Procorp Civil P/L v Napoli Excavations & Contracting P/L, Anthony Veghelyi & Mediate Today P/L t/a Adjudicate Today

JUDGMENT : Einstein J : Supreme Court of New South Wales : 29th March 2006

The proceedings

1 These are proceedings brought by Procorp Civil Pty Ltd ["Procorp"] to set aside a determination by the second defendant made under s 22 of the Building and Construction Industry Security of Payment Act 1999 ["the Act"] in favour of Napoli Excavations and Contracting Pty Ltd ["Napoli"] and for ancillary restraining orders and declaratory relief.

The background

2 Procorp was a subcontractor engaged by Reed Constructions (Australia) Pty Limited on the *Great Southern Oceans Coastline Precinct Project* at Taronga zoo in Mosman, Sydney ("the Project").

3 On Procorp's case:

(a) in 2005, Procorp entered into a construction sub contract with Reed Constructions for the demolition of areas 3 and 4 and for excavation works for the Project;

(b) Procorp sublet part of that work to Napoli;

(c) in August 2005 Procorp entered into a sub contract with Napoli for the demolition of areas 3 and 4 of the Project ("the Demolition Subcontract") and in September 2005, Procorp entered into a further sub contract with Napoli for the hire of its excavation equipment, including operators, fuel and maintenance ("the Excavation Subcontract");

(d) the Excavation Subcontract was a schedule of rates subcontract;

(e) the demolition works were completed by Napoli in about late September 2005;

(f) Reed Constructions is now claiming from Procorp backcharges in respect of the works carried out by Napoli.

4 Whereas Procorp maintains that it had two separate subcontracts with Napoli, Napoli contends that there was only 1 sub-contract between the parties.

5 Nothing presently turns on whether the works were carried out by Napoli under 1 contract, as it contends, or under 2 separate contracts as Procorp maintains.

The adjudication determination

6 The adjudication determination was made on 25 January 2006.

7 The schedule to the adjudication determination identifies the material dates, amounts and other formal matters as follows:

i. payment claim 14.12.05 for $378,887.92(incl. GST)
ii. payment schedule 16.12.05
iii. adjudication application 09.01.06 lodged with Adjudicate Today 09.01.06
iv. adjudication acceptance 12.01.06
v. adjudication response 16.01.06 lodged with Adjudicate Today 16.01.06
vi. adjudication determination 25.01.06
vii. adjudicated amount $378,887.92 (Incl. GST)
viii. due date for payment 05.01.06

8 Napoli entered a judgment debt against Procorp on 9 February 2006 in District Court Proceedings 453 of 2006.

The principles

9 It is convenient to next consider the operative principles. The case law continues to develop and in recent times the Court of Appeal has had occasion to consider a number of important issues concerning the Act.

10 With some exceptions the submissions of Procorp as to the presently operative principles are accepted as of substance and adopted in what follows:

Overview

i. *Brodyn v Davenport* ([2004] NSWCA 394) confirmed that the object of the Act is expeditious determination of disputed progress claims.

ii. As payments made under the Act are only on account of a liability to be finally determined, there is *only limited opportunity for the Court's involvement* in the process. ***Musico v Davenport*** [2003] NSWSC 977 had determined the touchstone for the Court intervention's in the adjudication process to be "jurisdictional error of law."

iii. This net has now been found as too widely cast (***Brodyn v Davenport*** [2004] NSWCA 394, ***Transgrid v Siemens Ltd*** [2004] NSWCA 395 and ***Estate Property Holdings Pty Ltd v Barclay Mowlem Constructions Ltd*** [2004] NSWCA 393).

iv. A determination under the Act will only be invalid if it:

a) fails to fulfil the mandatory "pre-conditions" on power in the Act: ***Brodyn v Davenport*** [53]; or

b) if the basic requirements of natural justice required by the Act are not met: ***Brodyn v Davenport*** at [55] and [57] and *Project Blue Sky v ABA* (1998) 194 CLR 355 at pp 374-5.

