JUDGMENT AUSTIN J : Supreme Court New South Wales Equity Div. Duty List 25th October 2007

1 In these proceedings the plaintiff challenges the validity of an adjudication determination by the third defendant, an adjudicator nominated by the second defendant, purportedly made under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act"). The second and third defendants submit to the order of the court, except as to costs.

Relevant provisions of the Act

2 The object of the Act (to the extent relevant) is to ensure that anyone who undertakes to carry out construction work under a construction contract is entitled to receive and able to recover progress payments in relation to the carrying out of that work (s 3(1)). The Act grants the contractor a statutory entitlement to receive a progress payment regardless of whether the construction contract makes provision for progress payments, and it establishes a procedure for recovery of progress payments that involves the making of a payment claim by the person claiming payment, the provision of a payment schedule by the person against whom payment is claimed, and the referral of any disputed claim to an adjudicator for determination (s 3(3)).

3 Section 13 of the Act makes provision for the making of a payment claim. Section 14 deals with payment schedules. Section 14(4) provides as follows:

"*(4) If:*

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."

4 If the respondent becomes liable to pay the claimant under s 14(4) and fails to do so, the claimant may either take proceedings in a court of competent jurisdiction to recover the claimed amount as a debt, or make an adjudication application (s 15(2)). A claimant may apply for adjudication of a payment claim in several circumstances, including where the respondent provides a payment schedule stating a scheduled amount which is less than the claimed amount (s 17(1)(a)(i)), and where the respondent fails to provide a payment schedule and fails to pay the whole or any part of the claimed amount by the due date for payment (s 17(1)(b)).

5 Section 17(2) provides as follows:

"*(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:*

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice."

6 Section 17(3)(c) states that in the case of an application under s 17(1)(a)(i), the adjudication application must be made within 10 business days after the claimant receives the payment schedule. Section 17(3)(e) states that in the case of an application under s 17(1)(b), the adjudication application must be made within 10 business days after the end of the 5-day period referred to in s 17(2)(b).

7 The respondent may lodge an adjudication response within 5 business days after receiving a copy of the application, or within 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later (s 20(1)). The adjudicator is prevented from considering an adjudication response made out of time (s 21(2)). The respondent may lodge an adjudication response only if it has provided a payment schedule within the specified time (s 20(2A)). The adjudication response cannot include any reasons for withholding payment that have not already been included in the payment schedule (s 20(2B)).

8 By s 22(2), in determining an adjudication application the adjudicator is to consider certain stated matters only. The subsection is set out later in these reasons for judgment.

9 By s 27 a claimant is authorised to suspend the carrying out of construction work on certain conditions, and is protected from liability for loss or damage suffered by the respondent or a person claiming through the respondent as a consequence of not carrying out that work (s 27(3)).

10 Service of notices is addressed by s 31, which provides as follows:

"*31(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:*

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business, or

(d) in such other manner as may be prescribed by the regulations for the purposes of this section, or

(e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices."

11 Some other statutory provisions are relevant to the question of service, especially having regard to s 31(3) of the Act. Section 109X of the Corporations Act 2001 (Cth) provides, relevantly, as follows:

"109X(1) For the purposes of any law, a document may be served on a company by:

(a) leaving it at, or posting it to, the company's registered office; …

(6) This section does not affect:

(a) … any provision of another law, that permits; …

a document to be served in a different way.

(7) This section applies to provisions of a law dealing with service whether it uses the expression 'serve' or uses any other similar expression such as 'give' or 'send'."

12 Section 109X does not itself deal with the time of service of a document served by post, but in this respect it is supplemented by s 29 of the Acts Interpretation Act 1901 (Cth) (applicable by virtue of s 5C of the Corporations Act), which provides as follows:

"29(1) Where an Act authorises or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) This section does not affect the operation of section 160 of the Evidence Act 1995."

13 Section 160 of the Evidence Act 1995 (NSW) provides, relevantly:

"160(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted."

Facts

14 In about October 2005 the plaintiff was awarded a contract to design and construct "the Conjola Regional Sewerage Scheme - Installation of Wastewater Transportation System", which comprised approximately 52 km of piping, 14 pump stations and associated services. It subcontracted the work of installing the sewer main and the rising main to the first defendant.

15 The circumstances surrounding the making of the subcontract are in dispute. It appears that the plaintiff's project manager, Ray Ward, invited the first defendant to tender for the works in about January 2006, and subsequently the first defendant submitted a tender to Mr Ward at Conjola. Ruairi O'Connor, the sole director and major shareholder of the first defendant, attended a meeting on 10 July 2006 with Frank O'Connell, a director of the plaintiff, to discuss the tender. His evidence, which I accept on this point, was that Mr O'Connell told him the plaintiff wanted the first defendant to start the job straight away.

16 Mr O'Connor attended the plaintiff's site office on 11 July and Mr Ward told him to submit all correspondence and invoices to the site office, and provided him with a facsimile number, 4456 1433. I accept Mr O'Connor's evidence on these matters because it is confirmed by evidence of transmission of progress claims to that facsimile number and their subsequent payment.

