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

Not Restricted

S CI 2014 00726

BRANLIN PTY LTD (ACN 108 591 304)	Plaintiff
v	
TONY TOTARO (T/A EZY DOZE IT) (ABN 78 822 145 580)	First Defendant
and	
MARIA TOTARO T/A EZY DOZE IT) (ABN 78 822 145 580)	Second Defendant
and	
NAVID KING	Third Defendant
and	
ADJUDICATE TODAY PTY LTD (ABN 39 109 605 021)	Fourth Defendant

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JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	5 AUGUST 2014
DATE OF JUDGMENT:	7 OCTOBER 2014
CASE MAY BE CITED AS:	BRANLIN PTY LTD v TOTARO
MEDIUM NEUTRAL CITATION:	[2014] VSC 492

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether incorrect inclusion of non-claimable variations - Whether the construction contract contained a method for resolving disputes within the meaning of s 10A(3)(d)(ii) of the Act – Whether payment claim invalid because not served within time or in accordance with the construction contract and s 14(5) of the Act – Whether the construction contract provided a mechanism for determining the reference date for a final payment claim and when the works achieved practical completion - Whether the claimant was required to serve a further s 18(2) notice before withdrawing the first Adjudication Application and making a fresh application under s 28 of the Act – Whether breach of the rules of natural justice - Whether the adjudicator was required to take into account the respondent's submissions – Application of s 21(2A) of the Act.

ADMINISTRATIVE LAW – Judicial review - Decision of adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether certiorari should be granted to quash the decision.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N A Andreou	Hutchinson Legal
For the First and Second Defendants	Mr A R Morrison	Rigby Cooke
For the Third and Fourth Defendants	No Appearance	

HIS HONOUR:

1 This proceeding arises out of a payment claim purportedly made under the *Building and Construction Industry Security of Payment Act 2002* (the 'Act').

2 On 4 October 2013 a construction contract (the 'Construction Contract') was entered into between the Plaintiff, Branlin Pty Ltd ('Branlin') (which was the Respondent under the relevant Payment Claim) and the First Defendant, Tony Totaro trading as Ezy Doze It ('Mr Totaro') (who was the Claimant under the relevant Payment Claim). Pursuant to the Construction Contract Branlin engaged Mr Totaro to perform preliminary site works, earthworks, water infrastructure works and concrete road pavement (the 'Works') at a 9 lot development site located on Broadgully Road and Glen View Close, Diamond Creek, Victoria (the 'Project'). The contract price for the work, excluding GST, was $235,000.

3 The Works commenced on 9 October 2012.

4 Mr Totaro purported to serve a payment claim under the Act dated 7 November 2013 (the 'Payment Claim') upon Branlin. The Payment Claim claimed the sum of $124,240.93 (including GST) under the Act.

5 Branlin did not pay any part of the sum claimed under the Payment Claim. Nor did Branlin serve a payment schedule under the Act pursuant to s 15 of the Act.

6 On 6 January 2014 Mr Totaro made an adjudication application purportedly under s 18(1)(b) of the Act. On 13 January 2014 the Third Defendant accepted an appointment as the adjudicator under the Act (the 'Adjudicator'), and subsequently he completed the adjudication and delivered his adjudication dated 20 January 2014 (the 'Adjudication Determination'), purportedly made in accordance with the provisions of Division 2 of Part 3 of the Act.

7 Branlin makes application for judicial review of the Adjudication Determination. It seeks orders in the nature of certiorari to quash the Adjudication Determination.

8 In relation to the Project, I accept that the following key steps of relevance occurred:

Date	Event
4 October 2012	Branlin and Totaro enter into the Construction Contract
9 October 2012	The Works commence on site
23 April 2013	Totaro asserts the Works reach practical completion
30 April 2013	Branlin asserts the Works reach practical completion
10 May 2013	Totaro asserts the last work under the Construction Contract was performed and later asserts this is date for practical completion
7 November 2013	The Payment Claim was purportedly made under the Act
26 November 2013	On this date Totaro claims to have served a notice under s 18(2) of the Act (the 'Section 18(2) Notice ') on Branlin entitling it to make a statutory adjudication application
5 December 2013	Totaro issues adjudication application pursuant to s 18 of the Act (the 'First Application')
11 December 2013	Damian Michael ('Mr Michael') accepts the position as adjudicator pursuant to s 20 of the Act
20 December 2013	Branlin's lawyers make submissions to Mr Michael raising amongst other things, s 14(5)4 of the Act
7 January 2014	Branlin is served with new adjudication application pursuant to s 28(2)(b) of the Act (the 'Second Application')
13 January 2014	Navid King ('Mr King') accepts the appointment as adjudicator
15 January 2014	Branlin's lawyers make submissions to Mr King raising s 10A, s 10B, and s 14(5) of the Act ('Adjudication Response')
20 January 2014	Mr King delivers his adjudication determination ('Adjudication Determination') which is forwarded to the Applicants on 22 January 2014 awarding Totaro the Adjudicated Amount of $120,248 (including GST).

9 In the Adjudication Determination the Adjudicator determined the matter referred to him for adjudication on the basis that the only substantive issue for decision was whether a payment claim was served on 7 November 2013 and whether the section 18(2) Notice was served by Mr Totaro on Branlin.

10 At paragraph 16 of the Adjudication Determination, the Adjudicator determined that the Respondent Branlin was not entitled to lodge an adjudication response and therefore he disregarded the adjudication response in full.

