

JUDGMENT : Nicholas J. Supreme Court, New South Wales. Equity Division. 28th April 2008.

- 1 These proceedings concern the adjudication determination of the second defendant, (the adjudicator) dated 10 August 2007 under the *Building & Construction Industry Security of Payment Act 1999* (the Act) that the plaintiff was liable to the first defendant for the payment of the sum of \$9,290.
- 2 Pursuant to the adjudication determination judgment, the sum of \$12,138.21 was entered against the plaintiff in the Local Court, Manly, on 5 October 2007. By its originating process the plaintiff challenged the validity of the adjudication determination on a number of grounds, and sought orders that the adjudication determination, and the judgment, be set aside.
- 3 The adjudication application determined by the adjudicator was made on 24 July 2007. The principle ground of attack was that the adjudicator was in error in proceeding on the basis that it was a new application under s 26(2)(b) of the Act in circumstances where an adjudication application made on 28 June 2007 was withdrawn by the first defendant and not determined by the adjudicator.

Background

- 4 On about 18 June 2005 the plaintiff and the first defendant entered into a contract whereby the first defendant undertook architectural welding and fabrication, and associated works at the UTS Science and Research Project, Ultimo, for the sum of \$344,473, plus GST.
- 5 On 30 May 2007 the first defendant made a payment claim under s 13 of the Act for \$31,328.
- 6 On 14 June 2007 the plaintiff served a payment schedule pursuant to s 14 of the Act which proposed a scheduled amount of nil.
- 7 On 28 June 2007 the first defendant made an application to the third defendant for adjudication of the payment claim pursuant to s 17 of the Act (the first adjudication application).
- 8 On 29 June 2007 the first defendant served on the third defendant a narrative document (submissions) relating to the first adjudication application. This document was served one day outside the time allowed under s 17(3)(c) of the Act.
- 9 On 3 July 2007 the adjudicator accepted the first adjudication application which had been referred to him by the third defendant. The notice from the third defendant to the parties which advised of the appointment included the following information:
“TERMINATION WITHOUT CONSENT DETERMINATION
16. If the Claimant wishes to terminate the adjudication (otherwise than by consent mutually advised in writing to the Adjudicator) the Adjudicator may make a determination that the Claimant is not entitled to any progress payment and is liable for 100% of the adjudication fees. If the Claimant wishes to have a right against the Respondent for adjudication fees, the Claimant must be careful not to abandon the adjudication application. Mere receipt of the claimed amount is not a reason for terminating the adjudication.”
- 10 On 6 July 2007 the plaintiff lodged its adjudication response with the adjudicator pursuant to s 20 of the Act. It included the assertion that the narrative document had been served out of time and should not be considered by the adjudicator.
- 11 On 6 July 2007 the adjudicator advised the parties in the following terms:
“* The 28 page submission received on 29 June is not admissible under the Act as it is late (more than 10 business days after the date of the payment schedule (14 June) [sic].
* The Claimant’s submission of the contract document is missing every even numbered page.
* The Claimant may elect to continue with this adjudication application without the benefit of the above mentioned [sic] document or pursuant to s13(4)(b) of the Act, the Claimant is free to pursue this matter at a later date.”
- 12 On 6 July 2007, in response, the first defendant informed the plaintiff and the third defendant as follows: “Could you please advise the adjudicator that given his position communicated today we are left no option but to withdraw the subject application. Could you please communicate this position to him. A cap of the withdrawal will be sent to the respondent.”
- 13 On 9 July 2007 the third defendant advised the first defendant and the plaintiff as follows:
“We acknowledge receipt of correspondence dated 6th July 2007, from Made Contracting Pty Limited requesting withdrawal of the above mentioned [sic] adjudication application.
The Adjudicator, Victor Lin confirms he will not deliver a determination for the above mentioned [sic] matter.
We confirm the file is now closed.”
- 14 In a facsimile dated 7 July 2007 (sent 9 July 2007) to the plaintiff and the third defendant, the first defendant said:
“As the adjudicator is not making a determination with regard [sic] this application we now give formal notification of withdrawal of the application as allowed under Section 26 of the Act.
A copy of the notice has been sent to the Respondent.

