JUDGMENT : McDOUGALL J : Supreme Court New South Wales, Equity Division T&C List. 19th January 2007

1 **HIS HONOUR**: The plaintiff (Veolia) and the first defendant (Kruger) were parties to a subcontract dated 22 March 2003 (the contract). It is common ground that the contract was a construction contract for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 (the Act).

2 Kruger gave Veolia a payment claim dated 26 July 2006. The "claimed amount" was $482,631.05. Veolia responded by a payment schedule dated 9 August 2006. It assessed the "scheduled amount" at nil.

3 The dispute thereby constituted was referred to the second defendant (the Adjudicator) for adjudication. She determined that the "adjudicated amount" was $428,291. Veolia says that the determination is void, and seeks relief accordingly.

The issues

4 As refined at the hearing, the essential issues were:

(1) Whether the Adjudicator failed to consider Veolia's case that the works carried out were defective or incomplete.

(2) Whether the Adjudicator failed to consider Veolia's case, based on clause P47 of the contract, in answer to Kruger's claim for delay costs ($369,943 of the claimed amount).

(3) Whether the Adjudicator decided in favour of Kruger, as to the valuation of delay costs, on a basis that was not advanced by the payment claim.

5 In each case, Veolia submitted that the answer was "yes", and that the Adjudicator thereby:

(1) Failed to accord it such measure of natural justice as the Act entitled it to receive, and;

(2) Failed to exercise her powers in good faith, as that was explained by Hodgson JA (with whom Mason P and Giles JA agreed) in ***Brodyn Pty Ltd v Davenport and Another*** (2004) 61 NSWLR 421 at 441-442 (55).

6 Mr Christie of counsel, who appeared with Mr Kremer of counsel for Veolia, did not suggest that his client could succeed on the basis of want of "*Brodyn*" good faith if it failed on the question of denial of natural justice. Accordingly, and consistently with what I said in ***John Goss Projects v Leighton Contractors & Anor*** [2006] NSWSC 798 at paras [56] to [59], I shall say no more about good faith.

Background

7 The contract was one for Kruger to design, supply, install and commission the above ground sections of the odour collection systems to be furnished by Veolia to three waste water treatment plants at and near Wollongong. There were disputes as to the progress (or lack of progress) achieved by Kruger. Each party blamed the other. Eventually, on 8 March 2005, Veolia took (or purported to take) the works out of the hands of Kruger. I am not concerned to inquire how, in those circumstances, Kruger could make a payment claim, as it sought to do, some 16 months later.

8 Before I turn to the issues, I wish to put on record the problems with which the parties presented the Adjudicator. She was given material that, before me, occupied six lever arch folders - in excess of 1,800 pages in all. The material, in particular that emanating from Veolia, was tendentious, repetitive and unfocused. It does not appear that any effort was made to isolate and define the real issues, and to direct the Adjudicator to the relevant parts of the documentation bearing on each issue. Instead, she was left to deal with this unstructured mass of material, with a maximum (subject to extension by consent) of ten business days to produce her determination. The Adjudicator commented adversely on this in paragraph 14 of her determination. She then said in paragraph 15:

"To ensure that all the respondent's reasons for withholding payment are addressed, much of the repetition found in the payment schedule is, unfortunately, reproduced below. The paragraphs referred to are the paragraphs of the payment schedule."

9 As foreshadowed, she dealt paragraph by paragraph with the propositions Veolia advanced in its payment schedule.

First issue: incomplete or defective works

10 The Adjudicator dealt with this in paragraphs 34 to 40 of her determination. She did so by reference to the relevant paragraph, seven, of the payment schedule (more accurately, of attachment A to the payment schedule).

11 Relevantly for present purposes, she said:

> *"34. In sub-paragraph (a), the respondent says that work taken out of the claimant's hands included incomplete work and defective work. I understand the respondent to mean that when it took work out the [sic] of the claimant's hands, those works were incomplete and/or defective.*
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> *35. The respondent says items 2, 5a, 5b, 5c, 6a, 6b, 6c, 8c, 9aii, 9bi, 10a and 10b and variations 2, 3 and 16 are incomplete but does not provide any details.*
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> *36. The respondent also says that work in relation to items 6a, 6b, 6c, 8d, 9bi and 10b is defective. The respondent does not say at all in that way the work is allegedly defective but estimates the cost of rectification at $76,000. The respondent does not show how it arrives at that estimate.*
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> *37. The claimant says that the respondent has provided no information whatsoever on the nature or extent of any alleged defects or how the estimate of the cost of rectification was arrived at. The claimant says that, in the*

absence of any information whatsoever, it is impossible for the claimant to comment. The claimant says that the respondent is prohibited by section 20(2B) of the Act from providing further details of defects in an adjudication response.

38. The respondent has not pointed me to any details of incomplete or defective work. I therefore agree that the respondent's reasons for not paying are so lacking in detail (there being none) that the claimant is unable to respond effectively. Moreover, to the extent that the respondent alleges that the work is incomplete and/or defective, it is incumbent upon the respondent to satisfy me that this is so. The respondent has failed to satisfy me that any of the work claimed for is incomplete or defective."

12 Veolia submitted that, by the first two sentences of paragraph 38, the Adjudicator demonstrated that she had ignored, or overlooked, certain aspects of its payment schedule and adjudication response, and of a statutory declaration of its project manager, Mr Fenton, made on 29 August 2006 and submitted to the Adjudicator with the adjudication response. Veolia relied also on passages in paragraph 35 in support of this submission; and, as well, on paragraph 23:

"23. The claimant clearly asserts that the work was carried out under the subcontract or variations to it. The respondent denies that all the work for which payment is carried has, in fact, been carried out under the contract. As the respondent does not state that none of the work claimed for was carried out under the contract, and does not specify what work, if any, was not carried out under the contract, I am not satisfied that any of the work claimed was carried out other than under the contract or variations to it. …

35. The respondent says items 2, 5a, 5b, 5c, 6a, 6b, 6c, 8c 9aii, 9bi, 10a and 10b and variations 2, 3 and 16 are incomplete but does not provide any further details."

