CA. Supreme Court of New South Wales before Giles JA; Tobia JA; McColl J.A. 18th June 2007

Judgment : Giles JA.

1 John Holland contracted with the RTA to construct a roadway and associated bridgeworks. Pursuant to the terms of the contract, it provided security for its performance and satisfaction of its obligations. In the course of the works determinations were made under the *Building and Construction Industry Security of Payment Act* 1999 ("the Act") that adjudicated amounts well in excess of the amount of the security be paid by the RTA to John Holland, and the amounts were paid. After the works reached practical completion John Holland asked that the RTA return half the security. The RTA declined.

2 In proceedings brought by John Holland, McDougall J decided the separate question -

"*Whether having regard to the contents of the following documents:*

- *the letters dated 6 April 2006 and 24 March 2006 from the Defendant to the Plaintiff set out at Tabs 1 & 2 of the Tender Bundle*
- *RTA Conditions of Contract set out at Tab 3 of the Tender Bundle*
- *Formal instrument of Agreement set out at Tab 4 of the Tender Bundle*
- *Building and Construction Industry Security of Payment Act 1999 (NSW) set out at Tab 5 of the Tender Bundle*
- *the letters dated 17 February 2006 and 13 March 2006 from the Plaintiff to the Defendant set out at Tabs 6 & 7 of the Tender Bundle*
- *The RTA's Technology and Construction List Response, the RTA's Cross Summons and the RTA's Technology and Construction List Cross-Claim List Statement, all filed on 8 June 2006,*

the RTA was entitled to retain both of the securities given by John Holland; or whether the RTA was required to return one of those securities."

3 His Honour decided that the RTA was entitled to retain both the securities. John Holland's summons claiming an order for return of half the security was dismissed.

4 For the reasons which follow, in my opinion his Honour's decision was correct and the appeal from the dismissal of the summons should itself be dismissed.

The contract

5 The contract was entered into on 8 September 2003. It adopted RTA Conditions of Contract based on NPWC3 (1981).

6 Clause 5 of the Conditions provided, so far as presently material -

"SECURITY, RETENTION MONEYS AND OTHER PERFORMANCE UNDERTAKINGS

5.1 Purpose

Security, retention moneys and performance undertakings shall, when the same or any of them are required, be provided and given for the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract.

5.2 Provision of Security

The Contractor must provide security in accordance with this clause in an amount equal to 5 per cent of the Contract Sum.

5.3 Form of Security

The security must be in the form of cash, bank cheque or an unconditional undertaking in the form set out in Schedule 1 given by a financial institution or insurance company approved by the Principal. …

5.7 Reduction of Security and Retention Moneys

The Principal may at any time after the Superintendent has issued a Certificate of Practical Completion under sub-clause 42.2 in respect of the Works or a separable part of the Works, make or allow a reduction of the amount of the security or the retention moneys by an amount which, in the Principal's opinion, is just and equitable PROVIDED HOWEVER that the reduction shall not reduce the amount of the security and retention moneys below fifty per centum of the security and retention moneys held by the Principal at the time the reduction is made or allowed by the Principal.

Any reduction under this sub-clause shall not operate so as to waive, prejudice, release or discharge any of the conditions of the Contract or any of obligations imposed on the Contractor by the Contract.

5.8 Release of Security and Retention Moneys

The Principal shall account to the Contractor for the security and any retention moneys as provided in sub-clause 42.7, subject to the rights of the Principal under the Contract. … "

7 Clause 42.1 provided for the Contractor to submit payment claims and the Superintendent to issue payment schedules on behalf of the Principal. By cl 42.1.2, the reasons why the amount of a payment schedule might be less than the amount claimed included -

"*(c) amounts which the Principal is entitled to withhold, set off or otherwise deduct*".

8 Clause 42.2 provided for the issue of a Certificate of Practical Completion by the Superintendent. Clause 42.3 relevantly provided that the Principal should thereafter without undue delay pay the Contractor by way of a progress payment "all moneys then payable in terms of the Contract for the Works".

9 A Defects Liability Period commenced to run upon the issue of the Certificate of Practical Completion. By cl 42.6, at its expiry the Contractor was to lodge with the Superintendent a Final Statement showing all money the Contractor claimed to be due from the Principal in connection with the work under the Contract. Clause 42.7 was then engaged -

*"**42.7 Final Payment Schedule and return of security***

42.7.1 Time and conditions for issue of Final Payment Schedule

The Superintendent must issue a Final Payment Schedule within 28 days after receipt of the Final Statement if:

(a) the Contractor has completed all its obligations under the Contract; and

(b) all Defects Liability Periods under the Contract have expired; and

(c) the Contractor has provided a statutory declaration in accordance with clause 43.2; and

(d) there are no outstanding claims or disputes between the Contractor and the Principal.

42.7.2 Contents of Final Payment Schedule

The Final Payment Schedule must set out the amount determined by the Superintendent as the amount finally due from the Principal to the Contractor or from the Contractor to the Principal in connection with the work under the Contract.

42.7.3 Money owing to Contractor

If the Final Payment Schedule shows money owing from the Principal to the Contractor, the Principal must within 28 days after the date of the Final Payment Schedule:

(a) pay the Contractor the amount certified as payable by the Final Payment Schedule, and

(b) release all security then held for the Contract.

