**Siemens Ltd v Tolco P/L : Tolco P/L v Siemens Ltd** [2007] Adj.L.R. 04/04

**JUDGMENT : Associate Judge Macready.** Supreme Court, New South Wales. Equity Division T&C List. 4th April 2007

1 **His Honour:** The proceedings 55082/06 concern an adjudication determination by the second defendant ("the adjudicator") pursuant to the **Building and Construction Industry Security of Payment Act** 1999 (NSW) ("the Act") arising out of a contract between the plaintiff ("Siemens") and the first defendant ("Tolco"). The contract was for Tolco to carry out construction work at the Westvamp power generation plant located at the West Cliff Colliery, in Appin, New South Wales ("the contract").

2 On 21 September 2006 Tolco served a payment claim upon Siemens pursuant to s13 the Act in the sum of $842,054.77. On 5 October 2006 Siemens served a payment schedule pursuant to s14 of the Act in which Siemens stated that the amount of the payment, which it proposed to make, was nil.

3 On 19 October 2006, Tolco served its adjudication application (pursuant to section 17 of the Act) upon the authorised nominating authority. On 27 October 2006 Siemens served its adjudication response on the adjudicator.

4 The adjudicator forwarded his adjudication determination by facsimile on 8 November 2006. The adjudicated amount was $306,851.76. Thereafter the adjudication was registered as a judgment in the District Court.

5 There are two proceedings before me which I have heard together. In proceedings 55082 of 2006 in its amended summons, Siemens seek a declaration that the adjudication determination is void.

6 Siemens also seeks an order in the nature of certiorari pursuant to s 69 of the **Supreme Court Act** 1970 (NSW) quashing the determination. Siemens acknowledged that on the basis of the Court of Appeal's decision in ***Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport*** (2004) 61 NSWLR 421, such relief is unavailable. Accordingly I was not requested to deal with this claim.

7 Proceedings 55001 of 2007 concern the judgment obtained in the District Court following the adjudication. In orders made by Bergin J on 11 December 2006 those proceedings were transferred to the Supreme Court and are now proceedings 55001 of 2007. Under her orders the adjudicated amount together with interest and the adjudicator's fees of $329,317.07 which had been paid into the District Court by Siemens pursuant to s.25(4) of the Act, was released to Tolco.

8 If the Court were to conclude that the adjudication determination is void, it would follow that the judgment ought to be set aside: ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at 443 [61]. Thus, in proceedings 55001 of 2007, Siemens seek an order that the judgment arising from the filing of the adjudication certificate be set aside. Siemens also seeks an order that the sum paid to Tolco be returned to Siemens.

**The claims made by Siemens**

9 Siemens' submissions were that the adjudication determination was void for the following reasons:

*First*, the adjudicator concluded that clause 13.4 of the contract (which established a time restriction within which Tolco could make a claim for costs arising from an extension of time) was void by reason of section 34 of the Act. This conclusion was reached in circumstances where neither party had advanced such a submission pursuant to the Act. The adjudicator reached such a conclusion without notifying Siemens that he intended to so and without providing Siemens with an opportunity to make submissions with respect to the adjudicator's proposed decision that clause 13.4 was void. Siemens submits that for these reasons, there has been a denial of natural justice, rendering the determination void.

*Secondly,* the adjudicator accepted Siemens' submission that the contract contained no provision which allowed Tolco to make a claim for delay, disruption or acceleration costs. However, the adjudicator held that Tolco was entitled to make a claim for delay, disruption or acceleration costs by reason of sections 10(1)(b) or 10(2)(b) of the Act. As in the case of the finding referred to above with respect to the application of section 34 of the Act to clause 13.4 of the Contract, this conclusion was not based on any submission made by either of the parties. Prior to reaching this conclusion, the adjudicator failed to notify Siemens that he proposed to do so and failed to provide Siemens with an opportunity to make submissions with respect to the adjudicator's proposed decision with respect to sections 10(1)(b) or 10(2)(b). For this reason, Siemens submits that there has been a denial of natural justice, rendering the determination void.

The *third* basis for challenging the adjudication determination concerns the conclusion that, by reason of section 34 of the Act, clause 13.4 of the Contract was void. Siemens submits that the adjudicator reached this conclusion without bona fide considering whether the criteria for the application of section 34 were satisfied.

