

# SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Bulk Water Supply Authority v McDonald Keen Group P/L & Anor* [2009] QSC 165

PARTIES: **QUEENSLAND BULK WATER SUPPLY AUTHORITY  
ABN 75 450 239 876  
(Applicant)**  
v  
**MCDONALD KEEN GROUP PTY LTD (IN  
LIQUIDATION) ACN 090 921 949  
(First Respondent)**  
and  
**PHILIP DAVENPORT  
(Second Respondent)**

FILE NO: BS 9365 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 June 2009

DELIVERED AT: Brisbane

HEARING DATE: 1, 2 June 2009

JUDGE: P Lyons J

ORDER: **1. Application dismissed.**

CATCHWORDS: **CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS –** Where construction contract to undertake rock excavation – Where the Second Respondent made an adjudication decision on a claim under the *Building & Construction Industry Payments Act 2004* (Qld) (*Payments Act*) – Where the Applicant has applied for a declaration that the adjudicator’s decision is void on the basis that there was no evidence on which the adjudicator could determine the amount of the claim – Whether the adjudicator failed to comply with the statutory provisions of the *Payments Act* – Whether the adjudicator failed to accord natural justice in the decision making process — Whether the adjudicator erred in taking into account a Facsimile in forming part of the decision about the contract.

**CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS –** Where the Applicant seeks an order that the judgment entered by the

First Respondent against the Applicant be set aside – Where in the alternative, the Applicant seeks a stay of execution of that judgment.

*Building & Construction Industry Payments Act 2004 (Qld)*, ss 21, 22, 23, 24, 25, 26, 27, 30, 31, 99 and 100.

*Judicial Review Act 1991 (Qld)*.

*Administrative Decisions (Judicial Reviews) Act 1977 (Cth)*.

*Migration Act 1958 (Cth)*, s474

*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223, considered

*BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409, cited

*Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, cited

*Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, considered

*Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72, considered

*Halkat Electrical Contractors v Holmwood Holdings Pty Ltd* [2006] NSWCA 125, considered

*Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, considered

*Holmwood Holdings v Halkat Electrical Contractors* [2005] NSWSC 1129, considered

*John Holland Pty Ltd v Roads and Traffic Authority of New Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd South Wales* [2007] NSWCA 19, cited

*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, applied

*Timwin Construction Pty Ltd v Façade Innovation Pty Ltd* [2005] NSWSC 548, considered

COUNSEL: R A Holt SC with P D Tucker for the Applicant  
J K Bond SC with M Ambrose for the Respondents

SOLICITORS: Minter Ellison for the Applicant  
Mullins Lawyers for the Respondents

[1] **P Lyons J:** On 20 June 2008, the Second Respondent made an adjudication decision on a claim under the *Building & Construction Industry Payments Act 2004* (Qld) (the *Payments Act*) by McDonald Keen Group Pty Ltd (*MKG*) against the Caloundra-Maroochydore Water Supply Board (now Queensland Bulk Water Supply Authority – (*QBWSA*)) in an amount of \$11,122,645.61. *QBWSA* contends that the decision was invalid, on a number of bases including a failure by the Second Respondent to comply with the statutory provisions of the *Payments Act* which conferred the adjudication power on him; a failure to accord natural justice;

and the fact that there was no evidence to justify the amount awarded. It seeks a declaration that the adjudication decision is void, and other relief.

### **Background**

- [2] In 2006, the Caloundra-Maroochy Water Supply Board was undertaking the construction of a 27 km pipeline in the Caloundra region. On 27 February 2008, by a Transfer Notice given pursuant to s 67(1) of the *Water Act 2000* (Qld), its assets and liabilities were transferred to *QBWSA*. For convenience, the Caloundra-Maroochy Water Supply Board will also be referred to as *QBWSA*.
- [3] *QBWSA* called for tenders for the construction of the pipeline, which involved excavation, the laying of the pipe, and the placing of backfill. A geotechnical report was provided to tenderers. It showed that some 190 test pits had been excavated with machinery, and that in 126 of those, rock had been encountered. The geotechnical report included the following statement:
- “In some areas however, where rock is massive with few joints or defects, production rates will be very low and blasting may be required. It is not possible to identify such areas from the investigations undertaken.”
- [4] *MKG* lodged a tender on 11 April 2006. With respect to excavation in rock, the tender included a provisional sum of \$40,000.
- [5] On 13 April 2006, *JWP* (the design engineers and the Superintendent of the project) sent a facsimile to *MKG*, commenting on its tender (*the Facsimile*). The Facsimile sought further information, and identified two respects in which it was said that the tender was non-conforming. That which related to the provisional sum for excavation was as follows:
- “2. A provisional sum for item 11 (which related to excavation in rock) in the Bill of Quantities;
- Adequate information was provided in the documentation to allow this activity to be priced as a lump sum.*”
- [6] *MKG* responded on 21 April 2006. With respect to excavation in rock, the response included the following:
- “The express condition of Item 11 being a Provisional Sum can be deleted. The allowance of \$30,000 for rock in this Item remains as part of our Lump Sum.”
- [7] *QBWSA* and *MKG* entered into a written contract dated 13 June 2006. It expressly identified the documents which comprised the contract, and included the tender of 11 April 2006, and the further communication of 21 April 2006, but did not refer to the Facsimile. It included AS 2124-1992, clause 12 of which dealt with latent site conditions.

- [8] In the course of the project, substantial quantities of hard rock were encountered by *MKG*. These became the subject of a series of claims based on clause 12. Ultimately, they were superseded by a Payment Claim under the *Payments Act*, dated 4 April 2008, the claim again being based on clause 12. *QBWSA* provided a Payment Schedule dated 18 April 2008. This resulted in an adjudication application on 2 June 2008, an adjudication response on 11 June 2008, and an adjudication decision on 20 June 2008.
- [9] The adjudication decision identified the Adjudicated Amount as \$11,122,645.61 and the due date for payment as 2 May 2008.
- [10] *MKG* has been placed in liquidation. The liquidator entered judgment under s 31 of the *Payments Act* on the basis of a certificate from *Adjudicate Today*, the Nominating Authority.
- [11] As mentioned, *QBWSA* has applied for a declaration that the decision of the Second Respondent is void. By an amendment to the application made on the first day of the hearing, it also seeks an order that the judgment entered by *MKG* against *QBWSA* be set aside. In the alternative it seeks a stay of execution of that judgment.