42.7.4 Money owing to Principal

If the Final Payment Schedule shows money owing from the Contractor to the Principal:

(a) the Contractor must pay the Principal the amount certified as payable by the Contractor within 28 days after the date of the Final Payment Schedule, and

(b) the Principal has no obligation to release security held for the Contract until the Contractor has paid the money due."

10 Clause 45 provided for resolution of "[a]ll disputes or differences arising out of the Contract or concerning performance or non-performance by either party of the Contract". For disputes or differences in relation to determinations or directions of the Superintendent or the Principal, in the first instance there had to be decision by the Superintendent, and thereafter discussion between the Contractor and the Principal. If the dispute or difference was not resolved, and for other disputes or differences, there could then be determination by an expert, which was binding unless the decision was that the Principal must pay the Contractor more than $500,000. In that event, either party could require the dispute or difference to be referred to arbitration. The description of the "arbitration process" in cl 45.7 concluded -

"If one party has overpaid the other, whether pursuant to a Superintendent's Final Payment Schedule or not, and whether under a mistake of law or fact, the Arbitrator may order repayment together with interest."

11 Clause 46 provided -

*"**46 RIGHT OF PRINCIPAL TO RECOVER MONEYS***

Without limiting the Principal's rights under any other provision in the Contract, any debt due from the Contractor to the Principal under or by virtue of any provision of the Contract may be deducted by the Principal from any moneys which may be or thereafter become payable to the Contractor by the Principal, including any retention moneys then held by the Principal, and, if such moneys are insufficient for this purpose, then from the Contractor's security under the Contract. Nothing in this clause shall affect the right of the Principal to recover from the Contractor the whole of the debt or any balance that remains owing after deduction."

The security and the request for return of security

12 An RTA letter dated 13 August 2003 part of the contract required security in the amount of $3,886,930, by way of cash, bank cheque or unconditional undertaking. By a letter dated 28 August 2003 John Holland provided security by way of two unconditional undertakings by an insurance company, each in the sum of $1,943,465.

13 The Certificate of Practical Completion was issued on 28 November 2005. The documents tabulated in the separate question did not disclose what happened in relation to the progress payment to which cl 42.3 referred. The Defects Liability Period began to run, and was to expire on 28 November 2006.

14 By a letter dated 17 February 2006 John Holland wrote to "The Superintendent, Roads & Traffic Authority" -

Further to our letter dated 29 November 2005 requesting Practical Completion of the Works and our letter of 30 November 2005 requesting reduction of our security to 50% we request again in accordance with clause 5.7 the return of one security provided by John Holland resulting in a reduction of our securities to 50%.

We believe the reduction in security now is reasonable, just and equitable as conformance reporting on asphalt works has now been provided, John Holland have completed all outstanding works, the RTA are withholding substantial monies in relation to the asphalt voids issue's [sic] pending an equitable solution."

15 The RTA replied by a letter dated 24 March 2006 -

"I refer to discussions between Bob Watson and Lachlan Marks regarding the release of security under clause 5.7 of the Contract.

RTA is not obliged under clause 5.7 to make a reduction of the amount of security once a Certificate of Practical Completion has been issued. The reduction of the amount of security is discretionary and RTA's view is that John Holland has no entitlement as a result of the substantial existing disputes between the parties, which are set out in the payment schedules issued under the Contract."

16 The documents tabulated in the separate question did not include any payment schedules. As will shortly appear, the RTA cross-claimed in John Holland's proceedings for recovery of adjudicated amounts paid following determinations under the Act. I will return to whether the "substantial existing disputes" were confined to recovery of the adjudicated amounts.

17 John Holland wrote at greater length to the RTA by a letter dated 31 March 2006. (As I understand it, this was the letter given the date 13 March 2006 in the separate question). The letter included that, having reviewed the payment schedules -

" … John Holland understands the RTA's position to be as follows:

The RTA may, following the issue of a Certificate of Practical Completion, make or allow a reduction of the amount of the security by an amount which, in the RTA's opinion, is just and equitable: see clauses 5.7. The RTA's payment schedules (issued under the contract) dispute certain amounts previously paid by the RTA pursuant to the adjudications under the Building & Construction Industry Security of Payment Act 1999 (NSW) ('the Act'). Because the RTA disputes those payments the RTA is not of the opinion that it would be just and equitable to reduce or release John Holland's security.

Please confirm whether or not John Holland's understanding of the RTA's position is correct. If it is not, kindly clarify the RTA's position.

On the premise that the RTA's position has been accurately summarised above, John Holland contends as follows:

Although the release or reduction of security is stated to be dependent upon 'the Principal's opinion' as to what is 'just and equitable', the Principal (ie the RTA) must act reasonably in forming an opinion as to whether reduction or release of security is 'just and equitable'. In the present case, the RTA has acted unreasonably. The RTA had adopted an attitude that because the RTA disputes John Holland's statutory entitlements to progress payments, the security which would otherwise have been released or reduced, not be so released or reduced.

Further, on the attitude adopted by the RTA, the Contract permits the security to be withheld by the RTA because of the adjudication determinations which the RTA regards as favourable to John Holland. If the Contract permits the RTA to withhold the security upon such grounds (as is apparently contended by the RTA) that clearly contravenes section 34 of the Act. Thus, the contractual provisions which purpose to allow the RTA to act in this way, are void.

