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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2014 000686

AMASYA ENTERPRISES PTY LTD & ANOR
(in accordance with the schedule) Plaintiffs

v

ASTA DEVELOPMENTS (AUST) PTY LTD & ANOR
(in accordance with the schedule) Defendants

JUDGE:	VICKERY J
WHERE HELD:	Melbourne
DATE OF HEARING:	23 July 2015
DATE OF JUDGMENT:	18 September 2015
CASE MAY BE CITED AS:	Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)
MEDIUM NEUTRAL CITATION:	[2015] VSC 500

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) – Adjudication conducted under the Act - Submission of a further substitute payment claim to correct mistakes and supplement an earlier payment claim delivered shortly prior, where otherwise it is the same as the earlier payment claim, not in breach of s 14(8) of the Act – Whether a payment schedule delivered complying with s 15 of the Act – Whether payment schedule delivered by email in compliance with the Act – Adjudication determination void for failure to consider a valid payment schedule - Adjudicator receives expert report and takes it into account without affording an opportunity to the other party to respond to it – Breach of natural justice - Adjudication determination void on ground of breach of natural justice - Adjudication determination quashed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr MG Roberts QC with Mr R Andrew of Counsel	Starnet Legal
For the First Defendant	Mr J Twigg QC with Mr N Andreou of Counsel	LMS Lawyers

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HIS HONOUR:

1 The facts in this proceeding have been outlined in the Court's earlier judgment in this matter, *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor*[1] (the trial of the Preliminary Question).

2 This proceeding arises out of a construction contract dated 10 October 2013 (the 'Construction Contract') between the First Defendant, Asta Developments (Aust) Pty Ltd as the contractor (the 'Contractor'), and the Plaintiffs, Amasya Enterprises Pty Ltd and TEK Foods Pty Ltd who together were the proprietors (the 'Proprietors'). The Construction Contract was for the construction of a warehouse/factory development at 882-900 Cooper Street, Somerton in Victoria.

3 The works proceeded during 2014. Between November 2013 and July 2014 the Proprietors paid the Contractor progress payments in the total sum of $2,912,598 (inclusive of GST).

4 On or about 10 October 2014 a purported payment claim (the 'Payment Claim') was served by the Contractor on the Proprietors under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act' or the 'Victorian Act'[2]).

5 The Payment Claim is the subject of this proceeding. The claimant Contractor described in the Payment Claim the construction work the subject of the claim by reference to purchase orders which arose under the Construction Contract.

6 The Payment Claim comprised: Tax Invoice No 69 dated 10 July 2014, Tax Invoice No 72 dated 1 August 2014 and Tax Invoice No 74 dated 30 September 2014. The amount claimed in the Payment Claim was a total of $2,064,974.36 (incl GST).

7 The Tax Invoices comprising the Payment Claim each included the words required by s 14(2)(e) of the Act : "*This is a payment claim under the Building and Construction Industry Security of Payment Act 2002*".

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1 [2015] VSC 233.

2 Cf the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the 'NSW Act').

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8 No part of the Payment Claim was paid by the due date for payment. This gave the Contractor an entitlement under s 18 of the Act to apply for adjudication of the Payment Claim.

9 By notice dated 20 October 2014, the Contractor gave notice to the Proprietors pursuant to s 18(2) of the Act of intention to apply for adjudication and giving the Proprietors a further 2 business days to provide a payment schedule. No response was received to that notice.

10 By Application dated 29 October 2014, delivered to Rialto Adjudications Pty Ltd ('Rialto Adjudications') on 29 October 2014, the Contractor applied to Rialto Adjudications, as an Authorised Nominated Authority under the Act, for an adjudication on the Payment Claim (the 'Adjudication Application').

11 By letter dated 29 October 2014, Rialto Adjudications referred the Adjudication Application to the Second Defendant, John McMullan (the 'Adjudicator'), who accepted and embarked upon the adjudication.

12 On 18 November 2014 the Adjudicator completed his adjudication (the 'Adjudication Determination'), which was published on 21 November 2014. In summary, he made the following findings as to his jurisdiction:[3]

(a) The Payment Claim contained the prescribed information;

(b) It identified the construction work or related goods and services to which the progress payment related;

(c) It indicated the amount of the progress payment that the claimant claimed was due;

(d) It stated that it was made under the Act.

13 The Adjudicator found that the Payment Claim was validly made under the Act. He determined that the adjudicated amount was $2,030,222.86 (the 'Adjudicated Amount') and the date the Adjudicated Amount was payable to be 17 October 2014.

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[3] Adjudication Determination [30].

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14 The Adjudicated Amount was not paid to the Contractor by the Proprietors by the due date.

15 On or about 12 December 2014, the Contractor entered judgment against the Proprietors in the sum of $2,030,222.86 pursuant to s 28R of the Act. The judgment was entered in proceeding SCI 2014 06395 according to the procedure outlined in the Act, on the basis of the Adjudication Determination and an adjudication certificate subsequently issued under s 28Q of the Act following non-payment of the Adjudicated Amount.

16 On 16 December 2014, the Proprietors commenced the present proceeding S CI 2014 000686 seeking judicial review of the Adjudication Determination on the basis of jurisdictional error on grounds including, *inter alia*, that:

(a) there was no valid payment claim which vested jurisdiction on the Adjudicator to make a determination;

(b) bad faith; and

(c) the Adjudicator denied the Plaintiffs natural justice by requesting, and receiving, detailed new submissions from the First Defendant, without giving the Plaintiffs sufficient opportunity to respond to the new submissions.

17 At a first directions hearing in this proceeding on 30 March 2015, it became clear that issues arising from the proper construction of s 28R of the Act required consideration.

18 Section 28R of the Act provides:

> **28R Proceedings to recover amount payable under section 28M or 28N**
>
> (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

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(2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court—

(a) the adjudication certificate; and

(b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.

(4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

(5) If a person commences proceedings to have the judgment set aside, that person—

(a) subject to subsection (6), is not, in those proceedings, entitled—

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

(6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

(7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.

(8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

19 On 21 March 2015, this Court ordered pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2005* the following question be fixed for separate trial:

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Whether the Plaintiffs' challenge to the adjudication determination dated 18 November 2014 can be sustained in the light of s 28R(5) of the *Building and Construction Industry Security of Payment Act 2002*?

20 On 2 June 2015, this Court determined in the trial of the Preliminary Question that:[4]

(a) s 28R(5)(a)(iii) of the Act has been validly passed by the Legislature in accordance with s 85 of the Victorian Constitution;

(b) it is a privative provision which operates in circumstances where a person commences proceedings to have a judgment entered under s 28R of the Act set aside;

(c) in this case the Plaintiffs have commenced such proceedings, and s 28R(5)(a)(iii) of the Act applies;

(d) section 28R(5)(a)(iii) of the Act is limited in its operation by the requirements of Chapter III of the *Australian Constitution* as found in *Kirk v Industrial Relations Commission of New South Wales Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)*.[5]

(e) section 28R(5)(a)(iii) of the Act cannot be applied to take from the Supreme Court of Victoria the power to grant relief in the nature of certiorari on the basis of jurisdictional error on the part of an adjudicator appointed under the Act in challenging an adjudication determination which is the foundation of a judgment entered under s 28R;

(f) the operation of the privative clause in s 28R(5)(a)(iii) is confined to denying relief being granted by a court in Victoria, including the Supreme Court, in the course of a proceeding to set aside a judgment

4 *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor* [2015] VSC 233 [94].
5 (2010) 239 CLR 531.

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> entered pursuant to s 28R of the Act, where the error relied upon is an error on the face of the record in an adjudication determination which is the foundation of the judgment. In other words, pursuant to s 28R(5)(a)(iii) of the Act, it is not open to challenge an adjudication determination (or a review determination) in a proceeding to have a s 28R judgment set aside, on the basis of an error on the face of the record in the relevant determination.

21 Accordingly, in *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor*[6] it was determined on constitutional grounds that a proceeding to set aside an adjudication determination made under the Act can be properly founded upon jurisdictional error (as opposed to error on the face of the record), even after judgment had been entered pursuant to s 28R of the Act, and in spite of the apparent effect of s 28R(5)(a)(iii).

22 It follows in this case that, if the Proprietors are able to establish a jurisdictional error in the Adjudication Determination, they are not precluded by the operation of s 28R(5)(a)(iii) of the Act from challenging the Adjudication Determination on that basis.

23 The Contractor relied on the following facts which it set out in a chronology:

Chronology

10 October 2013	Quotation provided by ASTA dated 10 October 2013
28 November 2013	Master Builders Association General Conditions of Contract GCC-5 and Quotation dated 10 October 2013 forming part of the Contract executed by the Plaintiffs[7]
3 December 2013	ASTA Tax Invoice 55 issued[8]
13 January 2014	ASTA Tax Invoice 56 issued[9]
3 March 2014	ASTA Tax Invoice 59 issued[10]
22 April 2014	ASTA Tax Invoice 62 issued[11]
22 April 2014	ASTA Tax Invoice 63 issued[12]

6 [2015] VSC 233.
7 Exhibit KB 1 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.
8 Exhibit MT 6 to the Affidavit of Muhittin Tercan sworn 17 March 2015.
9 Ibid.
10 Ibid.
11 Ibid.

