

SUPREME COURT OF VICTORIA  
COURT OF APPEAL

S EAPCI 2020 0075

1155 NEPEAN HIGHWAY PTY LTD  
(ACN 630 087 428)

Applicant

v

PROMAX BUILDINGS PTY LTD  
(ACN 630 303 801) (and others  
according to the attached schedule)

Respondents

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JUDGES: BEACH, KYROU and McLEISH JJA  
WHERE HELD: MELBOURNE  
DATE OF HEARING: 18 September 2020  
DATE OF JUDGMENT: 25 September 2020  
MEDIUM NEUTRAL CITATION: [2020] VSCA 253  
JUDGMENT APPEALED FROM: [2020] VSC 398 (Digby J)

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ADMINISTRATIVE LAW – Judicial review – Adjudicator’s determination under *Building and Construction Industry Security of Payment Act 2002* – Applicant failed to provide payment schedule in response to builder’s payment claim and barred from providing adjudication response – Whether adjudicator impermissibly drew adverse inference that applicant incapable of credibly challenging payment claim – Permissible to draw adverse inference from failure to provide payment schedule but not absence of adjudication response – Any inference drawn permissible – Whether adjudicator overlooked relevant evidence – Evidence not before adjudicator and irrelevant to review of determination – Whether adjudicator failed to conduct independent assessment of claim – Adjudicator’s reasons brief and reliant on builder’s trade summary – Brevity not indicative of failure to independently assess – Reliance on trade summary appropriate given contractual significance – Whether adjudicator impermissibly failed to consider contractually incorporated plans – Adjudicator required to consider provisions of contract but not incorporated documents – *Building and Construction Industry Security of Payment Act 2002* ss 11, 14, 15(4), 18, 21(2A), 22, 23.

WORDS AND PHRASES – ‘provisions of the construction contract’, ‘from which the application arose’.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr MA Robins QC with Mr A Rollnik	Arnold Bloch Leibler
For the First Respondent	Mr JAF Twigg QC with Mr AR Morrison	Corrs Chambers Westgarth

BEACH JA  
KYROU JA  
McLEISH JA:

1 This case concerns an adjudicator's determination made under s 23 of the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). The issues in dispute between the parties have been narrowed to a point where it is possible to state the background facts quite briefly.

2 The applicant is the owner of the land at 1155–1157 Nepean Highway, Highett. By contract dated 2 January 2019 it engaged the first respondent to construct a residential development on that land. The works were described in the contract as the construction of 26 apartments over four levels plus a single-level basement car park, for a lump sum contract price of \$8,595,000. It is convenient to refer to the first respondent as 'the builder'.

3 On 15 July 2019, the builder issued a payment claim pursuant to s 14 of the Act for the sum of \$2,017,382.15. The applicant did not provide a payment schedule in response to the payment claim as it was permitted to do under s 15(4) of the Act. This entitled the builder to seek an adjudication of the payment claim under s 18 of the Act, subject to compliance with s 18(2). Pursuant to that provision, the builder notified the applicant of its intention to apply for adjudication and gave the applicant a further two business days in which to provide a payment schedule.

4 The applicant did not provide a payment schedule in response to this notice. The builder duly applied to an authorised nominating authority under the Act for the appointment of an adjudicator. The second respondent was appointed as adjudicator as a result.

5 By virtue of s 21(2A) of the Act, the fact that the applicant had not provided a payment schedule in the time specified in either s 15(4) or s 18(2)(b) of the Act meant that it was not able to lodge an adjudication response with the adjudicator in response to the builder's adjudication application. The relevant provisions are set

out later in these reasons.

6 On 30 September 2019, the adjudicator delivered his adjudication determination, by which he awarded the builder the full amount it sought in its payment claim plus the adjudicator's fees, and determined that interest was payable at a rate of 10 per cent per annum on the adjudicated amount.

7 By an amended originating motion dated 1 October 2019, the applicant sought, relevantly for present purposes, to have the adjudication determination quashed in connection with certain items of work, being those with reference numbers 18.1 to 18.9, and for associated injunctive and declaratory relief. The matter was heard in the Trial Division on 14 and 18 October 2019 and the proceeding was ultimately dismissed on 7 July 2020.<sup>1</sup>

8 By its application for leave to appeal, the applicant seeks to raise three proposed grounds upon which it is said that the trial judge's decision should be set aside. It will be convenient to refer to the decision of the judge and the arguments of the parties in relation to each of those matters in turn. First, it is necessary to set out relevant provisions of the Act.

### *Statutory provisions*

9 Section 3 of the Act explains that the object of the Act is 'to ensure that any person who undertakes to carry out construction work ... under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work'. Section 3(2) goes on to say that the means by which the Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with the Act. This involves the making of a payment claim by the person claiming payment, the provision of a payment schedule by the person by whom the payment is payable, the referral of any disputed claim to an adjudicator for determination, the payment of the amount

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<sup>1</sup> 1155 Nepean Highway Pty Ltd v Promax Buildings Pty Ltd [2020] VSC 398 ('Reasons').

of the progress payment determined by the adjudicator and the recovery of the progress payment in the event of failure to pay. The Act does not limit any other entitlement that a claimant may have under a construction contract.

