

JUDGMENT : McDOUGALL J : Supreme Court New South Wales, Equity Division, T&C List. 15th June 2007

- 1 On 1 July 2006 the plaintiff (Downsouth) and the defendant (Jigsaw) entered into a construction contract (the Atrium contract). In essence, Downsouth undertook to construct and fit out a childcare centre for Jigsaw at 9 Castlereagh Street, Sydney (the Atrium project). The Atrium contract was one of four (each relating to different premises) made between Downsouth and Jigsaw (or, in one case, between Downsouth and a related company of Jigsaw known as Balanced Investment Group Pty Limited).
- 2 The essential question that I am required to resolve is whether the determination of an adjudicator, Ms Rosemarie Risgalla, on an adjudication application based on a number of payment claims relating to the Atrium contract, is void. I conclude that it is not.

Factual background

- 3 On 2 March 2007, Jigsaw received from Downsouth a bundle of invoices (and two summaries) claiming payment for construction work (or related goods and services) that Downsouth said it had carried out (or provided) pursuant to one or other of the four contracts. Each of those invoices was said to be "issued under" the *Building and Construction Industry Security of Payment Act 1999* (the Act). There is no doubt that each of the four contracts was a "construction contract" to which the Act applied. Jigsaw accepts that each of the invoices is a payment claim for the purposes of the Act. Some 21 of those more than 40 invoices related to the Atrium contract; I will refer to those 21 as "*the Atrium payment claims*".
- 4 On 9 March 2007, Jigsaw provided (although with one exception) payment schedules in response to the more than 40 payment claims that it had received on 2 March 2007. The payment schedules were generic in form, and it will be necessary to return to some of the detail. In substance, Jigsaw denied liability for all the amounts claimed, and said in addition that it was owed money.
- 5 The exception to which I have referred relates to Downsouth's invoice number #200841 for some \$2,035.00. That was one of the 21 invoices relating to the Atrium contract. There was no payment schedule responding to that invoice.
- 6 Downsouth applied to an authorised nominating authority for adjudication of the dispute relating to the Atrium payment claims. The adjudicator was nominated, and accepted appointment. She was given an adjudication application (including submissions) and an adjudication response (including submissions).
- 7 The original total of the Atrium payment claims was, in round figures, \$420,000.00. However, the amount claimed by the adjudication application was less: in round figures, \$318,000.00. The adjudicator determined that Downsouth was entitled to a lesser amount again: in round figures, \$202,000.00. Jigsaw complains that the adjudicator failed to afford it such measure of natural justice as the Act requires to be given, and failed to carry out her statutory functions, because she did not consider and deal with an element of its response, relating to an alleged overpayment of \$100,000.00 on another of the four projects.
- 8 Downsouth has recovered judgment for the adjudicated amount. It has tried to enforce that judgment. Jigsaw sought and obtained a stay, on the basis that the adjudicated amount together with an amount for interest and costs be paid into Court (which has been done).
- 9 By notice of motion filed in Court on 16 May 2007, Jigsaw sought a declaration that the adjudication determination was void, and (on an interim basis) a stay of execution on the judgment. It expanded its claim to include an order that the judgment be set aside. It sought in the alternative an order staying the judgment on the ground that Downsouth would not be in a position to repay any amount that it might be found to owe to Jigsaw. Jigsaw asserted that a director of Downsouth had threatened in effect to strip it of what assets it had and continue its business through a different corporation. The parties agreed that this alternative claim should be put off to another day. The only questions that I was required to resolve were those relating to the validity of the adjudication determination and the judgment founded upon it.

The Atrium payment schedules

- 10 Each of the Atrium payment claims related to individual aspects of work that Downsouth claim to have carried out on the Atrium project. Some were said to be variations; others were said to result from design changes and the like; and others again appear to be for works carried out under the contract. It is not necessary to go to the detail of those payment claims.
- 11 As I have said, the payment schedules followed a similar, and generic, format. The parties agreed that it was sufficient to consider the payment schedule relating to Downsouth's invoice number #200669. That payment schedule stated, among other things, that the scheduled amount was "\$0.00". It continued by stating "If the scheduled amount is less than the claimed amount, the reasons why it is less and the reason for withholding payment are set out in the Attachment(s) below".
- 12 There followed, not as "Attachment(s)" but as part of the text of the document, a number of assertions. The first group of assertions was preceded by the word "DEFENCE". Although the particular payment schedule to which the parties referred was said to relate to the Atrium project, some of the reasons set out under the heading "DEFENCE" related not to the Atrium contract but to another contract, which in turn related to the St Martins Tower premises in Market Street.

