JUDGMENT HAMMERSCHLAG J : Supreme Court New South Wales Equity Division T&C List 15th July 2008

Introduction

1 This is yet another dispute arising out of the provisions of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act").

2 The plaintiff seeks to have declared void an adjudication determination ("the determination") dated 17 April 2008 made by the second defendant ("the adjudicator") in favour of the first defendant in the amount of $958,553.53. Of that amount the plaintiff paid $433,997.99.

3 The first defendant proceeded to obtain judgment against the plaintiff in the District Court of New South Wales on 9 May 2008 ("the judgment") for the outstanding balance plus interest, and then sued out a writ for levy on property against the first defendant for $534,093.29 being the judgment amount plus interest, and costs of the writ.

4 Before me the plaintiff obtained leave to amend its originating process to sue for return of the moneys paid in the event that it obtained its primary relief, but then did not persist in that claim.

5 In addition the plaintiff seeks an order that the first defendant be permanently restrained from seeking to enforce the judgment or, in the alternative, a declaration that the judgment has been satisfied and its debt to the first defendant is discharged.

6 The first defendant has given an undertaking not to seek to enforce the judgment pending determination of these proceedings and under a consent arrangement paid into Court the sum of $534,093.29 pending the determination of these proceedings.

7 The adjudicator took no role in the proceedings before me.

Background

8 On 8 August 2007 the parties entered into a building contract ("the contract") under which the first defendant as Contractor agreed to carry out certain earth and foundation works for the plaintiff as Principal in respect of a project at 384 Church St, Parramatta in the State of New South Wales.

9 The general conditions of the contract are in the form known as AS 4000-1997 published by Standards Australia. The contract made provision for progress claims.

10 Clause 37.1 is in the following terms:

"***37.1 Progress claims***

The Contractor shall claim payment progressively in accordance with Item 28.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to the provisions of the Contract."

11 Clause 37.2 is in the following terms:

"***37.2 Certificates***

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

(a) a progress certificate evidencing the Superintendent's opinion of the monies due from the principal to the contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

(b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only."

12 "WUC" is defined in cl 1 of the contract to mean the work which the contractor is or may be required to carry out and complete under the contract and includes variations, remedial work, construction plant and temporary works.

13 "Item" is defined in cl 1 to mean an item in Annexure Part A. Item 28 of that Annexure provides that the times for progress claims are the 14th and 28th days of each month which are for WUC done to the 1st and 14th days of each month respectively.

14 The first defendant subcontracted out to Merrmac Pty Ltd ("Merrmac") certain of the works under the contract.

15 On 28 February 2008 Merrmac rendered an invoice to the first defendant for $476,868.67 plus GST described as "Claim 7".

16 On the same day the first defendant made a progress payment claim pursuant to the provisions of s 13 of the Act for $958,553.53 ("the payment claim"). The total was comprised of a number of separate line items. One of these was for $476,868.67 plus GST in respect of Merrmac's Claim 7.

17 The payment claim was directed both to the plaintiff and to the Superintendent under the contract.

18 The Superintendent did not within 14 days after receiving the payment claim issue a progress certificate.

19 It follows that under cl 37.2 of the contract the payment claim was deemed to be the relevant "*progress certificate*", and the plaintiff became bound under cl 37.2 to pay the amount less any deductions provided by the provision.

20 On 5 March 2008 the plaintiff took out of the hands of the first defendant the whole of the work remaining to be completed under the contract pursuant to cl 39.4 of the contract.

21 On 13 March 2008 the plaintiff replied to the payment claim by providing a payment schedule as contemplated by s 14 of the Act. The payment schedule indicated that the plaintiff owed the first defendant nothing but that the first defendant owed it $40,557.53. The payment schedule dealt with each of the line items in the payment claim including Merrmac's Claim 7.

22 On 17 March 2008 the plaintiff and Merrmac entered into a deed of agreement ("the deed"). The deed recorded the subcontract arrangements between the first defendant and Merrmac, including that there had been a variation revising the scope of the works to be performed by Merrmac, the fact that the remaining work had been taken out of the hands of the first defendant and that the first defendant had failed to make payment to Merrmac for moneys due and owing with respect to the performed works including part of the amended variation.

23 The deed further recorded that the value of the works including the variation and the amount which was owing by the first defendant to Merrmac was $176,907.67 plus GST and that, in addition, Merrmac had acquired material for the works invoiced in the sum of $398,500 plus GST for which Merrmac had not paid and which materials had been delivered to the site.

24 Clause 2 of the deed provided that the plaintiff would pay to Merrmac on or before 18 March 2008 the sum of $176,907.67 plus GST and would pay into Merrmac's solicitors' trust account on or before 20 March 2008 the sum of $398,500 plus GST.

25 Under cl 3 of the deed the plaintiff undertook to pay Merrmac for the unperformed works in accordance with the terms of its subcontract with the first defendant, in accordance with progress claims to be made by Merrmac pursuant to the Act and to be addressed to "Simon's c/o Plaza West" at the plaintiff's address.

26 n 31 March 2008 the first defendant made an adjudication application pursuant to s 17(1) of the Act for the amount of the payment claim, namely $958,553.53 (including GST). Of that amount $575,406.67 plus GST (the sum of the amounts referred to in clause 2 of the deed) was referrable on the face of the claim to Merrmac.

