JUDGMENT Bergin J : New South Wales Supreme Court : 9th September 2004.

1 These proceedings were commenced on 3 September 2004 when the plaintiff, Emergency Services Superannuation Board, was granted leave to file a Summons in court before the Duty Judge, Nicholas J. On that occasion it is apparent that, by consent, on the plaintiff's counsel giving the usual undertaking as to damages, an injunction was granted restraining the authorised nominating authority, which does not appear to be a party in these proceedings, from providing an adjudication certificate under the *Building & Construction Industry Security of Payment Act 1999 (*the Act*)*.

2 On 7 September 2004, Nicholas J restrained the second defendant, Lipman Pty Limited, from requesting the authorised nominating authority to provide an adjudication certificate pursuant to s24 of the Act. The first defendant, Robert Sundercombe, is an adjudicator who was appointed by the nominating authority. That person does not appear.

3 Today I permitted the plaintiff to file in court an Amended Summons on the referral of the matter to me from the Duty Judge. The injunction granted by Nicholas J expires at 6.00pm this evening. The plaintiff, represented by Mr Cheney leading Mr Orsborn, and the second defendant, represented by Mr Goldstein, requested that I deal with the matter on a final hearing basis. Thus, the interim relief that was originally sought at the commencement of the day is now final relief for a permanent injunction restraining the second defendant from requesting the authorised nominating authority for an adjudication certificate pursuant to s24 of the Act and from taking any step to file pursuant to s25 of the Act any adjudication certificate obtained.

4 These parties were in a contractual relationship in respect of the construction of a shopping centre at Fairfield. I understand that practical completion of the building works were completed in January 2004. As is usual in these large contractual matters, this one being for a lump sum in the order of some 22 million dollars, progress claims are made and payment claims under the Act are made from time to time. In this case the defendant, to whom I shall refer as Lipman, served a payment claim dated 31 May 2004 and the plaintiff served a payment schedule dated 15 June 2004. That dispute joined between the parties by their relevant claim and schedule was the subject of an adjudication before Mr Davenport as adjudicator. The plaintiff sought administrative law relief in respect of that determination and McDougall J heard that matter in July this year.

5 The history of the matter is in part set out in McDougall J's judgment in ***Emergency Services Superannuation Board v Davenport & Anor*** [2004] NSWSC 697. Put shortly, there were four claims entitled A, B, C and D. The adjudicator determined claim D at nil and there was apparently no issue about that. McDougall J held that the adjudication process in relation to claims A and C were infected by a denial of natural justice, however, the claim in respect of claim B was in a different category. McDougall J, in exercising his discretion on the basis that he had found that two of the challenges made by the plaintiff to claims A and C had succeeded, said this:

> *[72] In the present case, ESSB has succeeded on two of its challenges, but failed on the third. The challenges (leaving aside the s 13(1)(a) point) were to individual items within the Determination, not to the Determination overall. There is but one Determination. If I were to quash that Determination, Lipman would be deprived of the benefit of the entire Determination, including that portion which, as I have found, is not affected by reviewable error.*
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> *[73] In the present case, if I were to grant relief, it would be on condition that ESSB pay Lipman the unaffected amount of the Determination ($85,770), together with interest thereon from 21 June 2004, in accordance with the Determination. If ESSB is not prepared to accept this condition then, in the exercise of my discretion, I would withhold relief.*

6 Those reasons were delivered on 22 July 2004 and on 27 July 2004 his Honour made the following orders:

1. The Adjudication Determination of the First Defendant dated 12 July 2004 reference number 2004-TASC-088 be quashed.
2. The Second Defendant pay the Plaintiff's costs of the proceedings as agreed or assessed.
3. The Court notes that the Plaintiff has paid on account and without prejudice to its rights under the Contract between the Plaintiff and the Second Defendant dated 19 March 2002, the sum of $85,770 plus GST of $8,577 plus interest of $740.

