment claim were instituted by R&R at that time.

8 About eleven months later, on 9 November 2004, R&R served on Brookhollow a further payment claim under the Act. It has been called "Claim No 9" and I will refer to it by that description.

9 Claim No 9 claimed payment of exactly the same amount as was claimed in Claim No 8, namely, $169,494.25. R&R concedes that it did no further work on the site after 29 September 2003 and that the work for which payment is claimed in Claim No 9 is the same work which is the subject of Claim No 8.

10 However, between the delivery of Claim No 8 and Claim No 9, Brookhollow carried out certain remedial work which it said should have been done by R&R. Brookhollow claimed to be entitled to deduct the cost of this work from the amount to which R&R was entitled. R&R denied that entitlement.

11 In Claim No 9, R&R set out the work for which it claimed payment, by reference to Claim No 8 which was attached. Also attached was the Contract. A covering letter, referred to in the payment claim, stated:

"***A. PAYMENT CLAIM***

Please find attached our Payment Claim No.9 for November 2004 dated the 8th November 2004.

Our current Payment Claim is based on and relies on "The Building and Construction Security of Payment Act (as amended) Clause 13(6)".

Clause 13(6) states:

"(6) However, Subsection (5) does not prevent the claimant from including in a Payment Claim an amount that has been the subject of a previous Claim."

We advise that our current Payment Claim includes an amount that has been the subject of a previous claim.

B. RECENT WORK

Our current Payment Claim is also based on and relies on Clause 13(4)(b) of the Act referred to above.

Clause 13(4)(b) states in part:–

"(4)(b) the period of 12 months after the Construction work to which the Claim relates was last carried out."

We note that Grant Construction unilaterally and without prior agreement – undertook certain work allegedly on behalf of R&R Consultants Pty Ltd in March 2004. Grant Construction subsequently purported to back-charge us an amount of $3,633.67 for that work. A copy of your advice is attached.

Undertaking that work referred to above, on our behalf and allegedly at our cost, clearly satisfies Clause 13(4)(b)."

12 Brookhollow concedes that it did not serve a payment schedule in response to Claim No 9 within the time limited by s.14(4) of the Act. Brookhollow did not pay the amount claimed in Claim No 9.

13 On 4 January 2005, R&R notified Brookhollow of its intention to seek adjudication under the Act, in accordance with s.17(2).

14 On 14 January 2005, in accordance with s.15(2)(a)(ii) of the Act, R&R made an adjudication application under s.17(1) and (3) of the Act in relation to Claim No 9. A copy of the adjudication application was delivered to Brookhollow. Brookhollow concedes that it did not serve a payment schedule within the time limited in s.17(2)(b) of the Act. There is no dispute that the procedures for engagement of the adjudication process were properly carried out by R&R in due time.

15 As Brookhollow had not served a payment schedule within the times specified in s.14(4) or s.17(2)(b) of the Act, it was precluded by s.20(2A) from lodging an adjudication response under s.20(1).

16 On 21 January 2005, Mr Davenport delivered an Adjudication Determination. I will come to the reasons given by Mr Davenport for his adjudication later.

17 Mr Davenport determined that the "adjudicated amount", as referred to in s.22(1)(a), was the whole of the amount claimed by R&R, namely, $169,494.25 (including GST). He determined that the due date for payment, as referred to in s.22(1)(b), was 22 November 2004 and that the rate of interest, as referred to in s.22(1)(c), was the Supreme Court Rate.

18 On 31 January 2005, the authorised nominating authority issued an Adjudication Certificate purportedly pursuant s.24(1)(a). R&R concedes that this certificate is void because five business days had not elapsed between the date of service of the Adjudicator's Determination and the application for an adjudication certificate, as required by s.23(1)(a) and s.24(1)(a).

19 The Adjudication Certificate was filed in the District Court as a judgment pursuant to s.25(1) on 25 February 2005.

20 R&R does not submit that the entry of judgment in the District Court precludes Brookhollow from seeking injunctive relief in these proceedings. The fundamental question between the parties is whether or not Mr Davenport's Adjudication Determination was, in law, a nullity.

Brookhollow's submissions as to Claim No 9

21 Brookhollow submits that Claim No 9 was not a valid payment claim under the Act; accordingly, there was nothing upon which Mr Davenport could validly adjudicate so that his Determination is a nullity.

