JUDGMENT : HIS HONOUR JUDGE HABERSBERGER: Supreme Court of Victoria at Melbourne, Commercial and Equity Division, Building List. 12th September 2007

1 By a summons filed on 3 May 2007, the plaintiff, Van Ek Contracting Pty Ltd ("VEC"), applied for summary judgment against the defendant, Roads Corporation (trading as VicRoads) ("VicRoads"), in the sum of $1,149,506.65 together with interest and costs. VEC's claim was made pursuant to the provisions of the Building and Construction Industry Security of Payment Act 2002 ("the Act"). The application was supported by two affidavits sworn on 2 and 28 May 2007 respectively by Cornelis Van Ek, the managing director of VEC. In opposition to the application, VicRoads relied on two affidavits sworn on 21 and 29 May 2007 respectively by Rex Atkins, the manager of the Contract Services Department of VicRoads.

2 At the end of the hearing, in order that the parties knew where they stood, I informed them that I had concluded that the summary judgment application should fail and that I would give written reasons at a later date. I now publish my reasons for reaching that conclusion.

3 Whilst a large number of issues were raised by VicRoads' defence and Mr Atkins' affidavits, in the end there were only two issues argued by VicRoads in opposition to the summary judgment application. They were:

(a) whether VicRoads had, within the meaning of s.25(2) of the Act, "commenced proceedings" against VEC; and

(b) whether the outcome of the adjudication determination on which the application was based was so flawed that it should be regarded as invalid or not bona fide.

The parties agreed that should I find in favour of VicRoads on the first issue, which I have, it was not necessary to consider the second issue. I therefore propose to say nothing more about the second issue.

4 In the circumstances, the relevant facts can be simply stated. On or about 15 September 2004, VEC entered into a contract with VicRoads ("the Contract") under which VEC agreed to carry out certain rehabilitation work to the Bethanga Bridge over Lake Hume on the border between Victoria and New South Wales. Part of that work was to remove the existing paint from the steelwork in the bridge, including to collect and dispose of some lead-contaminated waste material, and to repaint the steelwork. The lump sum price tendered by VEC for that work was $2,614,500 plus GST. A dispute arose as to the alleged extra thickness of the paint to be removed, which was said to be a latent condition.

5 On 29 December 2006, pursuant to s.14(1) of the Act, VEC served on VicRoads a payment claim in the sum of $1,662,395.95 (inclusive of GST) ("the payment claim") for work on the Victorian side of the bridge. On 15 January 2007, VicRoads provided a payment schedule to VEC, in which the scheduled amount that VicRoads proposed to pay was indicated to be $88,983.69 (s.15 of the Act).

6 On 29 January 2007, an adjudicator accepted nomination for VEC's adjudication application (ss.18 to 20 of the Act). On 31 January 2007, VicRoads lodged its adjudication response (s.21 of the Act). On 26 February 2007, the adjudicator delivered his determination (s.23 of the Act) in which he determined that:

(a) VicRoads must pay VEC $1,139,391.10 (inclusive of GST) in respect of the payment claim ("the adjudicated amount");

(b) VicRoads must pay all of the adjudication fees totalling $10,115.55; and

(c) the date on which the adjudicated amount became payable was 29 December 2006.

7 Pursuant to s.25(1) and s.27(6) of the Act, VicRoads had to pay the adjudicated amount or give security for payment of that amount by 2 March 2007. By a letter dated 2 March 2007, the Acting Chief Executive of VicRoads wrote to VEC notifying it that:

(a) by its adjudication response, VicRoads had, pursuant to clause 45 of the General Conditions of Contract and Supplementary Condition S19.4, referred the matters at issue in relation to VEC's claims to arbitration under the Contract;

(b) pursuant to Supplementary Condition S19.4, VicRoads required VEC to provide its detailed particulars of the matters at issue to VicRoads, to be the subject of the agreed mediation, and requested suggestions as to an appropriate mediator; and

(c) pursuant to s.25(4) of the Act, the Acting Chief Executive of VicRoads was certifying that sufficient money would be legally available for payment of any amount up to the adjudicated amount if and when that amount became payable following the final determination of the matter.