7 On 23 July 2004 Holding Redlich, the solicitors for the plaintiff, wrote to the solicitors for Lipman enclosing a cheque made payable to Lipman in the sum of $95,087 comprising the amounts referred to by his Honour plus interest. Holding Redlich stated, "We confirm that payment of this sum is made by ESSB on account, and without prejudice to ESSB's rights under its contract with Lipman dated 19 March 2002."

8 In evidence before me, but limited only to the exercise of my discretion should that be necessary, Derek Humphries, a senior consultant and employee of Pinnacle Property Group Pty Limited, the plaintiff's Asset Manager and agent on the project, gave evidence that he authorised the payment of $95,087 on 22 July 2004. His evidence was that his decision to do that was based on an assumption that the payment would satisfy the payment claim, the subject of the adjudication and the subject of McDougall J's judgment and that Lipman would not submit a further adjudication application in respect of that payment claim. He went on to state that had he been aware that Lipman intended to submit a further adjudication application, he would not have authorised the payment.

9 Lipman withdrew the adjudication application that triggered the adjudication before Mr Davenport. It purported to do that pursuant to s26 of the Act which provides relevantly that a claimant may withdraw an application by the relevant notice in circumstances where an adjudicator has accepted an adjudication application but has failed to determine it within the time allowed under the Act (s26(1); 21(3)). On 4 August Lipman submitted what it referred to as a new adjudication application within five business days of the orders made by McDougall J pursuant to s26 of the Act. The first defendant was appointed as the adjudicator.

10 The parties proceeded to the adjudication by way of adjudication submissions and response and the adjudicator determined the dispute by determination dated 24 August 2004. That adjudication proceeded upon the original payment claim and the original payment schedule with submissions different from those that were made in the first adjudication process and indeed, the only matter pressed before the first defendant in the adjudication process was claim A. Lipman abandoned claim C or, put alternatively, did not make any claim in respect of claim C. The plaintiff promptly sought the injunctive relief to which I have referred.

11 In this application the plaintiff originally propounded five grounds upon which the adjudication should be quashed but was granted leave to add a further ground by way of Further Amended Summons which is to be filed by 4.00pm tomorrow.

Ground 1 - Defendant made an election

12 The first ground raised by the plaintiff is that Lipman was precluded from proceeding with the withdrawal of the adjudication application and making the new application because it had accepted payment of the $85,000-odd in circumstances where such payment would not have been made but for the finding that the first determination was unaffected by jurisdictional error to the extent of the amount of the payment. It was submitted that Lipman effectively affirmed the first determination and the first adjudication that gave rise to the first determination. Reliance was placed on what Mason J, as he then was, observed in ***Sargent v ASL Developments Ltd*** (1974) 131 CLR 634 at 655: *A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, i.e. when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach - in each instance the alternative right to insist on performance creates a right of election.*

13 It was submitted that the tender by the plaintiff to Lipman of the $85,000 put Lipman to an election whether to (a) accept the payment and with it the consequence that its right to withdraw the first adjudication application was extinguished or (b) reject the payment and thereby preserve its rights.

14 I disagree with that submission. What McDougall J said was that he would not quash the determination unless the plaintiff paid to Lipman the $85,000. It seems to me that McDougall J made clear that he was only going to grant relief on the condition that the plaintiff pay Lipman the unaffected amount. It was really up to the plaintiff whether to agree to that condition and it could not, it seems, have obtained its relief in the form that it did without agreeing to pay that amount. The defendant had no say at that stage. It was a matter for the plaintiff. I suppose, on one view of it, the defendant could have objected to the process that his Honour propounded in his judgment before orders were entered to indicate that it did not wish to be paid, but in the circumstances it does not seem to me that the payment of $85,000 imposed on the defendant a requirement to elect to receive it and give up all its rights. Indeed, the correspondence to which I have referred indicates that the plaintiff itself wished to maintain its rights under the contract.

