JUDGMENT : **Einstein J :** Supreme Court New South Wales, Equity Div, T&C List. 5th June 2008

The proceedings

1 These proceedings concern a challenge by the plaintiffs, Mr and Mrs Shorten, to two adjudication determinations by the second defendant ("the adjudicator") pursuant to the *Building and Construction Industry Security of Payment Act* 1999 ("the Act") arising out of a contract between the plaintiffs and the defendant ("the Builder"). The contract related to the construction of a residential building (comprising 10 apartments) in Wagga Wagga, New South Wales.

2 The challenge is grounded upon the contention that there was a denial of natural justice in the adjudication processes.

The first adjudication determination

3 On 21 November 2007, the Builder served a payment claim upon Mr and Mrs Shorten pursuant to the Act ("the first payment claim"). This was progress claim no. 18 under the contract.

4 On 5 December 2007, Mr and Mrs Shorten served a payment schedule pursuant to section 14 of the Act.

5 Late in the evening of Monday 17 December 2007, Mr David Hurst hand delivered a sealed box to Mr and Mrs Shorten, purportedly containing a copy of its adjudication application (purportedly pursuant to section 17 of the Act). Mr and Mrs Shorten allege that significant documents were missing from the box of documents delivered. This is one of the bases upon which they challenge the adjudication determination.

6 On 24 December 2007, Mr and Mrs Shorten served their adjudication response on the defendants.

7 The adjudicator forwarded his (purported) adjudication determination on 14 January 2008 ("the first adjudication determination"). The adjudicated amount was $424,681.90 (including GST).

The second adjudication determination

8 On Friday 21 December 2007, the Builder served another payment claim upon Mr and Mrs Shorten pursuant to the Act ("the Second Payment Claim"). This was progress claim no. 19 under the contract.

9 On or about 4 January 2008, Mr and Mrs Shorten served a payment schedule pursuant to section 14 of the Act.

10 On or about 18 January 2008, the Builder served its adjudication application with respect to the Second Payment Claim.

11 On 30 January 2008, Mr and Mrs Shorten served their adjudication response on the Defendants.

12 The adjudicator forwarded his (purported) adjudication determination on 11 February 2008 ("the second adjudication determination"). The adjudicated amount was $246,277.11 (including GST).

The relief sought

The first adjudication determination

13 Following the first adjudication determination being made, the Builder requested and obtained an adjudication, which was then filed with the District Court. The District Court proceedings have since been transferred to the Supreme Court. By reason of s 25(1) of the Act, the effect of filing the certificate was to create a judgment. Mr and Mrs Shorten seek an order that the judgment be set aside in the related proceedings transferred to the Supreme Court from the District Court, namely Supreme Court proceedings no. 55025 of 2008. Mr and Mrs Shorten submit that the adjudication determination is void. If this be correct, it follows that the judgment ought to be set aside: *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 443 [61].

The second adjudication determination

14 The plaintiffs contend that in the second adjudication determination, of the adjudicated amount of $246,277.11, the sum of $212,806.86 was referable to items valued by the adjudicator in the first adjudication determination. The plaintiffs contend that the adjudicator concluded in the second adjudication determination that he was required by section 22(4) of the Act to "find for the same amount" as he had valued the relevant works in his first adjudication determination.

15 On 19 February 2008 the plaintiffs sought interlocutory relief preventing the obtaining (pursuant to section 25) and filing (pursuant to section 24) of an adjudication certificate with respect to the second adjudication determination. The injunction was sought on the basis that if the first adjudication determination was void, it followed that any subsequent determination that purported to be founded upon the first adjudication determination, as mandated by section 22(4), would likewise be void: cf *Veolia Water Solutions & Technologies v Kruger Engineering Australia Pty Limited* [2006] NSWSC 1406 at [15] per McDougall J.

16 On 19 February 2008 the Court made interlocutory orders to that effect. Those orders were conditional upon payment into court of the sum of $477,000 [comprising the sum of the adjudicated amount in the first adjudication determination, that part of the adjudicated amount in the second determination not the subject of section 22(4), together with the adjudicator's fees in both determinations]. This sum has been paid into Court in accordance with the Court's directions.

