JUDGMENT : McDougall J. T&C List. New South Wales Supreme Court. 5th September 2006

1 The plaintiff (John Holland) as contractor and the defendant (the RTA) as principal are parties to a contract whereby John Holland undertook to construct a roadway and associated bridgeworks for the RTA. Practical completion has been achieved, but the defects liability period has not expired. The question today for decision is whether John Holland is entitled to the return of one half of the security given by it. This involves issues as to the validity of:

· the RTA's decision not to release any part of the security; and

· some clauses of the contract upon which the RTA relied to support that decision.

Background

2 It is common ground that the contract was one to which the *Building and Construction Industry Security of Payment Act* 1999 (the Act) applied. From time to time, John Holland made payment claims for progress payments under the contract. There were, relevantly, disputes as to particular claims raised in three of those progress claims.

3 The first disputed claim related to what the RTA in its cross-claim in these proceedings describes as "Spoil Claim work" at a particular rate per cubic metre. The superintendent under the contract determined that a different (and lower) rate was payable, and allowed the claim on the basis of that different rate. The dispute thereby constituted was referred to adjudication. The adjudicator (Mr Hunt) decided in favour of John Holland. The amount at stake exceeds $3.76 million.

4 The second disputed claim related to what the RTA calls "the Latent Condition claim". John Holland claimed that certain work carried out by it related to a latent condition as defined in the contract, and claimed payment accordingly. The superintendent rejected that claim. The dispute thereby constituted was referred to adjudication. The adjudicator (Mr Sullivan) determined that dispute in favour of John Holland. The amount allowed by Mr Sullivan in respect of the Latent Condition claim exceeds $1.8 million. Mr Sullivan also determined that John Holland was entitled to a further amount of $438,000 in respect of the Spoil Claim work.

5 The third disputed claim related to what the RTA calls "the Detonator Dump claim". John Holland claimed payment and an extension of time in respect of the work the subject of this claim. The superintendent allowed the claim for payment to the extent of $1.8 million (the claim exceeded $7.9 million). The dispute thereby constituted was referred to adjudication. The adjudicator (Mr Sundercombe) determined that John Holland was entitled to an amount in excess of $4.8 million in respect of the Detonator Dump claim.

6 The RTA's case, as propounded in its cross-claim, is that John Holland has been overpaid because of what it says were erroneous (but not reviewably erroneous) decisions by the three adjudicators. It seeks restitution of the amounts that it says have been overpaid, together with interest, and other relief.

7 Practical completion was achieved on 28 November 2005. The defects liability period will expire on 28 November 2006. Under the contractual regime (it will be necessary to go to the detail of the relevant clauses), the RTA may return up to one half of the total security given by John Holland once practical completion has been achieved if it considers it "just and equitable" to do so (cl 5.7). Once the defects liability period has expired, John Holland must lodge a "Final Statement" (cl 42.6), which the superintendent must assess and certify (cl 42.7). The amount certified as owing (by the RTA to John Holland, or by John Holland to the RTA, as the case may be) must then be paid (cls 42.7.3, 42.7.4). If an amount is certified as owing to John Holland, all security then held must be released; but if an amount is certified as owing to the RTA, the security need not be released until that amount is paid (ibid).

8 When practical completion was achieved, John Holland made application to the RTA for the return of one half of the security given by it. The RTA refused. The reason given for the refusal was that there was no obligation to return any part of the security, but only a discretion to do so if it were just and equitable; and it was not just and equitable to do so "as a result of the substantial existing disputes between the parties, which are set out in the payment schedules issued under the Contract" (letter of 24 March 2006 from the RTA to John Holland). The "substantial existing disputes" appear to be those now advanced by the RTA in its cross-claim, which I have summarised above.

