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

Not Restricted

S CI 2010 00234

METACORP AUSTRALIA PTY LTD (ACN 110 882 990) Plaintiff

v

ANDECO CONSTRUCTION GROUP PTY LTD (ACN 102 566 576) First Defendant

JOHN O'BRIEN Second Defendant

ADJUDICATE TODAY PTY LTD (ACN 109 605 021) Third Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATES OF HEARING:	4 – 5 MARCH 2010
DATE OF JUDGMENT:	17 MAY 2010
CASE MAY BE CITED AS:	METACORP PTY LTD v ANDECO CONSTRUCTION GROUP PTY LTD
MEDIUM NEUTRAL CITATION:	[2010] VSC 199

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic.) – Progress claim under s. 14 of the Act – Whether basic and essential requirements of the Act met – Jurisdictional error - Jurisdiction of an adjudication application made under the Act – Service of payment claim on person liable to make the payment – Whether service on superintendent sufficient – Whether service by email sufficient – Whether payment due under construction contract – Natural justice in respect of an adjudication under the Act – Principles of natural justice to be applied – Failure of adjudicator to permit respondent to the application to comment on material submissions put by the other party – Finding of breach of the rules of natural justice

ADMINISTRATIVE LAW - Natural justice in respect of an adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic.) – Principles of natural justice to be applied – Failure of adjudicator to permit respondent to the application for adjudication to comment on material submissions put by the other party – Finding of breach of the rules of natural justice

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M G Roberts	Piper Alderman
For the First Defendant	Mr M H Whitten	Pilley McKellar Pty Ltd

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HIS HONOUR:

Introduction

The Proceeding

1 Metacorp Australia Pty Ltd ("Metacorp") is a developer. The First Defendant, Andeco Construction Group Pty Ltd ("Andeco") is a builder. Mr Hor Yay Au ("Mr Au") is the director of Metacorp. Mr Frank Nadinic ("Mr Nadinic") is a director of Andeco. On 30 May 2008, Metacorp as the principal entered into a written contract (the "Contract") with Andeco as the contractor for the construction of a mixed use development comprising residential and commercial properties at 16-28 Wrecklyn Street, North Melbourne ("the Works"), for the lump sum of $9,854,649.

2 This proceeding arises from the operation in Victoria of the *Building and Construction Industry Security of Payment Act 2002* (the "Act") [1] and the Contract entered into between Metacorp and Andeco.

3 As was said in *Grocon Constructors v Planit Cocciardi Joint Venture [No 2]*:[2]

> The *Building and Construction Industry Security of Payment Act 2002* was introduced in Victoria to allow for the rapid determination of progress claims under construction contracts or sub-contracts, and contracts for the supply of goods or services in the building industry. The process was designed to ensure cash flow to businesses in the building industry, without parties getting tied up in lengthy and expensive litigation or arbitration. It was intended to establish a process for the fast recovery of progress payments payable under a construction contract. This was to be achieved by a novel procedure which provided for the rapid adjudication of payment disputes at a low cost to the parties. The amendments introduced into the Act which operate from 31 March 2007 reinforce the scheme by creating, inter alia, a fast track system for enforcing payment in the courts through an expedited process for the entry of judgment founded on a certificate evidencing the adjudication determination and an affidavit of non-payment.

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1 The legislation came into operation in Victoria on 31 January 2003. It has since been amended by Act No. 42 of 2006. The first of the amendments came into operation on 26 July 2006. These were relatively minor. The second and more substantial group of amendments commenced on 30 March 2007. Accordingly, the legislation in its present amended form applies to construction contracts entered into on or after 30 March 2007. For construction contracts entered into on or after 31 January 2003, but prior to 30 March 2007, the legislation in its unamended form applies, save for the minor amendments which became operative on 26 July 2006. See the transitional provision: s. 53 *Building and Construction Industry Security of Payment Act* 2002 (as amended). The word "Act" will be used to compendiously describe the legislation, both in its pre-amended state (the "Old Act") and as amended (the "New Act").

2 [2009] VSC 426 at [33].

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4 These observations find support in the outline of the Act provided in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*[3] where the objects and purposes of the Act, and the procedures designed to implement them, were canvassed in some detail.

5 As part of the statutory procedures for the recovery of progress payments due to a contractor under a construction contract, the Act provides a procedure for the adjudication of disputes under Division 2 of Part 3 of the Act. This procedure contemplates the referral of any disputed payment claim to an adjudicator for determination: ss. 18 -20; procedures for the making of submissions: ss. 21 – 22 (2) & (5); an adjudication determination being made by the appointed adjudicator within a strictly limited time frame: ss. 22 (4) - 23; and the payment of the amount of the progress payment determined by the adjudicator: s. 28M.

6 This is a proceeding for judicial review commenced by the Plaintiff ("Metacorp") pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. Metacorp seeks to review the adjudication determination (the "Adjudication Determination") of the Second Defendant (the "Adjudicator") who was appointed as an adjudicator pursuant to s. 20 of the Act following a reference to him by the Third Defendant ("Adjudicate Today") as the authorised nominating authority pursuant to s. 18. This followed a dispute arising between the parties as to a claim for a progress payment said to arise on 25 October 2009 ("Payment Claim 15").

7 The Adjudicator and Adjudicate Today were joined to this proceeding so as to be bound by any relief which the Court may grant, but took no part in the trial.

8 The Adjudication Determination was made on 7 January 2010. Metacorp claims that the Adjudication Determination is void.

9 Metacorp alleges that Payment Claim 15 was in breach of some of the basic and essential requirements of the Act, with the result that any purported adjudication of

3 (2009) VSC 156 at [36-65].

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that payment claim based upon it is a nullity. It also alleges a breach of the rules of procedural fairness in the conduct of the adjudication, giving rise to a further ground of invalidity in the Adjudication Determination.

10 The plaintiff seeks relief in the nature of ceriorari. It also seeks declaratory and injunctive relief.

Background to the Works and the Construction Contract

11 The Contract entered into by the parties on 30 May 2008 incorporated the Australian Standard general conditions of contract AS2124 - 1992 as amended together with other specified documents as follows:

(a) Amended General conditions of contract AS2124 – 1992 as amended and annexures;

(b) Specifications;

(c) Tender submission; and

(d) Drawings.

12 There is no dispute that the Contract was a construction contract within the meaning of s. 4 of the Act. Further, given that the Contract was entered into after 30 March 2007, the Act in its present amended form applies.

13 Clause 42.1 of the Contract in conjunction with Annexure Part A to the Contract provided that progress claims were to be submitted on a monthly basis by the 25th day of each month. Clause 42.1 relevantly provided:

> **42.1 Payment Claims**
>
> At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver to the Superintendent claims for payment showing or including…
>
> …
>
> (g) the amount then claimed by the Contractor
>
> …

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14 Clause 42.2 of the Contract provided that progress certificates were to be issued within 14 days after the receipt of a payment claim. Clause 42.2 relevantly provided:

> **42.2 Payment Schedules and Calculations**
>
> The Superintendent shall within fourteen (14) days after receipt of a claim for payment made in accordance with Clause 42.1:
>
> (a) Assess the contract value of work executed and actually incorporated into the Works (including Variations) completed or partially completed, the cost to complete the work under the contract, the contract value of unfixed materials and/or goods incorporated into the work under the Contract and the estimated cost of rectifying defective or omitted work;
>
> (b) Determine the amounts of any other adjustments to the Contract Sum in terms of this Contract; and
>
> (c) Issue a payment schedule to the Contractor showing…
>
> …
>
> (viii) the amount certified as then being due for payment to the Contractor by the Principal
>
> … For the avoidance of doubt, in issuing a payment schedule to the Contractor, the Superintendent does so on behalf of and as agent of the Principal. …

15 Clause 42.3 of the Contract provided that the amount as assessed in the progress certificate is due and payable to the claimant within 14 days of the issue of the progress certificate. Clause 42.3 relevantly provided:

> **42.3 Time for Payment**
>
> Subject to the provisions of the Contract within 14 days after the issue by the Superintendent of the Superintendent's payment schedule, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the payment schedule as due to the Contractor or to the Principal as the case may be…

16 Clause 23 of the Contract provided for a superintendent to manage the works. A firm of architects, Design Consortia Australia (ABN 07 475 490 775) was appointed by Metacorp as the superintendent under the Contract (the "Superintendent"). Mr David Wood ("Mr Wood") was a principal of the Superintendent.

17 Clause 23 of the Contract provided:

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23 SUPERINTENDENT

> The Principal shall ensure that at all times there is a Superintendent.
>
> The Superintendent shall give directions and carry out all its other functions under the Contract on behalf of and as the agent of the Principal and not as an independent certifier, assessor or valuer. In assessing the Contractor's payment claims, extension of time claims, claims for delay costs and variation claims under this Contract the Superintendent shall act honestly and fairly. For the avoidance of doubt, in exercising any power function in connection with the Contract, the Superintendent is not under any obligation to take into account the interests of the Contractor nor to exercise that power or function for the Contractor's benefit.

Dual Procedure for Progress Claims - the Act and the Construction Contract

18 The framework of the Act is to establish a dual system for the payment of progress claims under a construction contract, so that the contractual regime sits alongside the statutory regime. The Act does not seek to alter the existing rights of the parties under the contract which they have negotiated. The means by which the Act seeks to ensure that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with the procedure provided for.[4] Broadly, the procedure involves:[5]

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

19 It is intended that the Act does not limit any other entitlement that a claimant may have under a construction contract or any other remedy that a claimant may have for recovering that other entitlement. [6] In this respect, s. 47(1) provides:

> (1) Subject to section 48 [which provides that the parties cannot contract

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4 See: s. 3(2) of the Act.
5 See: s. 3(3) of the Act.
6 See: s. 3(4) of the Act.

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out of the Act], nothing in this Part affects any right that a party to a construction contract-

(a) may have under the contract; or

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

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

20 Importantly, the fact that the Act employs language which is derived from terms commonly used in standard contracts used in the building industry, such as "payment claim" and "payment schedule",[7] although prone to confuse, does not detract from the position that there are in fact two systems in operation, side by side, which may be utilised by a claimant seeking payment of a progress claim.

21 The Contract in this case makes specific reference to the Act. The Act is defined as the "Security of Payment Act": clause 2; it is referred to in clause 7 in relation to the service of notices; in clause 9.5 in relation to the notice of intention to suspend; in clause 42.8 in relation to issuing the final payment schedule; and in clause 51 in relation to adjudication under the Act.

22 Thus, in respect of any one progress claim, and depending upon the terms of the construction contract, a claimant could make a payment claim relying on the contractual provisions and a separate payment claim relying on the Act, or indeed, make a simultaneous claim which is made both under the Contract and the Act in one common document.

Payment Claim 15

23 In this case, during the currency of the Works, Payment Claim 15 was transmitted by Andeco (who was the "Claimant") by email to the Superintendent on 24 October 2009. As found by the Adjudicator, this was a Saturday. The next business day after that was Monday 26 October 2009.

24 Payment Claim 15 was accompanied by an email letter dated 24 October 2009 addressed to Mr Wood, who was a director of the Superintendent "Design Consortia

7 See: for example AS 2124 – 1992 Clause 42.1 and Clause 42.3.

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Australia". The letter identified the subject of the email as: "Progress Claim No 15." It attached a document described as: "Mixed Use Development Nth Melb Claim # 15 25 October 09". The attached document was in the following form: it was headed "Mixed Use Development North Melbourne"; "Progress Claim No 15"; 25 October 2009". The document was drawn with six columns of information under the following headings: "Trade Description"; "Original Allowance"; "Approved Variations"; "Adjusted Allowance"; "Completed %"; and "Current Value Completed". The claim was for a total of $549,734.64. It was endorsed with the following statement: "*This is a Payment Claim made under the Building and Construction Industry Security of Payment Act 2002.*" Attached to the document was a variation schedule.

25 Payment Claim 15 complied with the requirements for a payment claim prescribed by s. 14(2) of the Act. It was a simultaneous claim made both under the Contract and the under the Act in one common document.

Payment Schedule

26 On 9 November 2009, the Superintendent issued a Progress Claim Certificate No. 15 on behalf of Metacorp (who was the "Respondent" to the payment claim) in which it certified an amount of $212,513.00 in favour of Andeco. The Superintendent's certificate was accompanied by a letter to Andeco dated 9 November 2009 which stated, inter alia:

> We are pleased to issue you our Progress Claim Certificate No. 15 for the project.
>
> Upon your presentation to the client of this certificate together with your Tax Invoice for the certified amount, direct payment will be made to your bank account within the terms of the contract.

27 The Progress Claim Certificate No. 15 complied with the requirements for a payment schedule prescribed by s. 15 of the Act, and it was accepted by the Adjudicator as a payment schedule for the purposes of the Act. I see no fault in this finding and accept Progress Claim Certificate No. 15 as a payment schedule provided by Metacorp pursuant to s. 15 of the Act (the "Payment Schedule").

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28 The Adjudicator found tthat the Payment Schedule was served by the Respondent within 10 business days after 26 October 2009, the date when the Adjudicator found that the Superintendent received the payment claim. The Payment Schedule was therefore served by Metacorp within the time prescribed by s. 15(4)(b)(ii) of the Act, failing which it would have become liable to pay the progress payment to which the payment claim related.

29 The reasons provided in the Payment Schedule were confined to the Superintendent's assessments of Andeco's entitlements based on his assessment of the percentage of the items of the Works completed as at the date of the payment claim.

30 On 17 November 2009 the Superintendent purported to issue a second progress certificate in respect of Payment Claim 15 certifying the sum of $135,771.00. Then on 23 November 2009 the Superintendent purported to issue a third progress certificate in respect of Payment Claim 15 certifying the sum of $0.00. The Adjudicator found correctly that the two further payment claim certificates, insofar as they purported to be payment schedules under s. 15 of the Act, did not comply with s. 15(1) of the Act and were not served within the time specified by section 15(4)(b)(ii) of the Act. Accordingly, they were disregarded for the purposes of the Adjudication which followed. I accept this determination as correct.

The Adjudication

31 On 7 December 2009, Andeco commenced its adjudication application under the Act. In that application it sought payment of $534,589.04 (including GST). The amount claimed was less than the amount in Payment Claim 15 because Andeco accepted the Superintendent's assessment of the percentage of works completed for fire services in lieu of the amount previously claimed.

