

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

No. 10573 of 2009

ASIAN PACIFIC BUILDING CORPORATION PTY LTD
(ACN 053 997 989)

Plaintiff

v

AIRCON DUCT FABRICATION PTY LTD & ORS
(ABN 80 199 641 164)

First Defendant

And

TED SMITHIES

Second Defendant

And

IAN HILLMAN

Third Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 10, 11 and 15 MARCH 2010
DATE OF JUDGMENT: 1 JULY 2010
CASE MAY BE CITED AS: ASIAN PACIFIC BUILDING CORPORATION PTY LTD v
AIRCON DUCT FABRICATION PTY LTD & ORS
MEDIUM NEUTRAL CITATION: [2010] VSC 300

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002 (Vic)* - Adjudications conducted under Part 3 Division 2 of the Act - Basic and essential requirement of a valid adjudication determination - Requirements to assess whether work done (or goods and services supplied) and to value the work done (or goods and services supplied) - Adjudication determinations failed to value the work done - Adjudication determinations made beyond jurisdiction - Adjudication determinations declared void.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr M.G. Roberts Mr K.R. Naish	Dean Pavitt
For the Defendants	Mr J.A.F. Twigg	MCW Lawyers

HIS HONOUR:

Background

1 This proceeding raises for consideration the function of an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the “Act”), and whether a failure to discharge that function renders the adjudication determination void.

2 More particularly, the question in this case is whether an adjudication determination was or was not a valid and effective discharge of the adjudicator’s function, because the adjudicator did not, so it was submitted by the Plaintiff, apply his mind to a consideration of the progress claim within the parameters of the Act, but having rejected the matters raised by the Plaintiff in the submissions before him, simply accepted, without proper consideration, the First Defendant’s claim.

3 The Plaintiff, Asian Pacific Building Corporation Pty Ltd (“APBC”) is a contractor and developer of a number of building projects including the development of a number of boutique hotels named after a number of well-known contemporary Australian painters. One such development is to be known as the ‘Olsen Hotel’ the other is to be known as the ‘Blackman Hotel’.

4 The First Defendant, Aircon Duct Fabrication Pty Ltd (“Aircon”), as its name suggests, is a mechanical and air-conditioning services subcontractor.

5 APBC entered into a mechanical services contract with Aircon on or about 10 June 2008 (the “Olsen Contract”). By that contract, Aircon agreed to undertake air-conditioning works at the Olsen Hotel development being constructed at 637-641 Chapel Street, South Yarra (the “Olsen Project”).

6 APBC entered into a second mechanical services contract with Aircon on or about 24 September 2008 (the “Blackman Contract”). By that Contract, the Aircon agreed to undertake air-conditioning works at the Blackman Hotel development being constructed at 452 St Kilda Road, Melbourne (the “Blackman Project”).

SC:

7 It was common ground that both contracts were construction contracts for the purposes of the *Building Industry Security of Payments Act 2002* (Vic) (the “Act”), and that the Act in its current amended form applies to both the Olsen Project and the Blackman Project.

8 In relation to the Olsen Project, the following key steps of relevance occurred:

- | | |
|------------------|--|
| 15 October 2009 | Aircon served its payment claim pursuant to s.14 of the Act seeking payment of \$543,686.65 (the “Olsen Payment Claim”) |
| 26 October 2009 | APBC served its payment schedule pursuant tot s.15 of the Act for \$nil |
| 10 November 2009 | Aircon issued its adjudication application pursuant to s.18 of the Act |
| 16 November 2009 | The third Defendant “Mr Hillman”) accepted the position as adjudicator pursuant to s. 20 of the Act |
| 18 November 2009 | APBC filed its adjudication response pursuant to s. 21 of the Act |
| 23 November 2009 | Mr Hillman issued a notice pursuant to s. 21(2B) of the Act permitting Aircon to make further submissions in respect of APBC’s adjudication response by 26 November 2009 |
| 26 November 2009 | Aircon made further submissions by way of a four page letter |
| 27 November 2009 | Mr Hillman allowed Aircon until 27 November to make further submissions in response to the adjudication response |
| 30 November 2009 | APBC sent a letter to Mr Hillman responding to Aircon’s further submissions |
| 10 December 2009 | Mr Hillman allowed Aircon until 14 December 2009 to provide a further response to the adjudication response |
| 14 December 2009 | Aircon provided an 83 page letter by way of a further response to the adjudication response |

15 December 2009 APBC requested Mr Hillman to disregard Aircon's further response to the adjudication response dated 14 December 2009 or give APBC five days to respond to it. This request was not answered by Mr Hillman

16 December 2009 Mr Hillman delivered his adjudication determination (the "Olsen Adjudication Determination") awarding Aircon the full amount of its Olsen Payment Claim, namely \$543,686.65.

9 In relation to the Blackman Project, the following key steps of relevance occurred:

15 October 2009 Aircon served its payment claim pursuant to s.14 of the Act seeking \$532,725.52 (the "Blackman Payment Claim")

26 October 2009 APBC served its payment schedule pursuant to s.15 of the Act for \$nil

10 November 2009 Aircon issued its adjudication application pursuant to s.18 of the Act

16 November 2009 The Second Defendant, Ted Smithies ("Mr Smithies") accepted the position as adjudicator pursuant to s. 20 of the Act

18 November 2009 APBC filed its adjudication response pursuant to s. 21 of the Act

24 November 2009 Mr Smithies permitted Aircon to make further submissions in respect of APBC's adjudication response pursuant to s. 21(2B) of the Act

26 November 2009 Aircon made further submissions to Mr Smithies by way of a four page letter

2 December 2009 Mr Smithies delivered his adjudication determination awarding Aircon the adjudicated amount of \$127,727.92 (the "Blackman Adjudication Determination")

10 The position taken by APBC is that both the Olsen Adjudication and the Blackman Adjudication are void. The Plaintiff (APBC) seeks final relief in accordance with its Amended Originating Motion dated 21 December 2009. It seeks both injunctive and

declaratory relief in respect of two adjudication determinations. APBC also seeks, in the alternative, an order quashing the quashing the adjudication determinations, which I take to be relief in the nature of certiorari.

- 11 In addition to that substantive relief APBC also seeks its costs of the proceedings. However the costs order is only sought against Aircon, on the basis that Mr. Hillman and Mr. Smithies have filed appearances upon the express footing that they will abide the outcome of the proceedings and that no order as to costs will be sought against them. APBC is content with that position.

The Adjudicator's Function

- 12 I respectfully adopt the view tentatively expressed by Hodgson JA in relation to the New South Wales Act ¹ in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*, ² as re-stated by Brereton J in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors*: ³

[T]he adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

- 13 The fundamental determination to be made by an adjudicator as to whether the construction work identified in the payment claim has been carried out, and what is its value, is derived from the provisions of the Act.
- 14 The matter referred to an adjudicator for determination pursuant to an adjudication application is the adjudication of a payment claim: s. 18(1). An adjudicator who is

¹ *Building and Construction Industry Security of Payment Act 1999* (NSW).

² [2005] NSWCA 228.

³ [2006] NSWSC 13 at [82].

seized of the matter is required to determine is the amount of the progress payment: s. 23(1), after considering the matters referred to in the Act: s23(2).

15 In order to determine the amount of a progress claim, an adjudicator is driven back to the statutory regime for the valuation of construction work and related goods and services.