13 As will be seen from its concluding words, paragraph 23 was addressing a different issue altogether, namely, Veolia's claim that some of the work done by Kruger was not "carried out under the subcontract."

14 It is plain that the Adjudicator understood the nature of Veolia's reasons, relating to incomplete or defective work, for denying liability for this part of the payment claim. She referred in terms to the relevant parts of paragraph 7 of the payment schedule.

15 Paragraph 7(a)(iv) of the payment schedule directed attention to attachment B. That was a document in the nature of a Scott Schedule. That document identified (in three only out of many items) things that were said to be defective or incomplete. However, it did so by reference to the following categories:
(1) "Sludge Handling Area";
(2) "SSTP"; and
(3) "Variation - Change Order No. 2".

16 Veolia's comments in respect of each of those categories of work were:

*"**ii) Sludge Handling Area** …*

1. VWSA denies that the work is 75% complete as claimed by Kruger Engineering.
2. Kruger Engineering has failed to provide evidence proving that it has completed the works. VWSA denies that the work is complete. The VWSA position supported by Kruger Engineering letter dated 13 January 2006 which confirms that this work lot is not complete.
3. Pursuant to Clause P42.1.3, Kruger Engineering must complete a work lot in order to be entitled for payment with respect to this work lot. VWSA denies such work is complete and hence Kruger Engineering is not entitled to payment for that work lot.
4. VWSA also relies upon the reasons in Attachment A to this Payment Schedule and details in Attachment D. …

***i) SSTP** …*

1. VWSA denies that the work is 100% complete as claimed by Kruger Engineering. The work undertaken by Kruger Engineering is defective. The rectification of such defective work forms part of the work taken out of the hands of Kruger Engineering under Clause P44.4.1(a).
2. VWSA also relies upon the reasons in Attachment A to this Payment Schedule and details in Attachment D. …

***Variation – Change Order No. 2** …*

1. VWSA denies that the work is 100% complete as claimed by Kruger Engineering. The work undertaken by Kruger Engineering is defective. Rectification of the defective work forms part of the work taken out of the hands of Kruger Engineering under Clause P44.4.1(a).
2. VWSA relies upon the reasons in Attachment A to this Payment Schedule and details in Attachment D."

17 I accept that by this means the payment schedule identified three areas, or categories, of work that were said to be defective or incomplete. But in substance it did not:
(1) Specify what work, if any, "was not carried out under the contract" (determination, paragraph 23);
(2) "Provide any further details" of the incomplete work (determination, paragraph 35);
(3) "Say at all in what way the work is allegedly defective" (determination, paragraph 36); or
(4) Point "to any details of incomplete or defective work" (determination, paragraph 38).

18 It is reasonably plain from paragraph 37 of the determination and what follows that the Adjudicator accepted Kruger's submission as to the effect of s 20(2B) of the Act. That may explain why she did not refer to the adjudication response or to Mr Fenton's statutory declaration.

19 The status, in the context of adjudications, of adjudication applications and adjudication responses is not defined by the Act. Of course, an adjudication is commenced by the lodging of an adjudication application; and the respondent thereupon has an opportunity to lodge in reply its adjudication response. But neither document is in terms a document listed amongst those to be "considered" in s 22(2).

20 Section 22(2)(c) picks up s 17(3)(h); and s 22(2)(d) picks up s 20(2)(c) (the latter qualified by s 20(2B)):

> "***17. Adjudication Applications*** …
> *(3) An adjudication application:* …
> *(h) may contain such submissions relevant to the application as the claimant chooses to include.* …
>
> ***20. Adjudication Responses*** …
> *2) The adjudication response:* …
> *(c) may contain such submissions relevant to the response as the respondent chooses to include.* …
> *(2B) 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.* …
>
> ***22 Adjudicator's determination*** …
> *(2) In determining an adjudication application, the adjudicator is to consider the following matters only:* …
> *(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 …".*

21 There appears - and I say this at a level of generality - to be a practice of including in adjudication applications and responses an amount (sometimes substantial) of material going beyond the payment claim or schedule (as the case may be). Any such practice is not supported, let alone authorised, by the scheme and terms of the relevant provisions of the Act. Nor do the scheme or terms of the Act permit an adjudicator to consider such material, except insofar as it may be regarded as submissions authorised to be made and, if made, required to be considered. Indeed, s 22(2) makes it plain that such additional material should not be considered except as, and to the extent that, it constitutes submissions.

22 Thus, I conclude, both Veolia's adjudication response and Mr Fenton's statutory declaration were not matters that, by s 22(2), the Adjudicator was required to consider unless and to the extent that they could reasonably be regarded as submissions in support of the payment schedule. If they were to be so regarded, they could not be used to supplement any deficiencies, either as to particularity or as to proof, to the extent that these were observed (or that the Adjudicator found them, as she noted in paragraph 38 of the determination).

23 I dealt with the content of the obligation to "consider" matters in ***Timwin Construction v Façade Innovations*** [2005] NSWSC 548 at paras [39] and [40]. I said:

> "39 That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see ***Zhang v Canterbury City Council*** (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).
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> 40 As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in ***The Queen v Hunt; ex parte Sean Investments Proprietary Limited*** (1979) 180 CLR 322 (Mason J) and in ***Evans v Marmont*** (1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq)."

