JUDGMENT HAMMERSCHLAG J : Supreme Court of New South Wales Equity Div, T&C List. 1st November 2007

Introduction

1 The plaintiff, Trysams Pty Limited, seeks a declaration that an adjudication determination dated 28 May 2007 made by the second defendant, Mr Philip Martin, in favour of the first defendant, Club Constructions (NSW) Pty Limited, pursuant to s 22 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act") is void.

2 In July 2005 the plaintiff and the first defendant entered into a building contract ("the contract") for renovations and additions to a hotel at Gymea, New South Wales. The work entailed refurbishment of the hotel and construction of four unit dwellings.

3 The contract specified the date to be 17 March 2006 for practical completion of the hotel, car park and landscaping, and 26 May 2006 for the four unit dwellings. It provided rates for liquidated and ascertained damages if the specified dates were not met, and it provided for times to be extended in appropriate circumstances. The rate specified for liquidated damages for late handover of the units was $1,500 per calendar day. The contract provided for the retention of monies subject to specified conditions.

4 The work was completed in November 2006.

5 On 13 April 2007 the first defendant made a payment claim for $690,822.32 pursuant to s 13 of the Act.

6 The payment claim included an asserted entitlement to release of retention monies held under the contract and for extensions of time.

7 On 27 April 2007 the plaintiff served a payment schedule ("the schedule") pursuant to s 14 of the Act. It identified a negative amount, that is an amount payable by the first defendant to it, of $82,760.13.

8 The negative amount was the result, principally, of credits claimed in the payment schedule by the plaintiff for defects and for liquidated damages payable as a consequence of late practical completion under the contract. On the basis of claimed credits, the plaintiff asserted that no retention monies should be released.

9 The most substantial of the defects asserted was the delivery by the first defendant of defective tiles for which a credit of $140,000 was claimed. The amount of liquidated damages for late practical completion claimed was $159,000 being 105 days at $1,500 per day.

10 On 11 May 2007 the first defendant made an adjudication application under s 17 of the Act.

11 On 18 May 2007 the plaintiff lodged its adjudication response ("the response") pursuant to s 20 of the Act.

12 By adjudication determination ("the adjudication") dated 28 May 2007 the second defendant determined an adjudicated amount including GST of $393,114.82 payable by the plaintiff to the first defendant. The due date for payment was determined as 30 April 2007.

13 On 29 June 2007, by consent, the Court made orders that:

1. The plaintiff lodge with the Supreme Court an unconditional Banker's Guarantee in the amount of $407,167.02 (inclusive of GST) on or before 15 July 2007.

2. Until further Order of the Court, the first defendant shall not proceed to request the issue of an Adjudication Certificate and file the same as a judgment. If the Plaintiff fails to comply with Order 1, the first defendant may move the Court to vacate Order 2 and restore the matter on one day's notice.

14 On 15 July 2007 the plaintiff paid the sum of $407,167.02 into Court.

The attack on the adjudication

15 The plaintiff focused its attack on the manner which the adjudicator had dealt with three matters in dispute:
a the plaintiff's claim for a credit of $140,000 for the supply of defective tiles;
b the plaintiff's claim for liquidated damages;
c the plaintiff's contention that none of the retention monies should be released to the first defendant.

16 The substance of the attack was that the adjudicator had in respect of each:
a breached the basic and essential requirement of the Act to consider all submissions (including relevant documentation) that had been duly made by the plaintiff in support of the schedule;
b failed to make a bona fide attempt to exercise his powers under the Act; and
c denied the plaintiff the measure of natural justice required under the Act.

The Act

17 The object of the Act is stated in s 3(1) to be to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

18 Under s 13 a person who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or maybe liable to make the payment.

19 Under s 14 a person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant which must identify the payment claim to which it relates and indicate the amount of the payment (if any) that the respondent proposes to make.

20 Under s 17 a claimant may apply for adjudication of a payment claim (an adjudication application) if the respondent provides a payment schedule but the scheduled amount indicated in the payment schedule is less than the amount claimed. An adjudication application must be in writing and must be made to a nominated authorising authority chosen by the claimant.