The issues

9 On 16 June 2006, I ordered "that the question whether the Plaintiff is entitled to the return of one of the two unconditional undertakings … which the Plaintiff provided to the Defendant be heard separately to and before the cross summons filed and served by the Defendant". I did so on the basis of, among other things, the following statements made by Mr Collins QC, who appeared with Mr Christie and Mr Izzo of counsel for John Holland, that:

· *"upon the hearing of the Plaintiff's Summons the Plaintiff will rely only upon the provisions of the contract, the Building and Construction Industry Security of Payment Act 1999 and in particular but without limitation s.34 of that Act; and the Defendant's letters of 24 March 2006 and 6 April 2006 and the Defendant's Cross Summons;*

· *the Plaintiff accepts that the Defendant intends to prosecute the claims made in the Cross Summons and that the Defendant is acting bona fide in doing so."*

10 At my suggestion the parties reformulated the separate question as follows (I have amended their wording slightly, but in form only, not in substance): *"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*

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- *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."

11 The substantial issues that were argued on the hearing of the separate question were:
(1) Was the RTA obliged to act reasonably and in good faith in considering whether to release part of the security once practical completion had been achieved?
(2) Assuming that such a duty was owed, did the RTA comply with it?
(3) Are cls 42.7 and 46 of the contract (upon which the RTA relied to support the proposition that its decision not to release any part of the security was reasonable) void by reason of s 34 of the Act?

Relevant provisions of the contract

12 Clause 5 of the contract dealt with security, including its purpose, provision, amount, reduction and release. I set out the relevant sub clauses:

"***5. 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 % 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. …

5.5 Conversion of Security

If the Principal becomes entitled to exercise all or any of its rights under the Contract in respect of the security the Principal may convert into money the security that does not consist of money. The Principal shall not be liable for any loss occasioned by such a conversion. …

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 reductions 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. … "

13 Clause 36 obliged John Holland to keep the work clean and tidy, and to remove surplus material and plant, and after completion of the work to leave the site clean and tidy and free of rubbish. If it failed to comply with those obligations, the RTA might do the necessary work; and if the RTA did so, the cost incurred would be a debt due from John Holland to the RTA which could be recovered pursuant to cl 46.

14 Clause 37 dealt with defects liability. Not surprisingly, it obliged John Holland to rectify defects in the works as directed during the 12 months' defects liability period. If John Holland did not rectify defects so notified to it, the RTA could do so and, once again, could recover the cost from John Holland under cl 46.

15 Clauses 42.6 and 42.7 provided for John Holland to make, and the Superintendent to assess, a final claim at the expiration of the defects liability period. They read as follows:

"***42.6 Final Statement by Contractor***

The Contractor must lodge with the Superintendent a statement endorsed "Final Statement" within 28 days after the end of the last Defects Liability Period.

The Final Statement must show all money which the Contractor claims to be due from the Principal in connection with the work under the Contract other than money under a claim which is barred under clause 48. If barred claims are included, they may be ignored by the Superintendent and the Principal.

The Contractor may not make any claim against the Principal or the Superintendent in connection with the work under the Contract after the end of the period for lodgement of the Final Statement.

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."

16 It might be noted that, by cl 42.5, the issue of the final payment schedule (cl 42.7) constitutes "conclusive evidence that all work under the Contract has been finally and satisfactorily executed by [John Holland] except in so far as it is provided in any proceedings … or … arbitration … that the said Final Payment Schedule is erroneous by reason of" fraud, defects or omissions or accidental or arithmetical error. (Fortunately, no question arose as to the "finality" of a certificate subject to such wide exclusions.)

17 Clause 45 dealt with dispute resolution. It laid down a staged procedure: decision by the superintendent; review by the RTA; expert determination (binding up to an amount of $500,000); and, ultimately, arbitration. Clause 45.4 gave the RTA the right to deduct, from any amount determined by the expert to be payable to John Holland, any amount due by John Holland to the RTA (including for liquidated damages). Clause 45.7 gave the RTA a discretion to withhold payment of any money where the entitlement to it was the subject of arbitration, but otherwise denied any entitlement to withhold money simply because there was an arbitration.

18 Clause 46 gave the RTA a number of rights, including of access to the security in certain circumstances. It provided:

" 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."

Did the RTA act reasonably in deciding not to release any security?