- 13 The next heading, following the statement of the "DEFENCE", was "Downsouth: Cross Claim". There were eight headings set out under that:
1. Failure to fulfil terms of contract - defects
 2. Downsouth indebted to Jigsaw for other monies
 3. Monies overpaid to Downsouth by Jigsaw
 4. Additional Damages Claim
 5. Breach of Obligations under Fair Trading Act and/or Trade Practices Act
 6. Cost of Arranging Alternate Certification
 7. Interest
 8. Moneys owed for Negative Variations".
- 14 The first, fifth, sixth and eighth stated no monetary amount, and said that the amount of the claim would "be advised". The adjudicator disregarded most of them. I shall do likewise, since no complaint is made of that.
- 15 The second item comprised a number of individual components. The first (sub para (a)) related to "Liquidated Damages". There was a claim for \$203,500.00 for the Market Street project, \$500,500.00 for the Atrium project, and \$258,000.00 for a project at Walker Street, North Sydney.
- 16 The second sub para of item 2 should be set out in full:
- "Invoices overpaid pursuant to other contract.
Jigsaw claim repayment of monies paid to Downsouth in error.
Particulars:
\$100,000.00 paid to Downsouth that was claimed to be for variations. Being claims for variations not in accordance with any contracts or are not otherwise liable to be paid.
TOTAL: \$100,000.00"
- 17 Likewise, item 3 should be set out in full:
- "3. Monies Overpaid to Downsouth by Jigsaw
Jigsaw had paid monies on behalf of Downsouth for items which were included in the Scope of Works and are properly payable by Downsouth under the contract.
Particulars:
Payment to Eagle Lighting for 9 Castlereagh Street - \$24,118.49
Payment to Eagle Lighting for Level 2, 31 Market Street - \$20,794.06
TOTAL to date: \$44,912.55

Reports are still currently being collated to determine the final figure." (emphasis in original)

- 18 Item 4 purported to quantify a claim relating to the Market Street project.
- 19 The form of the particular payment schedule on which the parties focussed their attention was repeated throughout all the payment schedules. In particular, the "Cross Claim" in each followed the same format. A number of items (including, of present relevance, items 2, 3 and 4) appeared to be copied identically from one payment schedule to the other, regardless of the particular contract or particular invoice to which the payment schedule related. That is certainly the case in respect of the payment claim constituted by Downsouth invoice number #200844. (I mention that one because it featured in the submissions of Mr F P Hicks of counsel for Jigsaw.)
- 20 At the end of the individual payment schedules (which comprised in all 171 pages) was another bundle of documents that appeared to relate to all of them. It included such things as a copy of the construction contract. The last group of documents in it was described as "Emails and Correspondence as referred to in Responses". One of those documents was something purporting to be a tax invoice from Jigsaw to Downsouth dated 21 January 2007 (the set-off invoice). That invoice was headed "Credit on Walker Street Payment". It specified some six invoices as "owing to Downsouth". They included invoices numbered #200841 and #200844, each of which related to the Atrium project. The other invoices related to other projects. The total of all six invoices was \$32,436. The set-off invoice stated "\$100,000 paid to Downsouth by Jigsaw to be allocated to invoices owing" and claimed a "total credit owing to Jigsaw" of \$67,564.00. Mysteriously, and in a manner that Mr Hicks was quite unable to explain, the total owing was then stated to be "\$76,911.00".
- 21 It may be the case that the set-off invoice was referred to in one or other of the more than 270 pages of documentation that preceded it. If it was, neither Mr Hicks nor Mr J A N Hogan-Doran of counsel (for Downsouth) took me to any document in which reference was made to it. I note in this context that I made it plain to both counsel that it was their obligation to refer me to all documents that they contended to be relevant, and that I would not undertake my own investigation of documents to which no reference was made.