21 Under s 19 if an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent. On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

22 Under ss 20(1) and 20(2) the respondent may (within specified time limits) lodge with the adjudicator a response the claimant's adjudication application (the adjudication response) which must be in writing, must identify the adjudication application to which it relates, and "may contain such submissions relevant to the response as the respondent chooses to include."

23 Section 20(2B) provides as follows:

"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."

24 Section 21(4) provides as follows:

"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, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates."

25 Section 22(1) provides that an adjudicator is to determine the amount of the progress payments (if any) to be paid by the respondent to the claimant (the adjudicated amount), the date upon which any such amount became or becomes payable and the rate of interest payable on any such amount.

26 Section 22(2) of the Act is in the following terms:

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

(a) the provisions of the 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."

27 Under s 22(3) the adjudicator's determination must be in writing and include reasons for the determination unless the claimant and the respondent have both requested otherwise.

28 Section 22(5) is in the following terms:

"If the adjudicator's determination contains:

(a) a clerical mistake, or

(b) an error arising from an accidental slip or omission, or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination."

29 Under s 25(1) an adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

The principles

30 The provisions of the Act have been the subject of extensive judicial consideration. A review of the authorities yields the following relevant principles:

a the Act seeks to facilitate speedy resolution of claims to progress payments without excessive formality or intervention by the Court and the scope for invalidity for non-jurisdictional error is limited: ***Downer Construction (Australia) Pty Ltd v Energy Australia*** [2007] NSWCA 49 at [81];

b an adjudicator's determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination: ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** (2004) 61 NSWLR 421 at 441; ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521 at 539;

c whether a failure by an adjudicator to meet a requirement imposed by the Act makes the determination void depends on whether that requirement was intended by the legislature to be an essential pre-condition for the

existence of an adjudicator's determination: ***Transgrid v Siemens Ltd*** at 539 to 540; ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** at 441;

d the existence or otherwise of essential pre-conditions to a valid claim, as well as determination of the parameters of the payment claim, are matters for the adjudicator, not for objective determination by a court: ***Bitannia Pty Ltd v Parkline Constructions Pty Ltd*** [2006] NSWCA 238; ***Downer Construction (Australia) Pty Ltd v Energy Australia***;

e an erroneous decision by an adjudicator that an essential pre-condition has been satisfied, when in truth it has not, can be a jurisdictional error making the determination reviewable. When there is present such jurisdictional error the determination is void and relief by way of declaration and injunction is available: ***Transgrid v Siemens Ltd*** at 539;

f sections 13, 17, 18, 19, 21 and 22 of the Act contain certain basic requirements as well as more detailed requirements. The legislature did not intend exact compliance with all of the more detailed requirements to be essential to the existence of a determination. What was intended to be essential was compliance with the basic requirements, 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 that power, and no substantial denial of the measure of natural justice that the Act requires to be given: ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** at 442; ***Transgrid v Siemens Ltd*** at 540;

g if the basic requirements of the Act are not complied with, or if a purported determination lacks a bona fide attempt by the adjudicator to exercise the relevant power, or if there is a substantial denial of the measure of natural justice required, a purported determination will be void because then there will not be satisfaction of a requirement that the legislature has indicated to be essential to the existence of a determination: ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** at 442; ***Transgrid v Siemens Ltd*** at 540; ***Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd*** [2006] NSWSC 375 at [73]-[75]; ***Lansky Constructions Pty Ltd v Noxequin Pty Ltd (in liq) t/a Fyna Formwork*** [2005] NSWSC 963 at [20]; ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [90]-[92];

h the requirement of good faith is not a reference to dishonesty or its opposite but to the necessity for there to have been an effort to understand and deal with the issues in the discharge of the statutory function: ***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** [2005] NSWSC 548 at [38];

i an adjudicator is only required to consider submissions which are "duly made" under s 22(2)(d). A submission which is included in an adjudication response contrary to the requirements of s 20(2B) of the Act is not duly made within s 22(2)(d), although it could be duly made if made in response to a request under s 21(4)(a) or in a conference by an adjudicator under s 21(4)(c): ***John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*** [2007] NSWCA 19 at [31] and [51];