11 Before the Adjudicator, Branlin's position was that it was not served with the Payment Claim or the section 18(2) Notice. Apart from addressing the question of service of the payment claim and the section 18(2) notice, the Adjudicator did not address any other substantive issue. In particular he did not turn his mind as to whether Mr Totaro incorrectly included in its Payment Claim a claim for variations which the Act prescribes should not be taken into account as 'excluded amounts'.

12 Branlin's originating motion dated 14 February 2014 sets out 7 grounds on which it seeks declaratory relief or relief in the nature of certiorari, as follows:

- ground 1 is an introductory paragraph;
- grounds 2 and 3 allege, respectively, error of law on the face of the record and jurisdictional error for wrongly allowing payment for variations that were not ***claimable variations*** within the meaning of s 10A of the Act;
- grounds 4 and 5 allege, respectively, error of law on the face of the record and jurisdictional error as a result of the payment claim allegedly being made outside the time required by the Construction Contract and the Act;
- ground 6 alleges jurisdictional error as a result of the Adjudicator allegedly accepting his appointment outside the time permitted by s 18(3)(e) of the Act; and
- ground 7 alleges a breach of natural justice as a result of the Adjudicator failing to accept submissions made by Branlin.

13 The issues before the Court have been narrowed down to the following grounds of review grouped into the following 4 categories: Incorrect Inclusion of non-claimable variations (Grounds 2 and 3) – this involves the question as to whether the Construction Contract contained a method for resolving disputes within the meaning of s 10A(3)(d)(ii) of the Act; Payment Claim not valid (not served within time or in accordance with the construction contract (s 14(5)) (Grounds 3 and 4) – this involves questions as to whether the Construction Contract provided a mechanism for determining the reference date for a final payment claim and when the works achieved practical completion; Whether the claimant was required to serve a further s 18(2) notice before withdrawing the first Adjudication Application

and making a fresh application under s 28 (Ground 6); and Breach of the Rules of Natural Justice (Ground 7) – this involves questions as to whether the Adjudicator was required to request further submissions from the plaintiff so as to afford natural justice, and whether the Adjudicator was required to take into account the plaintiff's submissions regarding the due date for payment of the adjudicated amount.

Incorrect Inclusion of Non-claimable variations (Grounds 2 and 3)

Facts relevant

14 In seeking to make out Grounds 2 and 3, Branlin seeks to establish and rely upon the facts which follow.

15 The Construction Contract was in writing comprised by the following documents:

a) Document headed 'Construction Works 231 Broadgully Road & 6 Glen View Close Diamond Creek' signed by Mr Totaro and Rodney McGregor for Branlin; and

b) Document headed 'Ezydoze It Excavations' marked 'Quotation 12/09/2012'.

16 The Contract sum at the time the contract was entered into was $235,000 excluding GST.

17 The Payment Claim identifies variations claimed in the sum of $94,725 excluding GST ('claimed variations').

18 The claimed variations exceed 10% of the consideration under the Construction Contract.

19 The Construction Contract contained a method of resolving disputes (clause 1(d) of the Construction Contract).

20 In these circumstances, Branlin claims that because the Payment Claim included excluded amounts (variations which were not 'claimable variation'), the Adjudicator was in error when he included those amounts in the adjudicated amount.

Legal Analysis – Application of *Seabay Properties v Galvin Construction*[1]

21 The following propositions of relevance may be distilled from *Seabay*:

a) The Act provides of 'classes of amounts', called 'excluded amounts' that must not be taken into account in calculating the amount of a progress payment under the Act: s 10B(1);

b) An adjudicator's determination is void to the extent it includes an excluded amount: subsection 23(2A) and (2B) of the Act;

c) Legislative intention is that it is desirable to defer disputed variations to later dispute resolution or litigation;

d) Subsections 10A(2) and (3) provide for two classes of exceptions classed 'claimable variations'. The two classes are, first where the parties *agree* to the matters in s 10A(2)(a) to (f), and second, where the parties *do not agree* as to one or more of the matters in 10A(3)(c)(i) to (v); and

e) The Act contemplates that an agreement between parties under s 10A(2) is an agreement which is formed and is in place at the time of service of the relevant payment claim.

Whether Claimable Variations

22 The regime in the Act for excluding or taking into account variations in a progress payment is provided for in subsections 10A and 10B.

23 The second reading speech of the Building and Construction Industry Security of Payment (Amendment) Bill, which introduced subsections 10A and 10B into the Act, was delivered by the relevant Ministers on 15 June 2006, some three years after the Act had been in operation. Relevant extracts from the second reading speech presented to the Legislative Council are reproduced below:

> [It was noted that House amendments were made in the other house, being the Legislative Assembly, which considered the second reading speech on 9 February 2006]
>
> ... The first house amendment extends the range of disputed variations that can be claimed under the legislation.

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1 *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 ('*Seabay*').

… The amendment will no longer require the parties to agree that the work has been carried out or the goods and services supplied and that the person was directed to carry out the work or supply the goods and services. This will provide certainty that the adjudicator will be able to determine whether this has occurred.

The amendment also provides for a cap on considerations under the construction contract to which a claim for disputed variation may be dealt with under the act. This will apply to claims for disputed variations where the consideration under the construction contract at the time that the contract is entered into is $5 million or less

In the case where a consideration is $5 million or less, claims may be made until claims for disputed variations reach 10 per cent of the consideration.