19 In my view, the separate question (insofar as it turns on the "**reasonable**" character of the RTA's decision not to release any part of the security) can be decided on the assumption that, although cl 5.7 imposed a discretion on the RTA, it was bound to act in reasonably good faith and in the exercise of that discretion. In other words, I propose to deal with the separate question on the basis that the first issue (para [11(1)] above) is taken to have been answered in favour of John Holland.

20 It is not necessary to consider any question of "**honesty**". Whether honesty is something separate to good faith, or is comprehended within the concept of good faith, is a question that can be left to another day, because it was not submitted that the RTA's decision was afflicted with any want of honesty, let alone any possibility of dishonesty. Nor is it necessary to consider "**good faith**" separately from "**reasonableness"** because John Holland's case focussed (with the exception referred to in para [31] below) on the latter. Thus, no question arises as to the content of the duty of good faith, or whether it connotes something more than acting reasonably and honestly.

The construction of cl 5.1

21 The starting point is to be found in cl 5.1. Mr Collins submitted that the clause 5.7 discretion was limited by the purpose stated in cl 5.1, namely "*ensuring the due and proper performance of the Contract and of satisfying the obligations of [John Holland] under the Contract*". He submitted that this referred in essence to the work undertaken by John Holland pursuant to the contract.

22 Mr Collins referred to **Hudson's Building and Engineering Contracts** (11th Edition by I N Duncan Wallace QC, 1995) at Vol 2, 1498-1499, where a tripartite division of guarantees is proposed. They may be summarised, or paraphrased, as follows:

(1) Guarantees of the payment obligations owed by one party to the other for work or goods to be done or supplied by the other.

(2) Guarantees of compliance with specified and limited obligations.

(3) Guarantees of proper performance by the contractor of all the obligations owed by it as consideration for the contract price.

23 To the extent that I understand the submission (and I am not sure that I do), I do not think that the passage from **Hudson**, upon which reliance was placed, can bear the weight that, apparently, was sought to be placed upon it. Firstly, the learned author did not suggest that the tripartite classification proposed was exhaustive; on the contrary, the introductory words refer to "*the commoner types*" of "*[g]uarantees associated with construction contracts*". Secondly, if the matter were to be determined by reference to **Hudson's** classification, it would seem to me that, by default, the security provided for the purpose stated in cl 5.1 would fall into the third category: which would then require an exhaustive analysis of the contract to understand what are "*all … [the] various contractual obligations owed in return for the contract price*". (As will be seen, this was in fact the analysis proffered by the RTA.) Thirdly, I think, a resolution of the question requires not some *a priori* enquiry as to taxonomy but, instead, an analysis of the relevant contractual provisions to see what, on their proper construction, they require or permit to be done.

24 Mr Sexton SC, who appeared with Mr Scruby of counsel for the RTA, put as the RTA's primary submission that the discretionary exercise under cl 5.7 was not constrained by the purposes stated in cl 5.1. I do not think that this is correct. 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.

25 Mr Sexton submitted in the alternative that cl 5.1 made it plain, both in its own words and in the overall contractual context in which it is found, that the security was given in respect of all obligations owed or undertaken by John Holland pursuant to the contract. One of those obligations, he submitted, was that imposed by cl 42.7.4: to pay to the RTA any amount certified as owing by the superintendent in his final payment schedule. Further, he submitted, cl 42.7.4 of itself entitled the RTA to retain the security until John Holland performed that obligation.

26 Strictly speaking, it may not be necessary to resolve this debate. The ultimate question is whether the RTA acted reasonably (or unreasonably) in coming to its decision not to release any part of the security. Insofar as the RTA's decision turned on the proper construction of cl 5.1, it could only have been relevantly unreasonable if the construction adopted (expressly or by implication) was not reasonably available: if no reasonable decision maker could have reached it. Thus, strictly speaking, it is necessary only to consider whether each of the competing constructions is fairly or reasonably open. But, since the question was fully argued, and because a resolution of it may in any event be relevant to an alternative submission put by Mr Collins (to which I shall refer later), I shall deal with it.