The adjudication application and adjudication response

- 22 The adjudication application said the following, in relation to the "Payment Claim" and "Payment Schedule":
- "Payment Claim
13. On 1 March 2007 the Claimant issued a statutory payment claim, pursuant to the *Building and Construction Industry Security of Payment Act 1999* ("The Act") to the respondent by express post.
 14. The respondent admits in its payment schedule that it received this document, stating on each payment schedule in response to each invoice issued in the payment claim: "Date of Payment Claim: 2 March 2007."

15. The payment claim consisted of a series of invoices issued by the claimant on 1 March 2007, under the Act in relation to four (4) contracts or arrangements the claimant had with the respondent. These may be summarised as follows:
- (a) St Martins Tower, Market Street, Sydney in the sum of \$706,917.20;
 - (b) 9 Castlereagh Street, "Cheeky Monkeys" in the sum of \$318,007.10;
 - (c) Walker Street, North Sydney "Head Office" in the sum of \$48,075.00;
 - (d) The Maintenance Contract/Arrangement in the sum of \$28,000.00.
- Payment Schedule*
16. On 13 March 2007 the respondent provided the claimant with four (4) bound bundles of documents as its payment schedule (containing an individual payment schedule for each invoice) within each of these four bundles (one for each contract, and containing exhibits or annexures for each contract. These documents are described as follows:
- (a) Payment Schedule: Project Head Office valuing the works at nil or (\$0.00);
 - (b) Payment Schedule: Project 9 Castlereagh Street valuing the works at nil or (\$0.00);
 - (c) Payment Schedule: Project St Martins Tower valuing the works at nil or (\$0.00); and
 - (d) Table of Contents (Containing Annexures A to F) valuing the works at nil or (\$0.00)."
- 23 The adjudication application did not deal explicitly with the assertion that there had been an overpayment of \$100,000.00 on another contract. It did however give a generic denial in paragraph 30:
- "30. The respondent has provided reasons in an adhoc and disorganized fashion as an alleged justification for not paying the claimant the proper value of the claimant's work. The claimant rejects these reasons in their entirety and says its claim should be valued in full as claimed."*
- 24 In addition, Downsouth provided an individual summary in respect of particular invoices. Of the two invoices referable to the Atrium project that were referred to in Jigsaw's set-off invoice, Downsouth submitted the following:
- (1) *As to invoice number #200841: "The claim should be valued in full. The respondent is estopped from providing any reasons in relation to this claim by section 20(2B) of the Act."*
 - (2) *As to invoice number #200844: "The respondent agree [sic] that these works have been completed and are payable to the claimant."*
- 25 As to the first proposition: neither party has been able to refer me to a payment schedule relating to invoice number #200841. Thus, it would seem, the position taken by Downsouth was correct.
- 26 As to the second proposition: Downsouth referred to a particular point of the relevant payment schedule, the whole of which was attached. The payment schedule showed that invoice number #200844 was one for which Jigsaw admitted liability in full. However, Jigsaw's position was that it should be "paid" by set-off: based on the alleged credit of \$100,000.00 relating to the Walker Street project.
- 27 The adjudication response made specific responses to a number of paragraphs in the adjudication application. Of present relevance, it said, in relation to para 15 of the adjudication application:
- "15. This statement is consistent with the respondent's view that the parties have considered that the claimant had established a "running account" with the respondent whereby it performed work and made claims. In particular the Claimant was performing multiple contracts for the respondent, on at least one occasion, the claimant requested the respondent pay an amount of \$100,000 without reference to any specific contract. The respondent paid such amount and accordingly the parties have established a mutuality arrangement whereby there is an interlinking of set off rights between various contract rights as a "running account". For this reason monies owed by one party under one contract may be set off against monies owed by the other party under another contract. Further the respondent is otherwise entitled to set off monies owed under this contract by the Claimant to the respondent against monies owed or alleged to be owed by the respondent to the defendant under this contract under the general established principles of contract law."*
- 28 The adjudication response also contained a section titled "RESPONSE". That section said, among other things:
- "B. The mutuality of dealings between the claimant and the respondent requires that the total claim of the claimant under all contracts which it alleges exists is determined and set off against the total counter claims by the respondent."*
- 29 There was included with or attached to the adjudication response a schedule or annexure "1". That document had three headings: "Invoice", "Cost" and "Jigsaw's reason for non payment". Under the first heading it listed, by invoice number, if not all then substantially all the Atrium payment claims. Under the second heading it set out the amount claimed by each. Under the third heading it set out in most cases and in abbreviated form the material that the heading would suggest. I say "in most cases" because there were some 5 invoices (including number #200841 relating to the Atrium project) in respect of which no reason for non payment was stated.
- 30 On no possible construction of any stated "reason for non payment" relating to any of the payment claims could one deduce, infer or understand that Jigsaw was seeking to raise a defence by way of set-off in respect of the "cross claim" items set out in each payment schedule. Again, counsel did not refer in their submissions to any other