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4 June 2014	ASTA Tax Invoice 67 issued[13]
7 October 2014	Payment Claim made by ASTA for Tax Invoices 69, 72 and 74 to Amasya with facsimile transmission time 23:45[14]
9 October 2014	Fax from ASTA re-sending Payment Claim addressed to both Amasya and Tek Foods and enclosing the trade invoices which were not attached previously. Faxed at 18:17[15]
20 October 2014	Letter from LMS Lawyers to Amasya and Tek Foods, enclosing section 18(2) Notice, Notice of Intention to Terminate Contract, Notice of Suspension of Works and Notice of Extension of Time Claim served[16]
20 October 2014	ASTA's Notice of Intention to Terminate Contract served on Proprietors[17]
20 October 2014	ASTA's Notice of Extension of Time Claim served on Proprietors[18]
20 October 2014	ASTA's Notice of Suspension of Works served on Proprietors[19]
27 October 2014	Report prepared by DBQS Consulting Pty Ltd[20]
29 October 2014	Application for Adjudication lodged[21]
29 October 2014	Proprietors' Notice Under Clause 20 of the Contract served[22]
29 October 2014	Proprietors' Notice Under Clause 21 of the Contract served[23]
10 November 2014	Letter from Starnet Legal to Rialto Adjudications seeking stay of adjudication determination[24]
10 November 2014	Letter from LMS Lawyers to Rialto Adjudications advising settlement discussions have not resolved dispute and seeking Adjudicator proceed with determination[25]
10 November 2014	ASTA's Notice of Determination of Employment Under the Contract (Notice of Termination of Contract) served[26]
10 November 2014	Letter from LMS Lawyers to Proprietors' Solicitors enclosing copy of Notice of Determination of Employment Under the Contract (Notice of Termination of Contract) served on the Proprietors and advising that proposals of Proprietors were unacceptable and that ASTA would be proceeding to exercise its rights and remedies under the

12 Ibid.
13 Ibid.
14 Exhibit CJE 7 to the Affidavit of Caroline Jane Elliott affirmed on 27 March 2015 and Exhibit MT 12 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.
15 Exhibit MT 13 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.
16 Exhibit MT 14 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.
17 Ibid.
18 Ibid.
19 Ibid.
20 Exhibit KB 5 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.
21 Exhibit KB 2 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.
22 Exhibit CJE 2 to the Affidavit of Caroline Jane Elliott affirmed on 27 March 2015.
23 Ibid.
24 Exhibit MT 20 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.
25 Exhibit MT 22 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.
26 Ibid.

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	Contract and at law[27]
10 November 2014	Letter from Tek Foods to Rialto Adjudications providing Proprietors' submissions[28]
12 November 2014	Reply to the Proprietors' submissions of 10 November 2015 lodged and served on behalf of ASTA[29]
18 November 2014	Notice of Adjudication received[30]
20 November 2014	Adjudication Determination dated 18 November 2014 received[31]
2 December 2014	Adjudication Certificate issued and judgment entered in proceeding SCI 2014 06395[32]
12 December 2014	Letter from LMS Lawyers to Starnet Legal with facsimile transmission receipt, advising the Adjudication Certificate had been issued and registered as a judgment[33]

Relief and Grounds Claimed by the Plaintiffs

24 The Proprietors, by their Originating Process, claim the following principal relief:

> Pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules*, and or the inherent jurisdiction of the Court, judgment or orders that the adjudication determination purportedly made by the Second Defendant dated 18 November 2014 (the "Adjudication Determination") under the *Building and Construction Industry Security of Payment Act* 2002 (the "Act") be quashed or set aside.

25 They rely on the following grounds set out in its Originating Process:

(a) the First Defendant (the Contractor) did not serve a valid payment claim under the Act;

(b) any such payment claim was served by the Contractor in bad faith and is void and of no legal effect;

(c) the adjudication application was invalid and of no effect;

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27 Exhibit CJE-23 to the Affidavit of Caroline Jane Elliott affirmed on 7 July 2015.

28 Exhibit MT 23 to the Affidavit of Muhittin Tercan sworn on 17 March 2015 and Exhibit KB3 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.

29 Exhibit KB 5 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.

30 Exhibit KB 7 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014 and Exhibit MT 28 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.

31 Exhibit KB 8 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014 and Exhibit MT 29 to the Affidavit of Muhittin Tercan sworn on 17 March 2015.

32 Exhibit CJE 1 to the Affidavit of Caroline Jane Elliott affirmed on 2 December 2014 filed in proceeding SCI 2014 06395.

33 Exhibit CJE1 to the Affidavit of Caroline Jane Elliott affirmed on 27 March 2015.

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(d) the Second Defendant (the Adjudicator) failed to accord the Plaintiffs (the Proprietors) a reasonable opportunity to respond to submissions made by the Contractor;

(e) the Adjudicator failed to assess the value of the construction work the subject of the adjudication in accordance with the relevant construction contract, including *inter alia* by reference to the approval of a quantity surveyor as required by special condition SC7 of the contract;

(f) the Adjudicator took into account an irrelevant consideration, being a report by a quantity surveyor as to the market value of the work, not the value of the work under the relevant construction contract;

(g) further, by reason of the foregoing, the Adjudicator did not have jurisdiction to make the adjudication determination and/or committed an error of law on the face of the record and/or jurisdictional error.

Jurisdictional Error – Ground 2 Bad Faith

26 Ground 2 of the Proprietors' application alleges jurisdictional error on the ground of bad faith.

27 In the course of the hearing of this proceeding, I delivered *ex tempore* reasons on the validity of the ground of alleged jurisdictional error founded on bad faith. I concluded that this ground should be struck out. I provided the following reasons.[34]

Plaintiffs' Contentions – Facts Relied Upon

28 The facts relied upon by the Proprietors which were said to establish vitiating bad faith were set out in the affidavit of Muhittin Tercan sworn 17 March 2015.

29 It was put that these facts established that the Contractor acted opportunistically and sought to gain a substantial windfall.

30 The Proprietors relied on the following facts and circumstances:

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34 Which have been revised since delivery of the *ex tempore* reasons.

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31 The Contractor served tax invoices endorsed under the Act for an amount well in excess of any reasonable assessment. The Proprietors refer to the Affidavit of Ms Elliott[35] where it is deposed that her instructions from Mr Gino Asta, the director of the Contractor, are that the 3 invoices which were the basis of the payment claim were for work done in the period July to September 2014 when a "number of trade Contractors did work for the project" and that the "cost of this work was included in the Payment Claims … amounting to the sum of approximately $1,000,000 of trade debts".

32 There is no explanation as to why the total claimed in the relevant Payment Claim was $2,030,222.86.

33 The Proprietors say that this evidence confirms their contention that the Contractor's claims were excessive.

34 Further, the Construction Contract contained Special Conditions which expressly provided in clause SC-7 that:

> All monthly payments amounts to be made in accordance with the Contract must be first approved by a quantity surveyor as required by the Proprietors' financier. The Contractor must provide all necessary information as may be required for the consideration of the quantity surveyor.

35 The Proprietors referred to the assessments by the proprietors' financier, Westpac. Westpac's quantity surveyor was Rider Levett Bucknall. The evidence relied upon was that the Contractor agreed with Rider Levett Bucknall's assessment.[36]

36 It was put that, notwithstanding that on 24 September 2014 the Contractor agreed with the assessment by Rider Levett Bucknall, by early October 2014 the Contractor had, without any notice to the Proprietors, arranged for its own quantity surveyor to

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35 Paragraph [14].

36 See the Affidavit of Mr Tercan at [9] to [23] and Exhibit MT-10 being an email dated 24 September 2014 from Asta confirming agreement with the assessment by Rider Levett Bucknall.

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attend the site and conduct an assessment.[37] This was also about the time that Mr Asta stopped taking Mr Tercan's calls and became impossible to contact.[38]

37 It was submitted that the Contractor's quantity surveyor was not asked to assess the value of work on site in accordance with the contract price. Instead he was asked to assess the value of the work based on current market value.[39]

38 It was also submitted that the Contractor did not provide a relevant report or disclose its existence to the Proprietors at the time of its receipt on 27 October 2014. Further, it was not provided with the Adjudication Application on 29 October 2014.

39 The Contractor served the 10 October 2014 Payment Claim seeking over $2,000,000. Then on Monday 20 October 2014 it served the following notices:

(a) a notice under s 18(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic);

(b) a Notice of Intention to Terminate the Contract;

(c) a Notice of Suspension of Works;

(d) a Notice of Extension of Time Claim;

(e) an AFSA Verification Statement in respect of Personal Property Securities Register.

40 Work had essentially stopped in September 2014.[40] Friday 17 October 2014 was the last day of work on site. The 20 October 2014 notices were served on the Proprietors by LMS Lawyers on behalf of the Contractor.[41]

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37 See the Affidavit of Mr Tercan at [24].
38 See the Affidavit of Mr Tercan at [23].
39 See Exhibit MT-26, which includes the report by DBQS. The DBSQ assessment was over $2,000,000.
40 See Affidavit of Mr Tercan at [23].
41 See the Affidavit of Mr Tercan at [30].

