

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

No. 05082 of 2010

CLAUDE NEON PTY LTD

Plaintiff

v

RHINO SIGNMAKERS PTY LTD

Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 17 DECEMBER 2010
DATE OF JUDGMENT: 17 DECEMBER 2010
CASE MAY BE CITED AS: CLAUDE NEON v RHINO SIGNMAKERS
MEDIUM NEUTRAL CITATION: [2010] VSC 619

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Decision of adjudicator challenged by Plaintiff - Type of work to be valued under the Act - Whether there was sufficient material before the adjudicator to undertake proper valuation of building works subject of payment claim - Proper material on which adjudicator should rely - *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd* [2006] NSWSC 724 applied and followed - Plaintiff's claim dismissed.

ADMINISTRATIVE LAW - Judicial Review - Decisions of adjudicator and review of adjudicator appointed under *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether basic and essential requirement of the Act complied with - Plaintiff's claim dismissed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr R Andrew	Noble Lawyers
For the Defendant	Mr T Cogley	Madisons Lawyers

HIS HONOUR:

1 In this proceeding the plaintiff seeks orders in relation to an adjudication determination dated 7 September 2010 made by the adjudicator, the second defendant Mr John O'Brien. The adjudication determination was made purportedly pursuant to the *Building and Construction Industry Security of Payment Act 2002* ("the Act").

2 Parties to this proceeding are as follows:

- (a) the plaintiff is Claude Neon Pty Ltd ("Claude Neon"). It is a company providing corporate signage and related services and was engaged to provide signage to the Melbourne Rectangular Stadium;
- (b) the first defendant is Rhino Signmaker Pty Ltd ("Rhino"). It was engaged by Claude Neon pursuant to an oral contract to carry out some work in relation to the signs at the stadium; and
- (c) the second defendant, Mr John O'Brien ("the Adjudicator"), is the adjudicator who accepted a nomination by Adjudicate Today to act as adjudicator of Rhino's adjudication application in respect of Rhino's payment claim. Adjudicate Today is a nominating authority authorised by the Building Commission under s.42 of the Act.

3 On 29 July 2010 Rhino served a payment claim on Claude Neon under the Act. The payment claim was for a total of \$143,535 including GST. The work and materials which were the subject of the payment claim were comprised in two invoices which had been previously delivered, described in the payment claim as follows:

- (a) The work and materials the subject of the first part of the payment claim were stated to be:

... as described in invoice 5374/1 dated 29 April 2010 for the construction of subframes over the period 24 March to 29 April 2010.

A copy of Invoice 5374/1 is attached as attachment A to this payment Claim.

The total amount noted as invoiced (including GST) was \$70,950; the amount noted as paid as at 29 July 2010 was \$36,271 and; the amount claimed pursuant to the payment claim was \$34,679.

- (b) The work and materials the subject of the second part of the payment claim were stated to be:

... as described in invoice 5374/2 dated 13 May 2010 for works performed and materials supplied over the period 4 April to 13 May 2010.

A copy of Invoice 5374/2 is attached as attachment B to this payment claim.

The total amount noted as invoiced (including GST) was \$108,856; the amount noted as paid as at 29 July 2010 was \$0; and the amount claimed pursuant to the payment claim was \$108,856.

The payment claim was signed on behalf of Rhino by its director, Mr Vincent Merret. The payment claim was endorsed: "This is a payment claim made under *The Building and Construction Industry Security of Payment Act 2002 (Vic)*", as required by s.14(2)(e) of the Act.

- 4 On 3 August 2010 Claude Neon served a payment schedule on Rhino, which is also under the Act. The payment schedule allowed the sum of \$34,679, claimed by Rhino, to be the outstanding sum due to it under Invoice 5374/1. This sum was subsequently paid by Claude Neon on 4 August 2010.
- 5 On 16 August 2010, Rhino's solicitors Madison's Lawyers Pty Ltd, served Claude Neon with an adjudication application, pursuant to s.18 of the Act. A corrected payment claim was then included with the adjudication application. On 17 August 2010 Madison's purported to serve Claude Neon by email with a document entitled, "Invoice 5273/2 Breakdown of costs" which I will call the breakdown of costs.
- 6 The adjudication application from Rhino was received by Adjudicate Today, the authorised nominating authority under the Act, and on 20 August 2010 the Adjudicator accepted the reference of the adjudication to him.