10 Section 14 provides for the making of payment claims. Section 15(1) provides that a person upon whom a payment claim is served may reply to the claim by providing a payment schedule to the claimant, conforming with the requirements of the section. Section 15(4) provides for the consequences of not providing a payment schedule, in the following terms:

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.

11 Section 16 provides for the consequences where the recipient of a payment claim does not provide a payment schedule and also fails to pay the claimed amount. Section 16(2) contemplates the making of an adjudication application. It is in the following terms:

In those circumstances, the claimant—

- (a) may—
  - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
  - (ii) make an adjudication application under s 18(1)(b) in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention—
  - (i) to suspend carrying out construction work under the

construction contract; or

- (ii) to suspend supplying related goods and services under the construction contract.

12 As mentioned earlier, s 18 concerns the making of adjudication applications, and s 18(2) provides conditions to be satisfied before such an application may be made. Section 18(2) is in the following terms:

An adjudication application to which subsection (1)(b) applies cannot be made unless—

- (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

13 Section 18(3) provides for the content of an adjudication application. Among other things, the application must identify the payment claim to which it relates and may contain any submissions relevant to the application that the claimant chooses to include. Section 21 provides for adjudication responses on the part of a respondent to a payment claim. However, as previously noted, s 21(2A) provides that a respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the times specified in s 15(4) and 18(2)(b).

14 Section 22 sets out the procedures for adjudication. Section 22(5) specifies certain powers of an adjudicator, in the following terms:

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.

15 Section 23 concerns the content of a determination. Relevantly for present purposes, it provides:

- (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 that amount became or becomes payable; and
  - (c) the rate of interest payable on that amount in accordance with s 12(2).
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only –
  - (a) the provisions of this Act and any regulations made under this Act;
  - (b) subject to this Act, 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.

...

- (2B) An adjudicator's determination is void –
  - (a) to the extent that it has been made in contravention of subsection (2);

...

- (3) The adjudicator's determination must be in writing and must include –
  - (a) the reasons for the determination; and
  - (b) the basis on which any amount or date has been decided.

...

16 Section 11 determines the approach to be taken in relation to the value of construction work carried out under the contract. Sub-section (1) provides for two alternative methods of valuation, as follows:

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.

***Payment claim and adjudication determination***

17 The payment claim consisted of a trade summary, statutory declaration and invoices. The trade summary set out 41 aspects of the contract works with a budget figure for each, together with a percentage figure representing the extent to which it was claimed that those items had been completed. The trade summary also contained a list of consultant fees, external works and variations. The total amount of the payment claim was \$1,833,983.75, which, together with GST, comprised an overall claim of \$2,017,382.15.

18 In its adjudication application submissions, the builder provided material including the payment claim, the contract, various photographs and invoices, and a collection of legal authorities. The submission outlined the history of the matter and made a series of submissions as to the terms of the contract and compliance with various provisions of the Act. In section 17 of the submissions, the builder addressed the question of valuation under s 11 of the Act. It was submitted that sub-clause N5.2 of the contract provided a method of assessment of value in accordance with

s 11(1)(a) of the Act. In short, it was said that this provision required the adjudicator to identify in relation to each of the trades the subject of a payment claim the cost to complete the remaining necessary work, if any, and to subtract that cost from the relevant total cost for each of the trades, so as to arrive at the figure to which the builder was entitled to payment. The submission went on to say that, if it was determined that sub-clause N5.2 did not satisfy s 11(1)(a) of the Act as a method for valuing the work, then the same approach was nonetheless consistent with the provisions of s 11(1)(b) of the Act and would result in a calculation of the correct value of the works completed. The submission stated that the adjudicator was in any event still required to undertake a valuation exercise in accordance with s 11(1) of the Act and 'is not entitled to merely adopt those values without satisfying itself as to their appropriateness'.

19 The submission went on in section 18 to identify nine aspects of the work which it was claimed had been commenced or completed. These consisted of preliminaries, bored piers, capping beam, shotcrete, excavation, basement footing, civil, electrical services and retaining wall and siteworks. Sections 19 to 21 of the submissions went on to deal with various consultants' fees and other expenses, which are not the subject of the present dispute.

20 In the case of each of the matters under section 18, the builder noted, among other submissions, that the applicant had not disputed the claim, and submitted that the builder's costing should be accepted in accordance with its submissions in relation to s 11 of the Act. Earlier in the submissions, the builder had pointed to the provisions of the Act which prevented the applicant from lodging an adjudication response in relation to the payment claim.