- 15 On 10 July 2007 the third defendant informed the first defendant and the plaintiff as follows: "We cannot provide legal advice however we understand that a withdrawal under section 26 can only be made under the following circumstances ..."
- It included the terms of s 26 and continued: "We confirm if in the event Adjudicate Today was to receive another Adjudication application from Made Contracting Pty Limited pertaining to the payment claim referenced in the above mentioned [sic] Adjudication application, it would be administered in accordance with the above mentioned [sic] requirements. We suggest independent legal advice is sought to clarify any potential issues with a proposed subsequent Adjudication application."
- 16 On 18 July 2007 the first defendant notified the plaintiff and the third defendant as follows: "As the adjudicator has not made a determination within the time allowed by Section 21(3) we now give formal notification of withdrawal of the application as allowed under Section 26 of the ACT [sic]."
- 17 On 24 July 2007 the first defendant lodged with the third defendant a new adjudication application (the second adjudication application) with related submissions.
- 18 On 27 July 2007 the third defendant notified the plaintiff and the first defendant that the adjudicator had accepted appointment as adjudicator of the second adjudication application.
- 19 On 1 August 2007 the plaintiff lodged its adjudication response and related submissions which included submissions to the effect that the second adjudication application was invalid, and, by reason of the withdrawal of the first adjudication application, it was not open to the first defendant to lodge a new application under s 26 of the Act.
- 20 On 14 August 2007 the adjudicator delivered his adjudication determination in favour of the first defendant in the amount of \$9,290. In the preamble to his reasons for determination the adjudicator said:
"On 27 June 2007 the Claimant applied for adjudication of this matter, however, the Claimant failed to submit a part of its adjudication documents in the time allowed by the Act and therefore the adjudicator did not make a determination in the time required by s 21(3) of the Act.
Pursuant to s 26(2)(a) of the Act, the Claimant formally withdrew the adjudication application on 18 July 2007, and made a new adjudication application under s 26(2)(b) of the Act on 24 July 2007. This is the adjudication application to be determined by me ...
...
The Respondent disputes the Claimant's right to make a new application, submitting that the Claimant informally withdrew the application in correspondence to the ANA on 6 July 2007, before the adjudicator could make a determination. There is no right under the Act for the claimant to withdraw a claim before one of the times in s 26(1) has expired. The alleged "informal" withdrawal is a nullity. The Act makes no distinction as to the reasons why an adjudicator may chose [sic] to make no determination and I find this new application valid under the Act."
- 21 On 24 August 2007 the adjudication certificate was issued pursuant to s 24 of the Act for the total amount of \$12,138.21, being the adjudicated amount of \$9,290, interest and fees. On the same day the first defendant obtained judgment in the Local Court, Manly, for the certified amount and costs against John Holland Group Pty Ltd (instead of the plaintiff).
- 22 On 5 October 2007 the judgment entered against John Holland Group Pty Ltd was, by consent, set aside and, in exercise of the slip rule, judgment was entered against the plaintiff for the sum of \$12,277.88, being the certified amount plus interest.

The legislation

- 23 The scheme for the adjudication of disputes concerning a payment claim is established under Pt 3, Div 2 of the Act. The scheme is in accordance with the object of the Act as stated in s 3(3) as follows:
"3 Object of Act
...
(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
(a) the making of a payment claim by the person claiming payment, and
(b) the provision of a payment schedule by the person by whom the payment is payable, and
(c) the referral of any disputed claim to an adjudicator for determination, and
(d) the payment of the progress payment so determined."
- 24 Section 17(1) concerns the circumstances in which a claimant may apply for adjudication of a payment claim. Section 17(3) prescribes matters relevant to the content, and making, of an adjudication application by a claimant. Such application is to be made to an authorised nominating authority which refers it to an adjudicator as soon as practicable (s 17(3)(b) and s 17(6)).
- 25 An adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent (s 19(1)). Upon acceptance, the adjudicator is taken to have been appointed to determine the application (s 19(2)).

