John Holland P/L v Roads & Traffic Authority of New South Wales; Robert Sundercombe; LEADR [2007] NSWCA 19

JUDMENT : BEAZLEY JA; HODGSON JA; BASTEN JA; Supreme Court of New South Wales. Court of Appeal. 26th February 2007

1 **BEAZLEY JA:** I agree with Hodgson JA.

2 **HODGSON JA:** On 3 July 2006, Macready AsJ made a declaration that a determination of the second respondent (the adjudicator) was void, and made orders restraining the appellant (Holland) and the third respondent (LEADR) from taking steps consequential on the determination; and he ordered Holland to pay the first respondent's (RTA's) costs of the proceedings.

3 Holland appeals from those orders.

STATUTORY PROVISIONS

4 The appeal concerns the effect of the Building & Construction Industry Security of Payment Act 1999 (the Act), and in particular ss.8(1), 9, 10(1), 13(1) and (2), 14, 17, 20, 21 and 22.

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:
(a) who has undertaken to carry out construction work under the contract, or
(b) who has undertaken to supply related goods and services under the contract,
is entitled to a progress payment. …

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:
(a) the amount calculated in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:
(a) in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, having regard to:
(i) the contract price for the work, and
(ii) any other rates or prices set out in the contract, and
(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
(iv) if any of the work is defective, the estimated cost of rectifying the defect. …

13 Payment claims

*(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.

14 Payment schedules

*(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.
(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. …

17 Adjudication applications

*(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, or
(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(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.

(3) An adjudication application:
(a) must be in writing, and
(b) must be made to an authorised nominating authority chosen by the claimant, and
(c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and
(d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and
(e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
(f) must identify the payment claim and the payment schedule (if any) to which it relates, and
(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable. …

20 Adjudication responses

*(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.

(3) A copy of the adjudication response must be served on the claimant.

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
(b) within such further time as the claimant and the respondent may agree.

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
(b) may set deadlines for further submissions and comments by the parties, and

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

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

(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

(5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

22 Adjudicator's determination

(1) An adjudicator is to determine:

*(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and*

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

(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.

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract, or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

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

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

(d) a defect of form,

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

CIRCUMSTANCES

5 In about September 2003, Holland contracted with RTA to build a dual carriageway near Kiama. Part of the work was a deep cutting about 300 metres long known as "Cut 4".

6 Between November 2003 and March 2004, according to Holland, because of explosive detonators previously placed in the area of Cut 4, the Superintendent under the contract gave instructions affecting the works in that area.

7 Holland made a claim for additional amounts under the contract in respect of these instructions (this claim being called by the parties the detonator dump claim). In March 2005, the Superintendent issued a determination that his directions constituted a variation and that the quantum of the variation was assessed at $1,815,458.61 (including GST).

8 Holland challenged this assessment, leading to a process provided by the contract for resolution of disputes. Holland provided further information about the claim, and in late 2005 claimed $7,965,509.13 (including GST) for the variation.

9 On 2 February 2006, Holland delivered a payment claim, purportedly both under cl.42.1.1 of the contract and under s.13 of the Act, for $16,577,648.41 in respect of works up to and including 30 January 2006. This claim included $7,965,509.13 in respect of the detonator dump claim.

10 At that stage, progress payments of over $97,000,000.00 had already been made, including the $1,815,458.61 determined by the Superintendent in respect of the detonator dump claim.

11 RTA served a payment schedule on 15 February 2006, proposing to pay $738,033.42. In its reasons for the difference between this amount and the claimed amount, RTA included the following material explaining a difference of $6,150,050.52 in what it allowed in respect of the detonator dump claim:

Detonator Dump Influence on Cut 4 Excavation

John Holland submitted their claim associated with the Detonator Dump's influence on Cut 4, and identifying costs, on 8 November 2004. The amount claimed was $5,721,615.45.

The major basis of this claim relates to the existence of detonators (railway safety signals and electric detonators) in the vicinity of the northbound off-load ramp. Due to these detonators, a revised design was forwarded, and the affected area quarantined and all exposed detonators collected and removed. John Holland has submitted their claim based on the Impact of the quarantined area on their excavation practices.

The reasons for the differences between the amount claimed and the assessed amount are set out in the Superintendent's determination dated 17 March 2005. (ref 1/236.1435)

The Superintendent awarded an extension of time of 18 days and associated costs of $1,650,416.92 (excluding GST) as a result of the influence of the buried detonators.

Details of this Assessment were forwarded to John Holland under the same letter. Therefore the Assessed quantum of this variation is $1,815,458.61 (inclusive of GST) in accordance with the Superintendent's Assessment (as determined in accordance with the requirements of Clauses 40 and 45.2 of the Conditions of Contract).

John Holland has increased its claim since the last payment claim in the absence of further work having been carried out.

The reasons for the difference between the amount claimed and the assessed amount are as follows:

- John Holland is not entitled to be paid for all of the work as a variation;
- there is no entitlement to a variation for excavating and/or exposing detonators. Specification G1 is limited to the cost of removing exposed detonators;
- John Holland did not comply with clauses 48, 40.1 and 35.4.5 of the Conditions of Contract in giving notice to the Superintendent of a claim for a variation and extension of time;
- John Holland has not provided all necessary information to support its claim in accordance with clause 48 of the Conditions of Contract;
- John Holland did not examine all information available or obtainable by the making of reasonable enquiries at the time of tender in breach of clause 12 of the Conditions of Contract;
- some or all of the delays claimed have not been caused by the alleged variation; the detonator dump did not affect John Holland's intended or actual method of work;
- John Holland failed to take care when blasting as required under clause 16.2 of Specification G1 and is responsible for the spread of the detonators in Cut 4;
- the haulage cycle time analysis provided by John Holland is flawed;
- the cost claimed of additional loading and hauling was not incurred by John Holland;
- the claimed additional work carried out due to the detonators is not "additional work";
- extra plant, equipment and resources were not required for the work at Cut 4 as a result of the detonators;
- the margin claimed by John Holland for head office costs and profit on plant and equipment is excessive; and
- there is overlap in the amounts claimed by John Holland for the detonator dump and the other claims, namely spoil, swell and additional costs for blasting as a result of a latent condition, and some of these amounts have already been paid to John Holland.