27 Paragraphs 31 to 40 of the adjudication application were in the following terms:

Payment Clause

31. The payment clause under the Contract is set out below:

37.1 Progress claims

The Contractor shall claim payment progressively in accordance with Item 28.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.

37.2 Certificates

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

It the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal

elects to set off. It that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

32. The Payment Claim was a payment claim under the Act and a progress claim under the Contract.

33. The Payment Claim was clearly served on the Superintendent. However, whilst Plaza West has responded by serving the Payment Schedule, the Superintendent has not issued any Payment Certificate in respect of the Payment Claim.

34. This has a severe consequence for the Respondent. This is because clause 37.2 of the Contract provides that if the Superintendent does not issue a payment certificate within the time stipulated by the Contract (14 days), the progress claim is deemed approved and the Principal must pay the amount of the progress claim as if that amount appeared in a payment certificate.

35. As such, by reason of the Contract, the approved value of the Payment Claim is deemed to be for its full value.

36. This has an important consequence under section 9 of the Act, which relevantly provides:

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be: (a) the amount calculated in accordance with the terms of the contract; and

(b) …

37. As such, an adjudicator is bound to value the Payment Claim in accordance with the Contract. Due to the Superintendent's failure to certify, the full amount of the Payment Claim is deemed approved under the Contract.

*38. Simons expects that Plaza West will rely upon a letter from the Superintendent to Simons dated 12 February 2008 (see **Tab 13**). However, such letter is factually incorrect as to the voidness of the progress certification procedure under the Contract and fails to recognise the dual scheme of the Act, where the one claim can have consequences under the Act and under the relevant construction contract. Indeed, the consequences of a claim may be different under a construction contract that (sic) those under the Act.*

39. By reason of the Superintendent's failure to issue a payment certificate in respect of the Payment Claim the amount due and payable by the Respondent under the Contract, and by reason of section 9, under the Act, is the full amount claimed in the Payment Claim.

40. It is appropriate to deal with and dismiss each of the purported reasons for non payment in turn."

28 The adjudication application also supported each of the line items in the payment claim.

29 On 8 April 2008 the plaintiff lodged with the adjudicator an adjudication response pursuant to s 20 of the Act. Paragraphs 25 to 31 of the adjudication response were in the following terms:

"25. As to paragraph 13, Plaza West acknowledges that no direct payment has been made by it to Simon's Earthworks in relation to the Payment Claim dated 28 February 2008 for $958,553.53 including GST. However, $524,555.54 of the Payment Claimant (sic) is in respect of the Payment Claim dated 28 February 2008 of Merrmac made against Simon's Earthworks. As of 20 March 2008, Plaza West has paid all of that $524,555.54 to Merrmac or its solicitors' Trust Account pursuant to an agreement dated 17 March 2008 between Plaza West and Merrmac. In fact, as noted in the chronology, Plaza West has paid an additional $108,392.90 into the Trust Account of the solicitors for Merrmac. A copy of the receipts for the payments is attached.

26. The amount claimed by Simon's Earthworks must accordingly be reduced by the $524,555.53 (sic) paid by Plaza West direct to Merrmac because the payment has reduced the amount outstanding on the Payment Claim dated 28 February 2008 of Merrmac against Simon's Earthworks to nil.

Jurisdiction

27. As to paragraph 23, Plaza West does not know if the Adjudication Application is made in accordance with the time permitted by the Act because it does not know when the application was lodged with the nominating authority. If the Application was lodged on 31 March 2008, Plaza West acknowledges that the Application will be within time. If it was lodged on or after 1 April 2008, being the date the Application was served on Plaza West, the Application will be out of time.

Payment Clause

28. Plaza West disputes the assertion in paragraph 32 that the Payment Claim was a claim under the Act <u>and</u> under the contract for the following reasons:

a. The Payment Claim is expressed to be made under the Act. Furthermore, it is not expressed to be made under the contract. Nor is there any reference in the claim to the payment claim clause under the contract, namely clause 37 of the General Conditions of Contract.

b. The Payment Claim is addressed to Plaza West. That is as required by the Act. Furthermore, the Payment Claim is not addressed to the Superintendent. It is merely copied to the Superintendent.

c. The submission that a progress claim could be made under both the Act and the contract is untenable for the following reasons:

i. Section 34(2)(a) of the Act specifically provides that any provision of a contract that modifies the operation of the Act is void. The Act requires that the party liable to pay must issue the Payment Schedule. By way of contrast, clause 37.2 however requires the Superintendent to issue the payment certificate. The provisions are inconsistent. By reasons of section 34(2)(a) of the Act, clause 37.2 is void.

ii. Further to the preceding sub-paragraph, a Superintendent, acting as an independent certifier, cannot issue a Payment Schedule on behalf of the party liable to pay the claim. That is because the independent role of the Superintendent means that it cannot be said that the Superintendent can act as the agent of the Respondent in issuing a Payment Schedule.

iii. In the alternative, the objective of the Act is not to create two sets of administrative arrangements instead of one (namely that under the contract) for making and processing progress claims. Rather it is to create an alternative statutory procedure for making and processing progress claims.