j section 14(2) provides that the payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the respondent to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues: ***Clarence Street Pty Ltd v Isis Projects Pty Ltd*** (2005) 64 NSWLR 448 at 455;

k both ss 22(2)(c) and (d) make reference to "submissions (including relevant documentation)". The parenthesised words show that the legislature had in mind that the word submissions was not to be construed narrowly and that the submissions may include relevant documentation in support: ***Austruc Constructions Ltd v ACA Developments Pty Ltd*** [2004] NSWSC 131 at [68] – [69];

l under s 22(2) the adjudicator is required to consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission is not sufficient to invalidate the determination. This is either because an accidental or erroneous omission does not amount to a failure to comply with s 22(2) so long as the specified classes of consideration are addressed or because the intention of the legislature cannot have been to invalidate the determination for this kind of mistake: ***John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*** at [55]; and

m the legislature entrusts to the adjudicator the role of determining whether submissions are or are not duly made and if the adjudicator addresses that question and comes to the conclusion that a submission was not duly made, a failure to take account of that submission is not a failure to afford the measure of natural justice contemplated by the Act: ***John Holland Pty Ltd v Roads & Traffic Authority of New South Wales at*** [63] and [71]; ***Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229.

31 The application of these principles to the circumstances of a given case involves consideration of matters of fact and degree which exercise may not be a simple one. For example, and apropos this case, they do not (and could not):

a provide a yardstick for when an erroneous decision that an essential precondition has been satisfied is not jurisdictional error voiding the adjudication;

b elaborate on the measure of natural justice that the Act requires to be given; and

c give guidance as to when an omission to consider a submission is merely accidental or erroneous so as not to amount to a failure to comply with s 22(2) as opposed to when that omission constitutes a failure to afford the

required level of natural justice. For example, a failure to consider a submission may be erroneous because it is accidental (in the sense of inadvertent) or because of some other error not due to inadvertence.

32 As Sir Frederick Jordan said in ***Ex part Hebburn Ltd; Re Kearsley Shire Council*** (1947) 47 SR (NSW) 416 at 420:

*…the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction….**But there are mistakes and mistakes**; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test'…or to 'misconceive its duty', or 'not to apply itself to the question which the law prescribes'…or to misunderstand 'the nature of the opinion which it is to form'…in giving a decision in exercise of its jurisdiction or authority, a decision so given would be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law…*[emphasis added]

33 It is accordingly necessary to consider the nature, gravity and effect of the errors, if any, made by the adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the adjudicator breached a basic and essential requirement of the Act by not considering submissions duly made or by failing to make a bona fide attempt to exercise his powers under the Act, or whether the plaintiff was denied natural justice to a degree sufficient to void the adjudication.

34 The required exercise is to determine whether what occurred worked "practical injustice" on the plaintiff sufficient to vitiate the adjudication: ***Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam*** (2003) 214 CLR 1 at 13-14 per Gleeson CJ.

The defective tiles

35 In the schedule (which with supporting documents runs to over three hundred pages), the plaintiff (respondent) stated:

"Credits to be retained for Defects

There are several major outstanding issues that are detailed in this Tab. This tab also includes copies of evidence of provision of the defect lists and marked up plans that have been issued to Club Constructions (NSW) Pty Ltd during late 2006 and early 2007. Several matters are cause for great concern. These include poor workmanship matters and OH&S issues particularly with respect to the substituted alternative floor tiles supplied and installed by Club Constructions (NSW) Pty Ltd.

The major item is the tiling which has been supplied as an equivalent alternative while providing a cost saving to the client of $8,000. The tiles in question cover an extensive part of the internal and external areas of the hotel. In the event that they do not perform in accordance with the originally specified tile, they will accordingly need to be removed and replaced. At the time of accepting these tiles the letter of acceptance (facsimile) specifically required that the tiles provide the same slip resistance and specifications of that selected by the designer/architect. "

36 The schedule contained a section entitled Credits to be Retained for Defects. Paragraph 5 of that section contained the following:

*"**5. Tiles***

The alternative tiles have proved to be near impossible to maintain. They are not able to be cleaned efficiently and they represent a very serious risk for slip accidents. To establish if the client has been provided with an inferior product to that specified – a sample test area of the specified tiles has been installed. The test area shall be inspected in the coming weeks to identify any difference in quality and fit for purpose of the tiles specified vs installed.

