JUDGMENT : **Einstein J :** Supreme Court of New South Wales **:** 5th May 2005

The proceedings

1 These proceedings seek to impugn an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"].

2 The questions which arise are highly technical concerning the proper construction of particular sections of the Act.

The facts

3 There is no issue as to the facts. They are in short compass. The parties are agreed as to the following matters of fact:

- *the plaintiff, Taylor Projects Group Pty Ltd ["Taylor"], as head contractor, and the first defendant , Brick Dept. Pty Ltd ["Brick"], as subcontractor, are parties to a construction contract. The contract was amended to provide for payment of payment claims weekly within the meaning of the Act. The contract was for Brick to carry out brick and block laying work, at agreed rates, at a site in Holden Street, Ashfield;*
- *at 10:41pm on Wednesday, 5 January 2005 [all relevant events took place in 2005. For convenience, the reference to 2005 is omitted from subsequent dates], Brick faxed a payment claim under the Act for $158,490.82 to Taylor at its office at Suite B7, 12-14 Solent Crescent, Norwest Business Park in Baulkham Hills;*
- *the payment claim was received at Taylor's office at 10:47pm that day, although no officer of Taylor saw the payment claim until Monday, 10 January, when Taylor's office re-opened after the Christmas vacation;*
- *Taylor did not pay the amount claimed. Rather, at about 10:15 am on Thursday, 20 January, Taylor delivered, by courier, a payment schedule, stating the amount payable as $nil, to Brick's principal place of business at 52 Western Crescent, Gladesville. A courier also delivered a copy of the payment schedule to Brick's registered office at Suite 202, Roma Arcade, 413-417 New South Head Road, Double Bay at 11:00 am on 20 January;*
- *at 5:02 pm on Thursday 20 January, having received the payment schedule earlier that day, Brick sent a facsimile to Taylor recording that it had served a payment claim on 5 January, observing that Taylor had failed to pay the claimed amount by the due date and then stating:*

  Your Company has 5 business days in which to serve a payment schedule on the Claimant or pay the Claimant the whole amount of the payment claim. If, within that time, your Company fails to pay the whole amount, the Claimant will proceed to adjudication. If your Company fails to serve a payment schedule within that time, your Company will be barred from lodging an adjudication response by Section 20(2A) of the Act.
- *Taylor responded to that fax later that day asserting that the payment claim had not been served until 6 January, that the payment schedule was therefore not due until 20 January and that the payment schedule served earlier that day thus complied.*
- *on Thursday, 27 January Taylor's solicitors sent a separate response to Brick's 20 January facsimile, as follows:*

  The statements made in your [20 January] letter are incorrect.

  Your Company has been served with a payment schedule and this occurred on 20 January 2005, within the time specified by the Act.

  Regardless of the view that you have taken, since you have elected to proceed to adjudication your notice of 5 business days is unnecessary since the payment schedule has already been served on you.

  Accordingly, your advice that Taylor Projects will be barred from lodging an adjudication response is incorrect.
- *on Friday, 11 February Brick lodged an adjudication application with Adjudicate Today, a division of the third defendant, Mediate Today Pty Ltd (Mediate), an authorised nominating authority under the Act;*
- *Mediate appointed the Adjudicator as adjudicator on Monday, 14 February. The appointment was notified to Taylor that day;*
- *on Friday, 18 February Taylor lodged an adjudication response with the Adjudicator;*
- *on Monday 28 February, the Adjudicator determined the amount of the progress payment to be paid by Taylor as $101,459.31. In his reasons the Adjudicator decided, inter alia, that:*
  - *(a) Brick's payment claim was served on 5 January*
  - *(b) accordingly, Taylor had to serve its payment schedule under Division 1 [Division 1 of Part 3 of the Act] by 19 January and thus the payment schedule served on 20 January was out of time*
  - *(c) Brick's adjudication application was made under s17(1)(b), which applies when a respondent fails to provide a payment schedule under Division 1*
  - *(d) Brick notified Taylor of its intention to apply for adjudication, as required by s17(2)(a), on 20 January, "some hours after [Taylor] had served its purported Payment Schedule"*
  - *(e) under s17(2)(b), Taylor had 5 business days <u>thereafter</u> to provide a payment schedule*
  - *(f) Taylor failed to provide a payment schedule under s17(2)(b), observing that the payment schedule served on 20 January was served "prior to" Brick's s17(2)(a) notice and that Taylor did not serve another*
  - *(g) Brick's adjudication application, which was required by s17(3)(e) to be made within 10 days after the end of the 5 day period referred to in sub-paragraph 0 above, was made on 11 February, "the last possible day"*
  - *(h) in making his determination, he was precluded by s22(2) from having regard to:*
    - *(i) Taylor's payment schedule (since it had not been served in accordance with either s14(4) or s17(2)(b)) or*

(ii) Taylor's adjudication response (since, by s20(2A), Taylor was precluded from lodging an adjudication response because of its failure to provide a payment schedule within the times specified in s14(4) or s17(2)(b)).

The suggested threshold issue

4 There is a threshold question in terms of the definition of the issues which fall for determination. As will appear from what follows, Taylor contends that there were a number of errors made by the Adjudicator. Taylor's case seeks to demonstrate these errors and contends that it must follow if the Court accepts that these errors were made then the determination should be declared void.