iv. Furthermore, if it were possible to make a claim under both the Act and the contract, a claim for the same amount could produce inconsistent payment obligations because the assessment of the claim in each case must be by different persons (namely the Principal under the Act and the Superintendent under the contract). Parliament cannot have intended such an outcome.

v. In the alternative, on a proper construction of the contract, the parties, as reasonable commercial parties, must be taken to have intended that in the event Simon's Earthworks chose to make a payment claim under the Act, the payment provisions of the contract would cease to have effect. That is consistent with the joint Judgment of 5 Justices of the High Court of Australia in Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451. At paragraph 22 their Honours identified the fundamental rules of construction which must be applied. The Judgment states at paragraph 22:

"…the meaning of commercial documents is determined objectively…The construction …is determined by what a reasonable person in the position of (a party to the contract) would have understood them to mean [at the time the contract is made]. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to (both parties to the contract), and the purpose and object of the transaction…

…In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating".

vi. A reasonable person in the positions of the parties would not adopt a construction of the contract which meant (a) administrative burden on the parties would be increased because two processes could apply for making and processing of progress claims instead of one and (b) inconsistent payment obligations could arise.

vii. Furthermore, compliance by the Superintendent with the Act by not invoking the inconsistent provisions of the contract would have "severe consequences" for the Respondent (to quote from paragraph 34 of the Claimant's Submissions) if the Claimant's submission were to be adopted. That is because compliance by the Superintendent with the Act would produce an outcome of inconsistent payment obligations notwithstanding that the Respondent had also complied with the Act and served a Payment Schedule providing, with reasons, for payment of less than the amount claimed. According to the claimant, the Respondent would then be obliged under the terms of the contract to pay the full amount claimed notwithstanding it had done everything required of it under the Act to avoid that default position. Clearly such a proposition is untenable.

d. Not surprisingly, no authority is cited by the Claimant in support of its submission.

29. It follows Plaza West rejects the assertions in paragraphs 34 to 37 of the Claimant's Submissions. The amount payable is to be determined under section 9(b) of the Act.

30. In response to paragraph 38, Plaza West notes that the paragraph contains mere assertion. Plaza West repeats its submissions at paragraph 28 above.

31. By reason of the foregoing, Plaza West rejects as untenable the submission in paragraph 39 of the Claimant's submissions."

30 The adjudication response went on to deal with the line items in the claim.

31 On 17 April 2008 the adjudicator determined that the amount of the payment claim to be paid by the plaintiff to the defendant, that is the adjudicated amount, was $958,553.53 (including GST).

32 It is necessary to set out a significant part of the adjudication determination:

"Claim under the Contract and the Act

10. The Respondent observes at paragraph 28, that they take issue with the assertion of the Claimant that the Payment Claim is made both under the contract and the Act. In my view this is a crucial and unfortunate view. The Claimant has agitated that the Respondent has provided a Payment Schedule, in compliance with the Act, but has failed to provide a Progress Certificate as required by the Contract. For the avoidance of doubt, it is relevant to note that the Payment Claim was served on both the Superintendent and the Respondent.

11. It has been recognised by the courts for some period of time that the Act has created a dual track system. The grounds raised by the Respondent in objection to this appear to be as follows:

11.1. claim does not mention clause 37 of the Contract which requires the Superintendent to issue a Progress Certificate, while the Act requires the Payment Schedule to be issued by the Respondent (ie the person liable to pay). ***Determination*** *– The Act has been interpreted to apply the law of agency and to recognise that the Superintendent may issue the Payment Schedule for and on behalf of the Respondent. However, it appears from*

the terms of the contract that the Respondent can not issue a Progress Certificate. I form this view on the explicit and mandatory form of words used in clause 37.2 of the contract.

11.2 claim not addressed to Superintendent, merely copied.

***Determination** – The contract provides at clause 37.1 that 'Each progress Claim shall be given in writing to the Superintendent and shall include…' That provision does not require it to be specifically addressed to the Superintendent. In my view it contemplates the claim being addressed to the principal yet provided to the Superintendent. If I am incorrect in this view it does not matter because the clause simply does not support the submission of the Respondent.*

11.3 the Act is not intended to be a duplicate system.

***Determination –** This is not correct. The Act is intended to create a duplicate system, which in some cases will prevail over the contract and in other matters be subordinate.*

11.4 a claim under the Act and the contract cannot produce duplicate liability.

***Determination** – this is correct as only one party can be liable to pay the claim, that party being the Respondent, however so constituted. It is not the situation that the Superintendent would become liable unless they had contracted separately, in which case the principal would not be liable. In any event the Superintendent is not named as the Respondent and the issue is moot.*

11.5 making a claim for payment under the Act extinguishes the payment provisions of the contract.

