Reiby Street Apartments P/L v Winterton Constructions P/L [2006] Adj.L.R. 05/05

JUDGMENT : **His Honour White J** : Supreme Court of New South Wales : 5th May 2006.

1 Reiby Street Apartments Pty Ltd ("RSA") seeks a declaration that an adjudication determination made by the second defendant, Mr O'Mara, pursuant to the *Building and Construction Industry Security of Payment Act* 1999 (NSW), dated 6 July 2005, is void. It also seeks injunctive relief and an order in the nature of *certiorari* quashing the determination. It accepts that, by reason of the decisions of the New South Wales Court of Appeal in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 and ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521, relief in the nature of *certiorari* is not available, but wishes to reserve its position in relation to that issue.

2 The principal issues are:
(a) whether the adjudicator did not consider all or parts of RSA's payment schedule and adjudication response;
(b) if so, whether he erred;
(c) if so, whether his determination is void because he failed to consider matters he was required to consider by s 22(2)(b) of the Act, failed to exercise his powers in good faith, or failed to afford RSA natural justice.

3 The proceedings arise from a contract entered into between RSA as principal and Winterton Constructions Pty Ltd ("Winterton") as contractor, for the construction of a two-level basement car park, twenty-three residential apartments and four shops in Newtown in Sydney. Construction commenced on 26 November 2002.

4 RSA's complaint principally focussed upon the manner in which the adjudicator dealt with one of the variation claims which formed part of Winterton's payment claim. This was variation claim number 3 dealing with costs for removing allegedly contaminated soil. RSA also submitted by reference to three other claims, or sets of claims, that it should be inferred that the adjudicator did not consider any part of RSA's adjudication response. In respect of the first of those additional sets of claims, I do not consider that the terms of the adjudicator's determination enable a conclusion to be drawn either way as to whether RSA's proposition is correct. I deal with them briefly later in these reasons. To understand RSA's submissions in relation to variation claim 3 and the other claims, it is necessary to consider what was said about them in the payment claim, the payment schedule, the adjudication application, the adjudication response and the determination.

The Payment Claim

5 On 5 October 2004, Winterton served a payment claim for the sum of $242,195 plus GST pursuant to s 13 of the Act. There is no dispute as to the validity of the payment claim. It identified the construction work to which the claim for the progress payment related, and indicated the amount of the progress payment that Winterton claimed to be due. The claim for the progress payment was made up of about twenty separate claims for variations. Claim number 3 was for "*removal of contaminated soil as per site meeting minutes number 5 dated 13/1/03*" in the sum of $31,016. Claim number 14 was for "*Change to Ground Level structure as per SI No. 21 dated 12/2/03*". It was for $653. Claims numbered 35 to 44 were for "*EOT Delay/Disruption Cost*". Winterton sought recovery of additional costs incurred by reason of various delays in respect of which it claimed to be entitled to an extension of time.

The Payment Schedule

6 On 18 October 2004, RSA served a payment schedule pursuant to s 14 of the Act. Subsections 14(1)-(3) provide:

"*14 Payment schedules*

(1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount)".

(3) 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."

7 The payment schedule consisted of a covering letter and nine pages of attachments. In the covering letter, RSA stated: "*We refer to your submission dated 1 October 2004 and to your payment claim of 31 December 2003.*

For the purpose of the Act the amount of payment we proposed [sic] *we propose to make is Nil.*

Further, regardless of any amounts due to Winterton Constructions Pty Ltd, it is not entitled to payment because it has failed to provide a statutory declaration as required by Clause 42.1 of the construction contract.

Reasons why this amount is less than the claimed amount and the reasons for withholding payment are identified in the attached schedules.

With reference to the delay cost assessment dated 29/9/04 and submitted with the progress claim no/. 26, Reiby Street Apartments acknowledge receipt of this comprehensive report and have determined the variation costs applicable to these delay cost claims, upon the previous submissions made by Winterton Constructions. …"

8 The first two of the attached pages of the payment schedule set out the original contract sum, the value claimed as complete, the value assessed as complete, the percentage completed, the amount previously certified, the amount approved for the claim, the cost to complete, and the amount withheld for the various items of work required in the construction. There was also a column for "*comments*". There were brief comments in relation to

eight items. One of the items was for "*approved variations*" and the comment was "*refer variation table attached*". The attached variation payment schedule provided comments in respect of the claimed variations.

9 In relation to variation claim number 3, the payment schedule indicated that RSA did not propose to make any payment. The following comment appeared on the payment schedule in relation to that claim: *"The Superintendent has carried out an assessment of the Contractor's payment claim. The principal adopts the value determined by the Superintendent for the purpose of the payment schedule. Refer to Superintendent's SI 23 & 27 dated 13/2/03 and 19/2/03. WC responded on 20/2 and 23/4/03 with threats to refer the matter immediately to the Dispute Resolution Mechanism in the contract. WC is still to advise RSA of this matter being resolved via arbitration as both WC and RSA met on 18/2/03 to discuss this issue and could not agree."*

10 In relation to claim number 14, the payment schedule stated that the approved value was $112.50 and that nothing remained to be paid. The following comment appeared in respect of this claim: *"The Superintendent has carried out an assessment of the Contractor's payment claim. The principal adopts the value determined by the Superintendent for the purpose of the payment schedule. Refer to Superintendent's SI 21 dated 12/2/03. Refer to the stat declaration dated 2/7/04 located behind tab 2."*

There was no tab 2 forming part of the payment schedule.

11 The payment schedule dealt with each of the claims numbered 35 to 44 in which Winterton sought the costs arising from delays, in respect of which it claimed to be entitled to an extension of time. The payment schedule indicated that RSA did not propose to make any payment in relation to those claims. In relation to each of them it stated that the Superintendent had carried out an assessment of the contractor's payment claim and that it adopted the value determined by the Superintendent for the purpose of the payment schedule. It then referred to specific site instructions.