### **Statutory background**

- [12] Part 3 of the *Payments Act* contains a procedure for recovering progress payments. It includes provisions for the adjudication of disputes between parties to a building contract. Under s 21, a claimant may apply for adjudication of a Payment Claim in certain circumstances. Under s 23, an adjudicator may be appointed in respect of the Adjudication Application. Provision is then made under s 24 for an Adjudication Response. A period of 10 business days is fixed by s 25(3) for deciding the adjudication application, unless the parties agree to an extension of that period.
- [13] Section 26 deals with the adjudicator's decision. In part, it requires the adjudicator to decide the amount of the progress payment to be paid to the claimant. Subsection (2) of s 26 states:
- “(2) In deciding an adjudication application, the adjudicator is to consider the following matters only—
- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991* (Qld), part 4A;
  - (b) the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly 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 properly 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.”

[14] Section 27 then requires payment of the adjudicated amount. Under s 30, if the amount is not paid, the claimant may ask the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate. Under s 31, an adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.

[15] Under s 99, the provisions of the Act may not be excluded by agreement between the parties. Section 100 of that Act is in the following terms:

**“100 Effect of pt 3 on civil proceedings**

(1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract—

- (a) may have under the contract; or
- (b) may have under part 2 in relation to the contract; or
- (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

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

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

- (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
- (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.”

[16] It follows that while an adjudication decision gives rise to a right to payment in favour of a contractor, the decision does not preclude recovery of (or obtaining credit for) the amount the subject of the adjudication decision in subsequent civil proceedings. For that reason, an adjudication decision may be described as an interim decision, or a decision made on an interim basis.<sup>1</sup>

**Availability of relief**

[17] *MKG* submits that declaratory relief is not available to *QBWSA*, subsequent to the registration of the adjudication certificate as a judgment. It submits that to grant a declaration while the judgment stands would be an impermissible collateral attack on the judgment; and that if the judgment were set aside, then it would be

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<sup>1</sup> See *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at [51], per Muir JA.

inappropriate also to grant declaratory relief. It is not necessary to determine this issue unless *QBWSA* succeeds in establishing that the decision is void.

- [18] *MKG* has, in this context, referred to s 31(4) of the *Payments Act*. That subsection envisages proceedings to set aside the judgment resulting from the registration of the certificate. However, it provides that where such proceedings have been commenced, the party commencing them may not challenge the adjudicator's decision. Mr Bond SC who appeared with Mr Ambrose of Counsel for *MKG* expressly adopted the position that the judgment might be set aside if it were found that the adjudicator's decision was void, notwithstanding this provision.
- [19] Section 31(4)(b) requires *QBWSA* to pay into court the adjudicated amount, pending the final decision in the proceedings to have the judgment set aside. *QBWSA* has done this. Accordingly, if its submissions are made out, there is no reason not to set aside the judgment resulting from the registration of the adjudication certificate.

### **Broad test for good faith**

- [20] *QBWSA* attacks the adjudication on the ground that the adjudicator did not make a *bona fide* attempt to exercise the power conferred by the *Payments Act*.<sup>2</sup> In support of its challenge, it relies upon a test for determining whether the adjudicator made a *bona fide* attempt to exercise his power, which the parties referred to as the broad test. *MKG* submitted that the authorities relied upon by *QBWSA* did not support the test as broadly as it was formulated on behalf of *QBWSA*, and in particular challenged the inclusion of a requirement that the adjudication be reasonable.
- [21] *MKG* also contended that the correct test was significantly narrower than that formulated by *QBWSA* in any event. I shall discuss the test for which *MKG* contended later in these reasons.
- [22] The reasoning which leads to the good faith requirement is based on the fact that the *Payments Act*, in conferring on an adjudicator the power to decide an adjudicated amount (and other matters), identifies<sup>3</sup> matters which the adjudicator is required to consider. It follows that a decision cannot result in the consequences provided for by the *Payments Act*, unless it satisfies the requirements for such a decision, identified in the *Payments Act*.
- [23] The question which results from that line of reasoning is, what consideration of the specified matters is necessary to satisfy the statutory conditions, producing a decision which has the consequences specified in the *Payments Act* (or alternatively, without which consideration, the decision will be held to be void). The question is strongly analogous to that considered by the High Court in *Project Blue Sky Inc v*

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<sup>2</sup> See for example paras 15, 24-50, and generally paras 56-105 to its outline of submissions dated 4 February 2009 (Submission 1).

<sup>3</sup> in s 26 of the *Payments Act*.

*Australian Broadcasting Authority*.<sup>4</sup> It is ultimately a question of the proper construction of the statute.

- [24] Answers have been provided in other cases dealing with very similar legislation. In *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*,<sup>5</sup> Hodgson JA (with whom the other members of the New South Wales Court of Appeal agreed) said the following (of provisions which included the New South Wales equivalent to s 26):

“A question arises whether any non-compliance with any of these requirements has the effect that a purported decision is void, that is, is not in truth an adjudicator's decision. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's decision.

...

What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598) and no substantial denial of the measure of natural justice that the Act requires to be given. ... (If a purported decision is not such a bona fide attempt ... then in my opinion a purported decision will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a decision.”

- [25] The approach taken by Hodgson JA was adopted by Brereton J in *Holmwood Holdings v Halkat Electrical Contractors*.<sup>6</sup> His Honour also said, in respect of an adjudicator's decision:

“Accordingly, good faith as a condition of validity of the exercise of an adjudicator's power to make a decision requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation.”<sup>7</sup>

- [26] To similar effect, in *Timwin Construction Pty Ltd v Façade Innovation Pty Ltd*,<sup>8</sup> McDougall J, after referring to *Brodyn*, said:

<sup>4</sup> (1998) 194 CLR 355, 390-391.

<sup>5</sup> (2004) 61 NSWLR 421 at 441-442.

<sup>6</sup> [2005] NSWSC 1129 at [67]; see also [110].

<sup>7</sup> *Holmwood Holdings* at [117].

<sup>8</sup> [2005] NSWSC 548 at [38].

“Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in *Roberts v Hopwood* [1925] AC 578, 603, (sic – 604) where his Lordship said that a requirement to act in good faith must mean that the board ‘are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which (sic) they administer’.”

- [27] However, *QBWSA* also contends that, to be valid, an adjudicator’s decision must be reasonable.<sup>9</sup> In support of that contention it relies on *Downer Construction (Australia) Pty Ltd v Energy Australia*<sup>10</sup> where Giles JA said:<sup>11</sup>

“In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the decision.”

