

John Holland P/L v Cardno MBK (NSW) P/L, Graeme Robinson, The Institute of Arbitrators & Mediators Australia

JUDGMENT : Einstein J : Supreme Court of New South Wales. 20th April 2004

The proceedings

1 These proceedings concern an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* ["the Act"].

Section 20 (2B) of the Act

2 The critical issue which is raised is encapsulated in the following contention by the plaintiff, John Holland Pty Ltd ["John Holland" or "the respondent"] which had entered into an agreement ["the Contract"] with the first defendant, Cardno MBK (NSW) Pty Ltd ["the applicant" or "the defendant"] pursuant to which the latter was to provide design services:

- *An applicant is entitled to submit a progress claim and a respondent is entitled to reply to the claim by providing a payment schedule.*
- *The payment schedule must indicate why the scheduled amount is less and the reasons for withholding payments.*
- *If an applicant disputes the payment schedule it can apply for an adjudication.*
- *In that adjudication a respondent is expressly prevented from including in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant (s 20(2B) of the Act).*
- *Given that prohibition an applicant could not, for reasons of procedural fairness or natural justice, raise for the first time in its adjudication application reasons which had not been included in the payment schedule, as a respondent would not have been able to deal with those reasons in its payment schedule and would thus be unable to respond to them in its adjudication response due to the prohibition in section 20 (2B) of the Act.*

3 There is no provision to be found in section 17 which deals with adjudication applications equivalent to section 20 [2B]: as for example by providing that the claimant cannot include in the adjudication application, any reasons for claiming payment unless those reasons have already been included in the payment claim. The defendant's stance before this Court has been that the plaintiff's submissions seek to read such a provision into Section 17, which is said to be an impermissible exercise in terms of statutory construction.

4 Whilst logic and the authorities cited in this judgment would tend to suggest that in order to achieve consistency in the four steps [payment claim, payment schedule, adjudication application, adjudication response]:

- the statutory scheme dictates that the adjudication response be relevantly tied to the payment schedule [such that the adjudication response cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule-section 20 (2B)]
- the adjudication application should also be relevantly tied to the payment claim [such that the adjudication application cannot include reasons supporting the payment claim unless those reasons had been included in the payment claim]

the fact is that the Act does not expressly require any form of **reasons** for the making of a payment claim to be included in the payment claim.

5 This judgment treats with the legislative scheme where in applying that scheme it becomes necessary to cope with these difficulties.

6 As will appear from what follows, the devil will often lie in the detail: what precisely in a given case, can be said to have been "reasons not already [included] in the payment schedule"?

7 The broader issues which arise are as follows:

- whether the adjudication application made by the adjudicator contains submissions which were not duly made in support of the defendant's payment claim for the purposes of 17(3)(h) and 22(2)(c) of the Act;
- whether the adjudicator relied on submissions of the defendant in the adjudication application which were not duly made in support of the payment claim contrary to section 22(2)(c) of the Act;
- whether the adjudicator committed a jurisdictional error or otherwise committed an error justifying an order in the nature of certiorari quashing the determination;
- whether the plaintiff was denied natural justice in the adjudication.

The stance taken by the defendant

8 The defendant:

- denies that it made submissions in the adjudication application on new claims which were not raised in the payment claim;
- asserts that the matters alleged to be new matters in the defendant's adjudication submissions were in fact claims included in the payment claim and/or were further submissions made in response to the plaintiff's payment schedule and says that no claims were made in the adjudication submission that had not been incorporated in the payment claim;
- in the alternative, asserts that it was entitled to include in its adjudication application any such further submissions relevant to the adjudication application as the first defendant chooses to include in accordance with section 17(3)(h) of the Act.

The relevant provisions of the Act

9 *The Act includes:*

- *Section 13 which relevantly provides:*

"(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

- (a) must identify the construction work (or related goods and services) to which the progress payment relates; and
- (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and
- (c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

- (a) that the respondent is liable to pay the claimant under section 27(2A), or
- (b) that is held under the construction contract by the respondent and that the claimant claims is due for release."

• Section 14 which relevantly provides:

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

(2) A payment schedule:

- (a) must identify the payment claim to which it relates, and
- (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment."

• Section 17 which relevantly provides:

"(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if:

(a) the respondent provides a payment schedule under Division 1 but:

- (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim..."

• Section 20 which relevantly provides:

"(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within:

- (a) 5 business days after receiving a copy of the application, or
- (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.

(2) The adjudication response:

- (a) must be in writing, and
- (b) must identify the adjudication application to which it relates, and
- (c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

(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."

• Section 22 which relevantly provides:

"(1) ...

(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."

The principles

Generally – relief for jurisdictional error

10 It is convenient before turning to the particular facts which are before the court, to briefly examine the current position in terms of principle. The matter was the subject of a recent summary by Master Macready in *Transgrid v Siemens Ltd* [2004] NSWSC 87 (in turn adopted by Barrett J in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 (at [4]): "The parties are not at issue on the question of whether or not the decision of the adjudicator is reviewable for jurisdictional error. It is worth noting the general principles which do apply in this regard because, as has been made plain in the authorities, it is only where there is jurisdictional error rather than an error of law on the face of the record that there might be a right to review.