- 26 Section 20 prescribes matters relevant to the content, and making, of an adjudication response. By s 20(2B) a 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.
- 27 The procedure relevant to the conduct of the adjudication is contained in s 21. Relevantly, s 21(3) requires an adjudicator to determine an adjudication application as expeditiously as possible and, in any case, 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 within such further time as the claimant and the respondent may agree. Subsection (5) provides that 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.
- 28 The requirements imposed upon the adjudicator in determining an adjudication application are found in s 22, which, relevantly provides:
"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, ..."
- 29 Section 26 provides:
"26 Claimant may make new application in certain circumstances
(1) This section applies if:
(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or
(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).
(2) In either of those circumstances, the claimant:
(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and
(b) may make a new adjudication application under section 17.
(3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).
(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17."
- 30 Section 26 is the only provision which authorises a claimant to withdraw an adjudication application and to make a new one. The terms of s 26(1), s 26(2) and s 26(3) taken together make plain that entitlement to withdraw is confined to the happening of either of the circumstances specified in s 26(1)(a) or s 26(1)(b). In my opinion the effect of these provisions is to preclude the withdrawal of an application by a claimant in any other circumstances, including prior to expiry of the specified period. If it were otherwise, the enactment of s 26(2)(a) would be otiose. In his reasons for determination of 14 August 2007 the adjudicator, with respect, correctly held: "There is no right under the Act for the claimant to withdraw a claim before one of the times in s 26(1) has expired. The alleged "informal" withdrawal is a nullity."
- 31 An issue in these proceedings was the proper construction of s 26(1)(b), and it is convenient at this stage to refer to recent authority on the point. In *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, Palmer J said:
"102 An adjudicator may fail to determine an adjudication application for the purposes of s.26(1)(b) for a number of reasons. The adjudicator may become incapable of making the determination within the time required or may for some reason refuse to do so or become disqualified from doing so. But, in my opinion, an adjudicator may also fail to determine an adjudication within time for the purposes of the subsection if the determination is purportedly delivered within time but is not given according to law. For example, where the adjudicator has given a determination within time but it has been procured by fraud, it could hardly be said that the adjudicator has performed the task which the Act requires of him or her within the time stipulated in s.21(3). The same may be said of a case in which the adjudicator delivers a determination within the time stipulated but the determination has

been given without jurisdiction. In such cases, it may be said that the determination is of no effect: it is as if the adjudicator had made no decision at all.