The proceedings before the Court of Appeal

17 Nicholas J in *David Hurst Constructions Pty Ltd v Shorten* [2008] NSWSC 164 rejected the contentions put by counsel for Mr and Mrs Shorten [the then Defendants] that, by reason of s 7(2)(b), the Act has no application to

this contract. His Honour held that the Act did apply to the contract. An appeal has been instituted by the plaintiff and it was heard on 3 June 2008.

18 During the current hearing the plaintiffs accepted that they were bound by a res judicata in terms of the decision of Nicholas J.

The remaining grounds of the plaintiffs' challenge to the determinations

19 The two remaining grounds of challenge to the first adjudication determination relate to:

The mistake as to the Supreme Court decision:

i. In the first adjudication determination, made on 14 January 2008, the adjudicator [Mr Hillman] made the following finding::

"d) Previous Determination – The determination of the previous Adjudication Application No. 2007ADJT321 by adjudicator Helen Durham ***was subsequently found by the Supreme Court*** *to be void under the Act*. For the purposes of Section 22(4) I find that as the determination was void under the Act I will not be bound to give the work (or goods or service) the same value as determined by Helen Durham in Application Adjudication No. 2007ADJT321." (Emphasis added)

[It is common ground that no such finding had been made by the Supreme Court]

Incomplete service of the entirety of the adjudication application documents:

ii. The plaintiffs contend that the copy of the adjudication application served by the first defendant on the plaintiffs was incomplete. They allege that certain documents [which were part of the adjudication application served on the adjudicator] were either not provided to the plaintiff at all, or were provided in a different form to the form in which the adjudication application was provided to the adjudicator.

The requirements of natural justice in adjudication proceedings

The principles

20 The convenient course is to commence with the material principles which relate to the requirements of natural justice, and the way in which such principles have been applied in adjudication proceedings.

21 A convenient short summary of the directly pertinent principle was furnished in by Brereton J in ***Fifty Property Investments v O'Mara*** [2006] NSWSC 428 at [44]-[45]:

i. A denial of natural justice, to the extent that natural justice is to be afforded as contemplated by the procedure established by the Act, invalidates an adjudication [***Brodyn*** [57]]:

ii. 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 intent 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.

iii. The ambit of the measure of natural justice required by the Act extends beyond the "*basic and essential requirements*" which are preconditions to validity, to the particular process during the adjudication of receiving and considerating the submissions referred to in the Act [***Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd*** [2005] NSWSC 326, Macready AsJ]. Thus a denial of natural justice will invalidate an adjudication, but only if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act.

22 As in the case presently before the Court, the alleged denial of natural justice in *Fifty Property Investments* related to the adjudicator's consideration of certain documents where the parties had no notice of the documents in question, and had not been provided with an opportunity to respond. Brereton J set out the relevant principles as follows:

[51] Neither the adjudicator, nor either party, thought to inform the other of the correspondence which each had respectively sent to the adjudicator.

*[52] The receipt and consideration by the adjudicator of Impero's letter of 16 January, and enclosures, without notice to FPI, was a denial of natural justice. The receipt and consideration from one party of material, whether in the nature of evidence or submissions, which is not made known to the other, is a denial of natural justice [**TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd** [2004] NSWSC 1216 at [28]]. If, in pursuance of s 21(4)(a), the adjudicator seeks further information from a party, an opportunity must be afforded to the other to comment. This is specifically required by s 21(4)(a), which provides as follows:*

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:

a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions …

[53] The result of a denial of natural justice is that the decision is void, even if the decision would not have been affected by any submissions which might have been made had an opportunity to make them been afforded. While, as a matter of discretion, relief might be declined if it can be shown that the denial of natural justice could not possibly have made a difference to the outcome, all that a plaintiff need establish is that the denial of natural justice deprived it of the possibility of a better outcome, and in order to negate that possibility it is necessary to conclude that a properly conducted adjudication could not possibly have produced a different result