aspects of the documents attached to or forming part of the adjudication response save for the schedule or attachment "L", a spreadsheet summarising Jigsaw's position in relation to each item of the claim.

The adjudication determination

- 31 After setting out formal matters, the adjudicator summarised the contract and the parties' positions. She noted the following in relation to the adjudication response: *"The Respondent has submitted in the adjudication response that **the mutuality of dealings between the claimant and the respondent requires that the total claim of the claimant under all contracts which it alleges exists is determined and set off against the total counter claims by the Respondent**". While amounts relating to other contracts were included as offsets against the Claimant's payment claim, this reason was not included in the payment schedule. In accordance with Section 20(2B) of the Act, the 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. Accordingly, I cannot consider this reason in completing this adjudication."*
- 32 The quotation in that paragraph was taken from item B of the "Response" in the adjudication response, set out in para [28] above.
- 33 The adjudicator then turned her attention to the topic of "Valuing the Works". She said: *"I will now deal with the disputed items claimed for work done and in doing so will have regard to Section 10 of the Act and the contract between the parties."*
- 34 The adjudicator considered the various invoices that, in her view, Downsouth had agreed to pay and quantified their amount. She then turned to a different topic: "Respondent's Cross Claim". She dealt with this item by item under headings that were taken or adapted from the payment schedules. However, as I have said, she did not in most cases deal with "Cross Claim" items that were not quantified.
- 35 The first item with which the adjudicator dealt was "Liquidated Damages: \$203,500.00". As will be seen from what I have said in para [15] above, that item related to the Market Street project. However, I think (having regard to the text of this part of the determination) that the adjudicator misread this aspect of the payment schedules and thought that the amount to which she referred related to the Atrium project. (She did not deal with the amount of \$500,500 claimed on the Atrium project; and it seems clear from her discussion of the claim for \$203,500 that she understood it to relate to that project.) In any event, she was not satisfied that Jigsaw had "demonstrated an entitlement to the amount claimed".
- 36 The adjudicator then turned to "moneys overpaid to Downsouth by Jigsaw: \$24,118.49". It is apparent that she focussed on the amount of the claim relating to the Atrium project, and ignored the amount relating to the Market Street project. That having been said, she was not satisfied that Jigsaw was entitled to the amount claimed.
- 37 The adjudicator then turned to the "Additional Damages Claim". That claim related only to the Market Street project. The adjudicator gave a number of reasons for rejecting it including: *"The project included in the payment schedule for which the damages are submitted to have occurred is Level 2, 31 Market Street, Sydney. This is a separate project and is not included in the contract between the parties and [sic] which is relevant to this adjudication."*
- 38 The adjudicator then turned briefly to those other claims in respect of which costs were to be advised, and said that she would not consider them because there was no amount advised.