***Determination** – The Act does not contain the level of detail to allow it to be the sole source of a Payment Claim, one of the basic and essential requirements of a claim is to have a construction contract in place between the parties. The learned judges of the High Court in **Pacific Carriers v BNP Paribas** (2004) 218 CLR 451 were not contemplating the Act in that judgment and it is distinguishable to the extent it is being relied on by the Respondent in their submissions. By way of example the High Court considered the application of the Act in **Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd & Ors** [2006] HCA Trans 9 (3 February 2008), and made no observation of the type proposed. Further and expressly, the Act requires specific consideration of the contract with regard to matters such as valuation and interest. I do not accept this submission. If I am wrong in this regard I am in any event satisfied that a reasonable person on (sic) the position of the parties would be aware that they had a contractual burden to provide a Progress Certificate and a Payment Schedule. This is a broadly understood obligation, particulalrly (sic) amongst parties capable of performing the work contemplated under this contract. Examples of the provision of both documents in the single bundle of documents can be found in the reasons of the Court of Appeal in **Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation** [2007] NSWCA 9.*

11.6 the Respondent suggests that the dual system places an onerous burden of complying with two regimes and an outcome of inconsistent payment obligations.

***Determination** – I do not accept that submission. While the public policy elements of the 'onerous obligations' are outside my scope as an Adjudicator, it is my view it does not create the duplicate payment obligations as suggested at paragraph 28(c)(vii) of the submissions. I have formed this view as the Act or the contract has primacy with regard to different matters; by way of example:*

11.6.1 the Act requires a Respondent to advise their intention with regard to payment and reasons for non payment (if that is their view) within 10 business days or such shorter time as the contract may allow (see section 14(4)(b)). This creates a clear guideline to contracting parties that regardless of what term they put into a contract, if the claim is made under the Act the response cannot be provided later than 10 business days in the event that a claim is made under the Act. If a Superintendent observes the Payment Claim is made under the Act, they should serve the Progress Certificate this document could also fulfil the role of the Payment Schedule.

11.6.2 even where the contract may award a specific rate of interest or preclude the awarding of interest on delinquent payments the Act requires it to be awarded and also establishes minimum rates for such interest (see section 11(2) of the Act).

Conclusion Claim under the Contract and the Act

*12. I have included this somewhat detailed appraisal of the submissions of the Respondent as it was a matter that they could not reasonably contemplate, however, this does not mean that the submission of the Claimant was disguised or fell outside the scope of the Payment Claim as discussed in decisions of the Court in **John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors** [2004] NSWSC 258 **or Energy Australia v Downer Construction (Australia) Pty Ltd and 2 ors** [2006] NSWSC 52. I have also provided this level of detail as it is essential in light of the submission of the Claimant that it seeks to rebuff, that submission is that the effect of clause 37.2 of the contract is that a failure to provide a Progress Certificate will convert the Payment Claim into the Progress Certificate and create a liquidated liability.*

13. I accept that the application is compliant with the basic and essential requirements of the Act.

Reasons

14. The Respondent has provided clear reasons for withholding payment for each of the individual elements of the Payment Claim, however before dealing with those submissions, it is relevant to consider the more sweeping submission of the Claimant identified above in the final sentence of paragraph 12 above.

Deemed Valuation

15. Clause 37 of the contract details the obligations and processes regarding payment. Clause 37.2 includes the following unnumbered sub-clause:

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

16. *The Claimant submits that this clause should have its ordinary meaning and that the claim must be valued in accordance with section 9(a) of the Act. The impact of these submissions is that the full sum claimed must be valued in full for the purposes of the Progress Certificate. The Respondent resists these submissions saying in paragraphs 28 through 31 that it must fail. I have dealt above with most of the submissions made in paragraph 28. It is relevant to deal now with the remaining objections made to this submission of the Claimant.*

Paragraph 28(d) no authority cited

17. *There is no requirement for a party making a submission to provide an authority for a submission, though some guidance can reduce confusion and time expended unnecessarily. Having made this observation it is relevant for Adjudicators to consider relevant judicial pronouncements when applying section 22(2)(a) and 22(2)(b) of the Act. In this regard the following judgments are relevant:* ***Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd*** *[2005] VSC 388 a judgment of Habersberger J, who in that matter considered an identical clause to the one in issue. I return to the learned judges (sic) views later.*
18. *To the limited extent this is a reason for withholding payment it is not accepted.*

Paragraph 29 Valuation pursuant to section 9(b) of the Act

19. *After rejecting the submissions of the Claimant the Respondent submits the valuation of the Payment Claim / Progress Claim can only proceed pursuant to section 9(b) of the Act. Section 9 states:*

    9 ***Amount of progress payment***

    The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

    (a) the amount calculated in accordance with the terms of the contract, or

    (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.
20. *I do not accept the submission of the Respondent. The contract clearly makes provision for valuation through clause 37. The contract specifically creates a deemed valuation of the full sum claimed where no progress certificate is issued within the 14 days allowed.*
21. *It follows, in my view inescapably, that the valuation of the progress certificate must be that of the progress claim.*

Paragraphs 30 and 31

22. *These clauses do not add to the reasons provided. They conclude that the claims of the Claimant are untenable. I do not accept that submission. The contract provided clear terms and they have not been followed. The Act specifically contemplates, the retention of civil rights and the contract also notes that all payments are on account; these are provisions designed to ameliorate the sometimes harsh consequences of provisions such as the one in issue. However, the parties entered a contract where the terms are plain and the consequence is the contract governs the relationship between the parties and should be applied.*