*Fourthly*, and alternatively to the third basis, such a conclusion was reached without the adjudicator bona fide addressing the requirement to provide reasons as required by section 22(3)(b) of the Act.

*Fifthly,* Siemens submits that the adjudicator failed to afford Siemens procedural fairness with respect to the adjudicator's conclusion concerning manhours, and failed to exercise in good faith the power conferred upon him.

**The first challenge - procedural unfairness concerning clause 13.4 of the Contract**

10 Tolco's claim was for delay and disruption costs totalling $376,188.92 and acceleration costs of $163,287.90. Clause 13.4 of the contract between the parties provided: "*If the Vendor [i.e. Tolco] wishes to make a claim for any extensions of time to the delivery date(s) or claim any additional costs, then he shall notify Siemens in writing within 48 hours of the event that the Vendor is claiming an extension of time and/or additional costs, and, provide to the Purchaser within seven (7) calendar days of the claim, full details of the claim.*"

11 Siemens relied upon this clause in its payment schedule in rejecting the claim. Indeed Tolco in its payment claim had anticipated such a submission and had suggested that Siemens had waived the requirements of written notices under the contract in this respect.

12 The adjudicator's conclusion with respect to clause 13.4 was as follows: *"Clause 13.4 establishes a time restriction within which the claimant can make a claim for any costs arising out of an extension of time. Such costs would in my view include costs arising from delay, disruption or acceleration occasioned by an act or omission by a party other that the claimant. Such costs, where valued pursuant to the Act relate to additional costs arising from additional construction work or the provision or related goods and services. In my view the claimant is therefore entitled to make a claim for a progress payment, to do otherwise would be to restrict the claimant's rights pursuant to the Act".*

13 Plainly the adjudicator was referring to section 34 of the Act which is in the following terms:

*"34 No contracting out*

*(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*

*(2) A provision of any agreement (whether in writing or not):*

*(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*

*(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,*

*is void."*

14 Siemens' submissions were that in Tolco's adjudication application and its own response the matter was only dealt with by reference to clause 13.4 of the contract. A perusal of the application and response would suggest to the contrary.

15 In the adjudication application Tolco dealt with its application under six headings. The second heading was the primary submissions. In clause 2.12 it said the following: *"The amount claimed in the payment claim, subject to the revised calculation set out below, is the value of the indemnity that is provided by the respondent which cannot be legally limited or excluded under the contract and the Act because to limit a progress payment is void under s 34 of the Act."*

16 The fifth heading in the application was the claimant's responses to the respondent's payment schedule. It responded in detail to a number of points made in the payment schedule. The response to the claim concerning clause 13.4 was in the following terms: (p29) *" The claimant is entitled to an indemnity, for reasons set out above. Whilst clause 13.4 is there, it is not applicable to the claimant in the particular circumstances. All requirements waived. "*

17 In its response Siemens dealt with each of these submissions. In respect of the first it replied in these terms: (p12)

*"2.12 The respondent refers to its submissions above on the issues of the indemnity and the calculations set out below. Further the respondent says that section 34 has no application to this matter as there is no clause in the Contract which seeks to exclude, modify or restrict the operation of the Act. Rather the respondent considers that the claimant is seeking to modify the rights of the Respondent under the contract contrary to section 32 of the Act."*

18 The response to the second submission included the following: (p32) *"The respondent denies that it waived any requirement of the contract. Further clause 3.5 requires any such waiver to be in writing signed by the respondent and the Claimant. No such document exists. "*

19 It seems that Siemens submissions are in error as plainly the operation of section 34 was raised and Siemens has taken the opportunity to respond. In these circumstances there has been no procedural unfairness as the adjudicator has not dealt with the matter in circumstances where neither party has notified the other.

20 The only matter which needs to be dealt with is whether the argument should have been raised in the payment claim or payment schedule. In ***Holmwood Holdings v Halkat Electrical Contractors*** [2005] NSWSC 1129, Brereton J said at [129]:

*"129 While I accept that, as a respondent to a payment claim is not able in its adjudication response to go beyond the matters raised in its payment schedule, so an adjudication application may not include materials which go outside, in the sense of falling outside the ambit or scope of the materials provided in the payment claim [ **John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd** [2004] NSWSC 258], neither this principle, nor the provisions of the Act - which plainly envisage that an "adjudication application" may contain such submissions relevant to the application as the claimant chooses to include [s.17(3)(h)] – have the consequence that no material which was not included in the payment claim can be included in the adjudication application. The test is whether the additional material is or is not within the scope or ambit of the payment claim. If it is, then evidentiary and argumentative material to support it can be included in the adjudication application."*

21 In this case we are not dealing with material in the sense of further documents. All that has been included in the application is argument in support of existing claim that was clearly made in the payment claim. This course is permitted pursuant to s17(3)(h) of the Act. Indeed it is hard to see how it could have been included in the payment claim because it really is a matter to be raised in reply to Siemens' point in its payment schedule that the claim was barred by clause 3.14 of the contract.