The issues

- 39 Mr Hicks submitted that the adjudication determination was void for two reasons. The first related to that which was submitted to adjudication. He submitted that there was but one payment claim, being the bundle of more than 40 individual invoices received by Jigsaw on 2 March 2007. He submitted that neither the whole "Payment Claim" thus constituted, nor any individual invoice within it, was referred to adjudication. He submitted that it was not open to Downsouth to do as it had done: extract from the original bundle of invoices those relating to the Atrium project, and refer only those to adjudication.
- 40 Secondly, Mr Hicks submitted that the determination was void because the adjudicator had failed to consider the set-off relating to the alleged overpayment of \$100,000.00, or alternatively had failed to exercise her powers in good faith for the purposes for which they were given, because she had excluded that set-off from consideration on an irrelevant ground (namely, s 20(2B) of the Act).
- 41 In oral address, Mr Hicks accepted that if this aspect of his client's case failed on the ground of denial of natural justice, it could not succeed on the alternative "want of good faith" (in the "**Brodyn**" sense) ground. (My reference to **Brodyn** is of course a reference to the decision of the Court of Appeal in **Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor** [2004] 61 NSWLR 421; see in particular the decision of Hodgson JA (with whom Mason P and Giles JA agreed) at 441-442 [55]). Thus, and consistent with what I have said in a number of cases (see, by way of example only, **John Goss Projects v Leighton Contractors & Anor** [2006] NSWSC 798 at [56] to [59]), I shall say no more about good faith in this sense.

First issue: contents of the adjudication application

- 42 Each individual invoice in the bundle of more than 40 received by Jigsaw on 2 March 2007 was itself a payment claim. Mr Hicks accepted that this was so. Thus, each could have been referred to adjudication. Mr Hicks submitted that this was what the Act required, when it said in s 17 that "[a] claimant may apply for adjudication of a payment claim".

- 43 Mr Hicks referred also to Hodgson JA's (non exhaustive) list of "basic and essential requirements" that, in his Honour's view, were "the conditions laid down for the adjudicator's determination" (*Brodyn* at 441 [53]). The list given by his Honour was as follows:
- "53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 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 (ss.18 and 19).
 5. The determination by the adjudicator of this application (ss.19(2) and 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 (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a))."
- 44 Mr Hicks relied on Downsouth's statement in its adjudication application, that the "Payment Claim" was comprised of all the documents served by it, that were received by Jigsaw on 2 March 2007. However, that ignores the covering letter (dated 22 February 2007, and said to have been "re issued by post – 23/2/07") under cover of which those invoices (and the two summaries to which I have referred) were served. That letter said (omitting formal parts): "Please find enclosed copies of all outstanding invoices and summaries, with detail of request to confirm and clarify all costs."
- 45 Each individual invoice, and for that matter each summary, had at its foot the following words: "All invoices are issued under the [Act] ...".
- 46 I see nothing in this to indicate that Downsouth intended the whole of the invoices served by it to constitute together one payment claim. Each invoice was served as a separate payment claim. To the extent that Downsouth in its adjudication application may have sought to categorise them together as one payment claim (and I am not sure that it sought to do so), I do not see why the Court should be bound by that.
- 47 As Mr Hicks accepted, it was open to Downsouth to refer all or any one of those separate payment claims to adjudication.
- 48 If Mr Hicks' construction of s 17 were to be adopted, absurd results might follow in a particular case. Suppose, for example, that Jigsaw had admitted liability for some of the invoices, and had not asserted any cross-claim or set-off in respect of them. There would be no dispute in respect of those invoices; but, on Mr Hicks' approach, Downsouth would be required to refer them (together with all the disputed invoices) to adjudication, and the adjudicator would be required to consider them.
- 49 Mr Hicks conceded that his client could suffer no prejudice by the reference to adjudication of a sub group of the payment claims received on 2 March 2007. I think it is possible to express the point more generally: the practice adopted by Downsouth would not be capable of causing prejudice in any likely or "real world" situation. On the contrary, it is likely to lead to efficiency, and to substantial savings of both time and money. I do not see why the Court should adopt a construction that compels it to ignore those matters, and to accept potentially absurd results, unless there is no alternative. I do not think that the language of s 17 is intractable to the point where it offers no alternative but the construction proposed by Mr Hicks.
- 50 Thus, I reject this aspect of Downsouth's challenge to the determination. I note, in connection with this aspect of the challenge, that Mr Hicks did not put any submission based on s 13(5) of the Act.