The Requirements of Natural Justice

v. The content of the rules of natural justice are variable.

vi. *Musico v Davenport* [2003] NSW SC 977 is authority for the proposition that an adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party.

vii. McDougall J's reasoning in ***Musico v Davenport*** was predicated on the proposition that an adjudicator under the Act stands in the same position as a tribunal: see his Honour's reference to ***O'Reilly v Mackman*** [1983] 2 AC 237 in paragraphs [31] and [45] of the judgment.

viii. The decision in ***Emergency Services Superannuation Board v Davenport*** [2004] NSWSC 697 is to the same effect.

ix. Mason J observed in ***Kioa v West*** (1985) 159 CLR 550 at 585 that the real question in most cases has now become *what the hearing rule requires*, rather than *when it applies*. The hearing rule is a requirement of procedural fairness, but the Act prescribes the procedure that is to apply in connection with an adjudication determination. The legislature, having addressed itself to the question as to how a claimant and the respondent to adjudication application are heard by an adjudicator, the Act makes it clear that that is the limited opportunity of the hearing which is to be given and there is no warrant to vary that legislative scheme: see eg ***Twist v Randwick Municipal Council*** (1976) 136 CLR 106 per Barwick CJ at 110.

x. The adjudicator has a *broad discretion as to how to establish the facts that are relevant* in the valuation of a disputed payment claim. He is entitled to make use of the material submitted by the parties, and provided the parties are given the relevant notice to enable material to be placed before the adjudicator, the requirements of natural justice in the Act are satisfied. There is no other requirement as is established by applying the simple rules of construction.

xi. This is consistent with the Court's statements on the natural justice issue in ***Brodyn v Davenport*** by specific reference only to sections 17(1), (2), 20, 21(1) and 22(2) (d) of the Act. "…*such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions [namely occasioned by the failure to give notices], the determination is a nullity*." At [57] (adding emphasis to make the point clearly).

xii. The requirements of fairness require an adjudicator to determine the value of a contested payment claim only by reference to the specific submissions made by the parties, and if the adjudicator is minded to move outside those submissions, the adjudicator must give the parties the opportunity to make further submissions.

xiii. The Act contains the particular measure of natural justice which is a pre-condition to validity: ***Broydn v Davenport*** at [57], which requires no resolution as to whether the failure to accord procedural fairness is void or voidable.

xiv. A failure by an adjudicator to have regard to relevant facts *may* amount to a denial of natural justice under the Act. The rationale is clear: "*Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice*". According to Gleeson CJ, this alone was sufficient to dismiss the complaint of lack of procedural fairness in ***Minister for Immigration and Multicultural affairs; Ex parte Lam*** (2003) 214 CLR 1 at 13-14.

Bona fide attempt to exercise powers under the Act.

xv. If a statute confers a power and directs how it is to be exercised, a decision made in breach of a directory provision does not invalidate the power exercised in breach of a directory provision: see ***Project Blue Sky v ABA*** [1998] 194 CLR 355 and particularly the judgment of Brennan CJ at pp 374-5.

xvi. In ***Brodyn v Davenport*** the Court of Appeal construed the Act as containing the following preconditions for the valid exercise of an adjudicator's power, which the Court of Appeal described as the Act's "basic requirements":

a) the existence of a construction contract [required by s.13 of the Act];
b) a valid payment claim [required by s.17 of the Act];
c) a valid adjudication application [required by s.21 of the Act]; and
d) the Act of reference and the subsequent determination of the amount of the progress payment due and the rate of interest [as required by s.22 of the Act].

xvii. 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: see ***Brodyn v Davenport*** at [56], in expressing disagreement with the earlier views of Palmer J in ***Multiplex Constructions Pty Limited v Luikens*** [2003] NSW SC 1140.

xviii. In ***Brodyn Pty Ltd t/as Time Cost and Quality v. Davenport & Anor*** (2004) 61 NSWLR 421, Hodgson JA stated at [55] said: "In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. ***Project Blue Sky Inc. v. Australian Broadcasting Authority*** (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), *a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power* (cf. ***R v. Hickman; Ex parte Fox and Clinton*** (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If *the basic requirements*

are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but *if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance*."