- [28] *QBWSA* also relies on the following passage from the decision at first instance in *Holmwood Holdings*:

“I have concluded, for the reasons which follow, that, in the present context, the broader view should apply, and in particular that recklessness or capriciousness on the part of the adjudicator in the performance of his or her function, such as to establish the absence of a genuine or conscientious attempt to perform the adjudicator’s function – short of a wilful and deliberate failure to attempt to perform the function – can amount to a want of good faith.”<sup>12</sup>

- [29] Some support is also drawn from the following passage from *Timwin Construction*:<sup>13</sup>

“It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so (sic) in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.”

- [30] In challenging the inclusion of a requirement for reasonableness in the broad test for determining absence of good faith, counsel for *MKG* point out that, in the appeal from the judgment of Brereton J in *Holmwood Contractors*, the Court of Appeal did not adopt the reasoning of Brereton J at first instance, and went on to point out that its silence on some matters should not be taken as approval of all that had been said

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<sup>9</sup> Submission 1, para 32.

<sup>10</sup> (2007) 69 NSWLR 72.

<sup>11</sup> At [87].

<sup>12</sup> At [110].

<sup>13</sup> At [42].

at first instance. They further submit that the passage from *Downer Construction* which is relied upon does not attempt to state a test for review.

- [31] It seems to me that those submissions are well-founded. In *Downer Construction*, in my respectful opinion, Giles JA was identifying a decision which was within the limits set by the statute, rather than seeking to identify those limits. In *Halkat Electrical Contractors v Holmwood Holdings Pty Ltd*,<sup>14</sup> which was the appeal from the decision at first instance in *Holmwood Contractors* the Court of Appeal plainly treated with caution parts of the reasons for judgment at first instance. In *Timwin Construction*, McDougall J, it seems to me, was identifying a factual matter which, in the context of that case, helped his Honour to reach a conclusion about whether the adjudicator had in fact considered a particular submission.
- [32] It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation*,<sup>15</sup> is not a decision for the purposes of s 26 of the *Payments Act*. Otherwise, I do not consider an adjudicator's decision purporting to be made under the *Payments Act* will be invalid if it is not "reasonable". The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".
- [33] I am therefore of the opinion that the test advanced on behalf of *QBWSA* is too widely formulated. If the broad test for good faith is to be adopted, then what is required is a genuine attempt to exercise the power in accordance with the provisions in the *Payments Act*. Specifically, in relation to a consideration of the construction contract, what is required is a genuine attempt to understand and apply that contract.

### ***QBWSA's submissions on adjudicator's use of the Facsimile***

- [34] *QBWSA* submits that the adjudicator's reliance on the Facsimile led him into jurisdictional error.<sup>16</sup> It submits that the adjudicator found that, as a result of the Facsimile, the Superintendent had invited *MKG* to tender on the basis that any quantity of hard rock encountered in the project would be treated as a latent condition under the contract, thereby reversing the allocation of risk under the contract and overriding provisions of the contract, with the result that the adjudicator did not pay proper regard to clause 12.<sup>17</sup> It submits that the adjudicator's interpretation of the Facsimile enabled him to compensate *MKG*, not in accordance with the contract, but ultimately in line with the non-conforming tender.<sup>18</sup> It was an invitation to lodge a tender on the basis that any rock to be excavated in the course of the project which could not be precisely quantified on the basis of the geotechnical report, would be treated as a latent condition under the

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<sup>14</sup> [2006] NSWCA 125.

<sup>15</sup> [1948] 1 KB 223.

<sup>16</sup> Submission 1, para 11.

<sup>17</sup> Submission 1, para 17.

<sup>18</sup> Submission 1 para 76.

contract.<sup>19</sup> He accordingly treated the Facsimile as “a contractual document”.<sup>20</sup> The result, it was submitted, was that the adjudication was not based on a *bona fide* consideration of the contract.<sup>21</sup> In support of these propositions, *QBWSA* pointed to a number of paragraphs from the adjudication decision.<sup>22</sup>

[35] In the preceding paragraph, I have tried to assemble the principal propositions advanced on behalf of *QBWSA*, relating to the adjudicator’s use of the Facsimile. It supports these propositions by two related submissions.

[36] The first is that, in fact, the adjudicator set about ensuring that *MKG* was fairly compensated.<sup>23</sup> Again, *QBWSA* relies upon a number of passages in the adjudicator’s decision.<sup>24</sup> The second related submission is that in truth, the adjudicator sought to give effect to the non-conforming tender; or he took it into account when it was not a relevant consideration under the *Payments Act*.<sup>25</sup> Again, these submissions are supported by reference to specific paragraphs of the adjudicator’s decision.<sup>26</sup>

[37] *QBWSA* also draws some support for its position from the fact that the adjudicator took the view that clause 14 of the Job Specification, and the Facsimile, and the geotechnical report may have been misleading.<sup>27</sup> In doing so, passages from the adjudicator’s decision were again relied upon.<sup>28</sup> This submission seems to lead to a suggestion that the adjudicator had a disposition to find for *MKG* on a basis other than the provisions of the contract, and accordingly not to carry out his duty under s 26 of the *Payments Act*.

[38] These submissions make it necessary to consider the adjudicator’s decision in some detail.

### **Adjudication decision**

[39] The adjudication decision was delivered on 20 June 2008, 18 days after *MKG*’s adjudication application, and 9 days after *QBWSA*’s adjudication response. That reflects the time limitations imposed on the adjudicator by s 25(3) of the *Payments Act*.

[40] The principal issue dealt with in the adjudicator’s decision was the latent condition claim. Central to its determination was clause 12.1 of the General Conditions of

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<sup>19</sup> Submission 1, para 78.

<sup>20</sup> Submission 1, para 85.

<sup>21</sup> Submission 1, para 105.

<sup>22</sup> In particular paras 53, 58, 63, 85, 86, and 104.

<sup>23</sup> Submission 1, para 59, 67-69, 89, 93, 100, and 105.

<sup>24</sup> Adjudication Decision, paras 50, 70, 107 and 108.

<sup>25</sup> Submission 1, paras 62, 64, 65, 68 and 76.

<sup>26</sup> Adjudication Decision, paras 35-37, 42, 70, 107 and 108.

<sup>27</sup> Submission 1, paras 77 and 101.

<sup>28</sup> Adjudication Decision, paras 49, 88, 100, 102 and 104.