22 Mr Harper SC, who appears for Brookhollow, says that Claim No 9 is not a payment claim within s.13 of the Act because:

– *it was not served within the period determined by or in accordance with the Contract: s.13(4)(a);– it was not served within twelve months after the construction work to which the claim relates was last carried out: s.13(4)(b);*

– *it is a second payment claim in respect of the same reference date under the Contract, the first payment claim in respect of that reference date being Claim No 8, so that Claim No 9 is prohibited by s.13(5).*

23 Mr Harper submits that service of a payment claim which meets the requirements of s.13 is a necessary precondition to an adjudicator's jurisdiction to enter upon the adjudication. He says that whether a payment claim is valid under s.13 is ultimately a question of law so that it does not matter whether the validity of the payment claim was raised before the adjudicator: a party can always come to this Court or any other competent Court to take the point that the adjudication was a nullity because the payment claim adjudicated upon was not a valid payment claim under s.13 of the Act.

24 In support of his submission, Mr Harper relies upon the judgment of Hodgson JA in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, at paras 53 to 56. That passage has been commented upon in a number of judgments at first instance and in the Court of Appeal. The most recent judgment in the Court of Appeal is ***Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*** [2005] NSWCA 409. Another judgment which is in point is that of Campbell J in ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 1143, which was delivered two days after *Nepean Engineering* but, understandably, did not refer to it.

25 The judgment in *Nepean* has changed somewhat the law as it was stated in ***Brodyn*** and as it has been understood in the cases following *Brodyn*. It will be necessary for me to review the decisions to ascertain what the law is at the present moment.

The requirements for validity of a payment claim

26 In ***Brodyn*** at para 53, Hodgson JA referred to the basic and essential requirements for the existence of an adjudicator's determination as including:

"*1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (s.7 and s.8).*

2. The service by the claimant on the respondent of a payment claim (s.13).

3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).

4. The reference of the application to an eligible adjudicator, who accepts the application (s.18 and s.19).

5. The determination by the adjudicator of this application (s.19(2) and s.21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s.22(1)) and the issue of a determination in writing (s.22(3)(a))."

27 His Honour noted that the sections of the Act to which he had referred contained "*more detailed requirements*". In this regard he referred specifically to the requirements of s.13(2) as to the content of payment claims. At paragraph 55 his Honour said that, in his opinion, "*the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination*" – a remark upon which his Honour later elaborated in the context of a discussion of the validity of a payment claim under s.13 of the Act.

28 It had been submitted that the payment claim in ***Brodyn*** was invalid because, in the circumstances of the case, the relevant construction contract permitted only one relevant "reference date" so that the payment claim was prohibited under s.13(5). His Honour did not accept the submission that there could only be one relevant reference date but he went on to say at paragraph 66: "*There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has*

manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this."

29 The point raised by Hodgson JA in this passage but not decided was raised squarely for decision in ***Nepean***. The issues in that case were:– whether a document purporting to be a payment claim under the Act sufficiently complied with the requirement of s.13(2)(a) that it "*must identify the construction work to which the progress claim relates*";– if the document did not comply with that requirement, whether it was not a payment claim for the purposes of the Act so that the Adjudication Determination was a nullity.

30 The Court unanimously held that the document served by the claimant sufficiently identified the construction work to which the claim related. However, the members of the Court differed as to what would have been the consequences if the claim had not complied with the requirements of s.13(2)(a).

31 In the course of his judgment, Hodgson JA referred at paragraph 29 to the passage of his judgment in *Brodyn* which I have set out above and elaborated upon what he had there said. His Honour noted a view which he had expressed in ***Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 (para 26) to the effect that failure adequately to set out in a payment claim the basis of the claim could be a ground upon which an adjudicator could exclude a relevant amount from the determination; however, that was a matter for the adjudicator to decide – it did not deprive the adjudicator of the capacity to make the determination.

32 Hodgson JA then noted a possibly contrary view expressed by Basten JA in ***Co-ordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 and in ***Climatech***. In ***Climatech***, Basten JA, at para 23, directly confronted the question whether the existence of a "valid" payment claim, i.e. one which complied with the requirements of s.13(2), is an essential precondition to a valid determination by an adjudicator under the Act. His Honour said that although s.13(2) imposed mandatory requirements on the making of a progress claim under the Act, failure to comply with those requirements did not necessarily produce the result that the Court would set aside a consequent adjudication determination: "*Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine*": para 44. Basten JA was of the opinion that the latter position was correct: paras 45-46.

33 Consistently with the reasoning of Basten JA in ***Climatech***, Hodgson JA in *Nepean* concluded that a payment claim cannot be treated as a nullity for failure to comply with s.13(2)(a) of the Act "*unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made*": *Nepean* at para 36. The corollary of this proposition is that a payment claim can be treated as a nullity if it does not on its face reasonably purport to comply with s.13(2)(a).

