JUDGMENT : Einstein J : Supreme Court New South Wales Equity Division T&C List 19th August 2008

The proceedings

1 These are proceedings which raise questions concerning the validity of an adjudication determination made by the second defendant pursuant to the provisions of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ("the Act")

The agreements

2 The plaintiff ("Perform") is a formwork sub-contractor and utilises various formwork methods and systems. Between October 2006 and August 2007 it entered into three separate agreements with the defendant ("Mev-Aus") for the leasing from Mev-Aus of certain formwork systems.

3 The agreements are identified at paragraphs 2-4 of the Determination (page 581) as follows:

i. The Sydney Airport Car Park Contract – the documents found to constitute that contract appearing at pages 73, 74 and 151 for a "MevaDec" slab system;

ii. The Sydney Airport Car Park Columns Contract – the documents found to constitute that contract appearing at pages 84-85 for "Meva Startec for Columns"; and

iii. The City North Sub-Station Contract – the documents found to constitute that contract appearing at page 78 for "Meva Startec for Walls".

Outlining the issues

4 Whilst the proceedings cover a number of issues: the central issue revolves around whether or not section 14 (3) of the Act does or does not permit incorporation by reference. This subsection which deals with an aspect of payment schedules, is in the following terms:

"If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment"

5 The particular issue arises in circumstances where:

i. the claimant served its payment claim;

ii. the respondent served its payment schedule in which it indicated reasons for valuing the payment claim at nil and in so doing, referred to and sought to incorporate *by reference* reasons contained in a payment schedule served by the respondent upon the claimant approximately 2 weeks earlier [following the claimant's earlier payment claim which was in due course never proceeded with].

6 The central issues may be thumbnail sketched as follows:

(a) The above described 'incorporation by reference' issue;

(b) Whether the respondent's Payment Schedule indicated, within the meaning of s. 14 (4) of the Act as reasons for withholding payment, those reasons contained in the anterior Payment Schedule;

(c) Whether the Adjudicator made an error of a character that was within his jurisdiction;

(d) Whether the Adjudicator's findings at paragraphs 102-105 of the Adjudication Application constitute a failure by the Adjudicator to comply with the requirements contained in s.22(2)(d) of the Act;

(e) Whether the Adjudicator denied Perform natural justice;

(f) Whether the Adjudicator failed in good faith to exercise the power to make an adjudication.

The circumstances

7 The appropriate course is to travel through the detail of the events which occurred.

Service of the Payment Claim and following

8 On 10 March 2008, Mev-Aus served a Payment Claim for the amount of $308,601.86 including GST pursuant to the provisions of the Act" (page 382).

9 On 26 March 2008, Perform served a Payment Schedule under s.14 of the Act (page 16) ("the March Payment Schedule").

10 The March Payment Schedule included the following paragraphs:

(a) "19. In relation to the Airport Car Park Contract, the Respondent refers and to repeats the reasons contained in its payment schedule served on the Claimant on 22 February 2008 referred to at Attachment 4 below." (page 21); and

(b) "K – <u>Previous Payment Schedule</u>

40. The Respondent incorporates its payment schedule dated 22 February 2008 herein." (page 24).

11 "Attachment 4" referred to in paragraph 19 of the March Payment Schedule did not physically append the Payment Schedule served 22 February 2008 but comprised a document headed "Attachment 4" as follows:

"This and the following 1 pages is a copy of the Respondent's reasons contained in its payment schedule served on the Claimant on 22 February 2008 in reference to the Sydney Airport Car Park Contract (005) as described in paragraph F.19 of the Statutory Payment Schedule of Perform (NSW) Pty Ltd dated 26 March 2008." (page 40)

12 The following page stated the following:

"THE SYDNEY AIRPORT CAR PARK CONTRACT

The Respondent also relies on the reasons for withholding payment as set out in its Statutory Payment Schedule, made pursuant to s.14 of the Building and Construction Industry Security of Payments Act 1999 (NSW) dated 22 February 2008 in respect of this contract." (page 41)

13 By these references Perform sought to incorporate the reasons for withholding payment contained in its Payment Schedule served and dated 22 February 2008 ("the February Payment Schedule"). The February Payment Schedule had been served in response to an earlier payment claim by Mev-Aus for $209,968.68 (page 398).

14 The 22 February 2008 Payment Schedule contained a series of letters each dated 21 February 2008 from Perform to Mev-Aus in which Perform asserted a number of claims against Mev-Aus ("the Perform Claim Documents"). The documents are as follows:
(a) "Back Charge – BC # 1" (page 192);
(b) "Back Charge – BC # 2" (page 199);
(c) "Back Charge – BC # 3" (page 201);
(d) "Back Charge – BC # 4" (page 214);
(e) "Back Charge – BC # 5" (page 209);
(f) "Back Charge – BC # 6" (page 211).