27 I do not think that, on its proper construction, cl 5.1 can be limited in the way that Mr Collins submitted it should. It may be – I express no concluded view – that if the purpose of the security were limited to "ensuring the due and proper performance of the Contract", then it might be limited to what one might call the construction obligations undertaken by John Holland under the contract. However (and perhaps to guard against such an argument), the clause is not so limited. The purpose extends to "satisfying the obligations of [John Holland] under the Contract."

28 Those latter words – the second part of the stated purpose – are capable of referring to all the obligations of John Holland under the contact. Indeed, it is difficult to see how the word "obligations" could be read down: particularly if, as the wording of the clause suggests, the parties perceived some distinction between due and proper performance of the contract on the one hand, and satisfaction of obligations under it on the other. To return to **Hudson's** classification, cl 5.1 requires the provision of security for the due and comprehensive performance by John Holland of all its "*various contractual obligations owed in return for the Contract Price*" (emphasis supplied).

29 This construction is confirmed (if it needs confirmation) by cl 42.7.4(b), which confirms that the RTA may hold security until the amount due to it from John Holland under the final payment schedule has been paid. That is a clear recognition that the obligations of John Holland under the contract for which the security is given include its contingent liability under cl 42.7.4. Clause 46, although in more general terms, reinforces the ability of the RTA to have recourse to (among other things) the security for the satisfaction of "any debt due from" John Holland to the RTA "under or by virtue of any provision of the Contract".

The nature of the RTA's claim

30 The parties debated at some length the precise nature and source of the RTA's claim to recover what it said were overpayments pursuant to the three disputed adjudication determinations. Mr Collins submitted that the claim (if any) arose only under s 32 of the Act. Section 32 provides as follows:

"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."

31 Thus, Mr Collins submitted, the claim was not one made under or by reference to the contract, and accordingly was not one for which the security could be held. To the extent that the purpose of the RTA in retaining the security was to hold it as security for such repayment (if any) as it might be found to be entitled to receive, that was a purpose extraneous to cl 5.1. This, he submitted, meant that it was an improper purpose, so that reliance upon it would demonstrate either want of good faith or unreasonableness.

32 Mr Sexton submitted that the claim was one arising under the general law, and recognised (rather than authorised) by s 32. He submitted that the claim was in substance one for money had and received upon a total failure of consideration: analogous to a claim for restitution of monies paid under a judgment set aside on appeal, or for monies erroneously paid under compulsion of law.

33 I do not think that it is correct to speak of s 32 as creating a restitutionary right. Its place in the scheme of the Act is to reinforce the interim nature of adjudication determinations, and to provide that parties' legal rights (as decided by a court or tribunal) are given full effect notwithstanding what may have been determined by an adjudicator and what may have been done in pursuance of, or obedience to, that determination.

34 Thus, if it were necessary to do so, I would conclude that the nature of the claim to repayment is analogous to that described by Handley JA (speaking with the concurrence of Mahoney and Priestley JJA) in ***Production Spray Painting and Panel Beating Pty Ltd v Newnham (No 2)*** (1992) 27 NSWLR 659 at 661-662.

35 In the event that any of the adjudications is found to have been erroneous (so that it is found that John Holland had no entitlement to be paid any disputed amount), there will have been demonstrated a total failure of consideration for the amount in question. It is clear that a common money count would lie in those circumstances: ***Lee v Mallam*** (1910) 10 SR (NSW) 876 at 885 (Sly J, with whom Cohen and Gordon JJ agreed).

36 Kirby P applied that principle in ***Government Insurance Office of New South Wales v Healey (No 2)*** (1991) 22 NSWLR 380 at 384, referring not just to "a common money count" but also to "its modern equivalent" (ie, I think, a restitutionary claim).

37 The legislature intended the process of dealing with progress claims to be speedy. In many human activities, speed and error are natural companions. Section 32 is the legislative recognition of the potential application of that truism to the scheme of adjudication of disputes.