The defendant referred to *Craig v The State of South Australia* (1995) 184 CLR 163 at 178, where the High Court has considered the following passage from Lord Reid's speech in *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 at 171, to be applicable to tribunals but not inferior courts: 'there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it the power to act so that it failed to deal with something which it was required to take into account. Or it may have based its decision on some

matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.'

There have been a series of cases in this jurisdiction dealing with the principles as they are applied to an adjudicator under the Act. The matter was first considered in some detail in **Musico & Ors v Davenport & Ors** [2003] NSWSC 977. In that case McDougall J held that a determination of an adjudicator was open to judicial review. In **Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors** [2003] NSWSC 1019, Einstein J also came to the same conclusion. At paragraph 19 he summarised his conclusions in these terms: 'This then provides the essential reason as to why upon the proper construction of the Act the following conclusions may be drawn:

- that apart from any privative effect the Act might have, relief under section 69 of the Supreme Court Act would in principle lie against an adjudicator appointed under section 19 of the Act;
- that the determination of an adjudicator made pursuant to section 22 of the Act is in principle susceptible to judicial review;
- that judicial review of adjudication determinations made under the Act may be undertaken on jurisdictional grounds (at least in the sense that involves refusing to exercise, or acting in excess of, jurisdiction);
- that judicial review of adjudication determinations made under the Act may be undertaken for denial of natural justice or for fraud; and
- that relief in the nature of certiorari will not lie to quash the determination of an adjudicator on the basis of non-jurisdictional error of law on the face of the record [because the legislative scheme set out in section 25 (4) is inconsistent with the availability of this ground of review].'

In **Abacus v Davenport & Ors** [2003] NSWSC 1027, McDougall J again had to consider the question. His Honour referred to his earlier judgment in **Musico** and made the following comments: 'I dealt with these issues in my judgment in **Musico** at paras [21] to [60]. I concluded that:

1. Relief in the nature of prerogative relief would in principle lie against the determination of an adjudicator under the Act;
2. Relief would lie for jurisdictional error (including refusal to exercise jurisdiction, acting in excess of jurisdiction and what I described as jurisdictional error of law on the face of the record) and denial of natural justice (on the basis that the requirements of natural justice had to take into account, not only the circumstances of the particular case, but also the legislative scheme); and
3. Relief would not lie in the case of non-jurisdictional error of law on the face of the record.

I should make it quite clear that, in **Musico**, I was not intending to express in a comprehensive way all the grounds on which review might be available. What I said was, of course, said in the context of, and in the course of, deciding the particular issues propounded for decision in that case. There may be circumstances beyond those that I described that might ground an application for relief in the nature of prerogative relief. However, consideration of that question should wait until it is raised on the facts of a particular case.

I adhere to the views that I expressed in **Musico**. I note that the approach that I took in that case has been followed by Einstein J in **Brodyn Pty Ltd v Davenport & Ors** [2003] NSW SC 1019. Accordingly, the remaining issue for decision in this case is whether Abacus has demonstrated jurisdictional error, including jurisdictional error of law on the face of the record (there being no claim of denial of natural justice).'

The matter was again dealt with by Palmer J in **Multiplex Constructions Pty Limited v Luikens & Ors** [2003] NSWSC 1140, His Honour came to the same conclusion and he summarised the type of jurisdictional error which would lead to the setting aside of a decision at paragraph 34 in these terms:

'It seems clear enough that relief will be granted where the adjudicator's determination is the result of jurisdictional error: see **Musico** at paragraphs 42ff. Jurisdictional error will arise where, for example, the adjudicator's decision:

- was given in bad faith or was procured by fraud;
- was one which the adjudicator had no power under the Act to make;
- was made without complying with the limited requirements of natural justice provided by s.17(5), s.20(1), (2) and (3), s.21(1), s.21(4)(a) and s.18(4) of the Act; and see paragraph 15 above;
- did not deal with the question remitted for adjudication;
- determined a question not remitted for adjudication;
- did not take into account something which the Act required to be taken into account; or
- was based upon something which the Act prohibited from being taken into account.

See generally **Anisimic Ltd v Foreign Compensation Commission** [1969] 2 AC 147, at 171.'

His Honour also carefully considered the question of whether or not non-jurisdictional error on the face of the record could lead to the setting aside of a determination. He concluded, in agreement with McDougall J and Einstein J, that an adjudicator's determination under s 22 of the Act may not be reviewed under s 69 (1)(a) of the Supreme Court Act for non-jurisdictional error of law on the face of the record.