15 This matter was not raised before the adjudicator, the first defendant, nor was any injunctive relief sought to prevent the defendant from going forward with the adjudication or to prevent the adjudicator from adjudicating on the basis that there had been an election made by Lipman which prohibited it or precluded it from proceeding with the application for adjudication.

16 It was the plaintiff who obtained the benefit of the quashing of the determination by the payment of the $85,000. It was the plaintiff who was electing to satisfy the condition imposed by his Honour entitling it to the quashing of the determination but not preventing the defendant or precluding the defendant from exercising its rights, whatever they may have been at the time, under the Act.

17 I should deal with the evidence that was tendered on the basis of the exercise of my discretion, albeit that it is unnecessary because of the finding that I have just made. Even if the basis upon which the authorisation of the payment was made was as Mr Humphries claimed, it was never communicated to the defendant. Additionally, the evidence seems quite inconsistent with what was said by Holding Redlich when payment was made. There is nothing in McDougall J's judgment that would reasonably convey to any person that such a payment would, in fact, disentitle the defendant from relying upon the payment claim or the balance thereof after the payment was made.

18 In those circumstances, I am not satisfied that, even if I had concluded that the plaintiff made the payment on the basis claimed, the exercise of my discretion would not have been in the plaintiff's favour.

Ground 2 – Defendant not entitled to withdraw application

19 The second ground of challenge relied upon by the plaintiff developed during the hearing. It was submitted that the plaintiff was not entitled to withdraw the adjudication application as such withdrawal was not permitted by s 26(1)(b) of the Act. In ***Multiplex Constructions Pty Ltd v Luikens & Anor*** [2003] NSWSC 1140 Palmer J said:

> *[99] The consequences of the Court's order in this case will doubtless be inconvenient and expensive for the parties. That is, principally, the result of the way in which the Act is structured and because it makes no express provision for what is to happen if a determination under s. 22 or a judgment entered pursuant to s. 25(1) is set aside for jurisdictional error of law.*
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> *[100] If a payment claim which originates an adjudication comprises the whole of the claims made by that claimant under the contract, the consequence of quashing a determination may be relatively straightforward: the whole of the dispute, instead of being determined on an interim basis by the adjudicator under the Act, may simply await final determination by litigation or other dispute resolution procedures. If, on the other hand, a payment claim is in respect of many progress claims made under a contract and considerable construction work remains to be carried out under*

the contract, the matter will probably not be so straightforward. The claimant will no doubt want the payment claim determined before completing construction work. Can the claimant re-submit the dispute constituted by the payment claim and the payment schedule to the same adjudicator to be determined according to the reasons given by the Court in quashing the original determination? Or is the adjudicator, having made a determination under s. 22(1), functus officio?

[101] In my opinion, the solution lies in s 26 of the Act, which is as follows:

"(1) This section applies if:

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).

(2) In either of those circumstances, the claimant:

(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and

(b) may make a new adjudication application under section 17.

(3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17."

[102] An adjudicator may fail to determine an adjudication application for the purposes of s 26(1)(b) for a number of reasons. The adjudicator may become incapable of making the determination within the time required or may for some reason refuse to do so or become disqualified from doing so. But, in my opinion, an adjudicator may also fail to determine an adjudication within time for the purposes of the subsection if the determination is purportedly delivered within time but is not given according to law. For example, where the adjudicator has given a determination within time but it has been procured by fraud, it could hardly be said that the adjudicator has performed the task which the Act requires of him or her within the time stipulated in s 21(3). The same may be said of a case in which the adjudicator delivers a determination within the time stipulated but the determination has been given without jurisdiction. In such cases, it may be said that the determination is of no effect: it is as if the adjudicator had made no decision at all.