5 Brick on the other hand contends that the *first* issue is whether the errors alleged by the Taylor to have been made by the Adjudicator are of a nature that, if they be errors, render the Adjudicator's determination void. In this regard Brick cites ***Brodyn Pty Ltd t/as Time Costs and Quality v Davenport*** [2004] NSWCA 394 at [52] and [55] where the Court of Appeal (Hodgson JA, Mason P and Giles JA agreeing) held that this Court has power to declare void an adjudicator's determination if, but only if, the determination fails to satisfy one of the essential conditions laid down by the *Act*. [The Court of Appeal also held that a remedy in the nature of certiorari (s69 *Supreme Court Act* 1970) is not necessary to quash a determination which is void (at [52]) and is not available to quash one which is not void (at [58], [59])]. Those essential conditions were that:

· *the determination complies with the basic requirements of the Act;*

· *the* ***a****djudicator has bona fide attempted to exercise the power conferred by the Act;*

· *there has not been a substantial denial of the measure of natural justice that the Act requires.*

6 As to the first essential condition in **Brodyn,** the Court identified five basic requirements:

· *a construction contract between the parties (sections 7 and 8);*

· *service of a payment claim (section 13);*

· *the making of an adjudication application (section 17);*

· *reference of the application to an eligible adjudicator (sections 18 and 19)*

· *determination of the application (sections 19, 21 and 22) .*

7 The proposition for which Brick contends is that none of the matters raised by Taylor as suggested errors of fact or law constitute failure to satisfy an essential condition so that it is inappropriate for the Court to go beyond such a finding. In the alternative however Brick addresses each of the suggested errors contending that no error was made.

8 I propose to leave to the side for the moment the above described threshold issue and to address the substantive questions raised concerning the suggested errors.

The alleged errors

9 Taylor in essence alleges the Adjudicator made 2 errors:

· *he determined that Brick's payment claim was served on 5 January, rather than 6 January [summons paragraph 15(a). The matters in 15(b), (c) and (d) are said to follow axiomatically]; and*

· *he failed to conclude that the 27 January letter from Taylor's solicitor was "constructive resubmission" of the payment schedule [summons paragraph 15(e)].*

The date of service of the payment claim

10 Taylor has presented this issue in the following terms: *What is the meaning of "serve" in s13(1) of the Act? Noting that Brick provided its payment claim to Taylor by way of a facsimile sent at 10.41pm on Wednesday 5 January 2005 (which facsimile was not read by any Taylor employee until Monday 10 January 2005 – that is, the day when the Taylor office re-opened for business after the Christmas / New Year shut-down), was Taylor required by s14 of the Building and Construction Industry Security of Payment Act, 1999 ("the Act") to provide to Brick a payment schedule in response by 19 January 2005 (ie, 10-business days from 5 January 2005) or, by 20 January 2005 (ie, 10-business days from 6 January 2005), or by 3 February 2005 (ie, 10-business days from 10 January 2005)?*

Taylor's submissions

11 Taylor's submissions in this regard are as follows:

· *The Adjudicator made it plain on the face of his Determination [adjudication determination at page 5.8] that he did not consider the merits of either of Taylor's 20 January 2005 payment schedule or its adjudication response. The Adjudicator followed this course for the reasons that:*

· *the payment schedule was, in his opinion, served late (he considering that it should have been served on 19 January 2005 or* ***reserved*** *before 27 January 2005); and*

· *as a consequence, the Act operated to preclude Taylor from submitting an adjudication response [adjudication determination at pages 4 and 5].*

· *Brick's payment claim was sent* ***by facsimile*** *to Taylor's* ***business address, out of business hours*** *(ie at 10.47pm) on Wednesday 5 January 2005 [C Wickham's affidavit dated 8 March 2005 at [3] – [4]].*

· *Taylor did not in fact sight Brick's said payment claim until 10 January 2005 (when the office reopened after the Christmas/New Year shut down). Taylor says that the earliest that time under s14 of the Act could have begun to run was 6 January 2005, or alternatively on 10 January 2005 (when the payment claim came to its attention).*