32 On the assumption that Payment Claim 15 dated 24 October 2009 constituted a Payment Claim for the purposes of the Act, and that Progress Claim Certificate No.15 dated 9 November 2009 constituted a payment schedule for the purposes of

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the Act, given the amount set out in the Payment Schedule was less than the claimed amount indicated in Payment Claim 15, and given Metacorp's failure, in any event, to pay the amount set out in the Payment Schedule which it provided, Andeco was entitled to make an Adjudication Application under both s.18 (2)(a)(i) and (ii) of the Act.

33 The Adjudicator accepted his appointment to act on 11 December 2009.

34 The Adjudicator determined that he had been validly appointed pursuant to s. 20 of the Act, and having before him a prima facie valid adjudication application, he proceeded with his adjudication. Under s. 22(4)(a) the Adjudicator's determination was at first due on 29 December 2009. However, Andeco, at the Adjudicator's request pursuant to s. 22(4)(b) of the Act, consented to an extension of time to deliver the determination until 8 January 2010.

35 The Adjudication proceeded on the basis of the Payment Claim 15 claiming $549,734.64 (reduced to $534,589.04) and the Payment Schedule assessing the sum of $212,513.00 as due to the claimant, Andeco.

36 On 15 December 2009, Metacorp provided its adjudication response (the "Adjudication Response"). This was done pursuant to s. 21(1) and s. 21(2A) of the Act. The Adjudicator was satisfied that Andeco had been provided with a copy of the Adjudication Response.

37 An adjudication response may contain any relevant submissions which the respondent wishes to include: s. 21(2)(d). In its Adjudication Response, Metacorp did not make any further submission as to the assessment of Payment Claim 15. Instead, it proceeded to challenge its validity, a matter which had not been addressed previously in its Payment Schedule. Metacorp submitted, amongst other things, that:

> (a) the basis and essential requirements of the Act which are necessary to bestow jurisdiction on the adjudicator had not been satisfied in that the purported Payment Claim:
>
> (i) was not served on and from the reference date as required by s.9 of the Act;

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(ii) was not served on the person liable to make the payment as required by s.14(1) of the Act;

(iii) was not served in accordance with s.50 of the Act;

(iv) the due date for payment had not arisen as is a necessary requirement for an adjudication application under s.18(1); and

(v) the purported Payment Claim has been superseded.

(b) the payment claim and in particular the claim for preliminaries included excluded amounts; and

(c) works were not being performed.

Further Submission Invited from Andeco

38 In determining the adjudication application, the Adjudicator was obliged to consider the relevant matters contained in the Adjudication Response: s. 23(2)(d).

39 The Adjudicator, however, formed the view, as he was entitled to do, that the Adjudication Response contained reasons provided by the respondent which were not included in the Payment Schedule which it had earlier provided. As he observed in the Adjudication Determination: "Virtually all the reasons contained in the Adjudication Response were new reasons as the Respondent provided no reasons in the Payment Schedule other than the unexplained lesser assessments of the percentages of the Works completed by the Claimant up until the date of the Payment claim."

40 Accordingly, by letter dated 21 December 2009, pursuant to s. 21(2B) of the Act, the Adjudicator wrote to Andeco giving notice that:

> Pursuant to section 21(2B)(b) of the Act, the Claimant is herewith notified that it has two (2) business days after being served with the Notice to lodge a response (The Response) to the reasons set out in the Adjudication Response which were not included in the Payment Schedule with me through the ANA Adjudicate Today Pty Limited.

41 The Respondent, Metacorp, was also served with a copy of this notice on 21 December 2009.

42 Section 21(2B)(b) of the Act provides:

> If the adjudication response includes any reasons for withholding payment

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that were not included in the payment schedule, the adjudicator must serve a notice on the claimant-

(a) setting out those reasons; and

(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

43 The Adjudicator did not identify in his letter to Andeco which reasons were said to be new.

44 By letter dated 21 December 2009, Andeco's solicitor wrote to the Adjudicator stating:

> We note that pursuant to section 21(2B)(b) of the Act the adjudicator is required to identify which matters require further response. We appreciate this places a difficult burden on adjudicators and in the absence of any further reply we will proceed to respond to all matters in the adjudication response.

45 On 23 December 2009, Andeco served on the Adjudicator and Metacorp, further submissions. This was undertaken within the 2 business days stipulated in the Act: s. 21(2B)(b).

46 Metacorp, in the present proceeding, submitted that Andeco's further submissions were not limited to "reasons set out in the Adjudication Response which were not included in the Payment Schedule". Instead, it contended that Andeco made further submissions on a range of issues and also raised new issues which had not previously been put to Metacorp.

47 Upon receipt of Andeco's further submissions, Metacorp, by letter dated 23 December 2009, wrote to the Adjudicator requesting an opportunity to comment on the further submissions filed by the claimant. Specifically, Metacorp wrote:

> We consider the material filed by the Claimant is not properly material filed pursuant to s 21(2B) of the Act and some of the material filed ought fairly to be considered to be further submissions to which we should be given the opportunity to comment.
>
> Accordingly, pursuant to s 22(5)(a) of the Act, we would welcome the opportunity to put material in response and we ask that you confirm a time for submission.

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48 Section 22(5) of the Act provides:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator-
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
>
> (b) may set deadlines for further submissions and comments by the parties; and
>
> (c) may call a conference of the parties; and
>
> (d) may carry out an inspection of any matter to which the claim relates.

Time Limit Imposed on Adjudicator

49 By s. 22 of the Act, in keeping with the statutory objective of providing a swift procedure for the recovery of progress payments, an adjudicator is directed to determine an adjudication application as expeditiously as possible. Time limits are prescribed for the determination. Section 22 relevantly provides by sub-sections 1 - 4:

> (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
>
> (2) An adjudicator must serve a written notice-
>
> (a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and
>
> (b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application .
>
> (3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.
>
> (4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case-
>
> (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

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> (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.
>
> (4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

50 Under s. 22(4)(a) the Adjudicator was initially required to determine the matter by 29 December 2009.

51 By his letter dated 21 December 2009, the Adjudicator also made a request pursuant to s. 22(4)(b) of the Act for an extension of time to complete his determination. The request read as follows:

> My Determination in this matter is presently due on Monday 4 January 2010 taking into account the Christmas/New Year public holidays. As the Claimant has 2 business days after being served with the Notice: until and including 23 December 2009, to lodge its Response to the Notice under section 21(2B) of the Act and as there are a number of issues to be determined by me in this matter, I request of the Claimant, pursuant to section 22(4)(b) of the Act, that it grant me an **extension of time** to complete my Determination of **four (4) business days** until **Friday 8 January 2010**.
>
> The Claimant is requested to advise me through Adjudicate Today Pty Limited of its response to this request for an extension of time **by 4:00pm on Tuesday 22 December 2009**. The Claimant is also **directed to copy its response to this request for an extension of time to the Respondent by 4:00pm on Tuesday 22 December 2009.**
>
> The Claimant's attention is drawn to the provisions of section 22(4A) of the Act which provides that the Claimant "must not unreasonably withhold their agreement under sub-section 4(b)".

52 By letter also dated 21 December 2009, Andeco, by its solicitor, consented to the extension of time requested by the Adjudicator to deliver his determination to Friday 8 January 2010. A copy of this letter was forwarded to Metacorp.

Claim of Denial of Procedural Fairness

53 The Adjudicator did not respond to Metacorp's letter of 23 December 2009 which sought permission to file a further counter response submission. He proceeded to determine the adjudication application, which he did by the Adjudication Determination dated 7 January 2010. Accordingly, the Adjudicator did not request further written submissions from Metacorp, on Andeco's Further Submission dated 23 December 2009, pursuant to s. 22(5)(a), nor did he set any deadlines for further

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submissions pursuant to s. 22(5)(b).

54 Metacorp did not respond to Andeco's Further Submissions. It claims that it was denied the opportunity to do so by the conduct of the Adjudicator in not responding to its request to put in further material in response pursuant to its letter to the Adjudicator dated 23 December 2009.

The Adjudication Determination

55 By letter dated 13 January 2010, pursuant to s. 23A of the Act, the nominating authority, Adjudicate Today, provided to Metacorp a copy of the Adjudication Determination.

56 In making his Adjudication Determination, I am satisfied that the Adjudicator considered all of the relevant matters which he was obliged to consider pursuant to s. 23(2) of the Act, namely:

(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. [which was not applicable in this case]

57 Before proceeding with his assessment of Andeco's entitlements to payment, the Adjudicator considered and determined the issues raised by Metacorp as to the validity of Payment Claim 15 and his jurisdiction to determine the Adjudication application. In this regard, the Adjudicator noted that the validity of Payment Claim 15was not challenged in any respect in the Payment Schedule, only in the Adjudication Response.

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58 The Adjudicator rejected Metacorp's submissions as to the alleged invalidity of Payment Claim 15. He was positively satisfied that it was a valid payment claim under the Act and had been validly served for the purposes of the Act.

The Grounds of Review

59 Metacorp relied upon four grounds of review in relation to the Adjudication Determination. The first three grounds of review relied upon by Metacorp involved allegations of jurisdictional error. The fourth ground alleged a failure in the Adjudicator to afford natural justice or procedural fairness to Metacorp. Each ground will be considered in turn.

60 As to the scope and application of certiorari, the High Court in *Craig v South Australia*[8] ("*Craig*") made the following observations [which are here divided into sub-paragraphs with citations ommitted]:

> (a) Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal.
>
> (b) It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made.
>
> (c) Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record".
>
> (d) Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it.
>
> (e) In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

8 [1994] 184 CLR 163 at 175 – 176 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

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61 In considering what constitutes jurisdictional error, the High Court in *Craig* observed [here divided into sub-paragraphs with citations omitted]:[9]

(a) An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.

(b) Such jurisdictional error can infect either a positive act or a refusal or failure to act.

(c) Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.

(d) Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge.

(e) Such a court would act partly outside the general area of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach.

(f) Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain.

(g) Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make

9 *Supra* at 176 – 177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

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an order or decision in the circumstances of the particular case.

(h) Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.

62 Accordingly, since relief in the nature of certiorari is sought in this case on the grounds of jurisdictional error and breach of procedural fairness, the Court entertaining an application can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it, notwithstanding that it was not before the Adjudicator.

63 Secondly, this is a case where it is alleged that the Adjudicator, while acting wholly within his general area of jurisdiction, fell into jurisdictional error by proceeding to determine the adjudication application in circumstances where he lacked authority to do so because a condition or conditions essential for the existence of his jurisdiction were not in fact satisfied, even though his own conclusion was that the condition or conditions were satisfied.

64 It was submitted by Metacorp that the burden of proof to establish that the basic and essential requirements of the Act had been satisfied rested with Andeco. This proposition is incorrect.

65 In proceeings before an Adjudicator, it is for that Adjudicator to satisfy himself or herself that jurisdiction has been properly conferred. Neither party bears any onus in this respect.

66 In proceedings such as this, being an application for judicial review commenced by the plaintiff Metacorp pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005*, it is for the plaintiff, Metacorp, to establish an excess of jurisdiction, and must do so by clear proof if it is to be granted relief.

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67 Although Order 56 establishes a new procedure for the jurisdiction of the Supreme Court to exercise supervision over inferior courts and other tribunals in place of the prerogative writs of certiorari, prohibition, mandamus and quo warranto, the approach of the Court to the grant of any such relief or remedy, which is now made by judgment or order in a proceeding commenced in accordance with Order 56.01, remains unchanged. The changes introduced by Order 56 are merely procedural.[10]

68 As to the standard of proof, in *R v Blakeley; ex parte Association of Architects, Engineers, Surveyors & Draughtsmen of Australia*,[11] a proceeding in which a writ of mandamus was sought, the High Court observed that where the jurisdictional question is one of fact, then on an application for a prerogative writ the Court will hesitate long before interfering if the tribunal has investigated the relevant facts and its decision is not manifestly wrong.

69 In relation to the burden of proof, reference is made to the observations of the High Court in *R v Foster; ex parte Commonwealth Life (Amalgamated) Assurances Ltd*[12] concerning an application for a writ of prohibition. The Court said:

> The burden of establishing clearly the facts which show absence of jurisdiction always rests upon a prosecutor seeking a writ of prohibition.

70 A similar approach was taken by Brooking J in *R v Marshall; ex parte Baranor Nominees Pty Ltd*[13] in relation to proceedings in which a writ of certiorari was sought. His Honour observed:

> … the Court is to determine the question of fact for itself on the evidence placed before it, it being for the applicant to establish excess of jurisdiction by clear proof leading unmistakably to that conclusion, and the Court giving weight in an appropriate case to the special experience of the [tribunal].

Ground One – Payment Claim Premature

Metacorp's Contentions

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10 See: *Kay v DPP (Cth)* [2003] VSC 264.
11 (1950) 82 CLR 54 at 92 per Fullagar J.
12 (1952) 85 CLR 138 at 153 per Dixon, Fullagar and Kitto JJ.
13 [1986] VR 19 at 32-33.

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71 Metacorp submitted that in order for an Adjudication Determination to be valid, Andeco was required to comply with the "basic and essential requirements of the Act" so as to properly bestow jurisdiction upon the Adjudicator.

72 It submitted that the service of Payment Claim 15 was premature in that it failed to comply with the requirements of s. 9 and s. 14(1) of the Act.

73 Section 9 of the Act provides that a person is entitled to a progress payment under the Act "*On and from each reference date under a construction contract*" and calculated by reference to that date. The full text of the section reads:

> 9. Rights to progress payments
>
> (1) On and from each reference date under a construction contract, a person-
>
> (a) who has undertaken to carry out construction work under the contract; or
>
> (b) who has undertaken to supply related goods and services under the contract-
>
> is entitled to a progress payment under this Act, calculated by reference to that date.
>
> (2) In this section, reference date, in relation to a construction contract, means-
>
> (a) a date determined by or in accordance with the terms of the contract as-
>
> (i) a date on which a claim for a progress payment may be made; or
>
> (ii) a date by reference to which the amount of a progress payment is to be calculated- in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or
>
> (b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after-
>
> (i) construction work was first carried out under the contract; or

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(ii) related goods and services were first supplied under the contract; or

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that-

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

(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 (i) nor subparagraph (ii) 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.

74 Section 14(1) of the Act provides for the service of a payment claim:

14. Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

75 In the present matter, the reference date under s. 9 of the Act is determined by reference to the provisions of the Contract dealing with the time when claims for progress payments can be made. It was common ground that the reference date

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under the Contract was the 25th of each month, and for the month of October 2009, this fell on Sunday 25 October 2009.

76 It was also common ground that Payment Claim 15 was sent by email to the Superintendent the day before, on 24 October 2009. I accept that the email attaching Payment Claim 15 was in fact transmitted on Saturday 24 October 2009.