Claims made above that percentage are to be dealt with under the construction contract. The amendment also provides that considerations under the contract that are for $150,000 or less are not limited by the 10 per cent rule.

The amendment provides a safeguard for where the contract does not have a dispute resolution clause. In this case the act is to apply no matter what the consideration under the contract is.

[On a motion that the bill be read a second time in the Legislative Council, the second reading speech, including the following extracts, were incorporated into Hansard]

... The bill will enable some disputed variations to be dealt with under the act. This is where the variation results from a direction being given by the person for whom the work is being undertaken or the goods and services provided. These changes are aimed at avoiding uncertainties that have been experienced in other jurisdictions

In the case where a contractor has been directed to carry out the work the act will now apply to claims for disputed variations where the consideration under the construction contract at the time that the contract is entered into is below $5 million.

Claims for disputed variations in contracts below $5 million are considered to be suitable for assessment and interim decision within the time normally allowed by the security of payment scheme for the respondent to assess (10 days) and for the adjudicator to review (10 days).

The effect of the $5 million cap is that disputed variations in contracts in the small contracting sector and almost all the subcontracting sector would be subject to the scheme. Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme.

This addresses the concern that such disputes on major contracts should not be subject to the security of payment scheme and the normal contract methods of dispute resolution should continue to apply.

In the case where the consideration under the construction contract is between $150,000 and $5 million, claims may be made in relation to disputed

> variations until the claims reach 10 per cent of the consideration under the construction contract.
>
> Where the construction contract does not have a dispute resolution clause which includes the disputes under new section 10A(3)(c), then the act is to apply. This will ensure that contractors do not find that they have no means of dealing with disputes in this regard. The act becomes the fail-safe mechanism.
>
> I emphasise that the limitation on the application of the act to the consideration under the contract only applies to disputed variations. Claims for payments in respect of consideration under the construction contract where there is no dispute remain subject to the scheme for all values of considerations under the construction contract.
>
> [Emphasis added]

24 The *Building and Construction Industry Security of Payment (Amendment) Act 2006*, which incorporated the new sections 10A and 10B, came into force in Victoria on 30 March 2007.

25 Section 10A of the Act sets out what is a claimable variation. There are two types of claimable variations provided for in this section.

26 Section 10B sets out the classes of excluded amounts that are not to be taken into account when calculating the amount of progress payment to which a person is entitled under a construction contract. For this purpose, s 10B(2)(a) defines a variation of a construction contract that is not a 'claimable variation' as an 'excluded amount'.

27 However, s 10A of the Act provides for 'claimable variations' that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract. The section provides:

> **Claimable variations**
>
> 1) This section sets out the classes of variation to a construction contract (the *claimable variations*) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
>
> 2) The first class of variation is a variation where the parties to the construction contract agree

a. work has been carried out or goods and services have been supplied; and

b. to the scope of the work that has been carried out or the goods and services that have been supplied; and

c. that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

d. that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

e. to the value of that amount or the method of valuing that amount; and

f. as to the time for payment of that amount.

3) The second class of variation is a variation where

a. work has been carried out or the goods and services have been supplied under the construction contract; and

b. person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

c. the parties to the construction contract do not agree as to one or more of the following

i. the doing of the work or the supply of goods and services constitutes a variation to the contract;

ii. that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

iii. the value of the amount payable in respect of the work or the goods and services;

iv. method of valuing the amount payable in respect of the work or the goods and services;

v. time for payment of the amount payable in respect of the work or the goods and services; and

d. subject to subsection (4), the consideration under the construction contract at the time the contract is entered into

i. is $5,000,000 or less; or

ii exceeds $5,000,000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to '$5,000,000' were a reference to '$150,000'.

28 The Act provides a working example of the operation of s 10A insofar as it relates to the second class of variation as follows:

> A building contractor enters into a construction contract. The consideration (***contract sum***) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the ***new claim***) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (***disputed variation***). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350,000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150,000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

29 In this case, the variations claimed in the Payment Claim are claimed to fall within the second class of variation as defined in s 10A(3) of the Act.

30 Subject to the application of subsection (4), the consideration under the Construction Contract at the time the contract was entered into, being $235,000, was less than $5,000,000.

31 However, the variations claimed in this case exceed 10% of the consideration originally agreed to under the Construction Contract (10% of $235,000 is $23,500 excluding GST).

32 Accordingly, by operation of s 10A(4), subsection (3)(d) applies in relation to this Construction Contract as if any reference to '$5,000,000' were a reference to '$150,000'.

33 Therefore, in this case, s 10A(3)(d) is to be read as follows:

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into —

i. is ~~$5,000,000~~ $150,000 or less [which does not apply here]; or

ii. exceeds ~~$5,000,000~~ $150,000 [which does apply here] but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

34 Section 10A of the Act is a remarkable piece of legislation. Although there is a clear need to find a balance between simplicity and precision in drafting, in contexts which may often call for delicate judgment to be exercised between these considerations,[2] drafting which produces an excessive level of complexity is to be avoided. An example is provided by the Motor Traffic Ordinance 1936, s 112B(1), a provision which found its way into the road traffic law of the Australian Capital Territory. It was almost incomprehensible, and certainly would have escaped the understanding of all but the most mathematically gifted of its intended audience. The provision implored a driver, on approaching a traffic light with a red arrow, to make a 'snap' decision:

> … not proceed beyond the road marking applicable in relation to the light in the direction that makes with the direction directly ahead an angle that has approximately the same number of degrees as has the smaller of the angles that the direction in which the arrow is pointing makes with the vertical.