The defendant emphasised in submissions that the onus of establishing jurisdictional error clearly lies upon the prosecutor. Reference was made to **Hill v King** (1993) 31 NSWLR 654 at 661, where the Court of Appeal held: 'On an application for prerogative relief the prosecutor bears the burden of establishing clearly the facts which show an absence or excess of jurisdiction: see **R v Alley; Ex parte New South Wales Plumbers and Gas Fitters Employees' Union** (1981) 153 CLR 376 at 382, 392-393, 397.'

The principles more particularly going to issue definition

- 11 Standing back from the particular wording of the sections the propositions thus far which are supported by final stance authorities are as follows:
- the only issues which the respondent is entitled to agitate in the adjudication response are those issues squarely dealing with reasons for withholding payment which have been indicated in the payment schedule in accordance with section 14 (3) [*Multiplex*, Palmer J at paragraph 67];
 - the purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define as early as possible what are the issues in dispute between them [*Multiplex*, Palmer J supra];
 - the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. [*Multiplex*, Palmer J supra];
 - where an adjudicator determines an adjudication application upon a basis not notified by either party to the other and not contended for and not notified by the adjudicator to the parties, the requirements of natural justice are not satisfied [*Musico*, McDougall J at 108].
- 12 To be more precise Palmer J in *Multiplex* expressed the principle as follows:
- “67 The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then “ambush” the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*
- 68 Section 14(3) requires that if the respondent to a payment claim has “any reason” for “withholding payment”, it must indicate that reason in the payment schedule. To construe the phrase “withholding payment” as meaning “withholding payment only by reason of a set-off or cross claim” is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means “withholding payment of all or any part of the claimed amount in the payment claim”. If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been “duly made” by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).”*
- 13 McDougall J in *Musico* put the matter as follows:
- “107 ... 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).*
- 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)”*

The content of payment claims

- 14 Some attention has been given in the authorities to the content of payment claims, usually at the same time as dealing with the content of the payment schedule. Hence McDougall J observed in *Multiplex Constructions v Luikens*, op cit, at [76]: “A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute.”

Proper approach to statutory construction

- 15 It is trite to note that the Court approaches the question of statutory construction by looking at the words of the statute which are to be interpreted in accordance with their ordinary meaning and that the endeavour is a purposive one whereby the Court pays close attention to the particular legislative scheme in place. Resort may be had to the second reading speech although this will not of itself be determinative: cf *Brambles Australia Ltd v Davenport* [2004] NSWSC 120 at 16.
- 16 Further, as put by McHugh J in *Newcastle City Council v GIO General Ltd* [1997] 191 CLR 85 [at 109]: “In applying a purposive construction, **“the function of the court remains one of construction and not legislation”**. When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation.”
- 17 A difficulty which arises concerns the fact that section 13 of the Act does not, at least expressly, require the payment claim to include reasons for the claimed entitlement to a particular progress payment. The sole requirements provided for in subsection 2 are that a payment claim:
- (a) must identify the construction work (or related goods and services) to which the progress payment relates;
 - (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount);
 - (c) must state that it is made under the Act.
- 18 As will be seen from what follows below, my own view is that one commences with identifying what the statutory scheme puts forward as constituting a *payment claim*. A payment claim clearly is a claim to an entitlement to be paid a progress payment. The whole notion of a payment claim, it seems to me, requires as an *essential condition* thereof that the document by which the payment claim is put forward, *include*, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify *what the claim is*.
- 19 There is a powerful argument that this effectively means that the statutory regime requires that the claim *to be valid* must be comprehensible by the respondent. The argument is supported by reference to the whole of the statutory scheme and most particularly by reference to the following considerations:
- section 22(2)(c) clearly suggests (as does the whole of the environment being dealt with) [cf McDougall J in *Multiplex supra* at 76] that there will have been relevant documentation provided by the claimant in support of its claim;
 - the requirement stipulated for in section 14 (3) for the respondent to indicate *why* the scheduled amount is less than the claimed amount [and if it is less because the respondent is withholding payment for any reason, then to give the respondents reasons for withholding payment], can only be justified by the proposition that the payment claim will identify in a fashion comprehensible to a respondent, just what the claim is;
 - the statutory scheme is for an application [called an adjudication application]. The application must “relate to the payment claim” [section 22(2)(c)]. The application is for the adjudication of no more and no less than the payment claim as *contradicted/traversed by the payment schedule*.
- 20 However, as earlier observed, there are no words within section 13 (1) which require the claimant to do otherwise than:
- to identify the subject construction work to which the progress payment relates [subsection (1) (a)];
 - to indicate the amount of the progress payment that the claimant claims to be due [subsection (1) (b)];
 - to state that the claim is made under the Act. [subsection (1) (c)].
- 21 Ultimately it seems to me that the accepted principles of statutory construction simply do not permit the Court to take the further step of holding that in order to be valid, a payment claim must be comprehensible by the respondent in terms of its supporting materials [cf especially the abovementioned citation from McHugh J in *Newcastle City Council v GIO General*].