12 The various site instructions referred to in the payment schedule were not physically attached to it.

Earlier Proceedings

13 An adjudication application and adjudication response were made in relation to the payment claim and payment schedule. On 19 November 2004, an adjudication determination was made by Mr Zakos. However, on 16 June 2005, Macready M (as he then was) declared that determination to be void. (***Reiby Street v Winterton*** [2005] NSWSC 545).

Adjudication Application

14 On 22 June 2005, Winterton re-submitted its adjudication application of 1 November 2004. Pursuant to s 17(3)(h) of the Act, the adjudication application could contain "*such submissions relevant to the application as the claimant chooses to include*". In relation to claim 3, Winterton submitted that they were terms of the contract that no allowance had been made in the contract price for any contamination in soils, and that any sub-soil condition not shown in a geotechnical report would be treated as a latent condition under the contract. Winterton submitted that the geotechnical report referred to in the contract did not detail contamination in the ground and Winterton proceeded on the basis that the site was clean. Documents attached to the adjudication application included a geotechnical report from Geotechnique Pty Limited dated 22 April 2002 which referred to sub-surface conditions relevantly as including: *"Fill/Topsoil: gravelly sand, fine to medium grained, clay silt, low plasticity, dark brown, with concrete fragments, to depths of about 0.4m …"*

Winterton could not remove any of the spoil offsite to a tip, until a soil classification report was supplied. It submitted that on 27 November 2002, it was supplied with a copy of a soil classification report which pre-dated the contract and disclosed the existence of contamination. This report is called the Aargus report. Winterton submitted that subsequent testing by a firm called EIS showed that the soil was contaminated by fly ash. This, it submitted, caused additional costs in disposing of the soil. Neither site instruction 23, nor site instruction 27, referred to in the payment schedule, was attached to the adjudication application.

15 In relation to claim number 14, being a claim of $652.50 for change to ground level structure, Winterton enclosed an adjudication determination made by Mr Zakos of 31 August 2004. This was a corrected adjudication made pursuant to s 22(5) of the Act. The corrections were to an earlier determination of 20 July 2004 which contained errors in mathematics. It was not the adjudication subsequently determined to be void. In relation to the claim to ground level structure, Mr Zakos determined that the assessment made by RSA was correct and assessed the claim at $113. Winterton submitted that RSA had not complied with Mr Zakos' adjudication determination of 31 August 2004. It submitted that its progress claim had embodied exactly the adjudication determination dated 31 August 2004. This was clearly incorrect. Winterton also enclosed its submissions made to Mr Zakos on 24 June 2004.

16 In relation to claims 35 to 44, Winterton submitted, amongst other things, that RSA's response to the claim for delay costs was limited to responses it had previously made in respect of the delay claim; and that it had complied with the requirements of clause 35.5 of the contract that it advise within 14 days of anything that might delay the works, including any available details of the extent and cause of delay. Winterton annexed to its adjudication application various documents including an analysis of delays carried out by a firm called "Project Analysis", and various site instructions which had rejected its claims for an extension of time and provided reasons for so doing.

17 In its adjudication application, Winterton also submitted that RSA's payment schedule did not comply with subs 14(3) of the Act. It referred to the observations of Palmer J in ***Multiplex Constructions Pty Ltd v Luikens & Anor***

[2003] NSWSC 1140 at [67], [68], [70], and [76]-[78]. It submitted that the payment schedule did not provide sufficient particularity to enable it to understand even in broad outline what were the issues between it and RSA.

Adjudication Response

18 On 29 June 2005, the plaintiff lodged an adjudication response with the adjudicator. In relation to variation claim number 3, the adjudication response included the following:

"*1. Attached as pages 1 and 2 to this tab is a copy of Site Instruction SI 23 incorporating page 2 of the Geotechnical Investigation Report … dated 22 April 2003 (scil 22 April 2002). Attached as page 3 to this tab is a copy of site instruction SI 273* (sic) *dated 19/2/03. These are the documents referred to in the Payment Schedule.*

2. Under the second asterix SI 27 the Respondent makes it clear that it treats the soil which was removed as inert and therefore gives rise to no adjustment to the contract sum.

3. Prior to the signing of the Construction Contract a site meeting occurred which was attended by a director of the Claimant, William Winterton, a director of the Respondent, Steven Christofidellis and the ultimate Superintendent, James Chryssafis. This meeting took place prior to the contract document, referred to as the clarifications, being prepared and delivered by the Claimant to the Respondent.

4. At that meeting Mr Winterton expressed concern that the soil might be contaminated by tanks or oils and fuels because the site had previously been used as a second had car yard. Mr Christofidellis agreed to a contract clarification to cover the Claimant for such site conditions. Fly ash was not within the scope of contaminants which were discussed as being at the risk of the Respondent. Fly ash is inert and bears no connection to automotive associated land use.