*[**Stead v State Government Insurance Commission** (1986) 161 CLR 141 at 147; **Kioa v West** (1985) 159 CLR 550 at 633; **Murray v Legal Services Commissioner** (1999) 46 NSWLR 224 at 250–251; **Barwick v Council of the Law Society of New South Wales** [2004] NSWCA 32 at [111]–[121]; **Stanoevski v Council of the Law Society of New South Wales** [2005] NSWCA 428 at [54]].*

[54] As the evidence and argument on the construction contract issue was at best finally balanced, and as the adjudicator was sufficiently concerned by the point to seek further information from Impero, I cannot be satisfied that, had FPI been given an opportunity to respond, which they say they would have taken, their response could not possibly have made a difference. Mr Bechara says that he would have referred to the subsequent variations in answer to Impero's reference to the detailed estimate of November 2003, and pointed out that the contract had been varied since that time. Given the adjudicator's failure to advert at all to the variation claims in his reasons, I cannot begin to be satisfied that there was no possibility that a properly conducted adjudication would have resulted in a different outcome. Indeed, if the adjudicator relied on the circumstance that neither the contract nor the detailed estimate covered natural stone, then whether or not there was a subsequent variation was a matter of great significance upon which a further submission, had the opportunity been permitted, might well have been very influential.

[55] It follows that there was a contravention of the rules of natural justice, and that it is not established that that contravention was one in respect of which there was no possibility that the outcome would have otherwise been different.

23 This decision makes clear that relief may be declined if it can be shown that the denial of natural justice *could not possibly* have made a difference to the outcome. It is important to recall that on the authorities, cases in which procedural fairness "*could have made no difference*" to an outcome "*will be a rarity*": ***Re Refugee Review Tribunal; Ex parte Aala*** (2000) 204 CLR 82 at 130 - 131 [131]. Gaudron and Gummow JJ observed at 91 [17] as follows:

"[I]f there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as 'trivial' or non-determinative of the ultimate result."

24 Kirby J said (at 130-131 [131]) that:

"It is only where an affirmative conclusion is reached, that compliance with the requirements of procedural fairness '*could have made no difference' to the result* that relief will be withheld. *This Court has emphasised that such an outcome will be a rarity. It will be 'no easy task' to convince a court to adopt it.*" (Citations omitted, emphasis added).

25 An example of such a rarity is where it is obvious and certain that even in the absence of the breach of procedural fairness, the same result would have been reached. ***Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*** [2008] NSWSC 399, discussed below, is an example of such a case.

26 McDougall J had occasion in ***John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd*** (2006) NSWLR 707 to observe that "the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case. Whatever the principles of natural justice may require in that particular case they could not require the adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision."

27 In ***Trysams v Club*** (supra) McDougall J further analysed parameters of the entitlement to natural justice in a fashion which I respectfully adopt as correct:

[41] The Court of Appeal in ***Brodyn*** considered the grounds on which the courts might set an adjudicators determination aside, as being void. One of those grounds was that there was a "*substantial denial of the measure of natural justice that the Act requires to be given*". See Hodgson JA (with whom Mason P and Giles JA agreed) at 441–442 [55].

[42] The content or extent of the requirement to afford natural justice is to be assessed by reference to the relevant statutory provisions, including:

(1) the requirement that a respondent state in its payment schedule its reasons why its scheduled amount is less than the claimed amount (s 14(3));

(2) the limited time within which a respondent to an adjudication application may lodge an adjudication response (s 20(1)); and

(3) the prohibition against a respondent's including in its adjudication response any reason for withholding payment that has not been stated in its payment schedule (s 20(2B)).

[43] Ms Culkoff submitted that the test for denial for natural justice was that described by me in ***John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd*** (2006) 66 NSWLR 707. Referring to what I had said earlier in ***Musico v Davenport*** [2003] NSWSC 977 at [107], I said (in ***John Goss*** at [31]) "*that where an adjudicator was minded to decide a dispute on a basis for which neither party had contended, then natural justice required the adjudicator to notify the parties of that intention, so that they could put submissions on it.*" I adhere to that view. However, as I pointed out in ***John Goss*** at [42], "*the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case*". By that I meant, as I said, that the principles of natural justice could not … "*require an adjudicator to give the parties an opportunity to put submissions on matter that were not germane to his or her decision*".