- *Brick submits [outline submissions at [24] – albeit in the context of s.17 of the Act (the making of adjudication applications] that questions of the "timing" or taking of certain steps under the Act are not "essential matters", the breach of which would lead to a determination being void;* ***Brodyn Pty Limited v Davenport*** *[2004] NSWCA 394 at [54] – [55]. Taylor does not agree. While this matter is considered in more detail below, it is pertinent to note at the outset the comments of Einstein J in* ***Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited*** *[2003] NSWSC 903 at [38]: "Service being effected in accordance with the Act is critical as it governs the commencement of time limitations following such service. The consequence of non-compliance with the time limitation periods is harsh. As was submitted to the Court by Counsel for the Plaintiff, the Act exhibits "zero tolerance" for delay. To borrow a phrase from the world of contract, and in particular conveyancing, in a real sense* ***time is of the essence."*** *See also Einstein J at [52].*
- *Taylor's primary argument as to the invalidity of the Adjudicator's Determination turns on whether it had until 19 or 20 January 2005 to issue its Payment Schedule. That is so because:*
  - *(a) the Adjudicator decided not to have regard for Taylor's payment schedule and adjudication response as he considered that the payment claim was "served", for the purposes of s.13(1) of the Act, on 5 January 2005;*
  - *(b) if that interpretation and application of s.13(1) of the Act was incorrect, the Adjudicator's failure to have regard to Taylor's documents was itself in breach of s.22(2) of the Act and therefore amounted to a denial by him of natural justice [see TQM v Dasein [2004] NSWSC 1216 (3 December 2004), McDougall J at [28]. See also* ***Emag Constructions v High Rise Concrete*** *op cit, at [37]]; and importantly;*
  - *(c) if Brick's payment claim had not been "served" until 6 January 2005, then Taylor's 20 January 2005 payment schedule was indeed "provided" within the statutory 10-business days period permitted by s.14(4) of the Act, with the consequence that Brick's adjudication application dated 11 February 2005 [C Wickham's affidavit at [10]] was itself filed outside the time permitted by s.17(3)(b) of the Act.*
- *The primary issue therefore is the meaning of "serve" in s.13(1) of the Act.*
- *In* ***Capper v Thorpe*** *[[1998] HCA 24 at [26]] the High Court observed that, "… the ordinary meaning of served … requires that the writing be brought to the attention of the purchaser". Taylor respectfully urges this Court to adopt that view with respect to the meaning of "serve" in s.13(1) of the Act.*
- *That position is consistent with the reasoning of Einstein J in* ***Emag Constructions Pty Limited v Highrise Concrete Contractors****, op cit, at [45] to [59].* ***Emag*** *was a case concerned with when an adjudication application had been served. The claimant relied upon a letter sent by post to a solicitor/recipient who in turn denied that it had been received at all, and further denied that they were instructed to accept service. Einstein J held that service had not been effected or could not be proved [compare the outcome of a similar inquiry in* ***Barclay Mowlem Constructions Pty Ltd v Tesrol Walsh Bay Pty Ltd****]. His Honour did so by, inter alia, drawing on the reasoning of Young J in* ***Howship Holdings Pty Limited v Leslie*** *[(1996) 41 NSWLR 542, see Einstein J Judgment at [45] – [50], [55] and [57] that the question of service of the Claimant's Adjudication Application turned on the question of when that document "came into the possession of" the recipient.*
- *By comparison, Brick argues for a more narrow requirement under s.13(1), namely one where the Claimant need do no more than prove receipt of the payment claim at the Respondent's place of business, irrespective of the day or time of that receipt (and irrespective of whether the service was personal or not); see* ***Brick's Outline Submissions*** *at [38]. Brick submits that s.31(2), dictates how this court is to interpret "serve" in s13(1) of the Act.*
- *In Taylor's submission that approach is incorrect:*
  - *(a) Section 31 of the Act [which section, it is to be noted], does <u>not</u> apply to, or govern the meaning of, "serve" in the context of how a payment claim is to be provided under s.13(1) of the Act. Section 31 of the Act is concerned with the service of what are said to be "notices". Neither a payment claim nor a payment schedule, nor an adjudication application is a "notice" under the Act. Rather, "notices" are documents separately referred to within Pt 3 of the Act; see for example s.16(2)(b) and s.24(1)(b). The requirement to deliver documentation to invoke the various steps under the Act (such as to "serve" payment claims and to "provide" payment schedules and the like under Pt 3 of the Act) are separately defined in each of operative provisions (section 13 and section 14 respectively). Each step in the adjudication process is separately and differently described by the legislature. For example, a claimant may "serve" a payment claim [s.13(1)], while a respondent is to "provide" a payment schedule [ss.14(1)] and [14(4)(b)]. These differences are a deliberate and substantive. "Service" and "receipt" (like "serve" and "provide") are not equivalent concepts; see* ***TQM v Dasein*** *[[2004] NSWSC 1216 at [4] and [5] per McDougall J], and Barclay* ***Mowlem v. Tesrol Walsh Bay*** *[[2004] NSWSC 1232 at [42 and [49]]. The examples set out in s.31 of the Act by which "notices" under the Act may be served apply to the limited occasions when a party does in fact utilise the "notice" provisions in the Act.*
  - *(b) It is no coincidence that wherever the Act refers to the payment claim, the requirement is for it to be "served" (see for example sections 14(1), 14(4)(a), 16(1) (a). This is a clear indication from the legislators that* ***service*** *and no other form of delivery or provision of a payment claim is an essential requirement for invoking the serious consequences under the Act. It is also no coincidence that similar strictures do not apply to the delivery of a payment schedule, an adjudication application or an adjudication response. "Service" is however required where a notice is to be given to suspend the works (e.g. section 15(2)(b)).*
  - *(c) It follows that "serve" in s.13(1) is to be given its commonly understood meaning - of personal service, or service within business hours and on business days, or being brought to the attention of the recipient;* ***Howship Holdings Pty Ltd v. Leslie*** *[(1996) 41 NSWLR 542] at 544B per Young J]. This is the plain and ordinary*

meaning that flows from a construction of s.13(1) and Pt 3 of the Act as a whole; ***Kingston v Keprose Pty Ltd*** *[(1987) 11 NSWLR 404].*

(d) *To find otherwise would be to effectively permit a claimant to deliberately delay sending a payment claim by facsimile until after usual business hours and thereby reduce a recipient's time in which to reply by one day (ie, to 9-business days). Such a construction would not give effect to the purpose of this legislation – which creates a regime that allows for tight but defined periods in which the parties are to take certain prescribed steps leading to an adjudication;* ***Macquarie Bank Ltd v. Fociri Pty Ltd*** *[(1992) 27 NSWLR 203 at 217 per Kirby P].*

