NEW SOUTH WALES COURT OF APPEAL

CITATION:
Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor [2008] NSWCA 279

FILE NUMBER(S):
40228/2008

HEARING DATE(S):
15 October 2008

JUDGMENT DATE:
31 October 2008

PARTIES:
Plaza West Pty Ltd
Simon's Earthworks (NSW) Pty Ltd (First Respondent)
Scott Petersson (Second Respondent)

JUDGMENT OF:
Allsop P Giles JA Hodgson JA

LOWER COURT JURISDICTION:
Supreme Court

LOWER COURT FILE NUMBER(S):
SC 55041/2008

LOWER COURT JUDICIAL OFFICER:
Hammerschlag J

LOWER COURT DATE OF DECISION:
15 July 2008

COUNSEL:
M Rudge SC, S Goldstein
G Inatey SC, N Nicholls

SOLICITORS:
Adrian David Batterby, Pymble
Mills Oakley Lawyers (First Respondent)
Phillip Davenport, Bondi (Second Respondent)

CATCHWORDS:
BUILDING AND ENGINEERING CONTRACTS – payment claim – Building and Construction Industry Security of Payment Act 1999 (NSW) ss 9, 13, 14, 17, 22, 32 ADJUDICATION – whether error of fact or law sufficient to vitiate adjudication – whether adjudicator fulfilled statutory task – whether denial of procedural fairness

RESTITUTION – whether discharge of debt owed to third party

LEGISLATION CITED:
Building and Construction Industry Security of Payment Act 1999 (NSW)

CASES CITED:
Brodyn Pty Limited v Davenport [2004] NSWCA 394; 61 NSWLR 421
Firedam Civil Engineering v KJP Constructions [2007] NSWSC 1162
John Holland Pty Limited v Roads and Traffic Authority of New South Wales [2007] NSWCA 19; 23 BCL 205
Kalkat Electrical Contractors Pty Limited v Holmwood Holdings Pty Limited [2007] NSWCA 32
Kuswardana v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 186
Minister for Commerce v Contrax Plumbing (NSW) Pty Limited [2005] NSWCA 142
Reiby Street Apartments v Winterton Constructions [2006] NSWSC 375
Transgrid v Siemens [2004] NSWCA 395; 61 NSWLR 521

TEXTS CITED:

DECISION:
Appeal dismissed with costs.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40228/2008

ALLSOP P
GILES JA
HODGSON JA

31 October 2008

PLAZA WEST PTY LTD v SIMON'S EARTHWORKS (NSW) PTY LTD & ANOR

Headnote

The appellant, Plaza West Pty Limited, contracted with the respondent, Simon's Earthworks (NSW) Pty Limited, to carry out earthworks for a commercial development on property owned by the appellant in Parramatta. The respondent subcontracted the execution of certain work to Merrmac Pty Limited. Simons Earthworks served a payment claim on the appellant claiming $958,553.53, which sum included an amount of $524,555.54 claimed on it by Merrmac.

The appellant took the remaining work out of the hands of the respondent, coming to an arrangement with Merrmac for it to take over the work and for the appellant to pay the moneys said to be owed by Simon's Earthworks to Merrmac.

An adjudication took place on Simon's Earthworks claim for $958,583.53 against Plaza West, the adjudicator awarding the full amount on the basis that the lack of a response from the Superintendent within time under the contract made the full amount contractually due, without examining the dispute on its merits. Plaza West only paid that part of the adjudication not referable to the Merrmac claim. Simon's Earthworks obtained judgment in the District Court for the balance.

The primary judge declined to interfere with the adjudication or to restrain reliance on the District Court judgment. The appellant appealed.

On appeal, the appellant advanced three principal arguments:

(i) that the primary judge erred in failing to conclude that the adjudicator did not undertake his statutory task under the Act by dealing with the claim based on the contractual provision concerning the Superintendent's lack of response;

(ii) that the adjudicator had failed to afford procedural fairness to the appellant in not dealing with the payment schedule line by line; and

(iii) that the appellant paid the Merrmac claim; reliance by the respondent upon the District Court judgment was unsustainable in law.

Held, dismissing the appeal

(Allsop P; Giles JA and Hodgson JA agreeing)

In respect to (i):

1. Though the adjudicator erred in law in his approach, he fulfilled his statutory task in s 22 and attended to the task of dealing with the adjudication claim by dealing with the matters required by s 22. The adjudicator dealt with all relevant arguments and with every submission put to him by the parties: [32], [51], [52], [56].

2. The adjudicator's error was brought about by the way the parties conducted the matter before him: [31], [32], [51], [52].

3. There may be occasions (though this was not one) where a tribunal despite dealing with a matter on the basis of the approach taken by the parties can be seen to have failed to attend to its required task: [32].

Kuswardana v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 186

In respect to (ii):

4. There was no failure to afford procedural fairness; the adjudicator attended to all the submissions put by both parties: [34], [51], [52].