Other contractual provisions regarding payment

23. *Unlike the contract contemplated in* ***Main Roads Construction****, the contract includes provisions that allow the Principal to make some adjustments to the liability created through the Progress Certificate. Those provisions are also located in clause 37 of the contract and allow:*

    'The Principal shall within 7 days of receiving both such certificates, or within 21 days after the Superintendent receives the Progress Claim pay to the contractor the balance of the Progress Certificate after deducting retention monies and setting off such of the certificate in paragraph (b) as the Principal elects to set off. …'
24. *In my view, the Respondent has accordingly the entitlement to make deductions for retention and set offs, but not for other matters. The Respondent has claimed these set-offs in the Payment Schedule. The Respondent's set offs are not subject to a deemed valuation provision and accordingly must be valued, the entitlement to make such a claim being established under the contract.*
25. *I note the Claimant has submitted that set off claims can not be validly made under the Act. This is not correct, set off claims can be made on both the basis of the contractual entitlement and under the valuation provisions of the legislation. This submission which is founded on section 34 of the Act in my view is fatally flawed; I know of no precedent that supports this proposition out of the myriad judgments concerning the Act, many of which included set offs and the like." (footnotes omitted)*

33 After the adjudication determination the plaintiff wrote the first defendant a letter dated 24 April 2008 saying the following:

"The amount incorporated in your Payment Claim dated 28 February 2008, which is the subject of the Determination, in respect of Merrmac is $476,858.67 plus GST = $524,555.54. We have paid that amount to Merrmac. The payment was made in part on 18 March 2008 and in part on 20 March 2008.

We have accordingly reduced the amount payable by us in respect of the Determination by $524,555.54. We have also made that payment by the due date under the Determination, namely 20 March 2008.

…

We will immediately pay the $433,997.99 plus interest plus $4,427.50 [being 50 per cent of the adjudication fee]" – the words in square brackets do not appear in the letter – "into your bank account. Payment will therefore be made within the required 5 business days of the date of service on us of the Determination."

34 On 24 April 2008 the plaintiff deposited to the first defendant's bank account the amount which it said in its letter it would deposit.

35 The first defendant's solicitors responded on 28 April 2008 saying amongst others the following:

"Your letter suggests that you have made payment to Merrmac Pty Ltd ("Merrmac") of $524,555.54 apparently on account of our client despite our client making no request to you to make such direct payment to Merrmac. Your letter seems to also suggest that Merrmac has received such payment in satisfaction of claims it may have against our client. It is further suggested that our client's entitlement to payment pursuant to the Adjudication Determination should be reduced on account of the payment you have made to Merrmac.

In circumstances where our client has not received any advice from Merrmac that Merrmac's claims against our client have been satisfied by reason of the payment you have made, it is difficult for our client to accept the broad contention you have made, particularly in circumstances where you and Merrmac have apparently entered into an agreement (which our client is not privy to) in respect of the carrying out by Merrmac of works at the site.

It will be necessary for our client to be provided with advice from Merrmac as to the status of payment before it is able to further consider the contents of your letter of 24 April 2008.

In circumstances where Merrmac is refusing to correspond with our client, it may be sensible for you to liaise with Merrmac in this regard.

We look forward to hearing from you."

36 On 30 April 2008 the plaintiff's solicitors wrote to the first defendant's solicitor in the following terms:

*"I refer to your letter dated 30 April 3008 (sic) to Plaza West Pty Limited ("**Plaza West**"), which you copied to me, in respect of payments made by Plaza West to Merrmac Pty Limited ("**Merrmac**").*

I confirm:

1. I act on behalf of Plaza West.

*2. Plaza West made the payments to Merrmac of $194,598.44 and $438,350.00, both including GST, referred to in the Submissions forming part of the Adjudication Response dated 8 April 2008 ("**the Submissions**").*

Further details in relation to those payments are:

1. The payments were made on 18 March 2008 and 20 March 2008, as stated in the Submissions.

2. As shown by the transmission notice of 18 March 2008 under tab 10 of the Adjudication Response, the payment of $194,598.44 was made direct to Merrmac.

*3. As shown by the transmission notice of 29 March 2008 under tab 10 of the Adjudication Response, the payment of $438,350.00 was made to Doherty & Colleagues Trust Account. At the request of Plaza West, the account in which the funds were held was changed on 2 April 2008 to an "at call" cash management account. I **enclose** a copy of a letter to me of Doherty & Colleagues ("**Doherty**") dated 2 April 2008 confirming that.*

4. The amount of $438,350.00 held in that account may only be withdrawn with the consent in writing of both Doherty and me, as the solicitors acting on behalf of Merrmac and Plaza West respectively.

5. The amount of $438,350.00 held in that account is being withdrawn progressively, with my written consent given on behalf of Plaza West, by Doherty and paid to Merrmac. The payments made to date are as follows:

a. On or about 11 April 2008: $82,725.48

b. On or about 22 April 2008: $260,096.13

c. Total to date: $342,821.61

6. On 30 April 2008 the solicitor acting on behalf of Merrmac, namely Mr John Buordolone of Doherty, informed me he would be pleased to provide me with a receipt for payment of the above funds.