(e) *Under s 14 of the Act, the respondent's time limit in which to provide a payment schedule is* ***"10-business days after the payment claim is served"****. The word "business" is important [as is illustrated in the context of "notices" by s.31(1)(b)]. It means "****normal office hours****". Service on a business day ordinarily means service within business hours; see* ***Mohamed v Farrah*** *[[2004] NSWSC 482]. Under s.13(1) of this Act there is no justifiable basis to find otherwise.*

(f) *Service of a payment claim after normal office hours would mean that that day does not count for the purpose of s.13(1) or 14(4). To find otherwise would erode the recipient's already confined 10-business day period in which to reply. By deliberately withholding a payment claim until the late hours, a claimant could in reality, turn the 10-business day limit into a 9-business day limit. Such could not have been the intent of Parliament when the strict and draconian consequences of the Respondent missing a deadline are considered;* ***Emag Constructions Pty Limited v Highrise Concrete Contractors*** *op cit, at [38], and (in a post-****Brodyn*** *analysis)* ***Barclay Mowlem v. Tesrol Walsh Bay Pty Ltd****, op cit, at [10] – [14].*

(g) *In the present case, the prejudice of such a (some might say, "cynically") late provision of a payment claim is compounded by the payment claim being served during the commonly taken Christmas/New Year industry shut down.*

Decision

12 Brick's written submissions on this issue are accepted and adopted in what follows.

13 As a preliminary point it may be noted that the legislature may deem service to have taken place by means which do not, in fact, bring the document served to the attention of the person served: *Capper v Thorpe* (1998) 194 CLR 342 at [23].

14 It may be noted that ***Capper, Howship Holdings Pty Ltd v Leslie*** (1996) 41 NSWLR 542 and ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** [2003] NSWSC 903 are each cases in which the Court, having determined that service had not been effected in accordance with the statutory deeming provision, then dealt with whether service had nonetheless been effected at common law. I note that Brick did not contend that service was effected at common law.

Section 31(1)

15 Section 13(1) relevantly provides that a claimant "*may* ***serve a payment claim*** *on the*" respondent (emphasis added). Thus s13(1) uses the language of "service" on a person. Similarly, s31(1) relevantly provides "*Any* ***notice*** *that by or under this Act is authorised or required to be* ***served*** *on a person may be served on the person*" by any of 5 enumerated methods (emphasis added). Hence s31(1) also uses the language of "service" on a person. The entitlement of a claimant to choose to serve ("*may*") in s13(1) is one which is "*authorised*" under the *Act* within the meaning of that word in s31(1).

16 Hence ss13(1) and 31(1) correlate other than for the use of "*payment claim*" in the former and "*notice*" in the latter. The issue comes down, not to the meaning of the word "*serve*", but to whether a "*payment claim*" answers the description of "*notice*" within the meaning of s31(1). There appears to be no authority on the issue. The following matters relied upon by Brick support the proposition that a 'payment claim' does answer the description of 'notice' within the meaning of s 31(1):

· "*Notice*", when used as a noun (as it is in s31(1)), is a word of wide import capable of encompassing many forms of documents by which information is conveyed. A payment claim, which identifies construction work, indicates the amount of the progress payment claimed and states it is made under the *Act* [S.13(2)], is aptly described as a "*notice*".

· If "*notice*" in s31(1) had the limited meaning for which Taylor contends, namely to apply only to service of "notices" of intention to suspend work [ss 15(2)(b), 16(2)(b) and 24(1)(b)] or, presumably, to service of "notices" of an adjudicator's acceptance or service of "notices" of withdrawal of an adjudication application [see s19(1) and 26(2)(a)], then s31 would have a severely neutered operation notwithstanding its position in Division 4 dealing with "*General*" matters in the context of Part 3, dealing with the "*Procedure for recovering progress payments*". Such a limited role for s31 is inconsistent with its apparently intended general role in the *Act*.

· The *Act* establishes a statutory procedure to ensure persons who undertake construction work receive progress payments. In essence the *Act* sets out a detailed and prescriptive code by which such progress payments can be obtained. Taylor's submission, if accepted, dilutes that codification. It has the effect of requiring parties to have regard to legal principles not directly discernable from the *Act* to determine how to satisfy a requirement of the *Act* which, as Taylor observes, has been described as "critical". Such an approach does not effect the statutory intention apparent in s3.

· Taylor's construction is, in effect, a requirement for personal service. Absent personal service, and thus knowledge that the payment claim had been delivered into the hands of the respondent, the claimant could not

be certain when the payment claim came to the attention of the person served (eg where left at the respondent's ordinary place of business, or sent by post or, as here, sent by fax). The claimant would therefore not be in a position to exercise the various statutory remedies the *Act* otherwise provides (to sue, under s15(2)(a)(i), on the debt which arises on the non-provision of a payment schedule or to make an adjudication application under s15(2)(a)(i)). The *Act* does not provide any means for substituted service where a recalcitrant respondent is avoiding personal service. Taylor's construction does not achieve the object of the *Act* of ensuring persons who undertake construction work receive progress payments by following a simple and explicit statutory procedure.

· Taylor's construction gives rise to a very real practical problem. Where the respondent is a corporation the question which arises is as to the "attention" of which officer the payment claim must be brought? Presumably the relevant officer must have a sufficient level of seniority within the organisation [In ***CGU Workers Compensation (Vic) Ltd v Carousel Bar Pty Ltd*** (1999) 151 FLR 270 at [52] Gillard J held that whether a person had authority to accept service on behalf of a company and whether a company has notice sufficient to establish personal service will depend on all the circumstances]. Taylor's construction requires a claimant to conduct an investigation into the internal processes of the corporate respondent to be satisfied the payment claim has been brought to the attention of the right person. That cannot have been the intention of the legislature.