15 Common to each of the Perform Claim Documents was the assertion that the formwork system in fact supplied by Mev-Aus was not that which had been promised and was inferior. Perform's case is that it thereby asserted an entitlement to a reduction or credit for the amount claimed by Mev-Aus, and also sought to make back charges, which were in effect claims for estimated costs of rectifying and completing the defective works caused by Mev-Aus's failure to provide the correct formwork system.

16 On 9 April 2008, Mev-Aus made an Adjudication Application (page 69). The submissions comprise two pages (pages 71 and 72) and provided a series of documents. The Adjudicator correctly described the Adjudication Submissions at paragraph 73 (page 594) as setting out:

"*… Briefly the history of the attempts made by someone in the Claimant's office to collect payment for the unpaid invoices and changing the name on the invoices. What is conspicuously absent from the Adjudication Application Submissions is any attempt by the Claimant to deal with the issues raised by the Respondent in its Payment Schedule of 26 March 2008.*"

17 Perform served an Adjudication Response dated 16 April 2008 (Exhibit MW-1) comprising each of the documents contained in the Index to that Schedule at page 2, including the February Payment Schedule (page 163).

18 Having received the documents which were required to be considered for the purpose of the adjudication proceedings, on 23 April 2008 the Adjudicator wrote to the parties (page 402), "*pursuant to s.21(4) of the Act …*" making "*the following request …*" of the parties for the provision to the Adjudicator of certain documents. The requests were relevantly:

"*1. …by 4.00 pm today 23 April 2008, the Claimant is to provide by FAX OR HARD COPY ONLY to the ANA as agent to the Adjudicator, a complete copy of the Payment Claim of 10 March 2008 together with copies of all of the invoices referred to.*

2. <u>As the Respondent has incorporated by reference its Payment Schedule of 22 February 2008</u>, by 4.00 pm today, 23 April 2008, the Claimant is to provide by FAX OR HARD COPY ONLY to the ANA as agent to the Adjudicator, a copies of:

The 'Separate Response to each of the counter-claims attached to (the) Payment Schedule referred to on page 2 of the covering letter to the Payment Claim; and

If different to the document in 2(a), the response to the back claim by the Branch Manager referred to in the penultimate paragraph on the first page of the Adjudication Submission.

3. Each party is to provide submissions as to whether the adjudicator may have regard to the material provided in response to the above s.21 (4) requests, and if so, which material. …

4. Any comments which a party wishes to make on those submissions should be faxed to both Leader (for the Adjudicator) and the Claimant before 5.00 pm on Thursday, 24 April 2008 accompanied by a facsimile transmission record evidencing transmission to that other party.

5. …" (The first s.21 (4) request.) (Emphasis added).

19 The plaintiff has contended as follows:

i. that as to the first s.21 (4) request, the Adjudicator was invoking a power under the Act in the course of "*proceedings conducted to determine an Adjudication Application*". The contention is that in the process of invoking that power:

a) The Adjudicator must have applied his mind to the documents which at that stage were before him;

b) The Adjudicator must have read Perform's February Payment Schedule and understood it to have raised a series of claims or reasons for withholding payment;

c) The Adjudicator then proceeded on a basis accepting that Perform's March Payment Schedule had "*incorporated by reference its Payment Schedule of 22 February 2008*" and had communicated that view to the parties;

d) The Adjudicator must therefore have considered it necessary to have regard to the February Payment Schedule;

e) The Adjudicator was aware that Mev-Aus had prepared or was in the course of preparing a response to the claims or reasons for withholding payment;

f) Having in mind the need to have regard to the counter-claims, the Adjudicator invited Mev-Aus to provide him with the "*separate response*" to each of the counter-claims so that, subject to considering the submissions invited by the s.21(4) request, the Adjudicator would have regard to the response as well as to the counter-claims;

g) The only "submissions" which the Adjudicator had invited of the parties were submissions as to whether the Adjudicator could "*have regard to the material provided in response to the above s.21 (4) requests …*" That is, submissions upon whether the Adjudicator could have regard to the documents which were to be provided. The Adjudicator did not require further submissions in relation to the substantive matters raised in the Adjudication Application and Adjudication Response.

h) By requesting further submissions, the Adjudicator was no doubt seeking to comply with s.21 (4) (a) of the Act by which an adjudicator "… *must give the other party an opportunity to comment on those submissions …*"

20 The reference in paragraph 2(a) of the request to provide the response to the "*counter-claims*" was a reference to paragraphs contained on the second page of Mev-Aus' Payment Claim dated 10 March 2008 as follows:

"*We have noted the assertion in your Payment Schedule dated 22 February that our previous Payment Claim was invalid and advise that the issue of this Payment Claim dated 7 March in no way implies acceptance of your assertion.*

We reject your assertion that Novatec has failed to fulfil its commitments under the contract and we are responding separately to each of the counter-claims attached to your Payment Schedule.