22 In my view there has been no denial of procedural fairness by the adjudicator on this aspect.

**The second challenge - procedural unfairness concerning section 10**

23 Siemens' submission was founded upon the proposition that in its payment claim, Tolco contended that it was entitled to make a claim under the Act for compensation for losses caused by delays attributable to Siemens, on the basis that it had a contractual right to recover such compensation. Tolco relied upon the judgments of the Court of Appeal in ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 and ***Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385) in support of its contention that it was entitled to "delay damages". Reference was made to the fact that Tolco stated in its payment claim that: *"Delay damages under a construction contract can be for construction work or related goods and services of which such delay damages can be included in a payment claim under the Act."*

24 In its payment schedule, Siemens submitted that the claim by Tolco was distinguishable from the claims made in the ***Coordinated*** cases referred to above, because: *"The Contract in those cases included an express right to claim delay damages under the Contract whereas no such right exists under this contract and thus no contractual entitlement can be show [sic.] upon which to found a claim in the nature set out in the Claimant's Payment Claim".*

25 The adjudicator dealt with this part of the claim and said in paragraph 21: *"The basis of the claim relates primarily to the costs associated with delay, disruption, acceleration, administrative cost in managing changes to documents, together with related overhead and profit. The terms of the purchase order do not contain a provision which allows the claimant to make a claim for delay, disruption or acceleration. In my view therefore the claimant is entitled to make a claim for such matters in accordance with ss10(1)(b) or 10(2)(b) of the Act as applicable."*

26 It was submitted that in the second sentence in this passage, the adjudicator accepted Siemens' submission that the contract contained no provision, which allowed Tolco to make a claim for delay, disruption or acceleration. The adjudicator then concluded that because there was no contractual provision which allowed Tolco to make such a claim, it followed that Tolco was entitled to make the claim in accordance with sections 10 (1)(b) or 10 (2)(b).

27 It was submitted that this conclusion was not based upon any submission made by either party. Prior to reaching this conclusion, the adjudicator failed to notify Siemens that he proposed to do so and failed to provide Siemens with an opportunity to make submissions with respect to the adjudicator's proposed decision with respect to sections 10(1)(b) or 10(2)(b). It is for this reason that Siemens submits that there has been a denial of natural justice, rendering the determination void.

28 It is necessary to consider what was the basis of Tolco's payment claim to see if these submissions should be accepted. Siemens in its submissions characterised the claim of Tolco in these terms

*"(i) the existence of an implied contractual term, which has its source in the Act. ("The Act provides the right to imply the terms of the Act into a contract…") (Payment claim para 18.2, page 6 of 16, Exhibit Vol. 1, page 27);*

*(ii) Siemens had given "a promise to pay on the basis that it had ordered a variation under the contract or under a separate or distinct contract with" Siemens. (Payment schedule para 18.5, page 7 of 16, Exhibit Vol. 1, page 28).*

*(iii) Siemens was "liable for breach of its duty by not exercising proper care and diligence". (Payment claim, para 18.10, page 8 of 16, Exhibit Vol. 1, page 29);*

*(iv) breach of the Trade Practices Act 1974 (Cth) (Payment schedule paras 6-7, page 2 of 16, Exhibit Vol.1, page 23-34).*

In the alternative to specific heads of claim, Tolco claimed the same amount on the basis of a "*total global costs method*"; this claim was based upon an allegation that Siemens breached the contract, which caused Tolco loss (Exhibit Vol. 1, p 26 (para. 17), and see also at pp 34-35 (paras. 43.4 & 43.5))."