5. If an adjudicator in attending to the task in s 22 comes to the view (mistakenly by reference to the facts or law) that one aspect of the payment schedule does not arise for consideration, it is at best a problematic position that the failure to deal with such aspects of the payment schedule is a denial of procedural fairness. The appropriate question is to ascertain whether the statutory task laid down for the adjudicator has been complied with: [37].

In respect to (iii):

6. There was no implied request by Simon's Earthworks for the Plaza West to pay Merrmac from the terms of the contract, nor was there any implied adoption by Simon's Earthworks of Plaza West's payment to Merrmac: [44], [45], [51], [52].

(per Hodgson JA)

7. The phrase "calculated in accordance with the terms of the contact" in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed: [53]

Transgrid v Siemens Limited [2004] NSWCA 395; 61 NSWLR 521; *John Holland Pty Limited v Road and Traffic Authority of New South Wales* [2007] NSWCA 19, applied.

8. Contractors are not deprived of entitlement to payment under the Act because a condition precedent such as obtaining of a superintendent's certificate, has not been satisfied; and contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision: [54].

9. If proceedings are brought pursuant to s 32 of the Act and it can be shown that a judgment has been obtained under the Act which is unmeritorious, the judgment debtor may be able to obtain a stay of the judgment or an injunction against enforcement of it: [59].

Brodyn Pty Limited v Davenport [2004] NSWCA 394; 61 NSWLR 421, referred to.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40228/2008

ALLSOP P
GILES JA
HODGSON JA

31 October 2008

PLAZA WEST PTY LTD v SIMON'S EARTHWORKS (NSW) PTY LTD & ANOR

Judgment

1 **ALLSOP P**: This is an appeal from an order of the Court (Hammerschlag J) dismissing proceedings attacking the validity of an adjudication of the second respondent under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "Act").

2 The first respondent was the earthworks contractor on a commercial development at Parramatta of which the appellant was the proprietor. (I shall refer to the first respondent as the respondent. The second respondent was the adjudicator and, perfectly properly, took no part in the proceedings below or on appeal. I will refer to him as the adjudicator.)

3 The contract between the appellant and the respondent was in the AS 4000-1997 form. I will refer to this as the contract. The respondent entered a sub-contract with Merrmac Pty Limited ("Merrmac") for the execution of certain work within the scope of its (the respondent's) contract.

4 The Superintendent under the contract was a company related to the appellant.

5 On Monday 25 February 2008, the appellant served a show cause notice upon the respondent under cl 39 of the contract alleging breaches of contract.

6 On Thursday 28 February 2008 Merrmac served a payment claim on the respondent claiming $524,555.54.

7 On the same day, the respondent served a payment claim on the appellant, a copy being provided to the Superintendent, claiming $958,553.53, which included the amount of the claim on it by Merrmac. This was a payment claim under the Act, s 13 and a progress claim under cl 37 of the contract.

8 On 5 March 2008, the appellant took the remaining work out of the hands of the respondent.

9 On Thursday 13 March 2008, the appellant served a payment schedule under the Act, s 14. The payment schedule was served on the tenth, and last, business day after service of the payment claim, for the purposes of the Act, s 14(4). This avoided the statutory consequence provided for in s 14(4):

> *If:*
>
> *(a) a claimant serves a payment claim on a respondent, and*
>
> *(b) the respondent does not provide a payment schedule to the claimant:*
>
> *(i) within the time required by the relevant construction contract, or*
>
> *(ii) within 10 business days after the payment claim is served, whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.*

10 Under cl 37(2) of the contract, if the Superintendent did not issue a progress certificate within 14 days of receiving a progress claim (under cl 37.1) that progress claim was deemed to be the relevant progress certificate. By cl 37.2 that meant that after 21 days from the receipt by the Superintendent of the progress claim the principal (the appellant) was liable to pay the claim subject to relevant set-offs. The 14 days for cl 37(2) expired on (that is including) 13 March 2008. No progress certificate was issued by the Superintendent.

11 On 17 March 2008, the appellant and Merrmac entered a deed to complete the contract works.

12 On 18 March 2008, the appellant paid Merrmac $198,598.44 under the deed. On 20 March 2008, the appellant paid $438,350 into a trust account of Merrmac's solicitor pursuant to the deed.

13 On 31 March 2008, the respondent lodged an adjudication application under the Act, s 17. The adjudicator was then nominated.

14 On 8 April 2008, the appellant served an adjudication response under the Act, s 20.

15 On 17 April 2008, the adjudicator completed the determination and found $958,553.53 payable by the appellant to the respondent.

16 On 24 April 2008, the appellant paid the respondent the difference between $958,553.53 and $524,555.42 (the latter sum being the Merrmac claim and the former sum being the respondent's total claim).

17 On 1 May 2008, Merrmac's solicitors stated by letter that the sum of $524,555.42 had been paid to Merrmac by the appellant.

18 On 9 May 2008, judgment was entered in the District Court in favour of the respondent against the appellant for $532,123, under the Act, s 25.