12 Holland then made an adjudication application dated 28 February 2006, in which it requested the adjudicator to determine the amount which represented a proper valuation of RTA's instructions affecting the excavation of Cut 4. The adjudicator notified his acceptance of his appointment to act as an adjudicator on 6 March 2006.

13 RTA's adjudication response was submitted under cover of a letter dated 8 March 2006. In addition to referring to and elaborating on reasons given in the payment schedule, the submissions included the following:

> 2. Putting that to one side, the fundamental point in this Adjudication Application is that the claim made by the Claimant is not one that you, as Adjudicator, have jurisdiction to determine under the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"). …
>
> 10. Fundamentally, the Principal submits that you do not have jurisdiction under the Act to make a determination in respect of this claim. The character of this claim, as described in the submissions following and in the statement of Robert Watson, is a contested EOT claim. The claim is to be determined by an Expert in accordance with clause 45.3 of the Contract. The resolution of a contested EOT claim does not call for the Adjudicator to exercise a valuation function, but rather the Adjudicator is being asked to stand in the shoes of the Superintendent in respect of a determination he made under a dispute resolution clause – ie, clause 45.2(a).

This is fundamentally different from the situation where an Adjudicator is asked - and is permitted - to stand in the shoes of the Superintendent when the Superintendent is assessing a payment claim under the Contract.

11. Accordingly, the Adjudicator has no jurisdiction to determine this claim under the Act. …

64. The 8 November 2004 detonator dump claim is not a claim for a progress payment within the meaning of the terms of the Act. The Adjudicator does not have jurisdiction to consider the claim and it must be rejected.

65. Section 3(1) of the Act States that:
The object of the Act is to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work (emphasis added).

66. The definition of progress payment under section 4 of the Act is as follows:
progress payment *means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):*
(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
(c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment')

67. Under section 8 of the Act, a person who has undertaken to carry out construction under a construction contract or supply related goods and services under the contract is entitled to a progress payment. The payment claim must identify the construction work to which the progress payment relates (section 13(2)(a)).

68. Construction work is defined in section 5 of the Act to include:
(1) In this Act, construction work means any of the following work:
(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,
(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,
(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,
(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in para (a), (b) or (c), including:
(i) site clearance, earth-moving, excavation, tunnelling and boring, and
(ii) the laying of foundations, and
(iii) the erection, maintenance or dismantling of scaffolding, and
(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
(v) site restoration, landscaping and the provision of roadways and other access works,
(f) the painting or decorating of the internal or external surfaces of any building, structure or works,
(g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

69. However, clause 42.1.1 of the Contract states that:
42.1.1 Contractor to lodge monthly statement
Once a month, the Contractor must submit to the Superintendent:-
(a) a detailed statement showing the contract value of work carried out in performance of the Contract and incorporated in the Works up to and including the last day of the relevant month,..."

70. "The Works" is defined in clause 2 as:
"...the whole of the work to be executed in accordance with the Contract, including all variations provided for by the Contract, which by the Contract are to be handed over to the Principal".

71. Properly characterised, the 8 November 2004 claim is a claim for an extension of time and related delay costs. The Claimant characterises it as such in its 23 November 2004 letter (see tab # of Mr Watson's statement). Even though the Claimant attempts to bundle up the extension of time claim as "variation claims", the Claimant directed the Superintendent on 23 November 2003 to issue an extension of time determination.

72. It must firmly be kept in mind that the role of an Adjudicator is a valuation role. The Adjudicator is not the arbiter of complex extension claims under the Contract. Expressed differently, an Adjudicator "must exercise his powers under section 22(2) of the Act to make a valuation of a claim for a progress payment consistent with the Act and the Contract. This general principle is confirmed in the following terms by Hodgson JA ***Coordinated Constructions Co Pty Limited v J M Hargreaves (NSW) Pty Limited*** (2005) 21 BCL 390:

"52 The adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection"

73. In making his valuation of the amount of a progress payment, the Adjudicator must calculate that amount in accordance with the terms of the Contract. In making a payment claim for a progress payment Under the Contract, the Claimant must each month provide, in accordance with clause 42.1.1:

a detailed statement showing the contract value of work carried out in performance of the Contract and incorporated in the Works up to and including the last day of the relevant month,..."

74. An EOT claim made under clause 35.4 - as the detonator claim was (see letter at tab # to Robert Watson's statement) - is not a claim for payment under clause 42.1.1. They are entirely separate contractual processes -one for extension of time claims, the other for payment claims.

75. The regime clearly contemplated by the Contract in respect of EOT and consequential delay claims is as follows:
(a) a claim under clause 35.4 is made;
(b) a determination is issued by the Superintendent;
(c) if that determination has the effect of *contract value of work carried out in performance of the Contract and incorporated in the Works"* then a claim for that amount can be made under clause 42.1.1.

76. It is only once a determination in respect of an extension of time claim is made which can be claimed under clause 42.1.1 and is picked up by section 9(a) of the Act. This analysis is confirmed (albeit in relation to a different contract) by the Court of Appeal's decision in ***Co-ordinated Construction Co Pry Limited v JM Hargreaves (NSW) Pry Ltd*** [2005] NSWCA 228 - see Hodgson JA at [42]. However, the difference between:
(a) what is claimed in an extension of time claim; and
(b) the Superintendent's determination made in response to that claim,
is not a matter which can be picked up by section 9(a) of the Act and determined by the Adjudicator.