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41 It was submitted that Mr Tercan of the Proprietors became very concerned about the direction of events. He attempted to contact Mr Asta of the Contractor but Mr Asta failed to respond. [42]

42 Eventually a without prejudice meeting was held at the offices of LMS Lawyers on 28 October 2014.

43 The following day, 29 October 2014, LMS Lawyers lodged the Adjudication Application for the adjudication of the 10 October 2014 Payment Claim.

44 On Monday 10 November 2014 LMS Lawyers on behalf of the Contractor served a notice purporting to terminate the Construction Contract.[43] The Contractor abandoned the site within two days of the purported termination, despite a request from the Proprietors' solicitors inviting the Contractor to withdraw its notices of termination, to attend a mediation conducted by an experienced building law Silk, and also suggesting that the Contractor present its claim to the quantity surveyor for assessment and payment, including during any period of negotiation.[44]

45 On 20 November 2014 the Proprietors accepted the Contractor's repudiation of the Construction Contract and terminated the contract pursuant to clause 20.3 and/or at common law.

Plaintiffs' Contentions – Legal Contentions

46 The Plaintiff Proprietors submitted that the evidence outlined above established the following:

(a) Westpac's quantity surveyor assessed the Contractor's total entitlements to the relevant date at $3,168,856.90 (incl. GST), which assessment was agreed by the Contractor after discussions with the quantity surveyor;

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42 See the Affidavit of Mr Tercan at [32] to [35].
43 See Affidavit of Mr Tercan at [46] and Exhibit MT-21.
44 See the Affidavit of Mr Tercan at [49] and Exhibit MT-24.

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(b) pursuant to Special Condition SC-7 of the Construction Contract, as at 3 October 2014 the Contractor was only entitled to payment in the sum of $3,168,856.90 (incl. GST) as approved by the quantity surveyor, less the total of payments already made ($2,912,598) leaving a balance owing of $256,258.90 upon the submission of a tax invoice in that amount;

(c) the Contractor issued the 10 October 2014 Payment Claim for an amount substantially in excess of the amount which was assessed and agreed;

(d) the Contractor then determined on a course of suspending work and terminating the contract, while seeking payment of its excessive claim.

47 In the circumstances, the Proprietors' claim that the Contractor acted in bad faith by attempting to use the Act to gain a substantial financial windfall. The Act was never intended to support conduct of this type, the Proprietors submitted.

Analysis and Conclusion on Bad Faith Ground 2

48 The starting point is to identify the party or entity in respect of whom it is alleged that there has been bad faith which is claimed to vitiate the relevant decision on the ground of jurisdictional error.

49 Three possible alternatives may theoretically present themselves for consideration: bad faith alleged on the part of the decision maker, bad faith alleged on behalf of a party in respect of whom the relevant decision is made, or bad faith on the part of an involved third party.

50 As to bad faith on the part of the decision maker, in my view, depending upon the facts, this may amount to the production of an unreasonable decision which may, in turn, result in jurisdictional error.

51 This, however, is not what is alleged here.

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52 As to bad faith on the part of a party, this may too result in jurisdictional error, but only where the bad faith is the product of fraudulent conduct or conduct of that degree of impropriety. For example, the tendering of evidence which is false or known to be false.

53 A relevant fraud on the part of a third party connected with the decision, may vitiate the decision. However, this is not open on the facts of this case, nor is it alleged.

54 However, reckless conduct on the part of a party or even sharp practice on the part of a party in making an application which ultimately results in a decision which is subject to review, in my view, in the light of authority falls short of the level of impropriety required to be alleged and proven to amount to jurisdictional error.

55 The Act does not imply an obligation of good faith on the part of a party in making a payment claim. The bona fides of a claimant when serving a Payment Claim is not a necessary or desirable enquiry. In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor*[45] this Court said on the issue:

> 43 In my opinion there is no warrant for implying into the Act an obligation of good faith on the part of a claimant in preparing and submitting a payment claim. Following the service of a payment claim the Act provides mechanisms for the claim to be reviewed by the respondent and, if necessary, part rejected or wholly rejected by the serving of a payment schedule. It is at this point that a spurious claim lacking any proper foundation can be addressed. The Act also provides for a process of adjudication. Upon appointment, the adjudicator is in a position to addresses and determine the merits of the parties' dispute as articulated in the payment claim and payment schedule.
>
> 44 No enquiry into the bona fides of a claimant is necessary for the effective functioning of these processes. Nor is any such enquiry desirable, given the important objective of providing expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract. It would fly in the face of this purpose of the Act, and the robust determination of disputes under the statutory adjudication process, to import an element of good faith as an issue to be considered and determined for a valid payment claim, in addition to the s 14 requirements.

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45 [2012] VSC 235 (Vickery J) [43]–[44].

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56 I do not take what is alleged by the Proprietors to amount to more than sharp practice at worst, as is frankly conceded, it seems, by senior counsel for the Proprietors, when he said that what is alleged amounts to just that.

57 Further, I have no doubt that the Adjudicator approached his task under the Act with all due propriety, and administered its provisions in good faith in arriving at his Adjudication Determination.

58 The commercial approach of the Contractor, even if that could be described as opportunistic and with a view to obtaining a substantial windfall, provides no proper basis to ground jurisdictional error in the making of the Adjudication Determination. What is properly due and payable on a payment claim is a matter to be determined in accordance with the Act by the duly appointed adjudicator.

59 For these reasons, I struck out Ground 2 for the purposes of the present part of the proceeding to set aside the Adjudication Determination.

Ground 1 – payment claim contravened s 14(8)

The Adjudication Application and the Adjudication Determination

60 This Ground 1 is to be considered against the background of the Adjudication Application and the Adjudication Determination.

61 The Adjudication Application dated 29 October 2014 submitted by the Contractor's lawyers consisted of the following documents:

(a) covering letter from LMS Lawyers (on behalf of the Contractor claimant) to Rialto Adjudications dated 29 October 2014;

(b) one page 'Application for Adjudication' signed by LMS Lawyers;

(c) one page 'Submissions of the Claimant' referring to Invoices Nos 69, 72 and 74 (Annexures A, B and C) and claiming $2,064,974.36;

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(d) Tax Invoice No 69 dated 10 July 2014 marked "A" with 8 pages of supporting invoices;

(e) Tax Invoice No 72 dated 1 August 2014 marked "B" with supporting invoices;

(f) Tax Invoice No 74 dated 30 September 2014 marked "C" with supporting invoices;

(g) the Construction Contract; and

(h) the s 18(2) notice.

62 The Adjudication Application for present purposes relevantly stated:

> Date of Payment Claim: 10 October 2014
>
> Total amount of this Payment Claim: $2,064,974.36 (including GST)
>
> ...
>
> The Claimant applies for Adjudication under the *Building and Construction Industry Security of Payments Act 2002* (Vic) ("the Act"). The Claimant has served three Payment Claims on or about 10 October 2014, being for a total amount of $2,064,974.36, as follows: -
>
> (a) Invoice No. 69 dated 10 July 2014 (served on 10 October 2014) $864,686.48 (Annexure A)
>
> (b) Invoice No. 72 dated 1 August 2014 (served on 10 October 2014) $692,213.30 (incl. GST) (Annexure B)
>
> (c) Invoice No. 74 dated 30 September 2014 (served on 10 October 2014) $508,074.58 (incl. GST) (Annexure C)
>
> ("the Payment Claims").

63 The Adjudicator took the view, as he was entitled to do, that the three tax invoices in fact comprised one payment claim dated 10 October 2014.[46]

64 This was the day following 9 October 2014, no doubt to allow for the service provision of the Act, namely s 50(3) where a facsimile transmission is received after 4.00 pm on any day, it is taken to have been received on the next business day.[47]

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46 Adjudication Determination [33], [34], [35 – 37], [38] and [46].

47 See s 50(3) of the Act.

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65 The Adjudicator also found that, pursuant to the terms of the Construction Contract, the reference date in relation to the Payment Claim was 1 October 2014 because the contract provided that the time for submitting payment claims was the first day of each month.[48]

66 The Adjudication Determination makes no mention of the document sent on 7 October 2014 which is now said by the Proprietors to also comprise a payment claim in respect of the reference date 1 October 2014. It may be inferred that this document was never referred to the Adjudicator and argument upon it was never advanced before the Adjudicator.

Plaintiffs' Submissions

67 The first ground relied upon by the Proprietors is that there was no valid payment claim, because the 10 October 2014 Payment Claim contravened s 14(8) of the Act.

68 It was submitted that the document served upon the Proprietors by the Contractor on 7 October 2014 was itself a payment claim in respect of the reference date 1 October 2014. It was further submitted that the document served on 10 October 2014 was also a payment claim, and was in respect of the same reference date. This, it was said, amounted to a contravention of s 14(8) of the Act.

69 Section 14(8) of the Act provides that:

> A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

70 It was submitted that in these circumstances the Payment Claim dated 10 October purportedly made under the Act contravened s 14(8) of the statute.