38 Regardless of the precise classification of the restitutionary right, there is another answer to this aspect of Mr Collins' submissions. Clause 42.7.2 requires the superintendent to determine, and state in the final payment schedule, the amount finally payable by the RTA to John Holland or vice versa "in connection with the work under the Contract". The amounts in question were paid pursuant to John Holland's assertions that they were due for work under the contract. I do not think that John Holland should be heard to argue that they are anything other than amounts "in connection with the work under the Contract". They are thus, if held to be repayable, amounts, or parts of amounts, payable under cl 42.7.4 by John Holland to the RTA. That is a sufficient connection to entitle the RTA to hold the security until they are paid (cl 42.7.4(b)).

39 On either analysis, there is no extraneous or improper purpose.

Conclusion: the decision was reasonable

40 It follows, although on Mr Collins' submissions subject to the validity of (among others) cl 42.7, that the RTA's decision not to release any part of the security following practical completion was not afflicted with any relevant want of good faith or unreasonable quality.

41 I have not referred to the various alternative arguments propounded by John Holland because, one way or another, they depended upon or assumed the correctness of its fundamental position as to the limited "purpose" for which its securities were given: the cl 5.1 argument. In circumstances where that fundamental position is either incorrect or arguably so (so that, in the latter case, reliance upon it could not of itself be unreasonable) it is unnecessary to burden these reasons by considering the various alternatives propounded by John Holland. Its

written submissions will remain with the papers (as will those of the RTA); and the oral submissions for each party have been recorded.

Invalidity: s 34

42 Section 34 of the Act provides as follows:

> ***"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."*

The parties' submissions

43 John Holland's submissions on this point were based on the proposition that cl 5.7 should be "*properly construed as permitting security to be retained for the purpose of securing the repayment of adjudication monies*" (written submissions dated 4 August 2006, para 62). If cl 5.7 were to be so construed, then, John Holland submitted, "*it necessarily undermines the scheme of adjudication that is established by the Act. It would permit a principal which has suffered an adverse adjudication determination to reverse the result of that determination without pursuing the procedure envisaged by the Act, namely, commencing proceedings in which an order for restitution of adjudication monies may be made under s 32(3)(b) of the Act. Instead, a principal could have recourse to security … . It could, as in the present case, refuse to reduce the amount of security – notwithstanding that the Contractor's obligations of performance under the Contract have been discharged and Practical Completion has been achieved …* " (ibid, para 64).

44 In supplementary written submissions dated 10 August 2006, John Holland extended its attack to cls 42.7 and 46. The basis was that if cl 42.7.2 permitted the superintendent to determine and certify an amount owing that was inconsistent with the results of adjudication determinations then it was void; and so were cls 42.7.4 and 46, which in substance would permit the RTA to give effect to any such determination of the superintendent. On this basis, John Holland submitted, the superintendent could issue a "*negative certificate*" pursuant to cl 42.7.4 "*which negates prior adjudication determinations*" and which would "*set at naught the entitlement to progress payments that the Act provides and protects …*" (citing ***Abacus Funds Management v Davenport*** [2003] NSWSC 1027 at paras [35] to [37]).

45 The RTA's primary position was that the s 34 point did not arise because the discretion under cl 5.7 was not qualified in any relevant way (in particular, by cl 5.1). I have dealt with that submission already (see para [24] above).

46 Alternatively, the RTA submitted, John Holland's s 34 submissions fell down at every step. The security was not to be characterized in the narrow way that was the foundational assumption of John Holland's submissions. John Holland's obligations under the contract had not been discharged. The security was not a precondition of payment with no other function (contrast ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** [2005] NSWCA 248 at para [219]). The rights given by the Act were interim rights, which might be reversed after a final determination in some appropriate forum, and it was not inconsistent with any provision of the Act or, more generally, its "purpose", to require a contractor to provide security pending such a final determination.