77. In the present circumstances the Claimant's 8 November 2004 claim was presented as an EOT claim. The Superintendent determined that time but not cost should be awarded. As a result, the *"contract value of work carried out in performance of the Contract and incorporated in the Works"* did not increase and therefore there is no basis for the amount of the claim to be included in payment claim under clause 42.1.1.

78. Once the Superintendent made his determination on 7 December 2004, the Claimant gave notice of its dissatisfaction of that determination. Accordingly, the Superintendent was required to make a determination under clause 45.2(a), which he did on 17 March 2005 by awarding John Holland $1,815,458.61 (inclusive of GST). Recognising that the Superintendent's determination increased the *"contract value of work carried out in performance of the Contract and incorporated in the Works",* the Principal, by its disclosed agent, has consistently made payment.

79. Clearly, the Principal does not put in issue -nor can it -whether time related costs consequent upon an EOT are claimable under the Act. This matter has been decided conclusively now that the High Court has not allowed a special leave application in relation to the ***Co-ordinated Construction Co Ply Limited v JM Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 and ***Co-ordinated Construction Co Ply Limited v Climatech (Canberra) Ply Ltd*** [2005] NSWCA 228.

80. However, what the Principal does put in issue (and which is consistent with Hodgson's JA analysis in the *JM Hargreaves* case) is that the difference between what is claimed in an EOT claim and what has been determined by the Superintendent is not picked up by section 9(a) of the Act. An Adjudicator under the Act cannot be an arbiter of a contested EOT claim, which (in the present case) has not only been determined by the Superintendent but has been referred to discussion with the Principal under clause 45.2(b) of the Contract and is now subject to the Expert determination process under clause 45.3. The adjudication of such claims is beyond the object of the Act. The resolution of an EOT claim does not call for the adjudicator to exercise a valuation function, but rather the Adjudicator is being asked to stand in the shoes of the Superintendent in respect of a determination he made under a dispute resolution clause - ie, clause 45.2(a). This is fundamentally different from the situation where an Adjudicator is asked - and is permitted - to stand in the shoes of the Superintendent when the Superintendent is assessing a Payment Claim under the Act.

81. Furthermore, it is fundamental to note that that the Claimant prepared its Exhibits 1, 3 and 4 after its 8 November 2004 was referred to discussion between the Principal and the Contract or 6 April 2004. It defies belief that a contest for a $6,000,000 difference between a claim for extension of time costs and a determination in respect of that claim, which calls for the Adjudicator to stand in the shoes of the Superintendent, Principal and Expert under clause 45.3, could be resolved on an interim basis under the Act. The Adjudicator does not have jurisdiction under the Act to perform this function.

82. Further and in the alternative, by bundling a variation claim with an EOT claim, the Claimant is confused. The Claimant cannot obtain monetary compensation for delays under the guise of a variations claim. RTA

commends to the Adjudicator the observation of John Dorter in "Delay and Disruption" (2001) Vol 17 *Building and Construction Law* 372 at 381 that combining a claim procedure for delay costs with a claim for variations is generally not wise. However, the fundamental point is that since 17 December 2004, the 8 November 2004 claim, together with Exhibits 1,3 and 4, progressed in accordance with the clause 45 - dispute resolution clause of the Contract. It is beyond the jurisdiction of the Adjudicator under the Act to be an arbiter in respect of that claim.

83. In ***Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Limited*** [2005] NSWCA 142, Hodgson JA stated at [35] that:

"...paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d)."

84. Therefore, all of the RTA's submissions set out above are properly made and the Adjudicator must consider them and, accordingly, decline to make any reward in the Claimant's favour in respect of the Application.

14 In a facsimile to the adjudicator dated 10 March 2006 and copied to RTA, Holland contended that this adjudication response included reasons for withholding payment that were not in the payment schedule, including submissions in pars.64-81. RTA responded with a facsimile to the adjudicator dated 14 March 2006, contending that its submissions were properly made.

15 In a letter dated 15 March 2006, the adjudicator advised that he would only consider material permissible under the Act, and he requested an extension of time to provide the determination to 26 March 2006. Holland assented to this request, but RTA did not; and accordingly, the determination was required to be given by 20 March 2006, in accordance with s.21(3)(a) of the Act.

16 The determination was given on 20 March 2006. It was to the effect that RTA should pay Holland $5,583.794.00, comprising $4,845,760.59 in respect of the detonator dump claim and $738,033.42, being the amount in the payment schedule. The reasons did not refer to the submissions to the effect that the adjudicator did not have jurisdiction, but did include the following:

5. In reaching my determination I have considered:
5.1. The requirements of the Act.
5.2. The contract between the parties (the Contract).
5.3. The Adjudication Application and documents contained therein.
5.4. The Adjudication Response and documents contained therein. …
6.2 Both parties have provided submissions that are additional to the entitlements provided under the various sections of the Act and were not requested pursuant to Section 21 (4) (a) of the Act. These additional submissions have not been considered in determining the Adjudication Application.

17 Elsewhere, the reasons did refer to submissions made in the adjudication response that had not been included in the payment schedule, and indicated that accordingly they would not be considered.

18 In these proceedings, commenced on 28 March 2006, RTA sought a declaration that the determination was void and consequential injunctions.

DECISION OF ASSOCIATE JUDGE

19 The Associate Judge held that the adjudicator failed to consider RTA's jurisdiction submission. He then went on to consider four questions:

1. Was the adjudicator obliged to consider the submission which was not included in the payment schedule?
2. Was the determination void because the adjudicator did not consider the submission?
3. Should relief be denied on discretionary grounds, because the submission was bad in any event?
4. Whether failure to give reasons rendered the determination void?