7 The Adjudicator delivered his adjudication determination by a document dated 3 September 2010. The Adjudicator awarded Rhino the full amount of its claim, namely \$143,535 including GST an interim payment under the Act. However, in respect of that entitlement, the Adjudicator observed that Claude Neon had already paid the scheduled amount of \$34,679 and that this payment needed to be brought to account. Claude Neon was directed to pay 100 per cent of the adjudication fees.

8 Claude Neon submitted that Rhino failed, in the documents supplied with its adjudication application, to identify any material upon which a proper valuation of the works the subject of the claim could have been made by the Adjudicator. It was submitted that the Adjudicator therefore did not conduct any assessment of the value of the claim. It followed that, by simply adopting the value of the claim proffered by Rhino, the Adjudicator failed to perform the necessary statutory task of determining the value of the claim of the construction work and related goods and services identified in the payment claim.

9 Accordingly, Claude Neon as the plaintiff sought judicial review of the adjudication determination on the ground of jurisdictional error in that the Adjudicator failed to comply with a basic and essential requirement of the Act. It sought an order declaring that the adjudication determination was void and should be quashed, relying upon the authority of *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors.*¹

10 The central question in this case was whether there was sufficient material before the adjudicator to undertake the basic and essential statutory task required of him to value the work which was the subject of the payment claim, and whether he did in fact carry out his statutory task.

11 If the Adjudicator was not satisfied that he had sufficient information before him to undertake his valuation, it was open to him to exercise the discretion pursuant to s.22(5) of the Act and adopt the procedures which are therein specified to enable more

¹ [2010] VSC 300.

information to provided to enable him to undertake his task. Alternatively, if time did not permit that course, it was also open to the Adjudicator to simply not determine the application within the time allowed by s.22(4) of the Act and by leave of the parties point out the deficiencies in the material provided with the adjudication application. At that point the Adjudicator may have invited the applicant to make a new application for adjudication under s.18 on properly presented material. This could have been done under s.28 of the Act.

12 However none of these steps were invoked by the Adjudicator.

13 The Adjudicator proceeded on the insufficient material before him to adjudicate the adjudication application and make a determination upon it.

14 In *Asian Pacific*² the approach of Hodgson JA in relation to the New South Wales Act³ expressed in *Coordinated Construction Co Pty Ltd v Hargreaves (NSW) Pty Ltd*⁴ as restated in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd*⁵ where the following was said by Brereton J:⁶

The 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.

This approach was adopted here. Thus, the fundamental determination to be made by an adjudicator is whether the construction work identified in the payment claim has been carried out and secondly what is its value.

² [2010] VSC 300

³ *Building and Construction Industry Security of payment Act 1999* (NSW)

⁴ [2005] NSWCA 228

⁵ [2006] NSWCA 13

⁶ *Supra* at [82]

SC:

15 The Act provides for an entitlement to a progress payment calculated in accordance with the terms of the construction contract or if there is no express provision with respect to the matter, as in this case, the amount calculated on the basis of the value of:⁷

- (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.

16 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 provides:

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.
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are 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 goods and services; and
 - (ii) any other rates or prices set out in the contract; and

⁷ See s. 10(1)(b) of the Act
SC:

- (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 goods are defective, the estimated cost of rectifying the defect.
- (3) For the purposes of subsection (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

17 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 the Act.

18 In the present case, the construction contract was found by the Adjudicator to be an oral contract and accordingly there were no specific terms which defined how the work done or the materials supplied were to be valued. Accordingly, the valuation regime set out in s.11 of the Act was to apply.

19 Section 5 of the Act defines construction work. It is a reasonably detailed definitional section. The definition variously refers to numbers of activities involved in construction, for example s.5(1)(a) refers to construction, alteration, repairing, restoration and the like of buildings or structures forming or to form part of the land (whether permanent or not). Section 5(1) defines construction work to mean any of the following work:

- (1) In this Act, construction work means any of the following work-
 - (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);
 - (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and

harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;

- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
- (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including-
 - (i) site clearance, earth-moving, excavation, tunnelling and boring; and
 - (ii) the laying of foundations; and
 - (iii) the erection, maintenance or dismantling of scaffolding; and
 - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
 - (v) site restoration, landscaping and the provision of roadways and other access works;
- (f) the painting or decorating of the internal or external surfaces of any building, structure or works;
- (g) any other work of a kind prescribed for the purposes of this subsection.

20 In the payment schedule, Claude Neon contended that the amount claimed for Rhino's works was excessive. They said that Rhino had not clearly identified the further work or services allegedly provided or provided sufficient documentary evidence to allow it to verify the claim.