5. It is submitted that inert soil does not constitute contaminated soil for the purposes of the Construction Contract."

19 The submission went on to dispute whether fly ash was present in the excavated soil and asserted that the documents relied upon by the first defendant as establishing that fly ash was present in the soil did not in fact refer to fly ash being present in the soil removed from the site. The submission concluded with a statement that: "*It is submitted on the basis of this evidence the adjudicator cannot be satisfied as to the existence or nature of any soil contamination.*"

20 Site instruction 23 was dated 13 February 2003. It referred to the variation claim number 3 and asked for details of how it was said that the soil removed from the site varied in its composition from that noted in the geotechnical report. The geotechnical report referred to was the geotechnical report of 22 April 2002 referred to above. Site instruction 27 was dated 19 February 2003. Its relevant parts were as follows: "*Further to yesterday's meeting and our discussions today, we advised that we have considered all information put forward and have made our assessment of the above variation claim for contaminated materials as submitted on 11 Feb 03.*

* *The soil removed from site did not differ from that described in the geotechnical report provided to you at tender and included as a contract document i.e. the first 400mm of topsoil/fill includes "concrete fragments" – otherwise known as 'inert' soil/fill.*

* *The Site Validation Report issued to you under Site Instruction on 13 Dec 02 confirmed that the topsoil/fill was inert.*

* *The soil removed from site is not a latent condition as described in the contract.*

Your claim for additional costs are therefore denied."

21 Thus, the Superintendent rejected the claim for variation for contaminated soils on the ground that the soil removed did not differ from that described in the geotechnical report of 22 April 2002. This raised a question of fact as to the content of the soil removed.

22 The submissions made in relation to variation claim 3 were consistent with the position taken by the superintendent in site instruction 27, although RSA added statements that pre-contractual discussions in relation to contamination against which the first defendant was to be protected were confined to discussions about contamination by tanks or oils and fuel, and that fly ash was not within the scope of the contaminants discussed as being at the risk of the plaintiff. The submission that the pre-contractual discussions about contaminants did not extend to fly ash went beyond the reasons advanced in site instruction 27 for the rejection of the variation claim. However, the other submissions did not.

23 In relation to claim number 14, RSA submitted that the claim had been determined by Mr Zakos in the amount of $113 and not $653 as alleged in the payment claim. It submitted that there was no evidence produced by Winterton which would satisfy the adjudicator that the value of the work had changed since the previous determination. It submitted that the adjudicator was accordingly bound by subs 22(4) of the Act to find the quantum of the claim to be $113 in accordance with Mr Zakos' determination. Subsection 22(4) provides:

"*22 Adjudicator's determination …*

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract, or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

…"

24 However this submission was not reflected in the reasons contained in the payment schedule for rejecting this part of the claim. It does not appear that the site instruction 21 dated 12 February 2003 or the statutory declaration dated 2 July 2004 was included in the materials provided to the adjudicator. (If the documents were included, my attention was not directed to them and they were not included in any part of the adjudication application or the adjudication response which dealt with this claim.) However, the point made by RSA in its submission emerges equally from Winterton's adjudication application, except that no reference was made by Winterton to the provisions of subs 22(4).

25 In relation to the claims for additional costs as a result of delays for which an extension of time had been sought, RSA attached to its submissions the site instructions referred to in the payment schedule. It summarised the effect of those site instructions as including that the application for the extension of time did not comply with the requirements of clause 35.5 of the contract.

26 RSA submitted, by reference to the terms of clause 35.5, that a claim for an extension of time must set out the facts on which the claim was based, show clearly how the delay affected activities which were on the actual critical path for reaching practical completion, and state the steps which the contractor had taken, or proposed to take, to alleviate and otherwise deal with the delay. It submitted that the Extension Of Time claims did not address those matters and that the claims were consistently and rightly rejected by the superintendent for their failure to conform with the provisions of clause 35.5. It also submitted that Winterton's EOT claims were flawed because they relied upon a misconstruction of clause 35.5. It submitted that an event could not be claimed merely because it caused a delay in the completion of the works. Rather, the event must be responsible for a delay beyond the date for practical completion. It submitted that the report of Project Analysis upon which Winterton relied was flawed because it assumed that Winterton was entitled to claim for every day for which work had been delayed, irrespective of whether that delay caused the works to be completed before or after the date for practical completion.

27 These submissions were in accordance with the site instructions referred to in the payment schedule which set out the bases upon which the claims for extension of time had been rejected. The site instructions referred to in the payment schedule generally rejected the claims for extension of time on the basis that Winterton had failed to comply with the notification provisions of clause 35.5 of the contract, that the event of which Winterton complained was not a cause described under clause 35.5 of the contract, and in any event, had not delayed the works in reaching practical completion as, on the basis of the program provided by Winterton, there would be no delay to reaching the date for practical completion.

Adjudicator's Determination

28 The adjudicator made his determination on 6 July 2005. He stated as follows: "*I Determine, as an Adjudicator pursuant to the Building and Construction Industry Security of Payments Act 1999 No. 46 as amended, that:*

1. The Payment Claim was made pursuant to the requirements of section 13 of the Act.

2. The Adjudication application was made pursuant to the requirements of section 17.

3. A Payment Schedule was provided pursuant to section 14 of the Act but it contained minimal supporting documentation or explanation.

4. A Response to the Adjudication Application was provide (sic) *by the Respondent but on a cursory examination it was found to contain information not provided with the Payment schedule and was quarantined pursuant to section 20 2(B)* (sic) *of the Act.*

5. Variations + repayment of unjustified deductions less credits to the value of $178,136.72 + gst including the reimbursement of $25,232.00 + gst withheld for defective works, were found to be justified and became due and payable on the 29th December 2004. …"

29 aragraphs 3 and 4 of the Determination indicate that the adjudicator did not conclude that the payment schedule failed to comply with the requirements of s 14 of the Act, although he considered that it provided only minimal documentation and explanation.

30 In dealing with the payment schedule in his accompanying reasons, the adjudicator said: "*An examination of the payment schedule provided by the Respondent indicates that while comments are made on 8 items, even they could be described as skimpy and contain no information in support or any indication of how the value was adduced.*

In that regard I am directed to the deliberations of Palmer J in Multiplex Constructions Pty Ltd, v Luikens & Anor *[2003] NSWSC 1140 – 4th December 2003. Those I accept and follow.*

It follows that while a Payment Schedule has been provided, it is adjudged as unclear and not in accordance with the intent or requirement of the Act in that regard."