8 At the relevant time, s.25 of the Act provided as follows:

(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent—

(a) must pay that amount to the claimant; or

(b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.

(2) The respondent may only give security under subsection (1)(b), if the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.

(3) ...

(4) If the respondent is the Crown or a public authority representing the Crown, the security may be in the form of a written statement by the Department Head of the relevant Government Department or by the public authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when that amount becomes payable.

9 The relevant parts of clause 45 of the General Conditions of Contract ("clause 45") were as follows:

SETTLEMENT OF DISPUTES

(1) ...

(2) All disputes or differences arising out of the Contract or concerning the performance or the non-performance by either party of its obligations under the Contract whether raised before or after the execution of the work under the Contract shall be decided as follows:

(a) the Contractor shall, not later than fourteen days after the dispute or difference arises, submit the matter at issue in writing, specifying with detailed particulars the matter at issue, to the Superintendent for decision and the Superintendent shall, as soon as practicable thereafter, give his decision to the Contractor;

(b) if the Contractor is dissatisfied with the decision given by the Superintendent, he may, not later than fourteen days after the decision of the Superintendent is given to him, submit the matter at issue in writing, specifying with detailed particulars the matter at issue, to the Corporation for decision and the Corporation shall, as soon as practicable thereafter, give its decision to the Contractor in writing.

(3) If the Contractor is dissatisfied with the decision given by the Corporation pursuant to the last preceding paragraph, he may, not later than twenty-eight days after the decision of the Corporation is given to him, give notice in writing to the Corporation requiring that the matter at issue be referred to arbitration and specifying with detailed particulars the matter at issue, and thereupon the matter at issue shall be determined by arbitration. If, however, the Contractor does not, within the said period of twenty-eight days, give such a notice to the Corporation requiring that the matter at issue be referred to arbitration, the decision given by the Corporation pursuant to the last preceding paragraph shall not be subject to arbitration.

(4) Where a notice is given by the Contractor to the Corporation pursuant to the last preceding paragraph requiring that the matter at issue be referred to arbitration no proceedings in respect of that matter at issue shall be instituted by either the Corporation or the Contractor in any court unless and until the arbitrator has made his award in respect of that matter at issue.

(5) Arbitration shall be effected:

(i) by an arbitrator agreed upon in writing by the parties within twenty-eight days after the said notice is received by the Corporation; or

(ii) in the absence of that agreement, by one of at least three persons, none of whom shall be an employee of the Corporation or of the Contractor or have had any association with the work under the Contract, whose names are submitted in writing by the Corporation for selection by the Contractor within a further period of twenty-eight days after the expiry of that last mentioned period, being the person whose selection as arbitrator is notified in writing by the Contractor to the Corporation within twenty-eight days after the names are so submitted; or

(iii) in the absence of that selection, by an arbitrator appointed in accordance with the provisions of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto.

(6) A reference to arbitration under this clause shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto and the arbitration proceedings shall be conducted in that State or Territory. The arbitrator shall have all the powers conferred by those laws and it shall be competent for him to enter upon the reference without any further or more formal submission than is contained in this clause.

(7) Moneys that are or become due and payable by the Corporation in respect of work carried out under the Contract shall not be withheld because of arbitration proceedings but the Corporation may, at its discretion, and pending the award of the arbitrator withhold payment of moneys in respect of any matter that is the subject of arbitration proceedings.

(For ease of reference, I have added a number to each of the paragraphs.)

10 Supplementary General Condition of Contract S19 ("clause S19") provided as follows:

ADJUDICATION UNDER THE SECURITY OF PAYMENT ACT

S19.1 Nominating Authority for an Adjudication Application

The authorised nominating body for an adjudication application under the Security of Payment Act shall be the Institute of Arbitrators and Mediators Australia (Victorian Division).