[103] When an adjudication under the Act is quashed pursuant to judicial review, in my opinion the claimant becomes entitled to withdraw its adjudication application under s 26(2) upon and from the date upon which the quashing order is made because on that date it has been ascertained that the adjudicator did not determine the adjudication according to law within the time allowed by the Act, for the purposes of s 26(1)(b). The claimant may then, within five business days of the quashing order, make a new adjudication application under s 26(3). That subsection, in conjunction with s 17(3)(c), (d) and (e), makes it clear that the adjudication process does not start all over again from the beginning. Rather, there is an adjudication pursuant to a fresh adjudication application, of the dispute as defined by the original payment claim and the original payment schedule. The respondent may not, therefore, make any submissions to the new adjudicator in reliance upon reasons for withholding payment of the original payment claim which were not indicated in its original payment schedule, as provided in s 14(3) and s 20(2B). The new adjudicator appointed by the nominating authority under s 19 may, or may not, be the adjudicator who conducted the original adjudication, as considerations of convenience, saving of expense and perceptions of pre-judgment may require. In conducting the new adjudication, the adjudicator would, doubtless, have regard to the reasons of the Supreme Court for quashing the original determination. By this procedure, the saving in time and expense envisaged by the adjudication machinery of the Act may not be totally lost.

20 Palmer J expressed the view that a claimant may, within five business days of the order quashing the determination, make a new adjudication application. His Honour was of the view that there is a new adjudication pursuant to a fresh adjudication application of the dispute as defined by the original payment claim and the original payment schedule.

21 In ***Quasar Constructions v Demtech Pty Ltd*** [2004] NSWSC 116 Barrett J said at 38: *In my judgment, the existing determination of the adjudicator should be set aside and the parties' disputes as to the final resolution of their contractual relationship and the state of account between them should be dealt with by them as I have outlined. A consequence of the quashing of the existing determination will be that the first defendant is deprived of the ability to make any immediate recovery under the Act by reference to that determination. But, as Palmer J observed at paragraphs [99] to [103] of his judgment in* ***Multiplex v Luikens****, that does not necessarily mean that the first defendant cannot put in train steps to obtain another adjudication on the basis of its original payment claim and the plaintiff's original payment schedule. The statutory mechanism for obtaining a quick determination of an amount referable to contracted work and recoverable accordingly under the Act as a "progress payment" will therefore not be put beyond the first defendant's reach.*

22 The plaintiff submitted that Palmer J is wrong and that a failure to determine an application within the time allowed as referred to in s21(3) is not apt to describe a determination that has been quashed. He submitted that the determination was submitted within time but that it was infected with error and that it was quashed. That is a prima facie attractive argument but in the circumstances notwithstanding that there was a portion of that determination that was not successfully challenged, the order was that the whole of the determination was quashed. The fatal blow was delivered

by the order made on 27 July 2004 when McDougall J quashed the determination thus triggering the operation of s21(3) of the Act.

23 Palmer J's approach followed by Barrett J in the circumstances where the Act is otherwise silent as to what is to happen in respect of a quashed determination is persuasive and I am not satisfied that I should depart from that approach.

24 In those circumstances, I am satisfied that Lipman was entitled to withdraw its adjudication application and entitled, within the timeframe, to lodge the new adjudication application.

25 There was a further point raised by Mr Cheney. It was submitted that Lipman was required to comply with the original timeframe under the Act requiring it to file the adjudication application within the relevant period after service of the Payment Schedule. That cannot be what was intended by the legislation and is inconsistent with the approach adopted by Palmer J.

Ground 2A – The Nature of the Payment Claims

26 A further point was raised by Mr Cheney in respect of the nature of the payment claim that was made. This point is connected to a further point that I have allowed to be argued pursuant to the Further Amended Summons to be filed. The payment claim deals with a number of claims for variation which runs to approximately three pages, totalling some 4.3 million dollars. The total claim in the payment claim was 2.234 million dollars, part of which was subsequently paid and part of which was abandoned.