- 103 When an adjudication under the Act is quashed pursuant to judicial review, in my opinion the claimant becomes entitled to withdraw its adjudication application under s.26(2) upon and from the date upon which the quashing order is made because on that date it has been ascertained that the adjudicator did not determine the adjudication according to law within the time allowed by the Act, for the purposes of s.26(1)(b). The claimant may then, within five business days of the quashing order, make a new adjudication application under s.26(3). That subsection, in conjunction with s.17(3)(c), (d) and (e), makes it clear that the adjudication process does not start all over again from the beginning. Rather, there is an adjudication pursuant to a fresh adjudication application, of the dispute as defined by the original payment claim and the original payment schedule. The respondent may not, therefore, make any submissions to the new adjudicator in reliance upon reasons for withholding payment of the original payment claim which were not indicated in its original payment schedule, as provided in s.14(3) and s.20(2B). The new adjudicator appointed by the nominating authority under s.19 may, or may not, be the adjudicator who conducted the original adjudication, as considerations of convenience, saving of expense and perceptions of pre-judgment may require. In conducting the new adjudication, the adjudicator would, doubtless, have regard to the reasons of the Supreme Court for quashing the original determination. By this procedure, the saving in time and expense envisaged by the adjudication machinery of the Act may not be totally lost.”
- 32 Palmer J’s approach was followed in, for example, *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116, per Barrett J (par 38), and *Emergency Services Superannuation Board v Robert Sundercombe & Anor* [2004] NSWSC 405, per Bergin J (par 23) and, with respect, in my opinion it is correct. These cases indicate that the verb “fails” is to be given a wide meaning equivalent, in my opinion, to “does not”. Such usage is consistent with the usage of the same term in s 26(1)(a).
- 33 This construction is also consistent with the underlying intention of the legislature that, upon appointment, the adjudicator is under a statutory duty to determine the application according to law within the time stipulated in s 21(3). If the adjudicator does not do so he or she will be taken to have failed to determine the adjudication application within the meaning of s 26(1)(b).
- 34 Analysis of the statutory scheme establishes that an adjudicator’s task is to determine the amount of the progress payment (if any) to be paid. In order to provide a speedy mechanism for the determination of claims and the resolution of disputes it was the legislature’s intention that issues for adjudication be confined to those limited by the payment claim and the payment schedule. Submissions may be made in support of the payment claim (s 17(3)(h)), and in support of the payment schedule (s 20(2)(c)).
- 35 In *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* [2007] NSWCA 49, Giles JA (Santow, Tobias JJA agreeing) said:
- “63 ... the submissions do not set the parameters of the application or its determination. It may be that there are no submissions or only partial submissions, and submissions in support of a progress payment in relation to the construction work (or related goods and services) other than that identified in the payment claim should be put aside.
- 64 Accordingly, if an adjudication application does what s 17(3)(f) requires, ie identifies the payment claim and the payment schedule (if any) to which it relates, it is a sufficient application and the adjudicator can carry out the statutory task. The application is not changed by the submissions accompanying it, and it remains an application for adjudication of the identified payment claim. To repeat, there may not be any submissions in support of the payment claim. The adjudicator must still make the determination, perhaps invoking the powers under s 21(4) ...”
- 36 The adjudication process instituted by the making of an adjudication application is governed by the Act. It is the Act which delimits the source and ambit of the rights of the parties and of the powers of the adjudicator. The adjudicator must determine the adjudication application within the time provided under s 21(3) and the parties have an interest in the performance of that duty. There are no provisions for procedures similar to those applicable to court proceedings whereby the making of a determination may be suspended or stayed, or an adjudication application may be discontinued or summarily dismissed.
- 37 Relevant to the issues in this case, there is no provision which allows a claimant to withdraw an adjudication application except in the circumstances prescribed by s 26(1). In my opinion, it follows that, upon the appointment of an adjudicator, a claimant who no longer wishes to pursue an adjudication application cannot oppose its determination. Furthermore, in my opinion, there are no unexpressed powers or rights which allow for the termination of an adjudication application other than by the determination of the adjudicator, which includes a determination by consent of the parties.

Consideration

- 38 The plaintiff submitted that the effect of the first defendant’s notice of 6 July 2007 was to generally withdraw the adjudication application from the determination process. It was put that, when understood as the response to the adjudicator’s advice earlier that day, the notice represented the first defendant’s intention to put an end to the adjudication process and nothing in it indicated that it was claimed to be under s 26 of the Act. In the circumstances, it was put, the withdrawal should be taken to be the valid exercise of a right to do so outside the operation of the Act.