31 To say that comments were made on eight items, ignores the additional comments made on the schedule dealing with the variation claims. These in turn referred to the Superintendent having assessed the value of the claim, and to the Principal having adopted the value determined by the Superintendent, and to the Superintendent's site instructions. The site instructions give brief reasons for the Superintendent's assessment. The covering letter which formed part of the payment schedule stated that the reasons for assessing the claim at nil were identified in the schedules.

32 Notwithstanding the last sentence in the extract quoted in paragraph [31], it is clear that the adjudicator did not consider that the payment schedule was wholly invalid. In dealing with the individual claims he made references to it, including in some cases, but not all, to the comments in the schedule dealing with the variation claims.

33 Paragraph 20(2)(c) of the Act provides that the adjudication response "*may contain such submissions relevant to the response as the respondent chooses to include*." However, subs 20(2B) 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*."

34 Subsection 22(2) provides:

" *22 Adjudicator's determination…*

(2) 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."

35 Paragraph 4 of the determination quoted in paragraph [28] above suggests that having concluded that the adjudication response included reasons for withholding payment which had not already been included in the payment schedule, the whole of the adjudication response was "*quarantined*", that is, put aside. Nevertheless, the adjudicator did not conclude that none of the submissions in the adjudication response had been "*duly made … in support of the schedule*". Such a conclusion could not reasonably have been made, unless a very restricted view was taken of what constituted the payment schedule.

36 The adjudicator made the following reference to the adjudication response in his reasons: "*I report that at 4.20pm on 29th June 2005 I discovered a folder containing a* (sic) *Adjudication Response at my front door. I had been absence* (sic) *at the time of delivery.*

A cursory inspection indicated that that Response contained 22 annexure. (sic)

I note that the Payment Schedule was not in the form of the now received Response and presented additional document (sic)*, the inclusion of which contravene the requirements of Section 20 (2B) of the Act.*

They will not be considered and will be quarantined. In that regard I am referred to the decision of ***Multiplex Constructions Pty Limited v Luikens & Anor*** *[2003] NSWSC 1140 (4 December 2003) at 67*."

37 Thereafter, although there is frequent reference to the submissions and documentation contained in the adjudication application, no reference was made to any part of the adjudication response. At no stage in dealing with any of the individual claims was there any reference to the submissions or documents in the adjudication response.

38 The "*additional document[s]*" to which the adjudicator referred, which he quarantined, must have been those annexed to the adjudication response. That raises the question whether, as paragraph 4 of the determination suggests, he quarantined the whole of the adjudication response, or whether he only quarantined those "additional documents" whose inclusion he considered contravened subs 20(2B). Having considered how the adjudicator dealt with the detail of the claims, I consider that he "quarantined" the whole of the adjudication response.

39 The adjudicator allowed variation claim 3 in the amount claimed. His reasons for doing so were as follows:

"*I note that the backup documentation is contained behind Tab 11 of the submission. From the Payment schedule No. 26 provided – behind Tab 4 – I note that the Respondent relies on the Superintendent's assessment at $NIL due to the Superintendent's site instruction 23 & 27 dated the 13th of February 2003 & the 19th February 2003 but, as these documents have not been provided by the parties, I make no comment in that regard.*

The Claimant bases his claim on the exclusion noted at of items 10 & 12 of the clarifications of excluded works.

I note that those items directly refer to:

Item 10. No allowance made for any asbestos or contaminated fill.

Item 12. Ground allowance as per Geotechnical Report. Anything other will be treated as a latent condition under the contract.

The Claimant submits that the Geotechnical report of Geotech Pty Limited, No. 4247/1-AA dated the 22nd April 2002, was listed as a contractual document in the formal agreement and they relied on the site conditions there recorded.

It is submitted that after commencing on site on or about the 25th November 2002, approximately 3 days after the Contract was signed, they were supplied with a (sic) Environmental Soil Classification report prepared by Aargus showing that the site was contaminated Fly Ash *and as such the spoil would not meet the requirements ANZECC regulatory criteria.*

After reading all documents provided it is my opinion that, as a result of the contaminated fill *being discovered on the site, the Claimant incurred additional cost in disposing of the fill in at controlled tips.*

It follows that I accept the Claimant's submission that this item relates to a Latent condition that occurred on site with the result that a claim of a variation to the contract is justified.

I therefore accept this as a justified variation in the value of $31,016.00 + gst."

40 The tabs referred to were those in the adjudication application. The adjudicator was in error in saying that the Superintendent's site instructions 23 & 27 were not amongst the documents provided by the parties. They were

included as part of the adjudication response. They were referred to in the first paragraph of the submission in the adjudication response dealing with that claim. The adjudicator cannot have read the adjudication response where it dealt with this claim.

41 In addressing this claim, the adjudicator considered the submission made by Winterton in its adjudication application. He misstated Winterton's submission in saying that it submitted that the Aargus Report showed that the site was contaminated by fly ash. The report did not make that statement. Nor did Winterton submit that it did. The Aargus report stated that the soil sample from the fill layer could be classified as inert. Winterton merely submitted that it showed more contamination than in the report of Geotechnique. However, this error could not affect the validity of the determination.