21 In the adjudication determination, the adjudicator set out the history of the matter and relevant provisions of the Act before identifying the matters to which regard had been had in making the determination. Those matters relevantly included the payment claim, the submissions and the contract. The adjudicator

identified two issues in the application for adjudication. The first, whether the application itself was valid, is not a matter that remains in dispute. The second matter was the proper assessment of the items claimed and the payment claimed.

22 In that context, the adjudicator set out relevant provisions of the Act and various judicial decisions, in terms to which no objection has been taken. He then went on to determine the amount payable in respect of the nine items claimed. In each case, the adjudicator set out a summary of the submissions made by the builder, followed by his conclusions in respect of the claimed item. In the five cases where the work was claimed to be completed, the adjudicator referred to photos which, in his opinion, confirmed that the item had been completed. In the four instances where the relevant work was only claimed to be partially complete, the adjudicator referred to the basis of calculation and stated that the amount calculated 'looks reasonable'. In three of these cases, he also referred to photos as confirming that the work had been completed to the extent claimed. In each case, the adjudicator pointed out that there was no material from the applicant to dispute the calculation. For ease of later reference, it is convenient to set out the adjudicator's conclusions in respect of each of the claimed items:

Preliminaries

Ref: 18.1

1. The claimant claims 69% of the Trade Summary amount for preliminaries out of a total preliminaries budget of \$533,836.35 (excl GST). It bases the calculation on the remaining amount required to cover the balance of the site manager's wage, toilet hire, site office and crane erection, dismantle and hire. In my view, this method of calculation and the amount calculated looks reasonable.
2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$407,000.00 (incl GST).

Bored Piers

Ref: 18.2

1. The claimant claims 100% of the Trade Summary amount for bored piers out of a total bored piers budget of \$493,000.00 (excl GST).

2. It bases this claim on the 6 photos attached to the Application for Adjudication. In my view, the photos confirm that the bored piers item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$542,300.00 (incl GST).

#### Capping Beam

##### Ref: 18.3

1. The claimant claims 100% of the Trade Summary amount for capping beam out of a total capping beam budget of \$151,000.00 (excl GST).
2. It bases this claim on the 11 photos attached to the Application for Adjudication. In my view, the photos confirm that the capping beam item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$166,100.00 (incl GST).

#### Shotcrete

##### Ref: 18.4

1. The claimant claims 56% of the Trade Summary amount for shotcrete out of a total shotcrete budget of \$281,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of shotcrete works as per the contract documentation and plans, calculated on the basis of the capping beam having been sprayed in full, supported by the 16 photos attached to the Application for Adjudication. In my view, the method of calculation and the amount calculated looks reasonable.
2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$171,600.00 (incl GST).

#### Excavation

##### Ref: 18.5

1. The claimant claims 100% of the Trade Summary amount for excavation out of a total excavation budget of \$304,000.00 (excl GST).
2. It bases this claim on the 11 photos attached to the Application for Adjudication. In my view, the photos confirm that the excavation item is 100% complete.

3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$334,400.00 (incl GST).

#### Basement Footing

##### Ref: 18.6

1. The claimant claims 100% of the Trade Summary amount for basement footing out of a total basement footing budget of \$61,000.00 (excl GST).
2. It bases this claim on the 2 photos attached to the Application for Adjudication. In my view, the photos confirm that the basement footing item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$67,100.00 (incl GST).

#### Civil

##### Ref: 18.7

1. The claimant claims 44% of the Trade Summary amount for civil works out of a total civil works budget of \$50,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of civil works, claiming that, to date, all aggies have been installed in the bored piers and retaining walls and the civil component of the stormwater detention tank has been completed. The claimant says that the Trade breakdown item #9 'Basement Ritek' will be used to finish the detention tank as per the contract documentation and plans, calculated on the basis of the capping beam having been sprayed in full, supported by the photos attached to the Application for Adjudication. In my view, the method of calculation and the amount calculated looks reasonable.
2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$55,000.00 (incl GST).

#### Electrical Services

##### Ref: 18.8

1. The claimant claims 12% of the Trade Summary amount for electrical services out of a total electrical services budget of \$50,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of electrical services, based on the cost to complete the remaining electrical services, comprising delivery, hire and

installation of all temporary power poles including running of cables and set up of site office and lunch room power. In my view, the method of calculation and the amount calculated looks reasonable.

2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$55,000.00 (incl GST).

#### Retaining Wall & Siteworks

##### Ref: 18.9

1. The claimant claims 100% of the Trade Summary amount for Retaining Wall & Siteworks out of a total Retaining Wall & Siteworks budget of \$66,000.00 (excl GST).
2. It bases this claim on the 3 photos attached to the Application for Adjudication. In my view, the photos confirm that the Retaining Wall & Siteworks item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$72,600.00 (incl GST).