- 39 It was argued that the true effect of the withdrawal was to leave the adjudicator with no adjudication application for determination, a situation which he acknowledged on 9 July 2007 by advising the parties that he would not deliver a determination, and had closed the file. It was submitted that, as a consequence, it was only open to the first defendant to serve another payment claim under s 13(4)(b) and begin fresh proceedings for recovery.
- 40 The plaintiff also referred to the first defendant's facsimile of 7 July 2007 in which it purported to give notice of withdrawal under s 26 of the Act. It was submitted that this document was invalid on grounds that withdrawal had already been effected by the notice of 6 July 2007 and, in any event, because it was given before expiry of the time allowed under s 21(3), the requirement under s 26(1)(b) had not been fulfilled.
- 41 The plaintiff then challenged the first defendant's letter of 18 July 2007 in which notification was given of withdrawal of the application under s 26 of the Act. It was accepted that 17 July 2007 was the last day for the determination of the first adjudication application, and that the second adjudication application complied with s 26(3). However, it was argued that in circumstances where the first adjudication application had been withdrawn from the adjudicator prior to the expiry of the time for its determination, it could not be said that the adjudicator's decision on 9 July 2007 not to determine the matter constituted a failure to do so within the meaning of s 26(1)(b). Accordingly, it was submitted, the first defendant was not entitled to make the second adjudication application under s 26(2) which was, therefore, invalid with the result that the adjudication determination was invalid.
- 42 The first defendant's submissions may be briefly summarised. It submitted that its notices of withdrawal of 6 July 2007 and 7 July 2007 were invalid and not within the terms of s 26(2). It was put that as the notices were given prior to the expiry of the time allowed by s 21(3) on 17 July 2007, the circumstance specified in s 26(1)(b) was not established and, accordingly, there was no entitlement to withdraw the first adjudication application then. It denied the plaintiff's contention that the notice of 6 July 2007 operated as a general withdrawal outside the Act, and that the first defendant was entitled to withdraw otherwise than in the circumstances under s 26(1). It was put, in effect, that the adjudicator's decision not to proceed to determine the first adjudication application as advised on 9 July 2007 was inconsistent with his duty pursuant to s 21(3).
- 43 The first defendant submitted that by 18 July 2007 the adjudicator had failed to determine the first adjudication application within s 26(1)(b), which entitled it to withdraw that application and make a new one under s 26(2). This it did by its notice of 18 July 2007, and the second adjudication application of 24 July 2007. Accordingly, it was put, the second adjudication application was properly before the adjudicator, whose determination was valid, and should be upheld.
- 44 As earlier stated, in my opinion, the only circumstances which entitle a claimant to withdraw an adjudication application are those specified in s 26(1) of the Act. It follows that the notices of 6 July 2007 and 7 July 2007 were incapable of operating as valid withdrawals of the first adjudication application from the adjudicator, and to prevent his determination under s 21(3). Consistent with the approach taken in *Multiplex Constructions*, I find that the adjudicator's decision on 9 July 2007 not to determine this application inevitably resulted in a failure on his part within s 26(1)(b). It follows, and I find, that under s 26(2) and s 26(3) the first defendant became entitled to withdraw the first adjudication application on 18 July 2007, and to make the second application on 24 July 2007. On these issues I generally accept the first defendant's submissions.
- 45 The plaintiff next submitted that, in the circumstances, the first defendant was estopped from lodging the second adjudication application, and the adjudicator from determining it. As I understood the submissions, the plaintiff contended that by notice of 6 July 2007 the first defendant represented that it had withdrawn the adjudication application outside the operation of the Act which induced the plaintiff to believe that nothing more was required to be done on its part. This understanding was reinforced by the adjudicator's decision on 9 July 2007 not to determine the application, and to close the file. It was submitted that the combined effect of these communications evidenced an assumed state of affairs that the adjudication process had been brought to an end outside the Act with the result that there was nothing further for the plaintiff to do. It was also put, in effect, that this state of affairs could not be changed by the subsequent correspondence which referred to withdrawal under s 26 of the Act.
- 46 The plaintiff submitted that in reliance on the first defendant's notification of 6 July 2007 as a blanket withdrawal, it suffered detriment in that it was denied the opportunity to reject the withdrawal and to compel the adjudicator to make his adjudication determination in accordance with the Act without consideration of the narrative document.
- 47 The first defendant denied that the estoppel as claimed by the plaintiff had been established.
- 48 In *Ryledar Pty Ltd & Anor v Euphoric Pty Ltd* [2007] NSWCA 65, Tobias JA (Mason P, Campbell JA agreeing) reviewed the principles of estoppel. His honour explained (par 194) that estoppel by convention is founded upon an assumed state of affairs by the parties whether as to a matter of fact or a matter of legal effect which both will be estopped from denying. His honour restated the relevant principles as follows:
"200 ...
(a) the plaintiff has adopted an assumption as to the terms of its legal relationship with the defendant
(b) the defendant has adopted the same assumption;
(c) both parties have conducted their relationship on the basis of that mutual assumption;
(d) each party knew or intended that the other act on that basis; and

e) *departure from the assumption will occasion detriment to the plaintiff.*"

His Honour pointed out (par 202) that reliance and detriment were essential for the existence of conventional estoppel.