17 The first defendant began work on about 17 or 18 July 2006. Mr O'Connor gave evidence that the first defendant never executed any written contract for the work, either before commencing or afterwards. The oral evidence of Dermot O'Connell, the Quality Assurance Manager for the plaintiff, was that within the first day or two after the first defendant commenced work, Mr O'Connor was given a letter signed by Mr Ward dated 17 July 2006 with an attachment and a subcontract agreement (T 5). I shall refer to the alleged subcontract agreement, a detailed 67-page unsigned document which is in evidence (part of Ex P1), as *"the formal subcontract"* (without thereby meaning to prejudge the question whether the document constituted the contract between the parties).

18 The letter of 17 July 2006 was addressed to Mr O'Connor and said:

"Firedam Civil Engineering accepts your offer to install gravity wastewater piping for the Conjola RSS project.

"The Scope of Work will be in accordance with the attached document titled 'Scope of Work-Gravity Wastewater Collection System'.

"The sub-contract will be structured upon a Schedule of Rates basis at a rate of $80.00 per metre of pipe installed.

"Pipe installation shall generally be in accordance with the Firedam Civil Engineering Construction Program as amended from time to time.

"As discussed previously, Firedam Civil Engineering requires all Designers, Suppliers and sub-Contractors to have a 'back to back' contractual relationship with our contract with the Department of Commerce.

"A copy of sub-contract 400906-21 will be forwarded for your review and records. The sub-contract document is based upon the GC21 sub-contract conditions.

"Should there be any queries on the sub-contract conditions, do not hesitate to contact me at any time."

19 In cross-examination Mr O'Connor denied having received the letter of 17 July 2006 or ever having seen it (T 11). However, I prefer Mr O'Connell's evidence that the letter of 17 July 2006 was given to Mr O'Connor at about that time. I do so because of the inherent probability that Mr Ward, who went to the trouble of preparing the letter, would have seen to its delivery in the most efficacious way, and because Mr O'Connor was on-site.

20 Assessing the evidence as a whole, it seems to me more likely than not that the formal subcontract was not given to Mr O'Connor or anyone else on behalf of the first defendant at any time prior to completion of the work, and that the formal subcontract does not govern the contractual relationship of the parties. I do not accept Mr O'Connell's evidence that the formal subcontract was handed to Mr O'Connor on about 17 July 2006, at approximately the time the first defendant commenced the work. I have reached these conclusions for several reasons.

21 First, Mr O'Connell said in cross-examination that the letter and the contract were prepared by Mr Ward and that it was Mr Ward rather than Mr O'Connell who handed the documents to Mr O'Connor (T 6). Therefore Mr O'Connell was not in a position to give that evidence by observation.

22 Secondly, on its face, the letter contemplated that a subcontract document would be forwarded to the first defendant at a later time. This makes it unlikely that the contract was handed over with the letter. I note that there is a handwritten note on the bottom of the first page of the letter, which appears to say "Also give copy of subcontractor contract". The handwritten note was not referred to in evidence, there is no evidence as to when it was made, and it is ambiguous. I attach no weight to it.

23 Thirdly, I refer to the following cross-examination (at T 6):

"Q. If you look at the second page of the letter, it says a copy of subcontract [sic] will be forwarded for your review and records. That seems to indicate it was not attached at all?

A. Reading the letter yes, I think so. I know the package I gave to Rory on the 11th [of April 2007] had the 2 documents together."

And later (at T 8): *"His Honour:*

Q. I'm a little curious about something else. On the first page of exhibit P1 the third paragraph says that the subcontract will be structured upon a schedule of rates basis?

A. Yes.

Q. If the subcontract was attached to the letter that sentence would have been expressed differently, wouldn't it?

A. I suppose so yes."

24 Fourthly, Mr O'Connell conceded in cross-examination that the formal subcontract upon which the plaintiff relies was never signed and never dated.

25 In my view, the contract between the parties was formed partly by the letter of 17 July 2006, partly by oral statements made on behalf of the plaintiff by Frank O'Connell and Mr Ward, and on behalf of the first defendant by Mr O'Connor, and perhaps partly by performance of the work.

26 Mr O'Connor gave evidence that the first defendant did the work from July to December 2006. The main physical work was completed in about November and the job was finished on 9 December. The first defendant made two progress claims that were submitted to the facsimile number supplied by Mr Ward and were paid by the plaintiff. Mr O'Connor's evidence on these matters was not contested and I accept it.

27 According to Mr O'Connor, two more progress claims were submitted by facsimile, on 10 October for $160,035.60 and on 1 November 2006 for $67,581.25, which have not been paid. I accept that evidence, which is supported by copies of the progress claims.

28 I note that the address of the first defendant given on the progress claims is 39/Block C, 1-3 Endeavour Road, Caringbah. At the time of the last two progress claims and until 9 December 2006, the first defendant was occupying industrial unit premises at the Caringbah address.

29 Mr O'Connor gave evidence that from early November he started contacting Mr Dermot O'Connell about payment of the progress claims. Mr O'Connor said he told Mr O'Connell that the plaintiff's failure to pay the claims was sending him "broke" and that he was behind in his rent for the premises at Caringbah and that the landlord was going to evict him. He said Mr O'Connell replied that the first defendant would be paid and that the plaintiff was waiting for cash flow.

30 According to Mr O'Connor, he had a telephone conversation with Mr O'Connell early in December 2006 in which he told Mr O'Connell that the landlord at Caringbah was about to lock him out. The landlord at Caringbah did lock the first defendant out of the premises on about 9 or 10 December 2006 by changing locks, because of non-payment of rent.