34 It would follow that an adjudication founded on a payment claim which was a nullity for the purposes of the Act is itself a nullity. It would also follow that it would be a defence to an application for judgment under s.15(4) that the payment claim said to give rise to the statutory debt by virtue of s.14(4) was a nullity.

35 Santow JA in ***Nepean*** did not agree with Hodgson JA that a payment claim cannot be treated as a nullity unless the failure to comply with s.13(2) is patent on its face: para 47. At para 73, Santow JA said: "*It could not be the case that the question whether the claim complies with s13(2) is a matter solely for adjudication under s17. If it were solely a matter for the adjudicator to determine, there would then be no means of resolving compliance with s13(2) if there were no payment schedule and therefore no adjudication. I consider summary judgment under s15 can in an appropriate case be resisted on that basis and resolved in such proceedings provided argument perhaps even of an extensive kind is capable of doing so.*"

36 I gather from this passage that in his Honour's view, non-compliance with the mandatory requirements of s.13(2) will result in the payment claim being a nullity and that that ground of invalidity may be taken before the adjudicator as well as in any court of competent jurisdiction, whether the court is entertaining an application for summary judgment under s.15(2)(a) of the Act or an application to enjoin the taking of any step to enforce an adjudication determination, as in the present case.

37 The third member of the Court of Appeal in ***Nepean***, Ipp JA, agreed with the reasons of Hodgson JA. Ipp JA, summarised the fundamental proposition thus: "*... for the reasons given by Hodgson JA I would construe* [the Act] *as follows. Provided that a payment claim is made in good faith and purports to comply with s13(2) of the Act, the merits of that claim, including the question whether the claim complies with s13(2), is a matter for adjudication under s17 and not a ground for resisting summary judgment in proceedings under s15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication.*"

38 As I read this passage, his Honour is saying that the validity of a payment claim, in terms of its compliance with s.13(2), is a matter for the adjudicator to determine provided that the payment claim is made "*in good faith and purports to comply with s.13(2)*".

39 Leaving aside what is meant by the making of a payment claim in good faith, I take his Honour to be saying that if a payment claim does not purport to comply with s.13(2), then its validity is not a matter for adjudication: the payment claim is a nullity for the purposes of the Act. The second proposition which his Honour enunciates concerning the question of summary judgment is prefaced by the words "*in particular*", which indicate that what his Honour there says is an elaboration of the prior proposition and, like the prior proposition, is subject to the proviso that the payment claim must purport to comply with s.13(2).

40 In other words, if the payment claim does not purport to comply with s.13(2), his Honour would conclude that the nullity of the payment claim could be set up as a defence to an application for summary judgment under s.15(4).

41 The law as to compliance with s.13(2) of the Act as it emerges from ***Brodyn*** and ***Nepean***, may be summarised thus:

i) a payment claim which is never served on the respondent under s.13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;

ii) there are some non-compliances with the requirements of s.13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;

iii) a payment claim which does not, on its face, purport in a reasonable way to:– identify the construction work to which the claim relates; or– indicate the amount claimed; or– state that it is made under the Act fails to comply with an essential and mandatory requirement of s.13(2) so that it is a nullity for the purposes of the Act;

iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s.13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act;

v) in the case of a payment claim which purports reasonably on its face to comply with s.13(2):– if the respondent wishes to object that it does not in fact comply so that it is a nullity for the purposes of the Act, the respondent must serve a payment schedule under s.14(4) and an adjudication response under s.20, in which that objection is taken;– if the respondent does not serve a payment schedule within the time limited under the Act and the claimant ultimately seeks the entry of judgment under s.15(4), the respondent may not resist summary judgment on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s.13: the respondent has only one chance to take that objection, namely, in a timeously served payment schedule;

vi) in the case of a payment claim which was never served on the respondent or which does not purport reasonably on its face to comply with the requirements of s.13(2):– the payment claim is a nullity for the purposes of the Act;– an adjudication founded upon that payment claim is a nullity, regardless of whether the objection to the validity of the payment claim was taken in a timeously served payment schedule;– an application under s.15(4) for judgment for the statutory debt created by s.14(4) may be defeated on the ground that there was no payment claim in existence for the purposes of s.15(1)(b).

42 As a result of the decision in ***Nepean***, it may be that a number of prior judicial interpretations of the requirements of s.13(2) of the Act founded upon ***Brodyn*** alone will have to be revisited and modified: see e.g. ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 801 at paras 20-24; ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 1143 at paras 86-90.