16 Section 9(1) of the Act provides for the statutory entitlement to progress payments, which is to be calculated in temporal terms by reference to a 'reference date' under a construction contract, as defined by s. 9(2).

17 The Act provides for the amount of a progress payment, which is to be calculated in accordance with the terms of the construction contract, or valued in accordance with the Act by reference to the work carried out or the goods and services supplied under the contract. Section 10(1) provides:

- (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be-
 - (a) the amount calculated in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of-
 - (i) construction work carried out or undertaken to be carried out by the person under the contract; or
 - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract- as the case requires.

18 As to the valuation of the quantum of a progress payment required to be undertaken, s.11 sets out how this is to be done. Section 11(1) provides in relation to construction work:

11. Valuation of construction work and related goods and services

- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued-
 - (a) in accordance with the terms of the contract; or

- (b) if the contract makes no express provision with respect to the matter, having regard to-
 - (i) the contract price for the work; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.

19 The role of the adjudicator in valuing construction work and related goods and services supplied under a construction contract is reinforced by s.23(4) which provides that:

- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined-
 - (a) the value of any construction work carried out under a construction contract; or
 - (b) the value of any related goods and services supplied under a construction contract-

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

20 Thus, a progress payment is to be quantified by determining the value of the relevant construction work carried out (or related goods and services supplied), valued in accordance with the terms of the construction contract, or in the absence of any express provision in the contract, in accordance with s. 11 of the Act.

Is an Adjudicator's Determination Void for Failure to Discharge the Adjudicator's Function?

21 A failure to conduct an adjudication of a payment claim, which requires as a minimum a determination as to whether the construction work the subject of the

claim has been performed and its value (or whether the goods and services have been supplied and their value) is a failure to comply with a basic and essential requirement of the Act.

22 The absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim without addressing its merits, namely, as a minimum, determining whether the construction work identified in the payment claim has been carried out, and what is its value.

23 Accordingly, there will nor be a valid adjudication of a payment claim, within the meaning of the Act, if all the adjudicator does is reject the respondent's contentions.

As Brereton J said in *Pacific General*:⁴

... By allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the has been performed and without valuing it - would bespeak of a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity.

24 In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* ⁵ Hodgson JA, in explaining *Firedam Civil Engineering Pty Ltd v KJP Constructions Pty Ltd* ⁶ said:

Further, it appears that in *Firedam* the adjudicator, having decided the respondent's submissions should be disregarded, simply adopted the amount specified by the claimant in the payment claim. If so, that would be a failure to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the consideration[s] in s 22(2).⁷

25 Thus, putting the matter in terms of jurisdiction, the authority to validly adjudicate a payment claim is an authority which only may be exercised if the basic and essential functions required by the Act are undertaken by an adjudicator, namely and as a minimum, determining whether the construction work identified in the payment

⁴ *Ibid* at [86].

⁵ [2008] NSWCA 279.

⁶ [2007] NSWSC 1162.

⁷ The reference to s.22(2) was a reference to that subsection in the *Building and Construction Industry Security of Payment Act 1999* (NSW). The equivalent section in the Victorian Act is s.23(2).

claim has been carried out, and what is its value (or determining whether the goods and services identified in the payment claim have been supplied and their value).

The Olsen Adjudication

26 The Claimant served on the respondent a payment Claim dated 15th October 2009 claiming payment of \$543,686.65. The Respondent provided a payment Schedule reducing the amount to \$0.

27 The payment claim included a summary of the claims made, a project reconciliation and copies of tax invoices and progress statements for the period August 2008 to October 2009.

28 It was submitted by Aircon that each of the progress statements submitted with the payment claim represented its valuation of the work performed and completed and claimed for in the payment claim.

29 Aircon submitted to the Adjudicator that all of the work it claimed for had been completed.

30 On 10 December 2009, the Adjudicator gave notice to Aircon pursuant to s.21(2B) of the Act setting out reasons which he believed were included in the adjudication response submitted by APBS that were not included in the payment schedule which had been earlier submitted by it. One such reason identified in the adjudication response was insufficient supporting evidence evidencing the works had reached the stage claimed.

31 On 14 December 2009 Aircon provided a further submission pursuant to the adjudicator's notice given under s.21(2B). Included in the further submission was Annexure A, pursuant to which Aircon provided reports of costs of direct labour, materials and subcontractors it incurred on the Olsen project up to 15 October 2009.

Ground 1 - Adjudication Determination in the Olsen Project - Valuation of ADF's payment claim in the absence of any evidence/ Reversal of evidentiary onus

32 Ground 1 in relation to the challenge to the Olsen Adjudication Determination in the was as follows:

By paragraph 3(b) and 5(c) of the Adjudication Determination the third defendant purported to value the work the first defendant claimed to have performed at the time of termination, namely 12 October 2009.

The first defendant, by its Adjudication Application, provided no relevant material in support of its payment claim constituting evidence of work performed. Accordingly, there was no relevant material before the third defendant upon which he could have valued the work claimed to be performed by the first defendant.

The third defendant has not attempted to value the first defendant's work; rather, the third defendant has chosen to reject the material relied upon by the plaintiff and then decided to accept the first defendant's claim in full. The third defendant has described his task as a 'choice' between submissions of the plaintiff and the submissions of the defendant.

In the premises, the third defendant's acceptance of the first defendant's payment claim amounts to jurisdictional error alternatively an error of law on the face of the record, upon the basis that the third defendant has not complied with the basic and essential requirements for a valid adjudication determination in that amongst other things, irrespective of what a respondent might submit, an adjudicator must at a minimum make a determination of whether the construction work identified in a claim has been performed and of its value. Rather than satisfy himself of the essential preconditions what the second defendant has done is to, in large part, reject plaintiff's contentions and simply accept part of the first defendant's claim on face value without more. That determination very seriously undermines the adjudication process as it in effect produces the result of reversing the onus of proof which a claimant in the position of the first defendant usually bears.

33 The Adjudication Determination in the Olsen Project was dated 16 December 2009. The reasons of the Adjudicator extended over nine pages.

34 The Adjudicator determined that the Respondent was liable to the Claimant for the total amount of its payment claim, namely \$543,686.65 (including GST). The Adjudicator also awarded interest to the Claimant pursuant to s.12(2)(a) and costs of the adjudication against the Respondent pursuant to s. 45 of the Act.

35 Aircon's submission to the Adjudicator concluded with the following statement:

In those circumstances and where APBC has not provided any substantive evidence in support of its contentions in the Payment Schedule dated 26 October 2009 and where APBC has not disputed the value of the works claimed pursuant to the Payment Claim dated 15 October 2009 it is submitted that there is no valid reason for APBC to have withheld payment to Aircon.

36 In its Adjudication Response, APBC stated that:

Aircon did not complete the works which are the subject of the Contract and prior to APBC issuing the Termination Notice, Aircon ceased works and vacated the site. As at the date of termination the subcontract works were only 74% complete.

In its response, APBC also annexed a report of a quantity surveyor, Trevor Main. It said that:

The independent quantity surveyor's report indicated that only 74% of the works referred to in the Contract had been completed by Aircon and APBC has paid Aircon accordingly as explained in the email contained in Annexure C.

The email contained in Annexure C, which was addressed to Aircon's solicitor dated 30 September 2009, read:

As previously advised, please find attached Quantity Surveyor's valuation of works as at the 29th September 2009. This valuation will be applied to your claim dated 15th September 2009 Invoice number 327. Your total payments including this claim will be brought up to the percentage complete as per the attached spreadsheet.