19 The primary judge refused to interfere with the adjudication and refused to restrain reliance on the District Court judgment.

20 Three principal arguments were put to this Court as to why the primary judge erred. In order to understand these arguments it is necessary to appreciate the approach of the adjudicator and the way the adjudication was conducted before him.

21 Paragraphs 31 to 40 of the adjudication application of the respondent were in the following terms:

> *Payment Clause*
>
> *31. The payment clause under the Contract is set out below:*
>
> > *37.1 Progress claims*
> >
> > *The Contractor shall claim payment progressively in accordance with Item 28.*
> >
> > *An early progress claim shall be deemed to have been made on the date for making that claim.*
> >
> > *Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.*
> >
> > *37.2 Certificates*
> >
> > *The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:*
> >
> > *(a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and*
> >
> > *(b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.*
> >
> > *If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).*
> >
> > *It the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.*
> >
> > *The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting*

off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

32. The Payment Claim was a payment claim under the Act and a progress claim under the Contract.

33. The Payment Claim was clearly served on the Superintendent. However, whilst Plaza West has responded by serving the Payment Schedule, the Superintendent has not issued any Payment Certificate in respect of the Payment Claim.

34. This has a severe consequence for the Respondent. This is because clause 37.2 of the Contract provides that if the Superintendent does not issue a payment certificate within the time stipulated by the Contract (14 days), the progress claim is deemed approved and the Principal must pay the amount of the progress claim as if that amount appeared in a payment certificate.

35. As such, by reason of the Contract, the approved value of the Payment Claim is deemed to be for its full value.

36. This has an important consequence under section 9 of the Act, which relevantly provides:

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; and

(b) ...

37. As such, an adjudicator is bound to value the Payment Claim in accordance with the Contract. Due to the Superintendent's failure to certify, the full amount of the Payment Claim is deemed approved under the Contract.

38. Simons expects that Plaza West will rely upon a letter from the Superintendent to Simons dated 12 February 2008 (see Tab 13). However, such letter is factually incorrect as to the voidness of the progress certification procedure under the Contract and fails to recognise the dual scheme of the Act, where the one claim can have consequences under the Act and under the relevant construction contract. Indeed, the consequences of a claim may be different under a construction contract that [sic] *those under the Act.*

39. By reason of the Superintendent's failure to issue a payment certificate in respect of the Payment Claim the amount due and payable by the Respondent under the Contract, and by reason of section 9, under the Act, is the full amount claimed in the Payment Claim.

40. It is appropriate to deal with and dismiss each of the purported reasons for non payment in turn."

22 Paragraphs 25 to 31 of the adjudication response of the appellant were in the following terms:

25. As to paragraph 13, Plaza West acknowledges that no direct payment has been made by it to Simon's Earthworks in relation to the Payment Claim dated 28 February

2008 for $958,553.53 including GST. However, $524,555.54 of the Payment Claimant [sic] *is in respect of the Payment Claim dated 28 February 2008 of Merrmac made against Simon's Earthworks. As of 20 March 2008, Plaza West has paid all of that $524,555.54 to Merrmac or its solicitors' Trust Account pursuant to an agreement dated 17 March 2008 between Plaza West and Merrmac. In fact, as noted in the chronology, Plaza West has paid an additional $108,392.90 into the Trust Account of the solicitors for Merrmac. A copy of the receipts for the payments is attached.*

26. *The amount claimed by Simon's Earthworks must accordingly be reduced by the $524,555.53* [sic] *paid by Plaza West direct to Merrmac because the payment has reduced the amount outstanding on the Payment Claim dated 28 February 2008 of Merrmac against Simon's Earthworks to nil.*

Jurisdiction

27. *As to paragraph 23, Plaza West does not know if the Adjudication Application is made in accordance with the time permitted by the Act because it does not know when the application was lodged with the nominating authority. If the Application was lodged on 31 March 2008, Plaza West acknowledges that the Application will be within time. If it was lodged on or after 1 April 2008, being the date the Application was served on Plaza West, the Application will be out of time.*

Payment Clause

28. *Plaza West disputes the assertion in paragraph 32 that the Payment Claim was a claim under the Act* ***and*** *under the contract for the following reasons:*

    (a) The Payment Claim is expressed to be made under the Act. Furthermore, it is not expressed to be made under the contract. Nor is there any reference in the claim to the payment claim clause under the contract, namely clause 37 of the General Conditions of Contract.

    (b) The Payment Claim is addressed to Plaza West. That is as required by the Act. Furthermore, the Payment Claim is not addressed to the Superintendent. It is merely copied to the Superintendent.

    (c) The submission that a progress claim could be made under both the Act and the contract is untenable for the following reasons:

    (i) Section 34(2)(a) of the Act specifically provides that any provision of a contract that modifies the operation of the Act is void. The Act requires that the party liable to pay must issue the Payment Schedule. By way of contrast, clause 37.2 however requires the Superintendent to issue the payment certificate. The provisions are inconsistent. By reasons of section 34(2)(a) of the Act, clause 37.2 is void.