71 On this basis the Proprietors submitted that the Payment Claim, made on 10 October 2014, was not a valid claim under the Act.

72 It also followed that there was no jurisdictional foundation for the Adjudication of this Payment Claim.

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48 Adjudication Determination [101]–[102].

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73 Accordingly, the jurisdiction of the Adjudicator was not validly invoked and the Adjudication Determination should be quashed and declared void.

74 A principal authority relied upon was *Jotham Property v Cooperative Builders*.[49]

First Defendant's Submissions

75 The defence mounted by the Contractor to the breach of s 14(8) of the Act alleged by the Proprietors was that it served but one Payment Claim. This it did physically first on 7 October 2010, but which it re-sent shortly after, under cover of an explanatory cover page, by facsimile on the evening of 9 October 2014. It contended that this was one and the same payment claim which was deemed as served on 10 October 2014 under the Act. It was not therefore, a second payment claim made in respect of the same reference date in breach of s 14(8) of the Act.

76 The Contractor pointed to the Adjudication Application which identified 10 October 2014 as the date of the payment claim. Further, the invoices enclosed with the Adjudication Application marked A, B and C were the same three invoices nos 69, 72 and 74 claiming payment of the same sum of $2,064,974.36 as were claimed in the document served on 7 October 2014. The Submissions of the Contractor claimant also identified the same three invoices.

77 It followed, so it was put, that the payment claim which was the subject of the Adjudication was the 10 October 2014 Payment Claim, which was one and the same claim as the 7 October 2014 Payment Claim.

78 On this basis it was submitted there was no breach of s 14(8) of the Act.

Analysis and Conclusion on s 14(8) Ground 1

79 The following findings are made in respect of Ground 1:

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49 [2013] VSC 552 [37], [74].

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80 On 7 October 2014 what purported to be a payment claim was served by the Contractor on one of the Proprietors, Amasya Enterprises Pty Ltd, in respect of Tax Invoices Nos 69, 72 and 74. This was served by facsimile transmission at 23:45.

81 On 9 October 2014 the payment claim was re-sent by the Contractor to both Proprietors (Tek Foods Pty Ltd in addition to Amasya Enterprises Pty Ltd) in respect of exactly the same total amount, being $2,064,974.36, and in respect of the same Tax Invoices 69, 72 and 74 (save that the Tax Invoices were also addressed to Tek Foods Pty Ltd in addition to Amasya Enterprises Pty Ltd). The payment claim also enclosed the trade invoices which were not attached previously. This documentation was sent at 18:17 by facsimile transmission.

82 The 9 October 2014 covering latter included with the facsimile of that date relevantly stated:

> *Dear Muhittin, Sorry, I am re-sending these because I forgot to include the trade invoices for your reference. Please see following invoice numbers 69, 72 & 74. Prompt payment would be appreciated.*

83 As to the operation of s 14(8) of the Act, the NSW Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[50] considered the equivalent s 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the 'NSW Act'), together with s 13(6) (which is the equivalent to s 14(9) of the Victorian Act). Likewise *Dualcorp* concerned a subcontractor, which had done its work and had left the site; it claimed payment by six invoices; six weeks later it repeated that claim by reference to the same invoices and, in my view, in respect of the same reference date. Dualcorp was prevented by the operation of s 13(5) of the NSW Act (the equivalent to s 14(8) of the Victorian Act) from serving the second payment claim. For these reasons, Dualcorp was found to be not entitled to proceed to judgment on a claim founded on the operation of s 13(5) of the NSW Act premised on the relevant second payment claim being a payment claim under the Act. Allsop P said as to the operation of the relevant sections:[51]

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50 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 ('*Dualcorp*').

51 Ibid [8] and [14].

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> 8 As can be seen from the Act, s 13(5) a claimant is limited to one payment claim in respect of each reference date. Section 13(6) permits, however, inclusion in another payment claim (necessarily by reference to another reference date) of an amount that has been the subject of a previous claim. Amongst other usual and uncontroversial examples, this permits the submission of cumulative payment claims by reference to later reference dates, which include an amount the subject of a previous claim. In such circumstances, if there has been an adjudication, s 22(4) will apply to require the same value to be given to such work, subject to the qualification in that subsection.
>
> …
>
> 14 … The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act and does not attract the statutory regime of the Act.

84 More recently, the application of s 14(8) of the Act has been considered in similar terms in *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and anor*.[52] In this case it was determined in paragraphs [94] and [98] that:

> 94 Absent the application of s 14(9), the terms of s 14(8) provide for a prohibition. They indicate a clear statutory intention that what may be advanced by a claimant as a payment claim that is in respect of the same reference date as a previous claim, is not to be treated as a payment claim made under the Act, and is invalid.
>
> …
>
> 98 It follows that an adjudication determination founded upon an invalid payment claim, is also an invalid exercise under the Act. A payment claim served in contravention of s 14(8) is incapable of providing a jurisdictional basis for a valid adjudication conducted under s 23 of the Act.

85 The principal vice sought to be addressed by s 14(8) of the Act is to prevent multiple claims being made in respect of the same reference date, which, unless curtailed, could impose an unreasonable burden on recipient respondents who are called upon to expend resources in addressing claims. As was said by this Court in *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and anor*:[53]

> 96 If such conduct was to be permitted, a claimant could serve more than one payment claim in respect of each reference date for different items of work, resulting in the potential for multiple payment claims being made in respect of each reference date, each requiring individual assessment by a respondent on construction projects. Further, and contrary to a key objective

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52 [2015] VSC 426.

53 [2015] VSC 426 [96].

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> of the Act, this may in turn result in multiple adjudication applications being made in relation to different parts of what is in effect, or should be, the same payment claim.

86 However, the re-sending of the same payment claim, even if reasonably supplemented with additional material and information, does not offend these objectives of the Act. Indeed, it would be inimical to these objectives to inhibit reasonable corrections to be made to payment claims if they are called for. A realistic degree of tolerance needs to be observed to adjust for such shortcomings or mistakes made in the course of submitting a payment claim.

87 I am also mindful of the observations of Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*[54] where his Honour said as to payment claims made under s 14 of the Act, citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd*[55] "The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner", in the following passage:

> 10 It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: *Multiplex Constructions* [2003] NSWSC 1140 at [76].
>
> 11 The manner in which compliance with s 14 is tested is not overly demanding: *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54] citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] ("[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); *Multiplex Constructions* [2003] NSWSC 1140 at [76] ("[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves"); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at

54 [2008] FCA 1248 [10]–[11] ('*Protectavale*').
55 [2002] NSWCA 136 [20].

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[20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").

88 When the Payment Claim in this case is considered in a common sense practical manner, one can readily arrive at the conclusion that the payment claim documents sent on 7 and 10 October 2014 in fact constituted one and the same Payment Claim, which I find to be the case.

89 Alternatively, I find that the document served on 10 October 2014 was in substitution for that served on 7 October 2014 which was intended to be, and was in fact, abandoned. The inference of substitution and abandonment is to be drawn from the following facts:

(a) The text of the covering letter for the 10 October 2014 document which states "I am re-sending these" and the reason for doing this;

(b) Precisely the same amount was claimed in both documents, and, it may be inferred, for precisely the same works;

(c) The first document was supplemented by the second attaching the applicable trade invoices and correcting the name of the respondent party to include the second proprietor, Tek Foods Pty Ltd;

(d) The Contractor, in its Adjudication Application identified the Payment Claim to be the subject of the Adjudication as being that dated 10 October 2014 and no other;

(e) Neither party submitted to the Adjudicator that in fact there had been a prior payment claim dated 7 October 2014 which attracted the operation of s 14(8) of the Act; and

(f) The Adjudicator conducted the Adjudication throughout, and without objection, on the basis of the 10 October 2014 Payment Claim.

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90 The Proprietors relied on *Jotham Property v Cooperative Builders*[56] and *Dualcorp Pty Ltd v Remo Constructions Pty*[57] in support of their contention. However, both cases are readily distinguishable from the present.

91 *Jotham* concerned multiple Payment Claims which were found to be in respect of the same reference date.

92 I reject the contention of the Proprietors that there were in fact two payment claims dated 7 and 10 October 2014 in respect of the same reference date.

93 For these reasons, s 14(8) of the Act was not breached, and the Proprietors must fail on Ground 1.

Ground 3 – invalid adjudication application

Plaintiffs' Submissions on Ground 3

94 The Proprietors contend under Ground 3 that the Adjudication Determination was invalid and of no effect, because the adjudication was conducted on the basis that there had been no payment schedule. This was submitted to be incorrect because a valid payment schedule had in fact been provided.

95 The following facts were relied upon to found this submission:

(a) the 10 October 2014 Payment Claim was served by facsimile after 4.00 pm on 9 October 2014. It was therefore deemed to have been served on the following business day, 10 October 2014 pursuant to s 50(3) of the Act;

(b) the Plaintiffs then had 10 business days in which to provide a payment schedule;

(c) the period of 10 business days from the date of service of the 10 October 2014 Payment Claim was 24 October 2014;

56 [2013] VSC 552.
57 (2009) 74 NSWLR 190.

