Lanskey Constructions P/L v Noxequin P/L (in liquidations) t/a FYNA Formworks, Anthony Veghelyi & Mediatite Today t/a Adjudicate Today

JUDGMENT : Associate Justice Macready : New South Wales Supreme Court : 3rd November 2005

1 The plaintiff is a builder who was engaged in the construction of a project known as Northgate Apartments in Wollongong. The first defendant was a sub-contractor to the plaintiff engaged to do the formwork. The sub-contract was entered into in March 2003. The second defendant, Mr Anthony Veghelyi, was the Adjudicator who carried out an Adjudication under the Act and the third defendant, Mediate Today, was the body, which appointed him. The second and third defendants have taken no part in the proceedings and submit to any orders except orders as to costs. A Judge of the Court has referred the proceedings to me for hearing.

2 The present dispute between the parties arises out of a payment claim made by the defendant against the plaintiff on the 4 April 2005. The payment claim sought a final payment and release of retention monies totalling $145,849.40 inclusive of GST. This was responded to by a very detailed payment schedule from the plaintiff dated 15 April 2005. The plaintiff's payment schedule rejected the defendant's claims and rather than any monies being owing by it to the defendant claimed that the defendant owed it an amount of $21,481.92 inclusive of GST.

3 The defendant lodged an Adjudication Application and the plaintiff lodged its Adjudication Response. Both were detailed documents. On 17 June 2005 the Adjudicator issued his determination dated 27 May 2005. He found that the plaintiff was obliged to pay the first defendant the amount of its claim, which inclusive of GST was $160,434.34.

The plaintiff's claims

4 The plaintiff seeks orders declaring that the determination is void having regard to the Adjudicator's treatment of:
1. The plaintiff's claims in respect of deductions.
2. The question of whether the payment claim had been served more than 12 months after the first defendant performed work under the contract.

5 The plaintiff submitted that in respect of both of these matters the Adjudicator failed to engage in a bona fide exercise of power and failed to accord the plaintiff natural justice.

6 In ***Brodyn v Davenport*** (2004) 61 NSWLR 421 at 441-443 the Court dealt with these matters at paragraph 55 as follows:

"*55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf.* ***Project Blue Sky Inc. v. Australian Broadcasting Authority*** *(1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf.* ***R v. Hickman; Ex Parte Fox and Clinton*** *(1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*"

7 The Court went on to deal with the measure of natural justice that the Act required to be given in paragraph 57 as follows:

"*57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in* ***Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited*** *[2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example* ***Ridge v. Baldwin*** *[1964] AC 40, Durayappah v. Fernando [1967] 2 AC 337,* ***Banks v. Transport Regulation Board (Vic)*** *(1968) 119 CLR 222 at 233, Calvin v. Carr [1980] AC 574 at 589-90,* ***Minister for Immigration v. Bhardwaj*** *(2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void .*"

8 In a number of cases the Court has set aside determinations on the ground of a breach of natural justice, however, there has only been one case where the Court has declared void a determination on the ground that the Adjudicator failed to engage in a bona fide exercise of his power. That was a case of **Timwin Construction v**

Façade Innovations [2005] NSWSC 548. His Honour Justice McDougall discussed the requirement of good faith to which Hodgson JA referred in **Brodyn** in these terms:

"*38 There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in* ***Brodyn.*** *Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in* ***Roberts v Hopwood*** *[1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

39 That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see ***Zhang v Canterbury City Council*** *(2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

40 As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in ***The Queen v Hunt; ex parte Sean Investments Proprietary Limited*** *(1979) 180 CLR 322 (Mason J) and in* ***Evans v Marmont*** *(1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq)."*

9 I turn to a consideration of the determination of each of the subject matters to which I have earlier referred.

The plaintiff's claim for deductions

10 The Adjudicator commenced to deal with this matter in the middle of the second page of his determination. He refers to some confusion about what is the intended price to which I will return later but fortunately he adopts the correct figure for the approved contract price and variations. There is no dispute about these and the amounts which have been paid. He referred to the result which it must be emphasised is the price for the performance of the whole of the work under the contract in these terms:

"*Approved contract price $1,277,153.10*
Approved variations $224,876.57
Subtotal $1,502,029.67
Paid $1,297,296.37
Balance $204,733.30

That balance plus GST appears to me to be the amount which, on the respondent's figures, the respondent owes the claimant before any deduction for set offs claimed by the respondent.