[44] ***John Goss*** was a case where it was easy to see that the particular point on which the adjudicator decided it was "*germane*". Indeed, it was fundamental to the adjudicator's decision. Had the adjudicator notified the

parties of the way in which he was proposing to dispose of the case, there were substantial submissions that could have been put to dissuade him from doing so. Thus, it was easy to conclude that, by denying the plaintiff in that case any opportunity to put submissions, the adjudicator had denied the plaintiff natural justice.

[45] It does not follow from what I said in ***John Goss*** (or, for that matter, in ***Musico***) that any failure by an adjudicator to ask for submissions on a matter not raised by the parties will amount to denial of natural justice sufficient to justify the Court's declaring the adjudication to be void, on ***Brodyn*** grounds. At the very least, the point must be (as I said) "germane to [the] decision". In addition, perhaps, it must be at least arguable that meaningful submissions could have been put if an opportunity to put them had been afforded: i.e, that there was something to be put that might well persuade the adjudicator to change his or her mind.

28 At 52 and 53 his Honour observed that the concept of materiality is inextricably interlinked with the concept of natural justice, insofar as the latter concept is relevant to the determinations of adjudicators under the Act. On his Honour's view, which I respectfully share, that flows not only from Hodgson JA's use of the adjective "*substantial*" in ***Brodyn,*** but also from the point made by Gleeson CJ in ***Lam:*** that the law is concerned with the practical effect of the alleged denial of an opportunity to be heard. Hence his Honour's proposition that the concept of materiality requires some analysis of at least:

(1) the importance or otherwise of the relevant subject matter (as to which, it is said, there was a denial of an opportunity to put submissions): in particular, its significance to the actual determination; and

(2) whether or not there were submissions that could properly have been put that, as a matter of reality and not mere speculation, might have affected the determination.

29 As his Honour further indicated, in some circumstances those two matters may overlap; but in others, they may be quite separate.

30 It follows that even if the Court is satisfied that there has been a denial of natural justice the court requires to consider materiality treating in particular with the above areas of analysis identified by McDougall J.

Dealing with the mistake as to the Supreme Court decision

31 Mr Hillman's mistaken conclusion that the Durham determination had been declared void by the Supreme Court, and was therefore not binding, lead him to approach the issue of the valuation on quite a different statutory basis than if he had concluded that the Durham determination was extant. The relevant sections of the Act concerning valuation are set out below:

The material sections of the Act

32 Section 10 is entitled "Valuation of construction work and related goods and services" and provides:

10(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

33 Section 10 also deals with the manner of valuation of related goods and services supplied or undertaken to be supplied under Act construction contract.

34 Section 22 (4) of the Act provides:

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 is 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

35 Thus, Mr Hillman's finding that the Durham determination had been declared void lead him to make a valuation based on section 10 of the Act, rather than being bound by the previous valuation as required by section 22(4).

36 The plaintiffs submit that Mr Hillman's finding involved a denial of natural justice, as he came to his conclusion in circumstances where neither party had submitted that the Supreme Court had declared the Durham determination void. In those circumstances, procedural fairness or natural justice required the adjudicator to notify Mr and Mrs Shorten that the adjudicator intended to reach such conclusion, and further to provide Mr and Mrs Shorten with an opportunity to make submissions with respect to the adjudicator's proposed decision to that effect. This did not occur.

37 In contrast, the first defendant admits that the adjudicator came to his decision for the wrong reasons, but submits that the adjudicator was nonetheless correct in refusing to be bound by the Durham valuation. In such

circumstances, they submit, any denial of natural justice occasioned by the adjudicator's failure to invite the plaintiffs to make submissions is not material.

Was the adjudicator bound by the Durham valuation?