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(d) on 23 October 2014 the Proprietors sent an email to the Contractor which identified the payment claim, indicated that NIL would be paid and gave reasons for this.[58] This email was said to satisfy the requirements of a payment schedule under s 15 of the Act;

(f) the Adjudication Application was purportedly made under s 18(1)(b) and contained an incorrect statement that no payment schedule had been served by the Proprietors;

(g) the Adjudication Application should have been made under s 18(1)(a) of the Act, which applies if a payment schedule has been served.

96 It was submitted that this had two consequences which were fatal to a valid adjudication:

(a) the Adjudicator therefore (and incorrectly) was led to believe that the Respondents to the adjudication application, namely the Proprietors, were not entitled to serve an adjudication response and the Adjudication miscarried (the 'Section 18 Issue'); and

(b) an adjudicator *must* take into account the payment schedule by virtue of s 23(2)(d) of the Act. If an adjudicator fails to take into account a payment schedule, then the adjudication determination is deemed to be *void* pursuant to s 23(2B)(a) of the Act. Having determined that there was no payment schedule, it follows that the Adjudicator did not take it into account, and it further follows that the Adjudication Determination is void (the 'Section 23 Issue').

Defendant's Submissions on Ground 3

97 The Defendant contended that Ground 3 fails on a proper construction of s 18(1)(a)(i) of the Act and it is not supported by the evidence.

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58 See the Affidavit of Mr Tercan at [34] and Exhibit MT-16.

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98 It was further submitted that the email forwarded by the Proprietors dated 23 October 2014 was not a payment schedule by reason that it does not meet the requirements of the Act and was not intended by the Proprietors to be a payment schedule at the relevant time.

99 Further, it was submitted that this correspondence was forwarded by email and for this reason had not been served in accordance with s 50 of the Act, and for this further reason, no valid payment schedule had been served.

100 These matters provided a complete answer to both the Section 18 Issue and the Section 23 Issue.

Analysis and Conclusion – Ground 3 – the Section 18 Issue

101 Section 18(1) of the Act provides:

> (1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if—
>
> (a) the respondent provides a payment schedule under Division 1 but—
>
> (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or
>
> (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
>
> (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

102 Thus an adjudication application may be made in the circumstances provided for, both where the respondent provides a payment schedule (under s 18(1)(a)) and where no payment schedule is provided (under s 18(1)(b)). However, an adjudication application to which subsection 18(1)(b) applies cannot be made pursuant to s 18(2) unless, pursuant to s 18(2):

> (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the

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claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

103 The Adjudicator found that no payment schedule had been received in response to the Payment Claim.[59] The Adjudicator also noted that by notice dated 20 October 2014, the claimant Contractor gave notice to the Proprietors pursuant to s 18(2) of the Act of intention to apply for adjudication and giving them a further 2 business days to provide a payment schedule, and that no response was received to that notice.[60]

104 The Adjudicator appears to have proceeded on the basis that the Adjudication was a s 18(1)(b) adjudication where no payment schedule had been provided,[61] rather than an adjudication conducted under s 18(1)(a) of the Act where a payment schedule was provided.

Whether 23 October Email a Payment Schedule

105 The question as to whether the Adjudication should have been conducted under s 18(1)(a) rather than under s 18(1)(b) of the Act, turns upon whether the Proprietors email of 23 October 2014 sent to the Contractor[62] was a valid payment schedule under s 15 of the Act.

106 The email of 23 October 2014 was in the following form:

> From: Tek Foods Pty Ltd
> Sent: Thursday, 23 October 2014 1:50 PM
> To: Asta Developments
> Subject: 882-900 Cooper Street
> Dear Gino,
> I am writing this letter to you because I have been trying to contact you for over 3 weeks now, but you don't return my calls or texts. I have gone to site several times but you are never there anymore. On October the 16th I went to side, you were not there. I tried to talk to Terry and Aaron, but they said I needed to talk to you. I went again on October the 17th but again you were not there. On Tuesday the 21st October I had my office email Rebecca to arrange a meeting with you, the QS and Ken to discuss these issues. All I got in

59 Adjudication Determination [4].
60 Adjudication Determination [5].
61 Adjudication Determination [40], [41], and [48].
62 See the Affidavit of Mr Tercan at [34] and Exhibit MT-16.

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response was an email from Carolyn disagreeing with me, but no arrangement for a meeting as I had requested.

Up until now you always agreed to meet me to discuss your invoices, which we have then agreed as to payment. So far I have paid your invoices from the company funds, not finance. There has never been any problem paying your invoices.

The problem was with your company, which the financier deemed to be high risk. We worked with you to get this risk profile downgraded, and I have told you that you have been approved and the finance is ready. I have sent you evidence of this, which you refuse to accept. Mr Sam Nicolaci of Westpac can confirm that finance for the project is approved.

Next you accuse me of not paying invoices. What invoices, I ask? The invoices from July and August were discussed by us at a meeting, with Ken, and you agreed to withdraw those invoices.

On October the 9th you sent those invoices again, and with a further invoice number 69 for another $864,686.48. Over $2,000,000 is now claimed! Please note that we will not be making any payment towards these invoices, for a lot of reasons.

First, the amount you have claimed is excessive compared to what work you have done on site. I do not believe you can justify these claims. Very little work has been done since late September.

Next, as you know the QS must approve claims before they can be paid. Westpac will not pay unless the QS approves payment, you know this and agreed to this.

Next, the extras which you have claimed I cannot understand. I never agreed to these extras. I need you to explain these extras.

Finally, you have suspended works and issued lawyer's notices to terminate our contract. I do not know why you have done this rather than just meet with me so we can discuss our issued. Gino, if you want to finish this job as per our contract then let's have a meeting to resolve our problems and continue this project to a successful completion. Then you can put it up on your website with pride.

But if you want to end this contract, tell me honestly and we can discuss that.

Gino, I feel we are at the cross roads. Either we have a meeting to resolve our problems, or else we have a massive legal fight which will be not good for neither of us. I am prepared to meet with you on Monday afternoon to thrash out all issues. We can meet at my office and I can even try and arrange for the QS to come too, so we can get approval there and then.

Regards, Muhittin Tercan, Managing Director, Tek Foods Pty Ltd & Amasya Enterprises.

107 The requirements for a payment schedule are set out in s15(1) to (3) of the Act in the following form:

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> (1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) A payment schedule—
>
> (a) must identify the payment claim to which it relates; and
>
> (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and
>
> (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
>
> (d) must be in the relevant prescribed form (if any); and
>
> (e) must contain the prescribed information (if any).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

108 No form and no information has as yet been prescribed for the purposes of s 15(2)(d) and (e).

109 A payment schedule does not need to be in any prescribed form. In *Façade Treatment Engineering v Brookfield Multiplex*[63] the Court, having considered the authorities of *Protectavale*,[64] *Multiplex Constructions Pty Ltd v Luikens and Anor*,[65] and *Barclay Mowlem v Tesrol Walsh Bay*,[66] in concluding that the email in question did satisfy the requirements of a valid payment schedule, said this:[67]

> 36 In the first place, I think that it is clear from a plain reading of the 5 October email, when read as a whole, that Multiplex did not propose to pay anything to Façade in respect of Payment Claim No 19. In other words, Multiplex proposed to pay nothing to Façade in respect of the payment claim.
>
> 37 As to whether a proposal to pay 'nothing' or 'nil' or 'zero' in a response to a payment claim is 'an amount' for the purposes of s 15(2)(b), in the context of the BCISP Act, I am of the view that it is. I find myself in agreement with the further observations of McDougall J in *Barclay Mowlem* to the following effect:
>
> > There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and

63 [2015] VSC 41 ('*Façade*').
64 *Protectavale v K2K Pty Ltd* [2008] FCA 1248.
65 [2003] NSWSC 1140 ('*Multiplex Constructions*').
66 [2004] NSWSC 1232 ('*Barclay Mowlem*').
67 Ibid [36]-[38].

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> regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount ...
>
> ... A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).

38 In these circumstances, as s 15(3) of the BCISP Act makes clear, the respondent is required to tell the claimant why a nil payment is proposed, for the purpose, inter alia, of enabling the claimant to decide whether to take the matter to adjudication. In this case, Multiplex achieved this by claiming in its email that the Payment Claim No 19 was invalid, and setting out the reasons for the claimed invalidity. As McDougall J said further in *Barclay Mowlem* in relation to the mirror provision … of the NSW Act: 'The subsection is not concerned with the adequacy or sufficiency of those reasons'.

110 In *Multiplex Constructions*,[68] Palmer J set out the approach that the court should take in considering whether documents purporting to be payment claims or payment schedules complied with the relevant mandatory requirements of the security of payments legislation. His Honour noted that:[69]

> A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.
>
> A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues

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68 *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140.