We reject each of these counter-claims." (Emphasis added).

21 Mev-Aus responded to the first s. 21(4) request in two tranches:

i. By letter dated 23 April 2008 (page 441), it provided a copy of its Payment Claim, including invoices, together with certain other additional material;

ii. Secondly, by letter dated 24 April 2008 (page 406), Mev-Aus provided to the Adjudicator the "*responses*" referred to in its Payment Claim of 10 March 2008 stating "*Please note that these responses were not sent previously on legal advice.*" The responses relate to each of the Perform Claim Documents.

22 On 24 April 2008, Perform provided submissions to the Adjudicator as to whether the Adjudicator could have regard to the additional documents provided (page 516). Perform objected to the Adjudicator giving consideration to the documents (paragraphs 2-9), and made a particular objection to the Adjudicator considering the responses to Perform's claim documents (paragraph 11) noting Mev-Aus' concession that each of the responses had not been sent to Perform on legal advice (paragraph 11(a), page 518) and that each of the responses had in fact not been previously sent to Perform. The Adjudicator dealt with these submissions at paragraphs 32-35 and 105 of the Determination, ultimately finding, for reasons to be referred to, that it was not necessary for him to determine Perform's objection. (Page 602).

23 Because Perform had submitted that Mev-Aus' response to the Perform Claim Documents had never been received by it, the Adjudicator made a further request pursuant to s.21 (4) of the Act on 29 April 2008 ("the second s.21 (4) request") (page 521) in which the Adjudicator invited submissions and evidence to show that the Mev-Aus responses to the Perform Claim documents had been served.

24 By letter dated 29 April 2008, Perform again recorded an objection to the Adjudicator having regard to Mev-Aus' responses to the Perform claim documents (page 524).

25 In response to the second s.21 (4) request, Mev-Aus provided a letter dated 29 April 2008 (page 529) in which it again confirmed that the "*responses … were not issued to the Respondent on advice from Novatec's Adelaide head office*". The letter went on to make a series of further submissions which included the following:

"*Novatec's position regarding the claims is clearly indicated in the response of 21 April from our Adelaide office.*

That is that the contracts existing between the Respondent and Novatec were hire contracts in accordance with Novatec's terms and conditions. Under these term and conditions, there are no provisions for the Respondent to withhold payment in the manner that they have done.

As a result, we submit that the Respondent's six (6) claims which the responses dated 16 March were prepared should not be considered in the adjudication.

Further, it was our advice that the Respondent's claims in question while referenced had not been included in their payment schedule dated 26 March and as a result should not be included in the adjudication."

(Emphasis added)

26 Perform contends that these paragraphs constituted submissions by Mev-Aus, not previously made, to the effect that:

i. The terms and conditions of the hire contracts did not permit Perform to withhold payment for any of the counter-claims it was asserting in the Perform Claim Documents;

ii. As a consequence, Perform's counter-claims should not be considered; and

iii. The counter-claims did not form part of the Payment Schedule because they were merely "*referenced*" only.

27 By letter dated 29 April 2008, Perform again objected to the Adjudicator taking into account the responses to the Perform claim documents, however, to protect its position, and only in the event that the Adjudicator was to consider those responses, Perform made submissions answering those responses (pages 536-538).

28 The Determination was made on 30 April 2008 (page 579).

29 Central to the issues in the proceedings is the way that the Adjudicator ultimately dealt with the February Payment Schedule in findings at paragraphs 102-105 of the Determination (pages 571-572). Those findings were that:

i. "*… the 22 February 2008 Payment Schedule does not form part of the 26 March 2008 Payment Schedule.*";

ii. "*In my view the scheme of s.14 of the Act does not allow the incorporation by reference of materials extrinsic to the Payment Schedule.*";

iii. "*As the reasons for non-payment set out in the 22 February 2008 Payment Schedule were not in the 10 March 2008 Payment Schedule, s.20 (2B) of the Act prevents the Respondent from including them in the Adjudication Response.*"

30 As a consequence of these findings, the Adjudicator is said by the plaintiff to have given no consideration to the claims made by Perform against Mev-Aus in the Perform Claim Documents.

31 It is pertinent to observe that, albeit the manner in which the Adjudicator, in the fashion I have indicated above, ultimately dealt with the matter, there are a number of additional answers to the plaintiff's claim. These will be treated with in due course.