38 Mr Simpkins SC, appearing for Mr Hurst, submitted that a close examination of the Durham determination made clear that it was no more than a determination of *entitlement*: that is to say, it could not be categorised as a determination of *value*. In this regard the court was taken to a sections of the Durham adjudication beginning at paragraph 35 and ending at paragraph 100. In the latter paragraph the adjudicator said:

"The problem for the claimant is that it bears the onus of establishing its entitlement. The respondents have put the value of the incomplete works squarely in issue and the claimant has failed to respond in any meaningful way. The claimant offers no material in support of its valuation. There is no basis upon which I could prefer the claimant's value. In these circumstances I am not satisfied that the claimant is entitled to any more than the respondents concede."

39 It is apparent then that this adjudicator, in each of a number of cases, approached the value question on the uniform basis that, as the claimant bore the onus of establishing its entitlement [and had offered no material in support of its valuations], the adjudicator could not prefer the claimant's value and in each case was not satisfied that the claimant was entitled to any more than the respondent had conceded.

40 The present question is whether or not this approach may be characterised as failing to amount to a determination of value, within the meaning of section 10.

41 In ***Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd*** [2004] NSWSC 1151 McDougall J [at 43] observed that a determination under the Act *may* involve both *questions of quantification* – the section 10 issue - *and questions of entitlement*; or it may involve *one or the other*.

42 At [44] his Honour observed:

i. that section 22 (4) itself makes it clear that an adjudication determination need not necessarily include the valuation of construction work: the use of the introductory word "If" makes this clear.

ii. that subsection (4) therefore only applies where a component of a determination – that is to say, in terms of section 22 (1) (a), of the determination of the amount of the progress payment (if any) to be paid – includes a determination of the value of construction work. Where it does then subsection (4) applies.

iii. that where it does not (either because the work has not at all been valued before or because the value of the work has changed) then section 10 (1) applies.

iv. that there is nothing in these considerations that indicates that the phrase "construction work" when used in section 22 (4) should be construed in any way other than the way that it is used throughout the Act.

43 In short:

i. Section 22(4) of the Act only obliges (and entitles) an adjudicator to act as if a prior adjudication binds him/her to the extent that the adjudication determines value (as opposed to just entitlement). See the discussion about the role of an adjudicator in ***John Goss*** at [35]-[36]; ***Rothnere*** at [43]-[44]; ***Veolia Water; De Martin & Gasparini Pty Ltd v State Concrete Pty Ltd***[2006] NSWSC 31.

ii. 'Valuation' or 'quantification' is the process carried out pursuant to section 10 of the Act, whereby the construction work the subject of the application is valued. The act of determining 'entitlement' is the process of assessing whether an applicant has a right to some payment for the work carried out. It is not the determination of the amount.

Dealing with the issue

44 As will appear from what follows, Ms Durham determined the "value" (s 22(4)) of the construction work.

45 In ***David Hurst Constructions Pty Ltd v Durham*** [2008] NSWSC 318, in which the first defendant (in the current proceedings) attempted (unsuccessfully) to have Ms Durham's adjudication determination set aside, McDougall J said (at [67]):

"On a number of occasions, the Adjudicator [i.e. Ms Durham] referred to various heads of claim and said words to the effect that she was not satisfied, or the claimant had not satisfied her, that the claim should be valued at anything more than the amount allowed by the proprietors."

46 In that case, the very criticism by David Hurst Constructions – rejected by McDougall J – related to the manner in which Ms Durham valued the work. The complaint of David Hurst Constructions related to the issue of onus – see at [67]. As McDougall J noted, in many cases she adopted the value submitted by the respondents (Mr and Mrs Shorten) – see e.g. Ms Durham's adjudication at paras. 86 (CB p2637.7), 96 (CB 2638.7, 100 (CB2639.3), 106 (CB 2640.9); see also at paras. 43-46 (CB 2632).

47 Hence, as the plaintiffs have contended, the fundamental basis for the First Defendant's submissions on "*materiality*" in the context of the Durham determination is misconceived. Ms Durham's conclusion that she was "not satisfied that the claimant [was] entitled to any more than the respondents [conceded]" constituted 'a valuation' of the work the subject to the application.