77 It was then submitted by Metacorp that, as there was no entitlement under the Contract to a progress claim as at 24 October 2009 in respect of the month of October, Andeco was not entitled to serve a payment claim purportedly pursuant to s. 14 of the Act. This was so, it was put, because service of a payment claim pursuant to s. 14(1) is predicated on a claimant establishing a present entitlement to a progress payment under the construction contract, prior to service of a statutory payment claim. In other words, it was submitted that as a precondition to being entitled to serve a payment claim the claimant must be, in the words of s. 9(1) of the Act, "entitled to a progress payment under a construction contract."

78 It was said that as at 24 October 2009, under the Contract, Andeco was not entitled to payment of Payment Claim 15 and Metacorp was not liable to pay it. Accordingly, the precondition for valid service under s. 14(1) had not been met, and Payment Claim 15 was therefore not a valid payment claim under the Act.

The Adjudicator's Determination

79 The Adjudicator acknowledged Andeco's concession that Payment Claim 15 was transmitted by an email to Metacorp's Superintendent, Mr Wood, on 24 October 2009. He observed, as was the fact, that this date fell on a Saturday and not a business day. He therefore determined that service was not in fact achieved until the next business day, that is, Monday 26 October 2009.

80 The Adjudicator noted that the respondent did not say on what date Metacorp was served with Payment Claim 15, or on what date it came to the attention of the Superintendent.

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81 The Adjudicator determined that, although the email was sent on Saturday 24 October 2009, it was not served before the next business day being Monday 26 October 2009. He said that this was further borne out by the fact that the Superintendent issued and served the Payment Schedule on behalf of the Respondent on 9 November 2009, the tenth business day after 26 October 2009, the period limited by the Act for the service of a payment schedule, failing which the respondent becomes liable under the Act for full payment of the sum claimed in the payment claim: s. 15(4)(b)(ii).

82 On this issue, the Adjudicator concluded:

> As I am not satisfied that the Payment Claim was served before 26 October 2009, I determine that the payment Claim was served "on and from the reference date" of 25 October 2009. It is not therefore premature; it complies with the provisions of section 9 of the Act.

Finding of the Jurisdiction by the Adjudicator

83 In my opinion the Adjudicator was correct on the material before him to find that, although the email attaching Payment Claim 15 was sent on Saturday 24 October 2009, it was not served before the next business day Monday 26 October 2009, being the earliest date on which it was received by the Superintendent.

84 As was pointed out by the Lord Chancellor in *Hope v Hope*:[14]

> The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done as required.

85 To like effect were the observations of Holroyd J in *Rudd v John Griffiths Cycle Co Ltd*[15] where his Honour, in the course of delivering a dissenting judgment of the Full Court, after referring to the common law history of personal service, went on to say:[16]

> Before the *Common Law Procedure Act* 1852, 15 and 16 Vict., c. 76, came into

14 (1854) 4 De G.M. & G. 328 at 342.
15 (1897) 23 V.L.R. 350.
16 *Supra* at 354.

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> operation the Courts of England were in general very strict in their interpretation of what constituted personal service, but still on several occasions they declined to set aside the service where the copy of the writ had been delivered at the party's residence to a servant or relative of his and from the facts the Judge thought it fair to infer that it came into his hands or to his knowledge so that he did or could, if he pleased, become acquainted with its contents.

86 These passages were cited with approval by McInerney J in *Pino v Prosser*,[17] who observed that it would be:

> … remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ ... should be held not to have been served.

87 The general principle enunciated in *Hope v Hope* and *Rudd v John Griffiths Cycle Co Ltd*, was applied by McInerney J in *Pino v Prosser* to the following circumstances: the relevant document, a copy writ, although left with the defendant's wife, who was a person not capable of accepting personal service on behalf of her husband, came into the possession of the defendant on the same day when, later that night after returning from work, the defendant was handed the copy of the writ by his wife. Receipt by this means was held by the Court to be sufficient to constitute good personal service.

88 Service of a payment claim under s. 14(1) of the Act may therefore include delivery into the possession of the intended recipient, by whatever means, which may be taken to be effected upon receipt of the document by that person.

89 Receipt of Payment Claim 15 by the Superintendent was found by the Adjudicator to have occurred on or after 26 October 2009. Accordingly, service of the payment claim was found to have occurred on or after that date. In my opinion, on the facts as they were before the Adjudicator, this was a correct finding.

90 This conclusion is supported by the additional affidavit material presented at the trial of the present matter.

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17 [1967] VR 835 at p 837.

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91 Payment Claim 15 was sent by Andeco to the Superintendent as an attachment to the e-mail letter at approximately 8:40pm on Saturday 24 October 2009.

92 Given that Progress Claim 15 was sent by Andeco to the Superintendent as an attachment to the e-mail letter on 24 October 2009 on Saturday night at approximately 8:40pm, the timing of the email transmission made it even more likely that it was not received by the Superintendent before the next business day, Monday 26 October 2009.

93 The addressee and the natural person recipient of the email was Mr Wood, who was a director of the Superintendent. In these circumstances it is to be inferred, absent any other evidence on the matter, that the progress claim was likely to have been available to the Superintendent upon Mr Wood opening the email on the next business day, 26 October 2009, or sometime shortly thereafter. Mr Wood had to take a number of steps before it could be said that he had received the payment claim. Mr Wood would have to observe on his computer the notification of the email sent from his email server; he would then have to gain access to the email on his computer; and then open its attachment which comprised Payment Claim 15. Until at least these steps had been taken by Mr Wood, it could not be said that the email and its attachment had been "received" at the place of business of the Superintendent and the email remained merely accessible to the intended recipient.[18]

94 On this analysis, Progress Claim 15 was likely to have been delivered to the Superintendent on and from the next business day after the sending of the host email enclosing the claim as an attachment, namely on and after 26 October 2009. Payment Claim 15 was therefore in fact served on 26 October 2009, or shortly thereafter.

95 Further, on 9 November 2009, the Superintendent issued a Progress Claim Certificate No. 15 in which it certified an amount of $212,513.00 in favour of Andeco. The

18 See: *Austar Finance v Campbell* [2007] NSWSC 1493 per Austin J at [60]; and *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [124 - 126].

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Superintendent's certificate was accompanied by a letter to Andeco dated 9 November 2009 which stated, inter alia:

> We are pleased to issue you our Progress Claim Certificate No. 15 for the project.
>
> Upon your presentation to the client of this certificate together with your Tax Invoice for the certified amount, direct payment will be made to your bank account within the terms of the contract.

96 The service and issuing of the Superintendent's certificate with the accompanying letter arranging direct payment of the amount certified for the claim further supports the fact that no issue had been taken with the service of Payment Claim 15, and that, for the purposes of Metacorp, it had been received and actioned by the company after 26 October 2009, in compliance with the time limit prescribed by the Act: s. 15(4)(b), being within 10 business days of 26 October.

Walter Construction Group Ltd v CPL

97 Metacorp, in the trial before me, placed reliance on *Walter Construction Group Ltd v CPL*.[19] ("*Walter Construction*"). In that case the plaintiff as head contractor sought summary judgment against the defendant as principal in respect of the unpaid portion of the amount claimed by the plaintiff in a payment claim dated 20 December 2002. The payment claim in question was purportedly made pursuant to the New South Wales equivalent of the Victorian Act, namely, the *Building and Construction Industry Security of payment Act* 1999 (NSW) (the "NSW Act"). The defendant opposed the application and asserted that there were a number of triable issues in relation to the payment claim. One of the triable issues relied upon was that the payment claim was premature. The written contract provided that the payment claim for the month of December 2002 should be made on 28 December 2002.[20] However, Nicholas J found that an oral agreement had been concluded resulting in it being agreed by the parties that the payment claim for the month of December should be made on 20 December instead of 28 December.[21] Accordingly, the

19 [2003] NSWSC 266.
20 *Ibid* at [47].
21 *Ibid* at [51].

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payment claim in contention being served on 20 December 2002 was not found to be in breach of s. 13(1) of the NSW Act (the equivalent to s. 14(1) of the Victorian Act). However, in *obiter*, his Honour went on to consider the position in the event that the due date for making as payment claim remained as 28 December 2002. As to this the Court said, following a detailed analysis:[22] "It follows that, but for the agreement to change the date to 20 December 2002, I would conclude that the Plaintiff was not entitled to make the statutory claim." In other words, the payment claim being served on 20 December 2002 was premature, because as at that date, the plaintiff was not entitled to payment of the payment claim and the precondition for valid service under s. 13(1) of the NSW Act had not been met.

98 However, on close analysis, there is in my view a critical point of distinction between s. 13(1) of the NSW Act and s. 14(1) of the Victorian Act. Section 13(1) of the NSW Act was in the following terms in December 2002:

> (1) A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is liable to make the payment.

Whereas s. 14(1) of the Victorian Act as it presently stands provides: [23]

> (1) A person referred to in section 9(1) who is *or who claims to be entitled* to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.[24]

The words "*or who claims to be entitled*" have been added to the text of s. 14(1) of the Victorian Act, as they have also been added to s. 13(1) of the NSW Act.

99 Nevertheless, it is clear that the terms of s. 13(1) under consideration in *Walter Construction* were in the pre-amended form.[25] In my view, this makes a considerable difference to the reasoning employed in that case.

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22 *Ibid* at [60].
23 Section 13(1) of the NSW Act was subsequently amended
24 Emphasis added.
25 *Ibid* at [17].

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100 I would accept that the relevant reasoning in *Walter Construction*, and indeed the argument advanced by Metacorp in this case, as to the invalidity of a prematurely served payment claim, if the legislation remained as it was in New South Wales in 2002 in relation to s. 13(1). Under this regime, the trigger that commenced the process which led to the statutory rights of a claimant under the Act was, as it is now, the service of a payment claim. However, as the legislation then stood, this could only be done by a person who "is entitled to a progress payment under a construction contract." In other words, an actual entitlement at law to the payment claim at the relevant time needed to be established.

101 In contrast, under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons 'who claim to be entitled' to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made *bona fide*, the claimant is permitted to serve its payment claim pursuant to s. 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.

102 A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.

103 In the present case, I can see no evidence of any lack of bona fides on the part of Andeco in making Payment Claim 15, even though it was transmitted on the day prior to the contractual reference date for payment. The payment claim, on its face, purported reasonably to compy with the requirements of s. 14(2) of the Act. This sub-section sets out a number of fundamental components to be included in a payment claim.

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104 One further factor of relevance in this case is that Payment Claim 15 was in fact dated 25 October 2009. On its face this was a claim to entitlement to a progress payment on and from the reference date under the Contract. The fact that it may have been delivered prior to the reference date did not detract from the substance of the payment claim that was made.

105 I am satisfied on the evidence that Andeco was a person who claimed to be entitled to a progress payment within the meaning of s. 14(1) of the Act at the time when it sent Payment Claim 15 to Metacorp's Superintendent on 24 October 2009. It was therefore entitled to serve its payment claim on that day.

106 It might be thought that a difficulty arises from the construction of s. 14(1) of the Act which I have found in the event that a payment claim is delivered prematurely. At first glance such a difficulty arises because time begins to run from the perspective of the respondent to a payment claim from the date of service of the payment claim. Section 15(4) of the Act provides that if a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within the time required by the relevant construction contract *or 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. Does this mean that a respondent served with a premature payment claim has time running against it from the date of physical service, regardless as to when this might be, which it ignores at its peril?

107 In my opinion, time does not begin to run against a respondent for the purposes of s. 15(4) from the date when a payment claim is physically delivered to it, if this occurs prior to the relevant reference date. This is so because the entitlement to payment, which is conferred by s. 9 upon a claimant, only arises 'on and from each reference date under a construction contract'. In the case of the premature delivery of a payment claim prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until

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then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of s. 15(4) until the arrival of the reference date. On that date the earlier physical delivery of the document will result in the document becoming a valid payment on the reference date. In this event, time will commence to run under the Act from the reference date.

108 Premature delivery of a payment claim under the Act will not therefore necessarily result in non compliance with the Act, and in this case would not have led to this consequence.

109 In any event, even if the Act could be construed to require service of a payment claim on or after the passing of the relevant reference date, I do not consider that a payment claim which happened to be served prior to a reference date would constitute a breach of one of the basic and essential requirements of the Act such as to give rise to an invalidity in the payment claim.

110 No provision of the Act expressly makes it a requirement that service of a payment claim must be undertaken on or after the relevant reference date. Still less does the Act expressly prohibit service of a payment claim prior to the reference date to which the claim relates.

111 The approach which I have taken is consistent with that taken in New South Wales under the equivalent legislation which applies in that State. In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* ("*Brookhollow*"),[26] Palmer J dealt with the requirements of the equivalent of s. 14 of the Victorian Act (being s.13 of the New South Wales Act). His Honour said:[27]

> The law as to compliance with s. 13(2) of the Act as it emerges from *Brodyn* and *Nepean*, may be summarised thus:

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26 [2006] NSWSC 1..

27 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1 at [41].

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(i) a payment claim which is never served on the respondent under s.13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;

(ii) there are some non-compliances with the requirements of s.13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;

(iii) a payment claim which does not, on its face, purport in a reasonable way to:

– identify the construction work to which the claim relates; or

– indicate the amount claimed; or

– state that it is made under the Act

fails to comply with an essential and mandatory requirement of s.13(2) so that it is a nullity for the purposes of the Act;

(iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s.13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act ...

112 This is not a case where the payment claim in question was never served on the respondent so that the machinery under the Act could not be set in motion. The first limb of the passage cited from *Brookhollow* therefore has no application.

113 The High Court considered the approach to invalidity arising from non-compliance with a statutory requirement in *Project Blue Sky Inc v Australian Broadcasting Authority*.[28] The majority of the Court analysed the issue in this way:[29]

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is

28 (1998) 194 CLR 355

29 (1998) 194 CLR 355 at 390 per McHugh, Gummow, Kirby and Hayne JJ

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> mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". [Footnotes omitted]

114 In my opinion, it was not a purpose of the Act that service of a premature payment claim should be invalid.

Exercise of the Discretion as to Relief

115 Finally, no prejudice has been alleged by Metacorp by reason that Progress Claim 15 was forwarded by email on the evening of 24 October rather than past mid-night on 25 October 2009. Nor could any such prejudice be said to conceivably arise. If, contrary to my finding, service of the claim was undertaken on 24 October 2009 by the email sent at approximately 8:40pm on that day, it was only some 3½ hours short of midnight on 25 October. If this did constitute a breach of the requirements of the Act, in all the circumstances it was a *de minimis* breach of no practical consequence. Accordingly, even if Ground 1 could have been made out, in the exercise of my discretion, I would have granted no relief in respect of it.