Contract (AS 2124-1992), which formed part of the construction contract. It was in the following terms:

### 12.1 Definition

Latent Conditions are-

- (a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had-
  - (i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and
  - (ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and
  - (iii) inspected the Site and its surroundings; and
- (b) any other conditions which the Contract specifies to be Latent Conditions.

[41] After the discussion of some other preliminary matters, the adjudicator considered the contract and the original tender of 11 April 2006. In doing so, he considered the Bill of Quantities, which became part of the contract. He noted an apparent anomaly in that a number of items of work appear to have been set out twice in the Bill of Quantities. It was in respect of one of the entries for excavation in rock (item 11) that the provisional amount was included in the original tender. The adjudicator then characterised this tender as a tender for a lump sum amount of \$11,962,292 (excluding rock excavation); and in view of the amount of excavation relied upon by *MKG* in its claim before him, a claim for rock excavation of \$10,046,000.<sup>29</sup> He then commented that that result was comparable with other tenders; and observed that the latent condition claim which he had to determine was a claim for an amount equivalent to that which would have been payable under the original tender.<sup>30</sup>

[42] The adjudicator then went on to consider the letter from *MKG* of 21 April 2006.<sup>31</sup> He referred to this document as the second tender, although in truth it provided some additional information, and modified the original tender in respect of item 11. I shall refer to it as the modified tender. In the course of doing so, the adjudicator referred to some matters raised by the adjudication response (from *QBWSA*). This is a document which, it seems to me, the adjudicator was required to take into account under ss 24 and 25 of the *Payments Act*. The first of those matters was the relativity of the modified tender to other tenders - with the exception of a tender made in error which was withdrawn, the tender by *MKG* was by comparison with the other tenders very low. The second was the reliance by *QBWSA* on the original tender as showing a recognition of significant risks relating to the excavation of

<sup>29</sup> Adjudication Decision, para 35.

<sup>30</sup> Adjudication Decision, paras 36 and 37.

<sup>31</sup> The document bore the date 21 April 2005, but this was obviously an error.

rock.<sup>32</sup> It is in that context that the adjudicator expressed the view that *MKG*'s likely contract price was much greater than the stated figure of \$13,158,521, the basis for that observation being that it covered only a limited quantity of excavation of rock.<sup>33</sup>

- [43] In dealing with *QBWSA*'s submission about the recognition of risks associated with the excavation of rock, the adjudicator discussed the geotechnical report. That document had been available to *MKG* at the time of its original tender. It is in the context of that discussion that the adjudicator noted that inferences, which the adjudicator considered most material, had been drawn by Mr Morley, who supervised the excavation work for the geotechnical report; and that these inferences were not disclosed in that report. He then observed that the representation made in clause 14 of the Job Scope (another contract document) that the geotechnical report represented the inference drawn by "the operator" from drilling and test pit excavation operations may be misleading and deceptive. However, he noted that he was not called upon to decide a claim under the *Trade Practices Act 1974* (Cth).<sup>34</sup>
- [44] He then expressed the view that *QBWSA* (or its consultant, the Superintendent) appreciated the significant risk of encountering rock, and noted that (subsequent to the geotechnical report) the Superintendent had written to *QBWSA* stating that adequate information had been provided to allow excavation to be priced as a lump sum.<sup>35</sup> Against that background, the adjudicator characterised the Facsimile as a request of *QBWSA* to make a new offer based upon its assessment, from the information available, of a price for rock excavation.<sup>36</sup> He considered this to be inconsistent with the geotechnical report itself, which stated it was not possible to identify areas where rock might be particularly difficult to excavate, as a result of which the adjudicator considered the information to be patently inadequate to price rock excavation.<sup>37</sup> He then returned to a consideration of the adjudication response from *QBWSA*,<sup>38</sup> where it was asserted that it was for *MKG* to assess and price the risks of rock excavation. It was in dealing with that submission that the adjudicator expressed the view that the risk of latent conditions remained with *QBWSA*; and that *QBWSA* appeared to have misconstrued the risk allocation made by the contract.
- [45] The adjudicator then identified the Facsimile as a factor relevant in deciding what should have been anticipated by an experienced and competent contractor, an obvious reference to the test for the existence of latent conditions under clause 12.1.<sup>39</sup>
- [46] The adjudicator further considered a submission made in *QBWSA*'s adjudication response that *MKG* had in fact anticipated that rock excavation would be required,

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<sup>32</sup> Adjudication Decision, para 43.

<sup>33</sup> Adjudication Decision, para 42.

<sup>34</sup> Adjudication Decision, para 45.

<sup>35</sup> Adjudication Decision, para 48.

<sup>36</sup> Adjudication Decision, para 49.

<sup>37</sup> Adjudication Decision, para 50.

<sup>38</sup> Adjudication Decision, para 51.

<sup>39</sup> Adjudication Decision, paras 52-55.

but considered that this could be the subject of a claim based on a latent condition.<sup>40</sup> In commenting on that matter, the adjudicator considered *MKG's* position as confirmation that the quantity of hard rock anticipated by *MKG* at the time of tendering was vastly less than the quantity actually encountered.

- [47] The adjudicator then went on to characterise the latent condition on which *MKG* was relying in the adjudication as being the quantity of hard rock, rather than simply its existence in the area where the excavation had to be carried out. He then considered, in the context of the case presented on behalf of *QBWSA* in the adjudication, whether the quantity of rock should reasonably have been anticipated at the time of tendering.<sup>41</sup>
- [48] The adjudicator then proceeded to consider the geotechnical report, and its significance in light of *QBWSA's* adjudication response. It seems to me that the adjudicator, in carrying out this exercise, kept in mind the test for latent conditions found in clause 12.1 of the construction contract, as well as the submissions made by *QBWSA* in its adjudication response.
- [49] One of *QBWSA's* submissions was that *MKG's* estimate of the quantity of hard rock was completely flawed. In that context, the adjudicator expressed the view that that may have been the result of unconscionable conduct by the Superintendent or *QBWSA*, but thought it more likely that the contract had been misconstrued.<sup>42</sup>
- [50] The adjudicator then gave specific consideration to clause 12.1. He noted that *MKG* contended that site conditions were materially and substantially different to those which it anticipated,<sup>43</sup> and expressed the view that *MKG* was an experienced and competent contractor. However, he also noted that the test in clause 12.1 was formulated by reference to what he referred to as “a notional experienced and competent contractor”,<sup>44</sup> which he also noted to be different from the test advanced in *QBWSA's* adjudication response.
- [51] The adjudicator then considered a report relied upon by *QBWSA* from Golder Associates, but did not accept its conclusions because, in his view, the report did not deal with the test formulated in clause 12.1.<sup>45</sup> In dealing with the Golder Report the adjudicator again made reference to the statement in the Facsimile to the effect that adequate information had been provided to enable excavation to be priced as a lump sum. In that context, the adjudicator expressed the view that the author of the Facsimile was either misrepresenting the true position; or the author was asking *MKG* to price, as a lump sum, only such rock excavation as could be quantified from the information which had been provided to it, thereby accepting that any additional excavation would be a latent condition.