Second issue: denial of natural justice

- 51 Hodgson JA said in *Brodyn* at 441-442 [55] that a number of matters, including "a substantial denial of the measure of natural justice that the Act required to be given" will mean that "a purported determination will be void". That concept has been explored and developed in a number of cases subsequently. Without wishing to be thought to be disrespectful either to those decisions or to the submissions founded on them, it is not necessary to refer to them. The basic principle is clear. The question is one of its application.
- 52 Mr Hicks' submissions on this point encompassed two elements. The first was that it was not open to the adjudicator to conclude, as she did in that part of her reasons that I have set out in para [31] above, that the set-off based on mutuality of dealings had not been raised in the payment schedule, and was therefore something that should not have been included in the adjudication response.
- 53 The second element of this aspect of Mr Hicks' submissions was based on the adjudicator's failure to refer to "a substantial matter of payment that was expressly referred to in the payment schedule/s and submissions of" Jigsaw: the reference to the alleged overpayment of \$100,000.00 and the claim for its repayment.
- 54 There is a substantial overlap between those two elements of the "denial of natural justice" challenge.
- 55 At this point I note that there is one aspect of Jigsaw's submissions that is difficult to accept. Jigsaw raises as an issue in its points of claim and submissions dated 21 May 2007 (para 29) that Downsouth did not assert that "the sum of \$100,000.00 was not referable to the claims made in relation to the [Atrium] project ...". However, it is clear on the face of Jigsaw's payment schedules that Jigsaw accepted that this payment (or, as it would have it, overpayment) was not referable to the Atrium payment. Item 2(b) of the payment schedule says that it was "overpaid pursuant to other contract". Further, if anyone had troubled to refer the adjudicator to the set-off invoice, it would

have been plain that Jigsaw's position was that the credit related not to the Atrium project but to the Walker Street project.

- 56 I have to say that I have some difficulty in seeing why Downsouth should have asserted that the sum of \$100,000.00 was not referable to the Atrium project, when on a fair reading of the material provided by Jigsaw to the adjudicator, it was clear that this was Jigsaw's position also.
- 57 Leaving that aside, the question in relation to the first aspect (s 20(2B)) is whether it was reasonably open to the adjudicator, in the exercise of her powers and duties under the Act, to conclude as she did that the defence of set-off arising out of mutual dealings, raised in para 15 and again in item B of Jigsaw's adjudication response, was not a "reason ... included in the payment schedule".
- 58 The resolution of that question depends in part on an analysis of the payment schedule. The following matters bear on that analysis:
- (1) The "DEFENCE" and the "Cross Claim" were treated separately, and were comprised of distinct categories of reasons.
 - (2) The "Cross Claim" did not identify specifically the way in which the particularised items operated to reduce the claimed amount.
 - (3) Nonetheless, the "Cross Claim", including item 2(b) relating to the alleged overpayment, was given as one of the reasons why the scheduled amount was less than the claimed amount.
 - (4) Many of the items referred to in the cross-claim, and specifically many of the items quantified (as opposed to those in respect of which no amount was stated), related to projects other than the Atrium project.
 - (5) At no point in the payment schedule did Jigsaw assert expressly that it was entitled to rely by way of set-off on claims relating to contracts other than the Atrium contract because there was some course of dealings between the parties by reason of which the mutual debits and credits between them were taken not on each contract individually, but across all contracts from time to time in force.
- 59 This is not the appropriate place to deal in detail with the principles relating to set-off. It is sufficient to note that set-offs and counter-claims (or cross-claims) are conceptually different. A counter-claim is not a defence. It does not diminish or abate the plaintiff's case. At most, it leads to a situation where there may be two verdicts – one in the action and one on the counter-claim – and judgment for the balance. By contrast, set-off is a defence. A plea by way of set-off, if successful, will reduce the plaintiff's claim (if otherwise proved) to the extent of the set-off. There will be verdict and judgment only for the balance. (Section 90(2) of the *Civil Procedure Act 2005* modifies this position, enabling the Court either to give judgment for the balance or to give judgments in respect of each claim; but nothing of present moment turns on this.)
- 60 Set-off at law now arises under s 21 of the *Civil Procedure Act*. There is no point in going into the complicated reasons why this is so. It depends on the existence of "mutual debts between a plaintiff and a defendant in any proceedings". Thus, assuming for the moment that set-off at law would be available in the present case through s 21 (a point on which I express no view), liquidated claims may be set off one against the other to the extent that the requirement of mutuality can be met.
- 61 Set-off in equity includes a number of different concepts. The traditional form of equitable set-off arises where the defendant's claim against the plaintiff raises some equity, the effect of which is to impeach the plaintiff's claim. As Lord Cottenham LC put it in the leading case of *Rawson v Samuel* (1841) Cr & Ph 161 at 179; 41 ER 451 at 458, the party seeking the benefit of equitable set-off must be able to show "some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient ...". His Lordship's test has been applied on innumerable occasions; it is sufficient to refer to the judgment of Gummow J in *Re Just Juice Corporation Pty Limited; James v Commonwealth Bank of Australia* (1992) 37 FCR 445.
- 62 In the present case, the payment schedules on their face distinguish between matters of "DEFENCE" and matters of "Cross Claim". I accept that the payment schedules may not have been prepared with an eye to the fundamental principles governing set-off (whether at law or in equity). Nonetheless, I do not see why a reference merely to matters of "Cross Claim", without more, must be taken to signify that the matters relied upon were being asserted as a set-off, having the effect not just that there might be claim and counter-claim but that any amount found in Downsouth's favour should be diminished, or extinguished, by any amount found in Jigsaw's favour. This general impression is in my view confirmed by the circumstance that some of the matters relied upon by way of "Cross Claim" are plainly claims for damages and not liquidated claims.
- 63 Further, the payment schedules give no hint as to the fundamental requirement of mutuality (if the relevant concept now said to have been relied upon was set-off at law) or as to the matters going to impeachment of Downsouth's claim (if equitable set-off was the relevant concept). I do not suggest that it would be necessary to refer to these concepts by name. But the failure to refer to or identify facts relevant either to the concept of mutuality or to the concept of impeachment means that the reader is left to work out for himself or herself the nature of the defence or (in terms of s 14(3) of the Act) "the reasons for withholding payment."
- 64 It is obvious that the adjudicator had read the payment schedules. In the passage to which I have referred in para [31] above, she referred to "amounts relating to either contracts [that] were included as offsets against [Downsouth] payment claim." Clearly enough, in context, this must have been a reference to the various matters grouped under the heading "Downsouth: Cross Claim". Thus, I think, one may conclude that the adjudicator considered the payment schedule (see s 22(2)(d)). If she misunderstood the nature of the reasons for withholding payment that