Unless John Holland's security in the sum of $1,943,465 is promptly released, John Holland will commence legal proceedings in which it will seek appropriate orders, including an order for indemnity costs."

18 The RTA replied by a letter dated 6 April 2006, relevantly -

"Your understanding of RTA's position is not correct.

Clause 5.7 does not impose a duty on the Principal to reduce the security at all in any circumstances. Clause 5.7 merely requires that if the Principal makes or allows a reduction, the Principal forms its own opinion of a just and equitable amount for a reduction.

The Principal has not made or allowed a reduction."

19 The Defects Liability Period had not expired. Accordingly, John Holland had not lodged a Final Statement with the Superintendent and the Superintendent had not issued a Final Payment Schedule. The Defects Liability Period had still not expired when McDougall J gave his decision, so that remained the position. The Defects Liability Period expired prior to the hearing of the appeal. It was not suggested that this Court should pay regard to a Final Payment Schedule thereafter issued, or even that that one had issued.

The proceedings

On 8 May 2006 John Holland filed a summons in the Technology & Construction List, claiming relief of the kind foreshadowed in its letter of 31 March 2006. On the day of the hearing before McDougall J an amended summons was filed, claiming -

"1. An order that the Defendant return one of the two unconditional undertakings (each in the sum of $1,943,465) which the Plaintiff provided to the Defendant.

2. Damages.

3 Interest.

4. Insofar as Clause 5 of the contract permits the Defendant to retain and convert security for the purposes of securing restitution pursuant to section 32 Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') of moneys paid by the Defendant to the Plaintiff as progress payments pursuant to the Act, a declaration that that clause is void by reason of section 34 of the Act.

4A. Insofar as Clause 42.7 of the Contract permits the Superintendent to issue a Final Payment Schedule which has the effect of requiring the Plaintiff to repay to the Defendant monies paid by the Defendant to the Plaintiff as progress payments under the Act, a declaration that that clause is void by reason of the Act.

4B. A declaration that Clause 46 of the Contract is void by reason of the Act."

20 The RTA's response, filed on 8 June 2006, included -

"*16 The Defendant:*

(a) refers to its letters to the Plaintiff dated 24 March 2006 and 6 April 2006 as if they are set out in full herein;

(b) admits that the 'existing disputes between the parties' referred to in the letter of 24 March 2006 include disputes in relation to amounts paid by the Defendant to the Plaintiff following adjudications under the Act ('the adjudication monies');

(c) says that, by reason of the matters set out in the Cross-Summons and Cross-Claim List Statement, the Defendant is entitled to be repaid the adjudication monies;

(d) … "

and

"*19. In further answer to the entire Summons and List Response, the Defendant says that:*

(a) by reason of the matters set out in the Cross-Summons and Cross-Claim List Statement, the Defendant is entitled to restitution of the adjudication monies; and

(b) by reason of the aforesaid entitlement:

(i) the Defendant is not, and has not at any time been, under any obligation to exercise the power conferred by clause 5.7 of the Contract; and

(ii) if, which is denied, the Defendant is or has been obliged to exercise the power conferred by clause 5.7, it would not be just and equitable to reduce the amount of security held by the Defendant; and

(iii) if, which is denied, the Plaintiff is entitled to damages, the Defendant is entitled to set-off against such damages its entitlement to restitution of the adjudication monies."

21 In the RTA's cross-summons, also filed on 8 June 2006, it claimed -

"*1. Judgment for $5,819,095.55 comprised of:*

(a) $3,767,400.00 in restitution of the Spoil monies;

(b) $1,818,119.95 in restitution of the Latent condition monies; and

(c) $233,575.64 in restitution of the Cost adjustment on the Spoil monies;

2. A declaration that the Cross-Defendant has no entitlement to be paid the Detonator Dump monies.

3. A declaration that payment for the excavation, loading, haulage, disposal and/or incorporation into the works of material from an area of the works known as Cut 4 [is] to be made under Pay Item R42P15.1 and R4215.2.

4. Alternatively to paragraph 3, above, a declaration that the Cross-Defendant has no entitlement to payment for the excavation, loading, haulage, disposal and/or incorporation into the works of material from an area of the works known as Cut 4 that is other than sound good quality hard basalt rock."

22 Implicit in this was that the Spoil monies, the Latent condition monies and the Cost adjustment on the Spoil monies had been paid to John Holland, but the Detonator Dump monies had not been paid.

23 Under the heading "Nature of Dispute" in the cross-summons it was stated that the RTA "claims restitution of monies paid to [John Holland] following determinations made by adjudicators under [the Act]", and under the heading "Issues Likely to Arise" was stated as the issue "[w]hether [the RTA] is entitled to restitution of the aforesaid monies, whether under s 32 of the Act, or at common law". From the relief claimed in relation to the Detonator Dump monies, these were not full or accurate statements.

24 The RTA's contentions then propounded five claims, given the names the Spoil Monies Claim, the Alternative Spoil Monies Claim, the Latent Condition Claim, Cost Adjustment on Spoil Work and the Detonator Dump Claim.