21 Mr Andrew, who appeared for the plaintiff Claude Neon, reiterated the aforementioned complaint. He submitted that there was insufficient material before the Adjudicator to enable him to undertake his valuation because the material

presented by the claimant Rhino did not enable him to form a view as to, nor assess the value of, the physical work undertaken in relation to the construction carried out. This issue was drawn to the attention of the Adjudicator and was noted in the adjudication determination in the following terms:

In the Payment Schedule the Respondent contended that the amount claimed for the Claimant's works was excessive. The Respondent said that the Claimant had not clearly identified the further work or services allegedly provided or provided sufficient documentary evidence to allow the Respondent to verify the claim.

22 In this proceeding, reference was made by both Claude Neon and Rhino to two central pieces of evidence before the Adjudicator. The first was a breakdown of the amount set out in the relevant invoice, being Invoice No.5374/2, by reference to the labour, materials, and rental costs which comprised the payment claim (the "breakdown"). The second was a statutory declaration provided by Mr Vincent Merrett, a director of Rhino (the "Merrett declaration").

23 In his statutory declaration, Mr Merrett said in relation to his position with Rhino:

I am a director of Rhino Signmakers Pty Ltd. Rhino designs and manufactures electrically lit signage for commercial and industrial use. I am a qualified electrician and have worked in the sign construction industry for 25 years and I have been with Rhino for the last 13 years. My responsibilities as a director of Rhino include sales, estimating, design and project management. I also work on the tools to construct signs and when extra resources are needed on a project, I was the director responsible for Rhino's involvement in the contract with Claude Neon to prepare three pylon signs at AAMI Park on Olympic Boulevard in Melbourne.

He also referred in his declaration to the following:

Claude Neon have, since the issuing of the payment claim, paid all amounts outstanding under Invoice 5374/1. In order to assist in understanding Rhino's claim for the second invoice works, I have prepared a detailed breakdown of amounts set out in Invoice 5374/2 with reference to labour, materials, and rental costs. The breakdown is contained in Tab 7 of the adjudication application.

24 Thus the Adjudicator in this case had before him not only the sworn statutory declaration of Mr Merrett, he also had the detailed breakdowns which were referred to by Mr Merrett in his statutory declaration, being breakdowns prepared by him in

his capacity as a director of Rhino and having the expertise which he referred to in his statutory declaration.

25 In spite of this, Mr Andrew submitted that nowhere in the Merrett declaration, nor in the accompanying breakdown referred to in the declaration, is the physical work which was the subject of a claim properly described. He referred in particular to another business called Beacon which also worked on the project and was independently engaged by Claude Neon to work on the same works as Rhino. So much appears to be derived from the evidence of Mr Merrett contained in his statutory declaration, parts of which were referred to by Mr Andrew in his submissions.

26 Mr Andrew then submitted that it was not therefore possible for the works done by Rhino, which were the subject of the relevant payment claim, to be separated from the works done by Beacon, nor was this differentiation referred to in the breakdown. Furthermore, nowhere in the Merritt declaration, the breakdown, the relevant invoice or anywhere else in the materials was there a sufficient description of the physical works which were the subject of the payment claim to enable the Adjudicator to properly go about his statutory task.

27 It follows, that it was not possible for the construction work to be valued as required by the Act, therefore, the purported adjudication was undertaken in breach of a basic and essential requirement of the Act and was therefore void and should be set aside.

28 Mr Cogley, who appeared for Rhino, argued to the contrary. In his submissions he referred to the following paragraphs of the Merrett declaration:

45. I obtained the hours worked for each employee for performance of the second invoice works from Rhino's computer-based job management system. Labour for works undertaken under - in relation to both invoices 53741 and 53742 was entered into the system under the same job number. The breakdown contains only labour for the second invoice works.

I was able to extract this labour with reference to my knowledge of how the works were performed and the skills of the individual labourers. Labour is charged at the rate of \$80 for normal hours and \$100 for

overtime, classified as more than 7.5 hours in one day. These rates are applied by Rhino to all of its projects and are what I would consider industry standard. A lot of overtime was worked on the AAMI project by Rhino and other subcontractors' staff to meet the timeframes required by Claude Neon.