31 Mr O'Connell denied that Mr O'Connor ever told him he was going to be removed from the industrial unit at Caringbah if he did not pay rent, although he agreed that Mr O'Connor was pleading to be paid (T 8). Mr O'Connell said he explained to Mr O'Connor that the first defendant was not entitled to be paid because a lot of the work had to be rectified and made good (T 8).

32 On balance, it seems to me unlikely that Mr O'Connell told Mr O'Connor that he would be paid and that the plaintiff was waiting for cash flow. Such a statement would be out of line with the plaintiff's subsequent assertion,

for very detailed reasons, that it owed the first defendant nothing in respect of these progress claims and that on the contrary, according to the plaintiff's calculations, the first defendant was indebted to the plaintiff. While it seems that the detailed calculations were done several months after the telephone conversations in November and December, the plaintiff's claims relate to events occurring during the carrying out of the work.

33 The evidence does not enable me to decide whether Mr O'Connor told Mr O'Connell that he was about to be locked out of the Caringbah premises, but it is unnecessary to reach a decision on that point. If Mr O'Connell were aware that the first defendant was at risk of being excluded from the Caringbah premises, the plaintiff would still be entitled to serve its payment schedule on the first defendant in any of the ways permitted by s 31.

34 Mr O'Connor said that in the period from January to June 2007 he made contact with Mr O'Connell seeking payment for the first defendant's work. Mr O'Connell gave evidence that in April 2007 he put together information which included Mr O'Connor's documents, and some more information about back charges and other matters, and he had a review meeting with Mr O'Connor on about 11 April 2007. He said in cross-examination that he gave Mr O'Connor a copy of the formal subcontract at that meeting (T 6-7). Mr O'Connor's evidence was that he was handed some documentation by Mr O'Connell in April but it did not include any contract document. It seems to me unnecessary to resolve that conflict of evidence, because it is established that the work was completed well before the April meeting, which apparently was held to discuss various disagreements between the parties. It is not possible on the evidence to infer that any contract document handed over in April 2007 reflected terms that had been agreed before the work was performed. Therefore the question whether a contract document was handed over in April 2007 is irrelevant to any question I have to decide.

35 On about 19 June 2007, Mr O'Connor faxed, to the facsimile number provided by Mr Ward for the Conjola site office, a tax invoice dated 18 June purporting to be issued under the Act, directed to the plaintiff and purporting to be a final progress claim. The claim was for the "*balance of Adjusted Contract Sum as per attached summary $243,975"*. A 5-page summary was attached. The evidence includes a facsimile activity report showing the transmission of a 7-page fax to facsimile No 4456 1433, the number which Mr O'Connor was given by Mr Ward.

36 The plaintiff's address is in Newington in suburban Sydney and has never been at Conjola. Nevertheless, the invoice was received at the project site office and transmitted from the project site to Mr O'Connell, and he received it about 2 days later, according to his evidence. If (contrary to my finding) there had been a formal subcontract as claimed by Mr O'Connell, the contract would have required transmission of documents to the plaintiff at its address in Newington or at a post office box address in Silverwater, or to another facsimile number or another e-mail address. But the evidence establishes that even if the formal subcontract had been in place, its provisions concerning service of documents on the plaintiff would have been overridden by Mr Ward's specific instruction to Mr O'Connor, with which Mr O'Connor subsequently complied by transmitting documents to the fax number supplied by Mr Ward to which the plaintiff subsequently responded. That constituted service of the payment claim authorised by s 31(1)(e), because Mr Ward's instruction formed part of the contract between the parties. My conclusion, therefore, is that, whether or not the formal subcontract was in place, the final progress claim for $243,975 was validly made on the plaintiff on 19 June 2007.

37 Similar reasoning is applicable to the plaintiff's claim that the terms of its contract with the defendant required the first defendant to attach certain documentation to a payment claim, which was allegedly not attached to the tax invoice dated 18 June 2007. Additionally, Mr O'Connor's unchallenged evidence is that two progress claims were met and Mr O'Connell does not appear to have objected to lack of documentation on those occasions.

38 The address stated on the tax invoice dated 18 June 2007 was 3/234 Bronte Rd Waverley. Mr O'Connor gave evidence that from about August 2001 to about May 2006 he lived at 222 Bronte Rd Waverley and had a home office there. From about September 2006 to about 14 July 2007 he lived at 3/234 Bronte Rd Waverley. He said that the new address was close to the old address and the occupiers of the old address would forward documents they received to him. ASIC searches reveal that the registered office of the first defendant company, at least from late June until early September 2007, was 222 Bronte Rd Waverley. Mr O'Connor said in evidence that he had assumed his accountant would change ASIC's records when he moved to 3/234 Bronte Rd but obviously the accountant did not do so (T 17).