17 There is a related matter going to Taylor's submission that service under s13(1) should be construed to mean *"brought to the attention of the person served"*. The effect of that submission is that the payment claim is not served until it is **received and noticed** by the person served: in ***Mohamed*** at [42]-[44], Barrett J observed that a document which is received and noticed by the addressee is duly served, even if service has not been effected in accordance with a particular facultative statutory regime. Taylor observes that "service" and "receipt" are not equivalent concepts [PS 13(a), citing ***TQM v Dasein*** [2004] NSWSC 1216. See also ***Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors*** [2005] NSWSC 378 at [25]-[27]. The same could be said about "receipt" and "noticed"].

18 The legislature was careful to distinguish between the concepts when it wished to do so. Sections 17(2)(b), 20(1) and s31(2) depend upon "receipt". Each is instructive. The first two relate to the entitlement of a respondent to provide an answer to a claimant's claim – a payment schedule and an adjudication response respectively – for the purpose of foreshadowed or actual adjudication. In contradistinction to s13(1), the legislature has been careful to ensure that a respondent is not shut out from providing those responses until a particular time has expired after <u>receipt</u> of the triggering document. In that sense, receipt gives the respondent a greater level of protection than "mere" service under s13(1). Similarly, s31(2), which deals with service by post or facsimile addressed to the person's ordinary place of business under s31(1)(c), provides that "service" is taken to have been effected when the notice is "received" at that place.

19 Hence the legislature plainly considered "service" under the provisions of s31(1) did not incorporate "receipt" as the critical element, absent an express statement to that effect. Yet Taylor's submission treats service under s13(1) as requiring not only "receipt" but also "noticed". It may be inferred that had the legislature so intended it would have said so.

Service to be in business hours?

20 ***Mohamed v Farrah*** [2004] NSWSC 482 at [52-53] is authority for the proposition that, absent a specific limitation in the service provision relied upon, service which takes place at any time of the day, whether within or without business hours, is regarded as service on that day. Service outside business hours does not turn the 10 business day limit (s14(4)(b)(ii)) into a 9 business day limit. The day of service is not counted so that the respondent has 10 full days thereafter to provide a payment schedule [to be precise the respondent has 10 business days, plus the number of hours left in the day of service after being served, plus any non business days during the 10 business day period].

21 There is no such specific limitation in s13(1) or s31(1)(c). Indeed the fact that the legislature saw fit in s31(1)(b) to specify that service by lodging at the person's ordinary place of business was required to take place *"during normal office hours"* makes clear that other modes of service set out in the *Act* do not have such a limitation.

22 It may be noted that in ***Cornick Pty Ltd v Brains Master Corporation*** (1995) 19 ACSR 20, although not dealing with the time of service, Whitlam J held that service of a statutory demand at the registered office outside ordinary business hours was good service under s220(1) of the C*orporations Law*. [Compare s31(1)(b) which provides that service by lodging a document at the ordinary place of business must take place "*during normal business hours*"].

23 The fact that a document which has been served in accordance with a statutory provision does not, or even, to the knowledge of the server, will not, come to the knowledge of the person served, does not render the service invalid*:* ***Re Pyramid Building Society Ltd (in liq); Ex parte Hodgson*** (1994) 13 ACSR 566 at 569]. Neither matter is referred to, expressly or impliedly, in s31(2).

Holding

24 For the above reasons, the holding is that Taylor's payment schedule was required to be provided by 19 January 2005.

Section 109X(1)(a)

25 Bearing in mind the above holding it appears unnecessary for the Court to determine Brick's alternative submission. The submission was to the following effect:

- even it had been the case that Brick was unable to rely on s31(1)(c), service was nonetheless effected in accordance with s109X(1)(a) of the *Corporations Act*;
- that section provides that for the purposes of any law a document may be served on a company by leaving it at the company's registered office. Section 13(1) is such an "any law";
- Taylor's registered office was Suite B7, 12-14 Solent Crescent, Norwest Business park, Baulkham Hills. Taylor has admitted the payment claim was received at that address on 5 January 2005 by facsimile [PS1, referring, inter alia, to DS 8].
- The "leaving" of a document by facsimile at the registered office would be good service within the meaning of s109X(1)(a).

Constructive re-submission of the payment schedule

26 This question as formulated by Taylor is as follows: *If it is found that Taylor was required by s14 of the Act to provide its payment schedule to Brick by 19 January 2005 (which it did not do), and having regard to the agreed facts that:*

(a) Taylor provided to Brick a payment schedule on 20 January 2005 at approximately 10am;

(b) On that same day (20 January 2005) at approximately 5pm Brick sent a facsimile to Taylor asserting its service on 5 January 2005 of its payment claim, asserting a failure by Taylor to reply by issuing a payment schedule by 19 January 2005, and notifying Taylor under s17(2)(b) of the Act that Brick would proceed to adjudication if no payment schedule was provided within 5-business days thereafter;

(c) Later on that same day (20 January 2005) Taylor advised Brick by facsimile that the payment claim had not been served until 6 January 2005, and that therefore its payment schedule of 20 January 2005 complied with the timing requirements of the Act; and that,

(d) On 27 January 2005 Taylor advised Brick by facsimile that its payment schedule had been served in accordance with the Act, and that Brick's notification of allowing 5-business days for the service of a payment schedule was, "…unnecessary since the payment schedule has already been served on you";

did sections 14 and/or 17 of the Act operate to preclude the Adjudicator from having regard to Taylor's 20 January 2005 payment schedule because Taylor did not also take the step of physically (re)providing to Brick with its 27 January 2005 facsimile (ie, within 5-business days of 20 January 2005) another copy of that said payment schedule?