49 In **Legione v Hately** [1983] HCA 11; (1983) 152 CLR 406, Mason, Deane JJ said (p 430):

"Estoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement."

and pp 435-436:

*"First, it has long been recognized that a representation must be clear before it can found an estoppel in pais (**Low v. Bouverie** (1891) 3 Ch 82, at pp 106, 113 ; **Newbon v. City Mutual Life Assurance Society Ltd.** [1935] HCA 33; (1935) 52 CLR 723, at p 738 ; **Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.** (1972) AC, at pp 755-756, 768, 771). "Every estoppel, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference" (Coke's Littleton, 352b). In **Western Australian Insurance Co. Ltd. v. Dayton** [1924] HCA 58; (1924) 35 CLR 355, at p 375 , Isaacs A.C.J., referring to the requirement that a representation must be "unambiguous" if it is to found an estoppel in pais said:*

*'The word 'unambiguous' is explained by Kay L.J. in **Low v. Bouverie** (1891) 3 Ch, at p 113 , the word and its explanation occurring on the same page. The Lord Justice says: 'It is essential to shew that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it'. Bowen L.J. says (1891) 3 Ch, at p 106 : 'It must be such as will be reasonably understood in a particular sense by the person to whom it is addressed'. This is confirmed in George **Whitechurch Ltd. v. Cavanagh** (1902) AC, at p 145 by Lord Brampton and in **Bloomenthal v. Ford** (1897) AC, at p 166 by Lord Herschell.'*

and p 437:

"The second of those rules is that a person will not be estopped from departing from an assumption or a representation 'unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted'."

50 In the present case, the question whether there is an estoppel depends upon whether the suggested representation was made to the plaintiff and, if it was, whether the plaintiff acted on it with the result that it was placed in a position of material disadvantage if departure from the representation were permitted.

51 In deciding whether either of the communications was reasonably capable of establishing an estoppel it is relevant to keep in mind that the recipients must be taken to have been familiar with the Act and the procedure by which an application is made and determined, and to have been aware of the warning to the parties in the notice of appointment of 3 July 2007, referred to in par 9 above.

52 In my opinion, the representation, or the basis for the assumption, claimed by the plaintiff is not established on the evidence. The first defendant's notice of 6 July 2007, whether read with reference to the adjudicator's earlier communication or on its face, would be reasonably understood to say no more than the first defendant was withdrawing the first adjudication application. It conveys nothing as to any action which either the adjudicator or the plaintiff might or should take in response. It provides no basis for an assumption that the adjudicator would not proceed with the determination, or that the plaintiff should not require him to do so. It provides no basis for an assumption that the withdrawal was made by way of departure from the statutory scheme with the implication that the first defendant would not attempt to make a new application under s 26 if and when entitled to do so.

53 Furthermore, in my opinion, the adjudicator's response could not be reasonably understood to convey a view as to the validity or otherwise of the withdrawal. It conveys no more than that he would not make a determination, and had closed the file. The reasonable conclusion to reach from this information was that the adjudicator would fail to determine the adjudication application under s 21(3) unless action was taken to compel him to do so.

54 Accordingly, I find that the communications relied upon were incapable of being reasonably understood or acted upon by the plaintiff in the sense claimed. Alternatively, if such an interpretation was arguably open, in my opinion the representation was not so unequivocal and unambiguous as to found an estoppel (**Legione**, pp 435-437).

55 If I am wrong as to the making of the representation or the assumption, the claim must fail because the evidence does not establish that departure from it would occasion detriment to the plaintiff as claimed.

56 On 9 July 2007 the first defendant informed the plaintiff and the third defendant of withdrawal of the first adjudication application under s 26 of the Act. In its response of 10 July 2007, the third defendant pointed to the circumstances in which a withdrawal under s 26 could be made, and set out the terms of the section in full, and referred to the manner in which a new adjudication application would be dealt with. In my opinion, the effect of these communications would alert the plaintiff of the first defendant's intention to make a new application under s 26, and of the risk that, if the adjudicator failed to determine the first adjudication application within the time remaining, the first defendant would become entitled to make such an application. It follows that any misapprehension caused by the earlier communications would have been corrected by these later ones. In other

words, the effect of the later communications would have undermined any reasonable assumption that the first defendant was operating outside the Act and not attempting to withdraw under s 26.