    (ii) Further to the preceding sub-paragraph, a Superintendent, acting as an independent certifier, cannot issue a Payment Schedule on behalf of the party liable to pay the claim. That is because the independent role of the Superintendent means that it cannot be said that the Superintendent can act as the agent of the Respondent in issuing a Payment Schedule.

    (iii) In the alternative, the objective of the Act is not to create two sets of administrative arrangements instead of one (namely that under the contract) for making and processing progress claims. Rather it is to create an ***alternative*** *statutory procedure for making and processing progress claims.*

(iv) *Furthermore, if it were possible to make a claim under both the Act and the contract, a claim for the same amount could produce inconsistent payment obligations because the assessment of the claim in each case must be by different persons (namely the Principal under the Act and the Superintendent under the contract). Parliament cannot have intended such an outcome.*

(v) *In the alternative, on a proper construction of the contract, the parties, as reasonable commercial parties, must be taken to have intended that in the event Simon's Earthworks chose to make a payment claim under the Act, the payment provisions of the contract would cease to have effect. That is consistent with the joint Judgment of 5 Justices of the High Court of Australia in* Pacific Carriers Limited v BNP Paribas *(2004) 218 CLR 451. At paragraph 22 their Honours identified the fundamental rules of construction which must be applied. The Judgment states at paragraph 22:*

"…the meaning of commercial documents is determined objectively…The construction …is determined by what a reasonable person in the position of (a party to the contract) would have understood them to mean [at the time the contract is made]. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to (both parties to the contract), and the purpose and object of the transaction…

…In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating".

(vi) *A reasonable person in the positions of the parties would not adopt a construction of the contract which meant (a) administrative burden on the parties would be increased because two processes could apply for making and processing of progress claims instead of one and (b) inconsistent payment obligations could arise.*

(vii) *Furthermore, compliance by the Superintendent with the Act by not invoking the inconsistent provisions of the contract would have "severe consequences" for the Respondent (to quote from paragraph 34 of the Claimant's Submissions) if the Claimant's submission were to be adopted. That is because compliance by the Superintendent with the Act would produce an outcome of inconsistent payment obligations notwithstanding that the Respondent had also complied with the Act and served a Payment Schedule providing, with reasons, for payment of less than the amount claimed. According to the claimant, the Respondent would then be obliged under the terms of the contract to pay the full amount claimed notwithstanding it had done everything required of it under the Act to avoid that default position. Clearly such a proposition is untenable.*

(d) *Not surprisingly, no authority is cited by the Claimant in support of its submission.*

29. *It follows Plaza West rejects the assertions in paragraphs 34 to 37 of the Claimant's Submissions. The amount payable is to be determined under section 9(b) of the Act.*

30. *In response to paragraph 38, Plaza West notes that the paragraph contains mere assertion. Plaza West repeats its submissions at paragraph 28 above.*

31. By reason of the foregoing, Plaza West rejects as untenable the submission in paragraph 39 of the Claimant's submissions.

23 The adjudicator dealt in detail with all these arguments at [10]-[25] of his adjudication determination:

Claim under the Contract and the Act

10. The Respondent observes at paragraph 28, that they take issue with the assertion of the Claimant that the Payment Claim is made both under the contract and the Act. In my view this is a crucial and unfortunate view. The Claimant has agitated that the Respondent has provided a Payment Schedule, in compliance with the Act, but has failed to provide a Progress Certificate as required by the Contract. For the avoidance of doubt, it is relevant to note that the Payment Claim was served on both the Superintendent and the Respondent.

11. It has been recognised by the courts for some period of time that the Act has created a dual track system. The grounds raised by the Respondent in objection to this appear to be as follows:

11.1. claim does not mention clause 37 of the Contract which requires the Superintendent to issue a Progress Certificate, while the Act requires the Payment Schedule to be issued by the Respondent (ie the person liable to pay).

***Determination** – The Act has been interpreted to apply the law of agency and to recognise that the Superintendent may issue the Payment Schedule for and on behalf of the Respondent. However, it appears from the terms of the contract that the Respondent can not issue a Progress Certificate. I form this view on the explicit and mandatory form of words used in clause 37.2 of the contract.*

11.2 claim not addressed to Superintendent, merely copied.

***Determination** – The contract provides at clause 37.1 that 'Each progress Claim shall be given in writing to the Superintendent and shall include...' That provision does not require it to be specifically addressed to the Superintendent. In my view it contemplates the claim being addressed to the principal yet provided to the Superintendent. If I am incorrect in this view it does not matter because the clause simply does not support the submission of the Respondent.*

11.3 the Act is not intended to be a duplicate system.

***Determination** – This is not correct. The Act is intended to create a duplicate system, which in some cases will prevail over the contract and in other matters be subordinate.*

11.4 a claim under the Act and the contract cannot produce duplicate liability.