24 To that may be added a reference to ***Azriel v New South Wales Land and Housing Corporation*** [2006] NSWCA 372; see Basten JA, with whom Santow and Ipp JJA agreed, at paras [49] and [51]:

> "*49 Judicial review is concerned only with the legality of an administrative decision, in the sense of whether or not the decision-maker has exceeded the legal boundaries of his or her powers. Those boundaries are defined, in part, by reference to the consideration of matters which are legally impermissible and the failure to consider matters to which the law requires that consideration be given. The requirement of consideration is not satisfied by formalistic reference. In* ***Weal v Bathurst City Council*** *(2000) 111 LGERA 181 Giles JA, with whom Priestley JA agreed, stated at [80]:*
>
> *"Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration … ."*
>
> *Mason P commented at [9]:*
>
> *"There is little point in searching for a definitive statement of what is involved in taking something into consideration. I am however, attracted to Gummow J's formulation of 'proper, genuine and realistic consideration upon the merits'. This was in the context of s 5(2)(f) of the Administrative Decisions (Judicial*

*Review) Act 1977 (Cth) (see **Khan v Minister for Immigration and Ethnic Affairs** (1987) 14 ALD 291 at 292). The formulation has been carried across to the proper consideration ground of review and now appears to have a general acceptance in the Federal Court of Australia (see **Paramananthan v Minister for Immigration and Multicultural Affairs** (1998) 94 FCR 28 at 64 where the authorities are collected by Merkel J)." ...*

*51 At least in relation to findings of primary fact, the weight to be given to any particular matter is for the decision-maker and is not reviewable by the Court. As Spigelman CJ noted in Bruce v Cole (1998) 45 NSWLR 163 at 186D-E, the scope for assessing whether the decision-maker has given proper, genuine and realistic consideration to a mandatory matter must be approached with caution, so as to avoid the Court impermissibly reconsidering the merits of the decision. Indeed, the language adopted by Gummow J in Khan was not expressly directed to mandatory considerations, but to the merits of a case, and would extend to all material matters raised by an applicant, failure to consider which in the manner described is now treated as a question of procedural unfairness: see **Dranichnikov v Minister for Immigration and Multicultural Affairs** (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ) and [87] and [88] (Kirby J)."*

25 I do not think that the Adjudicator failed to consider, in the sense that I have explained, the relevant parts of the payment schedule. On the contrary, I think, it is apparent from her determination that she did so. Whether or not her reasoning and conclusions were correct is irrelevant.

26 In short, I do not think that the Adjudicator denied Veolia natural justice in this respect.

27 In any event, as the second half of paragraph 38 of the determination makes plain, the Adjudicator was not satisfied as a matter of fact that there was any incomplete or defective work. On the basis that, as I have said, the adjudication response and Mr Fenton's statutory declaration were to be treated at most as submissions (or were not required or able to be "considered" as evidence), that reasoning cannot give rise to reviewable error.

28 In this context, and as to the s 20(2B) point raised by Kruger before the Adjudicator (see paragraph 37 of the determination), it is plain that much of the material asserted by Mr Fenton was known, or available, as at 9 August 2006 when the payment schedule was provided.

29 However, for the reasons that I have given above, I do not think that the Adjudicator erred in failing to "consider" this as something capable of supplementing the deficiencies of proof to which she adverted to in paragraph 38.

30 It follows that even if, contrary to my view, the Adjudicator did fail in the relevant sense to consider the relevant aspect of the payment schedule (ie, Veolia's case and submissions based on the proposition that there was defective and incomplete work), that error would not have been dispositive, given her conclusion on the associated question of proof (or lack thereof).

Second issue: clause P47

Basis of the claim; relevant contractual provisions

31 This issue too concerns the claim for delay costs. Unfortunately, to understand the issue, it is necessary to look at that claim, and the relevant contractual provisions, in a little detail.

32 It was common ground, and in any event is plain, that Kruger put this claim on two bases. The first basis relied on Veolia's alleged failure to provide to Kruger timely access to the site. The second relied on Veolia's alleged suspension of the works.

33 Access to the site is dealt with by clause P27.1 of the contract, which provides relevantly:

"P27.1.1 The Contractor shall on or before the expiration of the time stated in the Annexure Part A give the Subcontractor access to sufficient of the Site to enable the Subcontractor to commence work. The Contractor shall from time to time give the Subcontractor access to such further parts of the Site as may be necessary to enable the Subcontractor to execute the work under the Subcontract in accordance with the requirements of the Subcontract. The Contractor shall advise the Subcontractor in writing of the date upon which the Site or any part will be available.

P27.1.2 Notwithstanding the provisions of this Clause, if the Subcontractor is in breach of Clause 21.1, the Contractor may refuse to give the Subcontractor possession of the Site or any part of the Site until the Subcontractor has complied with the requirements of Clause 21.1.

P27.1.3 The Subcontractor shall only be entitled to such use and control as is necessary to enable the Subcontractor to execute the work under the Subcontract."

34 Suspension of the works is dealt with by clause P34 of the contract, which provides relevantly:

*"**P34.1 Suspension by Contractor's Representative***

If the Contractor's Representative considers that the suspension of the whole or part of the work under the Subcontract is necessary:

(a) because of an act or omission of:

(i) the Contractor, the Contractor's Representative or an employee, consultant or agent of the Contractor; or

(ii) the Subcontractor, a Secondary Subcontractor or an employee or agent of either;

(b) for the protection or safety of any person or property or the environment; or

(c) to comply with an order of a court,

the Contractor's Representative shall direct the Subcontractor to suspend the progress of the whole or part of the work under the Subcontract for such time as the Contractor's Representative thinks fit. …

P34.3 Cost of Suspension

Any cost incurred by the Subcontractor by reason of a suspension under Clause 34.1 shall be borne by the Subcontractor but if the suspension is due to an act or omission of the Contractor, the Contractor's Representative or an employee, consultant or agent of the Contractor and the suspension causes the Subcontractor to incur more or less costs than otherwise would have been incurred, the difference shall be valued under Clause 40.2. … ".