This may give rise to an extra ordinary [sic] defect with costs being in excess of $140,000. This amount covers all costs associated with removal, re-bedding and replacement. There are additional costs that may be applicable due to the arduous and expensive cleaning costs incurred to date by the hotel owners.

***We recommend that an amount to be retained be $140,000**"*

37 The total costs sought to be retained for defective works was $259,140. The defective tiles claim represented more than half of the entire claim for defects.

38 The response of 18 May 2007 was also a very hefty document. By it the plaintiff persisted with the defective tiles claim. With it was included a statutory declaration dated 18 May 2007 ("the statutory declaration") by Dale Poland, a civil engineer and builder who had been engaged by the plaintiff, and a report from a materials scientist from Slipcheck Pty Ltd, slip testing and tile consultants ("the report").

39 The statutory declaration attached a facsimile dated 8 May 2006 in which Mr Poland informed the first defendant as follows:

"*We agree to proceed with the alternative T1 tile based on Club providing the credit as discussed and all complying certificates to satisfy PoPE requirements.*"

40 PoPE is an acronym for Place of Public Entertainment which is a reference to a particular licence required under the provisions of the *Environmental Protection and Assessment Act* 1979 (NSW) for use of premises as such a place.

41 In the statutory declaration Mr Poland stated that in or about May 2006 he had caused the relevant standards requiring the requirements of PoPE to be provided to the first defendant during a site meeting. He attached copy of the applicable standard requirements of PoPE being two pages referring to Standards Australia Handbook

197 which make it clear that that handbook "Provides minimum slip resistance classifications for different locations when surfaces are tested to AS/NZS 4586".

42 The report contained the following paragraph:

"*14. All three (3) surfaces do not meet the recommendations of Standards Australia Handbook 197. Additionally there is a significant difference between the lighter and darker shade of tiles.*"

43 The report included the particular results of the tests to which the tiles had been subjected.

44 The adjudication with respect to the defective tiles claim was in the following terms:

"5.5.5 Tiles

The Respondent submits that the tiles supplied are difficult to clean and are a slip hazard. The Claimant submits that the tiles are not defective.

The Respondent accepted the tiles with qualifications on 8 May 2006. The Respondent submits in the payment schedule, that tests were to be carried out. The Respondent included a report in the response on the tiles dated 16 May 2007 together with a statutory declaration by Dale Poland dated 18 May 2007 regarding the meeting about the alternative tile in May 2006. There is no indication that the Claimant has been given the opportunity to evaluate the report at the time of the adjudication application and as such I have not included its finding when making this determination.

I determine that the Respondent has not substantiated the allegation that the tiles are defective and make no allowance for this item."

45 On behalf of the plaintiff (for which Ms V Culkoff of counsel appeared) it was put that:

a the report was part of the submissions (or relevant documentation) "duly made" in support of the schedule, which under s 22(2)(d) the adjudicator was obliged to consider;

b there was no room, given the terms of the schedule, the material supporting it, the terms of the adjudication response and the adjudication itself, for the conclusion that the adjudicator had determined that the material were part of submissions not duly made;

c the exclusion of that material by the adjudicator was a failure or refusal, occasioned by a breach of s 22(2)(d), to consider submissions duly made and therefore a denial of natural justice or a failure to make a bona fide attempt to exercise the relevant power relating to the subject matter of the legislation, vitiating the determination.