Crucial issues

11 As will appear from what follows, this case essentially turns on:

i. whether a valid payment claim was made?
ii. what were the reasons advanced by Procorp for contending that no valid payment claim had been made?
iii. on what precise occasions were those reasons so advanced?
iv. whether in the particular circumstances, question i was a question for the adjudicator to decide and if so, in relation to which reasons advanced by Procorp?
v. whether the adjudicator addressed the question in good faith by reference to his bona fide opinion?
vii. Whether the adjudicator's determination of of issues of fact or law falling for consideration in his answers to the question is now binding upon the parties or alternatively may now be the subject of intervention by this Court?

An unusual set of circumstances

12 Napoli in its adjudication application submissions contended that the application for adjudication related to a payment claim dated 14 December 2005. The index to Napoli's adjudication application identified 'the payment claim' as dated 14 December 2005. However the documents which Napoli put forward as constituting the payment claim, comprised a number of tax invoices and ancillary supporting dockets, none of which was an invoice dated 14 December 2005. The adjudicator made plain in the reasons for the determination, that he had examined all of Napoli's invoices and that all bore an endorsement as required by s 13 (2) (a) of the Act.

13 The fact remains that nowhere in the bundle of documents put forward in the Adjudication Application as constituting 'the payment claim' does one find any document or letter dated 14 December 2005. A principal contention put to the Court by Procorp is that for this reason, there never existed a payment claim within the meaning of s13 of the Act.

14 Section 13 does not expressly mention any need for a payment claim to be dated. Common sense, in terms of the mechanics of the scheme provided for by the Act, would suggest the importance of dating a payment claim. This case throws up in stark relief, the types of difficulty which can occur if that simple step is not taken.

The position of the adjudicator

15 It is convenient to next consider the position of the adjudicator when embarking upon his task. He was assisted in this regard by having been furnished with:

i. The above described bundle of invoices each of which bore the words "This claim is made under the terms of the Building & Construction Industry Security (sic) Act 1999 NSW" [no point being taken by Procorp as to the missing words];
ii. A document described in the adjudication application index as "payment schedule dated 16 December 2005" which, upon examination, makes clear that:
  a) it was sent by Procorp to Napoli under cover of a facsimile bearing that date;
  b) it comprises a page of columns which essentially as against each invoice noted the amount claimed, and beside it, a column entitled "Scheduled amount", and alongside that, a column headed "Notes".
iii. Napoli's adjudication application submissions which relevantly described the payment schedule as "served by Procorp on 16 December 2005" and made comments in relation to that schedule;
iv. Procorp's adjudication response, which relevantly included the following:

PAYMENT CLAIM

10. Napoli has not served a Payment Claim in accordance with the Act.
11. The Adjudication Application alleges that there was one Payment Claim served on the Respondent on 14 December 2005.
12. The facts do not support this contention.
13. On 14 December 2005 Napoli provided to Procorp a list of invoices from Napoli to Procorp in respect of the Taronga Zoo project. The list included invoices received and paid.
14. There were a number of invoices served on Procorp on various dates.
15 None of the invoices stated that they were made under the Building and Construction Industry Security of Payment Act 1999 (NSWQ), although some of the invoices had similar words written on them. Some invoices made no reference to the Act at all.
16. Invoices 968, 971, 972, 973, 974 and 975 were served on Procorp on or about 7 September 2005. These invoices are alleged to form part of the Payment Claim which is the subject of this Adjudication Application. These invoices were paid in full on 13 September 2005.
17. Invoices 988, 989, 990, 991, 992, 993, 995, 996, 997, 998, 999, 1000, 1011, 1012 and 1013 were served on Procorp on or about 8 November 2005. These invoices are alleged to form part of the Payment

Claim which is the subject of this Adjudication Application. They total the amount of $144,773.37. Procorp paid these invoices in the amount of $81,809 .93 on or about 15 November 2005. The reasons for the discrepancy are set out in the reconciliation schedule sent to Napoli by Procorp on 16 December 2005.