25 For the Spoil Monies Claim the contentions described that John Holland had claimed payment for excavation work in Cut 4 under Pay Items R42P2 and R42P5.2, that the Superintendent had determined that it was to be paid under a different Pay Item R42P15.1, that in an adjudication under the Act John Holland's position had been upheld in an amount of $4,757,939.60, and that the money had been paid. It was said in para 16 that on the proper construction of the contract payment was to be made under Pay Item R42P15.1, and -

17. In the premises of paragraphs 6 to 16 above:

(a) The Cross-Defendant is entitled under the Contract to $1,815,390 for the Spoil Claim work; and

(b) The Cross-Defendant has been overpaid $3,767,400 for the Spoil Claim work; and

(c) The Cross-Claimant is entitled to restitution of the amount of $3,767,400 pursuant to s 32 of the Act; or alternatively

(d) The Cross-Defendant has been unjustly enriched at the expense of the Cross-Claimant in the amount of $4,767,400 and the Cross-Claimant is entitled to restitution of $3,767,400."

26 For the Alternative Spoil Monies Claim it was said in para 18 that John Holland was not entitled to be paid at all for the excavation work in question, and -

"*19. In the premises of the paragraph immediately above:*

(a) the Cross-Defendant has no entitlement under the contract to payment for the Spoil Claim work;

(b) the Cross-Defendant has been overpaid in the amount of $4,757,939.60 in respect of the Spoil Claim work;

(c) the Cross-Claimant is entitled to restitution of the amount of $4,757,939.60 pursuant to s 32 of the Act; and

(d) further or alternatively, the Cross-Defendant has been unjustly enriched at the expense of the Cross-Claimant in the amount of $4,757,939.60 and the Cross-Claimant is entitled to restitution of $4,757,939.60."

27 For the Latent Condition Claim the contentions described that John Holland had made a claim, that the Superintendent had determined that a latent condition did not exist and had rejected it, that in an adjudication

under the Act it had been determined that John Holland was entitled to $1,818,119.95 in respect of the claim, and that that amount had been paid. It was said in para 29 that John Holland "has no entitlement to the Latent Condition monies", and -

"*30. In the premises of paragraphs 20 to 29 above:*

(a) the Cross-Claimant has overpaid the Cross-Defendant in the amount of the Latent Condition monies.

(b) the Cross-Claimant is entitled to restitution of the Latent Condition monies pursuant to section 32 of the Act; and

(c) further or alternatively, the Cross-Defendant has been unjustly enriched at the expense of the Cross-Claimant in the amount of the Latent Condition monies and the Cross-Claimant is entitled to restitution of those monies."

28 For the Cost adjustment on Spoil Work it was said that the adjudicator's determination for the Spoil Claim work included $438,188.28 as a cost adjustment on the Spoil Monies, with assertions of reduced or no cost adjustment, overpayment and entitlement to recovery of part or all of the $438,188.28 in like manner to paras 17 and 19 in relation to the Spoil Monies claim.

29 For the Detonator Dump claim the contentions were to the effect that John Holland had claimed payment of $5,721,654.45 and an extension of time, that the Superintendent had certified less than the claim, that in an adjudication under the Act it had been determined that John Holland was entitled to $4,845,760.59 in respect of the claim, and in para 45 that the validity of the determination was under challenge in Supreme Court proceedings 55032 of 2006, pending which the money had been paid into a Controlled Monies Account. It was said in para 46 that John Holland had no entitlement under the contract to the Detonator Dump monies, and -

47. If, in the Supreme Court proceedings referred to in paragraph 46 [sic: 45] above, the Court declines to declare Mr Sundercombe's determination void, and the Cross-Claimant as a result and pursuant to s 23 of the Act pays the Detonator Dump monies to the Cross-Defendant, then in the premises of the paragraph above:

(a) the Cross-Claimant will have overpaid the Cross-Defendant in the amount of the Detonator Dump monies;

(b) the Cross-Claimant will be entitled to restitution of the Detonator Dump monies pursuant to s 32 of the Act; and

(c) alternatively, the Cross-Defendant will be unjustly enriched at the expense of the Cross-Claimant in the amount of the Detonator Dump monies and the Cross-Claimant will be entitled to restitution of those monies."

30 Nothing further was said in the appeal with respect to the challenge to the validity of the determination in relation to the Detonator Dump monies. Proceedings 55032 of 2006 were the proceedings in which McDougall J decided the separate question. The appeal papers did not disclose some other branch of the proceedings embodying the challenge. It is a puzzle, and it may be that the RTA had not at the time of McDougall J's decision (and even now has not) paid the Detonator Dump monies to John Holland. However, the puzzle need not be solved. Assuming failure of the challenge, it can be taken that the RTA will comply with its statutory obligation to pay John Holland, and a claim to recovery of the Detonator Dump monies will arise. Assuming success of the challenge, the Detonator Dump monies as an adjudicated amount will fall away. The unpaid status of the Detonator Dump monies does not as a practical matter call for consideration in deciding the separate question.

Reduction of security pursuant to cl 5.7

31 John Holland submitted that the RTA's decision not to return half the security was not a valid exercise of the power conferred by cl 5.7, because the power was exercised for a purpose other than that for which it was conferred. If that were so, it would not automatically follow that half the security had to be returned; the RTA could decide again. The RTA said that that should be the result. John Holland said that if its argument in support of its submission were accepted any decision other than to return half the security would not be open to the RTA. It is not necessary to decide between these positions.