***Determination** – this is correct as only one party can be liable to pay the claim, that party being the Respondent, however so constituted. It is not the situation that the Superintendent would become liable unless they had contracted separately, in which case the principal would not be liable. In any event the Superintendent is not named as the Respondent and the issue is moot.*

11.5 *making a claim for payment under the Act extinguishes the payment provisions of the contract.*

Determination *– The Act does not contain the level of detail to allow it to be the sole source of a Payment Claim, one of the basic and essential requirements of a claim is to have a construction contract in place between the parties. The learned judges of the High Court in* Pacific Carriers v BNP Paribas *(2004) 218 CLR 451 were not contemplating the Act in that judgment and it is distinguishable to the extent it is being relied on by the Respondent in their submissions. By way of example the High Court considered the application of the Act in* Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd & Ors *[2006] HCA Trans 9 (3 February 2008), and made no observation of the type proposed. Further and expressly, the Act requires specific consideration of the contract with regard to matters such as valuation and interest. I do not accept this submission. If I am wrong in this regard I am in any event satisfied that a reasonable person on* [sic] *the position of the parties would be aware that they had a contractual burden to provide a Progress Certificate and a Payment Schedule. This is a broadly understood obligation, particulalrly* [sic] *amongst parties capable of performing the work contemplated under this contract. Examples of the provision of both documents in the single bundle of documents can be found in the reasons of the Court of Appeal in* Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation *[2007] NSWCA 9.*

11.6 *the Respondent suggests that the dual system places an onerous burden of complying with two regimes and an outcome of inconsistent payment obligations.*

Determination *– I do not accept that submission. While the public policy elements of the 'onerous obligations' are outside my scope as an Adjudicator, it is my view it does not create the duplicate payment obligations as suggested at paragraph 28(c)(vii) of the submissions. I have formed this view as the Act or the contract has primacy with regard to different matters; by way of example:*

11.6.1 *the Act requires a Respondent to advise their intention with regard to payment and reasons for non payment (if that is their view) within 10 business days or such shorter time as the contract may allow (see section 14(4)(b)). This creates a clear guideline to contracting parties that regardless of what term they put into a contract, if the claim is made under the Act the response cannot be provided later than 10 business days in the event that a claim is made under the Act. If a Superintendent observes the Payment Claim is made under the Act, they should serve the Progress Certificate this document could also fulfil the role of the Payment Schedule* [sic].

11.6.2 *even where the contract may award a specific rate of interest or preclude the awarding of interest on delinquent payments the Act requires it to be awarded and also establishes minimum rates for such interest (see section 11(2) of the Act).*

Conclusion Claim under the Contract and the Act

12. *I have included this somewhat detailed appraisal of the submissions of the Respondent as it was a matter that they could not reasonably contemplate, however, this does not mean that the submission of the Claimant was disguised or fell outside the scope of the Payment Claim as discussed in decisions of the Court in* John

Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors *[2004] NSWSC 258 or* Energy Australia v Downer Construction (Australia) Pty Ltd and 2 ors *[2006] NSWSC 52. I have also provided this level of detail as it is essential in light of the submission of the Claimant that it seeks to rebuff, that submission is that the effect of clause 37.2 of the contract is that a failure to provide a Progress Certificate will convert the Payment Claim into the Progress Certificate and create a liquidated liability.*

13. *I accept that the application is compliant with the basic and essential requirements of the Act.*

Reasons

14. *The Respondent has provided clear reasons for withholding payment for each of the individual elements of the Payment Claim, however before dealing with those submissions, it is relevant to consider the more sweeping submission of the Claimant identified above in the final sentence of paragraph 12 above.*

Deemed Valuation

15. *Clause 37 of the contract details the obligations and processes regarding payment. Clause 37.2 includes the following unnumbered sub-clause:*

If the Superintendent *does not issue the* progress certificate *within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant* progress certificate.

16. *The Claimant submits that this clause should have its ordinary meaning and that the claim must be valued in accordance with section 9(a) of the Act. The impact of these submissions is that the full sum claimed must be valued in full for the purposes of the Progress Certificate. The Respondent resists these submissions saying in paragraphs 28 through 31 that it must fail. I have dealt above with most of the submissions made in paragraph 28. It is relevant to deal now with the remaining objections made to this submission of the Claimant.*

Paragraph 28(d) no authority cited

17. *There is no requirement for a party making a submission to provide an authority for a submission, though some guidance can reduce confusion and time expended unnecessarily. Having made this observation it is relevant for Adjudicators to consider relevant judicial pronouncements when applying section 22(2)(a) and 22(2)(b) of the Act. In this regard the following judgments are relevant:* Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd *[2005] VSC 388 a judgment of Habersberger J, who in that matter considered an identical clause to the one in issue. I return to the learned judges* (sic) *views later.*

18. *To the limited extent this is a reason for withholding payment it is not accepted.*