Conclusion as to Ground 1

116 The Plaintiff, Metacorp, has failed to establish that a basic and essential requirement of the Act was not satisfied in the making of Payment Claim 15 by reason of the matters relied upon under Ground 1. I am satisfied that there is no substance to Ground 1.

117 It follows that Payment Claim 15 was not invalid by reason of its transmission by email to Metacorp's Superintendent on the day prior to the reference date, and correspondingly, the Adjudication Determination founded upon the payment claim was also not invalid for this reason.

Ground Two – Defective service of payment claim

- service upon Superintendant

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- service by email.

118 Metacorp pressed two further matters relating to the service of Payment Claim 15. It said that service upon the Superintendent was not service upon the party who is or may be "liable to make the payment", namely Metacorp, and the purported service thereby contravened the Act. Secondly, it was said that service by email was not countenenced by the Act.

119 As to the first matter, Metacorp submitted that by section 14(1) of the Act, it is a basic and essential requirement that a payment claim be served upon the party who is or may be "liable to make the payment". The Plaintiff contended that service upon the Superintendent was not valid service upon Metacorp because it is the company, not its Superintendent, which was the party liable to make the payment. It was not contended by either party that the Superintendent was liable to make the payment as is required by the Act, nor could this be properly contended.

120 It was further submitted by Metacorp that, although Clause 42.2 of the Contract provides that "in issuing a *payment schedule* to the Contractor, the Superintendent does so on behalf of and as agent of the Principal",[30] the Contract does not bestow upon the Superintendent power to accept payment claims under the Act on behalf of its principal. It was submitted that the Contract, by clause 42.2, only provides a facility for the Superintendent *to issue payment schedules* on behalf of Metacorp.

121 Reliance was placed by Metacorp on *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited*[31] ("*Emag*"). In that case, the question was whether there had been proper service under the NSW Act of an adjudication application. The document in question had been served on a firm of solicitors acting for Emag Constructions Pty Ltd. His Honour, Einstein J, found as a fact that the solicitor had stated that his firm had no instructions to accept service.[32] Further, his Honour held that "there was neither actual authority in the plaintiff's solicitors to

30 Emphasis added.
31 [2003] NSWSC 903..

32 [2003] NSWSC 903 at [42].

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receive a copy of the adjudication application nor ostensible authority in that regard".[33] It was held that, there being neither actual authority in the plaintiff's solicitors to receive a copy of an adjudication application nor ostensible authority to do so, the adjudicator did not have jurisdiction to entertain the adjudication. Einstein J said in conclusion:[34]

> The service provisions of the Act require to be complied with in terms. Prudence dictates that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the *Supreme Court Rules* 1970 for notices of ceasing to act and the like. The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard.

122 Although the finding as to actual or ostensible authority was sufficient to dispose of in *Emag*, Einstein J then went on to say by way of *obiter dictum* that:[35]

> In my view the character of the subject legislation is such that the general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms.

123 As Habersberger J observed in *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd*[36], the rationale of his Honour's approach in *Emag* was to be found in an earlier passage in his judgment, where he said:[37]

> Service being effected in accordance with the Act is critical as it governs the commencement of the time limitations following such service. The consequence of non-compliance with the time limitation periods is harsh. As was submitted to the court by counsel for the plaintiff, the Act exhibits 'zero tolerance' for delay. To borrow a phrase from the world of contract, and in particular conveyancing, in a real sense *time is of the essence*.

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33 [2003] NSWSC 903 at [58].
34 *Ibid* at [59].
35 [2003] NSWSC 903 at [59].
36 [2006] VSC 425 at [45].
37 [2003] NSWSC 903 at [38].

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124 These views were echoed by Einstein J in the later decision of *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd*[38] where his Honour said further on the subject:

> In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination.

125 Underpinning these observations is the fact, which I well accept, that service of a payment claim is not without serious consequences for a respondent. The obligation to serve a payment schedule within a limited time frame is triggered by service of the payment claim. Section 15(4) provides that if (a) a claimant serves a payment claim on a respondent and (b) if the respondent does not provide a payment schedule to the claimant within the time required by the relevant construction contract or 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.

126 A failure by a respondent to provide a payment schedule to the claimant within the time required, not only triggers a liability for payment, it may also initiate other serious consequences. Pursuant to s. 16(2) of the Act, a failure by a respondent to provide a payment schedule within the prescribed time would entitle a claimant to 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 make an adjudication application under s. 18(1)(b) in relation to the payment claim. It also entitles a claimant to serve notice on the respondent of the claimant's intention to suspend carrying out construction work under the construction contract or to suspend supplying related goods and services under the construction contract.

127 Reference was also made by Metacorp to clause 7 of the Contract in this proceeding, the full text of which is set out below.

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38 [2005] NSWSC 439 at [49].

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128 Metacorp therefore submitted that, because the Progress Claim 15 was served on the respondent's Superintendent and not on the respondent, a basic and essential requirement of the Act had not been met, with the result that everything which followed service of the payment claim was invalid, including the Adjudication Determination founded upon it.

129 As to the second matter, it was submitted by Metacorp that service upon the Superintendent by use of an email was not valid service of a payment claim for the purposes of the Act because transmission of a document by email is not a prescribed method of service for the purposes of the Act or the Contract.

130 It was submitted that two separate and distinct payment regimes existed side by side in this case: that prescribed by the Contract, and that provided for under the Act. In considering the validity of the payment claim in this case, which was purportedly made under the Act, only the provisions of the Act may be applied, so it was said.

131 Metacorp relied upon s. 50 of the Act which provides for the service of documents, including a payment claim. The subsection 50 (1) is in the following terms:

> 50. Service of notices
>
> (1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person-
>
> (a) by delivering it to the person personally; or
>
> (b) by lodging it during normal office hours at the person's ordinary place of business; or
>
> (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
>
> (d) in such manner as may be prescribed for the purposes of this section; or
>
> (e) in any other manner specified in the relevant construction contract.

132 Metacorp submitted that, there being no other method of service prescribed for the purposes of this section, and given that the Contract did not specify any other

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manner of service, service by email was not countenanced. In those circumstances, if a payment claim was sought to be served by email, as in this case, a basic and essential requirement of the Act would not be satisfied, such as to give rise to its invalidity.

133 Metacorp also relied upon clause 7 of the Contract which made provision for the service of notices under it. The contractual regime for service applied to notices under the Act by the operation of s.50(1)(e). Clause 7 provided:

> **7 SERVICE OF NOTICES**
> Any notice required to be given to or served upon a party under the Contract may be given to or served:
>
> a) By delivering it to that party personally;
>
> b) By lodging it during normal office hours at the party's address stated in the Contract or last communicated in writing to the person giving the notice; or
>
> c) By sending it by post or facsimile addressed to the party's address stated in the Contract or last communicated in writing to the person giving the notice.
>
> The giving or service of a notice that is sent to a party's address is taken to have been effected in the case of posting, 2 business days after the day on which the notice was posted and in the case of a facsimile, at the time the facsimile is received. However, if the facsimile is received after 4:00pm on any day, it will be taken to have been received on the next business day.
>
> For the purposes of this Clause 7, a business day is a day that is not Saturday or Sunday or a day that is wholly or partly observed as a public holiday throughout Victoria.
>
> The Principal, the Contractor and the Superintendent shall each notify the others of a change of address.
>
> Without limiting the generality of 'notice', it includes a document.
>
> If the Contractor gives or serves upon the Principal any notice which the Security of Payment Act requires the Contractor to give to or serve upon the Principal, the Contractor shall give to the Superintendent a copy of such notice at the same time that it is given to or served upon the Principal.

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134 Andeco, on the other hand, contended that service by email upon the Superintendent, which it contended was Metacorp's agent for the purpose, was valid service upon Metacorp for the purposes of a payment claim under the Act.

The Adjudicator's Determination

135 The Adjudicator found Metacorp's submission that "neither contractually nor pursuant to the Act is [the Superintendent] empowered to receive payment claims on behalf of the respondent", was "clearly incorrect".

136 He found that the Contract provides at clause 42.1 that the "Contractor shall deliver to the Superintendent claims for payment, and that the Contract clearly empowers the Superintendent to act on behalf of the respondent in receiving, assessing and responding to payment claims".

137 In support of this finding, the Adjudicator also referred to clause 42.2 of the Contract which says: "For the avoidance of doubt in issuing a payment schedule to the Contractor, the Superintendent does so on behalf of and as agent of the Principal."

138 Accordingly, the Adjudicator found that service of Payment Claim 15 on the Superintendent by the Claimant was not in breach of s. 14(1) of the Act.

139 The Adjudicator also rejected Metacorp's submission that service by email was in breach of the Act. In so doing, he accepted Andeco's submission that s. 50 of the Act is not mandatory. He determined that, although the section provides for permitted methods of service, "it does not suggest that such methods are exclusive."

Service Upon the Superintendent

140 I do not accept Metacorp's submissions as to service of the payment claim on the Superintendent and I can see no error in the reasoning of the Adjudicator.

141 Section 14(1) of the Act provides that a payment claim is to be served "on the person who, under the construction contract concerned, is or may be liable to make the payment." This provision does not operate in a commercial vacuum. It needs to be read in the practical context of the building industry. Builders, more often than not,

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whether they are incorporated or unincorporated, act through their servants or agents.

142 Section 14(1) does not seek to remove the service of a payment claim from this reality. Accordingly, a payment claim may be served upon any person who, under the construction contract concerned, is or may be liable to make the payment, or has the actual or ostensible authority of such a person to accept service.

143 Receipt of a payment claim by a respondent or its servant or agent with actual or ostensible authority to receive it, for the purposes of s. 14(1) of the Act, constitutes service.

144 In the present case, the Superintendent did have the actual authority of Metacorp to accept service of a payment claim made by Andeco under the Act for the reasons stated by the Adjudicator on the material before him.

145 The terms of the Contract in use here contemplated that the Superintendent was authorised, not only to issue payment schedules to Andeco as the agent of Metacorp pursuant to clause 42.2, but also to receive payment claims delivered by the Contractor pursuant to clause 42.1, prior to assessing the claims.

146 In this case, the service provision in clause 7 of the Contract supports the structure established by the Principal for its Superintendent to deal with payment claims served under the Act, where it provided:

> If the Contractor gives or serves upon the Principal any notice which the *Security of Payment Act* requires the Contractor to give to or serve upon the Principal, the Contractor shall give to the Superintendent a copy of such notice at the same time that it is given to or served upon the Principal.

147 Further, and importantly, pursuant to clause 23 of the Contract, the Superintendent was empowered to "give directions and *carry out all its other functions under the Contract on behalf of and as agent of the Principal* and not as an independent certifier, assessor or valuer."[39] In so doing, the Superintendent was nevertheless required to

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39 Emphasis added.

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act honestly and fairly in assessing the Contractor's payment claims and other claims.

148 My conclusion is supported by the additional evidence adduced at the trial to which I am entitled to have regard. This amply demonstrates that the Superintendent also had the ostensible authority of his principal, Metacop, to receive service of payment claims under the Act.

149 Metacorp adduced further evidence at the trial of the originating motion on the issue. In an affidavit of its principal, Mr Au dated 12 February 2010, Metacorp's evidence was as follows:

> 6. Metacorp's position is and remains that the provision of payment claims under the Contract to the Superintendent is not service of the payment claim under the Act on the person liable to make the payment.
>
> 7. I draw to the court's attention clause 7 of the Contract which was attached to my earlier affidavit as HA-1, in relation to the service of notices which provides for service by delivery to the person, lodgement during normal office hours at the party's address for service or sending by post or facsimile. That clause provides:
>
> i. *"If the Contractor gives or serves upon the Principal any notice which the Security of Payment Act requires the Contractor to give to or serve upon the Principal, the Contractor shall give to the Superintendent a copy of such notice at the same time that it is given to or served upon the Principal".*
>
> 8. As is apparent from the submissions placed before both the adjudicator as well as the matters contained in the affidavits filed on Andeco's behalf at no stage did Andeco comply with this clause of the Contract in respect of the claim the subject of the Adjudication process. This is one of the matters which could have been brought to the Adjudicator's attention had he afforded Metacorp an opportunity to be heard as outlined in paragraphs 35 to 50 of my earlier affidavit.
>
> 9. I refer to paragraphs 5 to 8 of Mr Nadinic's affidavit. Metacorp does not dispute that email correspondence was sent between the Superintendent and [sic] the Andeco. However, that was not the sole means of written communication nor were communications exclusively between the Superintendent and Andeco. I am informed by Mr David Woods, the Superintendent under the Contract and verily believe that Mr William Devodier, who I know as Bill and is referred to at paragraph 5 of Mr Nadinic's affidavit, communicated using fax and letters.
>
> 10. Further, insofar as Mr Nadinic seeks to suggest that all communication on the project were required to be with the Superintendent, they were not. In fact, this is contrary to the Contract. For example, clause 23 of the Contract provides:
>
> *"should the Contractor consider that any direction is given in error or (without limiting Clause*

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40.1), although not given as a written direction in the form of a "Variation Direction", in fact involves a variation, or has any objection, of whatsoever nature, to any direction…then the Contractor shall promptly notify the Superintendent ***and the Principal*** *in writing within 10 days of receipt of the direction".*

11. In addition, clauses 44 and 47 also require service of notices on the Principal and not the Superintendent and I have already referred to clause 7.

12. The submission of progress claims under the Act is a serious matter that needs the direct and urgent attention of the Principal. It has to be treated appropriately in accordance with the Act and advice sought as appropriate. This opportunity was denied to Metacorp.

13. I refer to paragraph 8 of Mr Nadinic's affidavit where he seeks to suggest that there "was never any complaint or concern raised in respect of this mode of communication at any time from any person". That assertion is directly contrary to the position he took contemporaneously when he stated by letter dated 9 November 2009, to Metacorp that:

"which was not a written notice but an email transmission which does not classify as adequate in accordance with the Contract's protocol".

This is at precisely the time he now contends that email service of a payment claim is satisfactory service of a payment claim he was disavowing that position in correspondence sent directly to me. Again, this is a matter which could have been drawn to the Adjudicator's attention in the context of the matters put to him had Metacorp been provided with an opportunity to do so.

150 The principles giving rise to the ostensible authority of an agent are well established: *Freeman and Lockyer v Buckhurst Park Properties*.[40] The agent must have been held out by someone with actual authority to carry out the transaction and an agent cannot hold himself out as having authority for this purpose: *Armagas Ltd v Mudogas SA*.[41] The acts of the party alleged to be the principal must constitute a representation (express or by conduct) that the agent had a particular authority and must be reasonably understood so by the third party. In determining whether the principal had represented his agent as having such authority, the court has to consider the totality of the conduct of the party alleged to be the principal: *Egyptian International Foreign Trade Co v Soplex Wholesale*.[42]

151 From the commencement of the project to November 2009 Andeco submitted 15 progress claims for payment to the Superintendent as required by clause 42.1 of the Contract.