29 The characterisation of the claims set out above does not give full credence to the effect of paragraph 18 of the payment claim. A heading "Overarching entitlements" preceded that paragraph. It then went on to deal with different parts of those overarching entitlements. Clause 18.1 states: *"The claimed amount is for a fair and reasonable value due to the increased scope of supply consequent upon the drawing changes."*

30 Clause 18.3 of the payment claim referred to an implied term in the contract for delay costs. Clause 18.4 then went on to make a somewhat different claim upon the basis that:

> "*During the course of the works, the Respondent impliedly instructed the Claimant to carry out additional work in order to administer the drawing revision changes or expressly instructed the claimant by:*
>
> *18.4.1 Issuing and delivering the drawing revisions to the Claimant; and*
>
> *18.4.2 Issuing and delivering various construction programmes to the Claimant that altered the timing and performance of the contract works."*

31 Siemens' response to this in its payment schedule was not what was quoted in their submissions which I have quoted above. It also said prior to making the comment about the ***Coordinated*** cases the following: (p 55 of Exhibit Vol 1)

> *"The amounts are not properly claimable under the Act as they are not claims for progress payments for construction work or related goods and services calculated (or valued) in accordance with the terms of the Contract contrary to the provisions of the Act, in particular sections 3, 4, 6, 8, 9, 10(1), 11(1), 13, 17(1) or 22.*

*Rather the claims are based on alleged claims made outside the terms of the Contract and on bases other than a claim in Contract and are thus are in fact claims for damages which are not permitted under the Act (see **Kembla Coal & Coke v Select Civil & Ors** [2004] NSWSC 628 and **Quasar Construction v Demtech Pty Ltd** [2004] NSWSC 116).*"

32 This is express reference to the fact that the amounts are not claimable under the Act under ss 9 and 10 and also a characterisation of the claims as being claims for damages which are not permitted under the Act. There was also later in the payment schedule a more detailed response to the individual paragraphs, which were set out in the payment claim.

33 In responding to 18.1, Siemens denied that they increased the scope of supply and suggested that the changes were of a minor nature. In relation to 18.4, the respondent denied that they impliedly or expressly instructed the claimant to carry out additional works. It gave reasons for that denial. Thus in the payment claim and the payment response there seemed to the claims of a variety and nature which would comprehend a claim under the Act and not merely some contractual entitlement.

34 In the adjudication application Tolco suggested, no doubt in response to what was in the payment schedule that their claim was not a claim for damages of any kind. In clause 1.5, it characterised the dispute in these terms: (p 77 of Evidence Vol 1) *"The salient issue in dispute is solely in respect of whether the claimant is entitled to be paid an amount over and above the price set out in the purchase order because extra work was carried out by the claimant or additional related goods and services were supplied for construction work within the meaning of s 6 of the Act. It follows that the payment claim does not take into account the purchase order price or any amounts paid by the respondent (which is set out below) in respect of that price as it is purely a claim for extra work under the contract."*

35 In its adjudication response Siemens responded as its first reason in identical terms the matters which it had set out in its payment schedule which I have referred to above. In reference to the "salient issue" referred to in the adjudication application Siemens said: (129 of Evidence Volume 1) *"The Respondent denies that the claimant has carried out "extra work" as that term is defined in the Contract or that its claims in the Payment Claim are claims for "additional" related goods and services under the Contract within the meaning of Section 6 of the Act. The claims set out in the Payment Claim have the character set out in paragraph 1.3 above and are therefore not allowable under the Act."*

36 It seems to me that the application in response merely repeated the positions which the parties had taken in the payment claim and schedule namely that the claim included a claim for payment under the Act and did not restrict it to a contractual claim. In these circumstances there has been no denial of natural justice.

**The third challenge - no bona fide consideration of the effect of section 34 on clause 13.4 of the Contract**

37 In paragraph 10 I have set out the terms of clause 13.4. Section 34 of the **Building and Construction Industry Security of Payment Act** (1999) NSW provides:

*"34 No contracting out*

*(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*

*(2) A provision of any agreement (whether in writing or not):*

*(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*

*(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,*

*is void."*

38 The adjudicator said the following in reference to item 2.12: *"Clause 13.4 establishes a time restriction within which the claimant can make a claim for any costs arising out of an extension of time. Such costs would in my view include costs arising from delay, disruption or acceleration occasioned by an act or omission by a party other than the claimant. Such costs, where valued pursuant to the Act relate to additional costs arising from additional construction work or the provision of related goods and services. In my view the claimant is therefore entitled to make a claim for a progress payment, to do otherwise would be to restrict the claimant's rights pursuant to the Act."*