The spreadsheet Annexure "G" has a list of 69 "Items being charged" to the claimant by the respondent. Three are as small as $124.80. The largest is $66,000 for "Liquidated damages". One is for "Legal costs". All have a number. In the adjudication response of the response the respondent has a folder with tabs corresponding to the numbers. Under the tabs are copies of invoices. In the adjudication response the respondent gives reasons for the respondent's claims for the various items. These reasons, or many of them, seem to be additional to those contained in the payment schedule. The claimant has not had an opportunity to address these additional reasons. However, for reasons following, it is not necessary for me to go into each of the 69 claims for set off."

11 It will be seen from the Adjudicator's comments that he regarded all these deductions as "set offs". He then went on to give reasons in the next four paragraphs as to why they could not be considered. His argument referred to the fact that the parties had not appointed a Subcontract Superintendent. His conclusion seemed to have been that as the respondent did not appoint a Subcontractor's Superintendent the respondent had no right to make its own assessment of its entitlement to set off. His conclusion probably is wrong having regard to clause 37.7 which gave an express right of set off which apparently the Adjudicator had not noticed. He certainly did not refer to it. It also ignores the express statutory directive in s 10 (1) (iv) of the Act to value the cost of rectifying any defective work. However, whether or not his decision on this point is right or wrong is not the matter of consequence.

12 What is of consequence is that the Adjudicator has considered that all 69 claims were ones relating to set off. Plainly on the face of the documents before the Adjudicator this was not the case. In a number of claims the plaintiff made plain in its payment schedule with support in its Adjudication Response that the defendant had not completed all the work required under the contract. If there was a claim that the Subcontractor had not performed all the work, as this was a final claim the Adjudicator was bound to determine what amount the Subcontractor was entitled to in respect of the work that it had completed. Instead what has happened is that the Adjudicator has taken as his starting point the adjusted contract value less amounts paid and he has given no consideration to the omission or incompleteness of the work.

13 When one goes to the payment schedule one finds a variety of matters that could accurately be described as a form of set off. For example, the claim for liquidated damages to which the Adjudicator referred and claims for rectification works. However, there were a number of items where clearly there was reference to omissions for works not completed by the Subcontractor. There also was reference to costs to lay hobs that should have been formed by Fina. The total amount claimed for these omissions was $12,435.39.

14 It is not as though the parties' position was unclear in the payment schedule and I have already referred to the express description of incomplete work. Paragraph 7 of the plaintiff's Adjudication Response also made it plain

that the claim was in respect of both defective and incomplete works. It made reference to clause 37.7 of the contract to which I have already referred. When one goes to paragraph 8.1 there is set out detail for deductions from Fina's contract. In respect of each item referred to as a contract variation there is in 8.1 a description of the works, which were not completed, and reference to the supporting documentation. In 8.5 the failure to form the hobs is similarly dealt with in detail. There are other areas where there would be some doubt as to whether the claims were for work not done or for breach of contract. See for example 8.6 relating to clean up and 8.2 relating to scaffolding.

15 The course adopted by the Adjudicator when he described all the plaintiff's claims as set offs, avoided the necessity for him to consider the very detailed documents and submissions of the plaintiff that dealt with the 69 items. Plainly on the face of the documents there was a real question about incomplete work that the Adjudicator has not considered because of the way in which he dealt with the claims as set offs. It is clear therefore that he has not considered the plaintiff submissions in this respect and this is apparent on the face of his reasons. Having regard to his obligations to consider of the submissions under section 22 of the Act this failure means that the plaintiff has not been accorded natural justice.