20 As regards the first question, the Associate Judge noted RTA's contention that the submission was not a reason for withholding payment within s.20(2B) of the Act, but rejected that contention, relying on ***Multiplex Constructions Pty. Limited v. Luikens*** [2003] NSWSC 1140 and ***Brookhollow Pty. Limited v. R & R Consultants Pty. Limited*** [2006] NSWSC 1.

21 However, RTA also submitted that the adjudicator was obliged to consider the substance of the submission, because it concerned the Act, the contract and the payment claim, all of which the adjudicator was required to consider under s.22(2) of the Act; and primarily on the basis of what I said in ***The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Limited*** [2005] NSWCA 142 at [33]-[36], the Associate Judge upheld this submission.

22 The Associate Judge divided the second question into three sub-questions:

(a) Was there failure to comply with a basic and essential requirement for the existence of the adjudication determination set out in the Act?

(b) Was there a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject of the legislation and reasonably capable of reference to that power?
(c) Was there a substantial denial of the measure of natural justice that the Act required to be given?

23 The Associate Judge answered sub-question (a) yes, sub-question (b) no, and sub-question (c) yes. In relation to (a), he relied particularly on ***Holmwood Holdings Pty. Limited v. Halkat Electrical Contractor Pty. Limited*** [2005] NSWSC 1129 at [46]-[49].

24 As regards the third question, the Associate Judge held that he could not decide there was no possibility that the adjudicator would have changed his determination had he considered the submission; and accordingly, said he would not refuse relief on this basis.

25 As regards the fourth question, the Associate Judge said he did not need to consider it. However, he noted that RTA's contention on this matter seemed to be based on an inference that the adjudicator did consider the submission, contrary to the Associate Judge's findings.

GROUNDS OF APPEAL

26 Holland appeals on the following grounds:

1. The Court below erred in concluding that the Second Respondent was required by paragraphs (a) or (b) of sub-section 22(2) *Building and Construction Industry Security of Payment Act* 1999 (NSW) to consider the First Respondent's submission that the adjudication of the Appellant's claim identified as Variation No. 147 was beyond the object of the *Building and Construction Industry Security of Payment Act* and that that claim should be dealt with under the contractual regime between the parties.
2. The Court below ought to have held that the Second Respondent was not required by paragraphs (a) or (b) of sub-section 22(2) *Building and Construction Industry Security of Payment Act* to consider the said submission by the First Respondent.
3. The Court below erred in holding that there was a failure by the Second Respondent to comply with a basic and essential requirement for the existence of an adjudication determination set out in the Act.
4. The Court below erred in holding that there was not a bona fide attempt by the Second Respondent to exercise the relevant power relating to the subject of the legislation and reasonably capable of reference to that power.
5. The Court below erred in holding that there was a substantial denial of the measure of natural justice by the Second Respondent that the Act requires to be given.
6. The Court below ought to have held that there was no possibility that the Second Respondent's adjudication would have been different if the Second Respondent had considered the said submission and dealt with it in accordance with law.
7. The Court below erred in holding that the adjudication determination of the Second Respondent was void.

27 RTA relies on the following ground in its Notice of Contention:

1. Macready AsJ should have found that:
   (a) the Submission was "duly made" within the meaning of s 22(2)(d) the Building and' Construction Industry Security of Payment Act 1999 (NSW) and;
   (b) the Adjudicator was obliged to consider the Submission pursuant to s 22(2)(d) of the Act; and
   (c) as a result of the Adjudicator's failure to consider the Submission under s 22(2)(d):
      (i) the Adjudication Determination failed to comply with a basic and essential requirement for the existence of an adjudication determination; and further or alternatively;
      (ii) the Adjudicator failed to make a bona fide attempt to exercise his powers under s 22(2) of the Act; and further or alternatively;
      (iii) the First Respondent was denied the measure of natural justice the Act required it to be afforded; and
   (d) as a result of any or all of the matters in sub-paragraph c, above, the Adjudication Determination was void.

ISSUES

28 I will consider in turn the following issues:

1. Were RTA's submissions on jurisdiction "duly made" within s.22(2)(d)?
2. Did the adjudicator consider these submissions?
3. Was the adjudicator required to consider them pursuant to s.22(2)?
4. Was any breach of s.22(2) by the adjudicator such as to invalidate his decision, because of either:
   (a) failure to comply with s.22(2)?
   (b) lack of good faith?
   (c) denial of natural justice?

WERE RTA'S SUBMISSIONS ON JURISDICTION DULY MADE?

29 In his submissions for the RTA in support of the Notice of Contention, Mr. Walker SC submitted that s.14(3) of the Act made it clear that there may be reasons "*why the scheduled amount is less*" that are not "*reasons for withholding payment*"; and that this supported a narrow construction for "*reasons for withholding payment*", as limited to circumstances where payment would be due but for a particular reason or reasons. Mr. Walker submitted that it was not a reason for withholding payment that a future adjudicator would lack jurisdiction to determine an adjudication application; so that submissions that an adjudicator lacked jurisdiction to determine an

adjudication application would not be "*reasons for withholding payment*" within s.14(3), and thus would not be submissions precluded by s.20(2B) from being included in an adjudication response.

30 Mr. Walker further submitted that in so far as the jurisdiction submissions were based on the proposition that the amount to be paid in respect of the detonator dump claim had been determined by the Superintendent at a particular sum, that was asserted in the payment schedule. The claimant had not in its payment claim asserted that its statutory right went beyond the contractual right, so there was no occasion for the respondent to deny this in the payment schedule.