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<sup>40</sup> Adjudication Decision, para 56.

<sup>41</sup> Adjudication Decision, paras 58-64.

<sup>42</sup> Adjudication Decision, para 71.

<sup>43</sup> Adjudication Decision, paras 74-75.

<sup>44</sup> Adjudication Decision, para 79.

<sup>45</sup> Adjudication Decision, paras 80-91.

- [52] The adjudicator then considered the evidence of Mr Morley.<sup>46</sup> In doing so, he made reference to the test formulated in clause 12.1 for the existence of latent conditions. He also noted that Mr Morley, who had supervised the site testing, had information about what was observed, which was not included in the geotechnical report.
- [53] He then considered the evidence from Mr Betts who had been a project engineer with the Superintendent. The adjudicator was, at least by inference, critical of the Superintendent's conduct in dealing with *MKG* during the tendering process. However, he accepted a submission made on behalf of *QBWSA* that it would be highly inappropriate for him to make a finding of dishonesty in relation to the conduct of any person representing the Superintendent.
- [54] He then concluded<sup>47</sup> that *MKG* had satisfied him that it had encountered the latent condition claimed.

### **Absence of good faith and the Facsimile**

- [55] In my view, to determine whether or not the adjudicator has genuinely attempted to understand and apply clause 12.1, it is necessary to consider as a whole those parts of the adjudication decision where the adjudicator determined whether *MKG's* basis for its claim for compensation for encountering a latent condition had been established. In particular, it is necessary to consider those parts of the adjudication decision on which *QBWSA* principally relies for its submission of absence of good faith, in the context in which they occur.
- [56] It seems to me that the adjudicator was clearly very conscious of the provisions of clause 12.1 in considering this question. He reproduced the clause in the adjudication decision.<sup>48</sup> He made repeated references, though often in a summary way, to the test formulated in it.<sup>49</sup> In my view, a reading of those parts of the adjudication decision which deal with the question whether *MKG* had established the existence of a latent condition clearly reveals that the adjudicator was very conscious of the provisions of clause 12.1, and reached his conclusion by reference to the provisions of that clause, as he understood it.
- [57] The criticisms based on particular passages in the adjudication decision fail, in my opinion, to take sufficient account of the context in which those passages occur. Generally, they form part of a response to specific submissions made by *QBWSA* in its adjudication response, or form part of an evaluation of evidence of individual witnesses. They do not seem to me to form the basis of the adjudicator's application of clause 12.1. Indeed, in my view it would be extremely difficult to conclude that they did, when the adjudicator has on occasion expressly recognised that some of the matters on which he expressed a view were not relevant to a

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<sup>46</sup> Adjudication Decision, paras 92-105.

<sup>47</sup> Adjudication Decision, para 115.

<sup>48</sup> See para 72.

<sup>49</sup> See in particular the Adjudication Decision paras 52, 58, 60 (twice), 63, 77-80, 82, 83, 85, 91, 93, 94, 100, 101, 106 and 112. There are a number of other passages which, particularly in the light of the passages just identified, refer to the test in clause 12.1, although the reference is more oblique.

conclusion whether a latent condition existed by reference to clause 12. These statements in the adjudication decision are particularly significant in light of the fact that *QBWSA* does not assert actual dishonesty on the part of the adjudicator, or the presence of bad faith. The fact that it does not make these assertions is, in my view, appropriate, in view of the adjudicator's reasons, read as a whole.

- [58] *QBWSA* places great weight on the use made by the adjudicator of the Facsimile in finding for *MKG* in the adjudication. In a number of places, the adjudicator has referred to the Facsimile as a matter relevant for the application of the test for the existence of a latent condition stated in clause 12.1.<sup>50</sup>
- [59] Elsewhere, the adjudicator referred to the Facsimile in dealing with a submission in *QBWSA*'s adjudication response referring to the fact that in the Facsimile, *QBWSA* required a tender which provided for a lump sum priced for the project.<sup>51</sup> On analysis, it appears to me that the question which the adjudicator was considering at this point of the adjudication decision was whether the extent of hard rock to be excavated was a latent condition, having regard to the test formulated in clause 12.1. The same may be said of the reference to the Facsimile<sup>52</sup> in the course of the discussion of the geotechnical report.<sup>53</sup>
- [60] *QBWSA* submits that the adjudicator used the Facsimile to identify a contract under which the contract amount represented a lump sum for only a small part of the excavation which the project called for, and which accordingly was a contract different from the construction contract made between the parties.<sup>54</sup> It submits that accordingly the adjudication decision was beyond power, because the adjudicator was limited by s 26(2) of the *Payments Act* to a consideration of the construction contract.<sup>55</sup> This submission is related to a submission which I shall deal with later in these reasons.
- [61] I consider that the adjudicator has made a *bona fide* attempt to understand and to apply clause 12.1; and that he has not failed to give consideration to the construction contract. I therefore do not accept *QBWSA*'s submissions that the adjudication decision is void, because of an absence of good faith on the part of the adjudicator, in giving consideration to the construction contract.

### ***MKG's test for good faith***

- [62] Counsel for *MKG* submit that the applicable test for determining the validity of the adjudicator's decision on the ground that the adjudicator has failed to carry out in

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<sup>50</sup> See for example the Adjudication Decision, paras 83-88.

<sup>51</sup> Adjudication Decision, paras 47-64.

<sup>52</sup> Adjudication Report, para 68.

<sup>53</sup> Adjudication Report, paras 65-71.

<sup>54</sup> See *QBWSA*'s supplementary submissions dated 29 May 2009 (submission 5).