37 APBC also submitted in its Adjudication Response:

As a threshold matter APBC submits that the material which Aircon has chosen to include in its Adjudication Application is totally lacking in any persuasive content. It merely comprises a copy of several invoices which Aircon submitted during the course of the works to APBC without any further supporting material to assist the Adjudicator in understanding the basis upon which it says that it is entitled to be paid any amount. It is not supported by any evidence of any kind which demonstrates that the works had reached the stage claimed by Aircon or which provides any reasonable itemisation of the amounts claimed. Fundamentally it is but one indicator of the totally unacceptable and unreliable nature of the material that Aircon has chosen to rely upon in making its application.

The totally unacceptable nature of the material relied upon by Aircon is compounded by the paucity of the submissions advanced by Aircon in Section 2.2 of its submissions. Those submissions amount to no more than bald assertions as to the claim that the works have been completed and that the substantive reasons advanced by APBC are not valid. No supporting material of any nature is advanced in support of those central contentions. That state of

affairs when coupled with the generality and lack of consistency in the accounting material submitted must lead to the Adjudicator determining the amount paid to Aircon is \$0 as set out in APBC's payments schedule. By way of example APBC refers to the significant discrepancies in the amounts identified in the "project reconciliation" appearing at page 3 of the payment claim and the document headed "Progress Statement October 09" which appears at page 5. By way of further example, APBC rhetorically asks what is to be made of the heading "General claim" where it appears in the first Column of the first document and the amount of in excess of \$400,000 attributed to that item? The accounting material relied upon by Aircon does not constitute a proper basis upon which the adjudicator should determine any matter.

38 In its further submissions provided at the invitation of the Adjudicator pursuant to the Adjudicator's notice given under s. 21(2B) of the Act, Aircon said, inter alia:

The Claimant denies that only 74% of the work was completed at the time of Termination.

...

Based on the Respondent's Submissions, the Respondent is effectively alleging that only 2.35% of contract works were completed during the period 16 July 2009 to 15 October 2009, which equates to a value of only \$53,081.80. The Claimant denies that this is the case.

Attached as **Annexure A** are reports detail Direct labour, Materials and Subcontractors incurred on the project up until 15 October 2009.

Below is a summary of same:

Direct labour	525,395.31
Materials & Subcontractors	1,436,510.34
Total	\$1,965,930.38

The difference between the amount claimed and the costs incurred as detailed above relates to the profit margin build into the lump sum price.

...

Also included at Annexure A are details of those invoices relating to Materials and Subcontractors that were received after 15 October 2009 which totals \$4,024.73

In addition to the above, it should be noted that as at 15 May 2009, the Respondent advised that the value of works completed were between 50-55%.

...

Given the costs incurred during the relevant periods as per Annexure A, the Claimant refutes the allegation that only 74% of work was completed as at 15

September 2009. The Claimant reiterates the fact that it has merely claimed for the value of works completed which constitutes 90.23% of the Contract work as at 15 October 2009.

39 I find that Aircon's submissions when considered as a whole, with all of the supporting material, difficult to understand. No doubt it would have been also difficult for even an experienced adjudicator to have valued the work which Aircon alleged that it undertook, as identified in its payment claim. One example is the unexplained item described in Aircon's reconciliation statement which was included in its payment claim. The "General Claim" totals \$403,091.82, however, no explanation is provided in the reconciliation itself, or elsewhere in the payment claim or the Adjudication Application, as to what this item comprises.

40 If Aircon was to have fully succeeded in its adjudication application, given that APBC had put the matter of valuation of the work in issue by the evidence of its quantity surveyor which was to the effect that only 74% of the work had been completed, it ought to have put on material which would have enabled the adjudicator to conclude that, as at the date of termination, Aircon had completed all of the works which were the subject of its payment claim and enabled him to value those works. In my opinion, Aircon failed to present its case in a coherent manner such as to enable the Adjudicator to properly go about his task of valuing the work comprised in the payment claim in the limited time available to him under the Act.

41 Set out below is the chain of reasoning applied by the Adjudicator in arriving at his determination:

Adjudication Response: Executive Summary – B2 – Work only 74% complete at time of termination. Refer Adjudication Response Annexure 'C' and 'D'.

The Claimant's payment claim No 272 dated 13th February 2009 introduces for the first time a contract break-up so that amongst other things the amount claimed could be measured against on-site activities.

As the Respondent has assessed and paid against payment claims produced in this format up to and including July 2009 it is assumed the format was agreed.

Based on the Claimant's 'Project Reconciliation (refer Adjudication Application – Annexure 'A') up to and including July 2009 the amount assessed and paid by the Respondent totalled \$1,698,346,35. Other than a general statement

referring to 'significant discrepancies' (refer Adjudication Response – 2.1.2) the Respondent has not identified any specific incorrect amounts or disputed amounts contained in the above reconciliation.

The amount paid at July 2009 represented 68.4% of the original contract completed.

Based on the submissions made the Respondent had an independent quantity surveyor (Trevor Main & Associates) assessing payment claims from at least May 2009 (refer Adjudication Response – 2.1.6).

The amounts assessed for May 2009 was \$193,410.00, June 2009 was \$158,917.50 and July 2009 was \$171,727.50.

The Claimant disputes independent quantity surveyor's assessed amount of \$Nil for the August 2009, September 2009 and October 2009 payment claims.

The Respondent relies on a one page assessment made by the independent quantity surveyor's assessment claims that as at the 25th September 2009 the percentage complete of the original contract works was 74%. It should be noted that the assessment is not in the agreed payment claim format so it is difficult if not impossible to make a comparison between the Claimant's assessment and the Respondent's assessment.

I have reviewed the submissions before me and I find it difficult to understand how the independent quantity surveyor (Trevor Main & Associates) can make assessments for the amounts paid by the Respondent in May 2009, June 2009, and July 2009 at an average of \$174,685.00 per month and yet given the Claimant had a similar size crew on site value August 2009, September 2009, and October 2009 payment claims at basically \$Nil. On the balance of probabilities it seems to me that the Claimant would have 'earned' some percentage complete during the months of August 2009, September 2009 and October 2009 and given that I have a choice of the Claimant amounts or \$Nil I favour the Claimant's submissions. I find in favour of the Claimant.

- 42 The material provided by Aircon was not adequate to enable the adjudicator to perform his essential task of valuing the work done which was the subject of the payment claim. It was open to the Claimant to have provided a clear statement specifying the work done and the claimed value of the work. This could have been undertaken by a number of means, for example by provision of a signed statement from a person within the organisation of the claimant who had first hand knowledge of such matters, or by an independent quantity surveyor, or by other means which clearly specified the value of the works claimed for and the basis of the valuation undertaken by the claimant.

43 No doubt driven by the nature and form of the evidence provided by the Claimant to the Adjudicator on which he was expected to base his adjudication determination, in my opinion, the adjudicator fell into error in approaching his task. He may have had some basis for rejection of the evidence of APBC's quantity surveyor. However, the adjudicator fell into error in the following respects:

- (a) In concluding from his finding "the Claimant would have earned *some percentage complete* during the months of August 2009, September 2009 and October 2009" that the total value of the work undertaken by Aircon during that period was the full amount claimed by it, namely \$543,686.65. There appears to have been no assessment undertaken by the Adjudicator of the actual percentage of the work completed during the months in question; and
- (b) In concluding that "... given that I have a choice of the Claimant amounts or \$Nil I favour the Claimant's submissions. I find in favour of the Claimant", the Adjudicator did little more than succumb to a position where, having determined that the Respondent's submissions should be disregarded, he should simply adopt the amount specified by the Claimant in the payment claim. He therefore failed to undertake the basic and essential task of valuing the work claimed by Aircon to have been completed.