46 On behalf of the first defendant (for which Mr M Christie and Ms Youman of counsel appeared) it was put that:

a the report was not a submission or relevant documentation in support of a submission "duly made" because it advanced a reason for withholding payment which had not been advanced in the schedule, namely, failure of the substituted tiles to meet the requirements of Standards Australia Handbook 197. Reliance upon it was accordingly precluded by s 20(2B);

b if, contrary to that submission, the material did qualify as part of a submission duly made, the Court should conclude the adjudicator (albeit incorrectly) made a determination, as he was entitled to do, that it was not duly made; and

c the failure of the adjudicator to have regard to the material was an accidental or erroneous omission to consider a particular submission which did not invalidate the determination; and

d there was accordingly no denial of natural justice or lack of a bona fide attempt to exercise the power conferred on the adjudicator by the Act.

47 In support of the submission that the report advanced a reason for withholding payment not advanced in the schedule, it was put that the report did not in terms direct itself to the breach of any standard imposed by the contract. Reliance was placed on par 2 of the report which reads:

"*I have not had the privilege to view any specifications or background information. This report has been conducted on the [sic] time and budgetary constraints. Any further information required can be directed to the undersigned at the end of this report.*"

48 The difficulty with this submission is that the payment schedule made express reference the "*letter of acceptance* (facsimile)" under which the variation was accepted. The adjudication response included that facsimile (dated 8 May 2006). In it the plaintiff recorded its agreement to proceed with the alternative tile on the basis that it complied with the PoPE requirements. The response also included information on the Standards Australia Handbook 197. Leaving aside the fact that neither the correspondence nor the Standards material was excluded by the adjudicator, the material excluded by him went directly to the assertion that the tiles failed to meet the standards the subject of agreement in the facsimile referred to in the schedule.

49 In my view, the report was either part of a submission or relevant documentation in support of a submission "duly made" by the plaintiff in support of the schedule.

50 Section 20(2B) precludes reliance in the response upon reasons for withholding payment not previously included in the schedule.

51 The reason in the present context for withholding payment was the supply of tiles defective in the respect that they failed to meet the slip resistance and specifications described in the "letter of acceptance (facsimile)" being the 8 May 2006 facsimile referred to in the schedule.

52 That facsimile made express reference to the PoPE requirements and the schedule foreshadowed inclusion of a report of the testing of the tiles once it had been obtained.

53 None of the statutory declaration, the 8 May 2006 facsimile nor the Standards document was excluded from consideration by the adjudicator. Indeed, the terms of the adjudication make it clear that the adjudicator considered the reasons for withholding payment being advanced by the plaintiff in support of which it proffered the report. But, having excluded from consideration the report he determined that the plaintiff had not substantiated the allegation that the tiles were defective.

54 The first defendant in its claim sought payment for the installation of the tiles. The plaintiff indicated supply of defective tiles as a reason for withholding payment in full. The parameter of the matters contestable clearly encompassed material which the plaintiff might offer in support of the assertion of defective supply. Both the report and the statutory declaration were documentation in support of the particular reason for withholding payment being advanced.

55 The payment schedule referred to the letter of acceptance of the substitute tiles having specifically required that they provide the same slip resistance and specifications of that selected by the designer/architect. The schedule further referred to testing which was taking place to identify "any difference in quality and fit [sic] for purpose of the tiles specified vs installed". The reason for the credit claim was a defect in the slip resistance qualities of the tiles supplied. The adjudication response did not represent any shift from that position.

56 The report did not represent any shift from that position. It was provided in support of it.

57 It was put on behalf of the first defendant that in saying that there was no indication that the claimant had been given the opportunity to evaluate the report at the time of the adjudication application and "as such" the adjudicator had not included its finding was in effect (because there was no reasonable alternative construction) a determination that the report was a submission or relevant documentation in support of it which had not been duly made. This, it was put, followed from the fact that s 20(2B) was intended to protect a claimant against a respondent relying on reasons for non-payment which had not been provided in the schedule. Accordingly, the adjudicator could only have had in mind that the submission was not duly made because s 20(2B) had been infringed in that the claimant had not had an opportunity to evaluate the report.

58 It does not seem to me that it is fairly open to conclude or infer that the adjudicator determined that the report was not part of a submission or material in support of it "duly made", for a number of reasons.