16 I have earlier referred to the difficulty the Adjudicator had in arriving at the final contract sum. His comments on this aspect were as follows: *"In the adjudication response at para. 5.1, the respondent submits that the respondent has paid the claimant $1,297,296.37 exclusive of GST. The respondent has provided a spreadsheet [titled Annexure 'G'] which shows, "Total Contract Claimed & Paid - $1,277,153.10". The tendered price was $1,012,906 and this, according to the respondent [para 5.2], is the original Subcontract Sum. But in Annexure "F" to the payment schedule there is a "Subcontract Payment Advice Notice" which states "Original Contract Sum $1,277,153.10". The respondent says [at para. 5.3 of the adjudication response] that the respondent approved variations of $179,649.58. However, the spreadsheet Annexure "G" shows the "Approved value" of the variations as $224,876.57. Annexure "G" does not refer to GST. I cannot reconcile these conflicting amounts. I will adopt the figures in Annexure "G" and assume that they do not include GST and I will adopt the amount which in the adjudication response at para 5.1 the respondent says that the respondent has paid."*

The problem has a very simple explanation. The original contract amount for Blocks C & D was $1,012,806 and there was an agreed amount for a variation for Blocks A & B in the sum of $264,247.10. So much appears on the front page of the payment schedule that was before the Adjudicator. It is surprising that he had confusion on the matter.

17 I have earlier referred to the failure of the Adjudicator to refer to the terms of clause 37.7 of the subcontract when making his decision about the entitlement to claim a set off in the absence of an appropriate Superintendent. In the Adjudication Application the defendant had noted in paragraph 17 that the Subcontract Superintendent did not exist. Later when asserting a basis for the respondent's having no offsetting claims it referred to the failure of the Superintendent to certify those claims under the contract in clause 24 of the Application. It made no reference to clause 37.7 in the Application.

18 In the Adjudication Response the plaintiff and dealt with this in section 6 but did not in that stage refer to the particular terms of the subcontract. The reference to clause 37.7 came later in section 7 of the Response and that was the section, which made it absolutely plain that there were claims for both defective and incomplete works. The fact that in his analysis the Adjudicator has failed to make any reference to clause 37.7 tends to suggest that he may have only considered the matters in the submission that were prior to section 7.

19 A consideration of these matters leads me to the conclusion that the Adjudicator has not bona fide exercised his power to determine the matter.

20 The omissions of work amounted to $12,435.39. Having regard to the amount of the payment claim that is not a substantial proportion of the total claim. This raises the question of whether invalidity in respect of only a small part of the decision necessarily means that the whole decision must be set aside as being void. In ***Multiplex Constructions Pty Limited v Luikens & Anor*** [2003] NSWSC 1140 at paragraphs 90 to 92, Palmer J. considered the relevant principles with respect to partial invalidity of a determination:

> *"90. For the above reasons, I am not satisfied that Multiplex has made out any ground for the quashing of the Determination under s.69 (1) of the Supreme Court Act save in respect of Item 9. As I have found in paragraphs 79-81, the error into which Mr Luikens fell led him to exclude from his consideration Multiplex's evidence and submissions in respect of Item 9, which was matter which he was required to take into account by s.22(2)(d) of the Act. The difference between the parties as to what Multiplex owes in respect of Item 9 is $99,609. That is not a trivial sum in the context of a total of $529,034.59 (excluding GST) which Mr Luikens determined was the adjudicated amount for the purpose of s.22 (1)(a) of the Act. It seems to me, therefore, that the Determination is flawed by reason of a jurisdictional error. Remedies by way of judicial review are discretionary. The question now arises whether, in the exercise of the Court's discretion, the Determination should be quashed.*
>
> *91. The first point to note is that although the jurisdictional error in this case has affected only one disputed claim amongst the sixteen which Mr Luikens considered in his adjudication, the Court cannot quash just the decision which affects Item 9, leaving the rest of the Determination intact. That is because the adjudication process is required by s.22 (1) of the Act to produce only three findings: the adjudicated amount (if any), the date upon which that amount becomes payable and the rate of interest payable. Only these findings are reflected in the adjudication certificate which is issued under s.24 (3) of the Act and filed as a judgment under s.25 (1). The adjudicator has no power to correct the adjudication amount where it is shown to have been produced by error of law, whether or not*

jurisdictional. There is power to correct a determination under s.22 (5) only in accordance with what might loosely be called the "slip rule". None of the circumstances provided in s.22 (5) is applicable in the present case.