18. Invoices 1034, 1035, 1036, 1037, 1039, 1045, 1046, 1047 were served on Procorp on or about 28 November 2005. These invoices are alleged to form part of the Payment Claim which is the subject of this Adjudication Application.
19. Invoices 1014, 1015, 1016, 1017, 1019, 1023, 1024, 1028, 1029, 1030 and 1031 were served on Procorp on or about 16 December 2005. These invoices are alleged to form part of the Payment Claim which is the subject of this Adjudication Application.
20. The facts support the construction that there were either as many Payment Claims as there were invoices or that there were four Payment Claims served on or about the following dates:
    Payment Claim 1: 7 September 2005
    Payment Claim 2: 8 November 2005
    Payment Claim 3: 28 November 2005
    Payment Claim 4: 16 December 2005
21. The Act prohibits a Claimant from serving more than one payment claim in respect of each reference date under the contract. Section 13(5). The reference date is the last day of the month. Clearly the Claimant has served more than one Payment Claim in respect of each reference date.
22. If the Claimant is correct when it asserts that there was one Payment Claim, served on 14 December 2005, then that Payment Claim does not comply with the Act. In breach of section 13(2)(b) of the Act, it does not indicate the amount of the progress payment that the Claimant claims to be due.
23. On 14 December 2005 Napoli provided to Procorp a list of invoices from Napoli to Procorp in respect of the Taronga Zoo project. The list included invoices previously received and paid by Procorp to Napoli. The list included invoices which Napoli had not as at that date served on Procorp. On 14 December 2005 Napoli did not provide to Procorp any invoices.
24. The Act provides for strict consequences to follow if a Respondent's fails to pay a Payment Claim and otherwise comply with the Act. For these consequences to apply, it is incumbent on a Claimant to comply strictly with the provisions of the Act. In particular, the requirement that a Claimant must indicate in the Payment Claim the amount of the progress payment that the claimant claims to be due to it from the Respondent, must be strictly adhered to because of the strict consequences that follow if a Respondent fails to pay that amount.
25. The Claimant did not provide to the Respondent on 14 December 2005 a Payment Claim. The Claimant has not provided to the Respondent a Payment Claim or Payment Claims that comply with the Act.
26. For the reasons set out in the preceding paragraphs, the Claimant's Adjudication Application should fail.
27. The Claimant's Adjudication Application should also fail because the Claimant's failure to comply with the time provisions set out in the Act.
28. If the Claimant is correct when it asserts that there was one Payment Claim, served on 14 December 2005 with the Payment Schedule served on 16 December 2005, then pursuant to section 17(3)(c), the Claimant had 10 business days within which to make an Adjudication Application. That ten day period expired on Friday 6 January 2006. The Claimant made the Adjudication Application after that date and accordingly the Application should fail. [emphasis added]

16 It is important to note that:

i. the Act provides that 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. [s 20 (2B)]

ii. the document put forward as "the payment schedule" as part of the adjudication application, had not contended that no payment claim had been made on 14 December 2005.

iii. there was no contention in the adjudication response to the effect that Procorp had never submitted a payment schedule to Napoli within the meaning of the Act.

The adjudicator's reasons

17 The adjudicator commenced his reasons as follows: *"It is common ground that the claimant's payment claim was dated and served on the respondent on the 14.12.05 and the respondent issued a payment schedule on the 16.12.05 and served the payment schedule upon the claimant the same day. Pursuant to s.17(3)(c) of the Act the claimant had 10 business days in which to lodge an adjudication application. s.4 of the Act defines "business day" as any day other than;*

(a) a Saturday, Sunday or public holiday, or

(b) 27, 28, 29, 30 or 31December.

The claimant lodged their adjudication application with Adjudicate Today on the 09.01.06 complying with s.17(3)(c) of the Act."