Paragraph 29 Valuation pursuant to section 9(b) of the Act

19. *After rejecting the submissions of the Claimant the Respondent submits the valuation of the Payment Claim / Progress Claim can only proceed pursuant to section 9(b) of the Act. Section 9 states:*

9 Amount of progress payment

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 construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.*
>
> *20. I do not accept the submission of the Respondent. The contract clearly makes provision for valuation through clause 37. The contract specifically creates a deemed valuation of the full sum claimed where no progress certificate is issued within the 14 days allowed.*
>
> *21. It follows, in my view inescapably, that the valuation of the progress certificate must be that of the progress claim.*
>
> *Paragraphs 30 and 31*
>
> *22. These clauses do not add to the reasons provided. They conclude that the claims of the Claimant are untenable. I do not accept that submission. The contract provided clear terms and they have not been followed. The Act specifically contemplates, the retention of civil rights and the contract also notes that all payments are on account; these are provisions designed to ameliorate the sometimes harsh consequences of provisions such as the one in issue. However, the parties entered a contract where the terms are plain and the consequence is the contract governs the relationship between the parties and should be applied.*
>
> ***Other contractual provisions regarding payment***
>
> *23. Unlike the contract contemplated in Main Roads Construction, the contract includes provisions that allow the Principal to make some adjustments to the liability created through the Progress Certificate. Those provisions are also located in clause 37 of the contract and allow:*
>
> *'The Principal shall within 7 days of receiving both such certificates, or within 21 days after the Superintendent receives the Progress Claim pay to the contractor the balance of the Progress Certificate after deducting retention monies and setting off such of the certificate in paragraph (b) as the Principal elects to set off. ...'*
>
> *24. In my view, the Respondent has accordingly the entitlement to make deductions for retention and set offs, but not for other matters. The Respondent has claimed these set-offs in the Payment Schedule. The Respondent's set offs are not subject to a deemed valuation provision and accordingly must be valued, the entitlement to make such a claim being established under the contract.*
>
> *25. I note the Claimant has submitted that set off claims can not be validly made under the Act. This is not correct, set off claims can be made on both the basis of the contractual entitlement and under the valuation provisions of the legislation. This submission which is founded on section 34 of the Act in my view is fatally flawed; I know of no precedent that supports this proposition out of the myriad judgments concerning the Act, many of which included set offs and the like."*
>
> (Footnotes omitted)

24 The first argument put on appeal was that the primary judge erred in failing to conclude that the adjudicator did not undertake his statutory task under the Act, Part 3 Division 2. The error made by the

adjudicator, the appellant submitted, was to conclude, as he did in (and leading up to) [20] of his determination, that the contractual effect of the failure of the Superintendent to issue a progress certificate was making a provision for valuation through the contract. The Act, s 9 provides:

> *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 construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.*

25 The adjudicator concluded that the expiration of the 14 days from the service of the claim for the operation of cl 37 making the claim due under the contract was the calculation of an amount in accordance with the terms of the contract for the purpose of the Act, s 9(a).

26 The appellant submitted that this approach was not open to the adjudicator. The approach was wrong, it was said, because cl 37(2) was not "calculation in accordance with the terms of the contract", but rather a method or mechanism in the contract: see *Transgrid v Siemens* [2004] NSWCA 395; 61 NSWLR 521 at 542 [34] and [35] (per Hodgson JA with whom Mason P and Giles JA agreed); and *John Holland Pty Limited v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19; 23 BCL 205 at 216 [38] (per Hodgson JA with whom Beazley JA agreed) and 222 [77] (per Basten JA).

27 It was not submitted by the respondent that the adjudicator was entitled, as a matter of law, to take this approach. It was submitted, however, that this error did not vitiate the adjudication. This was the view of the primary judge. In coming to this view, the primary judge followed authorities in this Court to the effect that an error of fact or law by the adjudicator was not sufficient to vitiate an adjudication. The relevant question is whether the adjudicator has attended to his or her task under s 22: see generally *Brodyn Pty Limited v Davenport* [2004] NSWCA 394; 61 NSWLR 421 at 441-443 [52]-[57] (per Hodgson JA, Mason P and Giles JA agreeing); *Transgrid* at 539-541 [29]-[30] (per Hodgson JA, Mason P and Giles JA agreeing); and *Minister for Commerce v Contrax Plumbing (NSW) Pty Limited* [2005] NSWCA 142 at [49] (per Hodgson JA, Bryson JA and Brownie AJA agreeing).

28 No challenge was made to these expressions of principle.

29 The Act, s 22 sets out the task of the adjudicator as follows:

> *(1) An adjudicator is to determine:*
>
> *(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and*
>
> *(b) the date on which any such amount became or becomes payable, and*
>
> *(c) the rate of interest payable on any such amount.*
>
> *(2) In determining an adjudication application, the adjudicator is to consider the following matters only:*
>
> *(a) the provisions of this Act,*
>
> *(b) the provisions of the construction contract from which the application arose,*

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, 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.