Section 14 (3)

32 The convenient course is to commence by dealing with the matters raised concerning section 14 (3), beginning with whether or not the section permits incorporation by reference.

33 The Adjudicator found that the scheme of the Act did not allow for the incorporation by reference of materials extrinsic to the Payment Schedule [Adjudication at [102] – [103] (p 601)]. It is strongly arguable that that finding was correct on the proper construction of the Act. Ultimately, however, even if the Adjudicator erred in reaching that finding, as the reasons which follow make clear, that error did not render the present determination a nullity.

34 I accept that section 14 (3) requires that reasons must be indicated in the payment schedule with some particularity cf ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [70] per Palmer J. As the defendant has contended, the importance of setting out the reasons in the payment schedule is underlined by section 20(2B) which provides:

The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

35 The Payment Schedule in this case did not indicate the reasons but instead:

i. at paragraph 19 "refers to and repeats the reasons … referred to at Attachment 4 below";

ii. under heading "K" stated that the Payment Schedule "incorporated its payment schedule dated 22 February 2008 herein" – without discrimination as to what claims or aspect of claims or reasons were relied upon;

iii. attachment 4 stated that:

> This and the following 1 pages is a copy of the Respondent's reasons contained in its payment schedule served on the Claimant on 22 February 2008 …

iv. contrary to what was stated on the first page of Attachment 4 the second page did not provide a copy of any reasons but simply reiterated Perform's purported reliance on the 22 February 2008 Payment Schedule ("the February Payment Schedule").

36 This is not a case where the Payment Schedule is made subject to the degree of close analysis reserved for pleadings [cf ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [76] per Palmer J] or Acts of Parliament [cf ***Inten Constructions Pty Ltd v Refine Electrical Services Pty Ltd*** [2006] NSWSC 1282 at [56] per McDougall J]. Instead this is a case where *no* reasons were given in the Payment Schedule but in a separate document.

37 Reference has been made to the decision of Brereton J in *Pacific General Securities*. His Honour did not there decide whether a Payment Schedule "if appropriately worded" might sufficiently indicate reasons by reference to a previous payment claim.

38 What Brereton J did decide was that:

"*The statement that the claim is again refuted does not involve a statement of any reason for withholding payment. Nor is it sufficient to incorporate reasons previously advanced in previous payment schedules, adjudication responses or otherwise: the claimant could not know from it whether all or any and if so which of the grounds previously advanced were now relied upon, and the payment schedule was insufficient to convey what if any grounds (other than the two reasons expressly stated) were relied upon as justifying withholding payment.*"

[***Pacific General Securities Ltd v Soliman & Sons Pty Ltd*** [2006] NSWSC 13 at [71]] [emphasis added]

39 As the defendant has contended, the comments of Brereton J are germane where, as in this case, the February Payment Schedule is a document of 123 pages including one negative variation, six separate back-charges and

a range of other complaints. In this respect this case stands in contrast to the situation suggested *obiter* by Palmer J that:

"*… the issue is so straightforward or has been expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice.*"

[***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [70]]

40 The words in the Payment Schedule relied on by Perform are to a certain extent (that is to say in relation to Attachment 4) internally inconsistent.

41 The Adjudicator's finding that the evidence was equivocal as to whether the whole or only part of the February Payment Schedule was in fact served on Mev-Aus is also significant and properly taken into account by the Adjudicator.

42 As already indicated, it is not necessary to decide whether the Adjudicator was correct in deciding that Perform had not complied with s 14(3). Having said that, my view is that his construction of the Act was likely correct, so that his decision to exclude the materials was likely correct.

43 The scheme of the Act (sometimes described as 'fast track') must be kept in mind: cf ***Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd*** [2006] NSWSC 358 [at 14]. It is particularly important to recall that an approach which would permit a party, by the so-called 'incorporation route', to purport to include into the payment schedule, all manner of previous documents claimed to have passed between the parties, could lead to mayhem where time is of the essence in relation to the critical significance of the steps to be taken by the respective parties under the Act.