42 The only reason for the adjudicator's conclusion that contaminated fill was discovered on the site, resulting in additional costs in disposing of the fill to controlled tips, was that this appeared from all of the documents provided. The documents to which he had regard did not include site instruction 27 which disputed that the soil removed from the site differed from the description in the geotechnical report of 22 April 2002. Nor did the adjudicator address RSA's submission that there was no relevant contemporaneous document which identified fly ash as having been included in the excavated material, and that the first reference to the presence of fly ash was contained in a report prepared many weeks after the soil had been excavated. He did not deal with RSA's submission that the conclusion drawn in the March report of EIS was based on a small disturbed sample and that this was insufficient evidence that fly ash was present in the soil removed from the site, particularly given that neither of the earlier reports which were based on samples from the site before the soil was excavated referred to the existence of fly ash. It is clear that the adjudicator did not have any regard to RSA's submissions in its adjudication response dealing with this claim. Presumably this was because he "quarantined" the adjudication response.

43 In relation to claim number 14, the adjudicator made no reference to RSA's submission in its adjudication response that as the claim had already been determined by Mr Zakos, and as it was not claimed that there had been a change to the value of the work since Mr Zakos' determination, he was precluded by subs 22(4) from determining that the work had any value other than in the sum of $113 as determined by Mr Zakos. The adjudicator reassessed the claim in the sum of $180 plus GST. It would have been open to the adjudicator to have said that RSA's submissions on this claim were not open to it, as they were not included in the payment schedule as reasons for rejecting the claim. Nonetheless, he would still have needed to consider the provisions of subs 22(4) of the Act before determining the claim as he did. Paragraph 22(2)(a) requires the adjudicator to consider the provisions of the Act. Even though he could not take the submission into account under s 20(2)(d), he could and should have done so under s 20(2)(a) (***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [35]). I infer that he did not have subs 22(4) in mind. That could only be so if he had not read that part of RSA's submissions in its adjudication response. Again, this is consistent with his having quarantined the whole of the adjudication response because he had formed the view that it included reasons for withholding payment which were not included in the payment schedule.

44 In relation to claims 35 to 44, the adjudicator again made no express reference to the submissions in the adjudication response. He did note that: "*The documents provided indicate that Exceland Property Group Pty Ltd (EPG) had rejected this claim on the ground of non-compliance with clause 35.5 of the contract and a claimed inability to prove that the delays affected the critical path.*"

45 He then went on to consider the analysis prepared by Project Analysis and accepted "*the analysis as presented*". He also said that: "*I note from the documents supplied that Winterton Constructions notified the proprietor of an Extension of Time claim progressively and also that loss and expense had been experienced as a result, details of which would be supplied* in due course. *This was pursuant to the requirements of clause 35.5 of the contract.*"

46 However, he did not deal with RSA's submission in its adjudication response that clause 35.5 of the contract required that the claims for extension of time must show clearly how the delay affected activities which were on the actual critical path for reaching practical completion, so as to demonstrate the date for practical completion would be delayed. Different views might reasonably be held as to whether the claims notified did conform with clause 35.5 of the contract. That was a question for the adjudicator. He answered that question having had regard to the reasons in EPG's site instructions for rejecting the claim for extension of time. However, if the adjudicator had had regard to the submissions made by RSA in its adjudication response, it could reasonably be expected that he would have dealt more explicitly with RSA's contentions.

47 The adjudicator commenced his consideration of these claims by observing: "*From the payment schedule no. 26 provided – behind tab 4 – I note that the respondent's only comment was that:*

> '*With reference to the delay cost assessment dated 29 September 2004, and submitted with the progress claim number 26, Reiby Street Apartments acknowledge receipt of this comprehensive report and have determined the variation costs applicable to these delay costs claims, upon the previous submissions made by Winterton Constructions.*'"

48 This was not RSA's only comment. The payment schedule also included the comments in the schedule dealing with the variation claims. The adjudication response contained submissions developing those comments.

49 Having regard to the passage quoted, and the failure to deal explicitly with RSA's submissions, I infer that the adjudicator did not have regard to the submissions in the adjudication response. Although the adjudicator did not

refer to the comments in the payment schedule dealing with the variation claims, he did have regard to the substance of those comments, as they were contained in the site instructions which were attached to Winterton's adjudication application.

50 RSA also submitted that it should be inferred from the way the adjudicator dealt with variation claims 1 and 2 that he had no regard to the adjudication response. Those were claims for relocating pay TV cables which were said to involve a variation to the scope of work required under the contract. The payment schedule referred to the Superintendent's site instructions which gave as reasons for rejecting the claimed variations that the work was not a variation, was not included in agreed exclusions from the scope of works, and was obvious. The payment schedule also referred to items 23 and 24 of a schedule of clarifications of what works were excluded. The adjudicator referred to the payment schedule, observing that RSA relied on the Superintendent's assessment at $nil due to items 23 and 24 of the clarifications of excluded works. He did not specifically refer to the site instructions which were not included with the adjudication application, but were included in the adjudication response. Nor did he expressly refer to the adjudication response. He gave reasons for concluding that the items were a latent condition and a justified variation. If these claims were considered alone, I would not conclude from the adjudicator's failure to refer to the adjudication response and the site instructions that he had not considered them. I do not consider that the way the adjudicator dealt with these claims adds any material support for the view that the adjudicator did not consider any part of the adjudication response. Nor does it suggest that he did so.

51 However, the absence of any further reference to the adjudication response, and the way in which the adjudicator dealt with variation claims 3, 14, and 35 to 44 confirms that he dealt with the adjudication response as set out in paragraph 4 of his determination. That is to say, he gave it a cursory examination. He concluded that it contained information not provided with the payment schedule, and therefore "quarantined" it because of the view he took about the effect of s 20(2B). I conclude that he did not consider any of the material in the adjudication response in determining any of the claims. The adjudicator only considered the arguments advanced by RSA in its adjudication response to the extent those arguments were contained in documents appended to the adjudication application, or were spelled out in the payment schedule (as distinct from in the documents referred to in the payment schedule). However, it was in the attempted performance of his function of deciding what material he was entitled and required to consider pursuant to s 22(2) of the Act that the adjudicator decided that the adjudication response should not be considered.