The contractual scheme

47 Clause 42.7 provides in essence for what in ***ACA Developments Pty Ltd v Sullivan*** (2005) 21 BCL 71 at 76 [16], although speaking of s 32(3), I described as "**a final 'accounting'** ". The process for which the clause provides takes place after the expiry of the defects liability period, which in turn is 12 months after the achievement of practical completion. The only construction work for which John Holland had any entitlement to be paid would have been performed prior to practical completion (on the basis that, as the term was defined in the contract, practical completion could not be achieved until the works were completed "except for minor omissions and minor defects". The only construction work that would be performed thereafter would be defects rectification, for which John Holland had no entitlement to be paid.) Thus, the cl 42.7 procedure would necessarily commence at a time when a payment claim could no longer be served (s 13.4(b)). In other words, by the time the machinery of cl 42.7 comes to be engaged, the regime for progress payments for which the Act (read in conjunction with the contract) provides has come to an end.

Analysis

48 I do not think that anything in cls 5.7, 42.7 or 46 (considered separately or together) excludes, modifies or restricts the operation of the Act. Plainly, cl 5.7 by itself does not do so.

49 It is correct to say that cl 42.7 requires a final reconciliation of the amount owing by one party to the other under the contract. It is equally correct to say that this final reconciliation may reach a conclusion inconsistent with that reached by one or more adjudicators in respect of payment claims made in respect of work performed under the contract. But it does not follow that the operation of the Act is thereby excluded, modified or restricted.

50 As I have already said, the Act (at least implicitly) recognises that adjudicators may err. That is why an adjudicator's determination is not finally conclusive of rights and liabilities under the contract. (I recognise that,

absent reviewable error, such a determination may be regarded as conclusive of an entitlement to the amount of a progress payment; but that is a different matter.)

51 In a practical sense, a final determination of a balance owing under a construction contract may "undo" the effect of a prior determination by an adjudicator of the amount of a progress payment. But that is because the final determination – however it is made – establishes, on a final basis, the amount owing by one party to the other. If the final determination is made by a court, or arbitral or other tribunal, of competent jurisdiction then it establishes finally and conclusively (of course, subject to any appeal that may lie) the relevant rights of the parties to the contract.

52 In the present case, the contract authorises the superintendent (in the first instance) to make a final determination of the balance due by one party to the other in respect of work under the contract. There is no reason why a final determination by the superintendent could not "undo" the effect of a prior determination by an adjudicator, in just the same way as a final determination by a court or arbitral or other tribunal might do so. Of course, the contract provides for a process of review of determinations by the superintendent (cl 45); there is no equivalent review process for the decisions of courts or arbitral or other tribunals (and such rights of appeal as there may be are not to be equated to the kinds of review for which cl 45 provides). But this relates to the finality of the superintendent's determination. It says nothing as to the subject matter of that determination, or as to its effects on prior determinations by adjudicators.

53 Mr Collins submitted that the superintendent could not revisit the proper amounts of progress payments when he performed his function under cl 42.7 and issued a final payment schedule. The submission was that the superintendent was, in respect of progress payments, "*functus officio*".

54 The parties entrusted a number of functions to the superintendent. One was the valuation and certification of progress claims (cl 42.1.2). Another was the issue of a final payment schedule (cl 42.7.1). Of course, there were many others; and not all connected with payment obligations.

55 A payment schedule issued by the superintendent in response to a monthly payment claim must identify the payment claim to which it relates, must be based on the superintendent's determination of the contract value of work carried out, and must give reasons if the amount certified is less than the amount claimed (cl 42.1.2).

56 A final payment schedule under cl 42.7 is required to set out the superintendent's determination of the amount finally due by one party to the other in connection with the work under the contract. In substance, what is required is a valuation of all work performed under the contract for which John Holland is entitled to be paid, and all other claims in connection with the work under the contract for which John Holland is entitled to be paid, and a comparison of the total of those amounts with the total amount actually paid and any amounts that under the contract John Holland is liable to pay to the RTA. I do not think that there is anything in this scheme which puts it outside the superintendent's power to reassess the value of work that has been valued by an adjudicator, even though the adjudicator's value may differ from that assigned by the superintendent in the latter's payment schedule under cl 42.1.2.