32 The argument ran as follows -

(a) clause 5.1 of the Conditions stated the purpose for which security was provided, being "*the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract*";

(b) the power conferred by cl 5.7 had to be exercised consistently with this purpose, so that the RTA could only decide not to reduce the security where its retention was necessary to ensure the due and proper performance of the contract or satisfaction of John Holland's obligations thereunder;

(c) the RTA exercised its power, by the decision conveyed by its letters of 24 March and 6 April 2006, in order to hold the security as security for recovery of the money paid by it following the adjudicators' determinations and claimed by it in the cross-summons ("*the cross-summons recovery*": for reasons earlier given, the unpaid status of the Detonator Dump monies does not call for separate consideration).

(d) this was outside the purposes derived from cl 5.1, because –

(i) being only a claim to recovery of money, there was no question of ensuring due and proper performance of the contract; and

(ii) as a claim to recovery of money, any entitlement to recover the money arose under s 32 of the Act, and the obligation which recovery would satisfy was an obligation under the Act and not an obligation under the contract.

33 The argument required that the only occasion for holding the security was as security for the cross-summons recovery. It is not necessarily the case that the security was to be held only against the outcome of the disputes

raised in the cross-summons. The RTA's letter of 24 March 2006 referred to "substantial existing disputes … which are set out in the payment schedules", and in the absence of payment schedules or other information on the subject the disputes may have gone beyond those raised in the cross-summons and underpinned a purpose consistent with that derived from cl 5.1. John Holland's letter of 17 February 2006 spoke of the RTA withholding money *"in relation to the asphalt voids issue's [sic] pending an equitable solution"*, so there seems to have been a dispute over asphalt voids, and without knowing the amounts involved it can not be said that security was inappropriate in relation to that dispute. It may be noted that para 15 of the RTA's response earlier set out states that the existing disputes referred to in the letter of 24 March 2006 "include" disputes in relation to amounts paid by the RTA to John Holland following adjudications under the Act.

34 McDougall J said in [8] of his reasons that the substantial existing disputes "appear to be those now advanced by the RTA in its cross-claim", and his Honour's reasons do not indicate a submission by the RTA to the contrary.

35 The RTA was rather equivocal in the appeal: it did not concede that there were no other disputes, but it joined with John Holland in inviting the Court nonetheless to come to a conclusion on the separate question. If there were occasion for holding the security otherwise than as security for the cross-summons recovery, however, nothing is known of the other disputes and the question could not be answered by selecting one of its alternatives.

36 John Holland submitted that the correct view was that the disputes were only those raised in the cross-summons and the occasion for holding the security was only the cross-summons recovery. On that view, relevantly favourable to John Holland, I consider that the appeal fails. Accordingly, I am prepared to decide the appeal on the basis that the only occasion for holding the security was as security for the cross-summons recovery.

37 The RTA accepted that the power in cl *5.7* had to be exercised for a proper purpose. It did not accept that the purpose was constrained by the purposes in cl 5.1, submitting that any limitation on the exercise of the power was to be found in cl *5.7* in its distinct criterion of the Principal's opinion of what was just and equitable. It submitted that, even if the exercise of the power was constrained by the purposes in cl 5.1, its decision not to return half the security was a valid exercise of the power.

38 McDougall J did not accept *"the RTA's primary submission that the discretionary exercise under cl 5.7 was not constrained by the purposes stated in cl 5.1",* saying -

"Security is not given at large. It is given for particular (although large, and widely described) purposes. Consideration of the question posed by cl 5.7 - whether to release any part of the security - would normally require some analysis of the claims that might be made upon it. That in turn requires the decision maker to be reasonably satisfied that the claims are "valid": ie, referable to performance of the contract or to John Holland's obligations under it. In other words, the decision maker must be able to form the view, acting reasonably, that the security may be required for a purpose that can be justified under cl 5.1."

39 I am content to assume that that is correct. In my opinion, however, John Holland's argument falls down at the point of the RTA's purpose being outside the purposes derived from cl 5.1. The security could properly be retained as security for the cross-summons recovery.

40 The scheme of the Act is well known: the Act describes itself in s 3 -

> ***"3 Object of Act***
>
> *(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
>
> *(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
>
> *(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
>
> *(a) the making of a payment claim by the person claiming payment, and*
> *(b) the provision of a payment schedule by the person by whom the payment is payable, and*
> *(c) the referral of any disputed claim to an adjudicator for determination, and*
> *(d) the payment of the progress payment so determined.*
>
> *(4) It is intended that this Act does not limit:*
>
> *(a) any other entitlement that a claimant may have under a construction contract, or*
> *(b) any other remedy* that a claimant may have for recovering any such other entitlement."

41 The procedure of payment claims (s 13) and payment schedules (s 14) will bring liability to pay the claimed amount if a timely payment schedule is not provided (s 15) or liability to pay any amount recognised in the payment schedule (s 16). The amount may be recovered from the respondent as a debt due to the claimant in a court of competent jurisdiction.

42 If there is then an adjudication, the adjudicator determines the amount (if any) to be paid to the claimant (s 22) and that amount must be paid by the respondent to the claimant (s 23). If it is not paid, the claimant may obtain an "*adjudication certificate*" (s 24) and file it "as a judgment for a debt in any court of competent jurisdiction",

and it *"is enforceable accordingly"* (s 25). Other contractual rights and obligations do not come into the adjudicator's determination or the enforcement of the statutory liability. In an adjudication the adjudicator is confined to determination of the progress payment (s 22), and in any court proceedings for recovery as a debt or to have the judgment set aside the respondent cannot bring a cross-claim or raise a defence in relation to matters arising under the contract (ss 15, 16, 25).