52 Save in respect of claim number 3, I do not conclude that the adjudicator failed to have regard to the substance of the contentions in the payment schedule. Although in parts of his reasons the adjudicator describes the payment schedule as if it consisted only of the covering letter, or only of the first two pages containing eight comments, it is clear from other parts of his reasons that he did have regard to the schedule dealing with the variation claims. He makes reference to that schedule in dealing with claims 1, 2 and 3. However, where the payment schedule referred to a document, he had regard to the document only if it were included in the adjudication application.

Did the Adjudicator Err in not Considering Site Instruction 27 or the Adjudication Response?

53 The question of what reasons or submissions could properly have been included in RSA's adjudication response depends on the identification of its reasons for withholding payment indicated by the payment schedule. In dealing with claim number 3, it was submitted for Winterton that the reasons in site instruction 27 dated 19 February 1993, for the Superintendent having rejected the claim, were not incorporated into the payment schedule. Winterton submitted that there was no evidence that the Superintendent ever carried out an assessment of the payment claim, there was no evidence that the principal had considered this part of the payment claim, the schedule appended to the payment schedule predated the issue of the payment claim, and although RSA specifically adopted the value determined by the Superintendent, it did not adopt his reasons.

54 I do not follow the first three of these contentions. It is clear that the Superintendent did assess the claim which became incorporated in the payment claim. Nor need there be evidence as to what degree of consideration RSA gave to the claim, separate from the reasons it gave in the payment schedule as to why the amount of the payment it proposed to make (nil) was less than the claimed amount. Nor is it relevant that the payment schedule incorporated schedules which predated the payment claim. The payment claim incorporated claims for variations which had been made during the course of construction. There is no reason that the payment schedule could not incorporate schedules prepared at an earlier time which set out the principal's reasons for not accepting the claims.

55 The question then is whether the reasons for not accepting the claims to be found in the site instructions were "indicated" in the payment schedule as the reasons the scheduled amount was less than the claimed amount and why RSA was withholding payment.

56 In ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140, Palmer J said (at [70]) that: "*Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.*"

57 His Honour also observed (at [76]-[78]) that both a payment claim and a payment schedule must be produced quickly, and they may be contained in an abbreviated form, which, to an uninformed reader, would be

meaningless, but which would be readily understood by the parties themselves. The particularity and precision required of a payment schedule is that which is reasonably sufficient to apprise the claimant of the real issues in dispute. A payment schedule need only "indicate" the respondent's reasons for withholding payment. What is required is that the essence of the reason for withholding payment be made known sufficiently to enable the claimant to decide whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

58 His Honour's observations were endorsed by Mason P, with whom Giles and Santow JJA agreed, in ***Clarence Street Pty Ltd v ISIS Projects Pty Ltd*** [2005] NSWCA 391 at [31]. As McDougall J said in ***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** [2005] NSWSC 548 at [30]: "*It is commonly the case … that parties in the payment claims and payment schedules use a kind of shorthand and that an understanding of the issues that they seek to raise has to be obtained having regard to the background with which they are familiar and the relevant contractual terms.*"

59 The payment schedule did "indicate" the reasons RSA proposed to pay nothing in respect of claim number 3. The covering letter which formed part of the payment schedule stated that the reasons were identified in the attached schedules. The attached schedule stated that RSA adopted the value determined by the Superintendent and referred to the Superintendent's site instructions. The site instructions had already been supplied to Winterton. It was unnecessary to annex them physically to the payment schedule (***Coordinated Construction Co. Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [42]). Site instruction 27 stated the reasons the Superintendent denied Winterton's claim for additional costs. It was not necessary for the respondent to repeat those reasons verbatim in the payment schedule. They were incorporated by reference, and were sufficient to apprise Winterton of the issue upon which its claim for additional costs was disputed. There would be no point to the inclusion of the reference to the site instructions in the payment schedule unless they were relied upon by RSA as the reasons it proposed to pay nothing for the claim. Whilst RSA did not expressly say in the schedule that it adopted the Superintendent's reasons, that was necessarily implicit in its reference to them in the schedule, and was confirmed in the covering letter.

60 It follows that the adjudicator erred in not having regard to site instruction 27, nor to the adjudication response, insofar as it contained RSA's submissions in support of the reasons indicated in the payment schedule for rejecting claim number 3.

61 Further, for the reasons I have previously given, I conclude that the adjudicator did not consider any part of RSA's adjudication response. It was not only the part dealing with variation claim 3 which was not considered. Winterton did not submit that none of the submissions in the adjudication response was duly made.

Third Issue: Invalidity

62 It follows that the adjudicator did not consider, as he was required to do under paragraph 22(2)(d), all submissions (including relevant documentation), that were duly made by RSA in support of the payment schedule. He also failed to consider the payment schedule, insofar as it comprised the reasons for rejecting variation claim number 3 which were contained in the site instructions referred to in the payment schedule. He thereby failed to afford RSA the measure of natural justice the Act prescribes.

63 In relation to the variation claim number 3, it was submitted for Winterton that even if the adjudicator had had regard to site instruction 27, that document could not realistically have affected his determination. It was submitted that the material included in the adjudication application which was considered by the adjudicator covered all of the matters raised by site instruction 27. If it were clear that there was no possibility that the adjudicator's determination would have been different if the reasons indicated in the payment schedule and the submissions duly made had been considered, then the failure to consider the submission would not affect the validity of the determination (***Stead v State Government Insurance Commission*** (1986) 161 CLR 141 at 145; ***Re Refugee Tribunal ex parte Aala*** (2000) 204 CLR 82 at 88, [4]; 122, [104]; 130, [130]; 153, [211]; and compare the reasons of Gaudron and Gummow JJ at 91 [17] and 109, [58]-[60]).