31 In my opinion, it is clear that the limit in s.22(2)(d) to submissions "*duly made*" is intended to engage s.20(2B); so that a submission included in an adjudication response contrary to the requirements of s.20(2B) is not "*duly made*" within s.22(2)(d). Of course, the same submission could be duly made if made in response to a request under s.21(4)(a) or in a conference called by an adjudicator under s.21(4)(c); but there was no such request or conference in this case, so the question is whether RTA's submissions on jurisdiction were included in from its adjudication response in breach of s.20(2B).

32 As pointed out by Mr. Walker, s.14(3) does draw a distinction between indicating "*why the scheduled amount is less*" and "*the respondent's reasons for withholding payment*", the latter being required only where the scheduled amount is less "because the respondent is withholding payment for any reason".

33 In my opinion, this distinction does not justify a narrow view as to what amounts to reasons for withholding payment. If a respondent does not propose to pay any amount included in the payment claim for any reasons said to justify non-payment of that amount, then in my opinion that is withholding payment and the reasons are reasons for withholding payment. It does not matter whether the reasons relate to non-performance of work, bad work, set-offs or cross-claims of any kind, contractual provisions limiting the claimant's right to payment or statutory provisions limiting the claimant's right to payment, or indeed any other suggested justification. Any other view would do violence to the language "withholding payment for any reason", and be contrary to the plain purpose of s.20(2B) to avoid new submissions being introduced late in a process going ahead on a brief and strict timetable. I agree with what Palmer J said on this matter in ***Mulitiplex Constructions Pty. Limited v. Luikens*** [2003] NSWSC 1140 at [65]-[68].

34 Indications why the scheduled amount is less, which do not amount to reasons for withholding payment, could be such things as an allegation that payment had already been made, or possibly excuses for non-payment falling short of alleged justification, such as inability to pay.

35 RTA's contention is that its jurisdiction submissions were not "*reasons for withholding payment*" within s.20(2B), but merely reasons why the adjudicator did not have jurisdiction to make a determination on the matter; and that it would not have been appropriate, in the payment schedule, to give reasons why a future adjudicator would lack jurisdiction.

36 The jurisdiction of the adjudicator extended to determining the amount to which Holland was entitled pursuant to its payment claim, this amount being that specified in ss.9 and 10 of the Act, in particular in ss.9(a) and 10(1)(a).

37 In substance, RTA's submission as to jurisdiction was to the effect that "*calculated in accordance with the terms of the contract*" in those statutory provisions meant determined according to mechanisms provided by the contract, that is, the amount determined by the Superintendent or any amount substituted for that amount in accordance with the dispute resolution mechanism provided by the contract.

38 I note that in ***Transgrid v. Siemens Limited*** [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35], I expressed the view (obiter) to the effect that "calculated in accordance with the terms of the contract" meant calculated on the criteria established by the contract, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word "*calculated*" and with the prohibition in s.34 of the Act on contracting out of the effect of the Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s.34. I do not think the legislature intended to make such usual provisions void. That obiter view is not directly relevant to the issue now under consideration; but the circumstance that the weight of authority was against RTA's submission has some indirect relevance, as indicated below.

39 Quite apart from the matter in the previous paragraph, I do not see that RTA's submissions in any event truly went to jurisdiction. The adjudicator's jurisdiction is to determine the amount of the progress payment in accordance with ss.9 and 10 of the Act; and RTA's submissions go to what is the correct result of doing this. That is, the submissions were to the effect that the correct exercise of jurisdiction would be to adopt the amount reached by the contractual mechanisms, rather than to apply the contractual criteria to reach a different result. It may be said that this view of mine, that RTA's submissions were not truly as to jurisdiction but merely as to how it could be exercised, is also irrelevant to the issue under consideration; but in my opinion it does have relevance in assessing whether RTA's jurisdiction submissions were "*reasons for withholding payment*" within s.20(2B).

40 In my opinion, RTA's jurisdiction submissions were plainly such reasons. Against a background where the Superintendent had made a determination of $1,815,458.61 in respect of the detonator dump claim, Holland's payment claim included $7,965,509.13 in respect of that claim. There were broadly two ways of challenging Holland's entitlement to that sum in accordance with ss.9 and 10: one was to say that, on the criteria provided by

the contract, Holland was not entitled to it; and another was to say that ss.9 and 10 limited Holland's entitlement to amounts determined in accordance with contractual mechanisms. RTA's payment schedule adopted the first way; but while it referred to the Superintendent's determination, it did not say anything to the effect that ss.9 and 10 limited Holland's entitlement to amounts determined in accordance with the contractual mechanism, or to suggest that any such point was being taken. Mere reference to the Superintendent's determination did not of itself suggest this, since it would also support a contention that the case made by Holland was insufficient to show an entitlement under s.9 or s.10 that was different from that determined by the Superintendent.

41 There is some force in a submission made by Mr. Walker to the effect that the Act applies to a whole range of persons participating in the building industry, so it would be unreasonable to expect too much sophistication and precision in payment schedules; and thus that specific reference to the amount of the Superintendent's determination should be regarded as sufficient to raise the point that, under ss.9 and 10, the amount to which the claimant was entitled was limited to the amount determined in accordance with the contractual mechanisms. I do not think it necessary to decide whether that approach should be given weight in the case of an apparently unsophisticated respondent. It does not seem to me appropriate to give weight to it in the case of RTA. In circumstances where, as mentioned above, the weight of authority was against limiting a claimant's rights in that way, RTA should have signalled in the payment schedule that it was contending contrary to that authority, so that Holland would be given an opportunity to deal with that contention in its adjudication application.