44 In the event that the material before the adjudicator was insufficient for him to undertake the basic and essential tasks required of an adjudication, namely a determination as to the work done and a valuation of the work which is the subject of the payment claim, it was open to the adjudicator to exercise the discretion pursuant to s. 22(5) and adopt procedures which provide a facility for more information to be submitted or for the material already submitted to be fully explained in the course of an adjudication under the Act. Section 22(5) provides:

- (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
- (c) may call a conference of the parties; and
- (d) may carry out an inspection of any matter to which the claim relates.

45 None of these steps were invoked in this case, and consequently, there was, in my opinion, inadequately explained information before the adjudicator to enable him to perform his statutory function of valuing the work which was the subject of the payment claim.

46 Alternatively, if time did not permit these procedures to be availed of, it was open to the adjudicator to simply not determine the application within the time allowed by s.22(4), and by letter to the parties, point out the deficiencies in the material provided with the adjudication application, and invite the applicant to make a new adjudication application under s.18 on properly presented material, as is open to be done pursuant to s.28 of the Act.

47 In preparation of an adjudication application, a claimant must bear in mind that, unlike the respondent to the payment claim who will be thoroughly familiar with the construction project, the construction contract, the past history of payment of progress claims and the accounting system adopted between the parties for the calculation and payment of those claims, an adjudicator appointed under the Act will have no such knowledge. The adjudicator's sole source of information will be the material submitted as part of the adjudication process. Accordingly, the material submitted must provide sufficient information, supported by explanatory submissions presented in a sufficiently straightforward manner, so as to enable the adjudicator to undertake the statutory tasks of assessing whether the work (or goods and services) claimed for has been completed (or supplied) and then valuing the work done (or the goods and services supplied).

48 The result in this case was that there was a failure on the part of the Adjudicator to perform the required task of valuing the amount of the progress payment (if any) to be paid by first determining the work that was done (in this case by determining the percentage of the work claimed in the progress payment claim which was complete) and then valuing that work.

49 It follows that, on this ground, the Olsen Adjudication Determination is void.

50 Having found this to be the case, it is unnecessary to consider the other grounds of review under the Olsen Adjudication Determination.

The Blackman Adjudication

51 I now turn to the Blackman Adjudication Determination.

52 On 2 December 2009 the Adjudicator delivered his adjudication determination awarding Aircon the adjudicated amount of \$127,727.92. This was a substantial reduction on Aircon's Blackman Payment Claim which sought payment of \$ 532,725.52.

53 The course of the adjudication in the Blackman Project is otherwise described in the chronology earlier referred to.

Ground 1 - Adjudication Determination in the Blackman Project - Valuation of ADF's payment claim in the absence of any evidence/ Reversal of evidentiary onus

54 Ground 1 in relation to the challenge to the Adjudication Determination in the Blackman Project was as follows:

By paragraph 6.8 of the Adjudication Determination the second defendant purported to value the work the first defendant claimed to have performed subsequent to the trade summary of 27 August 2009. There is no evidence upon which the second defendant could properly do so.

The first defendant has provided no material in support of its payment claim constituting evidence of work actually being performed after 27 August 2009.

In the premises, the second defendant's acceptance of that portion of the first defendant's payment claim relating to work claimed after 27 August 2009 amounts to jurisdictional error alternatively an error of law on the face of the record, upon the basis that the second defendant has not complied with the basic and essential requirements for a valid adjudication determination in that

amongst other things irrespective of what a respondent might submit an adjudicator must at a minimum make a determination of whether the construction work identified in a claim has been performed and of its value. Rather than satisfy himself of the essential preconditions what the second defendant has done is to, in large part, reject plaintiff's contentions and simply accept part of the first defendant's claim on face value without more. That determination very seriously undermines the adjudication process as it in effect produces the result of reversing the onus of proof which a claimant in the position of the first defendant usually bears.

55 The Adjudication Determination in the Blackman Project was dated 30 November 2009. The reasons of the Adjudicator extended over 15 pages. The Payment Claim which was the subject of the adjudication was for a total of \$532,725.52 (including GST).

56 The Adjudicator determined that the Respondent was liable to the Claimant for the total adjudicated amount of \$127,727.92 (including GST in the sum of \$11,611.63). This sum comprised three components: (a) "Trade Summary Adjustment \$25,650.00"; (b) "Tax Invoice of 15/09/2009 \$79,997.75"; and (c) "Tax Invoice of 14/10/2009 \$22,080.17". The total of these components was \$127,727.92 which was the "Determined Amount Payable (including GST)". The Adjudicator also awarded interest to the Claimant pursuant to s. 12(2)(a) and costs of the adjudication against the Respondent pursuant to s. 45 of the Act.

57 Set out below is the chain of reasoning applied by the Adjudicator in arriving at his determination:

- (a) I refer to my conclusion in Section 6.4 of this determination that the Respondent's Trade Summary based calculation of the amount payable has undervalued the work by \$25,650.00.
- (b) Tax Invoice of 15/09/2009: The Trade Summary only covered part of the period of work covered by this invoice. As the Respondent has not offered any valuation that I can rely on for the period of work not covered by the Trade Summary, I am satisfied that the work was completed as submitted by the Claimant. I will therefore calculate that amount on a pro rata basis using the available work days in the period 14/08/2009 to the 15/09/2009, and excluding those days covered by the Trade Summary.

Clause SC16 of the Special Conditions of Contract defines normal work hours as Monday to Friday. This means that there are 22 work days of

which 8 work days are covered by the Trade Summary. Based on a pro rata calculation ($\$125,710.75 \div 22 \times 14$), the Claimant is entitled to be paid \$79, 997.75.

- (c) Tax invoice of 14/10/2009: As concluded in Section 6.8 above, I am not satisfied that the Respondent has provided sufficient reason to withhold payment of the amount included in this invoice. I am therefore satisfied that the Claimant is entitled to the amount of \$22,080.17.

58 I will deal first with item (a), "Trade Summary Adjustment \$25,650.00". As noted by the Adjudicator, the Respondent relied on the report of a quantity surveyor entitled "Trade Summary" dated 27 August 2009 as the valuation of all of the work completed by the Claimant, up to and including the date of the payment claim, 15 October 2009. The Trade Summary, as found by the Adjudicator, was not created to support the Respondent's payment schedule in response to the claimant's payment claim. Rather it was prepared for use by the respondent's financier, the National Australia Bank. The Trade Summary provided a one line assessment of each of the trades employed on the Blackman Project. The assessment identified in each case the budget forecast cost, variance, previous expenditure, expenditure to date, expenditure 'this month' and cost to complete. In relation to the area of work undertaken by Aircon, this was construed by the Adjudicator as being that described as "MECHANICAL INSTALLATIONS" in the Trade Summary. The figures beside this heading were: Budget \$2,053,530.00; Forecast Cost \$2,053,530.00; Variance \$0.00; Expenditure Previous \$ 567,422.00; Expenditure to Date \$593,553.00; Expenditure this month \$26,131; and Cost to Complete \$1,459,977.00. This was the only information provided to the Adjudicator from which a percentage of Aircon's works completed as at 26 August 2009 was calculated by the Respondent to be 28%.