23 The applicant raises three proposed grounds of appeal and it is convenient to deal with them in turn.

#### ***Proposed ground 1 – ‘construction error’***

24 The first ground alleges what is referred to as the ‘construction error’. It is said that the trial judge erred in holding that the adjudicator was entitled to infer from the applicant’s failure to adduce contradictory material in the adjudication, that no credible challenge could be made to the value of the claims made by the builder in its adjudication application. The applicant refers to statements in the determination in which the adjudicator said that there was ‘no material from the [applicant] to dispute’ the claim. It is submitted that the adjudicator adopted a ‘formulaic approach’ to the valuations, without the real analysis required by the Act. It is submitted that this constituted a clear jurisdictional error.

25 The applicant submits that the trial judge approved the approach of the adjudicator in drawing adverse inferences, despite the statutory prohibition against

the applicant serving any contradictory material as a result of its earlier failure to serve a payment schedule. The applicant relies on the following paragraph in the trial judge's reasons:

The Adjudicator also appropriately refers to the fact that there is no contradictory material or submission from the respondent in relation to each claim. In this regard I consider that the Adjudicator was entitled to draw an inference from the absence of any contradictory relevant documentation or material from the respondent, that no credible challenge was able to be made to the value of the claims made by Promax. I also consider that the fact that the plaintiff has not provided a payment schedule under either ss 15(4) or 18(2)(b) of [the Act] and is therefore, by force of s 21(2A) of the Act, not entitled to provide an adjudication response, is no impediment to the Adjudicator proceeding in this way as the determiner of fact.<sup>2</sup>

26 The trial judge cited observations made by Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*<sup>3</sup> in which it was said, among other things, that an adjudicator must proceed to make critical findings by drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent to a payment claim, 'including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant'.<sup>4</sup>

27 The trial judge went on to refer to the judgment of Gleeson JA (with Bathurst CJ and Payne JA agreeing) in *Iskra v MMIR Pty Ltd*,<sup>5</sup> adopting what was said by Hodgson JA in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*,<sup>6</sup> in the following terms:

The adjudicator may very readily find in favour of a claimant on the merits of a claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.

Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the

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2 Reasons [203] (citations omitted).

3 [2015] VSC 631 ('*SSC Plenty Road*').

4 Ibid [101].

5 [2019] NSWCA 126 [41] ('*Iskra*').

6 (2005) 63 NSWLR 385.

relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.<sup>7</sup>

28 The judge did not accept the submission that the adjudicator merely adopted the builder's trade breakdown and the amount claimed by it. He noted that the adjudicator explained how he arrived at the adjudication determination, expressing his opinion that the amounts calculated looked reasonable. In addition, the adjudicator had relied upon photographs with which he was provided to evaluate the nature, scope and extent of the work completed and other documentation including quotations in relation to the works.<sup>8</sup> The judge went on to give examples in relation to the matters claimed under the items in section 18 of the adjudication determination.<sup>9</sup>

29 The authorities relied on by the adjudicator and by the trial judge do not concern the situation which the present case involves, where a respondent to an adjudication application is prevented by the statute from lodging an adjudication response. It is convenient to consider that issue from first principles, having regard to the Act.

30 The inference which it is contended that the adjudicator drew in the present case has a close analogy with the 'rule' in *Jones v Dunkel*, by which a party's failure to call a witness may justify the inference that nothing the witness could have said would have assisted that party's case.<sup>10</sup> That inference depends on the notion that the witness in question was one whom the party in question would have been expected to call, if their evidence would have been of assistance. That reasoning is predicated on the assumption that the party had the ability to call witnesses in the first place. The inference has no foundation in a situation in which, for whatever reason, the party was not at liberty to call a witness.

31 This emerges plainly from the description of the operation of the so-called 'rule'

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7 Ibid 399-400 [52]-[53]; Reasons [205].

8 Reasons [206].

9 Ibid [208]-[210].

10 (1959) 101 CLR 298.

by Newton and Norris JJ in *O'Donnell v Reichard*:<sup>11</sup>

In our opinion, if the learned judge had thought that the jury might have any doubts about the availability of the three doctors to give evidence, then he ought to have directed them that it was open to them to *infer from the absence of any evidence to the contrary that the three doctors were available to be called as witnesses for the plaintiff*. But his Honour should then at the very least have ... told the jury that *if they drew the inference just mentioned*, then, while they must not treat as evidence what they might guess the doctors would have said about the plaintiff's condition if called as witnesses, it was nevertheless open to them to infer that the doctors' evidence would not have helped the plaintiff's case, and that it was further open to them, if they drew that inference, to take the inference into account against the plaintiff when they came to decide whether to accept any particular evidence, or whether to draw any particular inferences which were open on the evidence, in either case in relation to matters upon which the three doctors, or any of them, could reasonably have been supposed to be able to give evidence.<sup>12</sup>

32 Here, because the applicant had not provided a payment schedule, and also because the adjudicator had not sought further submissions or material from the applicant pursuant to s 22(5), the applicant's silence in the adjudication could not be taken as indicating anything at all about the strength of its case. If the adjudicator had drawn an inference based on the absence of an adjudication response, this reasoning would at least have been illogical and would have raised the question whether it disclosed jurisdictional error on the part of the adjudicator.