40 [1964] 2 QB 480

41 [1986] AC 717

42 [1985] BCLC 404 at 411

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152 The table below summarises the payment claim number, the date of submission, the method of submission and the person to whom claims were submitted:

Payment claim #	Date submitted	To whom submitted (list all)	Method of submission (list all)
1	25 August 2008	Superintendent	E-mail
2	25 September 2008	Superintendent	E-mail
3	27 October 2008	Superintendent	E-mail
4	25 November 2008	Superintendent	E-mail
5	17 December 2008	Superintendent	E-mail
6	25 January 2009	Superintendent	E-mail
7	11 March 2009	Superintendent	E-mail
8	25 March 2009	Superintendent	E-mail
9	25 April 2009	Superintendent	E-mail
10	25 May 2009	Superintendent	E-mail
11	24 June 2009	Superintendent	E-mail
12	27 July 2009	Superintendent	E-mail
13	25 August 2009	Superintendent	E-mail
14	25 September 2009	Superintendent	E-mail
15	24 October 2009	Superintendent	E-mail

153 The table demonstrates that each and every progress claim made during this project was submitted to the Superintendent by e-mail. On each and every occasion the Superintendent issued a payment schedule in response to the claim. For each of progress claims 1 to 14 the Principal paid the sum certified by the Superintendent following receipt of a statutory declaration and a tax invoice from Andeco.

154 Further, there is no evidence that any of the claims were submitted directly to the principal, Metacorp in the first instance.

155 Further, Payment Claim 15 was endorsed with the statutory notation as required by s. 14 (2)(e) of the Act, namely: "*This is a Payment claim made under the Building and Construction Industry Security of Payment Act*", and the evidence was that all other payment claims made earlier on the project were made in the same manner. The principal of Metacorp, Mr Au, swore that: "… progress claim 15 was the same as any other progress claim submitted under the Contract." I infer from this that all earlier payment claims had been similarly endorsed as required under the Act.

156 It is to be inferred from this conduct that the Superintendent was held out by its principal, Metacorp, as having authority to receive and action all payment claims

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delivered by Andeco during the course of the project, whether the payment claim was made under the Contract, or under the Act, or under both, as was the case with Payment Claim 15. Further, the conduct constituted a representation that the Superintendent had the relevant authority and was reasonably understood to have such by Andeco. Accordingly, the Superintendent had the ostensible authority of Metacorp to so act.

157 The further evidence adduced by Metacorp at the trial of the originating motion does not detract from this position.

158 Clause 7 of the Contract does not override the requirement for service of a payment claim as required by s. 14(1) of the Act, when it is read in the context of the common law of agency. Service of the payment claim upon the agent of the person who is liable to make the payment, whether acting pursuant to an actual or ostensible agency, is service upon the principal. In this event, clause 7 of the Contract is satisfied by service upon the Superintendent, who, for the purpose of receiving service of a payment claim, acts as both the Superintendent and the Principal.

159 I accept the further evidence adduced by Metacorp that email correspondence was not the only means of written communication between Metacorp and Andeco on the Project, and the evidence that communications were not exclusively between the Superintendent and Andeco and that communications also occurred by the use of fax and letters. However, this does not detract from the evidence of Andeco, which I also accept, that in the case of all payment claims served by Andeco on the Project, in every case this was undertaken by email upon the Superintendent. Nor do the other matters raised by Metacorp in its further evidence adduced at the trial detract from this position.

Conclusion as to Service on the Superintendent

160 Accordingly, in this case the Superintendent was acting as the agent of Metacorp, when he received Andeco's Payment Claim 15, having its actual or ostensible authority to do so. Service on the respondent's Superintendent in this case was

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service upon Metacorp, being the person who 'is or may be liable to make the payment' within s. 14(1) of the Act.

Service of Payment Claim by Email

161 I do not accept Metacorp's submissions as to service of the payment claim by email.

162 Section 50 of the Act is facultative, it is not mandatory. It will be noted that the opening words used in subsection (1) are "may be given to or served". Section 50 is not a code. The section does not operate so that if there is no service under any of its limbs there is no service at all.[43] The service provisions under s.50 of the Act are in addition to and do not limit or exclude the common law or the provisions of any other applicable legislation with respect of the service of notices, for example s. 109 X of the *Corporations Act* 2001. Further, under s. 50(1)(e) of the Act, service may be effected "in any manner specified in the relevant construction contract".

163 In *Howship Holdings P/L v Leslie and Anor*[44] Young J considered the position where the substantial dispute was whether service of a summons at a document exchange box was good service. His Honour held that the ordinary meaning of "service" being personal service, merely means that the document in question must come to the notice of the person for whom it was intended. His Honour referred to authorities supporting the proposition that the means by which the person obtained the document were usually immaterial, stating that:

> The ordinary meaning of "service" is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial. This is clear in cases that have been considered good law over the centuries, including *Hope v Hope* (1852) 4 De GM & G 328; 43 ER 534, 539-540; *Reg v Heron* (1884) 10 VLR 314, 315; *Pino v Prosser* [1967] VR 835, 838.

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43 *Howship Holdings Pty Limited v Leslie* (1996) 41 NSWLR 542; *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited* [2003] NSWSC 903 at [45 - 50]; cf. *Players Pty Limited v Interior Projects* (1996) 20 ACSR 189.

44 [1996] NSWSC 314 .

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164 Unless this were so, as observed further by Young J in *Howship Holdings*,[45] one would get the absurd situation referred to by McInerney J in *Pino v Prosser*,[46] to which I have earlier referred, where a party who acknowledges receiving a relevant document can be held not to have been served with it.

165 As to service by email, s. 50 of the Act makes no mention of this mode of service. By the same token, the section does not prohibit service by email.

166 As to the service provision found in clause 7 of the Contract, this is similarly is facultative, it is not mandatory. The clause opens with the words: "Any notice required to be given to or served upon a party under the Contract *may be given to or served*". [Emphasis added] Again the clause is not a contractual code. It does not exclude service by email, for example.

167 Further, in the light of s. 50 (1) (e) of the Act, which provides that service may be effected in "any other manner specified in the relevant construction contract", the facility in Clause 42.1 for the contractor to *deliver* to the Superintendent a payment claim, is broad enough to contemplate delivery (and receipt under Clause 42.2) by email, in line with common commercial practice as illustrated on this Project.

168 For these reasons, service of a payment claim by email on the Superintendent was in accordance with the requirements of both the Contract and the Act.

Exercise of the Discretion

169 A number of discretionary factors are present under both parts of Ground 2 which go to the grant of any relief which should be made, in the event that my conclusion as to service of a payment claim by email on the Superintendent was not in accordance with the requirements of either the Contract or the Act.

170 The table relating to the service of the previous 14 payment claims, which has already been referred to, indicates that the invariable practice on this project was to

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45 *Supra*.

46 [1967] VR 835 at p 837.

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serve payment claims by email which were then received, assessed and certified for payment by Metacorp. The service and processing of Payment Claim 15 was no different.

171 Further, no prejudice has been alleged by Metacorp by reason that Progress Claim 15 was forwarded by email to the Superintendent. Nor could any such prejudice be said to conceivably arise.

172 Payment Claim 15 was received by the Superintendent, who acted upon it and prepared and served payment schedules in response to it. The evidence before the Adjudicator was that the Superintendent in fact received the email and Payment Claim 15 and actioned it by preparing and serving a payment schedule pursuant to Clause 42.2, which he did by 9 November 2009.

173 In spite of the Payment Claim 15 being served upon the respondent's Superintendent and not directly on the respondent, there is nothing to suggest that the respondent was not able to comply with s.15 of the Act and provide a fully compliant payment schedule to the claimant which satisfied both the formal requirements for a payment schedule under s.15(2) and (3), but also the time limit for service prescribed by s.15(4). In fact this is precisely what Metacorp did by providing its payment schedule to Andeco on 9 November 2009, 10 business days after 26 October 2009.

174 Provided a payment claim is received by a person who is within the organisation of the party who is or may be liable to make the payment, who, for the purposes of the relevant construction project does receive the payment claim, and acts upon it by serving a valid payment schedule within time, no material prejudice will have been suffered by it in the usual case. This was the situation here. The failure to adhere to the strict requirements for service under the Act turned out to be of no practical consequence because Metacorp was in a position to, and did, serve a valid payment schedule upon Andeco within the time prescribed by the Act, in response to the service of Payment Claim 15 upon it.

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175 In this particular case, the nature of the breach was not such as to give rise to any adverse consequences for the respondent or the adjudication process.

176 Further, in this case, I accept the evidence that the payment claim was in fact brought to the attention of the principal of Metacorp, Mr Au, prior to service of the payment schedule by the respondent upon the claimant

177 Mr Au of Metacorp said in his affidavit that the Payment Claim 15 made by Andeco on 25 October 2009, ".... did not come to my attention until after Andeco served the adjudication application referred to below".

178 The adjudication application referred to by Mr Au was dated 7 December 2009 and was served on 13 December 2009. Accordingly, Mr Au claimed to have no knowledge of the Payment Claim from 26 October to 13 December 2009.

179 I do not accept this position taken by Mr Au. Between 26 October and 13 December 2009 the following relevant events occurred, as described in the affidavit of Mr Nadinic dated 29 January 2010: on 5 November 2009 a site meeting was held attended by Mr Au, Mr Nadinic and others in which concerns were raised over the claim for mechanical services made in Payment Claim 15. The outcome of this discussion was recorded as: "...revised figures taking into the above consideration to be issued to [the Superintendent] by COB Thursday 5/11/09."; on 9 November 2009 the Superintendent issued a payment schedule with covering letter to Andeco certifying the sum of $212,513.00; on 10 November 2009 Mr Nadinic of Andeco e-mailed to Mr Au of Metacorp a tax invoice and certificate for the amount certified by the Superintendent; on 17 November 2009 the Superintendent purported to issue a second progress certificate in respect of Payment Claim 15 certifying the sum of $135,771.00, with covering letter advising "We refer to previous correspondence and now issue our amended Progress Claim Certificate No. 15 for the project. Upon your presentation to the client together with your tax invoice for the amended certified amount"; and on 23 November 2009 the Superintendent purported to issue a third progress certificate in respect of Payment Claim 15 certifying the sum of $0.00.

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180 These events were not challenged in the affidavit evidence put on by Metacorp, and it did not seek to challenge Mr Nadinic in cross examination on these, or any other matters. Indeed, in his affidavit in reply dated 12 February 2010, Mr Au did not take issue with these events as described by Mr Nadinic in his affidavit. Mr Au said:

> The chronology of events set out in paragraph 22 of Mr Nadinic's affidavit also make it clear that the payment claim was a payment claim under the Contract but at no time during any of these meetings or in correspondence was it suggested to me that it was a payment claim within the meaning of the Act and I had not been served with a copy of it to be able to consider that for myself.

181 Mr Au also said in his reply affidavit, as has already been noted:

> [With one irrelevant exception] ….Otherwise, progress claim 15 was the same as any other progress claim submitted under the Contract.

182 Further, as has already been observed, Payment Claim 15 was endorsed with the following notice:

> "This is a Payment claim made under the Building and Construction Industry Security of Payment Act 2002"

183 I have accepted that all of the other 14 progress claims submitted under the Contract, contained the same endorsement.

184 Given the events which occurred prior to 8 December 2009, particularly the direct discussions with Mr Au concerning Payment Claim 15 at the site meeting on 5 November 2009 and the fact that on 10 November 2009 Mr Nadinic of Andeco e-mailed to Mr Au of Metacorp a copy of the tax invoice for payment of the scheduled sum found payable by the Superintendent in respect of Payment Claim 15, I am unable to accept that Payment Claim 15 did not come to Mr Au's attention until after Andeco served the adjudication application on 13 December 2009, as he said was the case.

185 The fact that it may not have been appreciated by Mr Au that Payment Claim 15 had been submitted both under the Act and under the Contract, is not to the point. Metacorp suffered no material prejudice by reason of this, and was able to respond appropriately in preparing its Adjudication Response to the claimant's Adjudication

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Application and submissions, once it had become aware that the procedures under the Act had been invoked.

186 The closest Mr Au came to pointing to any prejudice suffered by Metacorp was when he said in his affidavit:

> The chronology of events set out in paragraph 22 of Mr Nadinic's affidavit also make it clear that the payment claim was a payment claim under the Contract but at no time during any of these meetings or in the correspondence was it suggested to me that it was a payment claim within the meaning of the Act and I had not been served with a copy of it to be able to consider that for myself.

187 However, even if Mr Au had been personally served with Payment Claim 15, there was no step which Mr Au could take to alter the legal status of the document. Accordingly, I am satisfied that neither Mr Au or Metacorp suffered any material prejudice by the mode of service of the payment claim used in this case.

188 Further, the evidence confirms that on or after Monday 26 November 2009 and prior to 5 November 2009, Payment Claim 15 had not only been received by Metacorp's Superintendent, it had also come to the attention of its principal, Mr Au, which was 4 days before Metacorp served its Payment Schedule on Andeco.

189 Harking back to the observations of McInerney J in *Pino v Prosser*, [47] it would, in my opinion, be remarkable to the point of seeming absurdity, that a respondent who, on his own evidence admits that he was able to respond to the payment claim, have it assessed within the statutory time and have a payment schedule prepared and served so as to fully protect his interests, should later be in a position to have a Court declare that the payment claim was invalid because of improper service at the outset of the process.

190 As I observed in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* in relation to the submissions advanced by the plaintiff Hickory in that case: [48]

> The submissions made by Hickory to which I have referred, smack of excessive technicality. The legislature did not intend, in my view, that precise compliance with

47 [1967] VR 835 at p 837.
48 [2009] VSC 156 at [162 – 163].

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> all of the more detailed requirements of the Act is essential to the existence of a valid determination. To approach the matter in the manner suggested by Hickory would not accord with the legislative intention disclosed in the Act that adjudication determinations should be made and given effect to with minimum delay and therefore should be approached with minimal technicality and court involvement.
>
> True it is that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights. However, it is artificial to elevate this consideration to the point where it operates to insist on strict compliance with every procedural requirement with the attendant risk of the process being declared a nullity in the event of non-compliance, as the price for the privilege. In my view, it is not of sufficient weight to displace the legislative intention which I have described.