92. It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s.13 (1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced. This is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands".

21 Although ***Multiplex*** was not followed by the Court of Appeal in ***Brodyn,*** nothing was said to cast doubt upon the correctness of Palmer J's remarks in paragraphs 90 to 92 of the judgment. Indeed, Palmer J specifically recognised that a remedy in the nature of certiorari was discretionary. The first defendant submitted that the remedies of injunction and declaration are more flexible than that of certiorari and ordinarily cannot be used to enforce a remedy that is excessive or disproportionate to the wrong involved. As Palmer J points out the statutory framework does not admit any correction in these circumstances to the findings that are to be made by the Adjudicator. Either the finding can stand or it should fall.

22 For these reasons the Court cannot declare some part of the Adjudication Determination as void. No other discretionary considerations for refusing relief have been advanced in this case except the small proportion that the error $12,435.39 bears on the total claim, namely, $145,849.90. Although small I would not, in the exercise of my discretion, on this occasion refuse relief.

The question of whether the payment claim had been served more than 12 months after the first defendant performed work under the contract

23 The payment claim in this matter was made on 4 April 2005 and the payment schedule of the plaintiff raises the question of the claimant not being entitled to a payment claim as a period of 12 months had passed after the construction works to which the claim relates to were last carried out. It referred to a daily report of the 15th of March 2004 which indicated: *" Fina x 1 – Picked up remaining gear etc. Removed off site. "*

24 The relevant section of the Act is as follows:

"13 Payment claims

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later."

25 It is obvious from the section that the requirements are alternative in the sense that one or other of them have to be satisfied. In its Adjudication Application the first defendant referred to both parts of the section and suggested that because of defaults of the plaintiff it did not know whether the claim was served within the period determined in accordance with the contract. Alternatively it claimed the last day that the claimant did work on site was the day of the payment claim being 6 April 2004.

26 In its Adjudication Response the plaintiff addressed in detail the matters going to s13 (4) (b) and then addressed the matters which had been referred to by the first defendant in relation to s 13 (4) (a). The Adjudicator referred to the matter in the following terms: *"The respondent says that the claim is barred by s.13(4)(b) of the Act since construction work was last carried out more than 12 months before the claim was made. The respondent cites portion of s.13(4) but omits reference to the provision of related goods and services within the 12 month period. The respondent has not contended that the claimant has not provided any related goods or services within the 12 month period. It seems to me that in the preceding 12 months the claimant at least provided some services. The respondent has not expressly contended that the contract did not have a provision determining the time within which the payment claim can be made [see s.13(4)(a)]. There appears to have been a defects liability period, although just when it ended is not clear. Clause 37.4 of the contract conditions states that the claimant must submit a payment claim within 21 days after the end of the defects liability period. The respondent has not satisfied me that the payment claim was not made within that period. The respondent has not satisfied me that the claim is barred by s.13(4)."*

27 "Related goods" is defined in section 6 of the Act. In general terms it covers someone either supplying materials that are part of construction work or supplying labour in connection with the carrying out of construction work. As the Adjudicator noted it was common ground that the claimant carried out construction work within the meaning of the Act for the respondent. This is consistent with it being a subcontractor rather than a supplier to one of the parties engaged in construction work on the project.

28 In respect of 13(4)(b) the payment schedule clearly raised the relevant question in clear terms. This prompted a considered response from the first defendant in its Adjudication Application that in no way suggested that it supplied any related goods or services. All it did was to suggest that it performed work on 6 April 2004. It will be noticed in the subsection that the relevant related goods and services are those "to which the claim relates". The claim in question was expressed to be for construction work or related goods and services. Its details claimed amounts due for work carried out at the project up to 6 April 2004 and the release of retention monies held

under the contract. There was no suggestion in the payment claim that any construction work or the supply of any related goods and services occurred after 6 April 2004.