35 The convoluted drafting style adopted in s 10A(3) and (4) of the Act under consideration in this case suffers from the unworldly characteristics that are reminiscent of the ACT Motor Traffic Ordinance. Although s 10A is intended to be applied in somewhat less demanding physical circumstances than the Ordinance, it nevertheless takes several readings to digest the steps required to apply the provision, and several more steps, combined with a respectable prowess in the science of numbers, to apply it to the case at hand. Although the confounding formula described in s 10A on a close reading is tolerably precise, it fails in the critical task of communicating the legislative stipulations in a 'user friendly' and readily comprehensible fashion to its intended audience, which includes the

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2 Ian Turnbull, Statute Law Review, Volume 11, No 3, Winter 1990.

Defendant in this case, Mr Totaro an earth moving contractor and the principal of 'Ezy Doze It', and extends more generally to other construction subcontractors in a like position, and further, to any unfortunate Judge who may later be called upon to decipher and apply its contents

36 Section 10A is simply a way of saying that, in a case such as the present, the variations claimed will be classed as 'claimable variations' under the Act, where the original consideration agreed to under the Construction Contract exceeded $150,000, but only where the contract did not provide for a method of resolving disputes arising under the contract.

37 There will therefore be no 'claimable variations' under the Act if the Construction Contract in this case did provide a method of resolving disputes arising under the contract.

38 This is what the Plaintiff Branlin contends is the case here.

39 Unsurprisingly on the other hand, the Defendant Mr Totaro submits that the Construction Contract did not provide a method for resolving disputes for the purposes of s 10A(3)(d)(ii), and variations which were appropriately classified as 'claimable variations' were properly included in the Payment Claim and were properly included in the Adjudicated Amount.

Does the Construction Contract have a method of resolving disputes?

40 The Arbitrator in his determination does not appear to turn his mind to the issue of whether there is a method of resolving disputes before considering whether the claimed variations are 'claimable variations'.

41 The Construction Contract included the following term in clause 1(d):

> Other Documents: In the event of any contractual disagreements arising regarding any aspects of the works all efforts are required to be taken to resolve such disputes fairly and amicably. For further resolution of contractual matters reference may be made to Australian Standard 4905-202 [*sic*] Minor Works Contract Conditions (Superintendent administered) for guidance and intent.

42 Clause 27 of the Australian Standard 4905-2002 ('AS 4905-2002') provides for a process for dispute resolution which includes facilities for: Notification of a dispute (Clause 27.1); a Conference to resolve the dispute (Clause 27.2); followed by Arbitration in the event that these processes have no achieved a resolution of the dispute (Clause 27.3). Clause 27 of AS 4905-2002 is in the following terms:

> **27 Dispute resolution**
>
> 27.1 Notice of Dispute
>
> If a difference or dispute (together called a 'dispute') between the parties arises in connection with the subject matter of the *Contract,* including a *dispute* concerning:
>
> a) a Superintendent's direction; or
>
> b) a claim:
>
> i. in tort;
>
> ii. under statute;
>
> iii. for restitution based on unjust enrichment or other quantum meruit; or
>
> iv. for rectification or frustration then either the party shall, by hand or by registered post, give the other and the Superintendent a written notice of *dispute adequately* identifying and providing details of the dispute.
>
> Notwithstanding the existence of the *dispute*, the parties shall subject to clause 25 and subclause 27.4, continue to perform the *Contract*.
>
> 27.2 Conference
>
> Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
>
> If the dispute has not been resolved within 28 days of service of the notice of *dispute*, that *dispute* shall be and is hereby referred to arbitration.
>
> 27.3 Arbitration
>
> If within a further 14 days the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in *Item* 18(a). The arbitration shall be conducted in accordance with the rules in *Item* 18(b).

43 AS 4905-2002 also provides that if no-one is stated in Item 18(a) of the annexed schedule, the President of the Institute of Arbitrators & Mediators Australia will nominate an arbitrator. AS 4905-2002 also provides that if nothing is stated in Item

18(b) of the annexed schedule, Rules 5-18 of the Rules of the Institute of Arbitrators & Mediators Australia for the Conduct of Commercial Arbitrations apply. In this case there was no completion of Item 18(a) or (b) of the schedule to AS 4905-2002.

44 The question is whether the provision in clause 1(d) of the Construction Contract provides a 'method of resolving disputes under the contract' within the meaning of s 10A of the Act.

45 The issue of whether a Construction Contract contains a method of resolving dispute was considered by Judge Shelton in *A C Hall*. His Honour concluded that the contract before him did not provide a method of resolving disputes under it for the purposes of s 10A of the Act. In arriving at this conclusion the learned Judge referred to sub-clause 15(b) of the contract which was in the following terms:

> 15(b) Subject to the foregoing, the parties may agree in writing to refer part or all of such dispute or difference to arbitration according to the laws relating to arbitration in force in the State in which the Works are performed.

His Honour then reasoned:[3]

> Sub-clause 15(b), despite the heading of the clause, is not an arbitration agreement as defined in s 4 of the Commercial Arbitration Act 1984. By using the word 'may', all it does is to suggest the possibility of arbitration should a dispute or difference arise. What is required by subsection (3)(d)(ii), in my view, is a binding dispute resolution mechanism separate from the Court system.