<sup>55</sup> Submission 5, para 6.

good faith an action required by the *Payments Act*, is that found in a series of decisions of the Federal Court, both at appellate level and at first instance.<sup>56</sup>

- [63] In these cases, the test is usually, though not always, formulated with reference to bad faith.
- [64] Under this test, the inquiry is directed to the actual state of mind of the decision maker.<sup>57</sup> For the ground to be made out, the court must find that the decision maker “was recreant to his duty by wilfully and deliberately making the impugned decision without attempting to carry out the statutory duty lying upon him - tossing a coin without reading the file, allowing in every third applicant (for review of a refusal to grant a visa), or allowing in applicants from various countries in rotation might be examples”.<sup>58</sup>
- [65] Recklessness in the exercise of the power may not be sufficient to establish bad faith, unless it amounts to actual wrongful intent.<sup>59</sup> It is doubtful that capriciousness alone will demonstrate bad faith, unless whim or fancy has consciously been preferred to considered judgment.<sup>60</sup>
- [66] While actual bias may be a manifestation of bad faith, that will not be the case where actual bias occurs subconsciously,<sup>61</sup> presumably because bad faith requires a conscious intent to do something which is wrong.
- [67] It follows that an allegation of bad faith is a serious matter, involving personal fault on the part of the decision maker.<sup>62</sup> A decision by an advocate to make an allegation of bad faith gives rise to a question of professional ethics: like an allegation of fraud, an allegation of bad faith should not be made unless there are proper grounds for doing so.<sup>63</sup>
- [68] It is a large step to jump from a decision involving errors of fact and law, to a finding that the decision maker acted in bad faith.<sup>64</sup> Not surprisingly, bad faith in this sense is very rarely established.<sup>65</sup>

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<sup>56</sup> *SBBS v The Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 (especially at [42]-[48]); *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 (especially at [7]-[10]); *Minister for Immigration and Multicultural and Indigenous Affairs v NAOS* [2003] FCAFC 142 (especially at [18]- [19], [21]); *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) ALR 412 (especially at [15]-[25]); *SZHAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] 17; *SZJVA v Minister for Immigration and Citizenship* [2008] FCA 1631 at [47]; *SZJHB v Minister for Immigration and Citizenship* [2008] FCA 1771 at [11].

<sup>57</sup> *SBAN* at [8].

<sup>58</sup> *NAKF* at [24].

<sup>59</sup> *SBAN* at [8]; relevant intent seems to be an actual intent not to act within the statute.

<sup>60</sup> *NAOS* at [21].

<sup>61</sup> *SBAN* at [10].

<sup>62</sup> *SBBS* at [43].

<sup>63</sup> *SBAN* at [9]; see also *NAKF* at [19]; *SZAH* at [18].

<sup>64</sup> *SBBS* at [45].

<sup>65</sup> *SBBS* at [41].

[69] It will be apparent that the description of this ground, and the consequences which are said to follow from that description, are quite different from the ground as contended for by Counsel for *QBWSA*, or the modified version of their test to which I have referred previously.

[70] Some of the cases propounding the strict view of bad faith draw upon the grounds formulated in the *Administrative Decisions (Judicial Reviews) Act 1977* (Cth), where bad faith is a separate ground from, for example, improper exercise of a power conferred by the statute.<sup>66</sup> More generally, the cases relied upon by *MKG* are cases where review is sought of decisions made under the *Migration Act 1958* (Cth), which includes s 474. That section provides that a decision to which it applies is final and conclusive; must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration, or certiorari. The presence of such a clause makes it necessary to determine whether a decision purportedly made under the *Migration Act* is a decision which qualifies for the protection conferred by the section.<sup>67</sup> The result will be the outcome of a construction of the *Migration Act* as a whole, including the provisions which identify requirements for the exercise of the decision-making power and a privative provision such as s 474.<sup>68</sup> There is no general rule as to the meaning or effect of privative clauses such as s 474; and the outcome of the process of construction to which I have referred will depend entirely on the statutory provisions under consideration.<sup>69</sup>

[71] I note that, notwithstanding the passages in the cases referred to by Counsel for *MKG*, the expressions “absence of good faith” and “bad faith” do not always carry the pejorative connotations and significant consequences which I have attempted to summarise earlier in these reasons. For example, Wade and Forsyth write:<sup>70</sup>

“It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context ‘in good faith’ means merely ‘for legitimate reasons.’ Contrary to the natural sense of the words, they impute no moral obliquity.”

[72] The authors also refer to cases where the expression “in good faith” has a meaning similar to that contended for by Counsel for *QBWSA*,<sup>71</sup> and the expression “*mala fide*” means to act for a purpose not authorised by the statute conferring the power.<sup>72</sup>

<sup>66</sup> See for example *NAKF* at [17].

<sup>67</sup> Compare *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [19].

<sup>68</sup> *Plaintiff S157* at [33], [60].

<sup>69</sup> *Plaintiff S157* at [60].

<sup>70</sup> *Administrative Law* (9<sup>th</sup> Edition) page 416.

<sup>71</sup> *Roberts v Hopwood* [1925] AC 578, 603.

<sup>72</sup> *Westminster Corporation v London and North Western Railway Co* [1904] 1 Ch 759, 767; *Webb v Minister of Housing and Local Government* [1965] 1 WLR 755, 784.

- [73] Although a statutory order for review of an adjudicator's decision under the *Payments Act* can no longer be sought under the *Judicial Review Act 1991* (Qld),<sup>73</sup> nevertheless the *Payments Act* does not itself include any provision which makes an adjudicator's decision final, or which precludes a declaration about its validity. On the contrary, as noted, an adjudicator's decision has an interim quality. It is obvious, therefore, that the question of the minimum requirements for the validity of an adjudicator's decision is to be determined in a statutory context quite different to the *Migration Act*.
- [74] On the other hand, the cases relied upon by Counsel for *QBWSA* deal with legislation that is very similar to the *Payments Act*, and include decisions from the New South Wales Court of Appeal.
- [75] If it were necessary for me to do so, I would follow the approach taken in the decisions relied upon by Counsel for *QBWSA* in preference to that relied upon by Counsel for *MKG*. On either approach, in my view, the adjudicator's decision should not be found to be void on the ground that he has not acted in good faith.