64 It is impossible to say to what conclusion the adjudicator would have come had he considered site instruction 27 and the submissions made in support of it in the adjudication response. He may or may not have been persuaded that the evidence was insufficient to show that the excavated material contained fly ash. I have already observed that the adjudicator was mistaken in his understanding of what was disclosed in the Aargus report referred to in Winterton's submissions. It is impossible to say that had he considered the submission that there was no relevant contemporaneous document which identified fly ash as having been included in the excavated material, he would have come to the same conclusion. He should at least have observed that the Aargus report did not disclose the presence of fly ash, and then have considered RSA's submission as to what conclusion should be drawn from the report of EIS.

65 In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421, Hodgson JA, with whom Mason P and Giles JA agreed, said (at 441, [52]) that for an adjudicator's determination to be valid it must satisfy the conditions laid down by the Act as essential conditions to the determination. Otherwise it would be void. His Honour identified five "***basic and essential requirements***". These were not exhaustive. They did not include the matters to be considered by the adjudicator pursuant to subs 22(2). In relation to the "***more detailed requirements***" in ss 13(2), 17(2) and (3), 21 and 22(2), which were not classified as "***basic and essential***", his Honour said:

> *"[55] … the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination … What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power …, and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. …*
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> *[56] It was said in the passage in* **Anisminic Ltd v Foreign Compensation Commission** *[1969] 2 AC 147, quoted by McDougall J, that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in* Craig v South Australia *(at 177) the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s 22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s 22(2), especially in pars (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (s 20(1) and s 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered. …*
>
> *[57] The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity."*

66 The failure to consider the adjudication response insofar as it contained submissions duly made in support of the payment schedule, and the failure to consider site instruction 27 which contained RSA's reasons indicated in the payment schedule for not paying variation claim 3, was a substantial denial of the measure of natural justice the Act required. Subject to one matter, it would follow that the determination was void. That matter is the statement in para [56] of *Brodyn* that a determination will not be invalid for non-compliance with s 22(2) if the adjudicator bona fide addresses the requirements of the subsection as to what is to be considered. What is the position if the adjudicator in good faith, but mistakenly, decides that the payment schedule does not include reasons in documents referred to in the schedule which had been supplied to the claimant, or decides that he or she is not permitted to consider submissions of the claimant or the respondent because he or she forms the view they have not been "duly made" in support of the claim or the schedule?

67 This issue only arises in terms of ***Brodyn*** if the adjudicator acts bona fide. RSA submitted that he did not act bona fide in that he did not "*put* [his] *mind to the comprehension and* [his] *will to the discharge of* [his] *duty*" (***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** [2005] NSWSC 548 at [39], citing ***Roberts v Hopwood*** [1925] AC 578 at 603). The submission assumed that the adjudicator simply did not turn his mind to RSA's submissions (***Timwin Construction*** at [42]).

68 However, I do not think this does justice to the adjudicator's reasons. He did not ignore RSA's adjudication response. He decided that he should not consider it at all because it contained some information not included in the payment schedule. His reasoning appears to have been that because in one respect, or some respects, the adjudication response did not comply with s 20(2B), no part of it could be considered. A cursory examination was sufficient to show that it contained information not included in the payment schedule. This would be sufficient to exclude the whole of the adjudication response if that were the effect of s 20(2B).

69 Winterton did not seek to support this reasoning. Such a construction of s 20(2B) is untenable. Subsection 20(2B) does not prohibit the making of an adjudication response if it contains reasons going beyond those in the payment schedule. It prohibits the inclusion of such additional reasons. The consequence of a respondent's breaching s 20(2B) is that such additional reasons may not be considered under s 22(2)(d) (***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [34]). Hence s 22(2)(d) requires and permits the adjudicator only to consider such submissions in the adjudication response as are "duly made". This implies that the adjudication response may include some submissions which are duly made and some which are not. The latter are not to be considered under s 22(2)(d). But the adjudication response is not wholly invalid because some reasons additional to those in the payment schedule are included in it.

70 The question of the bona fides of an adjudicator's determination was extensively discussed in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129. Brereton J concluded (at [109], [110], [115] and [119]) that, in the sense in which the term "good faith" was used in ***Brodyn***, it did not encompass recklessness in the exercise of the adjudicator's powers or capriciousness. Hence his Honour held that an adjudicator did not

make a genuine or conscientious attempt to perform his function, but acted capriciously, where he accepted the claimant's submissions on one topic solely because he had rejected the respondent's submissions on other topics as unmeritorious.

71 The adjudicator's rejection of the adjudication response after a "cursory examination", and his failure to explain why its inclusion of information not included in the payment schedule rendered it wholly irrelevant, might suggest a capricious or reckless exercise of his powers. On the other hand, his statements are consistent with a mistaken view of the effect of s 20(2B) which would enable a rejection of the whole of the adjudication response after such a cursory examination. Errors in reasoning, even egregious errors, do not equate to an absence of bona fides. (***SBBS v Minister for Immigration and Multicultural and Indigenous Affairs*** (2002) 194 ALR 749 at 756, [45]-[46]). I do not conclude that the adjudicator did not act in good faith, even in the broad sense described in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*.