43 The proposition of the majority in ***Nepean*** that a payment claim is valid if it purports reasonably on its face to comply with the requirements of the Act is readily understandable when invalidity is said to arise from non-compliance with what s.13(2) requires a payment claim to contain. However, whether service of a payment claim is prohibited by s.13(4) or (5) is not something which s.13 expressly requires the payment claim itself to demonstrate. Does the reasoning of the majority in *Nepean* mean that a valid payment claim must now purport reasonably not only to demonstrate on its face that it complies with s.13(2) but that it has negatived the possibility of prohibition under s.13(4) or (5)? I do not think so.

44 A payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defences to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.

45 In my opinion, a payment claim under the Act works the same way. If it purports reasonably on its face to state what s.13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.

46 An assertion that service of a payment claim is prohibited under s.13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s.13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.

47 However, if the respondent does elect to raise a defence in bar founded on s.13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.

48 In my opinion, the scheme of the Act in general and of s.13 and s.14 in particular requires that a defence in bar to a payment claim founded on s.13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or

restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s.15(4) of the Act.

49 In my opinion, these conclusions are consistent with, and are inherent in, the reasoning in *Brodyn* and they are not contrary to the majority decision in *Nepean*. They are also in conformity with the general approach to the determination of invalidity of a payment claim under s.13(4) and (5) taken by McDougall J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801, at para 25, by Campbell J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705, at para 19, and by Campbell J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 1143 at paras 87-90.

Was Claim No 9 a nullity

50 Brookhollow does not contend that Claim No 9 did not purport reasonably on its face to comply with the requirements of s.13(2) of the Act.

51 For the reasons which I have given, I conclude that because Claim No 9 complied with the requirements of s.13(2), it was not a nullity under the Act, i.e. it was effective to engage the provisions of Pt 3. If Brookhollow wished to assert that the payment claim was barred by reason of the prohibition in s.13(4) or (5), it had to do so in a timeously served payment schedule. Having failed to serve a payment schedule within time, Brookhollow was not entitled to assert nullity of the payment claim in order to resist the entry of judgment under s.15(4). Likewise, it cannot now rely upon the defence in bar to found an injunction restraining enforcement of the adjudication determination or of the judgment resulting from it.

52 The fact that R&R attempted in Claim No 9 to negative a possible defence of prohibition under s.13(4) or (5) has no consequence in terms of the validity of the payment claim for the purpose of engaging the provisions of Pt 3 of the Act; it does, however, have a consequence in terms of whether Mr Davenport complied with the requirements of s.22, to which I now come.

The adjudicator's reasons

53 Section 22 of the Act relevantly provides:

"*(1) An adjudicator is to determine:*

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the "adjudicated amount"), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination)."

54 By his Determination dated 21 January 2005, Mr Davenport gave a determination as to the adjudicated amount, the date upon which it was payable, and the rate of interest payable on the amount, as required by s.22(1) of the Act. Purportedly in accordance with the requirements of s.22(3), he then gave the following reasons for his determination. "*The claimant carried out construction work within the meaning of the Act under a construction contract. The claimant has made a payment claim dated 8 November 2004 for $169,494.25. The respondent has not provided a payment schedule despite being given a s.17(2) notice. The respondent has not disputed the claim. The claimant has provided submissions in support of the claim. The submissions demonstrate that the claim is for the construction work carried out by the claimant for the respondent. In the absence of any denial by the respondent of liability for the amount claimed, I am satisfied that the claimant is entitled to a progress payment equal to the amount of the progress claim.*

In the absence of any submissions on the due date for payment, I apply s.11(1) of the Act and determine that it is 10 business days after the date of the payment claim. That makes the due date for payment 22 November 2004. Similarly, in the absence of any submissions on the rate of interest, I apply s.11(2) of the Act and determine that it is the rate on unpaid judgments of the Supreme Court.

Since the respondent has provided no payment schedule or adjudication response, I determine that the respondent is liable for 100% of the adjudication fees."