S19.2 Conduct of Adjudication

In adjudicating an application made by the Contractor under the Security of Payment Act the adjudicator shall:

(a) have no power to open up, review or revise any certificate or payment schedule not the subject of the adjudication issued under the Contract by the Superintendent;

(b) at all times act impartially between the parties, in accordance with the law; and

(c) include in the determination the reasons for the determination and the basis on which any amount or date has been decided.

S19.3 Security to be Provided under the Security of Payment Act

If the adjudicator determines an adjudication application made by the Contractor under the Security of Payment Act by determining that the Corporation must pay any amount to the Contractor:

(a) the Corporation may give security of payment of that amount pending the final determination of matters in dispute between the Corporation and the Contractor in the adjudication;

(b) such security shall be in the form described in Section 25(4) of the Security of Payment Act; and

(c) such security shall, pending the final determination of matters in dispute, be in lieu of payment and in full satisfaction of any liability for that amount under the Contract.

S19.4 Dispute Under the Contract

An adjudication response served by the Corporation under the Security of Payment Act shall be deemed to be a notice of a dispute under the Contract for the purpose of Clause 45 of the General Conditions of Contract. When the Contractor receives the adjudication response, the Contractor shall within thirty (30) business days (or such other period as may be agreed in writing between the parties) submit the detailed particulars of the matter at issue to the Corporation to be the subject of a mediation the terms of which (including the appointment of the mediator) shall be agreed in writing between the parties within ten (10) business days, failing which the mediation, but not the dispute process, shall be at an end.

For the purpose of this Clause S19.4 and Clause [sic] 25 of the Security of Payment Act, the determination of matters in dispute between the Corporation and the Contractor in the adjudication becomes final:

(a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or

(b) in the case of a determination from which there is a right of appeal or review, when a right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have finally been disposed of.

11 The first issue raised for determination was the question whether VicRoads had, by lodging its adjudication response, commenced "arbitration proceedings or other dispute resolution proceedings" against VEC in relation to a dispute under the Contract and thereby "commenced proceedings", within the meaning of s.25(2) of the Act. If not, VicRoads could not give security (s.25(2) of the Act) and its only alternative was to pay the adjudicated amount to the claimant (s.25(1)(a) of the Act). Failing that payment, VEC was entitled to recover, as a debt due to it, the unpaid portion of the adjudicated amount (s.27 of the Act). The parties agreed that, as this issue was a matter of construction of the Contract and no further evidence would be led in respect of it and there were no disputed facts involved, I should decide the point finally rather than on the basis of whether it was arguable, as was normally the test on a summary judgment application.

12 Mr Scerri QC, who appeared with Mr Hopkins of counsel for VEC, submitted that VicRoads had not commenced any proceeding, within the meaning of s.25(2) of the Act, and therefore, it had no defence to VEC's claim for judgment for the sum of $1,149,506.65. Mr Scerri submitted that clause 45 did not provide any right or entitlement to VicRoads to commence an arbitration and that only VEC could do so under that clause. He further submitted that although clause S19.4 referred to clause 45, that clause in particular paragraph (3), did not make any mention of the "notice of dispute", referred to in clause S19.4. Mr Scerri also submitted that the adjudication response was not a referral to arbitration because clause 45 specifically required the provision of "a notice in writing ... requiring the matter at issue be referred to arbitration". He argued that, even apart from the fact that clause 45 spoke only of VEC providing such a notice, VicRoads had not provided any such purported notice.

13 Mr Scerri submitted that clause S19.4 provided for the possibility of a mediation taking place, and nothing more. He submitted that I should follow the reasoning of Kaye J in ***Siemens Ltd v Vaughan Constructions Pty Ltd***,[1] in which his Honour held that a conciliation process was not a "proceeding". With reference to s.25(2) of the Act, Kaye J said that: "*While the phrase "other dispute resolution proceedings" is no doubt intended to encompass a broader category of proceedings than arbitration proceedings, nonetheless the context of that phrase, in my view, clearly envisages that such other dispute resolution* proceedings shall involve the independent determination or adjudication of the relevant dispute between the parties.[2]

Later, his Honour held that: "*[I]n order to conform with the term "proceeding" under s.25(2) of the Act it is, in my view, essential that, whatever process is adopted, that process must involve the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of procedural fairness. In other words, there must be a process the purpose of which is that some person or persons, independent to the parties to the dispute, decides that dispute by an impartial consideration of the competing merits of both sides of the dispute.*[3]

Thus, a mediation was not a "proceeding".