59 Firstly, the adjudicator dealt with the submission that the tiles were defective including by reference to the statutory declaration and 8 May 2006 facsimile which clearly raised the PoPE requirements. The adjudicator was doing nothing more than rejecting material in support of the conclusion that the reason being relied on should be accepted. Secondly, nothing in the words used by the adjudicator suggests that he was excluding the report on the basis that it was not duly made. Thirdly, the Act makes no provision (other than where further submissions are called for by the adjudicator or a conference held) for the claimant to respond to the response. The position would have been no different if the report had been attached to the schedule.

60 The report contained information of critical importance to the plaintiff in establishing its reasons for withholding payment.

61 Despite the interim nature of an adjudication, natural justice nevertheless clearly required the adjudicator to consider the report unless (even if erroneously) he determined that it was, or was part of, a submission not duly made. In this case, he made no such determination. This amounted to a substantial failure to afford natural justice which worked practical injustice on the plaintiff and rendered the whole adjudication void.

62 Section 22(2)(d) required the adjudicator, in the circumstances, to consider the report because it was part of submissions duly made. In so far as a failure to do so was jurisdictional error in the sense that a legislative requirement essential to the existence of a determination was not met, he made such an error.

The liquidated damages claim

63 In its adjudication application, which ran to some hundreds of pages, the first defendant made claims for extensions of time. It stated:

"*On 6 October 2006 the Hotel reached Practical Completion.*

On 17 November 2006, the first floor units reach Practical Completion."

64 Under the heading "**Units**" the application contained the following:

"*The Claimant notes the following:*

(i) The contracted completion date for the units was 26.05.06

(ii) Taking into consideration the 69.5 extension of time days the Completion date is adjusted to 01.09.06

(iii) Practical completion was reached 17.11.06."

65 The adjudication application went on to state:

"The Claimant calculates that it has a total of 157.5 days proper claim for EOT, 99.5 days of which has been granted and the contract adjusted accordingly."

66 In the schedule the plaintiff dealt with the extension of time claims made by the first defendant. It put, with respect to the units, that the maximum allowable and approved extension of time for the units was 69.5 days. It stated that the contractual completion date for the units was 26 May 2006 and that the adjusted contractual completion date became 16 August 2006.

67 In its adjudication response it repeated the contention that the revised contractual completion date for the units was 16 August 2006.

68 With respect to liquidated damages, in the schedule the plaintiff put its claim in the following terms:

Liquidated Damages

Liquidated damages have been assessed in accordance with the Contract, the requested practical completion dates and the period of time that expired while Club Constructions undertook extensive defect rectification in order to provide a product that was fit for use.

The amount claimed for liquidated damages is 105 x days @ $1,500 totalling $159,000 in accordance with Clause 10.14 of the Contract."

69 In a further section entitled Liquidated Damages, amongst others the following was put:

*"**UNITS***

The Practical Completion date requires by Club Constructions for the units was Friday 17th November 2006. Counting of days for late completion is 80 days.

…

Liquidated Damages costs for the late hand over of "fit for purpose" and habitable units is therefore 106 days x $1,500."

70 In its adjudication response it stated amongst others the following:

"Section I – Liquidated Damages

Liquidated damages has been reviewed following the re-assessment of extension of time costs, dates of practical completion and the arguments supplied within the Doyles Adjudication Application.

Liquidated damages are assessed on the two separable portions of the contract in accordance with contract clauses 10.14 and 10.15 and the related appendix items O."

71 In relation to the units it repeated that the contract completion date was 26 May 2006, that an extension of time of 69.5 days had been approved and that the revised contractual completion date was 16 August 2006. It stated:

"Practical completion for the Hotel was requested by the claimant on 6 October 2007 [sic].

Practical completion for the Hotel was requested by the claimant on 17 November 2007 [sic].

The above dates of practical completion and the above dates of extended contractual completion differ by the amounts as follows:

***Hotel** – The difference being a completion of the staged works 34 days late.*

***Units** – The difference being a completion of the staged works 81 days late.*

The contractor has failed in the opinion of the superintendent to bring both stages of the works to practical completion as the above dates demonstrate.