I will forward to you the receipt as soon as to hand. Hopefully that will be before 2.00pm on 1 May 2008. However you will appreciate that depends on the ability of Mr Buordolone to meet that time constraint. In any event, I trust that this letter constitutes sufficient material for the purposes of your above mentioned letter.

*For completeness, I note in the circumstances Plaza West denies that Simon's Earthworks (NSW) Pty Limited ("**Simon's Earthworks**") is entitled to seek Judgment against it for $524,555.54, being the amount of the Payment Claim of Merrmac dated 28 February 2008 submitted to Simon's Earthworks and claimed by Simon's Earthworks from Plaza West. In the event Judgment is entered by Simon's Earthworks, Plaza West will institute proceedings pursuant to section 25(4) of the Building and Construction Industry Security of Payment Act to have the Judgment set aside with costs. In the alternative, Plaza West will seek a stay on enforcement of the Judgment."*

37 On 1 May 2008 Merrmac's solicitors wrote to the plaintiff's solicitors in the following terms:

"We refer to previous correspondence in this matter and in particular the telephone conversation between Adrian Batterby and John Buordolone a short while ago.

*As discussed we now confirm that our client's progress claim #7 dated 28 February 2008 in the sum of **$524,555.54** has been paid to our client by Plaza West Pty Ltd.*

Thank you for your cooperation."

38 On 28 March, 11 April and 29 April 2008 respectively, presumably acting under the deed, Merrmac made progress claims numbers 8, 9 and 10 addressed to the first defendant care of the plaintiff. Each of those claims

makes reference to an item "Materials on site and in Manufacture" showing the contract amount of $398,500. In claim number 8 that item is reflected as being 55 per cent complete, in claim number 9, 65 per cent complete and in claim number 10, 66 per cent complete.

39 The item is clearly a reference to the amount of $398,500 which was referred to in claim 7, dealt with in the payment schedule and also referred to in the deed. Together with GST the amount comes to $438,350. The evidence shows the progressive draw down pursuant to the terms of the deed out of the monies deposited in trust for that purpose and held in an at call cash management account with the National Australia Bank. On the evidence it has not yet been fully drawn down. So much was conceded by counsel for the plaintiff.

40 As at 29 April 2008, of that amount, not more than $263,010 plus GST had been paid to Merrmac.

41 Consequent upon the adjudication application the first defendant obtained judgment against the plaintiff.

The plaintiff's case

42 Before me Mr M G Rudge of senior counsel together with Mr S Goldstein of counsel appeared for the plaintiff and Mr N Nichols of counsel together with Ms E Peden appeared for the first defendant.

43 The primary submission put on behalf of the plaintiff was that the adjudication determination was void because the adjudicator "failed to make a bona fide attempt to deal with the issues" and had also denied the plaintiff natural justice.

44 If that submission succeeds and the determination is void then from the plaintiff's perspective the matter ends there because the plaintiff puts that the monies it has paid to Merrmac were legitimately owing and it does not claim them back.

45 If the determination is not void the plaintiff says that by its payments to Merrmac it has discharged obligations of the first defendant to Merrmac which are subsumed in the judgment thereby satisfying the judgment. As a secondary submission it claims a permanent injunction restraining the first defendant from further executing on the judgment. In the alternative, it seeks a declaration that the judgment has been satisfied. Such a declaration would, however, be of no utility without ancillary injunctive relief because there is a judgment of the District Court and no stay.

46 I will deal with each of the submissions in turn.

Is the determination void?

47 The plaintiff's (conjunctive) submission was refined in argument to run as follows:

a *section 9 of the Act is in the following terms:*

"***Amount of progress payment***

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract."

b *the exercise which that section required was for the adjudicator to determine the amount of the payment claim by calculating it in accordance with the terms of the contract;*

c *calculating an amount in accordance with the terms of the contract requires calculating it on the criteria established by the contract and not reaching it according to mechanisms provided by the contract: see* ***Transgrid v Siemens Ltd*** *(2004) 61 NSWLR 521;* ***John Holland Pty Ltd v Roads and Traffic Authority of NSW*** *(2007) 23 BCL 205; [2007] NSWCA 19 at [38] and [77];*

d *the adjudicator accordingly did not calculate the amount because he applied the machinery of cl 37.2 to reach his conclusion rather than the criteria established by the contract, namely the value of WUC done;*

e t *he consequence of this is that he did not make a bona fide attempt to exercise the relevant power relating to the subject matter of the legislation so that what he did was not an adjudication determination as contemplated by the Act;*

f *the additional consequence is that his conclusion caused him not to consider the adjudication response so far as it challenged the payment claim on a line by line basis and thereby denied the plaintiff the measure of natural justice that the Act requires to be given: see* ***Brodyn Pty Ltd v Davenport*** *(2004) 61 NSWLR 421 at 442 [55] and following;* ***Transgrid v Siemens*** *at 540.*

48 Section 22(2) of the Act is in the following terms.

"In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

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

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

49 An error of fact or law including an error in interpretation of the Act or contract as to what are the valid and operative terms of the contract does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) of the Act requires the adjudicator to consider the provisions of the contract and the provisions of the Act but so long as the adjudicator does this or at least bona fide addresses the requirement of s 22(2) as to what is to be considered an error on these matters does not render the determination invalid: ***The Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [49].