46 His Honour then cited Kaye J, in *Siemens Ltd*.[4] However, in *Siemens Ltd*, the Court was dealing with a section entirely different in text and purpose to s 10A of the Act, which was a section then not in existence.

47 In the proceedings before Kaye J the plaintiff claimed an injunction to restrain the defendant from enforcing a bank guarantee for the sum of $271,813.41 issued in favour of the defendant by Citigroup on behalf of the plaintiff. The defendant had referred the dispute to adjudication pursuant to the provisions of the Act as it was at

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3 *A C Hall Air Conditioning Pty Ltd v Schiavello (Vic) Pty Ltd* [2008] VCC 1490 (*'AC Hall'*) [31]-[33].

4 *Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452 (*'Siemens Ltd'*) [32].

that time. The adjudicator had released his determination that the plaintiff was liable to pay the defendant $271,813.41 in respect to the relevant progress claim. The plaintiff then sent a letter to the defendant, enclosing a Notice of Dispute and a bank guarantee for the adjudicated amount of $271,813.41, which was said to be pursuant to 'clause 25 of the General Conditions of Contract and s 25 of the *Building and Construction Industry Security of Payment Act 2002*'.

48 Clause 25 of the contract before his Honour Kaye J was entitled 'Dispute Resolution'. Clause 25.2 stated:

> 25.2 Prior to the commencement of the Works, both parties to the Contract shall nominate representatives authorised to make binding decisions on matters of difference or dispute arising in connection with the Contract. The number of such authorised representatives shall be agreed between the parties but shall not exceed two per party and shall be collectively referred to as 'the Dispute Committee'. The parties shall refer all disputes to the Dispute Committee who shall meet at intervals to be agreed and as necessary to progress resolution, and shall undertake to resolve and agree matters of difference or dispute which have been referred to it by the parties' respective site and/or project management. The Dispute Committee may issue instructions to the referring party/ies in respect of further actions or provision of further information by the party/ies in such cases where the Dispute Committee is of the opinion that the parties have not made every effort to resolve the dispute or have not provided full and/or appropriate details or documentation. Any mutual decision confirmed by the Dispute Committee in connection with respective matters of difference or dispute shall be considered final and binding upon the parties and shall not prejudice or otherwise influence decisions made, or to be made, in other cases of differences or dispute.

49 As to s 25, it is to be noted that this section was later repealed by s 26 of Act No 42/2006. The former s 25(2) considered by his Honour was included in the scheme of provisions which provided for a respondent's obligations following an adjudicator's determination. The relevant sections for present purposes, s 25(1)(2) and (5), read:

> If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent –
>
> (a) must pay that amount to the claimant; or

> (b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.
>
> (2) The respondent may only give security under sub-s (1)(b) if the respondent has *commenced proceedings* (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.
>
> …
>
> (5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least two business days after any matters in dispute between them in connection with a progress payment to which this security relates have been finally determined.

50 The relevant question before Kaye J in *Siemens Ltd* was whether the processes of the Dispute Committee, under clause 25.2 of the contract, constituted 'proceedings' in s 25(2) of the Act.

51 The question arose because the plaintiff had made an urgent application to restrain the enforcement by the defendant of the guarantee. The claim by the plaintiff was based on the proposition that, by seeking to enforce the bank guarantee, the defendant was acting unlawfully and contrary to s 25(5) of the Act, as it then was. The plaintiff submitted that, by commencing the process under clause 25 of the contract, it had commenced 'dispute resolution proceedings' within the meaning of s 25(2), and that, accordingly, s 25(5) renders it unlawful for the defendant to enforce the bank guarantee until those proceedings have been finally determined.

52 An important issue for decision was whether the phrase 'other dispute resolution proceedings' in s 25(2) of the Act connoted curial or quasi-curial proceedings and whether the Dispute Committee appointed under clause 25.2 of the contract was merely a conciliatory body lacking curial or quasi-curial processes.

53 It was in this context that his Honour Kaye J in *Siemens Ltd* stated the passage quoted by Shelton J in *A C Hall*:[5]

> I accept that that is so, and that it may be that a number of those processes may constitute 'other dispute resolution proceedings', notwithstanding that

[5] *Siemens Ltd v Vaughan Constructions Pty Ltd* [2006] VSC 452 ('*Siemens Ltd*') [32].

> they lack the trappings and procedures which one would otherwise normally expect. Nonetheless in order to conform with the term 'proceeding' under s 25(2) of the Act it is, in my view, essential that, whatever process is adopted, that process must involve the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of procedural fairness. In other words, there must be a process the purpose of which is that some person or persons, independent to the parties to the dispute, decides that dispute by an impartial consideration of the competing merits of both sides of the dispute.
>
> [Emphasis added]

54 With great respect to the learned Judge in *A C Hall*, I do not consider that the concept of a 'method of resolving disputes' as found in s 10A(3)(d)(ii) of the present Act has the same meaning as, or indeed is informed by, the construction of s 25(2) of the former version of the Act. Nor in my opinion are the observations of Kaye J in *Siemens Ltd* upon the section a helpful aid to the construction of s 10A(3)(d)(ii).

55 To my mind, a contractual 'method of resolving disputes', as provided for in s 10A(3)(d)(ii) of the Act, is quite a different concept to that of 'proceedings (including arbitration proceedings or other dispute resolution proceedings)' found in s 25(2) of the former version of the Act.