33 However, an inference drawn, not from the absence of an adjudication response but from the applicant's failure to provide a payment schedule, is in a different position. In our view, it would have been open to the adjudicator to draw an inference from the applicant's failure to provide a payment schedule, to the effect that it was not able to dispute the payment claim. Section 23(2) makes it plain that an adjudicator is to consider certain specific matters, including the content of 'the payment schedule (if any)'. Inevitably, that means that the adjudicator must also consider the fact that no payment schedule was provided. A recipient of a payment claim may be taken to know of the critical significance of a payment schedule to the operation of the Act in general and to the making of an adjudication determination

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<sup>11</sup> [1975] VR 916.

<sup>12</sup> *Ibid* 937 (emphasis added).

in particular. It is significant in that regard that an adjudication cannot proceed until the recipient of the payment claim has had a further opportunity to provide a payment schedule.<sup>13</sup> As a matter of common sense, a recipient of a payment claim who does not respond to it might rationally be thought to have no basis upon which to contest it.

34 That is so, notwithstanding that the operation of the Act means that the recipient of the payment claim is precluded from proffering an explanation to the adjudicator as to why no payment schedule was provided.<sup>14</sup> It is plain that the Act calls upon the adjudicator to evaluate a payment claim by reference to identified material and envisages that he or she might do so without giving the recipient of the claim a third opportunity to argue their case. It is therefore permissible for an adjudicator to infer, based on the failure of a recipient of a payment claim to provide a payment schedule, that the recipient was not in a position to contest the claim.

35 It is then necessary to consider whether the adjudicator drew the inference identified by the applicant and, if so, upon which of the two bases discussed above.

36 It must first be noted that the adjudicator does not state that he has drawn any such inference. It is true that the adjudicator sets out the passage from the judgment of Vickery J in *SSC Plenty Road*, to which reference was also made by the trial judge, approving the drawing of inferences from an absence of controverting material, but he also set out the obligation upon him of addressing the claim on its merits based on all the material before him (underlining passages to the latter effect and not the former). The fact that the adjudicator quoted case law about the drawing of such inferences, in the course of a quite extensive discussion of the legal requirements of an adjudication under the Act is, without more, a slender basis upon which to conclude that this was what the adjudicator subsequently did.

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<sup>13</sup> The Act s 18(2)(b); see [12] above.

<sup>14</sup> It has not been suggested that the adjudicator ought to have exercised his power to require the filing of material or submissions, assuming that this step would have been open to him notwithstanding the application of s 21(2A).

37 The only support for the conclusion that the adjudicator drew the inference lies in his repetition of the observation that there was 'no material from the [applicant] to dispute' the claim. On one view, rather than drawing the suggested inference, the adjudicator merely observed the position in which the material before him lay, as a result of the application of the Act. But even if more was intended, in each instance, this observation follows a summary of the builder's claim, in which the builder notes that the applicant had not disputed the claim. That is a reference, inevitably, to the applicant's failure to provide a payment schedule. At its highest, then, the adjudicator can be seen to draw an inference from that failure. In our view, it cannot be concluded that the adjudicator based any such inference on the applicant not having filed an adjudication response.

38 For these reasons, the first proposed ground of appeal is not made out.

*Proposed ground 2 – 'evidence error'*

39 The second proposed ground of appeal concerns what is described as the 'evidence error'. It is asserted that the trial judge erred in law by failing to consider, or by overlooking, relevant evidence that was important or critical to the finding that the inference attributed to the adjudicator could be drawn.

40 The evidence upon which the applicant relies consists of statements in two affidavits filed on behalf of the applicant in the proceeding before the trial judge. Those affidavits were said to explain why no payment schedule had been provided, meaning that the inference should not have been drawn. However, the material in question was not before the adjudicator. The question on judicial review was not whether the judge should draw the inference, but whether the adjudicator had done so, and if so, whether this constituted jurisdictional error. It is irrelevant for that purpose to have regard to material not before the adjudicator which, had it been presented to him, might have been said to bear on the question.

41 For the reasons canvassed in relation to the first proposed ground of appeal, the

Act contemplates that an adjudication may proceed without hearing from the recipient of a payment claim who has not provided a payment schedule, and the adjudicator may draw an inference from such failure. Even if it is later established that, had the recipient been asked about the failure, a satisfactory explanation would have been forthcoming, the Act does not require the adjudicator to ask that question or to refrain from taking account of the absence of any payment schedule. The applicant's reliance on the affidavit evidence is therefore misconceived.