191 Accordingly, even if Ground 2 could have been made out in either of its manifestations, and service of the claim was not effected in accordance with the strict requirements of the Act, in the exercise of my discretion, I would have granted no relief in respect of it. I am satisfied that this approach, if I was invited to take it, would sit comfortably with the objects of the Act, which have now been fully explored in the case law.

Ground Three – Finding that the First Defendant could proceed to Adjudication under s.18(1)(a)(ii)

192 Metacorp submitted that a further basic and essential requirement of the Act was not complied with in this case in that there was *no failure* on its part to make payment of any scheduled amount by the due date for payment under s. 18(1)(a)(ii) of the Act.

193 Metacorp submitted that Andeco purported to refer Payment Claim 15 to adjudication pursuant to s. 18(1)(a)(ii) of the Act on the basis that Metacorp failed to make a payment by the "due date for payment". Section 18(1) of the Act provides:

> 18. Adjudication applications
>
> (1) A claimant may apply for adjudication of a payment claim (an adjudication application) if-
>
> (a) the respondent provides a payment schedule under Division 1 but-
>
> (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

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(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

194 However, it was Metacorp's contention that it had not failed to make a payment by the "due date for payment"under s. 18(1)(a)(ii) because, under the Contract, it was not obliged to do so. It was put therefore that there was no basis in law for Andeco to apply for adjudication of its payment claim because a basic and essential pre-condition to jurisdiction was not present.

195 The Plaintiff's first argument under this ground proceeded as follows:

(a) Section 12(1) provides:

12. Due date for payment

(1) A progress payment under a construction contract becomes due and payable-

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(b) Here the Contract did make express provision as to when a progress claim became payable.

(c) Clause 42.3 of the Contract provided:

Subject to the provisions of the Contract within 14 days after the issue by the Superintendent of the Superintendent's payment schedule, the Principal shall pay to the Contractor or the Contractor to the Principal, as the case may be, an amount not less than the amount shown in the payment schedule as due …

(d) One of the provisions dealing with when payment is to be made is Clause 43(b) and (c) of the Contract which provided:

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(b) Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1 and before the Principal makes that payment to the Contractor, the Contractor shall give to the Superintendent a statutory declaration by the Contractor, or where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of work under the Contract.

(c) If the Contractor fails –

(i) within five days after a request by the Superintendent under Clause 43(a), to provide the statutory declaration, or the documentary evidence (as the case may be) required by Clause 43; or

(ii) to comply with Clause 43(b),

Notwithstanding Clause 42.1, but subject to the next paragraph, the Contractor is not entitled to payment and the Principal is not obliged to make payment of moneys to the Contractor until the statutory declaration or documentary evidence (as the case may be) is received by the Superintendent.

If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall pay to the Contractor the amount in excess of the maximum amount.`

(e) It was submitted that the Contractor failed to provide a statutory declaration as is required by Clause 43(b) of the Contract. It was submitted that, although Andeco provided statutory declarations purportedly in compliance with clause 43, it failed to comply with the clause because it provided statutory declarations in relation to payment of subcontractors that were contradicted by the statutory declarations provided by the subcontractors themselves.

(f) Accordingly, it was contended that no payment was due.

196 Metacorp mounted a second argument as to why it was that no payment was due from it. This relied upon clause 44.4 of the Contract which provided:

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of –

the date upon which the Contractor shows reasonable;

the date upon which the Principal takes action under Clause 44.4(a) or (b); or

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the date which is 7 days after the last day for showing cause in the notice under clause 44.2.

197 The second argument relied upon the evidence of Mr Au that a notice to show cause was served on 19 November 2009 which had the effect of suspending Metacorp's payment obligations.

198 Accordingly, it was contended by Metacorp that any obligations it may otherwise have had in respect of the purported payment claim had not crystallised by reason of:

(a) Andeco's failure to comply with clause 43 in that it provided statutory declarations in relation to payment of subcontractors that were contradicted by the statutory declarations provided by the subcontractors themselves; and

(b) the operation of clause 44.4.

199 In those circumstances, the finding that Andeco was entitled to lodge an adjudication application under s.18(1)(a)(ii) of the Act in respect of Payment Claim 15, presupposed that Metacorp's payment obligations under the Act had crystallised, the date for payment had passed, and the payment claim remained unpaid. As this had not occurred, it was submitted that the Adjudication Determination based on Payment Claim 15, was:

(a) contrary to law;

(b) contains an error of law on the face of the record; and

(c) such failure further constitutes "Wednesbury unreasonableness" in that no Adjudicator in the Adjudicator's position could reasonably have determined that he had jurisdiction given the matters put before him.

Alternative Basis for the Adjudication

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200 It was submitted by Andeco that the short answer to Metacorp's submission on Ground 3 is that there was an alternative basis for the jurisdiction of the Adjudication founded upon s. 18(a)(i) of the Act.

201 Although in its adjudication application Andeco said that it sought the adjudicati on of its payment claim pursuant to s. 18(a)(ii) (because the respondent failed to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount), another basis was also available to it on the material before the Adjudicator, and this was under s. 18(a)(i) (because the scheduled amount indicated in the payment claim was less than the claimed amount indicated in the payment claim).

202 It was submitted that jurisdiction was in fact conferred on the Adjudicator because the claimed amount in Payment Claim 15 amounted to $549,734.64 whereas the amount certified in the relevant Payment Schedule provided by Metacorp was $212,513.00.

203 I am satisfied that the Adjudicator had jurisdiction conferred upon him by s. 18(a)(i) of the Act.

Clause 43(b) of the Contract

204 In the alternative, if the foundation for the jurisdiction of the Adjudicator springs from s. 18 (1)(ii), in the proceeding before me, Metacorp has failed to discharge the evidentiary burden which rested upon it to establish that the pre-condition to payment provided by clause 43(b) of the Contract was not satisfied.

205 The Adjudicator, having considered the Adjudication Response provided by Metacorp which articulated its submissions, rejected its arguments. He found as follows on the issue: "I have read clause 43 of the GCC [the Contract]. I note the Claimant's submission that it received no request from the Superintendent to provide a statutory declaration as is required by *clause 43(a)*."[49]

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49 Emphasis added.

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206 It is clear, however, that the Adjudicator proceeded to determine the issue, not on the basis of Metacorp's Adjudication Response which relied upon clause 43(b) of the contract, but rather upon clause 43(a). No doubt the genesis of this error was the further submission provided by Andeco which is sent to the Adjudicator and to Metacorp by facsimile transmission dated 23 December 2009. The further submission recited clause 43(a) which provided that before the principal makes each payment to the Contractor, the Superintendent may …. in writing request the Contractor to give the Superintendent the relevant statutory declaration. The further submission then stated: "No such request was made by the Superintendent and clause 43 simply has no application."

207 However, the Adjudicator did not proceed to consider and determine Metacorp's submission made under clause 43(b) of the Contract.

208 In the proceeding before me, I am obliged to consider the evidence before me in determining the question of jurisdictional error.

209 A statutory declaration was provided by Mr Nadinic to the Superintendent pursuant to the Contract by email transmission dated 5 November 2009. It was in the following form:

> STATUTORY DECLARATION
>
> I, **FRANK NADINIC** of **60 CANTERBURY ROAD TOORAK** do solemnly and sincerely declare as follows:
>
> I am the contractor/builder or and authorized employee of the contractor/builder entitled to make the claim for progress payment as detailed above. That to the best of my knowledge and belief having made all reasonable enquiries, at this date -25 October 2009.
>
> All workmen who are or at anytime have been engaged on the work under the Contract have been paid in full amounts which have become due to them by virtue of their employment on the work under the Contract as wages and allowances of every king required to be paid by or under any statue, ordinance of subordinate legislation, or by any relevant award, determination, judgment or order of an competent court, board, commission or other industrial tribunal or by any relevant industrial agreement that is in force in the State in which the work under the Contract has been carried our and to the latest date at which such wages and allowances are payable.
>
> All sub-contractors or suppliers of materials who are or at any time have

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> been engaged on the work under the Contract have been paid in full all monies which have become payable to the sub-contract or to the supplier of materials under the terms of agreement for supply.
>
> No disputes exist with workmen, cub-contractors or suppliers.
>
> *There is a current dispute with the Mechanical Contractor. (hand written)*
>
> All insurances required under the Contract are current and all premiums have been paid.
>
> I ACKNOWLEDGE that this declaration is true and correct and I make it in the belief that a person making a false declaration is liable to the penalties of perjury.

210 Mr Nadinic's statutory declaration, on its face, purported reasonably to comply with the requirements of clause 43(b) of the Contract, and *prima facie*, satisfied the condition.

211 The Superintendent was apparently satisfied with Mr Nadinic's statutory declaration provided to him, for on 9 November 2009 he issued the Payment Schedule in response to Payment Claim 15.

212 However, a short time later the Superintendent took issue with the statutory declaration in a letter to Andeco dated 23 November 2009 which relevantly said:

> PROGRESS PAYMENT CERTIFICATE No. 15
> MIXED USE DEVELOPMENT
> 16-28 WRECKYN STREET NORTH MELBOURNE
> Statutory Declarations from a number of subcontractors have been sent to the Principal, Metacorp Australia Pty Ltd, and have been forwarded on to us. These declarations outline in detail the amounts outstanding of subcontractor payments extending back over some months and highlight the gross misrepresentation of the situation presented in Andeco's own Statutory Declaration (attached to Claim No. 15 and dated 5 November 2009) and in previous declarations.
>
> Whilst we acknowledge that details of each of the subcontracts remain between Andeco and the subcontractors, it is clear from the subcontractor's declarations that substantial amounts have not been paid from previous payments to Andeco.
>
> Earlier assurances by Andeco to our office that subcontractors have been paid in accordance with what they were due now appear to be without foundation as some subcontractors have not received any payment for three or more months.
>
> The only dispute raised by Andeco in the Statutory Declarations attached to the Progress Claim No. 14 and No. 15 was with the Mechanical Contractor,

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> which infers that there were no other issues prevailing to preclude payments to any other subcontractors.
>
> The statutory declaration required in Clause 42.1(i) of the Contract is an important pre-condition of any payment certificate being issued by our office.
>
> The evidence presented by the subcontractors' declarations makes it abundantly clear that this pre-condition fro the issue by our office of the payment certificate has been abrogated or not complied with under the terms of the contract.
>
> Accordingly, until a compliant statutory declaration is submitted by Andeco properly and truthfully recording that all previous required payments to subcontractors have been made, we are unable to provide a progress claim certificate for anything other than for zero payment due to this non-compliance.
>
> We further advise that Progress Claim Certificate No. 15 (REVISED) was therefore issued in error on the basis that the submitted Statutory Declaration was true and correct.
>
> In accordance with Clause 42.12, we now correct this error and enclose our Progress Claim Certificate No. 15 for your records. We will review the current claim when a true and correct statutory declaration is received.

Attached to the letter was a progress claim certificate certifying that, in relation to Payment Claim 15 the sum of $0 was authorised for payment.

213 The matter was also addressed in Metacorp's Adjudication Response provided to the Adjudicator and to Andeco on 15 December 2009. It attached to its Adjudication Response a number of statutory declarations from subcontractors, and submitted:

> (vii) Further, the due date for payment only arises where the Claimant has provided a statutory declaration in accordance with clause 43 of the Contract. The Claimant still has not done so and indeed cannot do so as *"all subcontractors have [not] been paid all moneys due and payable to them in respect of work under the Contract"*.
>
> (viii) In this respect, we draw to your attention the statutory declarations provided by various subcontractors and contained behind tab 5, the reconciliation report prepared by CPS, the Superintendent's letter to the Claimant dated 23 November 2009 and the Claimant's own letter of 25 November 2009 (refer tabs 2, 3, 4 and 5).

214 The statutory declarations which were supplied with the Adjudication Response were provided by Coldflow Airconditioning Pty Ltd; Mt & I McGeary; Contemporary Cladding Systems (AUST) Pty Ltd; Bayside Plastering Pty Ltd; Chamion Structures (Aust) Pty Ltd; and Jetfire Fire Protection Pty Ltd.

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215 Metacorp did not, however, put on any additional evidence in support of the claims such as the accounting records of the sub-contractors; the terms of the sub-contracts as to payment providing the contractual basis for the payments alleged to be due; whether they had complied with all of the relevant terms of their sub-contracts so as to provide an entitlement to payment; the description, quantum and quality of the work performed by the sub-contractors to justify payment; and the circumstances in which they ceased work on the project and whether this provided a disentitlement to payment.

216 The information provided in the statutory declarations was not sufficient to assess the claims which were made. Indeed, the statutory declarations in essence consisted of claims for payment which were not particularised, save for statements by the sub-contractors in each case that monies were due to them by Andeco, and quantifying those monies, and in some cases specifying the invoice numbers and dates when the monies were said to have fallen due.

217 Further, at the trial of the originating motion, Metacorp did not seek expand on this body of evidence. It did not subpoena any witness to attend for examination on the sub-contractors' statutory declarations or to produce documents. Although the statutory declarations of the sub-contractors were admissible in the proceeding before the Court under the exception to the hearsay rule contained in s. 69(2) *Evidence Act 2008* (Vic), no witness was called to verify the material contained in them and the evidence could not be tested. In this circumstance the Court was left with the evidence of the sub-contractors in a form not further advanced than the statements contained in statutory declarations.

218 *Prima facie*, Mr Nadinic's statutory declaration dated 5 November 2009 satisfied the condition found in clause 43(b) of the Contract thereby entitling Andeco to payment on its Payment Claim 15. Metacorp sought to challenge Mr Nadinic's statutory declaration and in so doing, it assumed the evidentiary burden in the trial to establish, on the evidence, that the statutory declaration provided did not comply with clause 43(b). Metacorp sought to do this by alleging that the statutory

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declaration provided by Andeco was not bona fide because it misrepresented the true position. This is a serious allegation which invites application of the principles in *Briginshaw v Briginshaw* (*"Briginshaw"*)[50] where Dixon J said:[51]

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

219 In the end, the Court was left in a position where it cannot not be positively satisfied on the balance of probabilities, and to the requisite degree bearing in mind the principles of *Briginshaw*, that Mr Nadinic's statutory declaration dated 5 November 2009 was false.

220 Accordingly, I find on the evidence before me that the pre-condition in clause 43(b) of the Contract was satisfied by Andeco, and it was not disentitled to payment on Payment Claim 15 by reason of non-compliance with the condition.

Clause 44.4 of the Contract

221 Metacorp next contended that the due date for payment under Payment Claim 15 did not arise by reason of the operation of clause 44.4 of the Contract.