39 Mr O'Connell gave evidence that under the formal subcontract, notices were required to be given to the first defendant at its Caringbah address, which was set out in the document. But I have found that the formal subcontract did not govern the contractual relationship between the parties. He said that although he did not believe the tax invoice dated 18 June 2007 was a payment claim under the Act, on 2 July 2007 he caused a payment schedule to be sent to the first defendant at three different addresses, namely the addresses that 3/234 Bronte Rd Waverley, 222 Bronte Rd Waverley, and Endeavour Road Caringbah. He said he sent the three documents by express post (which is a form of pre-paid post) using the special envelopes provided for that purpose by Australia Post. He retained from the back of the envelopes the express post barcodes for the three items. He gave evidence that on the afternoon of 3 July he rang Australia Post and was told by an unidentified person there that the envelopes had been scanned and had been sent out for delivery (T 4-6). He said that after "numerous weeks" the express post letter sent to the Caringbah address was returned undelivered. The express post letters sent to the two Waverley addresses have not been returned by Australia Post, but Mr O'Connor asserts that the documents were not received by him.

40 What was sent to the first defendant, according to Mr O'Connell's evidence, was a letter from the plaintiff to the defendant dated 25 June 2007 attaching a payment certificate for the progress claim dated 18 June and a payment schedule under the Act, a bundle of documents comprising about 51 pages. The letter sought additional information about some matters, and alleged that the first defendant's claims were incorrect and failed to take into account various matters that were listed in the letter. The payment certificate purported to show that, far from being entitled to a further payment, the first defendant had been overpaid by $160,571.86.

41 I accept Mr O'Connell's evidence as to the posting of a payment schedule to each of the three addresses and as to the contents of the envelopes that were posted. It is corroborated by the envelope barcodes copies of which are in evidence. It is appropriate to infer from his evidence, and I do infer, that Australia Post delivered the envelopes addressed to the first defendant to each of the three addresses during office hours on 3 July. I prefer Mr O'Connell's evidence, and the inference that follows from it, to the evidence of Mr O'Connor denying receipt of the payment schedule, because Mr O'Connell's evidence is supported by the envelope barcodes and his evidence of what he was told by Australia Post. I neither accept nor reject Mr O'Connor's evidence in so far as he asserts that he did not actually receive the payment schedule, but my finding is that the payment schedule was delivered in an envelope to each of the three addresses, including his then current residential address and his earlier residential address the occupants of which had an arrangement with him for passing on mail. For reasons explained below, these findings are sufficient for the purposes of this case.

42 On 17 July 2007 Mr O'Connor sent a letter to the plaintiff purporting to be a notice under s 17(2) of the Act. Mr O'Connor's letter asserted that the plaintiff had failed to provide a payment schedule within the time allowed by the Act and consequently it had become liable to pay the whole amount of the first defendant's claim. The letter said that in the absence of payment the first defendant had elected to apply for adjudication of the payment claim, and notified the plaintiff that it had 5 business days in which serve a payment schedule or make payment, otherwise it would be barred from lodging an adjudication response. The letter displayed a new handwritten address for the first defendant, in Cannon Hill Queensland.

43 The plaintiff replied by letter dated 25 July 2007 addressed to the Cannon Hill address. The letter asserted that a payment schedule had been served, but did not enclose a copy of it.

44 The first defendant lodged an adjudication application with the second defendant, as nominated authority, on 8 August 2007. Mr O'Connell informed both the first defendant and the second defendant that the first defendant was out of time by about 21 days (presumably on the basis that a payment schedule had been provided and so the time limit was the one set by s 17(3)(c) rather than s 17(3)(e)) and that the plaintiff would not agree to any extension of time. But to protect its interests, the plaintiff lodged an adjudication response on 16 August 2007. That is a detailed document about 22 pages long, which purports to demonstrate that, rather than the plaintiff owing the first defendant money, the first defendant owes the plaintiff $160,571.86.

45 On 21 August 2007, the second defendant informed the parties that the third defendant had requested an extension of time for the adjudication, because the respondent (the plaintiff) had filed a box of material containing five lever-arch folders and two bundles of drawings. The third defendant's determination was dated 4 September 2007 and was transmitted to the parties on 6 September.

46 The third defendant reasoned that the plaintiff did not validly serve a payment schedule on the first defendant and consequently it was not in a position to lodge a valid adjudication response. He considered the adjudication response only to the extent that it contained submissions on the question of validity of service of the payment schedule. On the issue of validity of service, he referred to s 31(1)(c) and (2) of the Act and said (at [4.4]) that those provisions are satisfied only if the payment schedule comes into the possession of the claimant (relying on the judgment of McDougall J in ***Pacific General Securities Ltd v Soliman & Sons Pty Ltd*** [2005] NSWSC 378). Referring in particular to Mr O'Connor's statement dated 8 August 2007 that he had not received any payment schedule, the third defendant said that the claimant (the first defendant) had adduced evidence sufficient to raise doubt as to whether it received the payment schedule (at [4.12]), and he said that in those circumstances the onus had shifted to the respondent (the plaintiff), and it had not discharged that onus. He concluded that on balance, he was satisfied that the claimant did not receive a payment schedule within the required 10 business day period after the payment claim was served on the respondent (at [413]). These conclusions led him to disregard the adjudication response (except as regards the question of service of the payment schedule), and consequently to find that the first defendant was entitled to a progress payment of $243,975 calculated in accordance with the payment claim, without regard to the plaintiff's arguments to the contrary.