Approaching the question in terms of section 20 (2B)

- 22 The primary touchstone it seems to me, is section 20 (2B). Whilst a claimant which provides the most minimal amount of information in its payment claim may even so, be seen to technically comply with section 13, such a claimant will expose itself to an abortive adjudication determination if it be that:
- the respondent is simply unable to discern from the content of the payment claim, sufficient detail of that claim to be in a position to meaningfully verify or reject the claim: hence not then being in a position to do otherwise than to reject the whole of the claim on the basis of its inability to verify any part of the claim;
 - the claimant then elects to include the missing detail in the adjudication application with the inexorable consequence that the respondent is barred by section 20 (2B) from dealing with that detail/matter in its adjudication response;
 - the adjudicator relies in determining the adjudication application upon the detail supportive of the payment claim which first emerged as part of the adjudication application
- 23 For those reasons whilst it is not permissible to construe section 13 as providing that in order to be a *valid* payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.

Approaching the question in terms of the adjudicator's power

- 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 respondent's 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).

- 25 The emphasis upon submissions "*duly made*" makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served. The steps which follow generally concern the materials to be exchanged and most particularly furnished to the adjudicator. The adjudication application will *relate* to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot *constitute* a payment claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot *constitute* a payment schedule or part of it.

Section 21 (4) - additional submissions

- 26 Whether or not any of these problems may be addressed by the adjudicator requesting further written submissions from either party may become the subject of curial examination on another occasion. However it would seem unlikely that the legislature would have intended the provisions of section 21 (4) (a) and (b) to permit a radical departure from the statutory scheme described above. Rather it seems likely that these sub-sections are to be read as permitting no more than additional submissions which *clarify* earlier submissions: those earlier submissions being constrained in the manner above described.

Turning from the general to the particular

- 27 If one turns from the general to the particular, the circumstances in which a claimant for the first time treats in the adjudication application with parameters which were not telegraphed in the payment claim may occur across a number of different situations as for example:
- where the claimant for the first time advances a *new contractual basis* for a payment claim in the adjudication application;
 - where the claimant for the first time seeks to deploy in the adjudication application, supporting documentation of one type or another.
- 28 These situations may have differing results.

New contractual basis

- 29 The first situation seems to me to generally be quite plain. The abortive adjudication determination likely to result from the advancing [, within the adjudication application] of a new contractual basis for a payment claim, has already been explained.

Supporting documentation

- 30 The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says as much in the payment schedule [only later to receive as part of the adjudication application, the supporting documentation which should have been earlier supplied in order to permit a meaningful payment schedule response], will be otherwise than barred by section 20 (2B) from including in its adjudication response reasons for withholding payment arising by reference to the later supporting documentation. It could not be said that those reasons were *already included* in the payment schedule provided to the claimant. A complaint about inability to verify a claim because of insufficient information is not synonymous with reasons for dealing with a properly supported claim.

Approaching the facts

- 31 As earlier noted the application of this analysis throws up particular difficulties: the devil lies in the detail. Hence as one approaches the particular matters presently arising for determination it is necessary in each case to ask for what may be properly described as "reasons not already [included] in the payment schedule"?

The facts

- 32 The relevant facts fall into small compass although the volume of relevant materials [six lever arch folders having accompanied the adjudication application], may be considered somewhat daunting:
- on or about 3 July 2003 the plaintiff entered into the Contract with the first defendant pursuant to which the defendant was to provide design services for an amount of \$390,000 plus GST;

- the Contract is comprised in a written document titled Parramatta Rail Link Project GC-3 Works Contract - Civil Works Boundary Street to Rail Enclosure Structure O'Brien Street - Agreement for Engagement of Consultant - Cardno MBK (NSW) Pty Ltd - July 2003;
- on 10 November 2003 the defendant issued a purported payment claim under section 13 of the Act seeking payment of an amount of \$1,281,703 plus GST;
- on 24 November 2003 the plaintiff responded to the payment claim by issuing a payment schedule under section 14 of the Act disputing that any amount was payable to the defendant;
- on 9 December 2003 the defendant served an adjudication application dated 8 December 2003 under section 17 of the Act on the plaintiff;
- on 11 December 2003 the third defendant issued a letter nominating the second defendant as the adjudicator;
- on 16 December 2003 the plaintiff served its adjudication response dated 16 December 2003 under section 20 of the Act on the first and second defendants;
- the plaintiff informed the second defendant in the adjudication response that the plaintiff was precluded by section 20(2B) of the Act from including reasons for withholding payment which were not included in the payment schedule and that it would be a jurisdictional error if the second defendant relied on the new matters raised by the first defendant in the adjudication application;
- following receipt of the adjudication application and the adjudication response, the second defendant did not request further written submissions from the plaintiff in relation to the matter particularised in paragraph 8 above, as he was entitled to do pursuant to section 21(4) of the Act;
- the second defendant made his adjudication determination on 2 January 2004 and amended it on 2 January 2004 and 9 January 2004.