Taylor's submissions

27 Taylor's submissions in relation to this matter were inter alia as follows:

- at its core the matter for determination under this question is whether a respondent must physically re-submit a copy of a payment schedule already provided [by operation of s17(2)(b) of the Act] where that payment schedule was already provided, but provided after the expiry of the time permitted by s14(4)(b);
- Taylor firstly submits that s17(2)(b) is to be construed to operate in circumstances where the respondent has failed to provide any payment schedule at all. To construe that section so as to require a respondent to physically resubmit a payment schedule in identical form immediately after (ie, 1 day, or 5 days after) it has already been submitted (albeit submitted late) would be absurd. The well established rule of construction that absurdity and inconvenience are to be avoided is apposite; ***R v Bolton; Ex parte Beane*** (1987) 61 ALJR 190 at 204 per Gaudron J (Mason CJ, Wilson and Dawson JJ agreeing). See also, ***R v Overseers of the Parish of Tonbridge*** (1884) 13 QBD 339 at 342 per Brett MR;
- secondly, Taylor submits that the responsive letter of its solicitor dated 27 January 2005 which referred in terms to the 20 January 2005 payment schedule amounted to a constructive resubmission of the payment schedule in any event;
- thirdly, Taylor submits that were this Court to construe s17(2)(b) of the Act in a manner that required the respondent to physically resubmit its payment claim in circumstances where it had already been provided (albeit late) to the claimant, and thereby find that the infringement (of not resubmitting) complained of by Brick (and found by the Adjudicator) had the effect of precluding the Adjudicator from later having regard to either the payment schedule or the subsequent adjudication response, such a result would promote public inconvenience. That is, a technical infringement incapable of causing prejudice to the claimant or adjudicator would have been found to substantially prejudice the respondent's rights in the adjudication process. This Court should strain against so construing s17(2)(b); ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at [91] – [93] and [97] per McHugh, Gummow, Kirby and Hayne JJ;
- the Act does not in specific terms deal with the situation arising here where a respondent arguably provides a payment schedule after the expiry of the s14(4) period, but before the claimant further invites submission of such a payment claim under s17(2)(b). However, and by analogy to logic underpinning the pre-***Brodyn*** decision of ***MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd*** [2004] NSWSC 103, the Act should not be construed in such a way to preclude the **a**djudicator from reviewing Taylor's payment schedule and adjudication response where the payment schedule was in fact physically received by the claimant <u>before</u> the claimant's later invitation for it under s17(2)(b). The time-frames and requirements set up by that section need to be construed differently and pragmatically having regard to the steps that the parties may have already taken under, or purportedly under, sections 13 and 14; see ***MPM Constructions v Trepcha*** at [32].

Holding

28 In my view submissions by Brick are of substance. In what follows they are adopted as correct.

29 Under s14(1) a person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule.

30 If the respondent does not provide a payment schedule within 10 business days after the payment claim is served and does not pay the amount claimed then, by s15(2)(a)(ii), the claimant may make an adjudication application under s17(1)(b).

31 In that circumstance, the respondent must be given another opportunity to provide a payment schedule. That opportunity is given by the claimant, under s17(2)(a), notifying the respondent of the claimant's intention to apply for adjudication. The respondent then has, under s17(2)(b), *"an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice"*.

32 A payment schedule is defined in s4 to mean a schedule referred to in s14. Under s14 a payment schedule must:
(a) identify the payment claim to which it relates (s14(2)(a));
(b) indicate the amount of the payment the respondent proposes to make (s14(2)(b));
(c) if that amount is less than the claimed amount, indicate why it is less (s14(3));
(d) if it is less because the respondent is withholding payment, indicate the reasons for withholding (s14(3)).

33 The document served on Brick on 20 January satisfied the definition (it identified the payment claim as *"Tax invoice 000513"*, it stated the amount proposed to be paid as *"$nil"*, and it set out reasons), albeit that it was provided <u>after</u> the time required by s14(4). However, because it was served <u>before</u> the time required by s17(2)(b), since it was not served *"after"* Taylor received Brick's s17(2)(a) notice, it did not satisfy s17(2)(b).

34 As indicated earlier, Taylor contends that the 27 January letter from its solicitor constituted a *"constructive resubmission"* of the payment schedule provided on 20 January.

35 The 27 January letter was not itself a payment schedule – it did not identify the payment claim to which it related, it did not indicate the amount proposed to be paid and it did not contain any reasons. Although a payment schedule need not follow any particular level of formality [***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [76] – [78] (Palmer J), cited with approval in ***Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*** [2004] NSWSC 716 at [8] (McDougall J) and ***Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*** [2004] NSWSC 1232 at [11] (McDougall J). **t**he Court of Appeal's criticism of ***Multiplex*** in ***Brodyn*** at [56] did not extend to this aspect of Palmer J's reasoning – see the second ***Barclay*** case at [14]], it must nonetheless comply with the basic requirements.