69 Ibid at [76]-[78].

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between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

111 In this case the email of 23 October 2014 made it clear that nothing would be paid on the invoices which comprised the Payment Claim and provided reasons for this. This appeared in the following section of the letter of 23 October 2014:

> On October the 9th you sent those invoices again, and with a further invoice number 69 for another $864,686.48. Over $2,000,000 is now claimed! Please note that we will not be making any payment towards these invoices, for a lot of reasons.
>
> First, the amount you have claimed is excessive compared to what work you have done on site. I do not believe you can justify these claims. Very little work has been done since late September.
>
> Next, as you know the QS must approve claims before they can be paid. Westpac will not pay unless the QS approves payment, you know this and agreed to this.
>
> Next, the extras which you have claimed I cannot understand. I never agreed to these extras. I need you to explain these extras.
>
> Finally, you have suspended works and issued lawyer's notices to terminate our contract. I do not know why you have done this rather than just meet with me so we can discuss our issued.

112 I am satisfied that the 23 October email identified the payment claim to which it related, indicated the amount of the payment (if any) that the respondent proposes to make (namely zero Dollars), and there was no need to identify any amount of the claim that the respondent alleges was an excluded amount (because none was claimed).

113 For these reasons, I am satisfied that the 23 October 2015 email was a payment schedule within the meaning of s 15 of the Act.

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Emailing of Documents under the Act

114 As to whether the fact that the communication of 23 October 2014 was in the form of an email, rather than in hard copy, to my mind, this cannot work to detract from its force and effect as a valid payment schedule under the Act.

115 Section 50 of the Act provides for the services of notices. It is in the following form:

> (1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person—
>
> (a) by delivering it to the person personally; or
>
> (b) by lodging it during normal office hours at the person's ordinary place of business; or
>
> (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
>
> (d) in such manner as may be prescribed for the purposes of this section; or
>
> (e) in any other manner specified in the relevant construction contract.
>
> (2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected—
>
> (a) in the case of posting—2 business days after the day on which the notice or document was posted;
>
> (b) in the case of a facsimile—at the time the facsimile is received.
>
> (3) If a facsimile is received after 4.00 p.m. on any day, it must be taken to have been received on the next business day.

116 The section is a facilitative provision which is expressed in permissive terms by use of the word 'may' in subsection (1). It does not provide for a mandatory and exclusive regime for the service of documents under the Act. In particular, it does not exclude emailing as a means of service, either expressly or by implication.

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117 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*[70] the Court approved of the service of necessary documents under the Act (in this case an adjudication application) by email.[71]

118 The High Court considered the distinction between statutory provisions that are directory and those that are mandatory in *Project Blue Sky Inc v Australian Broadcasting Authority*.[72] The majority of the Court analysed the issue in this way:[73]

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".

119 By analogy, I adopt this approach to s 50 of the Act.

120 I take into account the language of s 50 of the Act, and the scope and object of the Act as a whole. I also take into account the context in which the Act is to operate, as described by Palmer J in *Multiplex Constructions Pty Ltd v Luikens and Anor*,[74] and judicial notice which may be taken of the fact of emailing being a common, if not the predominant, form of commercial communication within the building industry.

121 I do not regard the emailing of a document that is required to be served under the Act as giving rise to the breach of any essential requirement under the Act, even though this form of communication is not specifically referred to in s 50 of the Act. A payment schedule that has been emailed (as opposed to being hand delivered, or sent by pre-paid ordinary mail or by facsimile transmission) is not rendered invalid by the Act, because I do not discern any such intention or purpose from the Act. There is no mandatory requirement expressed in s 15 of the Act for payment schedules to be served exclusively by the methods set out in s 50.

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70 [2009] VSC 156.
71 Ibid at [124]-[132].
72 (1998) 194 CLR 355.
73 Ibid at 390 (McHugh, Gummow, Kirby and Hayne JJ).
74 [2003] NSWSC 1140 at [76]-[78].

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122 This approach to recognising that documents to be served under the Act may be served by email, unless expressly required otherwise by the statute, is consistent with contemporary practice to facilitate electronic transactions in business and a recognition, in the context of the importance of electronic communications to the economy as a whole, that transactions effected electronically are not by that reason alone treated as invalid. [75]

123 I also adopt contemporary practice in accepting that the time of receipt of an electronic communication such as an email is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. For this purpose it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.[76]

124 I accept that the email of 23 October 2014 was validly served as a payment schedule, and within the time prescribed by s 15(4)(b)(ii) of the Act, namely within 10 days after the relevant payment claim was served.

125 For these reasons, I accept the submission of the Plaintiffs that the email of 23 October 2014 was a valid payment schedule under the Act.

Whether Any Material Difference in the Present Case

126 The question then arises as to whether, in the present case, there was any material difference of substance between the Adjudicator proceeding under s 18(1)(a) of the Act as he should have proceeded, as if there was a payment schedule, rather than as he did, proceeding under s 18(1)(b) of the Act, as if no payment schedule had been provided.

127 The material difference here upon which the Plaintiffs relied, was the entitlement for a respondent to a payment claim to lodge an adjudication response, which entitlement is triggered under s 21(2A) of the Act, 'only if the respondent has

[75] See for example: the *Electronic Transactions (Victoria) Act 2000*, ss 1, 4, 5, and 7.
[76] See the *Electronic Transactions (Victoria) Act 2000*, s 13A(1) and (2).

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provided a payment schedule to the claimant within the time specified in s 15(4) or 18(2)(b)'.

128 Section 21(1) of the Act of the Act, which is expressed to be subject to subsection (2A), provides for an entitlement for a respondent to a payment claim to lodge adjudication responses. Subsections 21(1) and (2A) together provide:

> (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within —
>
> (a) 5 business days after receiving a copy of the application; or
>
> (b) 2 business days after receiving notice of an adjudicator's acceptance of the application —
>
> whichever time expires later.
>
> …
>
> (2A) 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 15(4) or 18(2)(b).

129 Section 21(2A) therefore excludes a respondent from the right to provide an adjudication response where no payment schedule has been provided within the time frames set by the Act.

130 However, in the conduct of an adjudication, the adjudicator is bound to afford natural justice to the parties. An adjudication determination made contrary to the rules of natural justice is void.[77]

131 It goes without saying that one strand of the rules on natural justice is the 'hearing rule'. This requires that parties be given a reasonable opportunity to know the case to be met and a reasonable opportunity to put a case in answer.

132 In some cases, in order to satisfy this element of natural justice, in spite of the restriction imposed on a respondent in lodging and relying upon an adjudication response provided by s 21(2A), observance of the duty to give a party a reasonable

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77 *SAAP v Minister for Immigration* (2005) 228 CLR 294 [77] (McHugh J); *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428 [44]-[45], [53] (Brereton J).

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opportunity to put its case may demand that an adjudicator utilises the procedure contemplated by s 22(5)(a) and (b) of the Act, and requests a respondent to provide further written submissions, in turn giving the claimant an opportunity to comment on those submissions.

133 For this purpose, an adjudicator may, amongst other things, and where appropriate to do so, avail himself or herself of the facility provided by s 22(5)(a) and (b) of the Act. These subsections provide:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator —
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
>
> (b) may set deadlines for further submissions and comments by the parties; and
>
> …

134 In exercising this important discretion in accordance with the principles of natural justice, the objects of the legislation, and the particular express confinements of the statutory scheme as a whole, must also be considered, requiring as they do, the limits of the matters to be taken into account in making an adjudication determination (s 23) and the time within which the adjudication determination is to be made (s 22(4)).

135 In the end, it is a matter of balance. Application of the common law principles of natural justice, as that application is necessarily curtailed by the particular statutory scheme of this legislation, need to be considered against the procedural fairness demanded by the particular case at hand.

136 This is precisely the approach adopted by the Adjudicator in the present case. In his Adjudication Determination the Adjudicator relevantly said this:[78]

> [71] The claimant says that the respondent should not be permitted to submit an Adjudication Response on the grounds that it failed to deliver a payment schedule. For the reasons set out below, irrespective of the other

78 Adjudication Determination [71], [76] and [77].

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> conclusions I have come to in this determination, as a matter of natural justice, I have preferred to err on the side of allowing that the submissions made by the respondent in its letter dated 10 November 2014 to be taken into account, and giving the claimant an opportunity to respond to those matters.
>
> [76] In my view, an adjudicator is required to balance the express language of the Act, and the requirement that he/she exercise a discretion to, consistent with those express provisions, ensure that each party is accorded natural justice.
>
> [77] On balance, though the Act provides that a respondent who fails to deliver a payment schedule may not deliver an Adjudication Response, as a matter of natural justice, I would err on the side of allowing the material provided.

137 The claimant Contractor was copied with the letter from the respondent Proprietors and was given an opportunity to respond to the matters raised by the respondent.

138 For these reasons, even though I have found that the Adjudicator was in error in determining that no payment schedule had been served, and was also in error in finding that this was a s 18(1)(b) adjudication where no payment schedule had been provided, the outcome of these errors had no material consequence for a valid Adjudication Determination. All necessary submissions from the parties were received and considered by the Adjudicator.

139 In arriving at this conclusion, I also take into account the matters addressed in my analysis and conclusion below under Ground 4 – breach of natural justice.

Analysis and Conclusion – Ground 3 – the Section 23 Issue

140 However, the error in determining that no payment schedule had been served, when in fact, and unknown to the Adjudicator, the 23 October 2014 email was a payment schedule, had a significant consequence in a different respect.