The costs for liquidated damages are as follows:

***Hotel** – 34 days x $4,500 = $153,00*

***Units** – 81 days x $1,500 = $121,500*

Total Liquidated damages = $274,500"

72 The adjudicator dealt with both the extension of time claims and the plaintiff's liquidated damages claim.

73 With respect to the liquidated damages claim his determination was in the following terms:

"The Respondent submits that the practical completion of the units has been delayed by the Claimant. The Respondent has not advised their determination of the date of practical completion as determined in accordance with the contract, including any adjustment to the dates in the contract as provided in section 9.

I determine that the Respondent has provided insufficient information to assess any liquidated damages to be applied in accordance with the contract.

I make no allowance for this item."

74 The determination of liquidated damages involved three steps. Firstly, determining how many days elapsed between 26 May 2006 (the stipulated date for practical completion of the units) and the date of practical completion; secondly, determining how many of those days were covered by extensions of time to which the first defendant was entitled; and thirdly, multiplying the remaining days by $1,500.

75 Mr Christie readily, and properly, conceded that the adjudicator had been provided with sufficient information for him to have assessed any liquidated damages with respect to the units.

76 Mr Christie further submitted that the adjudicator allowed 125.5 days as extensions of time, so that the date for Practical Completion of the units was extended to 1 October 2006. He accepted that the material before the adjudicator established that the date of Practical Completion was 17 November 2006. Accordingly, there were 47 days which at $1,500 per day yielded liquidated damages of $70,500.

77 He put that, in determining that the respondent had provided insufficient information to assess any liquidated damages to be applied in accordance with the contract, the adjudicator had simply made an "unfortunate mistake" being an erroneous failure to consider a submission, which was insufficient to render the adjudication void.

78 Mr Christie proffered as a possible explanation for the error the fact that that part of the response entitled "*Section I – Liquidated Damages*" did not in terms state the Practical Completion date for the units, but referred only to the hotel.

79 Ms Culkoff put that the problem with the adjudication was more profound. Not only had the plaintiff (contrary to what the adjudicator determined) advised its "*determination of the date of Practical Completion as determined in accordance with the contract, including any adjustment to the dates in the contract as provided in section 9* ", but that on the face of the adjudication itself, the adjudicator must have understood that the plaintiff had so advised and, moreover, the adjudicator had determined a completion date and the extensions of time to which the first defendant was entitled. Hence, she put, the adjudicator had failed to make a bona fide attempt to comply with basic requirements of the Act and had denied the plaintiff the measure of natural justice required.

80 In par 2 of the adjudication, the adjudicator stated "*work commenced on or about 5 September 2005 and was completed in November 2006*".

81 In par 5.8 he stated "*[t]he Claimant submits that practical completion for all work was achieved in November 2006. The Respondent considers that practical completion was attained on 17 November 2006.*"

82 It is difficult to see how, if the adjudicator was making a bona fide attempt to assess liquidated damages, he could have considered that the respondent had not advised its asserted date of Practical Completion nor adjustments for extensions of time when, in his own adjudication, he made reference to the date so advised by the plaintiff, recorded that the work had been completed in November and determined the extensions of time to which the first defendant was entitled.

83 In my view, the mistake was not one of the quality submitted on behalf of the first defendant. The adjudicator, in the face of his own findings, simply did not proceed to adjudicate the plaintiff's claim for liquidated damages as the Act required him to do. Having regard to his own findings, it is not open to conclude that he made a conscientious, but mistaken, assessment of that claim. What he did was to fail to adjudicate a claim on material which he clearly must have known was before him.

84 That the adjudicator's failure worked substantial practical injustice on the plaintiff is self-evident from the fact that there was no ready answer to the claim.

85 It is open to articulate what the adjudicator did as both a failure, bona fide, to attempt to exercise the relevant power with respect to the liquidated damages claim, and a failure to afford the level of natural justice required by the Act to be given to the plaintiff. Either way, his error rendered the whole determination void.

The retention monies claim

86 In the schedule the plaintiff contended that the whole of the cash retention of 5 per cent amounting to $355,025 be retained.