14 Mr Scerri submitted that VicRoads had commenced a process that might have led to mediation but the relevant clauses of the Contract did not go the next step of saying that an arbitration had been commenced. One consequence of providing the adjudication response was that the parties might agree upon a mediation. But there was no compulsion, they might or might not agree. If they did not agree, the mediation, but not the dispute process, was at an end. Mr Scerri submitted that the last words of the first paragraph of clause S19.4 meant that

1 [2006] VSC 452.
2 [2000] VSC 452 at [19].
3 [2006] VSC 452 at [23].

one party could not bring the dispute to an end by not agreeing to mediate. Confirmation that the dispute process was not at an end, he submitted, did not somehow amend clause 45 to provide that VicRoads might also commence an arbitration and that the arbitration was deemed commenced by the delivery of VicRoads' adjudication response.

15 Mr Digby QC, who appeared with Mr Andrew of counsel for VicRoads, submitted that clauses 45 and S19 should be read together in a sensible, commercial way. He submitted that the Contract allowed VicRoads, when there was adjudication under the Act, to refer matters the subject of the adjudication to arbitration by VicRoads giving VEC an adjudication response. This power was to be found in clause S19.4. The arbitration was commenced by the deeming of the adjudication response as a notice of a dispute under the Contract for the purpose of clause 45.

16 Mr Digby submitted that clause S19.4 was drafted to deal with a situation such as this, namely, an adjudication application under the Act. He further submitted that clause S19 was not limited to mediation. The language of the clause, particularly clause S19.3(c) clearly reflected an intention on the part of both parties to move towards a dispute resolution proceeding which had an outcome in the nature of a final determination.

17 Mr Digby submitted that clause S19.4 meant that, from VicRoads' point of view, the adjudication response served two purposes, first, responding to the adjudication claim and, secondly, acting as a notice referring that dispute to arbitration. The adjudication response defined the scope of the dispute. It then imported from clause 45 the mechanisms or machinery provisions to enable the arbitration to be followed through to finality. He submitted that there was nothing unusual in starting the arbitration dispute procedure before the adjudication had taken place. It was a sensible and convenient step to have the adjudication response serve the two purposes. If either the adjudication or the mediation led to a satisfactory result from VicRoads' point of view, then no further action needed to be taken.

18 Mr Digby also submitted that the fact that the words "*a notice of a dispute*" were not to be found in clause 45 was not to the point. It was analogous to the written document containing "*the matter at issue*". Both were concerned to identify the dispute. In essence, there was no difference between the "*notice in writing to [VicRoads] requiring that the matter at issue be referred to arbitration*" in paragraph 3 of clause 45 and the "notice of a dispute under the Contract for the purpose of Clause 45" in clause S19.4. Mr Digby emphasised that this passage referred to clause 45.

19 Mr Scerri's response was that clause S19.4 did not say that VicRoads had commenced an arbitration and that certain parts of clause 45 would apply, rather it just deemed the adjudication response to be a notice of dispute and then went on to talk about a mediation. On the authority of Siemens, that was not the "commencement of proceedings" required by s.25(2) of the Act. He submitted that clause S19.4 was all about mediation. Any arbitration did not commence until the mediation had failed or not taken place.

20 Further, Mr Scerri submitted that to construe clause S19.4 as meaning that if VicRoads provided an adjudication response, that would be deemed to be the commencement of an arbitration which would then be conducted in accordance with clause 45, required a large number of extra words to be read into it.