141 Sections 23(2)(d) and (2B)(a) of the Act relevantly provide:

> (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only –
>
> …
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

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…

(2B) An adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2);

142 The operation of s 23(2)(d) and (2B)(a) of the Act, together require an adjudicator to consider any payment schedule which has been delivered, failing which the adjudication determination is void 'to the extent that it has been made in contravention of this requirement'.

143 The Adjudicator, through no fault of his own, wrongly concluded that no Payment Schedule had been delivered. Save for indicating that a payment schedule had been 'identified' in the Adjudication Application,[79] which in any event I take to be a mistake by reason of the following:

(a) the Adjudication Application did not include or refer to any payment schedule. Indeed it said specifically: 'No Payment Schedule was served by the Respondents in respect of the Payment Claims';

(b) the documents presented to the Adjudicator for adjudication did not include or refer to any payment schedule;

(c) no argument was addressed to the Adjudicator by either party that there was a payment schedule in response to the Payment Claim which had been served.

144 Consequently, the Adjudicator did not refer to it in his adjudication determination in a manner which indicated he had considered it at all. Quite to the contrary: the Adjudicator made a specific finding that 'No payment schedule was received in response to the Payment Claim',[80] a finding that he was entitled to make on the material before him.

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79 Adjudication Determination [49] and [50(d)].

80 Adjudication Determination [4].

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145 Further, the Adjudicator proceeded to determine the Adjudication applying the procedure under s 18(1)(b) of the Act (as if no payment schedule had been provided) and considered himself bound by s 21(2A) of the Act (also on the basis that no payment schedule had been provided).

146 It is to be inferred from this conduct of the Adjudication that the Adjudicator, quite innocently from his perspective, did not consider any payment schedule in the course of making his Adjudication Determination, and certainly did not consider the Payment Schedule constituted by the 23 October 2014 email.

147 For this reason, the inescapable conclusion is that the Adjudication Determination was void by operation of s 23(2B)(a) of the Act, and must be declared to have been made in excess of jurisdiction under the Act.

148 Ground 3 therefore succeeds for the Proprietors.

Need for Reform

149 The litigation of this issue yet again emphasises the need for a simple reform by prescribing standard forms for payment claims and payment schedules under the Act.

150 As observed by this Court in *Façade:*[81]

> 26 [T]he Victorian Building Authority established under the *Building Act 1993*, although it is charged with the responsibility under s 47A(a) of the BCISP Act to 'keep under regular review the administration and effectiveness of this Act and the regulations', has not taken the step of prescribing any forms either for use in making payment claims under s 14(2)(a) and (b) or for use in providing payment schedules under s 15(2)(d) and (e). Had there been such a prescribed form in existence, no doubt the present issue in the proceeding would not have arisen and the parties would have been saved the costs of litigating the matter. This situation has not escaped the earlier attention of this Court. In *Gantley Pty Ltd v Phoenix International Group Pty Ltd*,[82] the Court, after noting the absence of any prescribed form for the making of payment claims under s 14 of the BCISP Act, and noting the initiatives of the Victorian Civil Contractors Federation and the New Zealand

81 *Façade Treatment Engineering v Brookfield Multiplex* [2015] VSC 41.
82 [2010] VSC 106 [139].

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Subcontractors Federation Inc in developing payment claim forms for use under the security of payment legislation[83] said:

> "If one or other or a combination of these forms, or an appropriate adaptation thereof, had been used by the claimant in this case, it may well have averted the cost, expense and delay associated with the prosecution of Ground 1 and the claimant's exposure to the allegation of invalidity of its payment claims and the subsequent adjudications upon them, at least on this ground."

27 A similar initiative could also readily be taken in Victoria to develop forms for payment schedules under s 15 of the BCISP Act.

151 The Victorian Building Authority is established under the *Building Act 1993* (Vic). Amongst other things, it is charged with the responsibility under s 47A(a) of the Act to 'keep under regular review the administration and effectiveness of this Act and the regulations.' Cases such as the present amply justify a review of the present position, where, although power is provided by the Act for prescribing standard forms for payment claims and payment schedules, none have thus far been provided. The result is that the existence or otherwise of a valid payment claim or payment schedule is an issue which commonly arises to be resolved by litigation. This situation presents as an opportunity to improve the effectiveness of the Act by eliminating or at least reducing such legal issues, thereby reducing the legal costs to which claimants and respondents in the building industry are exposed. It would appear that these opportunities have not been fully explored.

Ground 4 – Beach of Natural Justice

152 By way of summary, because the Adjudicator did not believe that the Proprietors were entitled to lodge an adjudication response because there was no payment schedule, he exercised his power under s 22(5)(a) and (b) of the Act and considered their letter to him dated 10 November 2014 to represent a requested submission, and invited the Contractor to then make a reply submission.[84]

153 However, it was contended by the Proprietors that this exercise miscarried, resulting in a breach of natural justice. The Proprietors submitted in this regard that the

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83 Ibid at [133]–[139].

84 Adjudicator's email dated 11 November 2014 at Exhibit MT-25.

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Contractor took unfair advantage of this facility to 'comment' on their submission of 10 November 2014 by providing a substantially detailed submission, which included colour coded tax invoices with explanations of how to understand the claims, as well as, for the first time, providing a copy of a report from a quantity surveyor dated 27 October 2014. This was contained in the Contractor's submissions delivered on 12 November 2014.

154 It was submitted that the Contractor's 12 November 2014 submissions ultimately constituted an entirely new adjudication application founded upon fundamentally different material, and in effect, the real adjudication application was provided on 12 November 2014.

155 Consequently it was submitted that this is a case where the claimant Contractor in an adjudication obtained a substantially unfair advantage over the respondent Proprietors by means of an 'ambush' when the Adjudicator failed to accord the Proprietors any or any reasonable opportunity to respond to the further submissions made by the Contractor on 12 November 2014.

156 It was contended that this failure amounted to:

(a) a denial of natural justice; and

(b) a breach of s 22(5)(a) of the Act, which provides that for the purposes of any proceedings conducted to determine an adjudication application, an adjudicator may request further written submissions from either party and must give the other party an opportunity to *comment* on those submissions.

First Defendant's Submissions

157 The Contractor submitted that its submissions of 12 November 2015 did not amount to a 'new application' but were lodged in direct response to each of the issues raised by the Proprietors' submissions of 10 November 2014. In particular, the inclusion of

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the QS Report was for the purpose of responding to the issue of the value of the works raised by the Proprietors in their submissions of 10 November 2014.[85]

158 It was submitted that the Proprietors were legally represented at the time the submission was made by the Contractor on 12 November 2014.[86]

159 Accordingly, the respondent Proprietors were not denied an opportunity to provide any further material, they did not request any such opportunity, and no breach of the rules of natural justice arose.

Analysis and Conclusion – Ground 4

160 As earlier observed, in the conduct of an adjudication, the adjudicator is bound to afford natural justice to the parties. An adjudication determination made contrary to the rules of natural justice is void.[87]

161 In *Fifty Property Investments Pty Ltd v O'Mara*[88] Brereton J stated:

> A denial of natural justice, to the extent that natural justice is to be afforded as contemplated by the procedure established by the Act, invalidates an adjudication [Brodyn [57];
>
> … natural justice is to be afforded to the extent contemplated by these provisions, and in my opinion, such is the importance generally of natural justice that one can infer a legislative intent that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.
>
> …
>
> The result of a denial of natural justice is that the decision is void, even if the decision would not have been affected by any submissions which might have been made had an opportunity to make them be afforded. While as a matter of discretion, relief might be declined if it can be shown that the denial of natural justice could not possibly have made a difference to the outcome, all that a plaintiff need establish is that denial of natural justice deprived it of the possibility of a better outcome, and in order to negate that possibility it is

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85 Paragraph 4(b) of the Adjudication Response: Exhibit KB 5 to the Affidavit of Kimani Adil Boden sworn on 16 December 2014.

86 The Plaintiffs' Solicitors, Starnet Legal and Mr Romauld Andrew of Counsel were representing the Plaintiffs from at least 27 October 2014: Paragraphs 4 and 5 and Exhibit CJE 5 of Ms Elliott's Affidavit affirmed 27 March 2015.

87 *SAAP v Minister for Immigration* (2005) 228 CLR 294 [77] (McHugh J); *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428 [44]-[45], [53] (Brereton J).

88 [2006] NSWSC 428 at [44]-[45], [53].

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> necessary to conclude that a properly conducted adjudication could not possibly have produced a different result.

162 Reference is also made to statement by McHugh J in *SAAP v Minister for Immigration*:[89]

> There can be no partial compliance with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process … it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act.

163 The valid exercise of the Adjudicator's power to request a further submission must depend upon the circumstances, in particular whether exercise of the power is required to satisfy the duty to undertake the Adjudication in accordance with natural justice.

164 Section 22(5)(b) of the Act provides an adjudicator with some flexibility in setting deadlines for further submissions and comments by the parties, particularly in the light of the extension of time facility provided by s 22(4) and (4A) of the Act for the adjudicator to make an adjudication determination.