87 The adjudicator determined that $177,512.50 should be released.

88 The adjudication in this regard is in the following terms:

"*… The contract provides for the retention fund to be 5% for 26 weeks after practical completion reducing to 2.5% for the remainder of the defects liability period. The Respondent submits that the entire retention fund should be retained due to the value of the defects calculated by the Respondent. I have not accepted the Respondent submissions regarding most of the alleged defective work and accordingly do not accept that the retention fund should be retained in excess of that allowed in the contract…*"

89 In the response the plaintiff made submissions as to why the retention should not be released that went beyond "the value of the defects" found by the adjudicator. Those submissions placed reliance on provisions in the contract which it submitted inhibited release of the retention monies and to case law on the subject.

90 The submissions it put to the adjudicator included a submission in the following terms:

"*64. Pursuant to s 22 (2) the Adjudicator* ***must*** *consider, inter alia, the provisions of the construction contract (as well as the Payment Schedule if duly made): see* ***Brodyn*** *at [56] where the Court of Appeal held that the various matters under s 22(2) must be address in a bona fide way by the Adjudicator in order to avoid invalidity of the adjudication determination: see also* ***The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** *[2005] NSWCA 141 at [48] where the Court of Appeal held:*

"*… Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this; or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.*

….

> *66. Clause 11.10 of the Contract, which deals with the "Release of Security", provides that retention moneys are to be released upon provision of "the final certificate". The Respondent submits that:*
>
> *· **No final certificate has been issued.***
>
> *· **No "special certificate" been issued** pursuant to clause 10.24.02.*
>
> *The certificates have not been issued because of the ongoing dispute between the parties regarding the defects claimed by the Respondent: see Statutory Declaration of Dale Poland.*
>
> *67. Accordingly, the Respondent submits that in addition to its rights to retain the retention moneys pursuant to Clause 10.25 for alleged defects, **the Contract itself mandates against the final release of retention moneys until and unless the pre-conditions stipulated under the Contract have been met.***

91 The terms of the adjudication on this subject make no reference to any consideration by the adjudicator of the submissions that without certificates the contract mandated no release of the retention monies.

92 That does not mean that the adjudicator did not consider the submissions. Moreover, if the adjudicator had failed to consider those submissions by accidental or erroneous (inadvertent) omission, that failure would not vitiate the adjudication and there is no warrant to conclude that his omission to refer to it (assuming he did not have regard to it – which is also not established) reflects anything other than inadvertence.

93 As a matter of law, the certification provisions relied upon by the plaintiff in its submissions did not bind the adjudicator. An adjudicator under the Act is not bound by the terms of any progress certificate issue under a contractual regime providing for entitlements to be paid according to such certificates: ***Abacus v Davenport & Ors*** [2003] NSWSC 1027 at [34]-[40]

94 I do not consider that the plaintiff has established that the adjudicator did not consider the submission, or that any failure to consider it was any more than an erroneous omission of a kind which in the context of the facts of this case would not be sufficient to vitiate the adjudication.

95 In the circumstances, this ground of attack fails.

Conclusion

96 The result is that the plaintiff is entitled to succeed.

97 As to the form of relief to be granted, Mr Christie foreshadowed that in the event that the Court found for the plaintiff on one of more of its grounds of attack, he wished to be heard on what orders should be made with respect to release of the monies in Court. He cited the decision of McDougall J in ***Emergency Services Superannuation Board v Davenport*** [2004] NSWSC 697 in which His Honour held (albeit in the context of granting prerogative relief – which was held in ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** not to be appropriate in the present kind of circumstances) that, as a matter of discretion, an adjudication might be set aside only on conditions which may include how the monies in court are to be dealt with.

98 In the circumstances, I will hear the parties on the question of relief.

99 I will also hear the parties on costs.

100 The exhibits are to be returned.

V Culkoff (Plaintiff) instructed by Joe Ryan Solicitor (Plaintiff)
M Christie with H Younan (First Defendant) instructed by Doyles Construction Lawyers (First Defendant)
Second and Third Defendants submitting appearances