43 Section 32 of the Act provides -

*"**32 Effect of Part on civil proceedings***

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
(a) may have under the contract, or
(b) may have under Part 2 in respect of the contract, or
(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

44 Any liability arising under the Act, whether prior to or by virtue of a determination or translated into a judgment, has been described as an interim progress payment on account (***Brodyn Pty Ltd v Davenport*** [2003] NSWSC 1019 at [18] per Einstein J), and in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [96] Palmer J spoke of the scheme of the Act as "*pay now, argue later*". There are many cases in which this has been recognised. In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 Hodgson JA, Mason P and I agreeing, said at [51] -

"The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss 3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss 3(3), 25(4)."

45 The respondent cannot oppose a payment claim, or if there is a judgment upon filing an adjudication certificate cannot seek to impugn the judgment, in reliance on matters arising under the contract, so rights under the contract are preserved and can be otherwise asserted. The statutory liability established by an adjudicator's determination can be challenged only on limited grounds: ***Brodyn Pty Ltd v Davenport*** (2004). So it is open to the respondent (or the claimant – an adjudicator's determination may be adverse to a claimant) to contend in a final working out of the contractual mechanisms or in other proceedings for a result different from that determined by the adjudicator. Statutory liability otherwise than that established by an adjudicator's determination is also not final, and either party may in the course of a final determination contend for a different result, see s 32(1) and (2). Section 32(3)(a) then states the obvious, that there must be allowance in any other proceedings for an amount which has been paid. Section 32(3)(b) may be unnecessary, because an order in the other proceedings that the claimant pay money to the respondent will have the effect of restitution; however, it does enable an order for restitutionary interest and, if there has been a judgment upon filing an adjudication certificate, an order contrary to the judgment: as was said by Handley JA in ***Falgat Construction Pty Ltd v Equity Australia Corporation Pty Ltd*** (2005) 62 NSWLR 385 at [21] -

"Finally, s 3(b) makes a judgment entered under s 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid."

46 Thus the RTA (and John Holland) remained entitled to assert and enforce their rights under the contract. That included, in the RTA's case, to contend as to the Spoil monies that John Holland was to be paid for the excavation work in Cut 4 under Pay Item R42P15.1, or was not to be paid for it at all; as to the Latent Condition monies that there was not a latent condition; and as to the Detonator Dump monies that the Superintendent's certification of the claim had been correct. The contractual mechanisms for working out the parties' rights under the contract still operated, and had to be followed – the adjudicated claims were only part of the contractual tapestry. In giving effect to the contractual mechanisms there would have to be allowance for the amounts paid, quite apart from s 32(3)(a). If it came to proceedings (including arbitration under the "*arbitration process*" in the contract), the parties' rights under the contract would again be worked out with allowance as recognised in s 32(3)(a), and perhaps orders as contemplated by s 32(3)(b) although there could be an order that John Holland pay money to the RTA without the necessity to call it an order for restitution of money paid under or for the purposes of the Act.

47 Under the contract the time will come when the Superintendent issues a Final Payment Schedule. Whether or not it is a species of the genus of Payment Schedules, and for that reason could include amounts which the Principal was entitled to deduct (cl 42.1.2), it may include on one side of the ledger payment of nil or of only $1,815,390 for the Spoil Claim work, and so on for the other adjudicated amounts; and on the other side of the ledger the payments of the adjudicated amounts to John Holland. The result may be that it sets out an amount determined by

the Superintendent as an amount finally due from John Holland to the RTA (cl 42.7.2.), and if it does that amount will be "in connection with the work under the Contract" (ibid).

48 John Holland will then be contractually obliged to pay the amount to the RTA (cl 42.7.4). If it disputes its liability on the ground that it was entitled to payment of an amount or of more than $1,815,390 for the Spoil Claim work, the dispute resolution procedures in cl 45 may be engaged, and so also with respect to the other adjudicated amounts. John Holland will not be limited to contending for the adjudicated amounts – it will be open to it, for example, to contend that it was entitled to the $5,721,654.45 claimed in the Detonator Dump claim rather than the $4,845,760.59 determined by the adjudicator. There could be curial proceedings outside the contractual dispute resolution procedures.

49 John Holland accepted, as recorded by McDougall J at his [9], that the RTA "intends to prosecute the claims made in the Cross-Summons and that [it] is acting bona fide in doing so". The intention and bona fides must extend to a working out of the contractual mechanisms, and to bona fides in the RTA anticipating an outcome that John Holland must pay to it an amount greater than the value of half the security. That contractual obligation to pay is arguably within John Holland's "*due and proper performance of the Contract*" in cl 5.1, but it is certainly within "the obligations of the Contractor under the Contract" in cl 5.1. The security can be held for the purpose of satisfying the obligation, as is reinforced by cl 42.7.4(b) specifically in connection with payment of an amount shown due in a Final Payment Schedule, and by cl 46 more generally referring to deduction from the security of "any debt due from the Contractor to the Principal under or by virtue of any provision of the Contract". On the basis favourable to John Holland earlier mentioned, a purpose in the RTA outside that for which the power in cl 5.7 was conferred has not been shown.