39 Siemens has submitted that in dealing with the matter in the way set out in the paragraph above the adjudicator has simply stated a conclusion and has provided no reason as to why clause 13.4 is a provision which restricts the operation of the Act. It is of course necessary for the arbitrator to give reasons as this is provided for in section 22 (3)(b) of the Act. The failure to provide reasons without more would not constitute an error which would render the adjudication determinations void

40 Siemens submitted that in determining whether a time limitation provision is void a number of factors need to be taken into account. They made reference to ***John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd*** [2006] NSWSC 798 at [73]-[83]. One factor they pointed to was whether the time provision *"was one within which [the claimant] could not possibly or reasonably comply with in any given case": **John Goss**,* at [83].

41 Siemens submitted that : *"Given the absence of reasons, there is no basis for concluding that the decision was other than arbitrary, in the sense that the adjudicator had no reason for concluding that clause 13.4 was void other than that it imposed a time restriction."*

42 Reference was made to a number of cases that suggest that if an opinion formed is arbitrary it will be void. see ***Holmwood Holdings Pty Ltd v Halkat Electrical Pty Ltd*** [2005] NSWSC 1129, and ***Coordinated Construction Co Pty Ltd v Climatech (Canberra)*** (2005) 21 BCL 364 at 381[47] where Basten JA referred to the principle in ***R v***

***Connell; Ex parte Hetton Bellbird Colleries Ltd*** (1944) 69 CLR 407 at 432, applied by Gummow J in ***Minister for Immigration and Multicultural Affairs v Eshetu*** (1999) 197 CLR 611 at [133].

43 Tolco suggested that the Siemens' submissions started from the incorrect premise that the adjudicator was required to, and was attempting to, determine whether clause 13.4 of the Contract was per se void under section 34 in all circumstances.

44 It submitted that the context in fact was quite different. It said that Siemens had specifically set up clause 13.4 as an answer to Tolco's claim because it was, to quote Siemens, "time barred". In other words Siemens was specifically asserting that clause 13.4 had the result that a claim otherwise available under the Act was defeated by clause 13.4. In that context all that the Adjudicator did, and all that he was required to do according to Tolco, was to state the self-evident effect of s34. The effect of section 34 is that any contractual provision purportedly restricting the operation of the Act is void. Siemens were contending for precisely that result from clause 13.4 - which the Act specifically invalidates. There was no further reasoning to be stated. Anything more according to Tolco would have been entirely otiose.

45 The question as to whether s34 will invalidate a particular provision of the contract is not a simple matter. Apart from the reference to ***John Goss*** set out above one can also see the debate in ***Minister of Commerce v Contrax Plumbing*** [2004] NSWSC 823 at [31] - [43] at first instance and on appeal in ***Minister for Commerce v Contrax Plumbing*** [2005] NSWCA 142. A decision in any case requires a careful consideration of the Act and the effect of the particular provisions on the operation of the Act.

46 I have earlier in the first ground set out the various responses appearing in the documents which were before the adjudicator. Plainly the question of the interaction between clause 13.4 of the contract and s34 of the Act was before the adjudicator. The question was clearly raised in the adjudication application in clause 2.12 and I set out in paragraph 17 above Siemens' response to this paragraph. It is notable that no reference is made to authority or to the factors which Siemens now suggest are necessary to consider in order to decide whether or not s34 had an effect on clause 13.4. In other parts of the documents Siemens had referred to legal authority where it thought it appropriate. The submission was nothing more than a denial of the proposition put forward by Tolco that clause 13.4 limited a claim under the Act and was void under s34.

47 The adjudicator is not necessarily legally trained and has to consider the submissions which are made to him. The submission made to him was a very simple one and in the absence of any further detail being put the simple response given by the adjudicator is appropriate. Having regard to the content of the submissions put to the adjudicator I would not conclude, as I am invited to by Siemens' submissions, that the conclusion is arbitrary. All that the adjudicator has done is accept Tolco's submission in preference to Siemens' simple denial. All the adjudicator was doing was responding to the extent of the submissions put to him. If the submissions had included detail that the adjudicator did not refer to, then there may be some basis for inferring that the conclusion was arbitrary but that is not this case. In these circumstances this challenge fails.