46. In relation to my own time and I have charged my time at \$80 per hour when working on the tools with the other labourers and \$100 per hour if working overtime on the tools. I have charged my management time, that is for design, attending meetings, management works and dealing with other contractors at the rate of \$100 per hour. I did not separately record my management time during the course of the AAMI project but I have estimated that I spent 40 hours performing management tasks over the course of the project. This is more than I would usually spend but was necessary given that Rhino were left to manage and coordinate much of the works by Claude Neon.
47. I have included in the breakdown the sum of \$7,320 for the rental of extra factory space leased by Rhino in which the sub-frames were stored and clad. I consider that it was appropriate to charge Claude Neon for this rental as the storage of the frames in this factory space precluded Rhino from utilising it to perform any other works. In my email to John Fortula on 19 May 2010, see Tab 26 of the adjudication application, I had included this amount within the labour figures to produce the amount of \$73,840 plus GST.
48. Material costs are shown for the materials used in the works. An explanation of the amount of materials used and the cost being charged for those materials is provided to assist. The costs charged for these materials are what Rhino ordinarily charges and are what I would consider industry standard. Rhino engaged a subcontractor Fabricon to construct the steel jigs to keep the frame square and the steel transport frames with materials being supplied by Rhino. Copies of Fabricon's invoices referenced in the breakdown are contained in Tab 28 of the adjudication application. It was not possible to isolate specific supplier invoice relating only to the AAMI project for each of the material types as most of the materials were undertaken from stock.

29 The breakdowns in each case prepared by Mr Merrett all made reference to the invoice in dispute in this proceeding which was the subject of the payment claim, namely Invoice 5273/2. Looking briefly at the breakdown documents, the first relate to labour costs and are said to be in respect of Invoice 5273/2, which I accept was intended to refer to Invoice 5374/2. In each case the date of the work and the subject of the breakdown is included; the staff member who undertook the work is identified; the amount of hours as broken up in to normal hours and overtime hours worked on each relevant day; and the total of the hours worked is then tabulated.

30 Moving to the total labour costs: a total of eight ordinary hours at \$80 per ordinary hour was calculated at 579 hours worked resulting in the sum of \$46,320. Overtime hours at \$100 per hour were calculated at 162, resulting in a total of \$16,200, and the management time to which Mr Merrett referred in his statutory declaration was calculated at \$4000, giving rise to a total labour cost of \$66,520.

31 As to material costs, this was again provided by way of a breakdown making reference to the relevant invoice where the work done in respect of the materials, and the materials themselves were set out in one column, the price of that work and materials was set out in the next column and a comment which described in each case the quantities of materials supplied were set out.

32 The material costs also included reference to work done and goods supplied by a subcontractor Fabricon. Two items were referred to.

33 The first item was described as steel transport frames for loading onto trucks and lifting off trucks. A total price of \$3751 was allocated to this item. This sum was said to comprise a Fabricon invoice dated 28 April, which amounted to \$1334, together with \$1345 for materials plus a 40 per cent mark-up.

34 The second item was described as steel jigs to hold frames straight and square while being clad. The jigs were further described as being 16 metres by 4 metres X 2. The price for this item was set out in the material costs breakdown as being \$3955. Again, in the comment section, reference is made to a Fabricon invoice dated 21 April for the sum of \$1821 together with \$994 in materials with a 40 per cent mark-up.

35 The two invoices from Fabricon were before the Adjudicator for him to consider as part of the evidence in the Adjudication. Both invoices described the hours worked on each day which was the subject of the invoice, and the unit price for each hour worked.

36 Following in the breakdown was a calculation of total invoice costs which included total labour time and management time, which were added together to comprise a

total labour cost of \$66,520. The total materials cost of \$25,125 was then added. In addition, the rental for extra factory space included in the sum of \$7320, claimed in respect of what was said to be 488 square metres of floor space used at \$2.50 per square metre for six weeks.

37 The total price therefore calculated in the breakdown in respect of the invoice, the subject of the payment claim, was \$98,965 (excluding GST) which including GST amounted to \$108,861.

38 Another important document was also before the adjudicator and that was the relevant invoice which was the subject of the payment claim, being Invoice 5374/2. That invoice was a tax invoice on Rhino letterhead dated 13 May 2010. It described the job number recorded as 05338 and then followed a description of the work in respect of which the invoice was prepared:

Collect cladding panels from Memmo Roma. Sort and fit panels to subframes in conjunction with Beacon. Supply double sided tapes and adhesive for fixing panels. Cork gap lines in cladding. Fabricate lighting boxes and fit lights supplied by Claude Neon. Supply and apply vinyl film to acrylic letters. Install acrylic letters to sign panels. Fabricate transport frames for trucks. Load trucks.

The total amount excluding GST was \$98,960 and the total balance including GST shown in the invoice was \$108,856.