The requirements of section 14 (3) are for the adjudicator to determine

44 Even if the Adjudicator had in fact erred in relation to the proper construction of the requirements of section 14(3), such error did not render the present determination a nullity. In short:

i. Where the basic and essential requirements of the Act have been complied with, an error of law by the Adjudicator, even in interpreting the Act itself, does not invalidate the adjudication [***Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385 at 398 [46] per Hodgson JA.

ii. Whether Perform complied with the requirement in section 14(3) that the Payment Schedule "*must indicate … the respondent's reasons for withholding payment*" is a matter that the Adjudicator has power to determine.

iii. The requirement in section 14(3) is relevantly analogous and complementary to the requirement in section 13(2)(a) that a payment claim "identify" the construction work or related goods and services [***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [25] per Hodgson JA]. That requirement has been found to be a matter for the Adjudicator to determine [***Coordinated Construction Co Pty Ltd v JM Hargraves (NSW) Pty Ltd*** (2005) 63 NSWLR 385, cf Basten JA dissenting at 404 [73]; ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [26]; ***Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*** [2005] NSWCA 409 at [30] per Hodgson JA]. Similarly White J has suggested that the "*quarantining*" of part or all of an adjudication response is within jurisdiction [***Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd*** [2006] NSWSC 375 at [73]].

iv. In this case the factors militating in favour of the Adjudicator having power to determine the question are [by analogy with the reasoning of Basten JA in relation to section 13(2) in ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [44]]:

a) what is or may be a sufficient indication of reasons falls within the special experience of a qualified adjudicator;

b) that decision requires a process of evaluation by the Adjudicator dependent on that experience and professional judgment;

c) the requirement relates to a procedural step in the claim process, rather than some external criterion;

d) the overall purpose of the Act is to provide a speedy and effective means to ensure progress payments are made without undue formality or resort to the law.

v. Relevant to the first two factors are the observations of Palmer J in *Luikens* that a payment claim and payment schedule are [***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [76], quoted with approval by McDougall J in ***Isis Projects Pty Ltd v Clarence Street Pty Ltd*** [2004] NSWSC 714 at [36]].

… given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim.

vi. The need for the Adjudicator in evaluating both payment claims and payment schedules necessarily to have regard to the contextual background of the building industry reinforces the view that this is a matter requiring the application of the Adjudicator's special expertise and therefore an issue within his jurisdiction.

vii. That section 14(3) was not one of the essential requirements cited by the Court of Appeal in ***Brodyn*** reinforces this reasoning. Indeed the position of section 14(3) appears to sit in the matters described by Hodgson JA in *Brodyn* as "*more detailed requirements*" not requiring exact compliance [***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at [53] to [55]. See **also** ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521 at [54] per Hodgson JA].

45 The plaintiff had, inter alia, submitted as follows:

i. The argument here is not one concerning the scope of issues raised in a payment claim in the sense discussed by the authorities referred to by the Court of Appeal in ***Downer Construction (Australia) Pty Ltd v Energy Australia*** [2007] NSWCA 49 at [81]-[88].

ii. Although the authorities such as ***Coordinated Constructions Co. Pty Ltd v. Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 and ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd &Ors*** [2005] NSWCA 228 support the proposition that questions concerning compliance with s.13(2) as to both validity of payment claims and their scope are matters for the adjudicator to determine, and not for the objective consideration of the Court, the reasons underlying those decisions have been influenced by the fact that it is the payment claim which sets out the basis of the claim to which the payment schedule responds, and in that way, also have the potential of impacting upon the application of s.20(2B) of the Act.

iii. On the other hand, all that is required by s.13 (4) is for the Respondent to indicate reasons.

iv. The words [by which it is contended that the plaintiff sought to incorporate the reasons for withholding payment contained in its 22 February payment schedule] are an indication of reasons. The mere fact that they refer to another document which is not physically appended to the March Payment Schedule can make no difference, particularly in circumstances where there is no dispute that the February Payment Schedule was in the possession of the Claimant and indeed, was specifically referred to by the Mev-Aus in its Payment Claim.

46 Notwithstanding the plaintiff's arguments seeking to distinguish the position of sections 13(2) and 14(3), the requirements of section 13(2) are more objective than those in section 14(3), which only requires a claimant to identify the construction work (or related goods and services) and the amount of the progress payment. By contrast section 14(3) requires *reasons*.

47 On this approach, the sufficiency of those matters, particularly in relation to the application of section 20(2B), is no more than a matter of degree and evaluation requiring the experience of the Adjudicator. Hence, the Adjudicator's suggested error of construction, if error there be, did not render the determination a nullity.

Was there a failure to apply section 22 (2) (d)?

48 I am satisfied that there was no failure by the Adjudicator to comply with the obligations under s 22(2)(d) of the Act, which requires to Adjudicator to consider:

… the payment schedule (if any) to which any application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule.

49 The Adjudicator did consider the Payment Schedule and had particular regard to the words in the payment schedule purporting to incorporate the February Payment Schedule.

50 The February Payment Schedule was provided to the Adjudicator within Perform's Adjudication Response. The limitation of "duly made" submissions in section 22(2)(d) engages the operation of section 20(2B) [***John Holland Pty Ltd v Roads & Traffic Authority of NSW*** [2007] NSWCA 19 at [31]. The Adjudicator properly applied section 20(2B) of the Act to exclude that part of the Response.