Challenges numbers 1, 2, and 4 - ultimately pressed at the hearing. [challenge 3 was abandoned]

33 It is convenient to commence with challenge 4 as it seems to me to be the clearest case in which to consider and apply the above described statutory construction analysis.

Detail of Challenge 4

34 This challenge is addressed by the plaintiff as follows:

Determination

- the adjudicator determined that an amount of \$12,280.00 was payable to Cardno MBK in relation to variation claim no. 6 which related to the investigation of requirements for drainage and downstream overland flow [see PX 284];

Challenges as jurisdictional error

- John Holland challenges this award on the basis that it was a jurisdictional error for the adjudicator to rely on matters which were the subject of the adjudication application, which had not previously been raised in Cardno MBK's payment claim;

Challenge as denial of natural justice

- in the alternative, John Holland submits that it was denied natural justice by not having an opportunity to adequately respond to this claim in its Payment Schedule and therefore was not able to present an adequate defence to this claim in its adjudication response, being expressly barred from doing so pursuant to s.20(2B) of the Act.

Payment claim is a variation claim

- Cardno MBK's payment claim gave notification, for the first time, of a claim for a variation pursuant to clause 7 of the Contract in respect of investigations for the requirement of drainage and downstream overland flow. It was stated by Cardno MBK that John Holland had directed Cardno MBK to carry out an investigation and an assessment in relation to this issue. Cardno MBK then alleged that this task constituted a variation [see PX 62];

Payment schedule rejection

- in response, John Holland rejected this claim in its Payment Schedule [see PX 122] on the basis that this work was already included in the scope of works under the Contract. John Holland referred to a number of provisions in the Contract in relation to this position;

Adjudication application invokes clause 3.14

- in the adjudication application, for the first time, Cardno MBK asserted that the basis of its claim was clause 3.14 of the Contract which is to the effect that Cardno MBK would be entitled to an additional fee where a correction or clarification arose from an act, default or omission of John Holland and/or its principal. In regards to the adjudication application John Holland refers to pages 184-189 of JP Exhibits;

Adjudication response rejection

- John Holland rejected this claim in its adjudication response (see page 270.104-270.106 of JP Exhibits) on the basis that:
 - the works were within the scope of Cardno MBK's agreed works under the Contract; and
 - that John Holland had not issued any direction for a variation.

Determination

- ultimately, the adjudicator awarded Cardno MBK an amount of \$12,280.00 in respect of this alleged variation. The adjudicator determined that: "...this was a design modification as a result of further information and accordingly

was a variation to the CMBK scope of work under clause 3.14 and the costs can be claimed under clause 7 of the Agreement" (see page 284 of JP Exhibits).

- the adjudicator determined this claim by reference to and reliance upon clause 3.14 of the Contract which was a claim which had not been put by Cardno MBK in its payment claim. Pursuant to s20(2B) of the Act John Holland was denied any opportunity to advance a defence based on clause 3.15 of the Contract (see page 15 of JP Exhibits) which provides that only John Holland is entitled to ask for variations, rather than other parties, and that Cardno MBK was not to act upon any requests of others unless it received written approval from John Holland.
- 35 The submission is that the adjudicator could have exercised his discretion pursuant to section 21(5) to invite John Holland to make further submissions with respect to the adjudication application. This could have cured the denial of natural justice, but it did not occur.

Dealing with challenge 4

- 36 Challenge 4 quite clearly amounts to a circumstance in which the claimant for the first time in its adjudication claim, changed its ground by putting an alternative contractual basis. There can be no doubt but that it had initially in its payment claim squarely raised this as a variation claim. Such a claim was regulated by and only by the variations clause 7 [PX 22]. That clause was in the following terms:

"7.1 VARIATIONS PERMITTED

John Holland may from time to time and at any time prior to completion of the Project give written Directions to the Consultant to do all or any one or more of the following things:

- (i) vary the nature and extent of the Services;*
- (ii) increase, change, decrease or omit any part of the Services;*
- (iii) carry out additional Services;*
- (iv) deploy additional resources to complete the Services or any part thereof, before the due date.*

The Consultant shall be bound to comply with such Directions and be bound by the same terms and conditions, so far as applicable, as if the Directions were part of the Consultant's Services originally included in the Agreement.

No Direction shall vitiate the Agreement, but the monies otherwise payable under the Agreement shall be increased or decreased having regard to the value (if any) of the Direction, determined in accordance with clause 7.2.

7.2 VALUATION OF VARIATIONS

Wherever appropriate a Direction for a variation shall be valued on the basis of the proportion that the variation represents in relation to the original Services to be provided by the Consultant expressed as percentage and applied to the Consultancy Fee and adjusted upwards or downwards, as necessary, to take into account any economies or diseconomies of scale and any other relevant factors.

If the above method of valuation is not appropriate, John Holland may request the Consultant to submit an estimate of its fees for the variation as a basis for negotiation and agreement on the valuation of the variation or, alternatively, the parties may agree to value the variation on a time, costs and expenses basis.

In appropriate circumstances, a variation may be valued on the basis of any combination of the above mentioned methods."