42 For these reasons, there is no substance in the second proposed ground.

***Proposed ground 3 – 'valuation error'***

43 Thirdly, the applicant alleges what is referred to in its written case as the 'valuation error'. This proposed ground concerns the operation of s 11 of the Act. The applicant submits that the adjudicator failed to carry out his statutory function and value the work pursuant to ss 11 and 23 of the Act. In particular, it is said that the adjudicator did not consider the contract drawings as required under s 23(2)(b) of the Act. It is further submitted that the adjudicator uncritically adopted the builder's claim in respect of every aspect of the claim without complying with ss 11 and 23. The applicant also submits that the adjudicator failed to say whether he conducted his valuation under sub-s (a) or (b) of s 11(1). The applicant states in its written case that it is 'difficult to see how the Act is applied when it is not mentioned by the Adjudicator in the valuation process and there is no clear path of reasoning'. However, no independent ground relying on inadequate reasons is advanced in the application for leave to appeal.

44 The applicant submits that the trade summary was merely an assertion on the part of the builder and that it was incumbent on the adjudicator to conduct his own valuation rather than accepting that assertion at face value. The applicant submits that the adjudicator simply adopted the submissions of the builder 'with 100 per cent uncritical precision with no genuine independent assessment under the Act'. It is said to be instructive that the adjudication determination does not address the fact

that the adjudicator did not have the contract drawings and that the 'plans' referred to by the builder in its submission were not identified. The applicant submits that it was impossible in the absence of those drawings to assess the photographs as the adjudicator did, while complying with s 23(2)(b). Mr Robins QC, for the applicant, also invited the Court to compare the comparatively short reasons in section 18 of the adjudication determination with the more elaborate reasons given in respect of variations the subject of section 19, even though the variations involved much lesser amounts. He submitted that a higher standard of reasoning was to be expected for claims involving larger amounts.

45 Reference has already been made to the parts of the reasons of the trial judge in which he identified the matters considered by the adjudicator in addressing the claims in section 18 of his determination. The judge did not decide whether the trade summary constituted a contractual document, both because the adjudicator did not make that finding and the builder did not argue that it formed part of the contract. The point did not arise, because the judge was satisfied that the adjudicator was entitled under s 23(2)(b) and (c) of the Act, and the terms of the contract, to have regard to and utilise the trade summary in evaluating the builder's progress payment entitlement.<sup>15</sup>

46 The contractual provisions referred to are cl N3.4 and sch 1, item 33(4). Clause N3.4 requires a progress claim to be supported by information shown in item 33 of sch 1. Item 33 of sch 1 requires the information to be included in a progress claim to consist of the amount claimed to date, and the amount for 'costs to complete', a statutory declaration for payments to contractors and 'trade breakdown'.

47 The judge treated the trade summary as relevant to an assessment of value under s 11(1)(b) of the Act. He held that it was clear on the terms of the contract that the parties agreed that the trade summary would be one of the prime materials required to support a payment claim and that the document would be utilised to value

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<sup>15</sup> Reasons [213].

payment entitlements under the contract.<sup>16</sup> The judge concluded:

In my view the Adjudicator was obliged by s 23(2)(c) of [the Act] to take into account, and was entitled to rely upon, the materials placed before him in the Adjudication, which included the Promax 'trade breakdown', the site photographs, quotations and other substantiating materials provided by Promax in support of its submission in relation to the value of its payment entitlement in the Adjudication.<sup>17</sup>

48 In our opinion, the judge was correct to treat the trade summary document in this manner. It was a document which the parties plainly regarded as essential to the making of a payment claim. Inevitably, therefore, it had a role to play in determining the amount of the claim to be paid. It was well open in the circumstances for the adjudicator to treat the trade summary as a significant element in the valuation process contemplated by the Act. It is irrelevant that the adjudicator did not explain whether he relied on s 11(1)(a) or (b) for that purpose.<sup>18</sup> It was not contended by the builder in its submissions to the adjudicator that any different approach was required as between the two paragraphs. On any view, as the judge held, the contract contemplated that payment claims would be evaluated having regard to the trade summary. The argument that it constituted mere assertion therefore misses the point. The summary was agreed as the relevant starting point to be utilised for the purpose of assessing a claim.

49 The fact that the adjudicator relied upon the trade summary does not bespeak a failure to conduct an independent assessment of the claim. It remained necessary for the adjudicator to form an opinion as to whether the work had been completed to the extent claimed. This he did, based on the material that was before him. That material included a statutory declaration on the part of the builder's chief operating officer to the effect that the basement excavation, foundation and retention system works were complete. It also included the fact that there was no payment schedule,

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<sup>16</sup> Ibid [221].

<sup>17</sup> Ibid [223].

<sup>18</sup> It is also not necessary to decide the correctness of a submission by Mr Twigg QC, for the builder, to the effect that a proper construction of s 10 of the Act revealed that s 11(1) need not be applied at all in this case.

and the inference discussed earlier in these reasons which could be drawn from that circumstance.