59 The Claimant did not provide any information to the Adjudicator which brought into question the validity of the Trade Summary document.

60 The Adjudicator, although he expressed some reservations about the "robustness of the quantity surveyor assessment" accepted the Trade Summary as the "only assessment" on which he could rely as to the value of the works completed up until 26

August 2009. However, up to that date, the Adjudicator calculated that the percentage of the work completed by Aircon on the Blackman Project was in fact 29% and not 28% as calculated by the Respondent. The Adjudicator calculated the increased percentage by comparing the Trade Summary '*Budget*' amount with the "*Expenditure to Date*" amount, resulting in the 29% figure. Allowing for the 1% difference, the Adjudicator then calculated that the Claimant had been underpaid by \$25,650.00 under the Trade Summary assessment up to 26 August 2009.

61 I can see no error in this process.

62 The claim for \$25,650, as found by the Adjudicator, is not void under Ground 1.

63 As to the second item (b), "Tax Invoice of 15/09/2009 \$79,997.75", this assessment was founded upon the Claimant's tax invoice dated 15 September 2009. The tax invoice dated 15 September 2009 claimed the sum of \$114,282.50 plus GST in the sum of \$11,428.25, a total of \$125,710.75. The schedule attached to the invoice, which was entitled "PROGRESS STATEMENT", identified the work performed and the amount claimed in relation to each item of that work, which totalled \$114,282.50. However, the Adjudicator noted that the Trade Summary, which provided an assessment only up to 26 August 2009 did not include all of the work claimed to have been undertaken by Aircon up to the date of the invoice, namely 15 September 2009. Accordingly, the Adjudicator set about the task of valuing the work carried out during this period. The Adjudicator found that the work claimed in the invoice was in fact completed as submitted by the Claimant. He then proceeded to calculate the value of the work undertaken between 26 August 2009 to 15 September 2009. He did this by calculating the amount on a pro rata basis using the available work days in the period 14 August 2009 to 15 September 2009, and excluding those days covered by the Trade Summary. Taking the total amount claimed in the invoice dated 15 September 2009, \$125,710.75, and finding that there were 22 work days, of which 8 were covered by the Trade Summary (leaving 14 days unaccounted for in the Trade Summary), the Adjudicator calculated that the Claimant was entitled to be paid \$79,997.75 ($\$125,710.75 \div 22 \times 14$).

In undertaking this reasoning, the Adjudicator accepted the Claimant's progress statement which summarised the work claimed to have been done by it which comprised the 15 September 2009 invoice, and accepted the value of that work as assessed by the Claimant as stated in its progress statement, where the 8 items of claimed work claimed to have been undertaken were valued by Aircon at \$114,282.50.

64 In relation to the Adjudicator's valuation of Aircon's claim founded upon its tax invoice of 15 September 2009 in the sum of \$79,997.75 I am satisfied that the Adjudicator valued the claim as he was required to do under the Act. The process undertaken by the Adjudicator in this case was quite different to that undertaken by the Adjudicator in the Olsen Adjudication. Here the Adjudicator was in a position to, and did, accept part of the assessment of value for the stated works provided by the claimant, Aircon, namely the sum of \$125,710.75 identified in its tax invoice and supporting progress statement of 15 September 2009. He then set about the task of valuing the work undertaken for the period 26 August to 15 September by undertaking the calculation in the manner described in his determination.

65 It follows that the finding that the claimant is entitled to \$79,997.75 under the Blackman Adjudication Determination, is not void under Ground 1.

66 However, I have concluded that the sum allowed by the Adjudicator in respect of the tax invoice of 14 August 2009 in the sum of \$22,080.17, is void under Ground 1.

67 The Adjudicator concluded in respect of this item:

I am not satisfied that the Respondent has provided sufficient reason to withhold payment of the amount included in this invoice. I am therefore satisfied that the Claimant is entitled to the amount of \$22,080.17.

68 In this case I am satisfied that there was a failure to undertake the basic and essential task of valuing the work done, as required in the process of adjudication under the Act. A finding that there is an absence of any sufficient reason advanced by a Respondent to the withholding of payment of the amount included in an invoice

which is the subject of a payment claim, does not amount to valuing the payment claim, and is not a substitute for the process required by the Act.

69 It follows that, the finding that the claimant is entitled to \$22,080.17 under the Blackman Adjudication Determination, is void.

70 As to the finding of the Adjudicator that the sum of \$25,650.00 is due and payable to Aircon on its payment claim, as this item of the claim arises for work done prior to 26 August 2009, Grounds 2, 4, 6, and 7 of APBC's Amended Originating Motion in relation to the Blackman Project are not relevant and it is unnecessary to consider those grounds in respect of this claim.

71 However, I will deal with each of the remaining grounds of judicial review, insofar as they relate to the claim for \$79,997.75 pursuant to Aircon's tax invoice dated 15 September 2009.

Ground 2 - Adjudication Determination in the Blackman Project - Failure to take into account a relevant consideration

72 Ground 2 alleged that in performing his valuation of the work undertaken by the first defendant, the second defendant has failed to take into account a relevant consideration (namely the statutory declaration of David Rogalsky dated 18 November 2009).

73 In its Adjudication Response, APBS included a statutory declaration signed by its construction manager, Mr David Rogalsky. The statutory declaration made two principal points relied upon by APBS in the following paragraphs:

4. According to the attached materials provided by Trevor Main & Associates, as at 31 August 2009 the works conducted by Aircon Duct Fabrication Pty Ltd ABN 80 119 641 164 ("Aircon") at the Site were only 28% of the works Aircon undertook to carry out at the location under the mechanical services contract between Aircon and APBC dated 24 September 2008.
5. Since the date of the assessment undertaken by Trevor Main & Associates, Aircon has conducted very little work of substance at the

Site. Further, since the date of termination of the employment of Aircon I have arranged for other subcontractors to attend to the completion of the outstanding sub-contract works.

74 The Adjudicator accepted the Trade Summary provided by Trevor Main & Associates, as at the end of August 2009, referred to in paragraph 4 of Mr Rogalsky's statutory declaration, finding that: "Having regard to the foregoing, and despite some reservations about the robustness of the quantity surveyor assessment, I accept this as the only assessment on which I can rely on the value of the works completed up until 26 August 2009."

75 Nevertheless, as he was entitled to do, the Adjudicator found as a fact that by the end of August 2009, the works completed by Aircon were 29% complete, as opposed to 28% indicated by the Trade Summary prepared by the quantity surveyor, Trevor Main & Associates.

76 As to the statement in Mr Rogalsky's statutory declaration: "Since the date of the assessment undertaken by Trevor Main & Associates, Aircon has conducted very little work of substance at the Site", the Adjudicator was entitled to give this evidence little weight in his assessment of Aircon's claim founded upon its tax invoice of 15 September 2009 in the sum of \$79,997.75. Further, in considering the statement of Mr Ragalsky in his statutory declaration: "Further, since the date of termination of the employment of Aircon I have arranged for other subcontractors to attend to the completion of the outstanding sub-contract works", The Adjudicator was entitled to not consider this as relevant to his assessment of Aircon's claim founded upon its tax invoice of 15 September 2009, because the date of termination of the employment of Aircon was 24 September 2009, as referred to in APBC's Adjudication response submission.

77 This ground does not involve any challenge to the decision of the Adjudicator on the basis of a jurisdictional error in that he failed to observe any basic or essential requirement of the Act or afford appropriate procedural fairness to the parties.