- 37 The respondent squarely addressed this basis in its payment schedule, its proposition being that the work for which the claim was made had already been included in the scope of works.
- 38 What then occurred was that the adjudication application now raised an alternative provided for by clause 3.14 which was in the following terms:

"3.14 CORRECTIONS

Notwithstanding any reviews, approvals or Directions undertaken or given by John Holland or the Principal with respect to documents prepared under this Agreement, any error, ambiguity or deficiency which subsequently becomes apparent and is referred to the Consultant for correction or clarification, shall be corrected or clarified by the Consultant to the satisfaction of John Holland or the Principal in a timely manner.

The Consultant shall only be entitled to an additional fee where the correction or clarification arises from an act, default or omission of John Holland and/or the Principal or parties authorised by either.

The Consultant shall provide all copies, documentation, assistance, explanations, liaison and the like as may be necessary to enable such review or checking to proceed expeditiously.

[I interpolate to note the terms of Clause 3.15:

3.15 LIAISON WITH REVIEWERS AND CHECKERS

The work of the Consultant may be subject to review or checking by John Holland and/or the Principal or parties authorised by either.

The Consultant shall provide all copies, documentation, assistance, explanations, liaison and the like as may be reasonably necessary to enable such review or checking to proceed expeditiously.

If the Consultant receives any comments or the like from other than John Holland, he shall promptly inform John Holland in writing with particulars of the comments and their standing, potential impact and any other relevant matters. Only John Holland is entitled to ask for alterations, alternatives or the like and the Consultant shall not agree to or act upon requests of others without the written approval of John Holland. "[

- 39 Ultimately the adjudication determination accepted the alternative basis relying upon clause 3.14.

- 40 In those circumstances the respondent was clearly prevented by section 20 (2B) from including in its adjudication response a reason for withholding payment, which reason had not already been included in the payment schedule. But it needed in order to so respond, to treat with clause 3.14 and to invoke in particular the last sentence of clause 3.15. It did not do so. The Adjudicator nonetheless expressly determined the matter by upholding by the clause 3.14 proposition which had first come forward in the adjudication application.
- 41 The adjudication determination miscarried in this regard. This was jurisdictional error. It was also a denial of natural justice. The adjudicator took into account a new contractual basis for a claim which basis had not been put forward as part of the payment claim. The respondent was not invited to address submission in relation to the new contractual basis.

Detail of challenge 1 pressed by the plaintiff – Progress Claim 39

- 42 This challenge, described as a *timesheet related* challenge, is addressed by the plaintiff as follows:

Determination

- the adjudicator determined that an amount of \$29,767.13 was payable to Cardno MBK in relation to progress claim no. 39 which was a claim for the amount of \$43,700.00;

Challenge as jurisdictional/error

- John Holland challenges this award on the basis that it was either a jurisdictional error for the adjudicator to rely on the matters the subject of the adjudication application, which had not previously been raised in Cardno MBK's payment claim;

Challenge as denial of natural justice

- in the alternative, John Holland submits that it was denied natural justice by not having an opportunity to respond to this claim in its Payment Schedule and therefore was not able to present a defence to this claim in its adjudication response, being expressly barred from doing so pursuant to s.20(2B) of the Act;

Shortcomings in payment claim

- Cardno MBK's payment claim included a claim for \$43,700.00 in respect of consulting engineering services alleged to have been performed in the period 9 August 2003 to 31 October 2003 [PX 46]. There was no reference to any time sheets supporting this claim nor was there any basis put forward as to how the claim was being made or pursuant to which clause of the Contract the claim was being made;

Payment schedule rejection

- John Holland rejected this claim in its Payment Schedule [see PX 129], (claim No. 39) on the basis, *inter alia*, that no time sheets approved by John Holland had been submitted by Cardno MBK;
- in this regard John Holland relied upon item 1.3 of Annexure C of the Contract which provides that:
"The rates quoted shall be for additional work as directed by John Holland. Invoices shall be itemised as per category of consult staff, at the quoted hourly rates and supported by Time Sheets approved by John Holland Site personnel."
[emphasis added - see PX 35])

Adjudication application draws in time sheets and construction stage services

- presumably in answer to John Holland's complaint that no timesheets had been submitted in support of its payment claim, Cardno MBK's adjudication application, for the first time, included various time sheets which were said to support the claim of \$43,700.00 [see PX 162 to 169];
- Cardno MBK's adjudication application, also for the first time, set out the contractual basis for the claim. In particular, Cardno MBK advised [at PX 162] that its claim was being made pursuant to clause 3 of Annexure B of the Contract, which states as follows: "If requested by John Holland during the Construction Stage, the Consultant shall undertake the following tasks. The Consultant shall be paid for the Construction Stage services at the rates indicated in Annexure C, items 1.3 and 1.4" (see page 31 of JP Exhibits).
- Item 1.3 of Annexure C of the Contract set out the relevant hourly rates for different categories of personnel from Cardno MBK. This term also sets out a requirement for the provision of "Time Sheets approved by John Holland Site personnel". None of the time sheets, belatedly submitted by Cardno MBK, had been approved by John Holland, but John Holland was deprived of the opportunity of validly making such submission to the adjudicator;