were being asserted, that was not a mistake of such a kind as to indicate either a failure to carry out the statutory duty to “consider” the payment schedule or a breach of one of the basic and essential requirements listed by Hodgson JA in *Brodyn*.

- 65 In summary, I think, this aspect of the adjudicator’s reasons reveals no error that would entitle this Court to intervene. That is sufficient to dispose of the first way in which Jigsaw put its case based on denial of natural justice. It is also sufficient to dispose of the second way.
- 66 The adjudicator did deal expressly with a number of the items that were raised under the heading “Cross Claim”. She did so, as I have noted, under the heading “Respondent’s Cross Claim”. She did not deal with all items listed under that heading. In general, she appears to have dealt only with those that related to the Atrium contract. It seems to be clear that, again in general, she excluded other quantified items from consideration because of her view that the reason for relying on them – set-off – was an excluded reason having regard to s 20(2B). If, as I have said, any error revealed in that conclusion is not error of a kind that entitles this Court to intervene, it must follow that the adjudicator did not deny Jigsaw natural justice by refusing, on her understanding of the application of s 20(2B) to the facts of this case, to consider some aspects of the payment schedule. In effect, she gave reasons for that refusal; this is not a case where she simply failed at all to turn her mind to the relevant subjects.

Conclusion and orders

- 67 Thus, Jigsaw’s challenges to the determination fail. However, there are other aspects of Jigsaw’s notice of motion that have not been dealt with (because the parties only argued those aspects going to the enforceability of the determination and the judgment based upon it). Clearly enough, Downsouth should have its costs to date. However, having regard in part to the drafting of the notice of motion and in part to the way the hearing before me proceeded, the only order that I make is to stand the proceedings over to 9.30 am on 28 June 2007 before me for the parties to bring in short minutes of order to give effect to these reasons and to provide for any further hearing under Jigsaw’s notice of motion.

J A N Hogan-Doran (Plaintiff) instructed by Wilkinson Building & Construction Lawyers
F P Hicks (Defendant) instructed by RBHM Commercial Lawyers