Brookhollow's submissions

55 Mr Harper SC submits:– consideration by an adjudicator of the matters specified in s.22(2) is a condition of the validity of the adjudicator's determination;– as Mr Davenport filed no evidence, it is necessary to rely on inferences drawn from available material to assess whether Mr Davenport considered the matters specified in

s.22(2);– Mr Davenport's "extra-curial" writings show "actual or apprehended bias" against giving consideration to the matters required by s.22(2) where a respondent has not served a payment schedule within time;– Mr Davenport's reasons for adjudication indicate that he gave no consideration to whether he had before him a "payment claim" for the purposes of the Act;– it is to be inferred from his reasons that he gave no real consideration to the payment claim at all and simply made a determination in favour of R&R because Brookhollow had served no payment schedule and did not, for that reason, dispute the payment claim;– in effect, Mr Davenport merely "rubber stamped" Claim No 9;– in particular, Mr Davenport applied s.11(1)(b) of the Act to reach a date for payment, apparently oblivious to the provisions of Clause 42.1 and Part A of the Contract which specified the 24th of each month as the date for progress claims, with payments to be made thirty-five days thereafter;– the erroneous application of s.11(1)(b) demonstrates that Mr Davenport failed to consider relevant provisions of the contract at all, so that his determination is invalid.

56 It is now established, I think, that an adjudication determination is void if the adjudicator fails to address in good faith the matters required by s.22(2): see ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at paras 31 and 49 per Brereton J and the authorities there discussed. Section 22(2) makes no distinction in this regard between, on the one hand, an adjudication in which the respondent has served timeously a payment schedule and has made submissions in support of the schedule and, on the other hand, an adjudication in which the respondent has been precluded from making submissions by s.20(2A).

57 Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s.22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.

58 In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation.

59 The case is very different when a respondent is precluded from participating in the adjudication process by the operation of s.20(2A). There will be no submissions of the parties raising issues for determination: the adjudicator will have the claimant's payment claim, the adjudication application and the attached documents and, probably, at least the relevant parts of the contract said to support the claim. The adjudicator may not know whether the respondent regards the claim as entirely justified and does not wish to contest the adjudication even though it has failed to make payment or whether the respondent has a "killer point" in defence of the payment claim but has been deprived of the opportunity to raise it because, by oversight or misadventure, it failed to serve a payment schedule within the prescribed time.

60 Where there is no contested adjudication process, what must an adjudicator do in order to comply with the requirements of s.22(2)? Must the adjudicator examine all of the provisions of the contract and all of the provisions of the Act with a critical eye to see whether the claim is supportable? Or, may the adjudicator take the view that as the claim is "*undefended*", he or she may "rubber stamp" the claim and make a determination against the respondent "*in default of a defence*".

61 In my opinion, neither position is correct. Section 22(2) requires the adjudicator to give consideration to the matters stated, to the extent applicable, whether the payment claim is "defended" or "undefended" in the adjudication process. That means that where the respondent is not a participant in the adjudication whether by preclusion under s.20(2A) or otherwise, the adjudicator must still consider "*the provisions of the Act*", "*the provisions of the construction contract from which the application arose*", the payment claim and the result of an inspection, if any.

62 Because an adjudication determination can have drastic financial consequences, s.22(2) requires the adjudicator to see that, even when the respondent does not participate, the process is not abused. That does not mean, however, that the adjudicator must play devil's advocate on behalf of the absent respondent. The adjudicator is not required to test the payment claim and the adjudication application for all possible defects and non-compliances with all or any of the provisions of the Act and all or any of the terms of the contract. In ***Holmwood*** at para 50 Brereton J said that the requirements of s.22(2)(b) to consider the provisions of the contract did not mean that: "*...in each adjudication the adjudicator must consider every provision of the contract – any more than the requirement in s.22(2)(a) to consider the provisions of the Act has the effect that in each adjudication the adjudicator must consider every provision of the Act; both the paragraphs are to be read as requiring consideration of the*

provisions only to the extent that they are relevant to the adjudication application in question. In other words, the adjudicator is not required to consider provisions of the Act or the contract which have no bearing on, or relationship to, the adjudication application under consideration. This follows from the stated function of the considerations required by s.22(2) – which is, as its opening words express, "in determining an adjudication application" – and from the great inconvenience without utility which any other construction would involve."

I respectfully agree.

63 In a contested adjudication, the adjudicator need consider only those provisions of the Act and of the contract which are relevant to the issues formulated by the parties in their submissions. In an adjudication in which the respondent does not participate the position of the adjudicator is, in my opinion, analogous to that of the Court when a plaintiff seeks the entry of judgment in default of an appearance by the defendant or where the defendant has failed to file a defence. In such a case, the Court still has a duty to decide the case according to truth and fact and if the plaintiff's case appears on the face of the pleading or on the plaintiff's evidence (or lack of it) to be fatally flawed, then the Court will refuse to enter judgment: ***Charles v Shepherd*** [1892] 2 QB 622, at 624, 625; ***Gramophone Company Ltd v Magazine Holder Company*** (1911) 28 RPC 221, at 225; ***Termijtelen v Van Arkel*** (1974) 1 NSWLR 525, at 529; ***Bridge Wholesale Acceptance Corporation (Australia) Ltd v Burnard*** **(unrep.)** NSWSC Young J, 31 May 1991.