50 While his conclusions are expressed in brief terms, it is apparent that the adjudicator considered the substance of each aspect of the claim. In that regard, it is to be borne in mind that s 22(4) requires an adjudicator to determine an adjudication application as expeditiously as possible, and the process has been described as being intended to operate in a 'rough and ready' manner.<sup>19</sup> As Mr Twigg QC, for the builder, pointed out, the adjudicator is not required to have legal training and the reasoning to be expected in an adjudication determination ought not be analysed too finely.<sup>20</sup> Nor is the adjudicator's task that of an expert valuer.<sup>21</sup>

51 The adjudicator was required to weigh the material before him and reach a determination based on that material alone. Within that context, he could draw and act on the inference discussed earlier in these reasons, arising from the applicant not having provided a payment schedule. The weight to be given to that inference, if one was made, was a matter for the adjudicator. Giving it greater weight might be one explanation for the comparatively brief nature of the reasons in this part of the determination. Equally, the question for determination, once it is accepted that the trade summary was an appropriate starting point, largely resolved to an evaluation of the extent to which works were completed. Brevity in explaining that assessment does not necessarily equate to a failure to conduct the assessment. In our view, the contrary has not been shown.

***Proposed ground 3 – s 23(3)(2b) of the Act***

52 There remains the question of the absence of reference by the adjudicator to the

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<sup>19</sup> *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 437 [208] (McDougall J); *Style Timber Floor Pty Ltd v Krivosudsky* (2019) 100 NSWLR 133, 141-2 [38]-[41] (Leeming JA, Bell P agreeing at 135 [1], Simpson AJA agreeing at 154 [82]).

<sup>20</sup> *Iskra* [2019] NSWCA 126 [38]-[39], [49] (Gleeson JA, Bathurst CJ agreeing at [1], Payne JA agreeing at [55]).

<sup>21</sup> *SSC Plenty Road* [2015] VSC 631 [94], [96], [107] (Vickery J).

contract drawings, which are treated as a contractual document under cl B2 of the contract. The submission that it was impossible to place reliance on the photos without comparing them to the drawings is no more than speculation. It amounts to an argument that the adjudicator erred in evaluating the merits of the payment claim, which is not a basis for judicial review. However, in oral argument Mr Robins QC pressed the point further, contending that the contract drawings constituted part of the 'construction contract' referred to in s 23(2)(b), so that a failure to have regard to them rendered the determination void under s 23(2B). Although not forming a separate ground of appeal, it is necessary to consider this issue. To evaluate the argument it is necessary to make further reference to some provisions of the contract.

53 The contract was a standard form 'major works contract'. It consisted of clauses lettered from A to S, together with schedules and an annexure. Clause A2.1(b) provided that the contractor must 'diligently carry out all *\*necessary work* and complete the *\*works* to the standard set out in the *\*contract documents*'. The asterisked expressions were defined in clause S. Relevantly, 'works' was defined to mean 'the completed construction set out in the *\*contract documents*'. The 'contract documents' were:

any special conditions shown in **schedule 2**, the conditions of this contract, the specifications, the drawings and any other documents shown in **schedule 3**.

54 Clause B2 provided for an order of precedence of contract documents, unless otherwise shown in schedule 3.

55 Schedule 2 contained a series of special conditions to which further reference is unnecessary. Schedule 3 set out an 'order of precedence' of contract documents, as follows:

1. Any special conditions shown in **schedule 2a**.
2. Any owner occupier conditions shown in **schedule 2b**.
3. The conditions set out in this contract and **schedule 1**.

4. ...
5. The drawings listed below:
  - Structural Drawings ...
  - Architectural Drawings ...
  - Civil Drawings ...
  - Fire Engineering Report ...
  - Services Engineering ... Electrical Drawing Set ...
  - Services Engineering ... Mechanical Drawing Set ...
  - Services Engineering ... Hydraulic Drawing Set ...
  - Services Engineering ... Fire Drawing Set ...
  - Soil Report ...
  - SMP ... including energy ratings ...
  - Town Planning Drawings ...

56 It is plain from these provisions that the 'contract documents' had force as part of the contract, incorporated by reference in the manner described. It follows also that the contract documents form part of the 'construction contract', defined in s 4 of the Act to mean:

A contract or other arrangement under which one party undertakes to carry out construction work ... for another party.

57 The question then is whether the contract documents, and in particular any or all of the drawings in item 5 of schedule 3 to the present contract, were 'provisions of the construction contract from which the application [for adjudication] arose'.

58 The expression 'from which the application arose' could be taken to describe the construction contract as a whole, or its provisions. In our view, the former interpretation is the preferable one. The words identify the relevant contract by reference to the disputed claim and the paragraph then looks to the provisions of that contract. The alternative construction would involve difficult questions of relevance and even causation. It would have the consequence, because s 23(2)(b)

confines the adjudicator's consideration 'only' to the matters identified, that the adjudicator would be prevented from having regard to the provisions from which the application did not arise.