42 In my opinion, the circumstance that the submissions were expressed in the adjudication response as being submissions concerning the jurisdiction of the adjudicator did not make them other than reasons for withholding payment. It was precisely because, on RTA's submissions, the right to payment calculated in accordance with ss.9 and 10 of the Act was limited to a right to payment determined in accordance with contractual mechanisms, that RTA contended that the adjudicator lacked jurisdiction. Accordingly, in my opinion the submission was in breach of s.20(2B) and was not duly made.

DID THE ADJUDICATOR CONSIDER RTA'S SUBMISSIONS ON JURISDICTION?

43 The Associate Judge found that the adjudicator did not consider RTA's submissions on jurisdiction, and there is no challenge to that finding by either party. However, it is relevant in my opinion to the ultimate question of invalidity to spell out a little further what it can be inferred the adjudicator did.

44 In my opinion, the exchange of correspondence following the adjudication response and the reasons given by the adjudicator for his determination made it clear beyond doubt that the adjudicator did consider RTA's jurisdiction submissions to the extent of reaching a view that they were reasons for withholding payment that had not been included in the payment schedule; that accordingly they had not been duly made within s.22(2)(d); and that therefore, he would not take them into account in reaching his determination.

WAS THE ADJUDICATOR REQUIRED TO CONSIDER RTA'S JURISDICTION SUBMISSIONS?

45 Mr. Christie for Holland submitted that any requirement to consider the submissions pursuant to s.22(2)(a) and/or (b) only arose if the adjudicator considered them relevant to the consideration of the provisions of the Act and/or the provisions of the contract. There was no basis in this case for concluding that the adjudicator did consider them so relevant.

46 Mr. Walker submitted that if a point is raised as to the jurisdiction of the adjudicator which is not unarguable, the adjudicator cannot ignore it. The matters raised in RTA's submissions were objectively fundamental to the adjudicator's jurisdiction; and it did not matter that the adjudicator may not have considered them significant.

47 I agree with the Associate Judge that a decision that RTA's submissions were not duly made is not conclusive on the question whether the adjudicator should have considered them. I adhere to the views which I expressed in ***Contrax*** at pars.[33]-[36]:

> 33 The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s.34, when that matter had not been raised in its payment claim. This contention relied on ***John Holland***, and also on a suggested anomaly arising from the prohibition in s.20(2B) on a respondent relying on reasons not included in its payment schedule.
>
> 34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration *under that paragraph*, reasons included in the adjudication response that were not included in the payment schedule.
>
> 35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).

36 Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s.34, when considering matters under paragraphs (a) and (b), even if that contention could not be taken into account under paragraph (c).

48 However, it is to be noted that I said that the adjudicator was required by pars.(a) and (b) of s.22(2) to consider matters "if he or she thinks [they are] relevant to the construction of the Act, the construction of the contract, and the validity of the terms of the contract having regard to the provisions of the Act". To put this another way, I was saying that the adjudicator should not ignore something which he or she is aware of and also believes is of real relevance to issues arising under pars.(a) and (b), simply because the matter was not raised in submissions duly made by a respondent. Of course, if the matter has not been so raised, there may be questions of natural justice to the claimant that need to be addressed, perhaps by calling for further submissions or by arranging a conference; but that is another issue. However, the requirement for natural justice to the claimant is a further reason why the adjudicator would not be required to consider such matters under pars.(a) or (b) unless he or she thought they were really material to issues arising under those paragraphs.

49 Thus, in my opinion, any requirement to consider such matters which were not raised in submissions duly made arises only after a threshold is crossed, involving both awareness of the matters in question and a belief that they are of real relevance. In this case, I would infer that the adjudicator became aware of the submissions to the extent necessary for forming a view that they were affected by s.20(2B), but there is no basis for any conclusion that the adjudicator believed they were of substantial relevance to issues arising under pars.(a) and (b) of s.22(2).

50 In those circumstances, in my opinion the adjudicator was not required to consider RTA's jurisdiction submissions by reason of par.(a) and/or par.(b) of s.22(2). I have already decided that those submissions were not "*duly made*", so that the adjudicator was not required to consider them under s.22(2)(d).

WAS THE DETERMINATION INVALIDATED BY FAILURE TO COMPLY WITH S.22(2)?

WAS THE DETERMINATION INVALID THROUGH LACK OF GOOD FAITH?

WAS THERE A DENIAL OF NATURAL JUSTICE?

51 These questions only arise if, contrary to my view, RTA's jurisdiction submissions were "duly made" or else were required to be considered by reason of s.22(2)(a) and/or (b).

52 Mr. Christie submitted to the effect that a failure by the adjudicator to consider the submissions, either because he wrongly concluded they were not "duly made" or because his failure to do so was in breach of s.22(2)(a) and/or (b), was not a failure to comply with an essential requirement of the Act, such as would invalidate the decision, and could not conceivably amount to a lack of a bona fide attempt by the adjudicator to exercise the relevant power, or to a denial of natural justice.

53 Mr. Walker SC submitted that the Associate Judge's decision on these issues was correct. He submitted that s.22(2) made it clear that the adjudicator was required to consider the matters in pars.(a)-(d); and in circumstances where this was part of Parliament's codification of procedural fairness, the legislature's intention was that a failure to comply should result in invalidity. The prohibition in s.25(4)(a)(iii) against challenging an adjudicator's determination only arose after a judgment had been obtained; as regards the situation before judgment was obtained, there was no tension between an apparent jurisdictional limit and an exclusion of the Court's jurisdiction, requiring narrow limits to be placed on intervention by the Court.

54 In my opinion, there may be a sense in which s.22(2) is breached if there is any relevant provision of the Act or provision of the contract which is not considered by the adjudicator, or indeed if there is any one of what may be numerous submissions duly made to the adjudicator which is not considered. However, in my opinion a mere failure through error to consider such a provision of the Act or of the contract, or such a submission, is not a matter which the legislature intended would invalidate the decision.