165 At least theoretically it should have been open to the Proprietors and their lawyers to request the Adjudicator to seek further submissions from them pursuant to s 22(5)(a), and, if necessary, further time to respond by seeking an extension of time for delivery of the adjudication determination pursuant to s 22(4)(b).

166 However, am satisfied that the time constraints denied this opportunity to the Proprietors.

167 By letter dated 29 October 2014 to the parties the Adjudicator served notice of his acceptance of the Adjudication Application. Time commenced to run by calculating the 15 business days from that date to arrive at the maximum time period for the delivery of the adjudication determination for the purposes of s 22(4)(b), which was 19 November 2014, not taking into account any extensions of time.

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89 (2005) 228 CLR 294 [77] (McHugh J).

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168 On 10 November 2014 the Proprietors sent a letter to the Adjudicator setting out their position, concluding that the parties should permit the contractual quantity surveyor to undertake an assessment of the works to enable the financing bank to make payment of any outstanding sum in accordance with the Construction Contract.

169 On 11 November 2014 the Adjudicator sent an email to the parties giving the Contractor until the close of business on 12 November 2014 to make any submissions in response to the letter of the Proprietors dated 10 November 2014. The Adjudicator also requested a 2-day extension under s 22(4)(b) of the Act, which the Contractor, as the claimant, agreed to.

170 On 12 November 2014 the Contractor sent a very detailed letter to the Adjudicator in response to his letter of 11 November 2014. These submissions included colour coded copies of tax invoices with corresponding explanations of how the tax invoices were calculated, together with electronic documents contained in a CD. Also included with these submissions was mention of a report prepared by a quantity surveyor, Douglas Buchanan of DBQS Consulting dated 27 October 2014 (the 'QS Report'). This was said to be an attachment to the submission. However, the attached documents were not provided with the submissions. The attachments, including the QS Report were not provided until Thursday, 13 November 2014, when they were provided in hard copy by post addressed to the business address of the Proprietors.

171 Pursuant to s 50 of the Act, service of the QS Report was deemed to have been effected on Monday, 17 November 2014, although I accept the QS Report was physically received by the Proprietors on Thursday, 13 November 2014.

172 The QS Report provided a detailed estimate based on current market prices. It also contained a series of photographs depicting the works inspected by Mr Buchanan on 7 October 2014.

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173 On Sunday 16 November 2014 the Adjudicator requested a further 3-day extension. On Monday 17 November the Contractor as the claimant agreed to the further extension under s 22(4)(b) of the Act.

174 The effect of the two extensions of time which had been granted meant that the Adjudicator had at least five extra days beyond 19 November 2014 within which to complete and deliver his Adjudication Determination. The Proprietors were entitled to take the view, as they did, that they had further time to make application to the Adjudicator to respond to the QS Report after 17 November 2014.

175 However, on 18 November 2014, the Adjudicator advised the parties that he had completed his determination. This occurred while the Proprietors and their lawyers were considering how to respond to the Contractor's 12 November 2014 submissions and the QS Report.

176 The Adjudication Determination set out the valuation exercise undertaken by the Adjudicator in some detail. It is clear that the Adjudicator placed considerable reliance upon the QS Report provided with the Contractor's 12 November 2014 submissions in arriving at his determination. The following paragraphs of the Adjudication Determination bear this out:

> Validation by Expert Report:
>
> In support of the amounts claimed in the Payment Claim, the claimant provides an Expert Report, prepared by Douglas Buchanan of DBQS Consulting Pty Ltd, Expert Quantity Surveyor, dated 27 October 2014. Mr Buchanan's qualifications are set out in his report. I regard Mr Buchanan as very senior, highly qualified and experienced, and expert in relation to the matters in his report.
>
> Mr Buchannan says, in summary:
>
> > 8. Summary of Opinions
> >
> > 8.1 I inspected the site on Tuesday 7 October 2014.
> >
> > 8.2 My inspection revealed that most of the substructure of the buildings is complete, concrete slabs were in place, precast concrete panels to the Cooper St frontage buildings are partially erected, steelwork and roofing to the frontage building partially completed. In slab trench grates have been installed, there is evidence that below

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ground drainage, fire services and water supplies have been installed. I attach copies of photographs taken at the time of my inspection.

8.3 I have prepared an estimate of value of works done based on current market prices. Have made allowance for preliminaries based on typical contracts of this type. I have included 6% for the builders margin and off site overheads, and 10% for GST.

8.4 I have included the value of tilt up concrete panels which have been cast but have not yet been erected. I note that the builder has indicated that 40 panels remain to be cast. I have based my assessment on my count of panels cast which suggests that more than 40 panels remain to be cast. My assessment excludes the value works related to cooling pipes installed in the slab at the coolroom. There are a number of PF12 footings (11no) for which we do not have full information. I have made an assumption in my assessment, but the value of these items is less than 0.01% of the total assessment.

8.5 In my opinion the reasonable value of works completed is $5,613,936.

Mr Buchanan attaches a Table described as "Elemental Summary", assessing the completed work as follows:

Description	Qty	Unit	Rate	Total
Cost Summary – Stage D				
Base Building Works				4,751,975
Subtotal (1)				4,751.975
Builder's off site overheads and profit	6.0	%		285,119
Contract Contingency		Excl		0
Goods and Service Tax	10.0	%		503,709
Anticipated Total Building Cost (incl GST) (Current – October 2014)				5,540,803
Authority Contribution Fees and Charges		Item		73,133
Anticipated Total Project Cost (incl GST) (Current – October 2014)				5,613,936
Block 1 Building Works				
Preliminaries		ITEM		317,813
Excavation		ITEM		70,425
Concrete		ITEM		1,096,676
Precast Concrete		ITEM		1,455,845
Structural Steel		ITEM		341,400
Roofing		ITEM		174,834
Hydraulics		ITEM		410,071
Variations		ITEM		884,911
Sub Total of Block 1 – Building Works				**4,751,975**

Mr Buchanan further breaks down each of the above items in a detailed spreadsheet entitled, "Elemental Breakdown".

In my view, Mr Buchanan's expert report looks correct, and gives support to the claimed amounts by the claimant in the Payment Claim.

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177 The QS Report was in a different category to comments or submissions provided by parties, which must be drawn to an expeditious closure, consistently with the time limits set by the Act and the administration of natural justice in the conduct of statutory adjudications. The QS Report was, in effect, new evidence of an expert nature which one party, the Contractor, placed before the Adjudicator, without providing an opportunity to the other party, the Proprietors, to be heard in respect of it.

178 Consideration of the QS Report, which was effectively served on the Proprietors on 17 November 2014, was new material. Given the nature and detail provided by that document, and the fact that it had been received by the Adjudicator and was ultimately taken into account by the Adjudicator in his Adjudication Determination, the Proprietors ought to have been given an opportunity to fully consider the document, seek expert advice upon it, and if necessary, request from the Adjudicator an opportunity to respond to the document, and if also necessary, seek a further extension of time for the delivery of the Adjudication Determination for this purpose. The Proprietors were denied these opportunities when, on 18 November 2014, the Adjudicator advised the parties that he had completed his determination.

179 In the circumstances, I am satisfied that the Adjudicator failed to accord the Proprietors any or any reasonable opportunity to respond to the further submissions made by the Contractor on 12 November 2014 containing the new evidence comprised in the QS Report.

180 The Proprietors therefore succeed under Ground 4.

Grounds 5 & 6– failure to assess work in accordance with Special Condition 7, and taking into account an irrelevant consideration

181 It was submitted by the Proprietors that the Adjudicator adopted an assessment which was excessive and bore no relationship to the contract price, which he was required to have regard to pursuant to s 11(1)(b)(i) of the Act.

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182 The Proprietors further submitted that the Adjudicator failed to assess the value of the construction work the subject of the adjudication in accordance with the relevant construction contract, including *inter alia* by reference to the approval of the bank's quantity surveyor as required by special condition SC7 of the Construction Contract.

183 Instead, it was submitted, the Adjudicator took into account an irrelevant consideration, being the report by the quantity surveyor as to the market value of the work, as opposed to the value of the work as required under the relevant Construction Contract.

184 In the light of my findings as to the Adjudication Determination being void under Grounds 3 and 4, it is unnecessary to determine Grounds 5 and 6 which seek the same relief.

Disposition

185 It follows that the Adjudicator did make jurisdictional errors, and the Plaintiff Proprietors have grounds for relief.

186 It will be declared that the Adjudication Determination, dated 18 November 2014, is void and it is ordered to be quashed.

187 I will make all necessary consequential orders as to the money paid into Court as security pursuant to s 28R(5)(b) of the Act, and will await a formal draft form of order from the parties to this effect, before authentication of the orders is made in this case.

188 I will set down a directions hearing after 5 October 2015 to hear the parties as to the form of the final orders and as to costs of the proceeding, taking into account the fact that both parties were legally represented in the adjudication proceeding and in my opinion, both had a duty to bring the Payment Schedule to the attention of the Adjudicator. The failure to do this led the Adjudicator into error on this element of the Adjudication.

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