The plaintiff's claims

47 In its amended summons filed in court on 23 October 2007, the plaintiff seeks the following final relief:

"1. A declaration that the appointment of the Third Defendant under the Building and Construction Industries Security of Payment Act (NSW) 1999 entertained the First Defendant's Adjudication Application in breach of the time limits set by section 17(3)(c) [sic];

2. A declaration that the Third Defendant appointed to hear the Adjudication Application did so in breach of the rules of natural justice, and in particular he failed to give any consideration to the Plaintiff's Adjudication Response;

3. A declaration that the adjudication determination of the Third Defendant dated 4 September 2007 is void;

4. An injunction restraining the First Defendant from applying to the Second Defendant for the Adjudication Certificate arising from the Third Defendant's Adjudication Determination dated 4 September 2007;

5. An injunction restraining the Second Defendant from issuing an Adjudication Certificate arising from the Third Defendant's Adjudication Determination dated 4 September 2007;

6. An injunction restraining the First Defendant from taking any steps to enforce the Adjudication Determination dated 4 September 2007; and

7. Costs."

48 Interim injunctions have been granted to maintain the status quo. I was informed from the bar table that an adjudication certificate has been issued but not acted upon.

Service of the payment schedule

49 I have found that the payment claim, constituted by the tax invoice dated 18 June 2007 and the attachments to it, was validly served on the plaintiff. There is evidence that it was actually received by Mr O'Connell at the Newington address on 20 June. Section 14(4)(b)(ii) applies in this case to require (in effect) the plaintiff to "provide" a payment schedule within 10 business days after the payment claim is served. It is accepted that if the payment schedule was provided on 3 July 2007, then it was provided within time.

50 The first question to consider is whether the posting of a payment schedule to the three addresses on 2 July 2007, followed by Australia Post's delivery of the envelopes to each of those addresses on 3 July, amounted to or included "providing" the payment schedule to the first defendant, as required by s 14(4)(b)(ii). That depends upon the proper construction of s 31 of the Act. The leading authority on the interpretation of that section is now ***Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** [2006] NSWCA 259 (BC200607427). Hodgson JA, with whom Handley JA and Hunt AJA agreed except on some issues not presently relevant, delivered the principal judgment. Some of the matters of construction addressed by Hodgson JA were obiter dicta (see [57]), but his Honour decided that it was appropriate to express his views about these matters because of the importance of clarity (at [57]), and the other members of the Court of Appeal agreed with him. In those circumstances I should follow and apply Hodgson JA's obiter observations in the absence of a compelling reason for not doing so.

51 Section 31 applies to any "notice" that by or under the Act is authorised or required to be "served" on a person. A payment schedule, like a payment claim, is a "notice" for the purposes of s 31 (***Falgat*** at [59] per Hodgson JA, obiter). Although the Act uses the word "provide", rather than "serve" or "give" or "send", when speaking of a payment schedule, "provide" in the context of s 31 does not mean anything different from "serve", and consequently the section applies to "provision" of a payment schedule as well as to "service" (***Falgat*** at [60]-[61] per Hodgson JA, obiter).

52 Since, therefore, s 31 is generally applicable, it is necessary to consider whether service has been effected in the present case in accordance with any of the provisions of that section. The only provisions that might arguably be relevant are s 31(3), which brings in s 109X of the Corporations Act, s 31(1)(c), which applies with s 31(2), and s 31(1)(e). Section 31(1)(e) may be disposed of swiftly. It does not apply in the present case because the construction contract, constituted by the informal agreement to which I have referred, made no provision for service on the first defendant (as opposed to service on the plaintiff).

53 For reasons set out below, my opinion is that s 31(1)(c) does not apply in the present case. However, since the first defendant is a company, s 109X of the Corporations Act and s 29 of the Acts Interpretation Act are relevant, their relevance being confirmed by s 31(3) of the Act. According to s 109X(1)(a), a document may be served on a company by posting it to the company's registered office. The evidence establishes that the registered office of the first defendant, on 2 July 2007, was 222 Bronte Rd Waverley. The evidence also shows that the payment schedule was served on the first defendant at that address by postage on 2 July. Therefore service was effected under s 109X(1)(a).

54 Mr O'Connor's evidence was that he did not live at that address on 2 July. He said that he had an arrangement for the occupiers to give him mail addressed to him there, but he did not ever receive the payment schedule. But as Lindgren J observed in ***Deputy Commissioner of Taxation v Trio Site Services Pty Ltd*** [2007] FCA 776 (23 May 2007), at [18], a document may be served under s 109X(1)(a) "*by nothing more than being posted to the company's registered office - posting it to that registered office **is** service."*

55 That proposition must be qualified in one respect: proof that the envelope, though posted, was not delivered to the registered office may have the effect that service is ineffective. The position was explained, with respect to legislation not relevantly distinguishable, by the High Court in ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87, at 95-97 (Mason, Murphy, Wilson, Deane and Dawson JJ). Proof of non-delivery does not establish invalid service, for service by post is proven under s 109X simply by establishing postage to the registered office. But if non-delivery is shown, then the presumption under s 29 of the Acts Interpretation Act, that service was effected at the time when the letter would be delivered in the ordinary course of post, is rebutted. Consequently, where it is necessary to determine whether service has taken place at a particular time (here, whether the payment schedule was provided within 10 business days after service of the payment claim), proof of non-delivery prevents the time of service from being established. But, as the High Court carefully pointed out (at 97), there is an important distinction between proof of non-delivery and proof of non-receipt. It seems to me that this distinction is reinforced where the addressee is a corporate entity and the evidence goes to whether an agent of the addressee, such as a director, has received the envelope. Where there is no evidence of non-delivery, but simply evidence of non-receipt, the statutory provisions apply so that service is effective and is presumed unless the contrary is proved to

have taken place at the time of delivery in the ordinary course of post (see also ***Trio Site Services*** at [24] per Lindgren J).