55 The relevant requirement of s.22(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s.22(2), so long as the specified classes of considerations are addressed; or alternatively, if one takes the view that s.22(2) does require consideration of each and every relevant provision of the Act and the contract and each and every submission duly made, the intention of the legislature cannot have been that this kind of mistake should invalidate the determination. In a case where there were 1,000 submissions duly made, an accidental failure to consider one of them could not reasonably be considered as invalidating a whole determination; and there is no basis for partial invalidation of a determination, that is, invalidation only of that part affected by the omitted submission.

56 I see these views as essentially the same as I expressed in ***Brodyn Pty. Limited v. Davenport*** [2004] NSWCA 394, (2004) 61 NSWLR 421 at [56]:

> 56 It was said in the passage in ***Anisminic*** quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on

something it had no right to take into account. However, in ***Craig v. South Australia*** (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, 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. 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. To that extent, I disagree with the views expressed by Palmer J in ***Multiplex Constructions Pty. Limited v. Luikens*** [2003] NSWSC 1140.

57 Accordingly, even if RTA's jurisdiction submissions were matters that should have been considered under s.22(2), the adjudicator's failure to do so did not invalidate his decision. At worst for Holland, they were submissions as to which there were strong reasons to hold they were not "*duly made*", the adjudicator made a reasonable if erroneous decision that they were not duly made, and the adjudicator took a reasonable if erroneous view that the matters raised were not of sufficient relevance to warrant express consideration under pars.(a) and (b) of s.22(2). Accordingly, if there was any breach of s.22(2), it was not of a kind that could invalidate the decision.

58 Even more clearly in my view, an omission to consider the submissions could not conceivably justify a finding that the adjudicator did not make a bona fide attempt to exercise the relevant power.

59 Whether or not in this context lack of bona fides can be demonstrated without demonstrating personal dishonesty, I do not see the slightest basis for concluding that the adjudicator did anything other than make a bona fide attempt to exercise his power.

60 I note in passing the terms of s.30 of the Act, which are as follows:

30 Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:

(a) in exercising the nominating authority's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.

61 It would be surprising in the extreme if what the adjudicator did in this case was such as could disentitle him to the immunity provided by s.30; and I think it would be rare that a decision could be invalidated for lack of bona fides by conduct that would not also lose the immunity given by s.30.

62 Mr. Walker SC in his submissions made a suggestion that it was inappropriate to adopt the criteria in ***R v. Hickman: Ex Parte Fox & Clinton*** (1945) 70 CLR 598 in circumstances where there was no provision in the Act excluding the jurisdiction of the Court to review the adjudicator's determination. In *Brodyn*, the view was taken that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment and thus the application of s.25(4)(a)(iii), an intention was disclosed to exclude intervention for errors of law or other errors short of errors causing invalidity, and that in those circumstances the *Hickman* criteria were applicable. There has been no application in this case to re-consider ***Brodyn.***

63 Finally, on the question of natural justice, plainly there was no denial of natural justice if the submission in question was not "duly made". Even if the correct view was that the submission was duly made, I would still not find a denial of natural justice. The legislature plainly entrusts to the adjudicator the role of determining whether submissions are or are not duly made, and thus of determining whether a submission contained in an adjudication response is one that should not be there because of the effect of s.20(2B). If an adjudicator addresses that question and comes to a conclusion that the submission was not duly made, I cannot see that the adjudicator has then failed to afford the measure of natural justice contemplated by the Act.

CONCLUSION

64 For those reasons, in my opinion the following orders should be made:

1. Appeal allowed.
2. Orders below set aside, and in lieu thereof order that RTA's summons be dismissed with costs.
3. Order that RTA pay Holland's costs of the appeal.

65 **BASTEN JA**: The *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Building Payment Act") has led to a spate of litigation in its relatively short life so far. There has been a tendency for counsel, for their own forensic purposes, to formulate questions which are said to require resolution in the particular proceedings. Often that proves to be unnecessary, but in seeking to respond to the issues raised by counsel in

argument, the Courts have tended to address such questions, even when their resolution is recognised to be unnecessary.

66 In my view the present case involves a short point, beyond which the Court should not stray. Under the standard form of construction contract entered into by the parties, a claim for an additional amount due to a variation of the contract could be made by the contractor, but was to be assessed by the superintendent appointed under the contract, who was required to make a determination. As noted by Hodgson JA at [9] above, a claim was made for approximately $8 million, of which the superintendent allowed an amount of approximately $1.8 million: above at [9]-[10]. The superintendent provided a document which particularised the amounts allowed and those disallowed.

67 The contractor (hereinafter "John Holland") then made a payment claim under the Building Payment Act for an amount which included $8 million for the variation. The principal ("the RTA"), responded with a payment schedule which attached the determination by the superintendent, identifying the payment which the RTA proposed to make as the amount allowed by the superintendent. The manner in which the RTA sought to rely upon the superintendent's determination is set out at [11] above. The language used could be understood as making one or both of the following responses:

(a) the value of the construction carried out or undertaken by John Holland in accordance with the terms of the contract, was correctly assessed by the superintendent ("the first response");

(b) the only amount to which John Holland was entitled as a progress payment was the amount determined by the superintendent, whatever that amount might be ("the second response").

68 It was contended by the RTA that when the matter went for adjudication under the Building Payment Act, the adjudicator failed to consider the contention in par (b) and that, accordingly, no valid adjudication has yet been undertaken.