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

(b) an error arising from an accidental slip or omission, or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

30 The Act, s 17 refers to adjudication applications. The appellant emphasised s 17(1) in support of an argument that the adjudicator was not entitled to consider events or facts after the date of the adjudication application, such as facts of the character of the Superintendent's failure to issue a progress certificate and operation of cl 37(2) of the contract. Section 17(1) is in the following terms:

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

31 In my view, the above arguments of the appellant are without substance. The adjudicator, in a meticulous determination, dealt with all relevant arguments. He adjudicated upon the payment claim put forward by s 17(1). He dealt with every submission put to him by the parties. He came to the view that he was not required to examine the payment schedule line by line in answer (as would have been required under s 9(b)) because of his (erroneous on this hypothesis) view of the operation of cl 37(2) and s 9(a).

32 There may have been a legal error but that did not mean that the adjudicator did not fulfil his statutory task in s 22. This is especially so when it is recognised that a legal submission reflected by the cases at [26] above was not put to him. Thus his error was brought about by the way the parties conducted the matter before him. There may be occasions where a tribunal despite dealing with a matter on the basis of the approach taken by the parties can still be seen to have failed to attend to its required task: see, eg, *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186. Here, the adjudicator attended to the task of dealing with the adjudication claim by dealing with the matters required by s 22(2).

33 The second argument put on appeal was to the effect that the adjudicator had failed to afford procedural fairness to the appellant in not dealing with the payment schedule line by line. It was submitted that a failure to deal with submissions put to the adjudicator was a breach of the rules of procedural fairness.

34 The appellant accepted during the course of argument that the operation of this submission was dependent, in substance, upon the success of the first argument. Given that the first argument fails this leads to the failure of this submission. Nevertheless, it is appropriate to make some further comments. There was no failure to afford procedural fairness. The adjudicator attended to all the submissions put by both parties. He came to the view that he did not need to deal with aspects of the submissions of the appellant because of the view (erroneous as I have said) of the operation of cl 37(2) of the contract pursuant to s 9(a). This was not ignoring the submissions of the appellant; it was dealing with them, appropriately on the hypothesis that he worked upon, and from which he was not dissuaded by the submissions of the parties.

35 Reference was made to the case of *Firedam Civil Engineering v KJP Constructions* [2007] NSWSC 1162. In that case, Austin J concluded that an adjudicator had denied a party procedural fairness by not dealing with its payment schedule on the basis that the payment schedule was served late. The case can be distinguished on the simple basis that here the adjudicator did not disregard the submissions of the appellant. Rather, though he had regard to them, he did not, on the way he approached the matter, have to deal with them in full.

36 Reference was also made to the decision of White J in *Reiby Street Apartments v Winterton Constructions* [2006] NSWSC 375 where White J also concluded that there had a breach of procedural fairness in disregarding matters put to him in the payment schedule and adjudication response because of mistaken views

as to the facts and law. Once again the case can be distinguished on the basis that here the adjudicator did not ignore the submissions.

37 For my part, I would wish to reserve the question as to the correctness of the reasoning (though not necessarily the result) in both *Firedam* and *Reiby Street*. If an adjudicator in attending to the task in s 22 comes to the view (mistakenly by reference to the facts or law) that one aspect of the payment schedule does not arise for consideration, it is at best a problematic proposition that the failure to deal with such submissions or such aspects of the payment schedule is a denial of procedural fairness. The appropriate question is to ascertain whether the statutory task laid down for the adjudicator has been complied with. That is not, of course, to say that procedural fairness should not be afforded to the parties in the adjudication.

38 The third basis of the attack on the primary judge's dismissal of the summons was that there had been payment of the Merrmac claim by the appellant and thus reliance by the respondent upon the District Court judgment was unsustainable in law.

39 This claim was also ventilated before the adjudicator. However, it had an independent life in the summons by way of a claim to restrain the respondent from seeking to enforce the judgment in the District Court or alternatively a claim that the respondent repay the sum plus interest.

40 The primary judge expressed the view that the preconditions for restitutionary repayment by the respondent to the appellant had not been fulfilled. He said that the payment had not been requested by the respondent and had not been acknowledged or adopted by the respondent.

41 On the appeal no attack was made on this reasoning. Rather, the terms of cl 38 of the contract were relied upon in support of the proposition that there was an implied request by the respondent to the appellant to pay Merrmac the sum.

42 Clause 38 of the contract was, relevantly, in the following terms:

> ***38.1 Workers and subcontractors***
>
> *The Contractor shall give in respect of a progress claim, documentary evidence of the payment of moneys due and payable to:*
>
> *(a) workers of the Contractor and of the subcontractors; and*
>
> *(b) subcontractors,*
>
> *in respect of WUC the subject of that claim.*
>
> *Without limiting the foregoing, each progress claim must be accompanied by:*
>
> *(a) a signed acknowledgment from each of the selected subcontractors and any other subcontractor that all payments due to it in relation to WUC up to the date of the Contractor's previous progress claim have been paid in full;*
>
> *(b) written evidence that all moneys due to the workers of the Contractor up to the date of the Contractor's previous progress claim have been paid in full; and*

(c) a declaration, signed by a Director of the Contractor, that all monies payable by it to its workers and subcontractors (including subcontractors) up to the date of its previous progress claim have been paid in full.