36 Further, the 27 January letter did not purport to be given under s17(2)(b). That is, it did not purport to be the provision of a payment schedule. To the contrary, it spurned Brick's invitation to submit a payment schedule. The premise on which the letter is written is that Taylor had **already served** a payment schedule *within the time specified by s14* – a proposition made, expressly or impliedly, in each paragraph in that letter. In that circumstance, so Taylor's solicitor asserted, there was no necessity to serve another and Taylor declined the invitation to do so. The position taken by Taylor's solicitors is consistent with that taken by Taylor 7 days earlier, namely that the payment schedule served on 20 January was within time.

37 Even if this be incorrect, there is another, and equally fatal, matter. The 27 January letter was not provided by Taylor. It was provided by Taylor's solicitor.

38 Section 20(2A) requires *"the respondent"* to have provided a payment schedule within the time specified in s17(2)(b). In ***Emag Constructions Pty Ltd v Highrise Concrete Contractors Pty Ltd*** [2003] NSWSC 903 at [59] the Court held that the general principles of actual or ostensible authority in solicitors to receive documents must yield to the strictures of the *Act*, which must be complied with in terms.

39 Provision of a payment schedule by a respondent's agent does not comply with the "strictures" of s20(2A), which requires provision by the respondent.

Holding

40 The holding is that section 17(2)(b) merely provides a respondent with an (additional) opportunity to provide a payment schedule when it has failed to do so in accordance with s14 and to do so <u>after</u> the claimant has given notice of its intention to apply for adjudication. The respondent may ignore the opportunity [in which case it loses the opportunity to lodge an adjudication response – s20(2A)] or it can provide a payment schedule. If it chooses to provide a payment schedule then it might choose to provide one identical to that which it has previously provided or it might choose to provide a different payment schedule. However the *Act* is not to be construed to require the claimant or the **a**djudicator to guess whether a respondent relies on a payment schedule for the purpose of section 17(2)(b) when it has not been provided in accordance with that section.

41 It is significant, further, to approach the formal requirements of the Act by reference to the provisions of the Act working backwards from section 22(2).

42 Section 22 is headed "Adjudicator's determination" and in subsection (2) provides, inter alia, that in determining an adjudication application the **a**djudicator is ***only*** to consider a number of nominate matters. Those matters include in section 22(2)(c) the following: *"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."* [emphasis added]

43 Next of relevance is the "Adjudication responses" section 20(2A) which provides: *"The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant **within the time** specified in section 14(4) or 17(2)(b)."* [emphasis added]

44 Finally of relevance is section 17 dealing "Adjudication of applications". Section 17(2)(b) provides that an adjudication application to which subsection (1)(b) applies cannot be made unless: *"the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days **after**_receiving the claimant's notice."* [emphasis added]

45 During the course of the taking of submissions, particularly from Mr Miller, the Court raised difficulties which may arise in the event that the submissions put by Taylor were accepted. These include, for example, a circumstance where:

(1) a respondent provided/served a payment schedule outside of the time stipulated in s14(4)(b) ;

(2) the respondent, before receiving a s17(2)(b) notice, proceeded to provide one or more variants of the already late payment schedule or alternatively purported to submit an entirely new form of payment schedule;

(3) the respondent then receives the section 17(2)(b) Notice.

46 During the course of argument Mr Miller was forced to accept that his submission [that any form of payment schedule which may have been sent out of time in the first instance could be relied upon without the respondent resubmitting it after receipt of the s17(2)(b) notice] runs into a particular difficulty. Mr Miller's proposition can only be accepted if it also be accepted that a respondent wishing to rely upon a payment schedule provided outside of the times stipulated for in s14(4)(b) must be pre-empted from being in a position to take up what the Act appears to offer [namely, an **entirely fresh** opportunity after the s17(2)(b) notification to furnish such payment schedule as it may desire, to fall for assessment by the **a**djudicator].

47 Other difficulties may arise if the submission pursued by Taylor be accepted. All of these difficulties stem from any attempt to give a payment schedule which is inefficacious in terms of mention in the Act, a part to play in the scheme provided for by the Act.

48 It is appropriate presently to note the strong contention by Taylor that the measure of natural justice that the Act requires to be given was not given in the particular circumstances where:

- the payment schedule had been submitted by courier on 20 January only approximately seven hours before Brick sent a facsimile to Taylor [taking issue with the service in time of the payment schedule and indicating that Taylor had five business days in which to serve a payment schedule on Brick or to pay Brick the whole amount of the payment claim];
- one hour later that same day, Taylor's solicitors by facsimile made the point that the payment claim had not been served until 6 January and that the payment schedule was therefore not due until 20 January and that the payment schedule served *earlier that day* therefore complied;
- Taylor's solicitors sent the above-described separate response to Brick's 20 January facsimile, doing so on 27 January, making the point in that response that the payment schedule *had already been served* on Brick.

49 The point was made in Emag that the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; that the time limits under the Act are strict and that the consequences of not complying with stipulated time limits may be significant. In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination. The **a**djudicator is not shown to have erred in failing to consider the payment schedule provided by Taylor on 20 January 2005.

50 Section 17(2)(b) is not satisfied by providing a document which does not *ex facie* satisfy the statutory requirements for a payment schedule and does not even purport to be a provision of a payment schedule.

51 Taylor's submissions as to "technical infringement" and "time-frames and requirements" set up by section 17(2)(b) are rejected. The Act requires to be construed in the orthodox fashion – in accordance with the ordinary meaning of the words used.