78 Rather, an error of the face of the record is claimed.

79 As observed in *Grocon Constructors v Planit Cocciardi Joint Venture [No 2]*⁸, there is no error of law on the face of the record simply in making a wrong finding of fact. Further, even if the reasoning of the tribunal in arriving at its conclusion of fact was demonstrably unsound, this would not amount to an error of law on the face of the record. As to inferences of fact, provided that the particular inference is reasonably open, there will be no error. Indeed a finding of fact will only be open to challenge as erroneous in law if there is no probative evidence to support it.

80 Further, as Kirby J observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* said:⁹

Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power. [Footnotes omitted]

81 In this case the Adjudicator clearly considered evidence in question, namely the statutory declaration of Mr Rogalsky. He did not accept it in its entirety, as he was entitled to do, when considered against the other evidence which was before him.

82 Ground 2 has no merit. No error of law on the face of the record is disclosed.

Ground 3 - Adjudication Determination in the Blackman Project - Adjudicator basing his decision on "editing of the emails"

83 In making the finding in relation to Mr Rogalsky's statutory declaration that there was "*some editing of the emails exchanged between the parties*" that "*raises questions about the completeness or balance of the exchange described by the Statutory Declaration*", it was submitted by APBC that, by this finding the Adjudicator has effectively accused

⁸ [2009] VSC 426 at [123] - [124]

⁹ [2003] HCA 30; (2003) 198 ALR 59 at [114]

SC:

Mr Rogalsky of falsifying the evidence he affirmed in his statutory declaration, which is a very serious allegation. APBC submits that by that action:

- (a) the Adjudicator has been guilty of a very serious breach of the rules of natural justice in that he failed to accord APBC with any opportunity to be heard before he made a finding of the nature which he did regarding the truthfulness of the statutory declaration;
- (b) the Adjudicator failed to accord procedural fairness to APBC in that he has valued Aircon's payment claim on a basis that neither party had identified to the other or contended for without notification to the parties and an opportunity to provide further submissions pursuant to s.22(5) of the Act;
- (c) the Adjudicator took into account an irrelevant consideration (namely the alleged editing of the emails referred to in paragraph 6.4 of the Adjudication Determination); and
- (d) the Adjudicator failed to take into account a relevant consideration, namely the statutory declaration of Mr Rogalsky.

84 In *Grocon Constructors v Planit Cocciardi Joint Venture [No 2]*¹⁰ I made the observation, derived from the statement of McHugh J in *Muin v Refugee Review Tribunal*¹¹ as follows:

Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power.

85 This requirement can be accommodated within the processes contemplated by the Act. Section 22(5)(a) enables an adjudicator to request further submissions from either party and to give the other party an opportunity to comment on those submissions. As to this, McDougall J in *Musico v Davenport* observed:¹²

Where, after considering an adjudication application and an adjudication response, an adjudicator comes to the view that there was some matter, not traversed in them, that might cause him or her to deal with the application in a manner adverse to one or other party, the principle enunciated by McHugh J would ordinarily require that the adjudicator request further written submissions and comments thereon. But whether or not this principle is enlivened in a particular case must, necessarily, depend on an analysis of the

¹⁰ [2009] VSC 426 at [134].

¹¹ [2002] HCA 30; (2002) 76 ALJR 966, 989 at [123].

¹² [2003] NSWSC 977 at [59].

“matter”, and of its significance to the determination ultimately made by the adjudicator.

86 To these observations should be added those of Brennan J in *Ainsworth v Criminal Justice Commission*:¹³

Where an official entity, purportedly exercising a statutory power or performing a statutory function which requires it to observe the rules of natural justice, publishes a report damaging to a person's reputation without having given that person an opportunity to be heard on the matter, prima facie that person is entitled to a declaration that the report, so far as it damages his or her reputation, has been produced in breach of the entity's duty to observe the rules of natural justice.

87 The matter received further attention from McHugh J in *Re Refugee Tribunal; Ex parte Aala*,¹⁴ who said, in applying *Mahon v Air New Zealand Ltd*:¹⁵

One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that persons of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submission rebutting the potential adverse finding.

88 As to the procedures to be applied under the Act in the event that a question of natural justice arises, I concluded in *Grocon*:¹⁶

If therefore an issue arises for consideration which is required to be determined beyond the material before the adjudicator pursuant to s.23(2), or that which can be reasonably inferred from such material, it would be incumbent on the adjudicator to seek the provision of further submissions (including relevant documentation) on the point from both parties pursuant to the adjudicator's power to do so under s.22(5).

Further, in the event that it becomes necessary to make an adverse finding as to the credit of a party or a witness in order to determine an issue, as a matter of procedural fairness, if the adverse finding on credit might significantly impact upon the personal reputation of the person involved, the facility to provide further submissions under s.22(5) should be utilised.

...

¹³ [1992] HCA 10; (1992) 175 CLR 564 at 597.

¹⁴ [2000] 204 CLR 82 at 121 [101].

¹⁵ [1984] AC 808 at 820-821.

¹⁶ *Ibid* at [139-140] and [143].

Nevertheless, in approaching the question of procedural fairness in the decision making of an adjudicator under the Act, not too finer point should be taken in relation to what is done. The shortcomings of the statutory procedure provided for in the Act point to the need for a large measure of practicality, flexibility and commonsense being observed to make it work. The procedures will call for adaptation in each case in the light of the clear legislative intention of the Act, namely that adjudicator's determinations are to be carried out informally: s.22(5A); and speedily: s.22(4); and "on the papers": s.23 and s.28I; and bearing in mind that there is always the facility for erroneous determinations to be corrected upon a final hearing of the issues in dispute between the parties: s.47(3).

89 To this summary, the following should be added, founded on the observations of the Victorian Court of appeal in *Ucar v Nylex Industrial Products Pty Ltd*.¹⁷ A mere breach of natural justice does not necessarily invalidate the decision. In analysing the principle in *Stead v State Government Insurance Commission*¹⁸, Redlich J synthesised the applicable approach when he said:¹⁹

In my view, the principle laid down in *Stead* contemplates two circumstances in which relief may be refused. It will be refused if upon analysis of the basis for the decision there is an incontrovertible fact or point of law which provides a discrete basis for the decision which cannot be affected by the procedural unfairness. It will then be concluded that the applicant could not possibly have obtained a different outcome. Secondly, even where the subject of the procedural unfairness touched upon an issue in dispute that was material to the decision, relief may be refused if the respondent can demonstrate that it would be futile to hold a further trial because the result would inevitably be the same.

...

Once the applicant establishes "the possibility" of a different outcome had there not been a denial of natural justice, relief will only then be refused if it would be futile to grant a new hearing as the same outcome would be inevitable. To establish this the respondent may rely upon arguments involving incontrovertible points of law or fact that were not raised at the initial hearing (or in some circumstances on new facts) which may support the conclusion that the outcome of a further hearing would inevitably be the same.

90 I will apply these principles to the case at hand.

91 APBC's submission is founded upon the observations made by the Adjudicator about the chain of emails referred to in Mr Rogalsky's statutory declaration where the

¹⁷ [2007] VCA 181; [2007] 17 VR 492 (Warren CJ, Chernov and Redlich JJA).

¹⁸ (1986) 161 CLR 141.

¹⁹ *Ibid* at 519 [75] and 521 [80].

finding was made that there was an inconsistency in one of the paragraphs of one of the emails which indicated: *“some editing of the emails exchanged between the parties has occurred and raises questions about the completeness or balance of the exchange described by the Statutory Declaration”*.