50 At the hearing of the appeal there was debate over cl 42.7.1(d), by which the Final Payment Schedule was to be issued if "(d) there are no outstanding claims or disputes between the Contractor and the Principal". Did it mean that the Final Payment Schedule could not issue until every claim or dispute had been brought to finality, including by decision of the RTA's claims in its cross-summons? Or were claims or disputes not "outstanding" for the purposes of the clause if the Superintendent or the Principal had made a determination, notwithstanding that there could be dispute or difference in relation to the determination? Sensible contract administration would suggest the latter, as could the conclusion to cl 45.7 earlier set out so far as it contemplated arbitration after the issue of a Final Payment Schedule of disputes not in relation to the Final Payment Schedule.

51 John Holland and the RTA took opposed positions, and sought thereby to support their respective cases. I do not think it matters, and it is not necessary to come to a conclusion. In the uncomfortable event that the Final Payment Certificate must await decision of the RTA's claims in its cross-summons, the decision will be that John Holland must pay nil or some amount to the RTA. If there is an amount, it may or may not be in terms of restitution. Whether or not it is in those terms, the Superintendent will include the amount on the appropriate side of the ledger in determining the amount finally due from one party to the other. It would be no different if the Final Payment Certificate had to await, for example, the arbitration of a dispute or difference. And the process of determining the amount finally due from the Principal to the Contractor or from the Contractor to the Principal (cl 42.7.2) will be the same, save that, the Superintendent's or Principal's determination of entitlement to the Spoil monies and other money the subject of the adjudications will be included in the ledger, if the Final Payment Certificate can issue before every claim or dispute has been brought to finality.

52 The key submission by John Holland was that the RTA's entitlement to recover the adjudicated amounts arose under s 32 of the Act, from which it argued that any obligation on its part was not an obligation under the contract. On one view, the RTA need not have claimed recovery of the adjudicated amounts by filing its cross-summons; it could have awaited the Final Payment Certificate. It did claim recovery of the adjudicated amounts, but (on the assumption of no other disputes) as a way of arriving at the final determination of the parties rights and obligations, presumably one which could then be taken up in the Final Payment Certificate. Even then, it did not confine its claim to a restitutionary order pursuant to s 32 of the Act; and in any event such an order would recognise and give effect to the RTA's contractual rights and John Holland's correlative obligations, with the obligation under the order emboding John Holland's obligations under the contract. It would still fall within the purposes derived from cl 5.1.

53 The entitlement to hold security for payment of money, payment being one of the obligations under a contract, is not lost when the contractual obligation has "*passed into judgment*" (the phrase is from ***Blair v Curran*** (1939) 62 CLR 484 at 532 per Dixon J). That is so whether the judgment is an order made in the exercise of the court's general powers or, so far as s 32(3)(b) of the Act gives a special power, in the exercise of the special power under the Act. But the RTA may achieve recovery of the adjudicated amounts otherwise than by a restitutionary order pursuant to s 32 of the Act, and whatever the basis of an order whereby it is entitled to recovery there will be (whether apart from decision of the cross-summons or after decision) a Final Payment Certificate which, if it shows money owing from John Holland to the RTA, is a contractual obligation apt for recourse to the security. The key submission is in my opinion untenable.

54 In the course of oral submissions John Holland put a different submission, albeit one not fully articulated; I should seek to record and deal with it. It was to the effect that upon practical completion John Holland was entitled under cl 5.7 to what was called "*interstitial*" return of half the security, simply because a Certificate of Practical Completion had issued. It was said, as I understand it, that there was the entitlement even if there were no question of payment and recovery of adjudicated amounts and there were other claims or disputes outstanding

which could result in John Holland having to pay money to the RTA. This submission, which does not seem to have been made to McDougall J did not turn upon an improper purpose of securing the cross-summons recovery. Why there was the entitlement was not explained, beyond the assertion that it was reasonable for John Holland to get back half the security.

55 It is sufficient to say that nothing in the contract supports entitlement to interstitial return of security, and it can not stand with the discretion in cl 5.7, the direct provision in cl 42.7.4 that there is no obligation to release security until payment of money due under a Final Payment Schedule, and the implicit provision in cl 46 to the same effect. John Holland submitted that these provisions should be read as applying only to the half security left after return pursuant to cl 5.7. This assumed what was in question, and there is neither contractual nor common-sense reason to do so.