18 He then proceeded to deal with what he described as "a number of submissions [made by Procorp] as to the validity of the claimant's payment claim".

19 Procorp strongly contends that the adjudicator was mistaken in his observation that it was 'common ground' that the payment claim was dated and served on 14 December 2005. However bearing in mind:

i. the fact that the payment schedule provided *as such* by Napoli in the adjudication application, said not a word about any contention that no payment claim had been received;

ii. the fact that the adjudication response submissions of Procorp went far outside the content of the claims made in the payment schedule;

iii. the fact that neither the payment schedule nor the adjudication response submissions, contended [as did Procorp before this Court], that the column headed scheduled amount" [in what had been put forward by Napoli to the adjudicator as the payment schedule] had never been intended by Procorp as otherwise than a response to a list of invoices provided by Napoli to Procorp on 14 December 2005, which had *itself* included a column entitled "scheduled amount"

it is clear that the adjudicator in his reference to what was 'common ground', was doing no more than stating what, in the environment before him, appeared not to be an issue. In this he was correct, but even if incorrect, his approach neither offended the requirement that he act bona fide nor the requirement for natural justice to be afforded.

20 The adjudicator then proceeded to deal with the respective submissions advanced by Procorp as to the 'invalidity' of the payment claim. He dealt with each of these matters giving reasons in a fashion compliant with:
i. his having bona fide addressed the requirements of the Act in terms of construing the same;
ii. his having bona fide addressed the factual, as well as the legal issues before him.

21 The authorities earlier cited as well as the authorities considered below, make clear that even had the adjudicator been mistaken in these reasons or some of them, much more is required before the determination will be held invalid.

The adjudicator's mode of dealing with the Payment Schedule

22 The adjudicator dealt with the payment schedule as follows:

"Fatally for the respondent, the respondent's payment schedule of the 16.12.05 does not provide any reasons (save with one (1) exception) for withholding payment to the claimant. The payment schedule as against each Invoice notes the amount claimed and beside it the respondent's scheduled amount and beside same a column headed "Notes". The "Notes" bearing comments such as; "*Operators deducted, to provide dockets, hours charged incorrect, attachment billed not used, rained off deduct 1 day*."

Yet the respondent fails in the response to substantiate why in the majority of cases the respondent has a lesser amount in the schedule amount from the claimant's claimed amount. It would have been a simple matter for the respondent to provided relevant material and particulars to substantiate same; e.g. where the respondent's notes "hours be or provided any documents to refute the claimants hours claimed or the amount claimed. The respondent has elected not to provide any material to support its submission that the claimant is not entitled to the amounts claimed.

The respondent's response asserts at par.4-6 and indicates in the payment schedule that the respondent seeks to make deductions for "Backcharges" totalling $83,777.95. Yet the respondent provides no relevant documents or material to support the assertion that there is agreement between the parties to do so or that the respondent has a present legal entitlement to do so. The claimant's adjudication application and submissions in support clearly dispute the respondent's right to deduct backcharges particularly in respect of two (2) amounts of $865.48 and $45,100.00 referable to a separate project at Wahroonga, which the claimant points out is not part of the Taronga Zoo Project, the contract under which this payment claim is submitted. However having examined the claimant's quote of the 15.08.05 and the respondent's purchase order (both documents being attachment 2 to the claimant's adjudication application) the respondent has failed to satisfy me the respondent has any present legal entitlement to withhold payments for the alleged backcharges or deduct any monies for the alleged backcharges. I disallow the backcharges in their entity as valid deductions.

The abovementioned exception in the respondent's payment schedule for withholding payment is in the column headed "Summary: Procorp" where the respondent asserts it has previously paid the claimant $81,809.93. In the response of the 16.01.06 the Respondent at par. 23 asserts: "*On the 14.12.05 Napoli provided to Procorp a list of invoices from Napoli to Procorp in respect of the Taronga Zoo project. The list included invoices previously received and paid by Procorp to Napoli.*"

Having made the assertion it would be a simple matter for the respondent to provide proof of payment in respect to those invoices. The respondent has not done so….