72 In ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** at [45]-[49], [120]-[123], Brereton J, after analysing *Brodyn*, held that if an adjudicator fails to consider matters required by subs 22(2) at all, as distinct from not considering them accurately, the adjudicator will not have complied with conditions essential to his or her authority to make a determination. (See also ***Pacific General Securities Ltd v Soliman & Sons Pty Ltd & Ors*** [2006] NSWSC 13 at [66]). Brereton J so decided having had regard to the statement in *Brodyn* at [56] that with the requirements of s 22(2) compliance was not a pre-condition to an adjudicator's authority to make a decision. When read with the balance at para [56] of ***Brodyn***, this meant that a decision was not void for non-compliance with the requirements of s 22(2) if there had been a bona fide attempt to comply. But the position was otherwise if the requirements were disregarded.

73 In the present case, the adjudicator did not consider at all the reasons indicated in the payment schedule for rejecting variation claim number 3. The adjudicator did not consider the reasons in the site instructions referred to in the payment schedule for the scheduled amount in relation to that claim being nil. His reason for not considering this part of the payment schedule was that he mistakenly considered that the site instructions had not been provided. He did not form the view that the reasons in the site instructions were not reasons indicated in the payment schedule. That is to say, the adjudicator's failure to consider those reasons was not due to his having made a conscientious, but mistaken, assessment of what the payment schedule consisted. Rather, he mistakenly thought that the site instructions had not been provided to him because he mistakenly quarantined the whole of the adjudication response. The fact that his failure to consider this part of the payment schedule at all was occasioned by another error (the quarantining of the adjudication response) which might arguably be within jurisdiction, does not mitigate his failure to consider the payment schedule and the reasons indicated in it. In relation to his failure to consider the reasons in site instruction 27, the adjudicator entirely disregarded a matter which paragraph 22(2)(d) requires him to consider. He thereby committed jurisdictional error. The error also resulted in a substantial failure to afford natural justice. It rendered the whole determination void (***Lansky Constructions Pty Ltd v Noxequin Pty Ltd (in liq)*** [2005] NSWSC 963 at [20]; ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [90]-[92]).

74 The adjudicator's failure to consider any of the adjudication response raises the issue identified in para [66] above. An adjudicator is given jurisdiction to determine whether a submission in an adjudication response has been "duly made". In assessing that question, he must apply the provisions of the Act so far as they are relevant. If the adjudicator's error was that he compared the reasons included in the adjudication response with those in the payment schedule, and decided that the former had not been duly made in support of the schedule, such an error would be one made in the exercise of his jurisdiction. There would not have been a failure to consider the submissions because they were rejected on an erroneous legal ground. However, the adjudicator's error was not of that kind. Rather, it involved a misconstruction of subs 20(2B) and paragraph 22(2)(d). It was not just an error in the application of those provisions to the documents in question. It was an error which meant that the adjudicator misconceived the jurisdiction he had to determine the payment claim. He wrongly considered that he could make his determination without regard to the adjudication response. In my view, paragraph [56] of ***Brodyn***, which has been quoted above, should not be understood as saving a determination from invalidity on the grounds of non-compliance with subs 22(2) if an adjudicator has committed jurisdictional error. Such a case is no different in principle from one where the adjudicator has failed to consider at all a matter required to be considered under subs 22(2).

75 Further, the adjudicator's error meant that natural justice was not afforded to RSA as required by para 22(2)(d). In my view, paras [55] and [57] of ***Brodyn*** require the conclusion that a determination is a nullity if there is a substantial failure to afford the measure of natural justice the Act requires, even if the penultimate sentence of para [56] of ***Brodyn*** (the last quoted in para [65] above) should be read as applying whether or not the adjudicator makes a jurisdictional error.

Conclusion

76 For these reasons, I consider that the determination was void. To cover the eventuality that I might find the determination was void by reason only of the adjudicator's failure to consider site instruction 27 or the submissions in relation to variation claim 3, Winterton offered to undertake not to enforce the judgment obtained on the basis of the determination, to the extent of that claim, being $31,016 plus GST. It is unnecessary to consider whether, if this had been the sole basis for my conclusion that the determination was void, it would be a proper exercise of discretion not to make the declaration sought on the basis of such an undertaking. I have found that the

determination was void by reason, inter alia, of the adjudicator having not considered any part of the adjudication response.

77 I was told that judgment has been filed in the District Court on the basis of the adjudication determination. RSA submitted that a declaration that the determination was void would have utility (***Brodyn Pty Ltd v Davenport*** *at 443, [61];* ***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** [2005] NSWSC 548 at [45], [47]). Winterton did not dispute this.

78 Accordingly, I will make a declaration in accordance with paragraph 1 of the summons. RSA also sought an injunction to restrain Winterton from "*taking any steps in relation to or arising from the said Adjudication Determination*". I decline to grant an injunction in those terms. An application may be made to set aside the District Court judgment. Winterton may be required to take some action in relation to any such application, even if it be consenting to the setting aside of the judgment. Such an action would be "*in relation to … the Adjudication Determination*". An appeal from my judgment would be the taking of a step in relation to the Adjudication Determination. There may be other things of which I am presently unaware which Winterton may be entitled to do in relation to the Adjudication Determination. In my view, the injunction sought is too wide. RSA has not pointed to anything which indicates the need for injunctive relief.

79 Accordingly, I make the following declaration and orders:

1. Declare that the purported adjudication determination made by the second defendant on adjudication application number 2004 MBA.N-033 pursuant to the *Building and Construction Industry Security of Payment Act* dated 6 July 2005 and issued to the plaintiff on or about 19 July 2005, is void.
2. Order that the plaintiff pay the second defendant's costs as a submitting defendant.
3. Order that the first defendant pay the plaintiff's costs of the proceedings, including any costs payable by it to the second defendant.
4. Order that the summons be otherwise dismissed.
5. The exhibits may be returned after 28 days.

Plaintiff: M Christie instructed by : J S Mueller & Co
Defendant: D Sachs (solr) instructed by Sachs Gerace Lawyers