38.2 Withholding payment

Subject to the next paragraph, the Principal may withhold moneys certified due and payable in respect of the progress claim until the Contractor complies with subclause 38.1.

The Principal shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to subclause 38.1 as due and payable to workers and subcontractors.

43 It was submitted that the evidence contemplated by cl 38 was not provided by the respondent to the appellant when it made its payment claim on the appellant. This much was common ground. There was no investigation of why this was so before the adjudicator, before the primary judge or on the appeal. It was submitted that where the respondent made a claim for moneys due to Merrmac, without providing such evidence, the respondent was impliedly requesting the appellant to pay Merrmac and that when the respondent subsequently declined to satisfy the liability of Merrmac it thereby impliedly adopted the appellant's payment to Merrmac as its own.

44 I reject these submissions. No such implication of a request arises out of the terms of the contract. If the relevant evidence was not provided, that was a basis upon which the appellant could withhold moneys. How cll 37 and 38 of the contract interrelated was not the subject of any discussion before the adjudicator, or before the primary judge, or on appeal. Nor was this point raised before the adjudicator or the primary judge.

45 In my view, there was no such implication to be drawn from the contract.

46 This was the only basis upon which it was argued on appeal that the primary judge was wrong in his conclusion that there should be no order for repayment or no order restraining the enforcement of the judgment.

47 In the above circumstances, the appeal should be dismissed with costs.

48 The above conclusion may be seen to lead to an unusual or arbitrary result that the respondent has a judgment for a sum of money referable to a debt to Merrmac that has been paid. The Act, however, in its own terms gives a mechanism for the appellant to vindicate any assertion that the respondent had been overpaid. The Act, s 32 provides as follows:

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

> *(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and*
>
> *(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.*

49 If, in all the circumstances, the respondent, by the adjudication process, has been provided with a windfall which, in law, should not be retained, the appropriate vehicle for the vindication of the appellant's rights in that regard is the kind of proceeding contemplated by s 32(3). The appellant chose to attack the validity of the adjudication. For the reasons given by the primary judge and for the above reasons, that adjudication was not invalid and led to rights recognised by the Act. The remedy for any injustice to the appellant also lay in the Act, in s 32.

50 The appeal should be dismissed with costs.

51 **GILES JA:** I agree with Allsop P.

52 **HODGSON JA**: I agree with the order proposed by Allsop P and with his reasons. I would add the following additional comments.

53 I adhere to the view I expressed in *Transgrid v Siemens Limited* [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35] and *John Holland Pty Limited v Road and Traffic Authority of New South Wales* [2007] NSWCA 19 at [38], to the effect that "calculated in accordance with the terms of the contract" in s 9(a) of the *Building and Construction Industry Security of Payment Act* 1999 (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referrable to the work performed.

54 This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.

55 Accordingly, in my opinion, the adjudicator did make an error of law.

56 However, as explained by Allsop P, he nevertheless addressed the task given to him under s 22 of the Act, and considered all of the submissions of the parties, but reached the view that some of them were not relevant. Accordingly, his adjudication was not vitiated.

57 I too would reserve for further consideration the correctness of all of the reasoning in *Firedam Civil Engineering Pty Limited v KJP Constructions Pty Limited* [2007] NSWSC 1162 and *Reiby Street Apartments Pty Limited v Winterton Constructions Pty Limited* [2006] NSWSC 375, although I do not think there is any substantial reason to doubt the result in each of those cases.

58 In each of those cases, natural justice was denied because submissions duly made were wholly disregarded, rather than, as in this case, being addressed and considered irrelevant. 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 in s 22(2): see *The Minister for Commerce v Contract Plumbing NSW Pty Limited* [2005]

NSWCA 142 at [33]-[37]; *John Holland* at [45]-[50]; *Halkat Electrical Contractors Pty Limited v Holmwood Holdings Pty Limited* [2007] NSWCA 32 at [26]-[27].

59 The result of this case may seem unsatisfactory, because it leaves the respondent with the benefit of a determination (and consequent judgment) arrived at through an error of law, and which includes about $500,000 claimed on the basis of the respondent's liability to Merrmac which has been satisfied by the appellant. As pointed out by Allsop P, any remedy for the appellant would have to be sought in proceedings brought pursuant to s 32 of the Act. If such proceedings are brought, and if in an interlocutory application it can be shown that a judgment has been obtained under the Act which is unmeritorious (and particularly if it can also been shown that payment made of the judgment is likely to be irrecoverable), the judgment debtor may be able to obtain a stay of the judgment or an injunction against enforcement of it: see *Brodyn Pty Limited v Davenport* [2004] NSWCA 394, 61 NSWLR 421 at [85]-[88].

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