- 57 Having been put on notice, it was open to the plaintiff either to require the adjudicator to proceed with the determination within the time remaining, or to take no action and risk the making of a new application after 17 July 2007. In the circumstances, it was unreasonable for the plaintiff, in reliance upon the earlier communications, to continue to take no action to protect its interest thereby allowing the circumstance under s 26(1)(b) to be established. I find that departure from the state of affairs claimed to result from the earlier communications occasioned no detriment to the plaintiff.
- 58 My conclusion is that the first defendant was not estopped from making the second adjudication application or the adjudicator from determining it.
- 59 An additional challenge to the validity of the determination was on the ground that the adjudicator erroneously considered the first defendant's narrative document dated 23 July 2007. This document was included with the submissions and documents submitted in support of the claim the subject of the second adjudication application. It was similar to the narrative document dated 29 June 2007 which had been lodged out of time in support of the claim the subject of the first adjudication application, and had been rejected by the adjudicator on 6 July 2007.
- 60 The plaintiff submitted that under s 22(2)(c) the adjudicator's consideration is limited to such submissions "that have been duly made" in support of the claim. It was put that, upon the proper construction of s 26, any new application must be confined to the same payment claim and to the same documentation which was duly made in respect of the previous adjudication application. Accordingly, it was argued that as the narrative document of 29 June 2007 was served outside the time allowed under s 17(3)(c) it had not been duly made in support of the previous claim within s 22(2)(c) and, accordingly, the similar document of 23 July 2007 had not been duly made in support of the new claim. As a consequence, it was put, it was outside s 22(2)(c) and should not have been considered by the adjudicator.
- 61 The first defendant submitted that upon the proper construction of s 26(2)(b) and s 26(3), and s 17, submissions relevant to the new application were not confined to those made in support of the previous application.
- 62 After a claimant becomes entitled to withdraw an adjudication application, it may, within five business days, make a new adjudication application under s 17. There is thus a new adjudication pursuant to a fresh adjudication application of the dispute as defined by the original payment claim and the original payment schedule (*Multiplex Constructions*, par 103; *Emergency Services Superannuation Board*, pars 20 and 23).
- 63 The effect of s 26(3) is to substitute a limit of five business days for the time limits under s 17(3)(c), s 17(3)(d) and s 17(3)(e), but otherwise the subsection applies to a fresh adjudication application.
- 64 Under s 17(h) a fresh application may contain such submissions relevant to the application as the claimant chooses to include. The provision contains no words which limit the contents of the submissions to those contained in the previous application. In my opinion, provided the new adjudication application which contains them is made within five business days under s 26(3), the submissions will have been duly made within s 22(2)(c), and the adjudicator must consider them.
- 65 In my opinion the plaintiff's submissions should not be accepted. In this case, it was common ground that the second adjudication application, which included the narrative document of 23 July 2007 was made under s 26(3). In the circumstances, the adjudicator was bound by s 22(2)(c) to consider the narrative document. The challenge to his determination on this ground fails.
- 66 I have not overlooked the submissions of the parties on the issue of the adjudicator's jurisdiction to make the determination. With regard to my findings on the other issues, in my opinion the plaintiff has failed to show any jurisdictional errors on the part of the adjudicator according to the principles considered, for example, in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421, pars 51-57, or at all.

Conclusion

- 67 For these reasons, I reject the plaintiff's case that the adjudication determination of 10 August 2007 is void and should be set aside, and for an order that the judgment entered by the first defendant against the plaintiff on 5 October 2007 in the Local Court, Manly, be set aside.
- 68 In the circumstances I direct the first defendant to bring in short minutes to give effect to these reasons. As to the question of costs, my present view is that there should be an order that the plaintiff pay the defendants' costs of the proceedings. However, failing agreement, I will afford the parties the opportunity to address me in relation to costs. Arrangements should be made with my associate by 4pm 7 May 2008 to re-list the matter.

V Culkoff –plaintiff instructed by Andrew McKeracher Solicitor

M Ashurst SC/J Doyle – first defendant submitting appearance – second defendant, third defendant instructed by Cosoff Cudmore Knox – first defendant submitting appearance – second defendant, third defendant