64 In my opinion, where the respondent has not participated in the adjudication process so that the payment claim is undefended, s.22(2) requires the adjudicator to address in good faith such issues arising from the need to conform with the provisions of the Act and of the contract as manifestly appear on the face of the payment claim, the adjudication application and any supporting material. In most cases, the consideration will be confined to:– whether there is in existence a construction contract between the parties and whether the payment claim is made pursuant to that contract;– whether the payment claim reasonably purports on its face to comply with the requirements of s.13(2);– whether there is evidence that the payment claim has been served on the respondent;– what the contract provides, if anything, about the particular claim made in the payment claim and the time for payment;– whether the claimant says that it has done the work for which the payment has been claimed but has not received payment.

65 If a fatal flaw in compliance with the Act or the contract is manifestly apparent from a consideration of these matters, the adjudicator will refuse to make a determination in favour of the claimant. If no fatal flaw appears, the adjudicator is entitled to make a determination in favour of the claimant even if a more penetrating analysis of the claim and the provisions of the Act or the contract would have revealed a flaw upon which the respondent could successfully have relied. In this regard, it must always be borne in mind that the adjudicator's determination is not final and binding on the parties; whatever defence to the claim the adjudicator may have overlooked in making the determination in this summary and provisional way may always be taken up by the respondent in civil proceedings to determine liability on a final basis: s.32.

66 The extent to which an adjudicator must give reasons for the determination in accordance with s.22(3)(b) reflects the extent of his or her duty to give consideration to the matters required by s.22(2). In a fully contested adjudication in which several issues have been raised, the adjudicator's reasons should demonstrate that he or she has endeavoured in good faith to consider those issues, in compliance with the requirements of s.22(2)(c) and (d).

67 On the other hand, when the payment claim is undefended in the adjudication process so that no issues have been raised and contested, the adjudicator's reasons may, permissibly, be quite brief. They should show in general terms that the adjudicator has considered the payment claim and the contract. However, I do not think that the adjudicator must ritualistically recite that the payment claim conforms to the requirements of s.13(2): if s.13(2) is not explicitly mentioned in the adjudicator's reasons, it may be legitimately assumed that that is because the adjudicator sees no problem in that regard.

68 Similarly, if no express reference is made in the reasons to any particular provisions of the Act or of the contract, it may legitimately be assumed that, in examining the payment claim, the adjudication application and any supporting material for a fatal flaw manifestly apparent on their face, the adjudicator has found none. He or she may be right or wrong in that regard but absence of explicit reference in the reasons cannot be taken, in itself, as evidence of failure to give such consideration in good faith to the requirements of s.22(2) as an uncontested adjudication process requires.

Whether Mr Davenport's "extra-curial" writings are admissible

69 In a separate ruling, I rejected evidence of various seminar papers delivered by Mr Davenport as going to show what was termed "actual or apprehended bias" on the question whether an adjudicator needs to comply with the requirements of s.22(2) in an "undefended" adjudication. For the sake of convenient reference, I will refer to those writings as "extra-curial" although, of course, Mr Davenport did not constitute a court.

70 The description "apprehended or actual bias" was, I think, inapt. "Bias" usually denotes prejudice against a person or class of persons. Here, what I gather Mr Harper meant was that Mr Davenport's seminar papers proved as a fact that he was committed to a view of the law as to the requirements of s.22(2) which is wrong and that he applied his erroneous view when he came to make his adjudication determination.

71 There are two objections to the use of Mr Davenport's "extra-curial" writings for the purposes of this case. First, let it be assumed that when Mr Davenport came to make his adjudication determination he adhered to the views as to the requirements of s.22(2) which he had expressed in the seminar papers. Even if those views, whatever

they are, are wrong in law, there is no reason to suppose that he did not hold those views in good faith. If he applied those views in making his determination, he may have committed an error of law but that is not to say that he failed to address in good faith the requirements of s.22(2) as he believed them to be.

72 The second objection to the use of "extra-curial" writing to prove error in decision making is more fundamental. Judges frequently express opinions, both in their judgments and in extra-curial writings, as to what is the law on some particular point; that does not mean that they are never open to subsequent persuasion about the point, that they will never change their minds over time, or that in any particular case they have reached a decision without fairly considering the point again, even though they have arrived at the same answer.