48 If it were necessary to so conclude, the finding would be that McDougall J's conclusion as to the determination of "*value*" by Ms Durham gives rise to an issue estoppel: see generally J D Heydon, *Cross on Evidence* (Seventh Australian Ed. 2004), pp204-206.

49 The foregoing is sufficient to dispose of the first defendant's submissions with respect to "materiality" in the context of the adjudication determination of Ms Durham.

50 I note the plaintiffs' submissions that the first defendant's approach obscures the proposition that is it is for the *adjudicator* to determine whether or not s22(4) is limited to circumstances where an adjudicator determines the value of construction work or whether it extends to circumstances where an adjudicator makes a decision without valuing work [for example where a claim is rejected in its entirety because it is time barred]. Hence the plaintiffs' contention that even had Ms Durham *not* determined the value of construction work in the manner described above and found by McDougall J in ***David Hurst Constructions v Durham***, it still would have been a matter *solely* within the province of Mr Hillman's jurisdiction to determine the manner in which s 22(4) would be applied.

51 In light of the above reasons, I do not see it as necessary to make a finding on this contention.

Incomplete service of the entirety of the adjudication application documents

52 This matter becomes essentially a question of fact.

53 Each of the parties have addressed close submissions in relation to the issue.

54 Having read the respective affidavits and listened carefully to the oral evidence adduced from the deponents and having closely studied the respective submissions of the parties I have come to the view that, on the balance of probabilities, a full copy of the document received by Mr Hurst from his lawyers was not furnished by him to Mr and Mrs Shorten.

55 As the plaintiffs have contended, the striking feature is that the method of reproducing, scanning, downloading, printing, copying and correlating adopted by the first defendant and those who assisted him involved several links in a chain, where even one error in one link was bound to cause an irregularity.

56 The procedure said to have been adopted by the first defendant was as follows:

i. On 17 December 2007 David Doyle of the Builder's Lawyer signed on behalf of the first defendant the adjudication application. The Builder's Lawyer provided it to the nominating authority in Sydney. The original adjudication application was contained in three ring folders identified by volume, and documents therein were stapled.

ii. According to Mr Hurst, on the same day The Builder's Lawyer created a "copy" in "pdf" format (T42.45 and T61.46). Presumably, a person at The Builder's Lawyer purportedly scanned each page.

[The first defendant has led no evidence as to the creation (by scanning or otherwise) of such "pdf" copy. There is no way of knowing if what was scanned by The Builder's Lawyer, was an accurate copy.]

iii. The Builder's Lawyer retained either:

a) an incomplete and defective copy of the original adjudication application; or

b) an accurate copy of the original adjudication application.

[It is unknown whether this was placed into folders, and whether it was stapled).

iv. The Builder's Lawyer then made available electronically to The first defendant "pdf" documents. These documents, divided into more than 40 parts, constituted either:

a) an incomplete and defective copy of The Builder's Lawyer's copy of the original adjudication application; or

b) an accurate copy of the Builder's Lawyer's incomplete and defective copy of the original adjudication application.

c) an accurate copy of the Builder's Lawyer's accurate copy of the original adjudication application.

[Thus, it is unknown whether the copy which the Builder's Lawyer retained, and sent in "pdf" version, was an accurate copy. Therefore, the copy in (b) may or may not have been accurate.]

v. The first defendant either:

a) copied the document referred to in paragraph iv (a) (giving rise to an incomplete and defective copy); or

b) copied the document referred to in paragraph iv (b) (giving rise to an incomplete copy) ; or

c) copied the document referred to in paragraph iv (c) (giving rise to an accurate copy); or

d) mis-copied the document referred to in paragraph iv (c) (giving rise to an incomplete and defective copy); and delivered such copy to Mr and Mrs Shorten.