Adjudication response rejection

- John Holland rejected this claim in its adjudication response (see page 270.147 of JP Exhibits) on the basis that Cardno MBK had not provided any substantiation of this claim prior to the adjudication application. In the absence of any time sheets with the payment claim John Holland was unable to respond to this claim in the adjudication;
- all invoices for construction stage services were required to be accompanied by approved time sheets. Cardno MBK failed to provide any time sheets prior to the adjudication application. This was entirely new material put forward in the adjudication application;

Determination

- the adjudicator determined that an amount of \$29,767.13 was payable to Cardno MBK in respect of this claim (see page 286 of JP Exhibits). The adjudicator noted that the time sheets supporting the claim may not have been approved by John Holland, in accordance with item 1.3 of Annexure C of the Contract. However, the adjudicator found that he had inspected the works and that the time sheets generally supported the labour hours claimed. Thus, the adjudicator determined this issue on the basis of time sheets which had never formed any part of the payment claim.

- 43 The burden of the plaintiff's submission is that in these circumstances:

- (a) John Holland consequently did not mount any defence with respect to these matters in its payment schedule (pursuant to s.14).
 - (b) The matters in (a) were raised by Cardno MBK for the first time in its adjudication application.
 - (c) John Holland was confined, in preparing its adjudication response, to matters included by it in its payment schedule: s.20(2B) of the Act.
 - (d) Even if the course adopted by Cardno MBK (in (c) above) did come within the scope of s.17(3)(f), the effect of the above course has been to deny John Holland natural justice.
 - (e) The adjudicator could have exercised his discretion pursuant to section 21(5) to invite John Holland to make further submissions with respect to the adjudication application. This could have cured the denial of natural justice, but it did not occur.
- 44 Hence John Holland submits that it has been denied natural justice by not being able to respond to this claim adequately.

Dealing with challenge 1

- 45 Clearly upon receipt of the payment claim the plaintiff was put on notice that Progress Claim 39 was being pressed as part of the Construction Stage Services provisions of the Contract. The problem faced by the plaintiff was an inability to substantiate or otherwise meaningfully respond to the payment claim. There was of course a contractual obligation [PX 31/35] binding the defendant to itemise Construction Stage Services by reference to the relevant category of the consultant's staff, the quoted hourly rates and timesheets approved by the plaintiff. In the absence of being provided with the timesheets, the plaintiff was confined to making the point in its payment schedule that there was no basis on which it could substantiate the claim value. It did so.
- 46 It is clear from the evidence that:
- Cardno MBK did not, in its payment claim, refer to or in any way rely upon:
 - (i) any time sheets;
 - (ii) clause 3 of Annexure B of the Contract.
 - John Holland did not mount any defence with respect to these matters in its payment schedule (pursuant to s.14).
 - The same matters were raised by Cardno MBK for the first time in its adjudication application.
- 47 Whilst the matter is certainly not clear beyond doubt my own view is that in this particular state of affairs it was impermissible for the claimant to raise these matters for the first time in the adjudication application. Had the respondent sought to treat with these issues in its adjudication response, it would have been in breach of section 20 (2B).
- 48 In result the adjudication miscarried – for the same reasons as have been given in relation to challenge 4. It was also a denial of natural justice – for the same reasons as have been given in relation to challenge 4.

Challenge 2

- 49 Challenge 2 concerns a situation in which no detail *whatever* of how the claimed amount was comprised or made up was included in the payment claim. Ultimately the adjudicator treated with this as a claim for \$59,370.00 awarding \$54,019.90. However there was simply no reference in the payment claim to a claim for \$59,370.00 [unless in some fashion, not apparent to me, this figure should be regarded as part of some global claim appearing in the payment claim].
- 50 The matter is curious for the reason that *somehow* [again not explained to the Court] the respondent was able in the payment schedule [PX 116] to identify the payment claim number and the amount claimed.
- 51 This challenge, also a timesheet issue, is addressed by the plaintiff as follows:
- the adjudicator determined that an amount of \$54,019.90 was payable to Cardno MBK in relation to progress claim no. 8 [see PX 282]. John Holland challenges this award on the basis that it was either a jurisdictional error for the adjudicator to rely on the matters the subject of the adjudication application, which had not previously been raised in Cardno MBK's payment claim;
 - in the alternative, John Holland was denied natural justice by not having an opportunity to respond to this claim in its Payment Schedule and therefore was not able to present a defence to this claim in its adjudication response, being expressly barred from doing so pursuant to s.20(2B) of the Act;
 - Cardno MBK's payment claim did not include any claim in respect of this amount. Cardno MBK did not provide any details *whatsoever* in the payment claim of how the amount was comprised or how the claim was being made;
 - John Holland rejected this claim in its Payment Schedule [see PX 116] on the basis that no time sheets were provided in support of the claim in accordance with item 1.3 of Annexure C of the Contract; [I interpolate to note that clearly John Holland must have believed that this was a claim for Construction Stage Services will out how it came to that belief is not apparent]
 - in the adjudication application Cardno MBK, for the first time, set out various details in relation to this claim [see PX 156 to 161]. In particular, Cardno MBK included various time sheets which were said to support the claim. John Holland asserts that these time sheets were not approved by John Holland site personnel as required by item 1.3 of Annexure C of the Contract [see PX 35]. Cardno MBK alleged in its adjudication application that the works were performed pursuant to various directions by John Holland. Because it was introduced for the first time in Cardno MBK's adjudication application, John Holland asserts that it was denied the opportunity to make any submissions that the claimed extra work had not been the subject of directions by John Holland:

- John Holland rejected this claim in its adjudication response [see PX 270.146] on the basis that Cardno MBK had not provided any substantiation of this claim prior to the adjudication application;
- Ultimately, the adjudicator determined that an amount of \$54,019.90 [see PX 282] was payable to Cardno MBK in respect of this claim. The adjudicator noted that the time sheets supporting the claim may not have been approved by John Holland, contrary to the requirements of item 1.3 of Annexure C of the Contract. However, the adjudicator found that he inspected the works and that the time sheets generally supported the labour hours claimed. The adjudicator determined this claim on the basis of time sheets which had never formed any part of the payment claim.

- 52 The burden of the plaintiff submission is that in these circumstances:
- (a) Cardno MBK did not, in its payment claim, refer to or in any way rely upon:
 - (a) any time sheets;
 - (b) clause 3 of Annexure B of the Contract.
 - (b) John Holland consequently did not mount any defence with respect to these matters in its payment schedule (pursuant to s.14).
 - (c) The matters in (a) were raised by Cardno MBK for the first time in its adjudication application.
 - (d) John Holland was confined, in preparing its adjudication response, to matters included by it in its payment schedule: s.20(2B) of the Act.
 - (e) Even if the course adopted by Cardno MBK (in (c) above) did come within the scope of s.17(3)(f) - which John Holland denies - the effect of the above course has been to deny John Holland natural justice.
 - (f) The adjudicator could have exercised his discretion pursuant to section 21(5) to invite John Holland to make further submissions with respect to the adjudication application. This could have cured the denial of natural justice, but it did not occur.
- 53 Hence John Holland submits that it has been denied natural justice by not being able to respond to this claim adequately, in circumstances where Cardno MBK never provided any details of this claim or any time sheets prior to the adjudication application.

Dealing with challenge 2

- 54 Whilst the Court would obviously be entitled to an explanation as to how it had come about that the respondent was able to summarise the claim by giving the amount of the claim in the payment schedule by thumbnail sketching it as a claim for "Construction Stage Services", no such explanation was given by either party.
- 55 In that state of affairs the Court proceeds upon the basis that challenge 2 concerns a claim for an amount, however grounded, which was never advanced in the subject payment claim [which payment claim covered other items only] and which was advanced in the adjudication application for the first time.
- 56 In those circumstances I do not see that the relevant provisions of the Act were enlivened at all in relation to this item. There is no warrant for the Court speculating as to how the respondent came to attribute any detail to this item in its payment schedule. If the fact be, for example, that there was a missing page which should have been included with the payment claim was later identified in some conversation or e-mail between the parties, so that the respondent, by the time it submitted its payment schedule could give the relevant detail, this would not assist the Court. It would simply throw up a need for a further payment claim [cf Act section 13(6)] to be subjected to the regime thrown up by the Act.
- 57 The adjudicator determined the whole of the item the subject of challenge 2 upon the mistaken assumption that the Act had been enlivened. The determination clearly miscarried in relation to the item the subject of challenge 2.
- 58 The payment claim was defective. The determination was misconceived. The claim was invalid and effectively "*writ in water*".

Discretionary considerations

- 59 The second defendant submitted that the present was a case in which the exercise of the courts discretion should be to refuse to grant the prerogative relief sought. My own view is that the plaintiff has made good an entitlement to the relief sought. The amounts involved are significant in terms of so much of the determination as has miscarried. Clearly enough the content of the obligation to afford natural justice to the parties depended upon the circumstances of the particular case and here the legislative scheme. The circumstances the subject of the judgment make clear that the determination has gone forward in an entirely misconceived fashion. The plaintiff has never been given a proper opportunity to deal with properly substantiated claims in the fashion mandated by the statutory scheme.

Short Minutes of Order

- 60 The parties are to bring in short minutes of order when costs may be argued.

Mr M Christie (Plaintiff) instructed by Clayton Utz (Plaintiff) : David Campbell-Williams Construction Lawyer
Mr D Miller (First Defendant) instructed by Bradfield Scott (Sydney Agent) (First Defendant)
No appearance for Second and Third Defendants : Philips Fox (submitting appearance)