56 Here I have found that the envelope addressed to the registered office was delivered to that address on 3 July 2007. It is immaterial whether Mr O'Connor received the envelope. As to the time of service, there is evidence showing that a letter posted by express post is delivered in the ordinary course of post on the following day, and therefore it is to be presumed under s 29 that service was effected on 3 July 2007. That presumption is confirmed, rather than rebutted, by Mr O'Connell's evidence of actual delivery on 3 July. This evidence, taken together, rebuts the presumption, arising under s 160 of the Evidence Act, of receipt on the fourth working day.

Section 31(1)(c) and s 31(2)

57 In my opinion these provisions do not apply because, on the evidence, none of the three addresses was the first defendant's ordinary place of business as at 2 July 2007. The Caringbah address had not been the first defendant's place of business since 9 December 2006. Mr O'Connor gave evidence that he had a home office at 222 Bronte Rd Waverley (T 16), and an ASIC search of the first defendant, which is in evidence, lists that address as its principal place of business. Whether that evidence is sufficient to establish that 222 Bronte Rd was ever the ordinary place of business of the first defendant company, it had long ceased to be Mr O'Connor's residence when the letter was posted and could not have been a place of business of the first defendant at that time. The address at 3/234 Bronte Rd Waverley was Mr O'Connor's residence when the letter was posted but there is no evidence that it was a business address for the first defendant. Indeed, Mr O'Connor gave evidence that this was his residential address and he was "*not conducting much business there because obviously it was all locked up*" [presumably referring to his earlier evidence that the first defendant was locked out of the Caringbah premises without access to its possessions].

58 However, the evidence is not entirely clear. If 222 Bronte Rd was the ordinary place of business of the first defendant because Mr O'Connor had a home office there, there is arguably an inference available that he must have established his home office at 3/234 Bronte Rd when he moved and consequently that the first defendant's ordinary place of business came to be at that address, notwithstanding failure to change the first defendant's recorded principal place of business and registered office. Although, in my view, that inference is too weak to be persuasive, I think it is appropriate to consider the position that would obtain if, contrary to my opinion, 3/234 Bronte Rd was the ordinary place of business of the first defendant on 2 July 2007 - especially since the third defendant seems to have proceeded on that basis.

59 On that hypothesis s 31(2) would apply, and consequently service would be taken to have been effected when the notice was "*received at that place*". But s 31(2) is not to be construed as implying that service under s 31(1)(c) is effected only when the posted article comes into the hand or possession of the person to whom it is directed or that person's agent. This is because mail delivered to a registered office or place of business is "received at that place" when it is put into the mailbox of the registered office or place of business, without the necessity of anyone actually seeing it (***Falgat*** at [62] per Hodgson JA, obiter).

60 The result is that, if (contrary to my finding of fact) s 31(1)(c) were applicable to the posting of the payment schedule to 3/234 Bronte Rd on the ground that this was the address of the first defendant's ordinary place of business at the relevant time, s 31(2) would have the consequence that service of the payment schedule would be taken to have been effected on 3 July 2007, when the envelope containing it was delivered to that address and therefore "received at that place", regardless of whether it came into the hand or possession of Mr O'Connor or anyone else.

Time limit for adjudication application

61 Since the plaintiff's payment schedule was provided to the first defendant, according to my findings, the first defendant's statutory right to apply for adjudication arose under s 17(1)(a)(i) of the Act rather than s 17(1)(b). Consequently the adjudication application was required to be made within 10 business days after the first defendant received the payment schedule (s 17(3)(c)). What does the word "receive" mean in s 17(3)(c)?

62 In ***Pacific General Securities Ltd v Soliman & Sons Pty Ltd*** [2005] NSWSC 378, McDougall J had to determine, under s 20(1)(b) of the Act, the time of the respondents "receiving" an adjudicator's notice of acceptance of an application. There was evidence of facsimile transmission and postage on 11 March but the respondents said they did not receive the notice until 18 March. If the correct date was 11 March, the respondents' adjudication response was out of time, and it was necessary for his Honour to decide the issue.

63 McDougall J said:

"27 The verb 'receive' in its ordinary meaning denotes the taking of something into one's hand or possession, something given or delivered, or having something delivered or brought to one. I see no reason why the word 'receive', and its cognate forms in the Act, should not be given that ordinary English meaning. This does not mean, in the case of a corporation (at least absent any contractual stipulation to the contrary) a document must come to a particular person within a corporation before it can be received. It means that the document must come into the hand or possession of, or be delivered or brought to, someone on behalf of the corporation; or, perhaps, that otherwise somehow it comes into the hand or possession of, or is delivered or brought to, the corporation."

64 In my opinion, that passage is inconsistent with Hodgson JA's remarks in ***Falgat*** (at [62]-[63]). Where, as in s 17(3)(c), the word "receive" is used in connection with receipt by a person rather than (as in s 31(2)) receipt at a place, Hodgson JA's view was that the requirement is satisfied once the document has arrived at the registered

office or place of address and is there during normal office hours. Consequently, his Honour did not accept the proposition that there can be no receiving unless and until the document is in the hand or possession of someone on behalf of the company.