29 The suggestion by the Adjudicator that in the preceding 12 months the claimant at least provided some services is not based upon evidence and does not deal with the argument that the parties had presented to him for his resolution. The argument that the parties presented to him was whether the work ceased as contended for by the plaintiff on 15 March 2004 or as contended for by the first defendant on 6 April 2004.

30 With regard to this argument presented to him by the parties the first defendant merely made a submission in its Adjudication Application to which I have already referred. It did not provide any supporting evidence. The plaintiff in its payment schedule made its claim and supported it with evidence from a site diary. In its Adjudication Response it provided further evidence by way of statutory declaration. The Adjudicator made no reference to this evidence on the point presented to him by the parties and has merely decided the matter on some assumption of which the parties have no notice and cannot address.

31 In relation to the point under s 13 (4) (a) the Adjudicator is correct in his underlying assumption that for a claim to be made within time one or other of the subsection must apply. However it is necessary to see where the onus lies to establish non-compliance having regard to the scheme of the Act. The question of whether subsection (a) has been complied with was raised by the first defendant in its Adjudication Application. In its Adjudication Response the plaintiff submitted to the Adjudicator that because of the decision of ***John Holland Pty limited v Cardno MBK (NSW) Pty limited*** [2004] NSWSC 258 as this argument was not raised in the payment claim the Adjudicator could not have regard to any such submission.

32 Plainly the Adjudicator has made no reference to this point and has merely assumed that the plaintiff had the onus of proving that there was no payment claim made in the contract period. If this assumption was correct then his decision that "the respondent has not satisfied me that the payment claim was not made within that period" is probably beyond challenge.

33 In ***John Holland*** his Honour encapsulated the problems before him in that case in these terms:

"2 The critical issue which is raised is encapsulated in the following contention by the plaintiff, John Holland Pty Ltd ["John Holland" or "the respondent"] which had entered into an agreement ["the Contract"] with the first defendant, Cardno MBK (NSW) Pty Ltd ["the applicant" or "the defendant"] pursuant to which the latter was to provide design services:

- *An applicant is entitled to submit a progress claim and a respondent is entitled to reply to the claim by providing a payment schedule.*
- *The payment schedule must indicate why the scheduled amount is less and the reasons for withholding payments.*
- *If an applicant disputes the payment schedule it can apply for an adjudication.*
- *In that adjudication a respondent is expressly prevented from including in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant (s 20(2B) of the Act).*
- *Given that prohibition an applicant could not, for reasons of procedural fairness or natural justice, raise for the first time in its adjudication application reasons which had not been included in the payment schedule, as a respondent would not have been able to deal with those reasons in its payment schedule and would thus be unable to respond to them in its adjudication response due to the prohibition in section 20 (2B) of the Act.*

3 There is no provision to be found in section 17 which deals with adjudication applications equivalent to section 20 [2B]: as for example by providing that the claimant cannot include in the adjudication application, any reasons for claiming payment unless those reasons have already been included in the payment claim. The defendant's stance before this Court has been that the plaintiff's submissions seek to read such a provision into section 17, which is said to be an impermissible exercise in terms of statutory construction.

4 Whilst logic and the authorities cited in this judgment would tend to suggest that in order to achieve consistency in the four steps [payment claim, payment schedule, adjudication application, adjudication response]:

- *the statutory scheme dictates that the adjudication response be relevantly tied to the payment schedule [such that the adjudication response cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule-section 20 (2B)]*
- *the adjudication application should also be relevantly tied to the payment claim [such that the adjudication application cannot include reasons supporting the payment claim unless those reasons had been included in the payment claim]*

the fact is that the Act does not expressly require any form of reasons for the making of a payment claim to be included in the payment claim.

5 This judgment treats with the legislative scheme where in applying that scheme it becomes necessary to cope with these difficulties.

6 As will appear from what follows, the devil will often lie in the detail: what precisely in a given case, can be said to have been "reasons not already [included] in the payment schedule"?"