**The fourth challenge - no bona fide addressing of the reasons required under section 22(3) in respect of the effect of section 34 on clause 13.4 of the Contract**

48 This alternative submission is predicated upon the assumption that the adjudicator had undisclosed reasons for reaching the conclusion that clause 13.4 was void. All that was said was that there was a failure to give reasons for the purposes of section 22(3) of the Act. These submissions continued to the effect that in these circumstances there was no bona fide attempt to address requirements in section 22(3) and accordingly the decision was void.

49 Given my comments above I do not think that I could conclude that the adjudicator had undisclosed reasons for reaching the conclusion that clause 13.4 was void. In these circumstances this challenge fails.

**The fifth challenge - failure to consider the manhours submission**

50 This claim is quantified in the costs and losses claimed by Tolco. The payment claim suggested that Tolco has suffered additional costs and losses as a result of the work exceeding the original planned work by 41.6%. The claim compared the planned labour costs versus the actual labour costs both in respect of the hands-on fabrication work and administration of drawing changes.

51 In its adjudication application Tolco submitted that the relevant hours were as follows:
*"Actual 13,126*
*Planned 8,061"*

52 Tolco claimed payment for the excess of the "actual" hours over the "planned" hours. The figure of 8,061 manhours, identified as "planned", was derived from an expert report of Evans & Peck annexed to the adjudication application.

53 In its adjudication response Siemens gave a detailed response which was summarised in submissions in these terms:
"*(a) Tolco, in its payment claim and adjudication application, stated that the actual manhours expended (13,216 hours) included hours for fabrication work and for administration;*
*(b) however, the Evans & Peck estimate (8,061 hours) relied on by Tolco, did not include any hours for administration and were for hours of fabrication work;*
*(c) therefore, when valuing the works on a global basis, the adjudicator could not (as he did in paragraph 55) simply deduct the Evans & Peck's estimate from the alleged actual hours expended;*
*(d) rather, the adjudicator must increase the Evans & Peck's estimate to include hours for administration.*"

54 The adjudicator's reasons on this issue included: *"The claimant included in its submissions to the adjudication application an expert's report to support its claim in relation to the manhours required to carry out shop fabrication of an amount of pipework for the project. This report has analysed in detail the work and the manhours required to carry out that work, in part basing its analysis on relevant industry publications (attached to the report), information provided to it by the claimant and relying on the expert's own expertise. That report concluded that '.. a reasonable manhour input required for the advised shop work would be approximately 8000 hours (8061 as shown in appendix 3* [of the expert report])'.

*The absence of supporting information in the adjudication response (which includes the payment schedule) results in limiting my valuation of the claim primarily to the supported submissions of the claimant."*

55 The adjudicator then proceeded with his analysis of the amount of the claim and set out his conclusions in paragraph 55 and 56 as follows:

*"2.16.1 Actual (13,126.40): $924,137.00*
*2.16.2 Less As Planned (8,061 x $75/hr): $604,575.00*
*2.16.3 Less Drawing Revisions $65,965.50*
*2.16.4 Subtotal: $253,596.50*
*2.16.5 Plus Onsite Overheads and Profit @10%: $25,359.65*
*2.16.7. Sub Total: $278,956.15*
*2.16.8 Plus GST $27,895.62*
*Progress Payment: $306,851.76*

*I note that the amount deducted for drawing revisions is deducted from the cost of the time differential between the actual and planned hours. In my view the deduction of that money is unnecessary. However for me to include that sum in the determination as a neutral amount would have resulted in an increase in the value of the claim. It is not within my jurisdiction to amend the claim in that manner. I therefore have decided to not take the above view into consideration in this determination."*

56 Tolco's point on this issue was that the actual manhours in the calculation did not include all administration time, only administration of the changes instructed by Siemens. It says that in clause 2.16.3 of the application Tolco deducted the value of the hours included for administration changes for the drawings and that the adjudicator gave effect to that concession in paragraph 55 that I have quoted above. Thus it says there was no inappropriate comparison.

57 The question seems to be whether in fact the actual manhours only included administration of the changes or included other administration amounts.

58 When one looks at the details of what was deducted by Telco in clause 2.16.3 one can see that included charges for a project manager, quality assurance, workshop supervisor, leading hand and workshop letter.