35 *Clause P40.2 provides, relevantly:*

*"**P40.2 Valuation***

Where the Subcontract provides that a valuation shall be made under Clause 40.2, the Contractor shall pay or allow the Subcontractor or the Subcontractor shall pay or allow the Contractor as the case may require, an amount ascertained as follows: …

(c) to the extent that neither Clause 40.2(a) or 40.2(b) apply, reasonable rates shall be used; …

(f) if the variation has caused a delay in respect of which the Contractor's Representative has extended the Date for Practical Completion, the valuation may include additional time based costs incurred by the Subcontractor in respect of the delay or disruption and the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit; and … ".

36 Veolia submitted in this Court that its case, as advanced in the payment schedule and before the Adjudicator, was that the claim, however based, was defeated by clause P47. That clause provides:

*"**P47. NOTIFICATION OF CLAIMS***

The Contractor shall not be liable upon any claim by the Subcontractor in respect of any matter under or arising out of or in connection with the Subcontract or any alleged breach thereof unless:

(a) the Subcontractor gives written notice to the Contractor's Representative not later than 7 days after it becomes aware of or should reasonably have been aware that it had a claim;

(b) the Subcontractor lodges the claim with the Contractor's Representative within a further 14 days or any other period agreed to by the Contractor's Representative from the date of written notice of the claim; and

(c) the claim sets out:

(i) the legal base for each aspect of the claim;

(ii) the facts relied upon in support of each aspect of the claim; and

(iii) details of the quantification of the sums claimed showing the manner of their calculation,

(iv) sufficient to enable a proper assessment of the claim; and

(d) any other requirement for notification of the claim elsewhere under the Subcontract has been met."

How Veolia put its case in the payment schedule

37 As I have noted, and as the Adjudicator commented, the payment schedule is not easy to follow. In their submissions, however, the parties drew attention to the various places in which clause P47 was mentioned in the payment schedule.

38 I start by setting out the relevant parts of paragraph 4:

"*4. The Payment Claim refers to Subcontract Number 400-896. It is incumbent upon Kruger Engineering to substantiate **in its Payment Claim,** its entitlement, if any, to a progress payment. Based upon the terms of that Subcontract and in spite of the position adopted by VWSA in its previous payment schedules related to payment claims referred to in Schedule 2 of the Payment Claim, Kruger Engineering, in its Payment Claim: …*

(h) has again failed to recognise, or incorrectly interpreted, the effects of Clause P36, "NOT USED" and its resultant effect on the meaning of the entry in Annexure Part A of the Subcontract "Limit of Delay Costs (Clause 36.2), Subcontract Sum". P36, had it been used, would have addressed Delay costs entitlements. That Clause P36 was however not used in the Subcontract and cannot and did not operate in the Subcontract. There can be no entitlement under Clause P36 to adjust the Subcontract Sum under Clause P36. As such the Subcontract Sum, as defined in Clause P2.1, is unaffected by Clause P36. In any event VWSA submits: …

(iv) To the extent Kruger Engineering is relying upon the provisions of Clause P34.3 then VWSA denies that this Clause gives rise to any entitlement to extra payment to Kruger Engineering on the basis that there was no suspension under Clause P34.1 (or 34.1) (or Clause 44.9.1). In any event the amount claimed of $369,943.10 (excluding GST) has not been valued consistent with the provisions of Clauses P34.3 (or P44.9.1).

(v) To the extent that Kruger Engineering is relying upon breach by VWSA then Clause P47 of the Subcontract is relevant to consideration of the position with liability.

(i) has again failed to recognise the effects of Clause P47 of the Subcontract in that Kruger Engineering has not taken action consistent with parts (a) to (d) of that Clause, and as a result VWSA "shall not be liable upon any claim by the Subcontract". Kruger Engineering has failed to discharge its onus of proof of entitlement to the claimed "Time Based Cost" and/or "Interest".

(j) has again failed to establish that Kruger Engineering has given notices and claims conformably or consistent with taking action under Clauses P35.5 and/or P47. In any event VWSA denies that Kruger Engineering has submitted notices and claims as it is obliged to do under Clauses P35.5.1 and/or P35.52.1 and/or P47 in relation to its Claims for $369,943.10 and $27,534.05 plus associated GST. To that extent that Kruger Engineering's Payment Claim is based upon alleged substantial breach by VWSA related to delay in giving access and/or alleged suspension then VWSA submits that as a result of Kruger Engineering's failure to comply with the provisions of Clauses P35.5 and/or P47 the Clause P47 provides that VWSA "shall not be liable upon any claim", by Kruger Engineering. Such provision is applicable to Kruger Engineering's claims for $369,943.10 and $27,534.05 plus associated GST. In any event VWSA denies any liability upon those claims. …

(s) failed to demonstrate that any of the amounts which Kruger Engineering has referred to in its Schedule 2 can be properly characterised as "moneys due". In any event VWSA denies that any of such amounts are "moneys due" for the purposes of Clause P42.11. …

(v) Kruger Engineering failed to give any notices under Clause P47 relative to any claim of the nature in Schedule 2 after receipt of the relevant VWSA payment schedule, or otherwise. VWSA relies upon such failure and its consequences under Clause P47 whereby VWSA "shall not be liable upon any claim by the Subcontractor".

In any event VWSA denies that Kruger Engineering has any entitlement under Clause P42.12 for part or all of the claimed amount of $27,534.05 plus associated GST. … ".