222 Clause 44.4 followed clauses 44.2 and 44.3 which made provision for the Principal to give the Contractor a written notice to show cause if the Contractor commits a substantial breach of contract. Clause 44.4 provided:

> 44.4 Rights of the Principal
>
> If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by notice in writing to the Contractor –
>
> (i) Take out of the hands of the Contractor the whole or part of

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50 (1938) 60 CLR 336.

51 *Supra* at 362.

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> the work remaining to be completed; or
>
> (ii) Terminate the Contract.
>
> Upon giving notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of –
>
> (i) The date upon which the Contractor shows reasonable cause;
>
> (ii) The date upon which the Principal takes action under Clause 44.4(a) or (b); or
>
> (iii) The date which is 7 days after the last day for showing cause in the notice under Clause 44.2.
>
> If the Principal exercises the right under Clause 44.4(a), the Contractor shall not be entitled to any further payment ***in respect of the work taken out of the hands of the Contractor*** unless a payment becomes due to the Contractor under Clause 44.6.[52] [Emphasis added]

223 The relevant facts relied upon by Metacorp on this issue were these: on 19 November 2009 Metacorp served a show cause notice upon Andeco under clause 44.2; Andeco failed to show reasonable cause why Metacorp should not exercise its rights under clause 44.4; on 1 December 2009 Metacrop took the works out of Andeco's hands under clause 44.4(a).

224 On these facts, Metacorp submitted that it was entitled to and did, exercise its right under clause 44.4(a), and in these circumstances and pursuant to the concluding paragraph of clause 44.4, Andeco was not entitled to any further payment in respect of the work taken out of its hands.

Adjudicator's Finding on Clause 44.4

225 As to the clause 44.4 contention of Metacorp, the Adjudicator found that Metacorp did not take the Works out of the hands of Andeco until 1 December 2009. This was after the due date for payment of Payment Claim 15 which fell on 23 November 2009. The Adjudicator found that "on this basis alone, the Respondent cannot take refuge behind clause 44.4 to refuse payment."

226 A further fact which completes the chain of reasoning of the Adjudicator, is that Payment Claim 15 related only to works which Andeco claimed had been completed

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52 Emphasis added.

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prior to the relevant reference date, being 25 October 2009. It did not seek any further payment for work which was subsequently taken out of its hands on 1 December 2009.

Analysis of the Clause 44.4 Point

227 In my opinion, the term "work", as it is used in the last paragraph in clause 44.4 is not to be confused with the term "Works" which is the subject of a specific definition in the dictionary found in clause 2 of the Contact. "Works" in the Contract is defined to mean "the whole of the work to be executed in accordance with the contract, including variations provided for by the contract, which by the contract is to be handed over to the Principal." The parties did not use the term "Works" in the last paragraph of clause 44.4. Being faithful to the objective theory of the construction of contracts, in my opinion, it was not intended that "works" as it was used in the last paragraph was intended to cover the whole of the work to be executed in accordance with the Contract. Properly construed, the term only applied to works which are undertaken under the Contract after the time when those works were taken out of the hands of the contractor.

228 This construction is confirmed by clause 44.6 of the Contract which provides a mechanism for adjustment of what falls due for payment on completion of the work taken out of the hands of the Contractor under clause 44.4(a). By clause 44.6, provision is made for the cost of the work completed by another contractor to be ascertained and if it is greater than the amount which would have been paid to the original contractor for the work, the difference is to be paid by the original contractor to the Principal. Clause 44.6 relevantly provides:

> When **work taken out of the hands of the Contractor under Clause 44.4(a)** is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying the amount of that cost.
>
> If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by

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> the Contractor, the difference shall be a debt due to the Contractor from the Principal.[53] [Emphasis added]

229 The concept of "work taken out of the hands of the Contactor", as it is used in clause 44.6, is confined to that work undertaken by the replacement contractor. The same phrase, as it is used in clause 44.4, bears the same meaning. In other words, the phrase "work taken out of the hands of the Contractor" as it is used in clause 44.4, is confined to future work undertaken by others, not work undertaken by the original contractor. By clause 44.4 the original contractor is not entitled to payment for such future work.

230 However, clause 44.4 has no application to work previously undertaken by the original contractor, in respect of which a payment claim under the Act is made.

Conclusion of the Clause 44.4 Point

231 Accordingly, the fact that work was taken out of the hands of Andeco on 1 December 2009 pursuant to clause 44.4(a) of the Contract, has no bearing on its entitlement to payment for work undertaken pursuant to the Contract prior to that time.

232 For this reason, the Adjudicator was correct in his finding on the issue, and there is no substance in the point.

Ground 4 - Failure to afford procedural fairness (natural justice)

Relevant Principles

233 The question which arises under Ground 4 is whether there has been a material denial of the measure of natural justice (or procedural fairness) that the Act entitles a respondent in the Metacorp's position to receive.

234 The principles of procedural fairness as they should be applied to the Act were considered in *Grocon Constructors v Planit Cocciardi Joint Venture [No 2]* ("*Grocon*")[54].

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53 Emphasis added.

54 [2009] VSC 426 at [127 – 144].

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Two central themes emerge: adaptation of the principles of natural justice to the circumstances of each case and the materiality of the alleged breach.[55]

235 As to adaptation, the observations of Tucker LJ in *Russell v Duke of Norfolk*[56] are here repeated:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

236 To this may be added the observation of Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*: [57]

> What the law requires in the discharge of a quasi-judicial function is judicial fairness ... what is fair in a given situation depends upon the circumstances.

237 Further, it was said in *Grocon*:[58]

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

238 A similar approach was later adopted by McDougall J in *Watpac Constructions v Austin Group*,[59] where his Honour said:[60]

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55 [2009] VSC 426 .
56 [1949] 1 All ER 109 at 188.
57 (1963) 113 CLR 475 at 504.
58 [2009] VSC 426 at [143 – 144].
59 [2010] NSWSC 168.

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> Any entitlement to natural justice must accommodate the scheme of the Act, including the extremely compressed timetable provided for the submission of payment schedules, adjudication applications, and adjudication responses; and the limited time (subject to the consent of the parties, which they may give or withhold at their will) for an adjudicator to determine an application. It must also accommodate the fact that, in many cases, claimants and respondents will prepare their documents themselves, and will not avail themselves of legal advice in doing so.

239 In *Re Minister for Immigration and Multicultural affairs; Ex Parte Lam*,[61] Gleeson CJ said that procedural fairness is not an abstract concept but is instead "essentially practical" and that "the concern of the law is to avoid practical injustice."

240 To similar effect were the observations of Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[62] it was said that the court should not undertake the task of "combing through the words of the decision-maker with a fine appellate tooth-comb [sic], against the prospect that a verbal slip will be found warranting" the intervention of the court.

241 As to the concept of 'materiality', this has been introduced and established as a governing consideration. McDougall J pointed out in *John Goss Projects Pty Ltd v Leighton Contractors*:[63] "the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case." His Honour proceeded to explain that the principles of natural justice "could not… require an adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision". McDougall J later observed in *Watpac*[64] that his approach was "consistent with the reference by Hodgson JA in *Brodyn* to substantial denial… of natural justice."

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60 *Ibid* at [142].

61 (2003) 195 ALR 502 at [37].

62 (1996) 185 CLR 259 at 291.

63 (2006) 66 NSWLR 707 at 716 [42]; cited in *Watpac Constructions v Austin Group* [2010] NSWSC 168 at [144].

64 *Ibid* at [145].

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242 In concluding his analysis of the principles of natural justice as they apply to the legislation, in *Watpac*, McDougall J said in observations with which I respectfully agree:[65]

> I accept, however, that the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the point in question. But it remains the case, I think, that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point.

243 It is with these principles in mind that I approach the issues of procedural fairness raised in this proceeding. In considering the facts of this case, it is a matter of realistically balancing the objects and purposes of the Act, the nature of the procedure it prescribes and its consequences, with the need to ensure an adequate measure of fairness in undertaking the processes contemplated, and the consequences for a party if they are not.

Metacorp's Submissions

244 At the time of accepting his nomination and embarking upon the Adjudication Application, the Adjudicator had in his possession:

(a) The Payment Claim 15 prepared by Andeco dated 25 October 2009 claiming $499,758.76: s.14; and

(b) The Payment Schedule prepared by Metacorp dated 9 November 2009 allowing $212,513.00: s. 15.

245 To these, the following additional documents were filed with the Adjudicator and served on the opposite party:

(c) The Adjudication Application and Submissions in support of its application prepared by Andeco dated 7 December 2009: s. 18;

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65 *Ibid* at [147].

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(d) The Adjudication Response prepared by Metacorp dated 15 December 2009: s. 21; and

(e) The Claimant's further submissions to the Adjudication Response prepared by Andeco dated 23 December 2009: s.21(2B).

246 It was upon these documents that the Adjudicator considered the Adjudication Application and delivered his Adjudication Determination dated 7 January 2010.

247 What Metacorp claims in this case was that it was denied procedural fairness in that it was denied the opportunity to file with the Adjudicator a further response submission to the Claimant's further submissions. For convenience I will simply call the document sought by Metacorp as its "Further Response."

248 Metacorp submitted that its entitlement to file the Further Response arose in the following way:

249 By his letter dated 21 December, 2009, the Adjudicator, pursuant to s.21(2B) of the Act, afforded Andeco an opportunity to respond to certain aspects of the Adjudication Response delivered by Metacorp dated 15 December, 2009. The Adjudication Response raised the jurisdictional arguments referred to in Grounds 1,2 and 3 of these reasons, which were matters not addressed in Metacorp's Payment Schedule as grounds for withholding payment to Andeco. This circumstance compelled the Adjudicator to serve the notice required by s.21(2B) upon Andeco, giving it 2 business days to lodge a response to those reasons with the adjudicator, which he duly did. The Adjudicator also properly advised Andeco that any further submissions were to be delivered by 23 December, 2009.

250 On 23 December, 2009 Andeco delivered its further submissions to the Adjudication Response. Metacorp alleged that this document ranged over a wide variety of issues beyond the parameters prescribed by s. 21(2B). By way of example, Metacorp said that:

> ….in respect of ground 3, on no basis is that a matter that could have been

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> raised in any document that may have been prepared in response to the asserted payment claim as it relates to events that occurred subsequent to the preparation of that document. Accordingly the detailed submissions put regarding that issue can on no view be considered as falling within the ambit of s.21(2B). Similar observations can be made in respect of each of the other three grounds.

251 On 23 December, 2009 by facsimile letter of that date sent to the Adjudicator, Metacorp requested permission to submit a Further Response in response to the further submissions it received earlier that day from Andeco. The Adjudicator did not reply to the request in Metacorp's letter and instead proceeded to make his Adjudication Determination.

252 Metacorp said that:

> Had that opportunity been made available [to file Further Submissions], Metacorp could have amongst other things addressed the detailed submissions put in respect of each of the three grounds identified above which raised numerous new matters not previously put on behalf of Andeco.

253 In the premises, Metacorp contended:

(a) the Adjudicator had taken into account an irrelevant consideration (namely the 23 December submissions placed before him by the Andeco) amounting to jurisdictional error; and

(b) the Adjudicator had failed to accord procedural fairness to Metacorp in that he had made his Adjudication Determination without affording Metacorp an opportunity to be heard in respect of the 23 December 2009 submissions.

Analysis of the Procedural Fairness Submission

254 The starting point in the analysis of Metacorp's procedural fairness submission is its Payment Schedule dated 9 November 2009. This document complied with s. 15(2) of the Act in that it (a) identified the payment claim to which it related; and (b) indicated the amount of the payment that the respondent proposed to make ($212,513.00). The document in its one page set out calculations showing how the sum of $212,513.00 was arrived at, by reference to notations of the assessments undertaken under each trade description, and the percentage complete as assessed in

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each category. In other words, the Payment Schedule provided by Metacorp was purely 'assessment based', although it complied in every respect with the requirements of s. 15 of the Act.

255 The Adjudication Application and Submissions in support of its application prepared by Andeco dated 7 December 2009, after setting out formal matters such as the making of Payment Claim 15 and the provision of the Payment Schedule, then proceeded to analyse Metacorp's assessment as to the sum that was due and owing. Andeco did not address any jurisdictional matters as to the validity of the Payment Claim 15 because to that date, no such issue had been raised by Metacorp.

256 However, by the Adjudication Response prepared by Metacorp dated 15 December 2009, the landscape changed. The Respondent submitted that the "Adjudicator has no jurisdiction other than to find that he does not have jurisdiction to issue a determination on the quantum of the Purported Claim". It submitted in this respect that:

> The Claimant cannot satisfy those basis and essential requirements as the Purported Claim:
>
> 1. was not served on and from the reference date as required by s 9 of the Act;
>
> 2. was not served on the person liable to make the payment as required by clause 14(1) of the Act;
>
> 3. was not served in accordance with s 50 of the Act;
>
> 4. the due date for payment had not arisen as is necessary for an adjudication application under s 16(2) [*sic*. S. 18(1)], which the Purported Application is: and
>
> 5. the Purported Claim has been superseded.

257 Metacorp then proceeded to make its jurisdictional submissions in some detail, following the contentions dealt with under Grounds 1, 2 and 3 of these reasons, together with one further submission which was not included in these Grounds.

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258 In the alternative, Metacorp submitted in its Adjudication Response that, in the event that the Adjudicator did consider that he had jurisdiction, "notwithstanding the Claimant's failure to comply with the basic and essential requirements of the Act", then upon the assessment as submitted, the Adjudicator "should find that no amount is payable to the Claimant."

259 Metacorp annexed to its Adjudication Response the letter from the Superintendent dated 23 November 2009 to Andeco dealing with Mr Nadinic's allegedly false statutory declaration of 5 November 2009; a letter dated 15 December 2009 from a company who says that he conducted an "audit and review process" resulting in a finding that some $1,624,062.00 was outstanding to the subcontractors; the 6 statutory declarations signed by subcontractors on the project which have already been referred to; a letter dated 9 December 2009 from Metacorp to Andeco's solicitors alleging that the "basic and essential requirements" of the Act had not been complied with and inviting a withdrawal of the Adjudication Application; a letter in reply from Andeco's solicitors; and copies of the *Brodyn* and *Emag* decisions.

260 Andeco's response to the Adjudication Response contained in its further submissions dated 23 December 2009 was then filed on the Adjudicator and served on Metacorp. Andeco's further submissions dealt with the two major items raised in Metacorp's Adjudication Response: the alleged lack of jurisdiction, and the quantification of the claim.