56 In the first place, a contractual dispute resolution process which provides for a method of resolving disputes, once availed of by the parties, is not happily described as a 'proceeding'. It strains the language of s 10A(3)(d)(ii) to so describe it. This serves to set apart the process intended by s 25(2) of the former version of the Act from the contractual regime contemplated by s 10A(3)(d)(ii) of the present Act.

57 In the second place, while the regime described in s 25(2) of the former version of the Act clearly lends itself to the requirement that it be a process involving the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of procedural fairness, on the other hand, a contractual provision which merely provides for 'a method of resolving disputes' may not necessarily have such qualities, yet may be regarded as a 'method of resolving disputes'. For example, a method prescribed in a contract which requires the parties to have their dispute resolved by an appointed umpire who is not

required to exercise procedural fairness in arriving at a decision which nevertheless is binding on the parties, may be regarded as a 'method of resolving disputes' within the meaning of s 10A of the Act.

58 What is required under s 10A(3)(d)(ii) is at least a 'method of resolving disputes', as opposed to a method which merely provides an opportunity for the parties to negotiate a resolution of their differences. Unless the method identified in the contract is capable of resulting in a binding resolution of the dispute, it will not satisfy the s 10A(3)(d)(ii) requirement.

59 However in this case, the provision of the Construction Contract found in clause 1(d) to the effect that 'In the event of any contractual disagreements arising regarding any aspects of the works all efforts are required to be taken to resolve such disputes fairly and amicably', did not, in my opinion, provide for a 'method' of resolving disputes. It merely exhorted to parties to 'resolve such disputes fairly and amicably', without prescribing any 'method' as to how this was to be done.

60 Branlin, however, relies on the second part of clause 1(d) of the Construction Contract in seeking to make out its case that the contract indeed provided a method of resolving disputes arising under the contract. The second part of clause 1(d) said: 'For further resolution of contractual matters reference may be made to Australian Standard 4905-202 [sic] Minor Works Contract Conditions (Superintended administered) for guidance and intent'. It was contended by Branlin that this part of the clause had the effect of incorporating the process described above set out in AS 4905-2002.

61 There can be no doubt that had the procedure described in AS 4905-2002 been prescribed in the Construction Contract as the procedure to be followed in the event of dispute under the contract, then clearly there would have been a 'method of resolving disputes' provided for.

62 However, clause 1(d) did not do this.

63 I am not satisfied that AS 4905-2002 was incorporated into the Construction Contract in a manner that made it a binding method to be adopted in the event of a continuing dispute requiring further resolution. AS 4905-2002 was referred to in clause 1(d) at best as a suggested approach. It was not a method prescribed by the contract which was required to be followed. The permissive approach described by the words 'reference may be made' to the relevant Australian Standard, which is then only to be referred to for 'guidance and intent', point strongly away from the parties expressing an intention that AS 4905-2002 was the stipulated method of dispute resolution that was required to be followed.

64 Further, the reference in clause 1(d) of the Construction Contract to AS 4905-2002 immediately followed the exhortation in the first sentence which called upon the parties to apply 'all efforts' to resolving disputes fairly and equitably. This sets the context for the second sentence of clause 1(d), and points to the references to dispute resolution in this particular Construction Contract as being no more than a suggested course or approach, rather than setting in place a binding process required to be followed.

65 In order for a construction contract to provide a method for resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act, at least what is required are three things:

a) a process which could be described as a 'method' of dispute resolution;

b) a process which is capable of resulting in a binding resolution of the dispute; and

c) a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

66 I am reinforced in this construction of s 10A(3)(d)(ii) of the Act insofar as refers to 'a method for resolving disputes', which in my opinion requires a method provided in the contract which is capable of resulting in a binding resolution of the dispute and which the contract makes it a binding obligation for the parties to enter upon and

participate in, by the terms of the second reading speech referred to above, where it is said:

> Where the construction contract does not have a dispute resolution clause which includes the disputes under new section 10A(3)(c), then the act is to apply. This will ensure that contractors do not find that they have no means of dealing with disputes in this regard. The act becomes the fail-safe mechanism.

67 For there to be a claimable variation within the second class under s 10A of the Act, sub-section 10A(3)(c), in addition to sub-section 10A(3)(d) (as it may be modified in operation by to sub-section 10A(4)), also needs to be satisfied. This provides that the parties need to be in dispute in relation to one or more of the listed items, including, for example, the doing of the relevant work constitutes a variation (s 10A(3)(c)(i)). The Act is designed to provide a 'fail-safe mechanism' to be applied by an adjudicator appointed under the Act to resolve, by an interim binding determination, claimable variations which are in dispute, where the consideration under the contract exceeds the sum provided for in s 10A(3)(d)(ii) (as it may be modified in operation by to sub-section 10A(4)), but only where the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)). In this event, the statutory 'safety net' may apply to enable an adjudicator appointed under the Act to resolve, by an interim binding determination, the claimable variations which are in dispute. However, if the contact consideration exceeds the sum provided for in s 10A(3)(d)(ii) (as it may be modified in operation by to sub-section 10A(4)), and the contract does provide for a method of resolving disputes, the parties are left by the Act to resolve the matter by operation of the contractual method they have provided for, and the statutory adjudicator will have no role to play in relation to the disputed variations. This is achieved by the statutory mechanism which defines the disputed variation in such a case as 'Excluded amounts' under s 10B, and not as 'Claimable variations' under s 10A.