69 The submissions of the RTA, described the second response as its "jurisdiction submission". This was purely a forensic device to base an argument that the submission could be contained in the "adjudication response" permitted under s 20 of the Building Payment Act, even though it may not have been raised by the payment schedule, and thus did not fall within the requirement in sub-s 20(2B). The argument was that a submission relating to the jurisdiction of the adjudicator could not constitute a "reason for withholding payment" and hence was not required to have been included within the payment schedule: see sub-s 14(3).

70 As the argument continued, the submission being a valid part of the adjudication response was therefore a submission "duly made" in support of the payment schedule, in accordance with s 22(2)(d). That provision made it mandatory for the adjudicator to consider such a submission and it followed that, if he failed to consider it, he would have failed to exercise his statutory function according to law.

71 This argument is based on a false premise, and has given rise to this Court being invited to consider a number of false issues. The false premise is that the scope of the payment schedule and the identification of submissions "duly made" by the Respondent in support of the schedule are matters to be objectively determined by this Court. In my view they are not: they are matters to be determined by the adjudicator. If, as appears to be accepted by both parties, the adjudicator did not address the second response, it may have been for one of a number of reasons, namely:

(a) he did not think it fell within the scope of the payment schedule and that to be taken into account it should have done;

(b) it did not need to fall within the scope of the payment schedule, but for some other reason it was not "duly made";

(c) The submission was inconsistent with the scheme of the Building Payment Act, which required the adjudicator to determine what work had been undertaken under the contract and what was the value of the work.

So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.

72 As I sought to explain in ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [43]-[48], in my view the power to resolve these questions has been conferred on the adjudicator.

73 In considering the correctness of this approach, the focus must again be on the particular circumstances of the present case. Thus, the complaint is that the adjudicator failed to consider an assertion that the rights of John Holland were limited in law, and hence the adjudicator's powers were limited, to a payment in accordance with the determination of the superintendent under the contract. It is not, for example, asserted that the adjudicator was the recipient of a corrupt payment from another party. Thus, bearing in mind the limitation of the argument, the following statutory provisions are relevant. The first provides that the result of an adjudication is an "adjudication certificate" and, if the adjudicator determines that the respondent is required to pay an amount, must identify the "adjudicated amount", which the respondent is then required to pay: s 23(2). If the amount is not paid, it can be enforced as a debt by filing the adjudication certificate in any court of competent jurisdiction: s 25(1). Section 25(4) recognises that a respondent may be entitled to commence proceedings to have the judgment set aside, but states that the respondent:

"*(a) is not, in those proceedings, entitled:*

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or
(iii) to challenge the adjudicator's determination … ."

74 The limitations imposed by s 25(4), with regard to "*those proceedings*", reflect the further provision in s 32(1) which prevents anything in Part 3 of the Act (which includes s 25) affecting -

"*… any right that a party to a construction contract:*
(a) may have under the contract, or
(b) may have under Part 2 in respect of the contract, or
(c) may have apart from this Act in respect of anything done or omitted to be done under the contract."

Subsection (2) provides:

"*(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided in subsection (3).*"

Subsection (3) provides that any amount paid by a party to the contract must be taken into account in any order or award made in such proceedings.

75 The second response raised by the RTA, asserts a right of the RTA under the contract, namely to pay no more than the superintendent certified. This right might constitute an unassailable defence, in particular circumstances, to a claim brought under the construction contract, unaffected by Part 3 of the Building Payment Act. However, it cannot be pleaded as a defence to a debt under an adjudication certificate, a fact which is not inconsistent with the possibility that a payment claim may be made and upheld under the Building Payment Act, giving rise to a statutory debt, regardless of the position under the construction contract. This being so, it is understandable that an error of law made by an adjudicator in considering either the scope of the right conferred by the Building Payment Act or, if relevant, the scope of the right under the construction contract, forms no basis for treating an adjudication certificate as invalid.

76 The next question is whether an injunction may lie to prevent the person who made the payment claim requesting an adjudication certificate, after the adjudication determination has been made, on the basis that the determination is invalid. This, it may be noted, is not a case in which the adjudicator failed to make a determination in writing nor is it suggested that he failed to include the reasons for his determination, in contravention of s 22(3). Nor, for example, is it a case where any error of the kind referred to in s 22(5), such as an accidental slip or a clerical mistake has been made. Further, where a respondent fails to make a payment in accordance with an adjudicator's determination, s 24 confers on the claimant a right to request an adjudication certificate. If the respondent cannot challenge, on the ground now under consideration, the adjudicator's determination in proceedings to have the judgment based on the certificate set aside, the statutory purpose would be thwarted if a determination could be set aside on that ground if the respondent acted before the certificate was provided.

77 A further factor which gives support to the conclusion set out above is that, as explained by Hodgson JA at [40], Part 2 of the Building Payment Act, and in particular the right to a progress payment conferred by s 8 and the calculation of the amount in accordance with ss 9 and 10, suggest that the statutory right to payment is unaffected by calculations undertaken by a superintendent or other authority appointed to value work under the contract. In other words, the statutory regime is, partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms: see the prohibition on contracting out in s 34.

78 It follows, in my view, that it is not appropriate for this Court to construe the payment schedule, or indeed to construe the contract or the Building Payment Act as applied by the adjudicator, for the purpose of determining the validity of an adjudicator's determination. For the purpose of a payment under the Act, authority to determine those matters conclusively is vested in the adjudicator. That is not to say that an adjudicator's determination cannot be set aside on any ground at all: it is merely to say that it cannot be set aside on the ground relied upon in these proceedings. No more need or should be said.

79 For these reasons, I agree with the orders proposed by Hodgson JA.

Mr. M. Christie with Ms. V. Culkoff and Mr. B. Kremer for appellant instructed by Andrew McKeracher, Pyrmont
Mr. B. Walker SC with Mr. R. Scruby for 1st respondent instructed by Clayton Utz, Sydney