92 True it is that the fourth paragraph of the second of the three emails of 10 September 2009 appears to be out of place, and indeed is not comprehensible in its context.

93 However, the Adjudicator made no finding that Mr Rogalsky himself had deliberately tampered with this or any of the emails, and made no finding that he had included them in his statutory declaration knowing them to have been tampered with. The Adjudicator was commenting about the quality of the email evidence annexed to the statutory declaration, and made no finding as to the credit of Mr Rogalsky. Further, although there was a need for the Adjudicator to have been more precise in making his finding on the matter in order to avoid any possible misinterpretation, the finding itself, when properly considered, was not capable of being construed as a finding against the credit of Mr Rogalsky. The finding needs to be considered in its context. There was no evidence that Mr Rogalsky, in signing his statutory declaration, acted other than with complete innocence.

94 As such, there was no denial of procedural fairness in the manner in which the Adjudicator dealt with the issue of Mr Rogalsky’s statutory declaration.

95 Ground 3 fails.

Ground 4 - Adjudication Determination in the Blackman Project - 9 and 10 September 2009 emails

96 APBC in Ground 4 alleged that the Adjudicator referred to two emails dated 9 September 2009 and 10 September 2009 as evidence of the fact that some work was performed by Aircon after 27 August 2009. APBC submitted that these emails do not evidence any work actually being performed. Rather, the emails, at best, indicate that

the Aircon claimed that it intended to perform work. In the premises, it was submitted that :

- (i) the Adjudicator took into account an irrelevant consideration (namely the 9 September 2009 and 10 September 2009 emails) amounting to jurisdictional error; and
- (ii) he failed to accord procedural fairness to the plaintiff in that he has valued the first defendant's payment claim on the basis that neither party had identified to the other or contended for without notification to the parties and an opportunity to provide further submissions pursuant to s.22(5) of the Act.

97 The Adjudicator's findings in this regard were as follows:

The Respondent's submission on the value of the work effectively means that the respondent is submitting that no work of value occurred on the site after the quantity surveyor assessment described in the Trade Summary [as at 26 August 2009]. I do not agree with this position as the Respondent's own emails demonstrate that work was proceeding on site. I reference the following by way of example:

- 10 September 2009 emails: the parties exchange emails concerning the cost of louvers to be installed on the project
- 9 September 2009, 3:57PM email: The respondent advises the claimant to 'forward through you[r] request for information and I will resolve straight away. A small issue such as mistake is no reason to hold up works that you have previously had approved in writing.'

98 I reject the allegation made under this ground. There has been no error on the face of the record.

99 The Adjudicator was entitled to place a degree of reliance on the two emails dated 9 September 2009 and 10 September 2009 as evidence of the fact that some work was performed by Aircon after 27 August 2009.

100 Further, there was no breach of the rules of procedural fairness in the conduct of the adjudication under the Act on this ground. APBC provided the two emails to the Adjudicator as part of its Adjudication Response. The Adjudicator was entitled to take them into account as part of the body of evidence before him in determining the issue which was squarely before him and well appreciated by the parties, namely whether any and what amount of work had been performed by Aircon under the construction contract between 27 August and 15 September 2009.

101 Ground 4 has no merit and fails.

Ground 5 - Adjudication Determination in the Blackman Project - Failure to take into account relevant considerations - Evidence of non-payment of Subcontractors

102 Ground 5 in relation to the challenge to the Adjudication Determination in the Blackman Project was as follows:

The second defendant has failed to take into account the uncontradicted evidence of Geejay Refrigeration, a subcontractor of the first defendant, that it had not been paid by the first defendant.

In paragraph 6.1 of the Adjudication Determination the second defendant refused to accept that evidence despite the fact that the first defendant did not dispute it in its later submission. Instead, the second defendant speculated that *"it might equally be that there is a dispute between Geejay Refrigeration and the Claimant as to entitlement"*.

103 Clause 10.1 of the construction contract in use in the Blackman Project provides that, as a condition precedent to payment under the contract, including payment of a progress claim, Aircon shall provide APBC with a statutory declaration or other evidence to the satisfaction of APBC that, inter alia, all subcontractors and persons engaged on the work under the contract have been paid all monies due and payable to them.

104 In relation to each of its claims made under its payment claim made in the Blackman Project, Aircon supplied a signed statutory declaration declaring as true the matters referred to in clause 10.1 of the construction contract. These statutory declarations

were provided to the Adjudicator as part of the payment claim submitted to him in the course of the adjudication.

105 The Respondent submitted, however, that “not all subcontractors have been paid”, with the result that the condition precedent to payment had not been satisfied. To this end, the respondent relied upon the letter from a firm called “Geejay Refrigeration” dated 2 August 2009 which stated that the firm had not been paid by the claimant for work completed on the Blackman Project.

106 The Adjudicator considered this evidence and concluded that:

Based on this information before me, I am not satisfied that this is sufficient reason to withhold payment.

107 APBC submitted that the evidence given on behalf of Geejay Refrigeration was compelling, as it indicated that the statutory declaration made by a representative of Aircon in support of its payment claim may be incorrect, and that there may be a contractual bar to payment for the amounts sought. Further, it was submitted that it was evidence that the amount sought by way of labour cost by Aircon may be incorrect. It was further submitted that procedural fairness had been denied to APBC because the Adjudicator decided the issue on a basis which neither party had put to him.

108 I reject these submissions. The matter of the satisfaction of the relevant condition precedent found in clause 10.1 of the construction contract was addressed by both parties in their submissions to the Adjudicator. The Adjudicator was entitled to make the findings he did on the evidence available to him, and was entitled to do so without further reference to the parties on the question.

109 No error of law on the face of the record has been disclosed, nor has there been any denial of procedural fairness.

110 Ground 5 fails.

Ground 6 - Adjudication Determination in the Blackman Project - Misconception of the role of an adjudicator - finding in relation to 15 July progress claim

111 It was submitted by APBC that in paragraph 6.3 of his Adjudication Determination the Adjudicator has made findings that:

- (i) the 15 July 2009 progress claim was a valid payment claim made under the Act;
- (ii) the plaintiff did not pay that payment claim in accordance with the Act;
- (iii) Aircon invalidly served a notice pursuant to s.16 of the Act declaring its intention to suspend the carrying out of construction work; and
- (iv) Aircon validly suspended works on 22 September 2009.

112 It was further submitted that it was not open for the Adjudicator to adjudicate or assess the validity of any other payment claim that the payment claim the subject of the Adjudication Application made on 10 November 2009. Further, it was contended that the Adjudicator assessed the lack of progress of Aircon on site on the basis of what he has deemed to be a valid suspension of work without giving APBC the opportunity to make submissions in respect of that issue when that issue has not been raised by either party. In the premises it was submitted that:

- (i) the Adjudicator decided a question not remitted to him in that he has made an assessment of the 15 July 2009 progress claim and the application of the Act to it;
- (ii) such a finding constitutes jurisdictional error; and
- (iii) the Adjudicator failed to accord procedural fairness to APBC in that he has valued the first defendant's payment claim on a basis that neither party had identified to the other or contended for without notification to the parties and an opportunity to provide further submissions pursuant to s.22(5) of the Act.