65 McDougall J's view was cited, evidently with approval, by Einstein J in ***Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd*** [2005] NSWSC 439 at [17]-[18] (see also ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** [2003] NSWSC 903 at [56]). All of those cases were cited to the Court of Appeal in *Falgat*. Hodgson JA's observations at [62]-[63] must therefore be taken as the unanimous disagreement of the Court of Appeal with McDougall J's construction of the word "receive", and hence his decision, in ***Pacific General Securities***. Although *Pacific General Securities* was not overruled (presumably because Hodgson JA's comments on the construction of "receive" were obiter), my view is that in light of the Court of Appeal's judgment, *Pacific General Securities* should not be followed.

66 Hodgson JA's view in ***Falgat*** (at [63]) means that in the present case, the first defendant received the payment schedule, for the purposes of s 17(3)(c), when it arrived at the first defendant's registered office during office hours on 3 July 2007, regardless of whether it came into the hand or possession of Mr O'Connor or any other agent of the first defendant on that or any other day. Consequently s 17(3)(c) required that the adjudication application be made, if at all, within 10 business days after 3 July 2007. The first defendant lodged its adjudication application on 8 August 2007, outside that time limit.

The third defendant's reasoning

67 In my opinion the third defendant made three errors of law, which are apparent on the face of his record of adjudication.

68 First, he found, in light of ss 31(1)(c) and (2) and in reliance on a written statement by Mr O'Connor submitted with the adjudication application, that the plaintiff did not provide the payment schedule to the first defendant within the 10 business day period set by s 14(4) (Adjudication, para 4.15) and consequently the plaintiff was not entitled to lodge an adjudication response (Adjudication, para 4.15 - presumably by virtue of s 20(2A)). He proceeded to adjudicate in favour of the first defendant without regard to the payment schedule and the adjudication response (except as regards submissions concerning service) (Adjudication, paras 6.1-6.3).

69 In making his central determination that the plaintiff did not provide a payment schedule to the first defendant, the third defendant purported to follow McDougall J's decision in ***Pacific General Securities***, as authority for the proposition that the word "receive" in s 31(2) denotes "*the taking of something into one's hand or possession, something given or delivered, or having something delivered or brought to one*" (Adjudication, para 4.4). He made no reference to the Court of Appeal's judgment in ***Falgat,*** which, as I have said, is inconsistent with McDougall J's reasoning. In my opinion this amounted to an error of law, for the reasons I have explained.

70 That error apparently led the third defendant to the mistaken view that the adjudication application, made (on his view) under s 17(1)(b) on the basis that the plaintiff had failed to provide a payment schedule, was made within the time limit set by s 17(3)(e). For the reasons given earlier, the adjudication application was out of time under s 17(3)(c).

71 Secondly, the third defendant made an error of law in the course of deciding that the payment schedule had not come into the hand or possession of Mr O'Connor. He said (Adjudication, at para 4.13):

"In my view, the onus in the first instant [sic] was on the Claimant to establish, on balance, that a payment schedule was not received. That onus shifted to the Respondent when it joined issue. I consider that the Respondent did not discharge its onus."

72 In ***Falgat*** at [51], Hodgson JA said that the onus of proof is on the claimant to show that it has a cause of action under ss 14 and 15 of the Act, and accordingly in the case before the court, the onus was on the claimant to prove that a payment schedule was not provided by the respondent within the requisite time period. His Honour was referring to a cause of action in debt for recovery of the claimed amount, under s 15(2)(a)(i), but it seems to me that the onus of proof is the same where, instead of taking proceedings in debt, the claimant chooses to make an adjudication application under s 15(2)(a)(ii). Substantially the same view was taken in ***Tsoukatos v Mustafa*** [2007] NSWSC 614 at [40], where Hall J said that where the plaintiff does not challenge the defendant's evidence of postage but simply contends that he never received the documents, "the *onus lies on him as plaintiff to adduce evidence sufficient to establish a cogent explanation"* for not having received the documents. Consequently, postage having been proven, the claimant before the adjudicator, the first defendant, bore the onus of establishing that a payment schedule was not provided by the plaintiff.

73 Thirdly, the third defendant made an error of law by failing to consider whether, independently of the application of s 31(1)(c) and (2), the plaintiff provided a payment schedule to the first defendant company by service under s 109X of the Corporations Act, effected at the time established with the assistance of s 29 of the Acts Interpretation Act. For the reasons I have given, my finding is that service was validly effected in this way on 3 July 2007.

Judicial review of the third defendant's determination

74 The next question is whether these errors provide grounds for judicial review of the third defendant's determination. That issue was considered by Hodgson JA (with whom Mason P and Giles JA agreed) **in *Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394. His Honour dealt with the structure of judicial review of an adjudicator's determination as follows:

- *notwithstanding the wording of s 69(3) and (4) of the Supreme Court Act 1970 (NSW), the scheme of the Act displays a legislative intention against the availability of judicial review of an adjudicator's determination for non-jurisdictional error of law (at [51], [55], [58]);*
- *the Act lays down conditions that are essential for there to be a determination by an adjudicator having the strong legal effect provided by the Act, but if those conditions are not satisfied the purported determination by the adjudicator is void, and the court may grant relief by way of declaration or injunction without needing to quash the determination by an order in the nature of certiorari (at [52]);*
- *the grounds for judicial review are not to be identified by asking whether an error by the adjudicator in determining whether a requirement of the Act has been satisfied is jurisdictional or non-jurisdictional; it is preferable to ask whether the requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination (at [54]).*

75 Bearing this general approach in mind, counsel for the plaintiff submitted that in the present case, the third defendant failed to comply with three conditions for the making of an adjudicator's determination, relating respectively to s 22(2), s 17(3)(c), and the requirements of natural justice.