39 These were apparently prefatory or introductory comments. It was not until paragraph 7(f), some nine pages further into the document, that Veolia commenced to "respond" to the detail of the payment claim:

"(f) VWSA responds to Kruger Engineering's Payment Claim, pages 002/011 (page 2 of 11) to page 7 of 11 as follows:

(i) The Kruger Engineering material comprises unsubstantiated assertions. The material contains a number of errors, inaccuracies and inconsistencies as demonstrated by the responses below. The most significant individual components of the Payment Claim relate to claimed time-based costs, Interest and associated GST. Such matters have been the subject of previous payment claims referred to in Schedule 2 and such claims have been responded to by VWSA in payment schedules. The method by which Kruger Engineering has now, in its 26 July 2006 Payment Claim, calculated and presented its claim differs from the methodology adopted in those previous payment claims. Such differences are consistent with Kruger Engineering recognising the flawed nature of its previous claims. As demonstrated in this Payment Schedule there remains significant flaws in the claimed position."

40 In paragraph 7(f)(iii), Veolia dealt with the claim insofar as it was based on breach of clause P27.1:

"(iii) In response to paragraph 2 "Veolia failed … to the site" then VWSA submits that even if there was failure of the nature asserted then the Subcontract had terms which were potentially relevant. VWSA submits: …

(d) Kruger Engineering did not attempt to comply with items (a) to (d) of Clause P47 notwithstanding that the Clause put beyond doubt that VWSA "shall not be liable upon any claim by the Subcontractor in respect of any matter under or arising out of or in connection with the Subcontract or any alleged breach thereof" unless such items (a) to (d) are complied with."

41 In paragraph 7 (f)(iv), Veolia dealt with the claim insofar as it was based on suspension:

"(iv) In response to paragraph 3 "Veolia gave numerous directions … and disruption" then VWSA submits:

(a) VWSA gave no directions to Kruger Engineering to suspend work whether under Clause P34.1 or otherwise.

(b) VWSA repeats its response in item (iii) above.

(c) The Subcontract does not provide for suspension by the Subcontractor and or any Administrator appointed by Kruger Engineering of the nature referred to in Kruger Engineering's letter dated 15 June 2006, nor does it provide for any additions to the Subcontract Sum as a result of any such suspension.

(d) Kruger Engineering has not particularised or substantiated the timing or duration of any alleged suspension. Contrary to the assertion in Kruger Engineering's letter dated 15 June 2006, item 10, to the effect that the Administrator's letter dated 21 February 2006 "informed Veolia that the work is suspended", in fact that letter does not refer to suspension. In any event prior to and by 21 February 2006 Kruger Engineering was not carrying out work on the Site."

42 It will be seen that this response did not refer expressly to clause P47. Whether or not it was intended to call up clause P47 through the repetition of paragraph 7 (f)(iii) is a matter of conjecture.

43 Veolia returned to the delay costs claim in paragraph 7 (f)(xxiii), some ten pages later. It said relevantly:

"(xxiii) In response to paragraphs 27 to 46 "Veolia failed to meet … set out in the attached Schedule 1" then VWSA submits: …

> (c) *VWSA denies that "suspension was directed under Clause P34.1". Consequently there can be no proper basis for Kruger Engineering to rely upon the provisions of Clause P34.3 as that clause relates to costs incurred "by reason of a suspension under Clause 34.12". There was no such suspension. …*
>
> (e) *Kruger Engineering has not demonstrated or substantiated that there was late and discontinuous access to the site or that Veolia failed to provide access in accordance with Clause P27.1.1. Even if it could provide any such demonstration and substantiation Kruger Engineering is not able to demonstrate that as a result of such access matters Kruger Engineering fulfilled the provisions of Clause P47, items (a) to (d), and/or P35.5 nor can it demonstrate that there were any relevant directions under Clause 40.1 which "shall be valued under Clause 40.2" relevant to its time-based claim."*

44 The question was addressed yet again in attachment C to the payment schedule. I interpose that it is plain from the first paragraph of that attachment that Veolia recognised the two bases on which the payment claim was brought:

> *" … The claim is based upon an alleged breach under Clause P27.1.1 of that Subcontract or alleged suspension allegedly directed under Clause P34.1. …".*

45 In paragraph 3 of the attachment, Veolia restated its reasons for rejecting the claim. Again, it addressed both aspects:

> "3. *The Payment Claim refers to Subcontract No. 400-896 ("the Subcontract"). Based upon the terms of that Subcontract and in spite of the position adopted by VWSA in its previous payment schedules, then Kruger Engineering, in its Payment Claim: …*
>
> c) *has failed to demonstrate that the amount claimed is an amount "due to the Subcontractor as a result of a breach under the Subcontract" and has therefore failed to comply with Clause P42.1.3(b)(v) of that Subcontract;*
>
> d) *has failed to demonstrate that the claimed breach was a result of a direction given by the Contractor's Representative under Clause P40.1 or approved in writing by the Contractor's Representative under Clause P40.1 consistent with Clause P40.1.1 of that Subcontract. In any event VWSA denies any such direction or approval in writing (or otherwise) was given by the Contractor's Representative;*
>
> e) *has failed to demonstrate any directions by VWSA should be properly characterised as a direction to the nature provided for in Clause P34.1 and/or P34.2.1 of the Subcontract. In any event VWSA denies there were, in fact, any such directions;*
>
> f) *has failed to demonstrate that the amounts claimed should be properly characterised as "costs incurred by the Subcontractor by reason of a suspension under Clause 34.1" and are "due to an act or omission of the Contractor, the Contractor's Representative or an employee, consultant or agent of the Contractor" referred to in Clause P34.3. In any event VWSA denies that the amounts claimed can be so properly characterised; …*
>
> j) *has failed to demonstrate that there is any proper basis under the Subcontract, or otherwise, to value a claim resulting from substantial breach by VWSA under Clause P40.2 (being the Clause relied upon in the Payment Claim). In any event VWSA denies that there is any proper basis to value the claim under the provisions of that Clause P40.2;*
>
> k) *has failed to demonstrate that Kruger Engineering has fulfilled its obligations under Clause P47 in relation to the claimed substantial breach under the Subcontract. Therefore VWSA "shall not be liable upon" Kruger Engineering's claim resulting from such substantial breach. In any event VWSA denies liability for any part, or all, of the claimed amount based upon Clause P47 of the Subcontract."*