34 His Honour referred to the terms of the Act and particularly made reference to the limited requirements in section 13 with regard to payment claims. He then went on to observe that the claimant might expose itself to an

abortive adjudication determination if it included minimal information in the payment claim. His conclusion after further consideration was in these terms:

"*24 The matter may also be analysed by reference to the power of an adjudicator. An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon:*

- *The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see section 22 (2) (c)].*
- *The payment schedule (if any) [together with the respondents submissions (and relevant documentation) in the adjudication response, which submissions have to have been "duly made by the respondent in support of the (payment) schedule": see section 22 (2) (d)].*
- *The provisions of the Act: see section 22 (2) (a).*
- *The provisions of the construction contract from which the application arose: see section 22 (2) (b).*
- *The results of any inspection carried out by the adjudicator of any matter to which the claim relates: see section 22 (2) (e).*

25 The emphasis upon submissions "*duly made*" makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served. The steps which follow generally concern the materials to be exchanged and most particularly furnished to the adjudicator. The adjudication application will *relate* to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot *constitute* a payment claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot *constitute* a payment schedule or part of it. ……..

27 If one turns from the general to the particular, the circumstances in which a claimant for the first time treats in the adjudication application with parameters which were not telegraphed in the payment claim may occur across a number of different situations as for example:

- where the claimant for the first time advances *a new contractual basis* for a payment claim in the adjudication application;
- where the claimant for the first time seeks to deploy in the adjudication application, supporting documentation of one type or another.

28 These situations may have differing results.

New contractual basis

29 The first situation seems to me to generally be quite plain. The abortive adjudication determination likely to result from the advancing [within the adjudication application] of a new contractual basis for a payment claim, has already been explained.

Supporting documentation

30 The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says as much in the payment schedule [only later to receive as part of the adjudication application, the supporting documentation which should have been earlier supplied in order to permit a meaningful payment schedule response], will be otherwise than barred by section 20 (2B) from including in its adjudication response reasons for withholding payment arising by reference to the later supporting documentation. It could not be said that those reasons were *already included* in the payment schedule provided to the claimant. A complaint about inability to verify a claim because of insufficient information is not synonymous with reasons for dealing with a properly supported claim."

35 In the present case we are not dealing with the situation where there is a problem of documentation. It also seems that we are not concerned with some new contractual basis for a claim which would normally have to be considered by a respondent to a payment claim in deciding whether to accept or reject it with given reasons. What is happening in this case is that in the payment claim the claimant simply claims to be entitled to make a claim.

36 It is then for the respondent in the payment schedule to take any point about that a lack of entitlement. A lack of entitlement is based upon non-compliance with section 13. In order to demonstrate non-compliance it would be up to the respondent in the payment schedule to suggest that neither of the alternatives have been satisfied. It did not do this and has only raised a matter concerning one of the requirements. It could only justify such a defence if it suggested that both requirements were not met.

37 The raising by the claimant in the Adjudication Application of both limbs to the section was not raising some new basis for its payment claim. It already had raised a basis for its payment claim namely that it was entitled to make it and it was up to the defendant as the respondent to deny that entitlement under the terms of the Act. There is no procedural unfairness in what has happened. Both parties knew after service of the payment schedule that there was a question about whether the claim was in time. This particular point was addressed by the

claimant in the Adjudication Application and could be supported by evidence going to both limbs of section. It purported to do so. The plaintiff in its Adjudication Response had adequate opportunity to deal with both aspects.

38 For these reasons I do not see that the Adjudicator was precluded from considering the question of whether the claim was made within the time limited by s 13 (4) (a). The Adjudicator has determined the matter in a way, which causes no procedural unfairness to any party. However his decision on the other part of the section is flawed in the manner to which I have referred. In the circumstances it would be plainly necessary for him to be satisfied that a claim was not made within the time limited by either limb. The result is his decision is flawed in the manner to which I have referred. He has denied the parties' natural justice by deciding the matter on a basis which they did not present to him and by reference to matters of which they had no notice.

39 In these circumstances I propose to declare the Determination void. I direct the parties to bring in short minutes and argue any question of costs.

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