#### **Absence of evidence of quantum of claim**

- [76] *QBWSA* submits that the adjudicator's decision is invalid because he determined the amount of the payment, without any proper evidence upon which the decision could be made.
- [77] Counsel for *QBWSA* submit that *MKG's* claim had to be supported by evidence of the amount due.<sup>74</sup> They rely in part on the decision of the New South Wales Supreme Court in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd*.<sup>75</sup> That case held that under clause 42.1 of AS214/1992 the provision of evidence of the amount due in support of a claim was a condition precedent to the obligation arising from the contract for the superintendent to issue a payment certificate.<sup>76</sup> This conclusion resulted from the construction of the contract. No issue arose of the validity of a decision made under legislation similar to the *Payments Act*.
- [78] Reliance was also placed on the decision of the New South Wales Court of Appeal in *Halkat Electrical Contractors Pty Ltd*,<sup>77</sup> where the adjudicator had adopted the figure advanced by one of the parties, without any evidence which would have enabled him to arrive at the value of the work.<sup>78</sup> The decision was held to be void, because he arrived at an adjudicated amount by a process wholly unrelated to a consideration of the matters specified in the New South Wales equivalent of s 26(2).<sup>79</sup>

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<sup>73</sup> See s 18 and schedule 1, part 2 of that Act.

<sup>74</sup> Submission, para 107.

<sup>75</sup> (2003) 56 NSWLR 576.

<sup>76</sup> See at para [42].

<sup>77</sup> *v Holmwood Holdings Pty Ltd* [2007] NSWCA 32.

<sup>78</sup> See at [27]

<sup>79</sup> See at [26]

- [79] On the basis of these decisions, Counsel for *QBWSA* submit that the onus lay on *MKG* to prove the quantities of rock which were the subject of its claim.<sup>80</sup>
- [80] Counsel for *QBWSA* support their submission by reference to the fact that there was a very great discrepancy between the total of the amounts which were the subject of previous claims, and the amount the subject of the claim before the adjudicator, which was intended to replace them.<sup>81</sup>
- [81] The adjudicator recorded that he had statutory declarations from Mr Latimer and Mr Keen of *MKG*, establishing that *MKG* had to carry out additional work, use additional construction plant, and incur extra cost, in dealing with rock.<sup>82</sup> He then expressed the view that it was necessary for *MKG* to demonstrate the quantities of rock excavated, though not the costs actually incurred.<sup>83</sup> It was not necessary to prove costs, in the adjudicator's view, because of the agreed rate.
- [82] The adjudicator then noted that he had an estimate of the quantity of rock which had been excavated by *MKG*.<sup>84</sup> Of this, he said that for the purpose of the progress payment, he saw no problem with estimates. The comment would appear to be based upon the interim nature of such a payment. The adjudicator subsequently accepted that the estimate was a reasonable estimate, and noted that *QBWSA* had not provided any evidence of the quantity of rock excavated.<sup>85</sup>
- [83] The adjudicator's approach was criticised, because the estimate was based upon the geotechnical report, which the adjudicator had earlier stated did not provide adequate information upon which to price rock excavation.<sup>86</sup> However, it is to be noted that there is a significant difference between the position of a contractor who was in possession of the geotechnical report at the time of tendering, and the position of the adjudicator. The adjudicator was carrying out his task after the work had been done, and extensive rock had been encountered. Moreover, the adjudicator, unlike a contractor at the time of tender, had evidence from Mr Morley, who supervised the geotechnical investigation, that the test pit results showed where hard rock was encountered, and provided a reasonable basis for the assessment of the quantity of rock excavated.<sup>87</sup> The adjudicator also recognised, and recorded, that there was a significant difference between the total of the previous claims, and the amount claimed in the adjudication – he noted that it was an eight fold increase in the amount claimed.<sup>88</sup>
- [84] Unlike *Halkat Electrical Contractors*, this is not a case where there was no evidence whatever upon which the amount of the claim could be determined. Whether or not a court would come to the conclusion reached by the adjudicator is beside the point.

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<sup>80</sup> Submission 1, para 107.

<sup>81</sup> Submission 1, para 109.

<sup>82</sup> Adjudication Determination, paras 115 and 116.

<sup>83</sup> Adjudication Determination, para 119.

<sup>84</sup> Adjudication Determination at par 122.

<sup>85</sup> Adjudication Determination at para 125.

<sup>86</sup> See for example, Adjudication Determination para 31.

<sup>87</sup> Adjudication Determination, para 105.

<sup>88</sup> Adjudication Determination, para 125.

The question is whether he has made a determination under s 26 of the *Payment Act*, or whether he arrived at the amount he has adopted by a process wholly unrelated to a consideration of the matters set out in s 26(2). It has not been suggested that the evidence to which he has referred, including the estimate, was outside the range of considerations identified in s 26(2).

- [85] I am therefore of the view that *QBWSA* has failed to establish that the adjudication decision is void on the basis that there was no evidence on which the adjudicator could determine the amount of the claim.

### Other Matters

- [86] A number of other grounds are relied upon on behalf of *QBWSA*. They include the following:
- (a) The adjudicator arrived at his decision by having regard to matters other than those specified by the *Payments Act*, and in so doing, failed to have proper regard to the contract;
  - (b) The adjudicator found for *MKG* on a basis not the subject of either party's submissions, and without providing an opportunity to *QBWSA* to provide submissions on the issue;
  - (c) The adjudicator made no mention of and did not apply a leading and relevant authority, addressed by each party in its submissions, regarding a contractor's entitlement to recover for late conditions.
- [87] There are other matters raised in the submissions made on behalf of *QBWSA* which seem to me to be either supportive of the submissions which I have attempted to summarise, or else responsive to submissions of *MKG*, and which I do not consider it necessary to deal with specifically to determine the outcome of this application.
- [88] The first two grounds may be considered together. In essence, the bases for these grounds are the following:
- (a) The adjudicator had regard to the tender lodged in 11 April 2006;<sup>89</sup>
  - (b) The adjudicator was concerned to provide what he considered to be "fair compensation" to *MKG*;<sup>90</sup>
  - (c) The adjudicator had regard to his view of the amount which *MKG* would have recovered, had its first tender been accepted unchanged;<sup>91</sup>
  - (d) The adjudicator took into account the Facsimile as a contractual document;<sup>92</sup>
  - (e) The adjudicator failed to have regard to the plain words of clause 12.1(a) of the contract, thereby failing to apply the contract;<sup>93</sup>

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<sup>89</sup> Submission 1, para 62.

<sup>90</sup> Submission 1, para 63; see also paras 67-69, 89, 93, 100 and 105.

<sup>91</sup> Submission 1, para 65 (a), (d) and (e); see also para 67.

<sup>92</sup> Submission 1, para 85.

<sup>93</sup> Submission 1, para 87.

- (f) The adjudicator formed the view that the conduct of those associated with *QBWSA* was misleading conduct or potentially otherwise actionable.