51 Here again, it is appropriate to go further to treat with yet another alternative: even had the Adjudicator erred in this respect, that error does not invalidate the determination. The Court of Appeal in ***Brodyn*** identified section 22(2) and subsection (d) in particular as requirements which were *not* preconditions of the validity of a determination. [***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at 442 [56] per Hodgson JA; also ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521 at 540 [30] per Hodgson JA; *John* ***Holland Pty Ltd v Roads & Traffic Authority of NSW*** [2007] NSWCA 19 at [56] per Hodgson JA]

52 As the defendant has contended, the decision in ***John Holland*** reinforces this conclusion. In that case Basten JA stated: "*The false premise is that the scope of the payment schedule and the identification of submissions "duly made" by the Respondent in support of the schedule are matters to be objectively determined by this Court. In my view they are not: they are matters to be determined by the adjudicator.*"

[***John Holland Pty Ltd v Roads & Traffic Authority of NSW*** [2007] NSWCA 19 at [71] per Basten JA]

53 I accept that ***Halkat Electrical Contractors*** is distinguishable since in that case the adjudicator had failed at all to consider relevant contractual provisions [***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [139]]. Notably also the Court of Appeal drew attention to the apparent departure in ***Halkat*** from ***Brodyn*** and expressly disclaimed its approval of the decision at that point, dismissing the appeal on other grounds [***Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd*** [2007] NSWCA 32 at [29] per Giles JA].

The claim that there was a denial of natural justice

54 There is no substance in the contention that there was a substantial denial of natural justice within the meaning of ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421.

55 I accept as correct the following submissions advanced by the defendant:

i. In ***Downsouth Constructions*** as to the intentional exclusion of matters by the Adjudicator in that case, McDougall J found:

"*If, as I have said, any error revealed in that conclusion is not error of a kind that entitles this Court to intervene, it must follow that the adjudicator did not deny Jigsaw natural justice by refusing, on her understanding of the application of s 20(2B) to the facts of this case, to consider some aspects of the payment schedule.*"

[***Downsouth Constructions Pty Ltd v Jigsaw Corporate Childcare Australia Pty Ltd*** [2007] NSWSC 597 at [66]]

ii. That is the situation here. The Adjudicator excluded particular matters from his consideration by application of sections 14(3) and 20(2B).

iii. Any requests made under section 21(4) necessarily involve a preliminary consideration of the issues involved in the dispute in order to exercise that power. Any views expressed incidentally to such a request are necessarily provisional.

iv. An Adjudicator is not bound by such a view nor does it lead to a denial of natural justice or a lack of good faith to reconsider that position, particularly where the Adjudicator is required to consider the provisions of the Act and the relevant contract independently of the duly made submissions of the parties under section 22(2)(a) and (b).

v. The requirements of natural justice are also circumscribed by the requirements set out in the Act. ***Brodyn*** identified sections 17(1) and (2), 20, 21(1) and 22(2)(d) as the extent of natural justice to be afforded [***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at 442 [57]; ***Inten Constructions Pty Ltd v Refine Electrical Services Pty Ltd*** [2006] NSWSC 1282 at [64]]. Each of those provisions has been satisfied in this case. Also relevant is the short time period in section 21(3) in which the Adjudicator must complete the Determination.

vi. Perform had in its Adjudication Response provided to the Adjudicator the complete February Payment Schedule including each of the "*Perform Claim Documents*". Perform by its Adjudication Response therefore already had made submissions in effect that:

a) the Adjudicator should treat the February Payment Schedule as incorporated by reference in the Payment Schedule;

b) the Adjudicator should have regard to the Perform Claim Documents.

vii. Perform itself put the matter in issue by means of its Adjudication Response. The question of how Perform's claims should be construed in relation to the contractual terms is a matter necessarily following from the propounding of the Perform Claim Documents.

viii. The plaintiff had an opportunity to make submissions in relation to how the Adjudicator should treat those claims in its Adjudication Response and failed to do so. Indeed Perform did make some submissions as to the treatment of the back charges in its letter dated 29th April 2008.

ix. There is no evidence to support the plaintiff's contentions as to Perform's state of mind, understanding and intention in sending the letter dated 29th April 2008 nor can those matters be reasonably drawn from the document itself.

x. As Perform correctly contends, the request under section 21(4) on 23rd April 2008 shows that the Adjudicator "must have read Perform's February Payment Schedule and understood it to have raised a series of claims or reasons for withholding payment".

xi. This begs the question as to what Perform was denied the opportunity to put before the Adjudicator. This is not a case like ***John Goss Projects*** where the critical point in issue turned on a detailed legal analysis of the reasons of McDougall J in ***Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd*** [2004] NSWSC 1151 and related cases, and in particular whether those reasons were *obiter* and/or should be followed ***John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd*** (2006) 66 NSWLR 707 at [44] to [45]; also see *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [45].