50 In ***John Holland Pty Ltd v Roads and Traffic Authority of NSW*** at [37] and [38] Hodgson JA said:

"In substance, RTA's submission as to jurisdiction was to the effect that 'calculated in accordance with the terms of the contract' in those statutory provisions meant determined according to mechanisms provided by the contract, that is, the amount determined by the Superintendent or any amount substituted for that amount in accordance with the dispute resolution mechanism provided by the contract.

*I note that in **Transgrid v Siemens Ltd** [2004] NSWCA 395; (2004) 61 NSWLR 521 at [35], I expressed the view (obiter) to the effect that 'calculated in accordance with the terms of the contract' meant calculated on the criteria established by the contract, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word 'calculated' and with the prohibition in s 34 of the Act on contracting out of the effect of the Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s 34. I do not think the legislature intended to make such usual provisions void. That obiter view is not directly relevant to the issue now under consideration; but the circumstance that the weight of authority was against RTA's submission has some indirect relevance, as indicated below."*

51 At [77] Basten JA said: *"A further factor which gives support to the conclusion set out above is that, as explained by Hodgson JA at [40], Part 2 of the Building Payment Act, and in particular the right to a progress payment conferred by s 8 and the calculation of the amount in accordance with ss 9 and 10, suggest that the statutory right to payment is unaffected by calculations undertaken by a superintendent or other authority appointed to value work under the contract. In other words, the statutory regime is, partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms: see the prohibition on contracting out in s 34."*

52 Counsel for the first defendant put a submission that these statements were obiter and a formal submission was put that the decision is wrong although counsel did not clearly articulate any basis for the latter submission. Even if the statements were obiter I consider them, with due respect to their Honours, to be entirely correct and I intend to follow them.

53 It may be accepted, and it was accepted by counsel for the first defendant, that cl 37.2 is a mechanism for calculation rather than a provision which specifies the criteria for the determination of the amount of the claim. The delineation between a criterion provision and a mechanism provision may not always be clear.

54 I also accept, following upon ***John Holland Pty Ltd v Roads and Traffic Authority of NSW***, that if cl 37.2 is a mechanism for calculation rather than one which lays down criteria for calculation, the adjudicator should not have utilised that mechanism to determine the payment claim.

55 However, the determination of the parameters of the payment claim is a matter for the adjudicator not for objective determination by a Court: ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [44]; ***Downer Construction (Australia) Pty Ltd v Energy Australia*** [2007] NSWCA 49 at [82] and following; ***Bitannia Pty Ltd & Anor v Parkline Constructions Pty Ltd*** (2006) 67 NSWLR 9 at [71].

56 The question how a progress payment is to be calculated in accordance with the contract is no less a question for the adjudicator than the question what the value is that is yielded by that method of calculation. Nothing to the contrary was held in ***John Holland Pty Ltd v Roads and Traffic Authority of NSW***.

57 The first defendant, in its adjudication application, put a proposition to the adjudicator that he was bound to value the payment claim in accordance with the contract (which is correct) and then put that due to the Superintendent's failure to certify, the full amount of the payment claim is deemed approved under the contract and that is the value to be ascribed to it by reason of s 9 of the Act (which is incorrect).

58 The plaintiff's adjudication response did not deal with that proposition by putting that the correct approach was to disregard cl 37.2 because it is a mechanism and that the correct approach required regard to be had to the value of the work done which was the subject of the claim.

59 Rather the plaintiff itself put the wrong proposition that the claim was not a claim under the Act **and** under the contract so that cl 37.2 did not apply and that the approach that should have been taken by the adjudicator was not to apply s 9(a) but rather to apply s 9(b) because the contract made no express provision with respect to the matter.

60 In a considered and careful determination the adjudicator acceded to the first defendant's approach and rejected that of the plaintiff.

61 His conclusion may have been wrong as a matter of law but he clearly made a bona fide attempt (especially given the submissions of the plaintiff) to exercise the power in his hands. His decision may have been erroneous but it was not unreasonable: see *Downer Construction (Australia) Pty Ltd v Energy Australia* at [87].

62 The plaintiff was also not denied the measure of natural justice that the Act requires to be given or, indeed, denied natural justice in any way. At best the adjudicator made a mistaken assessment of what the correct calculation was according to the terms of the contract. He did not disregard the plaintiff's submissions on the point but dealt with them: cf ***Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd*** [2006] NSWSC 375 at [73].

63 The consequence was that it was not necessary for him to determine the line by line matters and the plaintiff was not denied natural justice.

64 Just as it would not have been necessary for me to deal with the plaintiff's second submission in these proceedings if it were to have succeeded on the first, it was not necessary for the adjudicator to deal with the line by line response.

65 The plaintiff relied on the decision of Austin J in ***Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd*** [2007] NSWSC 1162 at [82] to [83] in which his Honour said the following:

"*As to the requirements of natural justice, Hodgson JA said (at [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 a breach of these provisions, the determination will be a nullity. … I note there is some controversy as to whether a denial of natural justice generally results in voidness or voidability … ; 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.