Finding

52 The **a**djudicator was precluded by s22(2)(d) from considering the payment schedule provided by Taylor on 20 January 2005.

Essential conditions laid down by the Act

53 The above findings make it strictly unnecessary to determine whether had the **a**djudicator fallen into error, the determination would nonetheless not be void for failure to satisfy an essential condition of a valid determination under the Act.

54 The contention by Taylor had been that such a failure arose because:

(a) the **a**djudicator assessed the validity of Brick's adjudication application by reference to the requirements of a section 17(1)(b) application, thus invoking section 17(3)(e) as to time for service of the application, rather than those of a section 17(1)(a)(i) application, to which section 17(3)(c) applies; and

(b) the **a**djudicator's refusal to consider Taylor's payment schedule or adjudication response was in breach of section 22(2)(d).

55 In that regard, Taylor had sought, as indicated, to identify two errors of fact or law by the **a**djudicator which led to those failures, namely:

(a) the **a**djudicator's alleged incorrect conclusion that Brick's payment claim was served on 5 January rather than 6 January, leading to the suggested error;

(b) the suggested error that the **a**djudicator had incorrectly failed to conclude that the letter which referred to the earlier service of, but did not enclose the payment schedule, constituted the provision of a payment schedule within section 17(2)(b).

The date for service of the adjudication application

56 This matter related to the third basic requirement. Taylor did not dispute that Brick had made an adjudication application. It had rather contended that the **a**djudicator fell into error by assessing the time in which the application must be made by reference to the requirement in section 17(3)(e) rather than the requirement in section 17(3)(c). Section 17(3)(c) applies to an application under section 17(1)(a)(i) where a payment schedule has been provided but for an amount less than the payment claim.

57 Had the matter required consideration the holding would have been:

(1) that the question of timing under section 17 is one of "the more detailed requirements" of the Act;

(2) that question of timing has been addressed, then an error will not make the determination void, although a failure to address that question may indicate that there was not a bona fide attempt to exercise the power;

(3) to answer the question of whether the adjudication application was made under s17(1)(b) or s17(1)(a)(i) required the **a**djudicator to decide whether Taylor had provided a payment schedule under Division 1 of Part 3 of the Act;

(4) that, in turn, required the **a**djudicator to decide whether Taylor had provided a payment schedule to Brick within 10 business days after the payment was served, as required by s14(4)(b)(ii);

(5) that, in turn, required the **a**djudicator to require when Brick had served its payment claim, there being no issue that Taylor had not served its payment schedule until 20 January.

58 The **a**djudicator considered the question of the date of service of Brick's payment claim at pages 2 to 3 of the reasons for determination and concluded that it had been served on 5 January. That conclusion led inexorably to the position that Taylor's payment schedule was served outside the period required by s14(4)(b)(ii), that Brick's subsequent adjudication application was thus made pursuant to s17(1)(b) and that its validity was therefore to be assessed against the time period set out in section 17(3)(e). Hence the question of timing identified was addressed by the **a**djudicator.

59 The holding would have been:

(1) that any error in the **a**djudicator's conclusion is not a failure to satisfy one of the basic requirements, noting that no contention was advanced to suggest that the **a**djudicator lacked bona fides in addressing the question;

(2) in any event, the determination shows a carefully reasoned analysis of the question;

(3) hence no issue of natural justice would appear to arise.

The failure to consider the payment schedule or the adjudication response

60 This relates to the fifth basic requirement, namely, the determination of the adjudication application. Again, Taylor did not dispute that the **a**djudicator determined the adjudication application. Taylor, rather, contended that the **a**djudicator fell into error by not considering matters [the payment schedule and the adjudication response], which s22(2) required him to consider.

61 Had the matter required consideration the holding would have been that:

(1) there is no invalidity if the **a**djudicator bona fide addressed the requirements of s22 as to what was to be considered;

(2) the **a**djudicator did so and concluded that he could not have regard to Taylor's payment schedule or adjudication response;

(3) the **a**djudicator reasoned that to be entitled to lodge an adjudication response Taylor was required by s20(2A) to have **previously** served a payment schedule under either s14(4)(b)(ii) or s17(2)(b). Taylor had done neither;

(4) as to s17(2)(b), that section required the payment schedule to have been served **after** Brick served its s17(2)(a) notice, whereas the only payment schedule served by Taylor was served before Brick served its s17(2)(a) notice. Taylor had by its letter of 27 January 2005 elected not to serve a payment schedule under s17(3)(b);

(5) the failure to provide a payment schedule under either s14(4)(b)(ii) or s17(2)(b) precluded him from having regard to the payment schedule provided on 20 January.

62 The holding would have been that:

(1) it follows that any error in the **a**djudicator's conclusion was not a failure to satisfy one of the basic requirements;

(2) it is true that at first blush a question of natural justice appears to arise because the **a**djudicator refused to consider Taylor's submissions;
(3) however, the natural justice which is to be provided, as already indicated, is that afforded by the relevant provisions of the Act, including s22(2)(d) [**Brodyn** at 57];
(4) providing that the **a**djudicator bona fide addresses the requirements of s22(2) as to what he is to consider [**Brodyn** at 56], there can be no breach of s22(2) so as to render the determination void.

63 The proceedings are stood over for argument as to costs, orders and questions concerning a stay of orders.

Mr D Miller (Plaintiff) instructed by Avendra Singh Strati & Kam
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