Voidness

56 John Holland submitted that if the contract operated so as to permit retention of the security, it encountered the voidness directed by s 34 of the Act -

> "***34 No contracting out***
>
> *(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*
>
> *(2) A provision of any agreement (whether in writing or not):*
>
> *(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
>
> *(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,*
>
> *is void."*

57 John Holland relied on s 34(2)(a), and said that it could not "get home on (b)". It had some difficulty identifying the provisions of the contract which it said were void. In the amended summons it claimed declarations that cll 5 and 42.7 were void so far as they permitted retention of security for recovery of or repayment of the adjudicated amounts, and that cl 46 was wholly void. McDougall J recorded at his [11] that it was submitted that cll 42.7 and 46 were void, but concluded at [66] that none of cl 5.7, 42.7 or 46 was void. In its written submissions on appeal John Holland said that cl 5.7 was void and all of cl 5 was consequentially void. That would have left it without a means of reduction of the amount of security, and in the written submissions it said that all the security had to be released, it seems as some kind of restitutionary entitlement. It submitted that cll 5.1 and 42.7 were void *"so far as they enable the RTA to use the security for the purpose of ensuring the return of adjudication monies paid by John Holland"*, and finally came to submit that cll 5.1 and 42.7 were void – apparently wholly so, and leaving cl 5.7 intact. Whether and how there could be partial avoidance through the operation of contractual provisions in some circumstances but not in others – in the present case, if relied on for some purposes but not for the impugned purpose – was not explored in its submissions. Nor was how cl 5.7 could remain if the provision under which security had initially to be provided was void.

58 Passing over these difficulties, John Holland submitted that the only means of "*undoing*" an adjudicator's determination was a restitutionary order under s 32 of the Act. If the contract operated so as to enable the RTA to use the security for the purpose of ensuring the return of the adjudicated amounts paid by John Holland, its effect was to "undo" the adjudicators' determinations, which could not be done; so there was voidness. It was said that the Act confers upon a contractor a statutory right to retain an adjudicated amount, and that the right can not be negated by a superintendent.

59 The submission relied on an observation by Ipp JA, with whom Hodgson and McColl JJA agreed, in ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** [2005] NSWCA 248. The contractor had made a progress claim as a payment claim under the Act. Although it is unclear from the reasons, it appears that the amount of the claim became payable because a payment schedule was not provided, and that payment was made but subject to the condition that it be secured by a bank guarantee provided by the contractor (at [215]). If this was not payment for the purposes of the Act, the contractor could suspend the work. Agreeing with Master Macready (as his Honour then was), Ipp JA held that payment conditionally upon provision of a bank guarantee was not payment precluding suspension of the work, saying -

> "*[219] The purpose of the Act was to ensure that contractors and sub-contractors, in the circumstances stipulated, could obtain a prompt interim progress payment on account, pending final determination of all disputes (**Brodyn Pty Ltd v Davenport** [2003] NSWSC 1019 per Einstein J; see also **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140 at [96] per Palmer J). If the requirements of the Act concerning such interim progress payments could be satisfied by payments made conditionally against the provision of bank guarantees, the purpose of the Act would be defeated. In the circumstances, I agree that the payment of 18 November 2002 did not cause the suspension to cease; the suspension continued until the Contract was terminated.*"

60 John Holland submitted that his Honour regarded payment against a bank guarantee as defective because, as he had observed at [216], by reason of the requirement to provide a bank guarantee the contractor did not have access to the funds represented by the payment for use in its day to day operations. It said that in the present case retention of the security following payment of the adjudicated amounts meant that there was a "*clog*" on its use of the adjudicated amounts, and that if the security was retained the purpose of the Act would similarly be defeated.

61 ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** does not assist John Holland. Ipp JA was not concerned with voidness under s 34. The payment received by the contractor in that case was apparently sterilised because at the same time a like amount had to be committed to its bank; in the present case, the security was given long before the adjudicated amounts were paid, it was given in respect of performance of the contract in general, and John Holland's cash flow was enhanced by its receipt of the adjudicated amounts. The security was not, as was submitted, a "*clog*" on its use of the adjudicated amounts.

62 It is not correct that retention of security "*undoes*" an adjudicator's determination, or that a superintendent who in performing his contractual function comes to a determination negates a statutory right to retain an adjudicated amount. The adjudicator's determination remains, and brings payment of the adjudicated amount, but that is interim and subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings. If in civil proceedings it is decided that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, that does not undo the adjudicator's determination. It has done its work in ensuring "*prompt interim progress payment on account, pending final determination of all disputes*" (per Ipp JA in ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** at [219], above). So also if, in the manner earlier described, the contractual mechanisms result in a contractual obligation on the principal to pay the contractor or the contractor to pay the principal. The contractor's right under the Act is to receive the adjudicated amount, but subject to final determination, and if the final determination involves the superintendent determining that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, the superintendent is not negating the contractor's statutory right.

63 Section 34 of the Act requires that the contractual provision exclude, modify or restrict, or have the effect of excluding, modifying or restricting, "*the operation of this Act*". The Act operated to require that the RTA pay the adjudicated amounts to John Holland, and it did so. (In relation to the Detonator Dump monies, it may be taken that it has done so or will do so if the challenge to the adjudicator's determination has failed or fails). There is no effect contrary to that operation of the Act if, in the final determination of the position between the parties, one party has to pay money to the other because the final arbiter takes a different view from that of the adjudicator. Section 32 of the Act preserves the final determination, by the contractual mechanism or by proceedings. Nor is there an effect contrary to that operation of the Act if security provided under the contract is retained, the contract on its proper construction and operation so permitting, to satisfy John Holland's obligation to pay money to the RTA if that is the outcome of the final determination.

Orders

64 I propose that the appeal be dismissed with costs.

65 **TOBIAS JA**: I agree with Giles JA.

66 **McCOLL JA**: I agree with Giles JA.

B W Collins QC & M Christie & M A Izzo – Appellant instructed by Andrew McKeracher
J E Sexton SC & R C Scruby – Respondent instructed by Clayton Utz