57 If Mr Collins' submission were correct, the superintendent would be bound to accept every valuation of work by an adjudicator, even though there might be a palpable or manifest, but not reviewable (in the ***Brodyn*** sense) error: for example, an application of the wrong rate for an item of work, an accidental duplication or double counting for a particular item of work, or a simple arithmetical error. Mr Collins did not shrink from embracing this consequence. He submitted that it was up to the party dissatisfied to take the dispute to the next stage of dispute resolution.

58 It is a little difficult to understand why the parties should have intended such a cumbersome procedure to be followed in the case of palpable or manifest error. If it be accepted that errors of the kind described in the previous paragraph might be cured, or corrected, on a final determination of the balance due under the contract (and Mr Collins did not submit to the contrary), there is no commercial utility in preventing the superintendent from doing this; in requiring him to rubber stamp the previous mistakes and send them on to the cl 45 processes. On the contrary, it seems to me, there is much utility (bearing in mind the availability of the cl 45 review process) in permitting the superintendent to attempt this task. For example, the commonsense and correctness of the superintendent's determination may be so clear that the party adversely affected by it will not trouble to take the next step.

59 Thus, I think, the construction for which Mr Collins contends lacks commercial utility; indeed, I think, it would lead to commercial inutility. I do not think that such an intention should be imputed to the parties unless their language permits of no other view; in my opinion, it does not.

60 Further, if Mr Collins' submission were correct, it would not be open to the superintendent to correct an obvious error that he himself had made in valuing a progress claim, in circumstances where John Holland had gratefully accepted the consequent payment. It is very difficult to see why this should be so.

61 In this context, what I have said in para [59], based on considerations of commercial utility and inutility, is equally applicable.

62 Once it is accepted, as I think it must be, that the interim determination of rights under the Act (either alone or in conjunction with the contract) and the final determination of rights under the contract are separate and distinct, I think it must follow that no one – superintendent or other – performing the latter function can be bound by a

determination reached in performing the former function. The processes are separate and distinct; and they remain so even though the same person is (at least "at first instance") involved in both of them. The performance of one function does not render that person *functus officio* in respect of the second.

63 In short, I do not think that a final determination of rights (including as to what is payable by one party to the other under the contract) has anything to do with the operation of the Act, in circumstances where that determination of necessity takes place after the rights given by the Act cease to be available (see para [47] above). It follows, in my view, that nothing done as part of or in the course of such a final determination of rights can exclude, modify or restrict the operation of the Act.

64 Equally, I think, there can be no purported, or effect of, exclusion, modification or restriction of operation.

65 That leaves for consideration s 34(2)(b). If the submission is to be made good in respect of that paragraph, it must necessarily mean that a contractor in John Holland's position might be deterred from taking action under the Act (ie, claiming a progress payment) by the prospect of being required to repay it, and of having its security retained until such repayment was made. The obvious answer to that is that John Holland was not. It entered into this contract, and made progress claims, knowing that at least one half of its security must be held (and, perhaps, the whole might be held) until the issue of a final payment schedule and the satisfaction of obligations certified by it. Although there was some suggestion in the correspondence of a pattern of dealings, or expectations, as to return of part of the security following practical completion, John Holland did not rest its case, under s 34, on any such conduct or expectation.

Conclusion

66 I do not think that any or all of cls 5.7, 42.7 or 46 (considered separately or together) are rendered void by operation of s 34(2) of the Act.

Conclusion and orders

67 John Holland's attacks on the RTA's decision not to release any part of the security fail. I make the following orders:

(1) Order that the summons be dismissed.

(2) Subject to order (3), order the plaintiff to pay the defendant's costs of the proceedings.

(3) Grant each party liberty to apply to vary or discharge order (2); any such application to be made within 7 days of today's date by notice in writing to my associate and to the other party; any such notice to specify both the order sought and in brief the reasons why it is sought.

(4) Order that the exhibits be retained for 28 days and thereafter held or disposed of in accordance with the Rules.

B W Collins QC/M Christie/M A Izzo (Plaintiff) instructed by Holding Redlich
J E Sexton SC/R C Scruby (Defendant) instructed by Clayton Utz