Error not material to decision

56 Nor is it sufficient to point to vitiating error. One must show that the error said to vitiate the adjudication was materially relevant to the adjudication [***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [53]].

57 The exclusion of the February Payment Schedule – even if it was an invalidating error – had no material effect on the Determination as the reasons themselves were repeated in the Payment Schedule.

58 Perform complains that the Adjudicator excluded the February Payment Schedule including the Perform Claim Documents.

59 While paragraph [19] of the Payment Schedule purported to refer to and repeat the reasons in the February Payment Schedule – excluded by the Adjudicator – paragraphs [20] to [27] of the Payment Schedule in fact repeated the reasons in the February Payment Schedule.

60 In particular paragraphs [25] and [26] set out Perform's claim that Mev-Aus provided a different and inferior formwork system, and claimed $878,893.86 in back charges. These are the same reasons for withholding the payment as set out the February Payment Schedule and the Perform Claim Documents.

61 The Adjudicator in fact considered these reasons and rejected them.

Did the adjudicator exercise his powers in good faith?

62 The plaintiff's case as to lack of good faith is that:

i. the Adjudicator received a letter from Mev-Aus dated 29th April 2008 which made certain submissions;

ii. the Adjudicator made rulings that were consistent with those submissions – the Adjudicator "adopted the submissions" of Mev-Aus;

iii. the Adjudicator did not refer to the letter dated 29th April 2008 in the Determination;

iv. the Adjudicator made a ruling in relation to the effect of the contracts that was not contended for by Mev-Aus.

63 I accept that there is no basis for the assertion that the Adjudicator was to any degree reckless or capricious, let alone to the degree necessary to demonstrate *"the absence of a genuine or conscientious attempt to perform the adjudicator's function"* [***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [110]].

64 In particular Perform does not show that the Adjudicator rejected Perform's case for some capricious reason or without an examination of the merits [***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [65].

65 The plaintiff relies on the principle that bad faith may be shown by inference. Yet as the defendant observes, the Full Court of the Federal Court in ***SBBS*** [***SBBS v Minister for Immigration and Multicultural and Indigenous Affairs*** (2002) 194 ALR 749 at 756 [43] to [45]; discussed by Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [97] to [100]] had also observed:

i. an allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker;

ii. the allegation is not to be lightly made and must be clearly alleged and proved;

iii. the circumstances in which the court will find an administrative decision-maker had not acted in good faith are "rare and extreme";

iv. this is especially so where all that the applicant relies upon is the written reasons for the decision under review.

[***SBAU v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 1076 at [28] citing ***SAAG v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 547 at [35] per Mansfied J ***and SCAA v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 668 at [38] per von Doussa J].

66 In this case the written reasons for the determination negative the allegations.

67 The issue of incorporation by reference is dealt with at paragraphs [102] and [103] of the Determination. Paragraph [102] gives detailed consideration to:

i. the length of the February Payment Schedule and Payment Claim;

ii. pages apparently omitted in the faxing process; and

iii. the equivocal evidence as to the service of the February Payment Schedule on Mev-Aus.

68 Paragraph [103] analyses the effect of section 14(3) in the context of the Act and in relation to section 20(2B) of the Act.

69 Paragraph [107] of the Determination indicates that in making the ruling on Perform's claims, the Adjudicator correctly considered section 10(2)(a) of the Act as well as the quotation and the General Terms and Conditions in reaching his conclusion.

70 I accept that this analysis by the Adjudicator demonstrates that he gave careful consideration to, and formed his own views on, these matters and did not merely "adopt the submissions" of Mev-Aus.

71 In relation to the proposition that the February Payment Schedule was effectively quarantined by the Adjudicator, in truth, if one reads the March Payment Schedule, which was taken into account by the Adjudicator, it also replicates the reasons that were quarantined and effectively those reasons were in two places. One was in the February Payment Schedule, one was in the March Payment Schedule and there was an overlap. Hence it is necessary to closely compare certain of the paragraphs to be found in the February Payment Schedule with certain of the paragraphs to be found in the March Payment Schedule and in particular the comparisons which are worthy of examination include:

i. paragraph 3 of the February Payment Schedule to be compared to paragraph 20 of the March Payment Schedule;

ii. paragraph 4 of the February Payment Schedule to be compared to paragraph 21 of the March Payment Schedule;

iii. paragraph 5 of the February Payment Schedule to be compared to paragraph 24 of the March Payment Schedule;

iv. paragraph 6 of the February Payment Schedule to be compared to paragraph 25 of the March Payment Schedule; and

v. paragraph 7 of the February Payment Schedule to be compared to paragraph 26 of the March Payment Schedule.