76 Section 22(2) is in the following terms:

"22(2) In determining an adjudication application, the adjudicator is to consider the following matters only:
- *(a) the provisions of this Act,*
- *(b) the provisions of the construction contract from which the application arose,*
- *(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,*
- *(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,*
- *(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."*

77 Counsel for the plaintiff contended that, by refusing to take into account the payment schedule and the adjudication response at all, except on the question of efficacy of service, the third defendant failed to satisfy the precondition, stated in s 22(2(d), that an adjudicator must consider the payment schedule and the respondent's submissions. The wording of s 22(2) provides some support of the submission. The subsection places an obligation on the adjudicator to consider the listed matters "*in determining an adjudication application*", those words suggesting that if a stated matter is not considered, the adjudicator has not determined the application. There seems to be a distinction between the matters set out in subsection (2), which have the appearance of preconditions to the making of a determination, and the procedural matters in subsections (3)-(5), suggesting that subsection (2) is intended to prescribe pre-conditions for a valid determination.

78 However, the question is governed by the observations of Hodgson JA in ***Brodyn***, who said (at [56]):

"I do not think that compliance with the requirements of s 22(2) are made such preconditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record [referring, presumably, to [51] and [55] of the judgment, which explain the structure and purpose of the Act]. The matters in s 22(2), especially in pars (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is 'duly made' by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss 20(1), 22(2)). In my opinion it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered."

79 It follows from his Honour's reasoning that non-compliance with s 22(2)(d) by an adjudicator acting in good faith is an error within jurisdiction, not leading to the consequence that the adjudicator's determination is void and amenable to declaratory and injunctive relief. That appears to be so even if the adjudicator has, as in the present case, determined for legally wrong reasons not to give any consideration at all to the respondent's payment schedule and submissions.

80 As to s 17(3)(c), in the ***Brodyn*** case Hodgson JA took the view (at [53]) that the making of an adjudication application by a claimant to an authorised nominating authority under s 17 is one of the basic and essential requirements for a valid determination. He left open the question (at [54]) whether the *"more detailed"* requirement as to the time when an adjudication application can be made is one of the preconditions non-compliance with which renders the adjudication void. Construction of the Act does not provide an obvious answer. On the one hand, the times prescribed by s 17(3) are expressed to be mandatory. On the other hand, the definition of "adjudication application" in s 4 does not require that the application comply with those limits in order to warrant that description.

81 It is germane that, as Hodgson JA pointed out at [51], the procedure established by the Act contemplates a minimum of opportunity for court involvement, and the remedy provided by s 27 can only work if the claimant can be confident of the protection given by s 27(3): "*if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap*". Those considerations imply that one should be very cautious about finding that any of the detailed statutory requirements are preconditions essential for the making of a determination. But it is unnecessary for me to reach a conclusion on this point, as in

the present case there is another ground of judicial review that is more clearly applicable, namely the natural justice ground.

82 As to the requirements of natural justice, Hodgson JA said (at [57]):

"The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by a breach of these provisions, the determination will be a nullity. … I note there is some controversy as to whether a denial of natural justice generally results in voidness or voidability … ; but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."

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

Conclusions

84 The plaintiff has established its entitlement to a declaration, in terms of para 2 of the amended summons, that the third defendant appointed to hear the defendant's adjudication application did so in breach of the rules of natural justice, in particular by failing to give any consideration to the plaintiff's adjudication response except with respect to the question of service; and consequently to a declaration, in terms of para 3, that the adjudication determination is void. In light of my conclusion that the adjudication determination is void, the plaintiff is also entitled to final injunctions against all three defendants restraining them from taking any further steps to implement or purport to give effect to the determination. Since it appears that the adjudication certificate has been issued, it is not appropriate to make orders in the form of paras 4 and 5 of the amended summons, but an order in terms of para 6 will be made.

85 Paragraph 1 of the summons seeks a declaration that the third defendant entertained the first defendant's adjudication application in breach of the time limits set by s 17(3)(c). Although that proposition is correct, I have left open the question whether an adjudicator's determination is void if the adjudication application was made out of time. In those circumstances there is no utility in the declaration sought, and I shall not make it.

86 The plaintiff has been successful in all substantial respects, notwithstanding that I will not make a declaration in terms of para 1. It is appropriate to order the first defendant to pay the plaintiff's costs. The plaintiff does not seek any order for costs against the second and third defendants.

87 Consequently the orders I shall make as follows:

1. Declarations in terms of paras 2 and 3 of the Amended Summons.
2. Final injunction in terms of para 6 of the Amended Summons.
3. Order that the First Defendant pay the Plaintiff's costs as agreed or assessed.

S Goldstein (P) instructed by Hassetts Solicitors (P)
D A Caspersonn (D1) instructed by JJ Noy & Associates (D1); Philip Davenport (D2); Church & Grace (D3)