113 This issue needs to be considered in the context of the Blackman Adjudication Determination as a whole.

114 APBC placed its letter of termination of Aircon's work under the relevant construction contract before the Adjudicator. The letter of termination was dated 24 September 2009. The Termination letter advised, *inter alia*, as found by the Adjudicator: 'We hold you liable for all delays and additional costs we incur in having to complete the works you were contracted to provide.'

115 The Adjudicator found in relation to this component of the termination letter: "The extent to which the Claimant is liable for costs incurred by the respondent in completing the work is dependent on the validity of the Claimant's suspension of work under the act, versus the respondent's termination of the contract for default. I will consider this issue in Section 6.3 below."

116 In considering this question, the Adjudicator made the findings complained of by APBC, save that he made no finding that Aircon invalidly served a notice pursuant to s.16 of the Act declaring its intention to suspend the carrying out of construction work.

117 To the extent that he made the other findings, these were all directed to the ultimate finding on the question made by the adjudicator that: "Based on the information before me, I am satisfied that the claimant was able to suspend work under the Act on 26 September 2009." He further concluded that, based on s. 29 of the Act: "...the Claimant is not liable for any costs that the Respondent incurs in completing the works that the Claimant was contracted to provide. I am satisfied that this includes the '*costs and losses*' claimed by the Respondent and referenced in Paragraph 2.1.13 of the Adjudication Response."

118 In paragraph 2.1.13 of its Adjudication response. APBC claimed that: "The costs and losses APBC has incurred as a direct consequence of Aircon's conduct and default are substantial. APBC has had to directly commission subcontractors to complete the balance of the work which Aircon did not complete under the Contract. APBC's current estimate of those costs is \$1,000,000."

119 To the extent that the Adjudicator purported to determine whether or not Aircon was liable for any of the costs that APBC incurred or incurs in completing the works that the Aircon was contracted to provide, this was a matter which was unnecessary for the Adjudicator to decide, even though the issue was touched upon by APBC in its Adjudication Response in paragraph 2.1.13. The finding has no binding effect and

cannot of itself result in any invalidity of any part of the Blackman Adjudication Determination.

120 Ground 6 also fails.

Ground 7 - Adjudication Determination in the Blackman Project - site meeting minutes

121 Finally, APBC contended that in paragraph 6.5 of the Blackman Adjudication Determination the Adjudicator dismissed the evidence of the site meeting minutes as demonstrating that Aircon was late in performance compared to its construction program. APBC relied on the finding made by the Adjudicator that *"while they indicate that the Claimant was behind program, I find that they equally indicated that the Claimant's performance can be linked to issues associated with the Respondent's approach to coordination of trades and the overall management of the project"*.

122 In the premises APBC contended:

- (i) the Adjudicator took into account an irrelevant consideration (namely the unidentified 'issues' referred to in paragraph 6.5 of the Adjudication Determination);
- (ii) Such a finding is contrary to law; and
- (iii) the Adjudicator failed to accord procedural fairness to APBC in that he has valued Aircon's payment claim on the basis that neither party had identified to the other or contended for without notification to the parties and an opportunity to provide further submissions pursuant to s.22(5) of the Act.

123 In paragraph 6.5 of the Blackman Adjudication Determination the Adjudicator found as follows:

The Respondent has submitted that the Claimant was behind program and that this appears to be part of the basis that the Claimant has no further payment entitlement. The Respondent relies on the Site Meeting Minutes in support.

I have reviewed the Site Meeting Minutes, and while they indicate that the Claimant was behind program, I find that they equally indicated that the Claimant's

performance can be linked to issues associated with the Respondent's approach to coordination of trades and the overall management of the project.

124 Indeed, APBC referred directly to the Site Meeting Minutes in its Adjudication Response. In paragraph 2.1.15 it submitted to the Adjudicator:

Minutes of site meetings attended by representatives of APBC and Aircon (and others) were prepared and circulated by email promptly after each site meeting. A print out of each set of site minutes was also provided to each attendee at the following site meeting. The delays caused by Aircon are referred to in the site meeting minutes, a copy of which is annexed at Annexure G.

125 Accordingly, APBC itself directly put in issue the Site Meeting Minutes and the evidence it said was to be derived from those minutes. The evidence was considered by the Adjudicator, and he made a finding upon that evidence.

126 No error of law on the face of the record has been identified by APBC, nor was it denied any procedural fairness in relation to the issue.

127 Ground 7 has no merit and also fails.

Conclusion and Orders

128 In relation to the Olsen Adjudication Determination dated 16 December 2009 awarding Aircon the sum of \$543,686.65, this adjudication determination is declared void and is set aside.

129 In relation to the Blackman Adjudication Determination dated 2 December 2009 awarding Aircon the sum of \$127,727.92, the manner in which this adjudication determination was considered and drawn, lends itself to severance of those parts which are valid from the part which is void.

130 The Blackman Adjudication Determination is declared in part valid and in part void. To the extent that the Adjudicator determined that the amount to be paid by APBC to

Aircon comprised the sums of \$25,650.00 and \$79,997.75 (totalling \$105,647.75) this part of the Blackman Adjudication Determination is declared to have been validly found by the Adjudicator to be due and payable by APBC to Aircon as the adjudicated amount pursuant to s.23(1)(a) of the *Building and Construction Industry Security of Payment Act 2002*. The date upon which the said amount became due and payable is determined to be 30 November 2009 pursuant to s.23(1)(b) of the Act, and the rate of interest payable pursuant to s.23(1)(c) is the rate fixed under s.2 of the *Penalty Interest Rates Act 1983*. Otherwise, the Blackman Adjudication Determination is declared void to the extent that it determined that the sum of \$22,080.17 was also payable by the Plaintiff to the First Defendant and to that extent it is set aside.

131 I have considered quashing the void Olsen Adjudication Determination and that part of the Blackman Adjudication Determination found to be void and in each case remitting the adjudication applications insofar as they are void back to the authorised nominating authority for reference to the relevant adjudicator for reconsideration in accordance with law. However, because of the deficiencies in the adjudication applications arising from the paucity of material provided by Aircon in relation to those claims, I am not persuaded that the adjudicator would be in any better position to determine the applications and perform the required statutory tasks if this was to occur.

132 Accordingly, I decline to make any order remitting the Olsen Adjudication Application and the void part of the Blackman Adjudication Application to be determined afresh.

133 However, having declared the Olsen Adjudication Determination wholly void, and the Blackman Adjudication Determination void in part, it would be open to the Aircon in each case, to invoke the procedure pursuant to s.28 of the Act, and make a new adjudication application, on properly presented material pursuant to s.18 of the Act: see s.28(2)(b). This may be done on the ground that the Adjudicator in each case had failed to validly determine the adjudication applications within the time allowed

by s.22(4): see s.28(1)(b). These steps may be taken once the claimant in each case withdraws the original application by notice in writing served on the adjudicator or the authorised nominating authority in each case to whom the application was first made: see s.28(2)(a).

134 In relation to costs, although APBC was entirely successful in setting aside the Olsen Adjudication Determination, it achieved only a minor success in setting aside \$22,080.17 of the \$127,727.92 determined in the Blackman Adjudication Determination. Further, it advanced Grounds 2, 4 and 7 in the Blackman matter which I have determined had no merit.

135 I will hear the parties on why an order to the following effect should not be made: the First Defendant pay the Plaintiff's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Olsen Adjudication Determination, and the Plaintiff pay the First Defendant's costs, including the First Defendant's reserved costs, of the application insofar as those costs relate to the judicial review of the Blackman Adjudication Determination.