21 In my opinion, clause S19.4 provides that when there is adjudication under the Act, VicRoads can arbitrate that dispute. That arbitration is commenced by VicRoads serving its adjudication response. Clause 45 is referred to in order to bring in or make applicable some of the machinery provisions concerning an arbitration. What would be imported from clause 45 are paragraphs (5) (appointment of arbitrator), (6) (governing law) and (7) (effect of arbitration on payment). Whether paragraph (4) (exclusivity of arbitration) would also be applicable is doubtful, given that it commences with a reference to "a notice given by [VEC} to [VicRoads] ... requiring that the matter at issue be referred to arbitration." However, it is not necessary to decide that point. What is clear is that all or some of the machinery provisions of clause 45 are to be utilised in the arbitration commenced by VicRoads serving its adjudication response.

22 Clause S19.4 also provides for an early mediation of the dispute now submitted to arbitration, but if the mediation is not agreed to or it fails then the dispute process, the arbitration, continues. This is important because I respectfully agree that, for the reasons given by Kaye J in Siemens, a mediation would not be a "proceeding" within the meaning of s.25(2) of the Act.

23 In my opinion, it is irrelevant that further steps in the arbitration, commenced by the service of the adjudication response, could be delayed by the time limits allowed for the mediation. The same applies to an arbitration commenced by VEC under clause 45. Even though "*the matter at issue*" has been referred to arbitration, and no litigation can therefore be commenced, time is allowed for steps to be taken in respect of the appointment of the arbitrator. I consider that merely because there may be a mediation, does not mean that an arbitration has not commenced. Rather, the first sentence in clause S19.4 means that an arbitration process has started, but the rest of the clause then deals with a mediation as a possible first step, and if that step fails or does not occur, then the parties must proceed with the arbitration, in accordance with the applicable provisions of clause 45.

24 I accept Mr Digby's argument that it was not to the point that the words "*a notice of a dispute*" were not to be found in clause 45. The difference between that wording in clause S19.4 and the "notice in writing ... requiring that the matter at issue be referred to arbitration" in clause 45 is slight and insignificant. In my opinion, the first sentence in clause S19.4 was clearly intended to provide for the commencement of an arbitration. Otherwise, there is no reason to refer to clause 45. Moreover, this construction of clause S19.4 means that it has some scope

for operation, whereas the construction contended for by VEC would result in this sentence being nonsensical and having no effect at all. Contrary to Mr Scerri's submission, I do not consider that the construction I favour requires a large number of words to be read into clause S19.4.

25 I reject the submission by VEC that VicRoads' construction of clause S19.4 somehow infringed the prohibition contained in s.48 of the Act on contracting out of the operation of the Act because any participation by VicRoads in an adjudication process would automatically mean that an arbitration had been commenced. That is not excluding, modifying or restricting the operation of the Act. It is simply one way of utilising the provisions of s.25 of the Act to challenge the adjudicator's determination, having commenced the required proceedings and given the required security.

26 I also reject the submission that VicRoads' construction has the effect of wrongly denying VEC the intended benefit of the Act, namely to provide cash flow for the contractor pending final resolution of disputes between the parties.[4] That consequence followed from the Act itself. The only question was whether VicRoads had done what was required by s.25. If it had, then the Act expressly contemplated that a claimant could be denied the fruits of its victory before the adjudicator.[5]

27 As I said previously, it was not disputed that VicRoads had lodged its adjudication response on 31 January 2007 and had sent the letter dated 2 March 2007 in the terms referred to above. Accordingly, as I concluded that VicRoads had by the first of those steps "commenced proceedings" within the meaning of s.25(2) of the Act, and as it was not disputed that, by the second of those steps, VicRoads had purported to give security within the meaning of ss.25(1)(b) and 25(4) of the Act, there was no debt due to VEC at the time of the summary judgment application. Therefore, that application must fail.

Mr C Scerri QC, with Mr N Hopkins instructed by Clayton Utz for the claimant
Mr J Digby QC, with Mr R Andrew instructed by Phillips Fox for the defendant

4 See s.3(1) for the stated object of the Act.

5 Sections 25 to 27 of the Act have now been repealed and replaced by new Divisions 2A and 2B of Part 3. See ss.26 and 28 of the *Building and Construction Industry Security of Payment (Amendment) Act* 2006.