I note the payment schedule contains two (2) patent errors:
(a) Invoice No 9990 indicates the claimed amount to be $8,120.00 and the schedule amount to be $8,932.00. An examination of the claimant's Invoice confirms the claimed amount as $8,932.00.
(b) Claimant's Invoice No 1042 for $742.50 is not referred to in the payment Schedule at all. As the respondent has raised no objection to the amount claimed I find the claimant is entitled to this amount as claimed." [emphasis added]

23 Nothing in this approach is exceptional. Nothing in this approach suggests a failure to bona fide address the factual issues.

The adjudicator's task

24 Returning to the authorities, [conveniently summarised by McDougall J in ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 801]:

- In ***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142, Hodgson JA dealt with the consequences of errors of law (and fact) at para [49]. He said that an error of law in the interpretation of the Act or the contract, or as to the validity and operative terms of the contract, would not prevent a determination from being valid for the purposes of the Act: *"49 In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid."* [Similar views were expressed by his Honour in ***Coordinated Constructions Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 at paras [45] and [46].]
- In ***Coordinated Constructions Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors*** [2005] NSWCA 229, Hodgson JA said at para [24] that the task of the adjudicator was in substance to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. He said: *"24 However, I accept that what is referred to an adjudicator for determination is a claimant's payment claim, and what an adjudicator is to determine is the amount of the progress payment to be paid on the basis of that claim and on the basis of other considerations in s 22(2) of the Act. Accordingly, the task of the adjudicator is to make a determination within the parameters of the payment claim, although that is not to say that, if an adjudicator were to make an error which can later be seen as taking the determination outside those parameters, it necessarily invalidates the determination."*
- In ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 1143, Campbell J observed as follows: "[90] To say that an adjudicator can make a valid determination under the Act even if the service of the payment claim to which the determination relates contravenes s 13(5), or the payment claim itself contravenes s 13(2), is not, however, to detract from the significance of either s 13(2) or s 13(5), for the purpose of an adjudicator making his or her decision. If a payment claim which lacked the attributes which s 13(2) says it "must" have were to be submitted to adjudication, or if, notwithstanding s 13(5), a claimant served more than one payment claim in respect of a particular reference date and that claim was submitted to adjudication, the breaches of s 13(2) and s 13(5) would provide a sound reason for the adjudicator to decline to order any payment pursuant to that payment claim. To say that such a payment claim can give rise to a valid determination *means that, even if the adjudicator makes a mistake by giving effect to a payment claim which does not comply with s 13(2), or a payment claim which does not comply with s 13(5), the adjudicator will still have made a determination which gives rise to an obligation to make a payment, and can be registered as a judgment."*

25 Finally in ***Brookhollow Pty Ltd v R & R Consultants Pty Ltd*** [2006] NSWSC 1, Palmer J treated with the general scheme of the Act in the following terms:

"[44] A payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defences to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.

[45] In my opinion, a payment claim under the Act works the same way. If it purports reasonably on its face to state what s 13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.

[46] An assertion that service of a payment claim is prohibited under s 13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s 13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.

[47] However, if the respondent does elect to raise a defence in bar founded on s 13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.

[48] In my opinion, the scheme of the Act in general and of s 13 and s 14 in particular requires that a defence in bar to a payment claim founded on s 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s 15(4) of the Act.

[49] In my opinion, these conclusions are consistent with, and are inherent in, the reasoning in *Brodyn* and they are not contrary to the majority decision in *Nepean*. They are also in conformity with the general approach to the determination of invalidity of a payment claim under s 13(4) and (5) taken by McDougall J *in* ***Energetech***

Australia Pty Ltd v Sides Engineering Pty Ltd [2005] NSWSC 801 at 25, by Campbell J in ***Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd*** [2005] NSWSC 705 at 19, and by Campbell J in ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** [2005] NSWSC 1143 at 87–90."