[89] The submissions relating to error about the construction contract were extended to a submission that the adjudicator assessed the payment claim under the wrong contract.<sup>94</sup>

[90] Earlier in these reasons, I have set out my view of the way that the adjudicator carried out his task. In doing so, I have dealt with a number of matters relevant to the determination of these two grounds. In my opinion, the adjudicator undertook the task he was required to perform under the Act, and reached his conclusions having regard to the matters he was required to have regard to under the *Payments Act*. To the extent that he took into account other matters, it seems to me that he did so for the purpose of understanding, or applying, the construction contract. In particular, I do not consider he regarded the Facsimile as a document that formed part of the contract. Rather, he used it to apply the test which is formulated in clause 12.1.

[91] For similar reasons, I do not think that the adjudicator erred in determining the claim under a contract other than the construction contract. I should add that I do not consider that some error in relation to the terms of the construction contract would invalidate the adjudicator's decisions.

[92] Counsel for *QBWSA* have referred to authorities which show that an error of law in interpretation of the contract does not invalidate an adjudicator's decision. Thus in *Plaza West Pty Ltd*,<sup>95</sup> Hammerschlag J said:

“An error of law or fact including an error in interpretation of the Act or contract as to what are the valid and operative terms of the contract does not prevent a decision from being an adjudicator's decision within the meaning of the Act. Section 22 (2) of the Act (the New South Wales equivalent of s 26 of the *Payments Act*) requires the adjudicator to consider the provisions of the contract and the provisions of the Act but so long as the adjudicator does this or at least bona fide addresses the requirements of s 22 (2) as to what is to be considered an error on these matters does not render the decision invalid.” (*Emphasis added*)

[93] His Honour's reasoning was upheld on appeal to the Court of Appeal.<sup>96</sup> That court cited its earlier decision, *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*,<sup>97</sup> where Hodgson JA (with whom the other members of the Court agreed on this point) said:

“In my opinion, an error of fact or law, including an error in interpretation of the Act or the contract, or as to what are the valid

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<sup>95</sup> *v Simon's Earthwords (NSW) Pty Ltd* [2008] NSW 753,

<sup>96</sup> [2008] NSWCA 279 at [27], [32].

<sup>97</sup> [2005] NSWCA 142 at [49].

and operative terms of the contract, does not prevent a decision from being an adjudicator’s decision within the meaning of the Act.” (Emphasis added).

- [94] In *Brodyn*,<sup>98</sup> Hodgson JA (with whom the other members of the Court agreed) pointed out that the matters raised by the New South Wales equivalent of s 26(2) could involve extremely doubtful questions of fact or law, for example, whether a particular provision such as a variation is or is not a provision of the construction contract, and continued:
- “In my opinion it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered.”
- [95] This approach can be traced back to the decision of McDougall J in *Musico v Davenport*<sup>99</sup> where his Honour drew an analogy between an adjudicator and a person to whom parties have submitted a dispute for expert decision, and concluded that where the decision of a dispute under the New South Wales equivalent of the *Payments Act* requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and decision of those issues.<sup>100</sup> That view was adopted by the New South Wales Court of Appeal in *Brodyn*.<sup>101</sup>
- [96] The alternative view is that s 26(2) of the *Payments Act* requires the adjudicator to consider the construction contract, and if he or she makes a mistake in correctly identifying the contract, that mistake will invalidate the decision.
- [97] I consider the approach taken in the New South Wales decisions to be more likely to reflect the presumed intention of the legislature when adopting the *Payments Act*. Further, there are now a significant number of judgments in New South Wales which have come to a consistent conclusion, including decisions of the New South Wales Court of Appeal. Accordingly, I would adopt the approach taken in those cases.
- [98] Because I do not accept that the adjudicator decided the payment claim on the basis which *QBWSA* submits, I also do not accept its submission that the adjudicator substantially breached the requirements of natural justice by failing to give it notice of his intended approach. I note that *MKG* makes a submission that a breach of the rules of natural justice would not invalidate the adjudicator’s decision, but it is unnecessary to rule on this submission.
- [99] The third ground is based on the fact that the adjudicator did not refer to the decision in *BMD Major Projects Pty Ltd v Victorian Urban Development*

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<sup>98</sup> at [56].

<sup>99</sup> [2003] NSWSC 977.

<sup>100</sup> at [51]-[52].

<sup>101</sup> at [51] by Hodgson JA (with whom the other members of the court agreed).

*Authority.*<sup>102</sup> That case discusses the application of clause 12.1, and the extent to which a contractor should make inquiries about site conditions. *QBWSA* submits that the fact that *BMD Major Projects* is not referred to in the adjudication decision can only be explained by a failure by the adjudicator to pay any regard to it, and that accordingly, his determination is void.<sup>103</sup>

[100] As I have previously indicated, I consider that the adjudicator formed a view about the correct application of clause 12.1, and applied that view. The fact that in doing so, he has not mentioned *BMD Major Projects* in the adjudication determination does not, in my view establish that he has failed to consider the case. I have previously noted the very short time within which an adjudicator is required to make his determination. The adjudication response from *QBWSA* dated 11 June 2008 was 1,248 pages in length. The submission within it occupied 54 pages, and was supported by three expert reports and seven witness statements. Given the compressed timeframe, and the need to consider *MKG's* adjudication application (some 1,303 pages in length) as well as the payment claim and payment schedule, it would be surprising if every matter considered by the adjudicator was recorded in the adjudication decision.

[101] Counsel for *MKG* submit that even if it were established that the adjudicator failed to consider *BMD Major Projects*, that would not invalidate his decision. They rely on the following passage from the judgment of Hodgson JA (with whom Beazley JA agreed) in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*:<sup>104</sup>

“The relevant requirement (of s 26(2)) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination or invalidate it as regards any part affected by the omission.”

[102] It is apparent from the adjudication decision that substantial consideration has been given to the submission made by *QBWSA* in the adjudication. Even if there were a failure to consider one matter raised in the submission, it does not seem to me that that would invalidate the adjudicator's decision.

[103] I therefore do not consider that the adjudication decision has been established to be void on this ground.

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<sup>102</sup> [2007] VSC 409, see submission paras 90-93.

<sup>103</sup> Submission 1, para 91.

<sup>104</sup> [2007] NSWCA 19 [55].

**Conclusion**

[104] The grounds for asserting that the adjudicator's decision is void, have not been made out. I propose to dismiss the application, and to hear submissions about costs.