39 The other invoice in respect of the claim which is not disputed, being Invoice No.5374/1 dated 29 April 2010, was also before the Adjudicator. The job number was also 5338 and the work was described in the invoice as follows: "AAMI Park subframes as per order No.980 and as instructed by John Fortula three pylon sign subframes overall size 15,600 millimetres by 3980 millimetres by 550 millimetres". The balance payable on that tax invoice, including GST, was \$34,679.

40 The work done by Rhino on the project, as described by Mr Merrett in his statutory declaration, was consistent with the work described in both invoices. In respect of the work done by Rhino, the Adjudicator specifically found as follows:

I am satisfied on the evidence that the claimant carried out substantial works at the respondent's direction on a piecemeal basis. I am satisfied that the claimant has not been paid for much of this work, although the respondent is well aware that the claimant undertook substantial work for which it has not been paid. I am satisfied that the respondent is aware of the nature of the work carried out by the claimant, and that it has had the benefit of the claimant's labours. If it is not so aware, that is more to the respondent's failure to manage the works adequately than it does for lack of communication on the part of the claimant.

41 In his determination the Adjudicator found further in arriving at his assessment:

The claimant has provided its valuation of the work. The claimant could have provided more detail in the payment claim to justify the amount claimed. The claimant has done so subsequently in the breakdown of costs. In my view, this does not justify the respondent's refusal to make any payment for the work claimed in Tax Invoice 5273/2. The respondent has had an opportunity to revise its position; it has not done so.

Further the Adjudicator found as follows:

On the evidence provided to me, I am satisfied that the claimant is entitled to payment for the items of work contained in the payment claim. In the absence of contractual provisions to clarify or limit entitlements, the claimant is entitled under the Act to be paid for its construction work and of goods and services it provided. The latter include the costs occasioned to the claimant incidental to its completion of its works; for instance, management costs and the costs of providing floor space to house the works.

The Adjudicator found further:

In the absence of alternative costings from the respondent, no doubt because the respondent elected to dispute the claimant's entitlement altogether, I have only the claimant's valuation to assess and evaluate. Having regard to my determining that the claimant is entitled to be paid for the work it carried out, I am obliged to value that work on the evidence.

And:

Notwithstanding the respondent's submissions to the contrary, I am satisfied that the contribution to the works by the claimant and the claimant's efforts to meet the commitments imposed on it benefited the respondents, having regard to the circumstances in which the claimant met its obligations, I am of the view that the amount claimed by the claimant is not excessive. If anything, I think it is conservative.

Finally the Adjudicator concluded:

On the evidence I am satisfied that the claimant has established for the purpose of an interim payment under the Act an entitlement to be paid, the amount claimed in the payment claim, an amount of \$143,535 including GST.

42 In my opinion, the Adjudicator did have sufficient material before him to arrive at his conclusion. First, he was able to determine the construction work by reference to the invoice which related to the work, the subject of claim, and the summary of the work it described. Second, he was able to determine the labour applied and the materials supplied and the expenses such as rental costs and management fees which were incurred, both from Mr Merrett's declaration and from the detailed costs breakdown which was referred to in that declaration.

43 Although, it must be said that the description of the construction work in the relevant invoice was in summary form, when read with the breakdowns of work, the materials supplied and rental costs and management fees and the like incurred, it was sufficient in my view to enable the Adjudicator to undertake his statutory task of valuing the construction work.

44 It is after all "construction work", which is the subject of the payment claim which is to be valued under the Act. It is not the end product of the thing produced which is to be valued, as for example the value of a building which has been erected or the value of the additional component of a building which has been constructed, although the end product may provide a guide as to the value of the construction work which the claimant undertook. What a contractor does to achieve the end product is essentially comprised in the physical work it carries out through the labour of those it employs and the materials it has supplied. There may also be other items which may legitimately fall into this category, such as in this case expenditure on the hire of extra space, the engagement of a subcontractor and the provision of management facilities.

45 In undertaking the valuation exercise, I am satisfied that the Adjudicator had before him, and was able to take into account, the summary description of the work contained in the relevant invoice, the statutory declaration of Mr Merrett and the annexed breakdown as to the things that Rhino did to undertake the relevant construction work, namely the provision of labour and materials, rental of additional space, the engagement of the subcontractor and the provision of management. These

things were all applied to produce the relevant construction work, and the documents which recorded the details of these elements all combined in this case to provide the Adjudicator in effect, with a valuation of a construction work which he was able to assess. In the absence of controverting material, he was entitled to adopt the Rhino valuation.

46 By way of conclusion, I find no error on the part of the Adjudicator.

47 I will order that the proceeding be dismissed and that the plaintiff pay the costs of the first defendant of this application.