68 However, this statutory purpose, as I have found it to be, could not be advanced in a practical way, unless the contractual method for resolving disputes provided in the

relevant construction contract is at the very least a process which the contract makes it a binding obligation for the parties to enter upon and participate in. Indeed if the position was otherwise, the requirement for there to be a contractual method of resolving disputes before a variation is to be regarded as an 'Excluded amount' in the circumstances defined under s 10B, would serve no purpose at all.

69 In no proper sense could it be said that the Construction Contract in this case, by clause 1(d), provided a method for resolving disputes. At best it suggested such methods, which could be availed of by the parties, had they chosen to do so.

70 The Construction Contract in this case did not provide a method for resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act which could operate to deprive Mr Totaro from claiming payment for the variations in his Payment Claim.

71 It follows that the variations claimed by Mr Totaro are to be appropriately classified as 'claimable variations', were properly included in the Payment Claim and were properly included in the Adjudicated Amount.

72 The Adjudicator did not turn his mind to the classification of the variations. The Adjudicator awarded the sum of $111,823.64 for variations.

73 Had the adjudicator valued variations which were not claimable variations, he would have erred in valuing the construction work carried out.

74 However, in this case the variations which were the subject of the Payment Claim were claimable variations under the Act and no error has been demonstrated under Grounds 2 and 3 which would justify relief in the nature of certiorari.

Payment Claim not valid (not served within time or in accordance with the construction contract (s 14(5)) (Grounds 3 and 4)

75 The Adjudicator had no jurisdiction to consider a Payment Claim which was served outside the relevant period of time limitation provided for in s 14(5) of the Act.

76 The Payment Claim in this case was a final payment claim within the meaning of subsections 9(2)(d) and 14(5) of the Act. At the time when the Payment Claim was made, the Works had reached completion and Mr Totaro was not performing any further works under the Construction Contract. The Payment Claim sought payment for all outstanding amounts owing to Mr Totaro under the Construction Contract.

77 The Payment Claim was therefore the 'final balancing of account' between the contracting parties as described by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*.[6]

78 Branlin submitted that, as the Payment Claim was a final payment claim as defined under the Act, it was served outside the period required by the Act.

79 Branlin submitted that the works had reached practical completion some 6 months prior to the payment claim. It also made reference to the adjudication submission, which itself makes reference to:

> *The Act provides that a payment claim can be served within 3 months of last completing work under the contract. The Claimant completed the works onsite on 10 May 2013.*

80 Branlin relied upon s 14(5) of the Act which provides for the service of a payment claim which is a final payment claim. This sub-section provides:

> (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—
>
> (a) the period determined by or in accordance with the terms of the construction contract; or
>
> (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

81 The Construction Contract in this case made no provision for the time of service of a final payment claim. Accordingly, s 14(5)(b) of the Act applied.

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6 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [17] ('*Protectavale*').

82 The reference date in respect of a final payment claim referred to in s 14(5)(b) is provided for under s 9(2)(d) in the following terms:

> (2) In this section, 'reference date', in relation to a construction contract, means;
>
> (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—
>
> i. the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
>
> ii. the issue under the contract of a certificate specifying the final amount payable under the contract ***a final certificate***; or
>
> iii. if neither subparagraph
>
> iv. nor subparagraph applies, the day that—
>
> a) construction work was last carried out under the contract; or
>
> b) related goods and services were last supplied under the contract.

83 There was no mechanism under the Construction Contract within the meaning of s 9(2)(d)(ii) in respect of the issue under the contract of a certificate specifying the final amount payable under the contract, called in the Act a 'final certificate'.

84 However, the Construction Contract in this case provided for a defects liability period within the meaning of s 9(2)(d)(i) in the following terms found in Clause 1(f):

> 1. This Agreement and the documents listed as follows shall together constitute the Contract and form the agreement between the parties:
>
> …
>
> (f) A defects liability period of 3 months from the date of practical completion shall apply. As per clause 21 of AS 4905 2002.

85 As a result, I find that Mr Totaro's 'reference date' for his final payment claim was at the expiration of this 3 month defects liability period.

86 Clause 1(f) of the Construction Contact provided that the defects liability period commenced on the date of practical completion.

87 I accept the submission made on behalf of Mr Totaro that the date of practical completion was either on 10 May 2013 (the date when the appointed surveyors issued a certificate which indicated that the works were 100% complete) or 8 July 2013 (being the date when the evidence indicates that the Works were complete).

88 If either of these dates is the relevant reference date, three months from either date (being the period specified purposes of s 14(5) of the Act) will be either 10 November 2013 or 8 January 2014.

89 There was evidence which the Adjudicator could have relied upon to justify a finding that the Payment Claim was sent to Branlin on 7 November 2013, and that it was within time, whichever of the two dates for practical completion is accepted.

90 For these reasons, Branlin must fail on Grounds 4 and 5.

Whether the claimant was required to serve a further s 18(2) notice before withdrawing the first Adjudication Application and making a fresh application under s 28 (Ground 6)

91 Ground 6 alleges jurisdictional error as a result of the Adjudicator allegedly accepting his appointment outside the time permitted by s 18(3)(e) of the Act.

92 The provisions of the Act relevant to Ground 6 are: s 18(2); s 18(3)(e); and s 28.

93 Mr Totaro as the claimant was entitled to apply for adjudication of the Payment Claim because he satisfied s 18(1)(b) of the Act. Section 18(2) then applies, which provides:

> (2) 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.