261 As to the jurisdiction issue, Andeco made submissions directed to each of the contentions dealt with under Grounds 1, 2 and 3 of these reasons, in direct response to the matters raised by Metacorp in its Adjudication Response. These matters occupied a little over three pages in text which spanned a little over five pages in total.

262 It is correct to say that some matters raised in Andeco's further submissions to the Adjudication Response had not appeared earlier in any of the material supplied to the Adjudicator. However, they were provided in direct response to the arguments

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as to jurisdiction mounted by Metacorp in its Adjudication Response, which had not appeared in its Payment Schedule. As such, Andeco's further submissions were clearly within the parameters invited by the Adjudicator pursuant to s. 21(2B) of the Act and were not improperly received or considered by the Adjudicator.

263 As to matters which were addressed for the first time by Andeco in its further submissions to the Adjudication Response, these were presented in direct response to the allegations already raised by Metacorp, which earlier had the opportunity to present its full case on the matter in its Adjudication Response. In the context of an adjudication application under the Act, operating as it does within tight time constraints, there must be closure at some point where it is considered that a party has had an adequate opportunity to present its case. With one exception, which I refer to below, Metacorp had an adequate opportunity to present its case, and was not denied procedural fairness by not having the opportunity to reframe or expand on arguments which it had already put, or present further evidence on the points it had already raised.

264 The alleged falsity of Mr Nadinic's statutory declaration was an example of an issue where Metacorp was not denied procedural fairness by not having the opportunity to reframe or expand on arguments which it had already put, or present further evidence on the points it had already raised. The issue was raised directly in its Adjudication Response. It made submissions on the matter and presented documentary evidence which included 6 statutory declarations from sub-contractors alleging payments to them from Andeco remained outstanding. These matters were responded to in Andeco's Further Submissions to the Adjudication Response where submissions on the matter were made, which included pointing to what it said were shortcomings in Metacorp's evidence on the issue. Metacorp had its opportunity to present its full case on the matter. It was not denied natural justice in the context of an adjudication application conducted under the Act by refusing it an opportunity to present fresh evidence on the point, particularly where there is no evidence that any

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such further material was not available to it when it prepared its Adjudication Response.

265 In Andeco's Further Submissions to the Adjudication Response there were two examples of a new arguments raised, which turned out to be immaterial in the Adjudication Determination which was ultimately made.

266 First, Andeco raised the issue of the effect of the Payment Schedule issued by Metacorp. It submitted that, by reason of the scheduled sum allowed by Metacorp not being paid, jurisdiction was conferred on the Adjudicator to hear and determine the Adjudication Application pursuant to s. 18(1)(a)(ii) of the Act. However, the Adjudicator assumed jurisdiction, not under s. 18(1)(a)(ii) of the Act, but under s. 18(1)(a)(i), by reason of the scheduled amount allowed being less than the claim.[66] This finding, on the facts, was unassailable. There was nothing which Metacorp could have put on the point in question.

267 Second, Andeco, in its further submissions to the Adjudication Response, submitted: "Further and alternatively, by issuing a Payment Schedule, in the absence of any complaint about jurisdiction, Metacorp has waived its right to object to the claim on jurisdictional grounds." However, the Adjudicator proceeded to hear and determine each of Metacorp's jurisdictional arguments on their merits. The point made by Andeco went nowhere and was not material.

268 Further, with the exception of one issue referred to below, I am satisfied that the matters of law sought to be raised by Metacorp in its proposed Further Response, although material to the issues dealt with in the Adjudication Determination, were not submissions that could have been put which might have had some prospect of changing the adjudicator's mind. Save for the one matter which I refer to below, the legal arguments as to jurisdiction were fundamentally flawed and there was nothing which could have been properly put further on the matters in reply by Metacorp. A party is not denied natural justice in the context of an Adjudication Application

66 See: paragraph 45 of the Adjudicator's Determination.

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under the Act if it is excluded from presenting further agument on matters which it has already put, but which have no merit because the foundation for the submissions put have no proper basis.

269 As to the issue of the agency of Superintendent, this stands in a different position. Although I have found on the balance of probabilities that the Superintendent was the agent of Metacorp for the purposes of being served with a payment claim under the Act, this is a finding of fact upon which reasonable minds may differ, particularly when invited to consider a different body of evidence.

270 Further, and unlike the question of the falsity of Mr Nadinic's statutory declaration for example, the agency issue was clearly a new issue which had not been previously canvassed in any of the submissions which had passed between the parties. The issue involved new questions of fact and law which Metacorp was not given the opportunity to address.

271 Further, it is clear that the agency of the Superintendent was the subject of relevant findings made by the Adjudicator in his Adjudication Determination which were germane to his decision. The Adjudicator made the following findings on the agency issue:[67]

> The Respondent says that the Respondent should have been served and not the Superintendent in order for the Claimant to have complied with the provisions section 14(1) of the Act. The Respondent says it was not provided directly with a copy of the Payment Claim until it received the Adjudication Application
>
> If this is correct, the Superintendent must not have provided a copy of the Payment Claim or the Payment Schedule to the Respondent. I note there is no requirement for the Superintendent to do so in order to comply with clause 42.2(c) of the Contract.
>
> The Respondent says that "neither contractually nor pursuant to the Act is [the Superintendent] empowered to receive Payment Claims on behalf of the Respondent". This is clearly incorrect. The Contract provides at clause 42.1 of the GCC that "the Contractor shall deliver to *the Superintendent* [my italics] claim for payment". The Contract clearly empowers the Superintendent to act on behalf of the Respondent in receiving, assessing and responding to Payment Claims.

67 Adjudication Determination paragraphs 75 – 79.

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> I am satisfied that the Superintendent is empowered by the Contract to act as the Respondent's agent when dealing with Payment Claims. Clause 42.2 of the Contract confirms this where it says: "For the avoidance of doubt in issuing a payment schedule to the Contractor, the Superintendent *does so on behalf of and as agent* [my italics] of the Principal".
>
> I am satisfied that the service of the Payment Claim on the Superintendent by the Claimant is not a breach of section 14(1) of the Act.

272 It is equally clear that the Adjudicator received Metacorp's letter requesting the opportunity to deliver a Futher Response, and that the Adjudicator determined that he ought not to receive the further proposed submissions from Metacorp. He said in his Adjudication Determination on the matter:[68]

> In an unsolicited letter dated 22 December 2009 the Respondent expressed the view, in relation to the Claimant's entitlement to respond to the Section 21(2B) Notice dated 21 December 2009, that the Act does not entitle the Claimant "to respond to all matters in the Adjudication Response", only those matters which were identified by the Adjudicator as being reasons not contained in the Payment Schedule.
>
> Pursuant to the Act, I am not obliged to consider unsolicited correspondence from either party. Even if I was so obliged, I do not accept the Respondent's submissions and I would reject them. As I have noted above, no reasons were provided in the Payment Schedule, only the Respondent's assessments of the Claimant's entitlements based on what the Superintendent assessed to be the percentages of the items of Works completed as at the date of the Payment Claim.

273 However, in my opinion, and with due respect to the Adjudicator, such an approach was misconceived. It put to one side the rules of procedural fairness which he was bound to apply.

274 Reference is made to the statutory direction found in s. 22(5) of the Act, which provides in mandatory terms:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator-
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions;

275 I do not consider that the s. 22(5)(a) requirement directly applies to submissions provided by a party pursuant to s. 22(2B). The latter provision establishes a process

68 Adjudication Determination paragraphs 64 – 65.

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which is enlivened if, as in this case, the adjudication response provided by a respondent includes any reasons for withholding payment that were not included in its payment schedule. In that circumstance, the adjudicator *must* serve the appropriate notice on the claimant giving that party an opportunity to lodge a response within 2 business days. In other words, the s. 22(2B) procedure is a mandatory process. However, the requirment under s. 22(5)(a) directly applies in circumstances where an adjudicator, *as a matter of his or her discretion*, requests further written submissions from either party. In that case, the Adjudicator *must* give the other party an opportunity to comment on those submissions.

276 In this case, the claimant was invited to provide further submissions pursuant to s. 22(2B) of the Act, not s. 22(5)(a).

277 Nevertheless, although s. 22(2B) does not in its terms oblige an Adjudicator to give the other party an opportunity to comment on the submissions supplied by a claimant pursuant to the statutory notice, there may be circumstances where the common law rules of procedural fairness, which sit alongside the Act, demand that this occur. Such circumstances may arise in a case where:

(a) the s. 22(2B) response provided by a claimant raises a new matter of fact or law (or both) which has not been previously canvassed by the parties in the documents provided to the Adjudicator in the course of the Adjudication Application; and

(b) where the matter is material to the determination which the Adjudicator is required to make.

Conclusion as to Procedural Fairness

278 On this issue, I conclude that there was a breach of the rules of procedural fairness.

279 The agency question was a new issue placed before the Adjudicator for the first time by the claimant in its s. 22(2B) response. It was a matter which was material to the way the Adjudicator decided the application, and, being principally a factual matter,

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submissions and evidence could have been advanced by the respondent which might have had some prospect of changing the adjudicator's mind on the point, namely as to whether the Superintendent was or was not the agent of the principal, Metacorp, for the purposes of receiving service of a payment claim pursuant to s. 14(1) of the Act. Yet the respondent, Metacorp, was not invited to deal with the new point.

A Further Jurisdictional Point

280 Metacorp sought to raise a further jurisdictional point in its submissions before the Court.

281 Although no application was sought to amend its originating motion dated 19 January 2010 to include any further ground, I am satisfied that there is nothing in this new point, and even if an application to amend the Originating Motion were to have been successful, I would have determined against Metacorp on the matter.

282 In short, Metacorp contended on this further ground that:

(a) On 20 January 2010 Metacorp was served with a second adjudication application by Andeco. That adjudication application was in respect of progress claim no. 17;

(b) By notice of acceptence of appointment of an adjudicator dated 21 January 2010 Mr Sean O'Sullivan accepted his nomionation as the adjudicator;

(c) The notice fo acceptance included the following clause 17: "*....if the Claimant wishes to terminate the adjudication (otherwise than by consent mutually advised in writing to the Adjudicator) the Adjudicator may make a determination that the Claimant is not entitled to any progress payment ans is liable for 100% of the adjudication fees;*"

(d) By its Adjudication Response dated 28 January 2010, Metacorp responded to, what Metacorp described as "the reformulated claim" identifying what it said was Andeco's failure to comply with the basic and essential requirements of

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the Act in relation to progress claim 17, its point being that the claim was served on the Superintendent, and not on the Principal;

(e) Andeco then sought to withdraw the application for adjudication in respect of progress claim 17;

(f) Metacorp did not consent to the withdrawal of the adjudication application by Andeco;

(g) The adjudicator failed to issue any adjudication application, and instructed its solicitors to write a letter to the nominating authority requesting the adjudicator to issue an adjudication determination which it claimed it was entitled to receive;

(h) Andeco, through its solicitors, claimed that in the circumstances, Metacorp was not entitled to receive an adjudication determination.

283 On these facts, Metacorp claimed that it was entitled to an adjudication determination on progress claim 17 which ought to have detemined, by reason of the withdrawal of the adjudication application, that the amount due to Andeco was as assessed by Metacorp under its payment schedule, namely $NIL. Metacorp claimed further that because progress claim 17 included claims to common sums that were included in Progress Claim 15, the $NIL determination from the adjudicator to which it claimed to be entitled, would result in a $NIL determination being made in respect of the sums claimed under Payment Claim 15. On this basis it was claimed that, other than an entitlement to interest, Andeco was not entitled to any adjudicated sum in its favour under Payment Claim 15.

284 This submission is to be rejected.

285 Payment Claim 15 is a discrete claim from progress claim 17. The subsequent service of progress claim 17, the initiation of the adjudication application in respect of it, and the subsequent disposition of that application have no bearing on any entitlement which Andeco may have under the Act arising from Payment Claim 15.

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286 Further, if the second payment claim amounts to a resubmission of a claim that has been the subject of an earlier claim and adjudication, which appears to be the position advanced by Metacorp, then, to the extent that the second payment claim involves repetition of an earlier claim and includes claims in respect of work that has been the subject of a prior adjudication, the second payment claim is invalid. See: *Watpac Constructions v Austin Group*.[69]

287 Accordingly, the second progress claim 17, being invalid to the extent that it relates to work which is the subject of Payment Claim 15, cannot operate to affect the validity of Payment Claim 15.

Conclusion and Orders

288 I have found that the Adjudicator in this case, and in one respect, failed to abide by the rules of natural justice and afford procedural fairness to Metacorp.

289 However, as has already been observed, the grant of relief in the nature of certiorari is discretionary. This was also emphasised by the Court of Appeal in *Garde-Wilson v Legal Serices Board*[70] in the context of a finding of a breach of natural justice at the hands of a tribunal. Further, as observed in *Ambridge Investments Pty Ltd v Baker and Ors*,[71] the Court has a discretion as the whether to grant or withhold declaratory relief, as it does with injunctive relief.

290 The question of relief was also considered recently by the Supreme Court of New South Wales in an application for judicial review under the New South Wales Act where a successful ground of review was founded upon a breach of natural justice on the part of an adjudicator. See: *Watpac Constructions v Austin Group*.[72]

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69 [2010] NSWSC 168 at [74] and [76] per McDougall J

70 (2008) 19 VR 398

71 [2010] VSC 59 at [61 – 74]

72 [2010] NSWSC 168; [2010] NSWSC 347

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291 The parties have not had the opportunity to address on the question of relief and the exercise of the discretion of the Court in the light of the findings made in these reasons. In particular, I have not heard submissions from the parties on the question as to whether orders giving effect to which or any of the following should be made:

(a) An order in the nature of certiorari quashing the Adjudication Determination and remitting the Adjudication Application back to the Adjudicator to be heard and determined in accordance with law;

(b) An order refusing relief and dismissing the originating motion on the basis that, remitting the Adjudication Application back to the Adjudicator would be futile by reason that the agency of the Superintendent has been determined under Ground 2 of these reasons, and the parties are bound by an issue estoppel [73] in relation to the point, or on any other basis;

(c) An order declaring the Adjudication Determination void; or

(d) An order refusing to grant declaratory relief in the exercise of the discretion of the Court.

292 I will refer the matter of relief for further argument on the next TEC directions day on Friday 21 May 2010 at 10.00am.

CERTIFICATE

I certify that this and the 76 preceding pages are a true copy of the reasons for Judgment of Vickery J of the Supreme Court of Victoria delivered on 17 May 2010.

DATED this seventeenth day of May 2010.

Associate to Justice Vickery

73 See: *Blair v Curran* (1939) 62 CLR 464 per Dixon J at 531 - 533

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