72 I accept that the analysis by the Adjudicator demonstrates that he gave careful consideration to and formed his own views on the above matters and did not merely adopt the submissions of Mev-Aus.

73 The plaintiff's associated complaint, that the Adjudicator was not entitled to consider the late submissions of Mev-Aus, and in so doing failed to act in good faith, as the defendant has submitted, fails on the following ground:

i. Under section 22(2)(a) and (b), an Adjudicator is required in every adjudication to consider the provisions of the Act and the provisions of the construction contract from which the application arose.

ii. This obligation to consider the Act and the contractual terms is independent of the obligation to consider the "duly made" submissions of the parties.

[***The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [33] to [35] per Hodgson JA; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [50] to [51]

74 Finally, it is appropriate to observe that the plaintiff at several stages through its submissions stressed the proposition for which it contended, which was that the Adjudicator had taken as *a given* the proposition that the respondent had incorporated its Payment Schedule of 22 February 2008 'by reference'. The plaintiff's proposition was that the terms of the letter effectively from the Adjudicator to the parties of 23 April 2008, in using the words "As the respondent had incorporated by reference its Payment Schedule of 22 February 2008" in seeking copies of the separate responses, he must be taken to have approached the adjudication upon the basis that this was common ground.

75 The proposition for which the plaintiff contended was that the Adjudicator was bound to accept that the parties were treating with this adjudication as if there was nothing exceptional so far as either of the parties were concerned, in an acceptance that the incorporation by reference was to be taken as a given.

76 On the evidence the defendant was simply silent on that issue. In my view the Adjudicator had every entitlement to, in compliance with his statutory obligations, determine, as he did, inter alia, the proper construction of the provisions of the Act s 22(2)(a).

77 For all of those reasons the plaintiff's application in the summons for declaratory relief is appropriate to be dismissed.

78 In the circumstances of the manner in which the Court has dealt with the proceedings, it has been unnecessary to deal with any of the other matters which may have been germane to be litigated had the plaintiff succeeded.

79 The appropriate orders with respect to the proceedings are as follows:

1. The summons is dismissed.
2. The Court reserves to the parties an entitlement to address on costs.
3. Submissions in respect of costs [including Calderbank letters and the like] are to be furnished by the defendant to the plaintiff on or before 27 August 2008, responsive submissions are to be furnished by the plaintiff to the defendant on or before 3 September 2008. In each case the submissions are also to be forwarded in soft copy to my Associate.
4. the decision as to costs to made in chambers.

Stay Order

80 The plaintiff has sought an order staying any order by this Court for the payment out to the defendant of the amounts paid into court by the plaintiff, that amount being the sum of $322,038.36 paid into court pursuant to order of the Court made on 27 March 2008. The stay application is pursued for the purpose of permitting the plaintiff to have a proper opportunity to take advice on the reasons for judgment against the possibility that the plaintiff will seek to appeal.

81 It is common ground that the *Building and Construction Security of Payment Act 1999*, represents a fast track but intermediate method of giving relief to claimants seeking to obtain an adjudication in their favour. My own view is that it is inappropriate for the Court *in the usual circumstance*, to accede to an application for a stay of an order that moneys paid into court, effectively as the price of the plaintiff being able to litigate, be paid out to the claimant: cf ***Procorp*** *supra* [at 5].

82 There is one only parameter which currently would seem to require a slightly different approach to that approach: that is that this judgment is being given ex tempore. The entitlement of both parties to have the judgment in its revised form for the purpose of their making an informed decision, would seem to perhaps merit only a *very short* stay for that purpose.

83 For those reasons, the principled exercise of the discretion is to stay the order for the payment out to the defendant of the moneys which have been paid into court.

84 The further orders are:

5. The Court orders that the moneys paid into court by the plaintiff be paid out to the defendant.
6. The Court stays the order for the payment out to the defendant of those moneys up to and including Tuesday, 26 August 2008 at midnight.
7. In the event that the reasons for judgment in their revised form have not been able to be furnished to the parties by Thursday, 21 August 2008, the plaintiff is granted leave to apply for an extension of the time during which the stay order would operate.
8. These orders are to be entered forthwith.

Mr NA Nicholls (Plaintiff) instructed by Wilkinson Building and Construction Lawyers
Dr A Greinke (Defendants) instructed by Doyles Construction Lawyers