73 To treat a Judge's previous writings, curial or extra-curial, as evidence of the reasoning process by which he or she has actually decided any particular case is to invite limitless speculation and endless litigation: for sound policy reasons, quite apart from considerations of logic and commonsense, the only reasoning process which may legitimately be reviewed to show error in judicial decision making is the reasoning process, or absence of reasoning process, revealed in the judgment itself. In my view, in the light of the express requirement for written reasons which is imposed on the adjudication decision making process by s.22(2), the same considerations apply to decisions given by adjudicators.

74 In my opinion, if I have to find that Mr Davenport failed to give such consideration in good faith to Claim No 9 as s.22(2) required in this case, I must make that finding on the basis of Mr Davenport's written reasons alone.

Conclusions

75 I am unable to accept Mr Harper's submission that the omission in Mr Davenport's reasons for determination of any reference to the validity of Claim No 9 as a payment claim means that he failed in good faith to consider its validity to the extent that he was required to do so.

76 For the reasons I have given earlier, the validity of Claim No 9 as a payment claim under the Act depended on whether it purported reasonably on its face to comply with s.13(2), not on whether it also complied with the requirements of s.13(4) and (5). Non-compliance with s.13(4) and (5) was a defence which it was open to Brookhollow to raise in a timeously served payment schedule. There being no such payment schedule, Mr Davenport was not bound to consider those defences.

77 There is no suggestion that Claim No 9 did not comply with s.13(2). The fact that Mr Davenport did not refer in his reasons to s.13(2) is capable of indicating merely that he saw no fatal flaw with regard to the requirements of that subsection.

78 However, the covering letter to Claim No 9, which Mr Davenport had, and the adjudication application expressly attempted to negative a possible defence based on non-compliance with s.13(4) and (5). The argument of R&R seems to be founded upon the wording of s.13(4)(b), which requires that a payment claim may be served only within *"the period of twelve months after the construction work to which the claim relates was last carried out"*. As I apprehend it, R&R was contending that remedial work carried out by Brookhollow within the period of twelve months was *"construction work to which the claim relates"* because that remedial work was said to result in a deduction from the amount claimed in Claim No 8. Alternatively, Brookhollow seemed to be suggesting that in doing the remedial work, Brookhollow was purporting to act *"for or on behalf of R&R"* so that the work can be said to have been carried out by Brookhollow as its agent.

79 I do not find those arguments at all convincing. It seems to me that the words in s.13(4)(b) *"the construction work to which the claim relates"* means "the construction work carried out by the claimant itself" and that such work would not include remedial work carried out by the proprietor or a third party which is said to result in an offsetting deduction against a progress claim. However, it is not necessary for the purposes of this case to decide the question. The issue is whether omission of reference to s.13(4) and (5) in Mr Davenport's reasons for determination demonstrates that he failed to address in good faith the provisions of the Act and of the contract to the extent which was required, bearing in mind that no defence to the payment claim founded on non-compliance with s.13(4) and (5) was raised in a payment schedule.

80 Mr Davenport may have omitted reference to s.13(4) and (5) in his reasons simply because he accepted the argument advanced by R&R as to the construction of s.13(4)(b), saw no fatal flaw in the payment claim in that regard, and saw no reason to mention the matter further as the adjudication process was uncontested. If this is what happened, it may be that Mr Davenport fell into error of law but that does not invalidate his determination.

81 On the other hand, it may be that Mr Davenport did not accept the arguments as to the effect of s.13(4) and (5) but believed that, because no timeously served payment schedule had raised defences founded on those subsections, s.22(2) did not require him to consider them. In other words, he may have held the same views as I have expressed in paragraphs 44 to 48 of this judgment.

82 In short, I cannot infer that Mr Davenport's failure to advert in his reasons to R&R's argument negating a defence to the payment claim is unequivocally the result of a failure to address in good faith the essential question which s.22(2) requires an adjudicator to consider when a payment claim is undefended in the adjudication process by reason of the operation of s.20(2A), namely, does the payment claim or the material adduced in support manifestly demonstrate on its face a fatal flaw in compliance with the provisions of the Act or with the relevant provisions of the contract.