The documents delivered to Mr and Mrs Shorten are in the form of loose paper, i.e. not clipped, stapled nor placed in folders.

vi. Of the four possible scenarios in the foregoing paragraph:

(a), (b) and (d) involve defective copies;

(c) involves an accurate copy;

vii. That is, on three of the four possible scenarios, a defective copy of the adjudication application was served on Mr and Mrs Shorten. On these three scenarios, the incomplete and defective copy served on Mr and Mrs Shorten would be attributable to mis-copying by either the first defendant or its solicitors.

viii. On my finding the scenario in paragraph v (c) above could not have occurred because documents comprising a full and complete copy of the adjudication application could not have fitted in to the box with lids shut flat.

ix. It is of significance that the first defendant has not established:

a) the circumstances in which The Builder's Lawyer purported to copy the adjudication application provided to the nominating authority; and

b) the circumstances in which The Builder's Lawyer scanned such copy for the purposes of sending by "pdf".

The reliability of the evidence given by Mr Hurst

57 There were several areas in respect of which Mr Hurst's evidence cannot be accepted as reliable. These included the following evidence which he gave *for the first time* under cross examination:

i. He accessed about 40 different electronic links (T57.7);

ii. He proceeded to print from each link;

iii. Simultaneously, Ms Sonia Hurst and Ms Marni Betts copied those documents being printed by Mr Hurst (T57.18);

iv. There were some 80 different piles of documents (T45.14);

v. The documents were not stapled and there was no index (T58.5-10);

vi. He acknowledges that it would have possibly assisted in checking the completeness of the copy if he had stapled the documents (T58.24).

58 Critically, Mr Hurst acknowledged that he had no way of checking that the photocopy destined for Mr and Mrs Shorten was an accurate copy of the 40 discrete and separate documents he was downloading and printing off (T58.18).

59 In complying with the Court's order to serve affidavit evidence upon which it proposed to rely, the First Defendant served evidence that:

i. was silent as to the method of scanning, transmission, copying and collating of copies of the adjudication application by The Builder's Lawyer;

ii. was silent as to the steps undertaken by the First Defendant and its staff as to the downloading, copying and collating of documents to be served on Mr and Mrs Shorten;

iii. failed to call evidence from Ms Sonia Hurst, who played a central role in copying and collating documents downloaded and printed by Mr Hurst; she did half the copying – see T64.30 – T65.9.

Reliability of the evidence of Ms Betts

60 Ms Betts evidence cannot be relied upon. She gave evidence that when she saw Mr Shorten take the box from Mr Hurst, it appeared to her that Mr Shorten had been affected by alcohol. But under cross-examination she withdrew that statement. She was an unimpressive witness and it may be inferred that a measure of her unreliability is discernible from her readiness to on oath put forward the alcohol allegation, subsequently withdrawing it but only under cross-examination.

The reliability of the evidence given by Mr and Mrs Shorten

61 Having observed the evidence given by Mr and Mrs Shorten I was satisfied that they had carried out their best endeavours to furnish the Court with their best recollection of what had occurred. In particular they gave compelling evidence with regard to:

i. The circumstances in which the box was delivered to them;

ii. The level of the loose papers contained in the box upon their initial inspection.

iii. Mr Shorten's copying of the documents served upon him;

iv. The importance placed by Mr Shorten on the documents served upon him (T25.16-26).

62 There are cases where it becomes necessary for the Court to do its best on the balance of probabilities to determine some unusual issues. This case is one of those by reason of the close attention given to the dimensions of the box handed to Mr Shorten on the evening in question. I dutifully watched the several demonstrations of whether or not it was possible to fit the full adjudication application, comprising 1151 pages, into the box. Although the several demonstrations left a deal to be desired, at the end of the day the finding is that the plaintiffs have established, on the balance of probabilities, that a copy of the original adjudication application could not have and did not fit into the box on the occasion when it was delivered. Indeed Mr Hurst gave the following answer under cross-examination, [given to a question which I had asked endeavouring to understand his evidence]:

"His Honour:

Q. *I think you are accepting the proposition that Mr Christie put to you. When you say "not in that form" you mean "yes, I agree that in the form of the material in the red bundle", it would not, you think, be possible to fit all of that in the same box?*

A. *No, that's right.*

Q. *Is that what you were saying?*

A. *That's right, yes, I don't believe that pile would have.*" (Emphasis added.)

The onus of proof with respect to the service of documents

63 In these proceedings, the plaintiffs acknowledge that they bear the onus of establishing that they were denied natural justice. They note, however, that it is the defendants [who are the plaintiffs in related proceedings 55028 of 2008] who seek to obtain the benefit of a [purported] adjudication determination. The plaintiffs assert that it is incumbent upon a party that wishes to obtain the benefit of an adjudication process to establish that it has

complied with the requirement pursuant to section 17(5) of the Act, namely to serve a copy of the adjudication application upon the respondent to the application, in this case Mr & Mrs Shorten.