46 The last reference to clause P47 (at least as the parties put the case before me) occurred in paragraph 4, which commenced with the somewhat obscure incantation *"Setting aside on a without prejudice basis the effects of P47 …".*

47 It cannot be said that Veolia put its case with any degree of clarity. In particular, if Veolia were intending to raise as an issue that clause P47 applied to both bases of the claim, and not just to the clause P27.1 basis, it did not state so expressly.

48 The relevant portions of the payment schedule must be considered in context, not in isolation. (I would add, although this is more relevant to Veolia's submissions on the first issue, that the same approach should be taken to the determination.)

49 The context includes the two separate bases on which the claim was put; something that, as I have said, Veolia clearly recognised.

50 One would have expected Veolia to address each basis, including by giving a statement of all of the grounds on which it is said that each must fail.

51 In those parts of the payment schedule where Veolia does address the separate bases of the claim for delay costs, a reasonably clear pattern emerges. The document refers expressly to clause P47 in response to the clause P27.1 basis, but does not do so in the response to the clause P34.1 basis. This distinction, or pattern, is clear in:
(1) The introductory section - see the extracts from paragraph 4 of the payment schedule set out above;
(2) The direct response to the clause P27.1 basis - see the extracts from paragraph 7(f)(iii) set out above;

(3) The direct response to the clause P34.1 basis - see paragraph 7(f)(iv) set out above;
(4) The detailed response to the delay costs claim - see the extracts from paragraph (7)(f)(xxiii) set out above;
(5) The further reasons given in attachment C - see the extracts from paragraph 3 set out above.

52 In my view, it is at least a fair and available reading - indeed, I would go further and say the better reading - of those parts of the payment schedule, taken in context, that Veolia relied on clause P47 as an answer only to the clause P27.1 basis of the delay costs claim, and not as an answer also to the clause P34.1 basis.

53 It is certainly the case that some confusion is introduced by the other, general or indiscriminate, passages that I have set out. But I do not think that they, individually or together, dispel the clear impression given by the individual discrete responses: an application by analogy (and commonsense) of the maxim *generalia specialibus non derogant*. Nor do I think that Veolia should be able to take advantage of any confusion created by its tendentious, repetitive and unfocused approach to the task of setting out its position in the payment schedule.

How Veolia put its case in the adjudication response

54 Veolia relied also on what was said in its adjudication response and in Mr Fenton's statutory declaration. It referred to clause P47 in paragraph 1.9 of the former. That section of the adjudication response did not address the individual bases on which Kruger pressed its claim. It stated, without differentiation, that the claim was defeated by clause P47.

55 If that were intended to repeat what had been said in the payment schedule, it did not dispel the clear impression that I have concluded can be derived from the relevant paragraphs. If it were intended to raise a separate reason, it was forbidden by s 20(2B). On either basis, I do not regard it as overcoming what I think is the better, and in any event a reasonable, view of Veolia's position as it can be discerned from the payment schedule.

56 Mr Fenton's statutory declaration, considered overall, does not assist Veolia. On the contrary, two of the three portions on which Veolia relied are consistent with the view that I have expressed.

57 Paragraph 111 occurs in a section headed "*Date for Provision of Access to the Site*". It reads, relevantly:

> "*111. I accept that Veolia failed to provide access to the Site in accordance with Clause 27.1.1 and Annexure Part A. Relevantly I note that: …*
>
> *(b) If Kruger intended to make claims for additional remuneration as a result of Veolia's failure to provide access to the site in accordance with Clause 27.1.1 it was obliged to take action consistent with Clause P47. In fact it did not take such action. As a consequence, then my construction of the provisions of that Clause 47 is that under the circumstances Veolia "shall not be liable upon any claim by the Subcontractor" including any claim for "alleged breach". … ".*

58 That makes it clear that Veolia relied on clause P47 as an answer to the clause 27.1 basis.

59 Paragraph 129 occurs in a section headed "Clause P34 of the Subcontract Conditions". Paragraph 129 states, relevantly:

> "*129. In the Adjudication Application, paragraph 80, Kruger asserts that in relation to "the extraordinary delays to access" then "The Subcontract contains two important provisions to deal with such a situation" and then goes on to address Clause P34.1 and P35.8. In my opinion it is relevant that: …*
>
> *(c) If Kruger intended to claim additional remuneration as a result of the delays over access then Kruger was obliged to take action consistent with Clause P47. … ".*

60 I accept that this material suggests that Veolia relied on clause P47 also as an answer to the clause P34.1 basis.

61 However, subsequent paragraphs of the statutory declaration give a different impression. Paragraphs 162 and 163 occur in a section headed "Additional Time Based Costs: Extensions of Time". Those paragraphs read, relevantly:

> "*162. Having regard to the evidence presented by Kruger in its Payment Claim and or the Adjudication Application, then in my opinion, as Contractor's Representative,*
> *(a) There was no direction issued of the nature provided for in Clause P34.1; and*
> *(b) Kruger's assertion that:*
> *" … Veolia gave notices from time to time to Kruger Engineering advising of the delays. These notices were directions to suspend work under the Subcontract and were notices extending the date for Practical Completion."*
> *has no proper basis. As a result Kruger has been found to be unable to demonstrate, in its evidence, that any direction under Clause P34.1 was given. …*
> *(d) As there was no "suspension under Clause 34.1" there can be no entitlement to Kruger arising from Clause P34.3; and*
>
> *163. Further to the previous paragraph, I have previously noted that relevantly if Kruger intended to make claims for additional remuneration as a result of Veolia's failure to provide access to the site in accordance with Clause 27.1.1, Kruger was obliged to take action consistent with Clause P47. In fact it did not take such action. A consequence, based [sic] my construction of the provisions of that Clause P47, is that under the circumstances Veolia "shall not be liable upon any claim by the Subcontractor" including any claim for "alleged breach"."*

62 They confirm the impression arising from the payment schedule, that Veolia relied on clause P47 only in answer to the clause P27.1 basis, and not also in answer to the clause P 34.1 basis.

The determination

63 The Adjudicator dealt with the delay costs claim in paragraphs 59 to 68 of the determination. She concluded that the claim succeeded on the clause P37.1 basis. Accordingly, as she said in paragraph 68, she did not need to consider the clause P27.1 basis.

64 The Adjudicator did not refer to clause P47. In my view, for the reasons that I have given (and bearing in mind the basis on which she decided the claim) it was not incumbent upon her to do so. The material on which Veolia relied in the adjudication was quite insufficient to put a reasonable (and reasonably careful) reader on notice that Veolia relied on clause P47 in answer to the clause P34.1 basis.

Conclusion on second issue

65 I do not think that the Adjudicator denied Veolia natural justice, or otherwise in any relevant way erred, in failing to consider whether clause P47 might afford an answer to the basis on which, as she concluded, the delay costs claim should succeed.

Third issue: valuation of delay costs

66 I have set out above the relevant words of P34. It will be observed from clause P34.3 that any amount to which Kruger may be entitled is to be valued under clause P40.2.

67 Clause P40.2 reads:

> "***40.2 Valuation***
>
> *Where the Subcontract provides that a valuation shall be made under Clause 40.2, the Contractor shall pay or allow the Subcontractor or the Subcontractor shall pay or allow the Contractor as the case may require, an amount ascertained as follows:*
>
> *(a) if the Subcontract prescribes specific rates to be applied in determining the value, those rates shall be used;*
>
> *(b) if Clause 40.2(a) does not apply, the rates in a Schedule of Rates shall be used to the extent that it is reasonable to use them;*
>
> *(c) to the extent that neither Clause 40.2(a) or 40.2(b) apply, reasonable rates shall be used; …*
>
> *(f) if the variation has caused a delay in respect of which the Contractor's Representative has extended the Date for Practical Completion, the valuation may include additional time based costs incurred by the Subcontractor in respect of the delay or disruption and the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit; and … ".*

68 The Adjudicator dealt with the appropriate basis of valuation in paragraphs 65 to 67 of the determination. Having set out clause P40.2 in paragraph 65, she said in paragraphs 66 and 67:

> "66. *The claimant relies on clause P40.2(f). The respondent does not address this issue in the payment schedule. In my view, P40.2(f) is not applicable as it provides a mechanism for valuing delay costs caused by variations. Although variations are not defined, I am not satisfied that the suspension of works constitutes a variation of work.*
>
> 67. *The respondent says that the claimant must rely on 40.2(d), (e) or (f). However, the respondent does not say why the claimant is precluded from relying on 40.2(a), (b), (c) or (d). At the very least, the claimant can rely on P40.2(c) which stipulates that reasonable rates shall be used. Even though the claim for delay costs is calculated on a time-based costs basis, this would seem to fit within 40.2(c). In any case, the only valuation in respect of delay costs is that provided by the claimant. The respondent has provided no basis by which I could arrive at a different amount. I am therefore satisfied that the claimant is entitled to this aspect of the claim."*

69 Veolia submits that in deciding to value the delay costs on this basis, she went outside the payment claim.

The relevant principles

70 In its written submissions, Veolia did not put this aspect of its case on the basis of denial of natural justice. It relied on what Einstein J said in ***John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors*** [2004] NSWSC 258 at para [24]:

> "*24 The matter may also be analysed by reference to the power of an adjudicator. An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon:*

- *The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see section 22 (2) (c)].*
- *The payment schedule (if any) [together with the respondents submissions (and relevant documentation) in the adjudication response, which submissions have to have been "duly made by the respondent in support of the (payment) schedule": see section 22 (2) (d)].*
- *The provisions of the Act: see section 22 (2) (a).*
- *The provisions of the construction contract from which the application arose: see section 22 (2) (b).*
- *The results of any inspection carried out by the adjudicator of any matter to which the claim relates: see section 22 (2) (e).*"

71 Brereton J applied this reasoning in ***Holmwood Holdings Pty Limited v Halkat Electrical Contractors Pty Limited*** [2005] NSWSC 1129. His Honour explained at para [129] that the test in ***John Holland*** was: *"Whether the additional material is or is not within the scope or ambit of the payment claim".*

72 In my view, the same test arises where a matter is raised in an adjudication response, with the required comparison being to the payment schedule.