27 In the payment schedule, the plaintiff included the following in par 13.2: *Without prejudice to the principal's other submissions, the payment claim is invalid in that it does not comply with s13(2A) as it consists only of single line descriptions of claims and provides no further information such as the provision of the contract relied on when making the claim.*

28 It was submitted that the plaintiff was not in a position to know or understand the nature of the claim that was made against it or understand the provisions of the contract upon which the claim was made. This was raised before the adjudicator in a general way, it seems, and the adjudicator dealt with it under a heading "*there is insufficient information in the payment claim to enable the respondent to respond*". Reliance was placed upon what Einstein J said in ***John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors*** [2004] NSWSC 258.

29 The adjudicator made findings in respect of that submission and found that the payment claim was not defective and that the respondent had been provided with enough information to meaningfully respond in the payment schedule. The payment schedule is in evidence before me and it is detailed indeed. It includes a schedule setting out the various items and the plaintiff's response to Lipman's claims. In addition, the plaintiff referred to its understanding that Lipman's claims for time-related costs were made pursuant to cl 36.2(b) of the contract, with reference to a letter of 19 May 2004 that refers to Lipman's claim "pursuant to cl 36.2(b) of the contract". It is apparent that the plaintiff assumed that that was the clause under which the defendant was proceeding.

30 It is submitted that the Act requires appropriate exposure of the nature of the claim so that the recipient of it is able to understand what is claimed against it. Section 13 of the Act, in particular s13(2)(c), requires that "*A payment claim must state that it is made under this Act*". It also requires that it must identify the construction work or related goods and services to which the progress payment relates and must indicate the amount of the progress payment that the claimant claims to be due. In ***John Holland*** Einstein J said:

[23] whilst it is not permissible to construe section 13 as providing that in order to be a valid payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2(a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.

31 It seems to me that there is no jurisdictional error in respect of this matter identified in the determination of the first defendant. Rather, it seems to me that the adjudicator dealt properly within the confines of his statutory obligations and proceeded to deal with the claim that there was insufficient information in the payment claim to enable the respondent to respond.

32 The next matter is, as I said, related to that point but raised in the Further Amended Summons to be filed tomorrow and that is that the adjudicator committed a jurisdictional error by failing to address the submissions put by the plaintiff.

33 The adjudicator, in dealing with the time costs in relation to variations, said in par 52 that the respondents had raised a series of reasons in their adjudication response on this topic that were not included in their payment schedule. Specifically, he referred to pars 60 to 62 and said that they had not been considered pursuant to s20(2B) of the Act. Section 20(2B) of the Act prohibits a respondent to a payment claim including in the adjudication response any reason for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant. Pars 60 to 62, which the adjudicator said that he had not paid regard to were as follows:

60. ESSB submits that Lipman has not identified (in either its Payment Claim or its Application) a contractual basis for entitlement to this sum. The payment claim does not refer to any provision of the Contract. In its Application for Adjudication Lipman states (at paragraphs 1 and 2 under the heading "Tab No 3"):

"The term "time related costs" is used when referring to the variation cost component described in clause 36.2(b) of the Contract. The claimant has an entitlement under the contract to claim and be paid for actual costs caused by time related issues in performing a variation."

Such a statement does not identify the basis of claim and it is submitted that the Claimant has provided insufficient information to ESSB to respond. ESSB repeats its submissions in paragraphs 31 to 35 above in this regard. Further, the strong inference from Lipman simply asserting that it has an entitlement under the Contract for these costs, without

identifying, adequately or at all, the relevant contractual provisions, is that Lipman does not itself know what these provisions are.

61. Any such submission by Lipman is embarrassing, unhelpful and an abuse of the adjudication process and should be construed against Lipman to the fullest extent.

62. In the circumstances:
(a) the inclusion of this claim in the Application invalidates the Application; and
(b) the claim should be dismissed.