94 Section 18(3)(e) provides for a time limit for applications for adjudication made under sub-section 1(b) in the following terms:

(e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).

95 Section 28 provides for the situation where a claimant fails to receive an acceptance by an adjudicator of an adjudication application within the time prescribed and, relevantly to this case, where an appointed adjudicator fails to determine the application within the time allowed by s 22(4), which is within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect. In either of these two circumstances the following provisions of s 28 operate:

(2) In either of those circumstances, the claimant —

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

(3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

96 On 26 November 2013, Mr Totaro served a valid notice under s 18(2) of the Act.

97 Mr Totaro made his first adjudication application under the Act on 5 December 2013. The first adjudicator (Mr Michael) accepted his nomination on 11 December 2013, estimating that his determination would be made by 2 January 2014.

98 However, the first adjudicator failed to determine Mr Totaro's application within the time allowed by s 22(4) (which was within 10 business days after the date on which the adjudicator accepted his appointment).

99 On 6 January 2014 Mr Totaro sent a letter to the first adjudicator withdrawing his earlier adjudication application which he had made on 5 December 2013. Mr Totaro also said that he sent to the first adjudicator his Adjudication Application dated 6 January 2014. Branlin was not served with these documents or notified of these steps.

100 The second adjudicator (Mr King) accepted an appointment as the Adjudicator on 13 January 2014.

101 I am satisfied that this new Adjudication Application dated 6 January 2014 was made within time under the Act. Given that the first adjudicator failed to determine this Adjudication Application within the period set out in s 22(4) of the Act, Mr Totaro was entitled to withdraw his first application and make a fresh application. When he did make a fresh application on 6 January 2014, he did so in accordance with the Act and was within time.

102 Further, Mr Totaro was not, in the circumstances, required to serve a further s 18(2) notice before withdrawing the first adjudication application and making a fresh application under s 28. Section 28(2)(b) provides that, in either of the circumstances referred to under s 28(1), a claimant may make a new adjudication application 'under section 18'. Section 28(4) then provides that 'This Division [which includes s 18] applies to a new application referred to in this section in the same way as it applies to an application under section 18'. Section 18(2) is mandatory in its terms. It provides that an adjudication application 'to which subsection 1(b) applies' cannot be made unless a section 18(2) notice has been served on the respondent to the adjudication application. However, a new adjudication application made under s 28 is a new application, the entitlement to which arises under the circumstances specifically referred to in the section.

103 If the first adjudication application was, as here, made in circumstances where s 18(1)(b) triggered the entitlement, and the section 18(2) notice had already been provided under that process, the requirements of s 18 had been complied with.

104 There is no invalidity if a second section 18(2) notice had not been provided under the new adjudication application made under s 28.

105 The following factor points to this construction: a compliant section 18(2) notice could never be provided in circumstances where the appointed adjudicator fails to make a decision within the 10 business day time limit provided by s 2(4). The section 18(2) notice must be provided within 10 business days 'immediately following the due date for payment', which by definition in all cases would have well expired before the period allowed to an adjudicator to make his or her determination.

106 Ground 6 therefore also fails.

Breach of the Rules of Natural Justice (Ground 7)

107 This ground involves questions as to whether the Adjudicator was required to request further submissions from the plaintiff so as to afford natural justice, and whether the Adjudicator was required to take into account the plaintiff's submissions regarding the due date for payment of the adjudicated amount.

108 The Adjudicator in this case said in his Adjudication Determination that he 'disregarded the purported adjudication response [of Branlin] in full'. He said that he did so pursuant to s 21(2A) of the Act.

109 In this case, Branlin failed to serve a payment schedule to the Payment Claim, either when the Payment Claim was first served on 7 November 2013, or when Mr Totaro served a s 18(2) notice on 26 November 2013. Branlin therefore failed to provide a payment schedule, either under s 15(4) or s 18(2)(b) of the Act.

110 Section 21(2A) sets out the consequences for the hearing of a subsequent adjudication where there has been a failure to serve a payment schedule in respect of a claim. Section 21(2A) provides:

> The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in s 15(4) or s 18(2)(b).

111 Branlin led no evidence to dispute that the Payment Claim was validly served and that it (Branlin) failed to serve a payment schedule in response to it.

112 The Adjudicator acted properly and in accordance with the statutory regime provided by the Act in refusing to consider Branlin's submissions.

113 In my opinion, the clear wording of s 21(2A) is such as to deprive a respondent, who has failed to provide a payment schedule, either under s 15(4) or s 18(2)(b) of the Act, from lodging an adjudication response, whatever the content of that response, including a question which raises an issue as to the jurisdiction of the adjudicator. Application of the usual rules of procedural fairness in this instance are curtailed by the statute. It needs to be recalled that the Act places emphasis on the expedition with which an adjudication is to be conducted, as reflected in the 10 business day time limit afforded to an adjudicator to consider and determine an adjudication application (see: s 22(4)). The Act also makes it clear that an adjudication determination is an interim award, which may be reviewed and adjusted in later proceedings (see: s 47). Section 21(2A) no doubt was introduced to advance, or at least to provide a regime which is consistent with, these purposes.

114 For this reason, the Adjudicator was not in error in failing to consider Branlin's adjudication response, and in taking the course of disregarding it. It also follows that there was no duty upon the Adjudicator to call upon Branlin to provide further response submissions.

115 Ground 7 therefore fails.

Orders

116 The application of the Plaintiff will be dismissed.

117 I will hear the parties on costs.