64 Ultimately, this case does not turn on whether the plaintiff or the defendant bears the onus of proof on this issue. On the approach which places the onus upon the plaintiffs, I am satisfied that the plaintiffs have proven on the balance of probabilities that what was served was an incomplete copy.

65 However if the plaintiffs did not bear the primary onus of proof, then I would not accept that the first defendant had discharged its onus of proving what was served by adducing exhibit MB1.

'Nullus commodum capere potest de injuria sua propria'

66 In considering the type and weight of evidence required to satisfy the Court on this issue, the court is entitled to further rely upon the maxim *'nullus commodum capere potest de injuria sua propria'*: "*No man can take advantage of his own wrong": cf* ***ADC v White*** (1999) NSWSC 43 at 89 et seq. This principle is supported by a long line of authority [cf *Broome's Legal Maxims*, 10th edition, Pakistan Law House, 1989 at 191 et seq, noting that this maxim, being *'based on elementary principles'*, is fully recognised in Courts of law and equity and, indeed, admits of illustration from every branch of legal procedure].

67 The principle and its application to several areas of law has relatively recently been discussed in the House of Lords by Lord Jauncey in ***Alghussein Establishment v Eton College*** [1988] 1 WLR 587, with whose reasons Lord Bridge, Lord Elwin Jones, Lord Ackner and Lord Goff agreed.

68 The principle is applicable to "*various and dissimilar circumstances*" [per Broome at page 195].

69 In the current proceedings, it was the first defendant's approach to creating and serving the documents, including the election to prepare and serve the materials without an index and in loose-leaf form, which could be expected to contribute to such difficulties, if any, as may be faced by the plaintiffs in pursing the current litigation.

70 In a recent affirmation of that principle in which the actions of the defendant had made it quite difficult to assess the compensation due to the plaintiff, Handley JA put the matter as follows:

"In my judgment the court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof and resolving doubtful questions against the party ***"whose actions have made an accurate determination so problematic":"*** ***Houghton v Immer (No 155) Pty Limited*** (1997) 44 NSWLR 46 at 59.

71 Whilst of course that case dealt with the different context concerning assessment of compensation, the same approach is appropriate to the first defendant's forensic position presently. If there be any suggested difficulties for the plaintiffs in their endeavour to prove with absolute precision what documents they actually received, the Court can rely upon the presumption against wrongdoers in order to resolve doubtful questions against the party whose actions have caused the difficulties.

Materiality

72 The first defendant contends that even if the Court holds that an incomplete copy of the adjudication application had been served on the plaintiffs, any denial of natural justice would not result in the plaintiff suffering any material prejudice.

73 This submission is rejected. There was a clear discrepancy between the number of pages which Mr Shorten claims to have received in comparison with the number of pages in the adjudication application. In the unusual circumstances which obtained, this is in fact evidence of *materiality* to outcome. Quite obviously the plaintiffs were entitled to a full copy of the adjudication application and did not receive it. The whole of the circumstances of the sorry state of affairs may be sheeted home to the relevant conduct of the first defendant who cannot profit by his own wrongdoing.

Jurisdictional Fact

74 It is also very arguable that the failure to serve the whole of the adjudication application on the plaintiffs constitutes a critical lacuna in the arbitrator's jurisdictions and therefore *by itself* renders the arbitrator's decision a nullity. On this view, service of the entirety of the application is what is sometimes called '*a jurisdictional fact*'.

Conclusion

75 It follows that the plaintiffs are entitled to the declarations and orders sought in paragraph (i), (iii) and (iv) of the further amended summons.

Short minutes

76 The parties are required to bring in short minutes of order on which occasion costs may be argued.

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