34 As can be seen, the submission was that the claim should not be entertained because there was no identification of the basis of the claim in the payment claim and indeed, in the other documents. It is peculiar that the adjudicator said that he was not going to deal with that matter and then dealt with it. I am not satisfied that this amounts to a jurisdictional error, however, even assuming that it did, the exercise of my discretion on this point is against the plaintiff because of the matters to which I have referred, being that the adjudicator dealt with the issue in any event.

Ground 2B – Approach in second adjudication

35 There was a further point raised in argument that, assuming Palmer J's approach is accepted to be correct and that Lipman was entitled to withdraw its application, what should have happened was that the basis upon which the defendant proceeded in its submissions before the original adjudicator should be the basis upon which it proceeded in the new adjudication.

36 This point is a little complicated because of the reliance upon 36.2(b) to which reference has been made earlier. Notwithstanding the identification of 36.2(b) and the supporting documentation to Lipman's payment claim at the first adjudication, Lipman advised the first adjudicator that the variation of time-related costs were not claimed under cl 36.2(b), but as a component of the cost of the variation under cl 36.4(d) of the contract. In the second adjudication process, the subject of these proceedings, Lipman returned to its original claim in the payment claim and supporting documentation to the claim under cl 36.2 (b) of the contract. The plaintiff complains that the defendant has reprobated and approbated and that somehow such conduct has been unfair to it.

37 Reference was once again made to what Einstein J said in *John Holland,* in particular at par 27. In that case his Honour was dealing with a claimant who was advancing a new contractual basis for payment of the claim in the adjudication application. In the present case the plaintiff claims that for the first time at the second adjudication and differently from what was done in the first adjudication, the defendant propounded a new contractual basis for payment of the claim which had not been propounded before. The adjudication application was in respect of the dispute identified by the payment claim and the payment schedule. Those documents proceeded on the basis of a claim under clause 36.2(b), and thus at the time issue was joined nothing had changed between the time that first adjudication application was made and the second adjudication was made.

38 One has to focus on the dispute as established between the parties by the payment claim and the payment schedule. The submissions made on the first occasion dealt with, as I say, the matter in relation to cl 36.4(d), perhaps somewhat inconsistently with the payment claim. That is neither here nor there now because the adjudication determination has been quashed. However, the plaintiff submits that Lipman should have been forced to make the same submission in respect of the second adjudication.

39 Lipman was driven back to that which it should perhaps have been driven back to in the first adjudication, the claim it made in its supporting documentation pursuant to cl 36.2(b). The fact that the cl 36.2(b) argument was raised in the second adjudication does not, in my view, establish that there was any invalidity in the process or any jurisdictional error committed by the adjudicator. Lipman responded to the plaintiff's claim dealing in detail with cl 36.2(b) and supplementing that submission in the schedule with its detailed submissions before the adjudicator.

40 I am not satisfied that the grounds thus far raised justify quashing the determination.

Grounds 3 to 5 - Abandoned

41 Grounds 3 to 5 are abandoned.

Final Ground – Date for payment

42 The final ground raised was that the adjudicator committed a jurisdictional error when he determined that the date upon which the adjudicated amount became payable under s22(1)(b) was 21 June 2004. Section 22(1)(b) requires the adjudicator to determine that date and the parties agree that the date should have been 28 June 2004. The reference to 21 June is curious. It may have been that the adjudicator looked at McDougall J's judgment and saw the reference to 21 June that I referred to earlier but whatever be the case, it seems to me it is not a jurisdictional error. It may be an error of law or it may just be a slip. I am not satisfied that such error is a jurisdictional error justifying the quashing of the determination.

43 In all the circumstances, I refuse to grant a permanent injunction. The injunction granted by Nicholas J is discharged. The Further Amended Summons to be filed tomorrow is dismissed. The plaintiff is to pay the defendant's costs.

Mr R. Cheney; Mr J. Orsborn (Plaintiff) instructed by Holdng Redlich
Mr S. Goldstein (Second Defendant) instructed by Cowley Hearne