59 It would be anomalous to require an adjudicator, who need not be a lawyer, to undertake a classification of provisions on the basis of relevance and causation in order to ensure the validity of the determination. To identify the specific provisions of a contract, from which provisions a disputed claim 'arose', could be a very time-consuming exercise, especially given the typical complexity of building contracts, and it would serve no apparent purpose. Instead, just as s 23(2)(a) requires consideration of the provisions of the Act, para (b) requires consideration of the provisions of the construction contract. For these reasons, the words 'from which the application arose' describe the relevant construction contract.

60 The issue becomes, what constitutes 'the provisions' of that contract? Again, two interpretations are open. On the broader view, all the contents of documents having force as part of the contract or arrangement constituting the construction contract make up the provisions of that contract. On a narrower reading, the provisions of a construction contract are to be found only in the contract executed by the parties, and not in other documents incorporated by reference in that document. On that approach, even though documents incorporated into the contract by reference form part of the construction contract, their contents are not among its provisions.

61 The text of s 23(2)(b) supports the narrower approach. The use of the expression 'the provisions of the construction contract', rather than 'the construction contract' suggests that s 23(2)(b) contemplates something other than the whole of the construction contract as broadly defined. Further, when a contract incorporates a document by referring to it, it is not usual to describe that document as containing provisions of the contract. By way of analogous example, if a will provides that personal chattels are to be bequeathed according to a list provided to the testator's solicitor, it would strain language to describe that list, as distinct from the relevant

clause of the will, as a provision of the will. The provision of the will in that context is the part of it that gives effect to the incorporation, and the matter incorporated only has force by virtue of the incorporation and not as a free-standing provision. The list is not a provision of the will. The use of the word 'provisions' in s 23(2)(b) is consistent with a similar understanding here.

62 The context is also supportive of this interpretation. The parties are able, subject to the Act, to provide 'relevant documentation' to the adjudicator. This suggests that the 'provisions of the construction contract' need not refer to all aspects of the construction contract that may be relevant. To the extent that documents incorporated into the construction contract may be relevant, there is ample scope for their consideration if the parties or the adjudicator consider that necessary.

63 Finally, the provision's purpose also points to the narrower approach. Bearing in mind that a contravention of sub-s (2) renders an adjudication determination void, and that adjudications are required to be conducted expeditiously, it is less likely that Parliament would mandate consideration in every case of the myriad of documents that might make up a construction contract as defined. The adjudicator has a power to demand further submissions, which would extend to the provision of documents, in those cases where the adjudicator considers that the parties have not provided all 'relevant documentation'. This is consistent with a reading of para (b) whereby it sets a basal level of contractual material that an adjudicator must always consider, allowing for flexibility in the conduct of adjudications rather than mandating a heightened threshold for the validity of every adjudication.

64 Mr Robins QC, for the applicant, submitted that questions of relevance govern the scope of s 23(2)(b). He accepted, in the present case, that the soil report (for example) need not have been considered, but submitted that the structural, architectural and civil drawings were in a different position. However, the difficulty in drawing lines in this context based on questions of relevance, and the undesirability of adopting relevance as a criterion of validity of an adjudication

determination, have been canvassed above. In our view, s 23(2)(b) is to be construed as imposing an easily identified requirement and not one involving questions of degree. For the reasons given, it requires an adjudicator to consider the provisions of the contract document but not, unless they are provided by the parties or required by the adjudicator, any document incorporated by reference into that contract.

65 We therefore conclude that the 'contract documents' as defined, which did not constitute part of the contract executed by the parties, but were incorporated by reference into it, were not 'provisions of the construction contract' required to be considered under s 23(2)(b).

66 We observe that, in any event, application of a test of relevance in the present case would not avail the applicant. The Court, like the trial judge, has not seen the drawings said to have satisfied the applicant's test of relevance. Accepting that the builder referred to plans in its submissions to the adjudicator, indicating that such plans had some relevance, without seeing the particular plans referred to it is impossible for the Court to decide whether they did in fact meet the posited threshold for mandatory consideration as 'provisions of the construction contract'. The question of relevance which this task would present tends only to confirm our conclusion that this is not how s 23(2)(b) is properly construed.

### ***Conclusion***

67 In our opinion the applicant's proposed grounds raised questions of some difficulty and leave to appeal should be granted. However, the appeal must be dismissed.

SCHEDULE OF PARTIES

1155 NEPEAN HIGHWAY PTY LTD  
(ACN 630 087 428)

Applicant

v

PROMAX BUILDINGS PTY LTD  
(ACN 630 303 801)

First Respondent

JOHN McMULLAN

Second Respondent

RIALTO ADJUDICATIONS PTY LTD

Third Respondent