83 Brookhollow submits that Mr Davenport must have failed to consider the relevant provisions of the contract in applying s.11(1)(b) to reach a date for payment for the purposes of s.22(b) and (c) because Clause 42.1 and Part PA of the contract stipulate a date upon which the payment claimed in Claim No 9 becomes due for payment. Brookhollow contends that it should have been clear in the present case that s.11(1)(a) was applicable, not s.11(1)(b). I am unable to accept this submission.

84 Mr Davenport does not say in his reasons that the contract makes no express provision with respect to a date for payment of Claim No 9. Rather, he says that no submission has been made as to the date for payment. This distinction is of some significance.

85 Clause 42.1 of the contract provides that a claim for payment is payable within thirty-five days after receipt by Brookhollow's "*Representative*" of a claim for payment or within fourteen days of the issue by the Representative of a payment certificate, whichever is the earlier. The date upon which Claim No 9 became due for payment under the contract therefore depends on the ascertainment of certain facts, namely, the date of receipt of the claim by Brookhollow's Representative and the date of issue of a payment certificate, if one was issued at all.

86 Neither Claim No 9 nor the adjudication application made a submission about either of these dates. Claim No 9 is dated 8 November 2004 and the copy provided to Mr Davenport bears a stamp "faxed 9/11/04". But nothing is said about whether Brookhollow had a "Representative" for the purposes of Clause 42.1 and, if so, when that Representative received Claim No 9. Nothing is said about whether the Representative had issued a "payment certificate" in respect of that claim.

87 In the absence of information about facts and circumstances necessary to calculate the date for payment of Claim No 9 under the contract, Mr Davenport may well have taken the view that s.11(1)(b) was applicable to fix the date for payment for the purposes of s.22(1)(b). He may or may not have been in error in that view. Whatever be the case, I am far from being persuaded that Mr Davenport's reasons for determination demonstrate clearly that he made no attempt in good faith to consider the terms of the contract in arriving at a date for payment under s.11(1)(b).

What relief is appropriate

88 Brookhollow fails in its substantive claim that Mr Davenport's adjudication determination is void and that enforcement of it should be restrained.

89 As I have noted, R&R concedes that the adjudication certificate issued on 31 January 2005 is invalid because it was requested and issued prematurely. On 9 May 2005 R&R obtained a second adjudication certificate from the authorised nominating authority. Mr Harper submits that the authorised nominating authority, having once issued a certificate purportedly pursuant to s.24(1)(a), was functus officio even though the certificate was a nullity. The consequence would be that the judgment obtained in the District Court on the basis of the first certificate would be set aside, the second certificate would be a nullity and R&R would now have no means of enforcing the adjudication determination which Mr Davenport had validly made.

90 I am unable to accept these submissions. If the adjudication certificate issued on 31 January 2005 was a nullity then the authorised nominating authority was exercising its power under s.24(1)(a) validly for the first time when it issued the second adjudication certificate in May 2005.

91 The District Court judgment is valid unless and until it is set aside. This Court cannot itself set aside a judgment of the District Court except on appeal. However, this Court, acting in personam, could in a proper case restrain the judgment creditor from enforcing the judgment.

92 As the judgment in the District Court is in aid of a valid adjudication determination and there is now in existence a valid adjudication certificate which could be filed as a judgement under s.25(1), I do not see the utility in restraining R&R from enforcing the judgment which it already has. Leaving Brookhollow to set aside the present judgment and requiring R&R to obtain another judgment upon the filing of the second adjudication certificate would simply produce delay in R&R obtaining payment of Claim No 9 and would involve both parties in needlessly duplicated expense.

93 In the exercise of discretion, I decline to restrain R&R from seeking to enforce the District Court judgment. This does not, of course, prevent Brookhollow from applying to the District Court to set that judgment aside but one would hope that some commonsense will prevail and that unnecessary legal expenditure will be avoided. The issue of Brookhollow's ultimate liability should be decided in civil proceedings, as envisaged in s.32.

Orders

94 I refuse the declarations and orders sought in paragraphs 1, 2, 5, 6, 7, 9 and 10 of the Plaintiff's Amended Summons. In view of the concession by R&R that the first adjudication certificate is invalid, I see no utility in the declarations and orders sought in paragraphs 3, 4 and 8 of the Amended Summons.

95 Accordingly, the Plaintiff's Amended Summons is dismissed.

96 As to costs, my present tentative view is that, as the First Defendant has succeeded on the substantive issue of the validity of Mr Davenport's determination, the Plaintiff should pay the Defendants' costs. However, I will hear the parties further on costs, if they wish.

R. Harper SC – Plaintiff instructed by Home Wilkinson Lowry
Ms J. Oakley – Defendants instructed by McMahons National Lawyers