I regard these observations as covering the present case. Receiving and considering submissions made by the respondent to an adjudication application is an essential component of the audi alteram partem rule of natural justice, implied by the provisions of the Act identified by his Honour. The third defendant excluded all consideration of the plaintiff's submissions contained in the payment schedule and adjudication response (except with respect to service), because of his erroneous finding that the plaintiff had not provided a payment schedule within the specified time, a finding based upon the errors of law that I have identified, expressed in the record of his adjudication. The consequence, according to Brodyn, is that the adjudicator's determination is void."

66 That is not this case. The adjudicator did not exclude all consideration of the plaintiff's submissions. He dealt with the central submission and his determination of it made it unnecessary to adjudicate on the remainder.

67 It follows that I do not accept that the determination was void and I do not accept that the plaintiff was denied the measure of natural justice that the Act requires.

68 In the circumstances the plaintiff's application fails.

The Merrmac claim

69 Turning then to the Merrmac claim there are a number of hurdles in the way of the contention that the plaintiff has satisfied the judgment by paying Merrmac under the deed.

70 Firstly, as counsel for the plaintiff accepted, the evidence does not establish that even the full amount paid into Merrmac's solicitor's trust account has been drawn down.

71 Secondly, the plaintiff on its own version was a voluntary and unrequested payer of the first defendant's debt to Merrmac. The plaintiff accepted that on equitable principles the plaintiff is entitled only to a restitutionary claim to reimbursement if the debtor (here the first defendant) adopts the payment by the third party (here the plaintiff) in discharge of the debt. This was expressed by Brereton J in ***Brasher v O'Hehir*** [2005] NSWSC 1194 at [37] in the following terms:

"*While a voluntary and unrequested payer of a debt has no common law restitutionary claim to reimbursement, equity recognises such a claim arising through subrogation to the creditor's rights, if the debtor validly applies the money advanced to the discharge of its debt [**Re Cleadon Trust Ltd** [1939] Ch D 286 at 302 (Lord Greene MR), 316 (Scott LJ), 322–324 (Clauson LJ)]. If a debtor adopts the payment by the third party by applying it in discharge of the debt, then the debtor's conscience is bound by the knowledge that the payer made the payment not as a gift, but with the intention of being repaid, even though unsupported by a promise express or implied, because adoption of the payment with knowledge of the payee's intent creates an equity to reimbursement [**Re Cleadon Trust Ltd,** and see generally the discussion by IM Jackman in **The Varieties of Restitution, Federation Press**, 1998, pp 90–95].*"

72 It was suggested that in the second sentence his Honour's references to "debtor" and "debtor's" was meant to be a reference to creditor and creditor's. On reflection, however, it seems to me that this is not so. It is only if the debtor (here the first defendant) were to have adopted the payment that a restitutionary claim against it by the plaintiff would lie.

73 There is no evidence of any adoption by the first defendant, quite the contrary. That this is so appears from the first defendant's solicitor's letter dated 28 April 2008.

74 Thirdly, in pars 25 and 26 of its adjudication response, the plaintiff claimed that it had "paid all of that $524,555.54 to Merrmac or its solicitors' Trust Account pursuant to an agreement dated 17 March 2008 between Plaza West and Merrmac…" and that "The amount claimed by Simon's Earthworks must accordingly be reduced by $524,555.53 (sic) paid by Plaza West direct to Merrmac because the payment has reduced the amount outstanding on the Payment Claim dated 28 February 2008 of Merrmac against Simon's Earthworks to nil."

75 The adjudicator dealt with this at pars 45 and 46 of the determination in the following terms:

> "*45. I note that much discussion has ensued in the various unsolicited correspondence regarding payments made by the Respondent to a sub contractor of the Claimant. This payment has not been evidenced to me and is outside the scope of the Adjudication as it is not listed as a reason for withholding payment. While it is a matter for the parties and their advisers, it appears likely that some aspects of the liability that would otherwise be borne by the Claimant has been satisfied by the Respondent and this may be a factor in any sum finally paid in satisfaction of this determination.*
>
> *46. I allow the full sum claimed of $958,553.53, (including GST).*"

76 The submission by the plaintiff in effect constitutes an appeal against the adjudicator's determination or perhaps an attempt to ventilate a cross-claim before me which is properly to be brought under s 32(3)(b) of the Act on discharge of the judgment by payment to the first defendant.

77 Section 32(3)(b) is in the following terms:

> ***"32 Effect of Part on civil proceedings***
>
> …
>
> *(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal: …*
>
> *(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*"

78 Finally, whether the judgment has been satisfied is a matter which is more properly to be ventilated in the District Court and to be determined by that Court with respect to its own judgment.

79 The Merrmac claim, accordingly, fails on those series of counts, including a failure on the part of the plaintiff to establish the facts.

Conclusion

80 The proceedings are dismissed.

81 The plaintiff is to pay the first defendant's costs.

M.G. Rudge SC with S. Goldstein (Plaintiff) instructed by Adrian Batterby Lawyer
N.A. Nicholls with E.M. Peden (Defendants) instructed by Mills Oakley Lawyers (1st Defendant) : Phillip Davenport (2nd Defendant)