73 To similar effect, Hodgson JA said in ***Coordinated Construction Pty Ltd v Climatech (Canberra) Pty Limited*** [2005] NSWCA 229 at para [24] that: *"The task of the Adjudicator was to make a determination within the parameters of the payment claim".*

74 However, as Einstein J recognised in ***John Holland*** at para [52(e)], a question of natural justice is involved.

75 I dealt with this in *Musico v Davenport* [2003] NSWSC 977. I said at para [107] that where an adjudicator was minded to decide a dispute on a basis for which neither party had contended, natural justice required the adjudicator to notify the parties of that intention so that they could put submissions on it:

> "*107 If that be Grosvenor's position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).*"

76 I affirmed this in para [108]:

> "*108 It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it". (See Lord Diplock in* ***O'Reilly*** *at 279.)*"

77 In ***Procorp Civil Pty Limited v Napoli Excavations and Contracting Pty Ltd & Ors*** [2006] NSWSC 205, Einstein J referred to this aspect of *Musico v Davenport* at para [10vi] as: *"authority for the proposition that an Adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party."*

78 In ***John Goss*** at para [42], I pointed out that: *"The concept of materiality is inextricably linked to the measure of natural justice that the Act requires to be given in a particular case".*

Relevant aspects of the payment claim and payment schedule

79 Having set out what it said were the relevant facts and their characterisation, Kruger said in paragraphs 41 to 43 of the payment claim:

> "41. Under Clause P34.3, Veolia is obliged to pay the extra costs incurred by Kruger Engineering due to the suspension if, as was the case here, the suspension was directed under Clause P34.1 and was due to an act or omission of Veolia.
>
> 42. Clause P34.3 provides for Kruger's extra costs to be valued under Clause P40.2. Clause P42.5.1 provides for Kruger's extra costs to be included in progress payments.
>
> 43. Clause 40.2(f) provides for valuation if a delay has occurred. It states that *"the valuation may include additional time based costs incurred by the Subcontractor in respect of the delay or disruption and the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit".*"

80 Veolia did not specifically address those paragraphs in paragraph 7 (f)(xxiii) of its payment schedule that responded to individual paragraphs of the payment claim. It did however acknowledge in paragraph 1 of

attachment C (to which cross reference was made in paragraph 7 (f)(xxiii)) that Kruger based the claim "*upon the provisions of clause P40.2.*".

81 After referring to the two bases of the claim (clauses P27.1 and P34.1) Veolia said: "The '*delay costs'* claimed are not additional amounts due and payable under clause P40.2 or any other provisions of the subcontract, and cannot be properly claimed under the Act."

Analysis

82 In my view, it was open to the Adjudicator to conclude that the relevant dispute as to valuation was whether there was an applicable valuation method specified in clause P40.2. That dispute was one that she was entitled to determine, being "*within the parameters of the payment claim*".

83 I do not think that she was bound to conclude that Kruger had limited its claim, as to valuation, to clause P40.2 (f). On the contrary, I think, she was entitled to conclude, particularly having regard to Veolia's response, that the dispute was as to clause P40.2 generally.

84 In its adjudication application, Kruger set out clause P40.2 in full at paragraph 88. It then put submissions in paragraphs 89 and following as to what were the relevant paragraphs of clause P40.2. It is sufficient to set out Kruger's paragraphs 89 and 90:

"***89. Sub-clauses (a), (b), (d), (e) and (g) are not applicable in this case.***

Veolia's Response to 89:

89V Agreed.

90. Sub-clauses (c) and (f) are relevant.

Veolia's Response to 90:

90V Veolia refers to its response to 67-76, 86, 87 and 88 and submits that sub-clauses (c) and (f) are not relevant.

If GCC P40.2 was relevant, which Veolia denies, then it is submitted that having regard to the reference in GCC P34.3 to "costs incurred" then for the purposes of establishing a "reasonable rate" in GCC P40.2(c) then any such rate would be based upon evidence of "costs incurred". It is submitted that Kruger has not submitted evidence to establish such a rate.

If GCC P40.2(f) applies, which Veolia denies, then any entitlement is to be based upon evidence provided by Kruger of "costs incurred by the Subcontractor in respect of the delay or disruption". It is submitted that Kruger has failed to provide evidence of that nature.

If GCC P40.2(f) applies, which Veolia denies, then it is submitted that in conjunction with establishing any entitlement to "a reasonable amount for overheads" Kruger needed to provide evidence of time-based overheads applicable to the Project at the time of the delay or disruption. It is submitted that Kruger has not provided such evidence.

In addition to the above submissions Veolia also refers to and relies upon the Statutory Declaration of Arthur Penton including paragraphs 5 to 12; 131 to 156; and 158 to 163."

85 If confirmation were needed that the issue joined between the parties as to the applicable basis of valuation extended to paragraph (c), it was provided by those paragraphs of the adjudication application and response.

86 It was open to the Adjudicator to consider whether clause P40.2(c) provided an appropriate method to value Kruger's claim for delay costs.

Conclusions and orders

87 Each of the challenges that were pressed fails. The amended summons should be dismissed. The parties requested that I reserve the question of costs, and I shall do so.

88 I make the following orders:

(1) I order that the amended summons be dismissed.

(2) I reserve the question of costs.

(3) I direct any party seeking an order for costs to notify the party affected within 21 days of today's date of the order sought, and in brief the grounds on which it is sought.

(4) I reserve liberty to apply either in respect of costs or otherwise.

(5) I order that the exhibits remain with the papers for 28 days, and that thereafter they be retained or disposed of in accordance with the Rules.

(Mr Christie made an application for a short stay in relation to the judgment. Mr Wilkinson informed his Honour that he would need to get instructions).

89 **HIS HONOUR:** I grant the plaintiff leave to file in Court a notice of motion in the form initialled by me and dated today's date on the basis that the first defendant consents to a stay of the judgment for a relatively short time. I will in due course make that order.

90 I will stand the proceedings over to 31 January 2007 at 9.30 am before me.

M Christie/B R Kremer (Plaintiff) instructed by Thomson Playford
N A Nicholls (Defendant) instructed by Wilkinson Building & Construction Lawyers