59 In the adjudication response Siemens made the following comments:

*""2.3 The Respondent notes that the report provided by Evans & Peck only appears to only [sic] assess the direct manhours required for the fabrication of the pipework … and contains no allowance for administration costs.*

*By comparison, at paragraph 14 if [sic] the Payment Claimant [sic] and paragraph 3.1 of the Adjudication Application the Claimant confirms that its calculation of the "actual" manhours … contains both labour costs for fabrication and labour costs for administration. This is confirmed by the material provided at Annexure L of the Adjudication Application.*

*Accordingly the comparison the Claimant seeks to make between the figures in the expert report and the "actual" hours is flawed as it has not allowed in its "planned" figure of 8,061 manhours for any administration / project management manhours. …*

*2.5 The Respondent refers to its submissions regarding the "planned hours". Further it says that the emails provided by the Claimant at Attachment 1 (which appear to relate to the Claimant's quote for the first tender not for the Contract) show that the figure of 5103 manhours was for fabrication work and that separate figures were provided for administration / management costs. In fact the Claimant included in its lump sum price an amount for management costs for Package 1A and $30,000 for management cost for Package 1B thus amounting to a total cost of $60,000 for management under the Contract. On the hourly rates for Edmen and Tolco set out in item 2 of Attachment A to the Payment Claim (ie $39.03 / hr) this appears to show an allowance in the lump sum price of 1537.28 manhours for administration.*

*In order to undertake an accurate assessment of the "planned" vs "actual" comparison it would be necessary to include allowance for these additional [administration / project management] manhours in the calculation.*

*Further, it would appear from these figures that the Claimant had allowed for administration / supervision in the order of 1 hr supervision per 3 hrs fabrication (ie 1537.28 administration manhours for 5103 fabrication hours).*

*On that basis it may be appropriate to assume the same ratio with the adjusted figures provided by Evan & Peck (ie to allow 2687 manhours for administration) when comparing the "planned" and "actual" figures. This would lead to a comparison of 13,126.40 manhours actual vs 10,748 manhours planned. As set out below, this figure should then be further adjusted to allow for the manhours paid for by way the Respondent [sic] for variations and*

*the initial acceleration payment of $21,080 and the manhours expended in rework and cause by the Claimant's own acts."* (Emphasis added)."

60 If as suggested in this submission Tolco in fact included administration charges then plainly on the face of item 2 at attachment A of the payment claim they are charges for administration charges for the whole of the project.

61 It is notable that the adjudicator has not referred to this matter. He has not referred to the claim in 2.5 of appropriate way to deal with them on a proportional basis and has not referred to the adjustments referred to in the concluding sentence of 2.5. In the adjudicator's comments which are quoted above he refers to the absence of supporting information in the adjudication response. It would seem a reasonable inference that he has overlooked the reference in 2.5 to the information already before him in Tolco's payment claim.

62 The failure by an adjudicator to consider a submission by a party will invalidate an adjudication determination either because there has been a failure of procedural fairness or there has been a failure to consider bona fide the matters required by s22 to be considered, namely, the submissions of the parties. In ***Brodyn Pty Ltd v Davenport & Anor*** (2004) 61 NSWLR 421 at [55] Hodgson JA 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 390–391. 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."*

63 In ***Timwin Construction v Façade Innovations*** [2005] NSWSC 548, it was alleged that an adjudicator had failed to comply with both of these requirements. McDougall J at [37]-[40] said:

*"[37] Insofar as one can gather from reading the determination, he [i.e. the adjudicator] appears not to have read the submissions at all. He certainly does not indicate that he has gained any enlightenment as to the argument in relation to variations from Façade's submissions. Further, when dealing with the other reasons given by Timwin in support of its claim that it was not liable to pay, he dealt only with the arguments raised in the payment schedule.*

*[38] There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in **Brodyn**. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in **Roberts v Hopwood** [1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

*[39] That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see **Zhang v Canterbury City Council** (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

*[40] As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in **The Queen v Hunt; ex parte Sean Investments Proprietary Limited** (1979) 180 CLR 322 (Mason J) and in **Evans v Marmont** (1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq)".* (Emphasis added)

64 McDougall J held that because the adjudicator did not turn his mind to those submissions, he did not deal with the real dispute: see [41]. He accordingly held that the adjudicator *"did not attempt in good faith to exercise the power given to him by the Act"*, which rendered the determination void. In addition, it followed that by disregarding the plaintiff's submissions in that case the adjudicator also denied the plaintiff natural justice: see at [43]-[44].

65 In the present matter the same result should follow and accordingly the parties should bring in short minutes in both matters.

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