The hearing before the Court

26 Procorp accepted that in order for it to succeed it must prove either:

i. a failure to satisfy the essential pre-conditions to validity expressly set out in [53] of *Brodyn v Davenport*; or

ii. a breach of the fundamental requirements of natural justice required by the Act, namely a failure by the adjudicator to receive or consider submissions which is due to a breach of the provisions in sections 17(1), (2), 20, 21(1) or 22(2)(d) of the Act.

Evidence taken on the voire dire

27 During the hearing both parties sought to place the extensive affidavit evidence of a variety of matters before the Court. Ultimately only extremely limited affidavit evidence was permitted and on a particular basis. The evidence [both in affidavit form as well as came forward in the limited cross-examination] was admitted on the voire dire upon the basis that a decision as to whether or not the evidence would be admitted on the hearing would be given in the judgment. This course permitted very limited evidence on only one area, namely what precisely had occurred on 14 December 2005. Portions only of the affidavit of Ms Bechini of Procorp of 22 March 2006 and of the affidavit of Mr Guerrera of Napoli of 24 March 2006 were permitted.

28 The decision is that none of this evidence is allowed. To my mind the evidence is simply irrelevant in terms of the task of the Court at hand. Alternatively and if the evidence be relevant, the probative value of the evidence is outweighed by the danger that the evidence would cause or result in a waste of time within the meaning of s 135 of the Evidence Act 1995.

29 I reject the proposition that the adjudicator, following receipt of the adjudication response of Procorp, was obliged to invite further submissions first from Napoli and then further responsive submissions from Procorp. The adjudicator was entitled to proceed upon the basis that s20 (2B) was operative. That he did so is clear from his use of the words *"fatally for the respondent"*. Indeed nothing in the adjudication response submissions of Procorp threw up the vital questions put to the Court, concerning precisely what had occurred on 14 December 2005.

The incorrect computation of the total amount

30 The adjudicator included in the determination the following paragraph: *"…[T]he claimant at par.26 of their submissions accepts that since making the payment claim they have received payment of $122,139.35 for the works the subject of the invoices comprising the payment claim, I note the payment claim invoices are for $378,887.92, and the claimant "claims the outstanding amount of $256,748.57."*

31 The position which obtains may clearly be characterised in terms of the adjudicator failing [as is apparent on the face of the determination] to have had regard to the matter which was indeed common ground, in terms of the net amount claimed by the claimant following receipt by Napoli of $122,139.35. One presumes that this was simply an oversight.

32 The adjudicator's determination clearly containing what must be characterised for the purposes of s 22 (5) as *a clerical mistake* and/or *an error arising from an accidental slip or omission* and/or *a material miscalculation of figures*, the adjudicator had power on his own initiative or on the application of either party, to correct the determination.

33 At the commencement of the hearing, the Court raised with the parties the question of whether the adjudicator still has the power on his own initiative or on the application of either party, to correct the determination. Indeed at one stage the parties were asked to address on whether a preliminary point should be ordered on the questions concerning whether a slip or mistake was able to be remedied even at this late point in time. It was made clear by both parties that they did not discern this issue as a matter of substance. [transcript 6, 7, 9, 10, 38, 39].

34 Mr Corsaro SC, counsel for Procorp, did contend that as the adjudicator had been joined as a party to these proceedings, it was open to him, even after these proceedings had commenced, to have sought leave to correct the determination on the computation issue.

35 In my view the position which obtains is that the adjudicator is still possessed of the above-described power.

Procedures/the way forward

36 It is important to follow with precision the precise events which occurred. They are as follows:

i. On 9 February 2006 an adjudication certificate was issued in the sum of $392,607.77 including the adjudicated amount plus interest and the unpaid share of the adjudicator's fees;

ii. On 9 February 2006 an affidavit was made by Mr Guerrera pursuant to s 25 of the Act which provides inter alia:

"(1) An adjudication certificate may be filed as a judgment for a debtor in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only."

iii. The affidavit included the following:

9. This Affidavit is made pursuant to section 25 of the *Building and Construction Industry Security of Payment Act* 1999 NSW to accompany the adjudication certificate for an adjudication amount of $392,607.77.
10. A total payment of $129,115.98 has been received from the Defendant and the Defendant had incurred costs of $61,237.43 which it can properly claim as back charges from the Plaintiff.
11. Accordingly, the amount outstanding, which is due and owing, as at the date of this affidavit is $202,254.36 ("the Judgment Debt"), which includes interest of $3,269.85.
12. On 9 February 2006 the Plaintiff obtained the Adjudication Certificate from Adjudicate Today by making a payment of $550.00. Now shown to me and marked annexure "G" is a copy of the tax invoice from Adjudicate Today.
13. I request that the Court issue an order that the Defendant pay the Plaintiff's costs of obtaining the Adjudication Certificate from Adjudicate Today in the sum $550.00.

iv. On 9 February 2006 a Certificate of Judgment issued from the District Court in which the Registrar certified as follows:

1. In this action the Plaintiff recovered Judgment against the Defendant on 10/02/2006, in the sum of $392,607.77 and his costs $0.00.
2. I am informed by the Judgment Creditor that the amount of $0.00 has been paid in respect of the Judgment.
3. Interest is payable per annum on so much of the judgment debt (including costs) as is from time to time unpaid – see attached schedule.
4. The Judgment Creditor has incurred costs of attempting to enforce the judgment, recoverable against the judgment debtor, in the amount of $0.00.

37 The proper analysis seems to me to be as follows:

i. The adjudicator's determination contained what has earlier in the judgment been described as a clerical mistake and/or an error arising from an accidental slip or omission and/or a material miscalculation of figures;
ii. That matter can be remedied by the adjudicator within the s22 (5) power;
iii. The District Court made another error. The certificate of judgment did not comply with the dictate of s 25 (3) of the Act. The judgment entered ought to have been for the unpaid part of the adjudicated amount;
iv. That matter can also be remedied by the District Court within the slip rule applying in that jurisdiction.

38 The appropriate course is to simply adjourn the proceedings for a short period and to then relist the proceedings following the parties having had an opportunity to review these reasons.

39 A real degree of assistance may be found in the recent decision of the Court of Appeal: ***Khoury v Hiar*** [2006] NSWCA 47 dealing with disconformity between the order of court and the relevant statutory regime. The *Legal Profession Act 1987* enabled a party to obtain a judgment through an assessment of costs and the filing of an assessor's certificate. That Act relevantly provided that a legally assisted person should not be liable for the payment of the whole or any part of particular costs. The judgment taken to have been entered on the filing of the certificate was subject to the statutory prescript that the claimant [a legally assisted person] was not liable for the costs.

40 The holding was that the judgment and the non-liability stood together. The effect of the section was superimposed on the judgment which had no greater force then the order for costs which enabled the assessment of costs. Disconformity between a Court's order and liability to pay was accepted in the Act's approach, by which the liability of a legally assisted person to pay costs was not worked out when the court made its costs order, but was left for the superimposition of the section. [cf at 37-41; 45].

41 There is particular relevance in the reference (at [50]) to the ability of the Court to turn to its armoury of relief and to control by injunction enforcement of the judgment so as to permit enforcement *only* to the extent of the entitlement. An injunction was ordered restraining the First Opponent from enforcing the judgment entered in the District Court save *to the extent of his entitlement*.

42 The purpose of these observations is to make clear that this Court, depending upon what occurs after the parties have had a proper opportunity to consider these reasons, has the jurisdiction to restrain Napoli from enforcing the judgment entered in the District Court save to the extent of the unpaid part of the adjudicated amount.

43 Submissions will be taken as to whether there is any need for a further interim interlocutory regime pending the next occasion when the matter is before the Court.

Mr Frank Corsaro SC, Ms Chan (Plaintiff) instructed by McManus Lawyers (Plaintiff)
Mr Doyle (First Defendant) instructed by Doyles Construction Lawyers (First Defendant)