

to an adjudication. This case highlights the difficulty that arises for adjudicators where no independent verification of the work completed is provided by the parties to an adjudication. Where such information is absent, an adjudicator should not prefer the evidence of one party over the other based purely on other irrelevant considerations or submissions. ●

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### Endnotes

1. *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129; BC200509449, which was considered in the article Williams J ‘Adjudicators and the requirement to act in good faith’

- (2006) 18(1) ACLB 4–6.
2. (2004) 61 NSWLR 421.
3. Brereton J at [65].
4. Brereton J at [117] and [119].
5. Brereton J at [123].
6. Giles JA at [30]; Santow JA at [31]; and Tobias JA at [32].
7. Giles JA at [26].
8. Giles JA at [26].
9. Giles JA at [27].
10. Giles JA at [29].

## JOHN HOLLAND PTY LTD v ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES

[2007] NSWCA 19; BC200700928

### Background

John Holland Pty Ltd (John Holland) entered into a contract (the contract) with the Roads and Traffic Authority of New South Wales (RTA) to complete roadworks near Kiama, NSW.

John Holland served on the RTA a payment claim under the Act, seeking \$7,965,509.13 (the payment claim) and the RTA responded with a payment schedule proposing to pay \$738,033.42 (the payment schedule). John Holland then made an adjudication application, and Mr Robert Sundercombe (Sundercombe) was appointed adjudicator.

The RTA’s adjudication response argued that Sundercombe did not have jurisdiction to exercise a valuation function but, rather, Sundercombe was being asked to stand in the shoes of the superintendent in respect of a determination the superintendent made under the dispute resolution clause. Sundercombe was only entitled to adopt the superintendent’s calculation as part of his determination, not complete another calculation. Critically, this submission was not included in the payment schedule. John Holland responded by arguing that the adjudication response included a reason not included in the payment schedule and that, as a consequence, the reason could not be considered by the adjudicator.

Ultimately, Sundercombe indicated that he would not consider any submission made in the adjudication response but not included in the payment schedule and determined that the RTA pay John Holland \$5,583,794.

### Lower court decision

The RTA commenced Supreme Court proceedings seeking a declaration that the determination was void, as well as consequential injunctions. Associate Justice Macready held that the adjudicator should have considered the jurisdiction submission, as it involved a matter to be considered under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) and the determination was consequently void.

### Court of Appeal decision

John Holland appealed to the Court of Appeal and, on 26 February 2007, the Court of Appeal handed down its judgment. The leading judgment was that of Hodgson JA (with whom Beazley JA agreed), who considered the following issues.

- Was the jurisdiction submission in the adjudication response ‘duly made’ within s 22(2)(d) of the Act?
- Did the adjudicator consider this submission?
- Was the adjudicator required to consider it pursuant to s 22(2)?
- Did the adjudicator breach s 22(2) such as to invalidate his decision because of either:
  - failure to comply with s 22(2);
  - lack of good faith; or
  - denial of natural justice?

Each of these issues is discussed separately below.

### Submissions ‘duly made’

#### Application of s 20(2B)

Section 14(3) of the Act states *inter alia* that:

... if the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less) the respondent’s reasons for withholding payment.

The RTA attempted to distinguish between reasons ‘why the scheduled amount is less’ and ‘reasons for withholding payment’, arguing that there may be reasons ‘why the scheduled amount is less’ which are not ‘reasons for withholding payment’. That is, the ‘reasons for withholding payment’ were limited to where payment would be due but for a particular reason or reasons. Counsel for the RTA argued that it was not a reason for withholding payment that a future adjudicator would lack jurisdiction to determine an adjudication application. Consequently, such a submission could be included in the adjudication response without having been included in the payment schedule (notwithstanding s 20(2B) of the Act).

Hodgson JA rejected the attempted distinction, holding that the limit in s 22(2)(d) to submissions ‘duly made’ is intended to engage s 20(2B) such that a submission included in an adjudication response contrary to the requirements of s 20(2B) is not ‘duly made’ within s 22(2)(d). ●

#### Meaning of ss 9 and 10

The RTA also addressed how Sundercombe should have exercised his jurisdiction in determining the amount to which John Holland was entitled.

Sections 9 and 10 of the Act address

the determination of the amount of a progress payment and state inter alia that 'the amount of a progress payment ... is to be the amount calculated in accordance with the terms of the contract' and 'construction work ... is to be valued in accordance with the terms of the contract', respectively.

Notwithstanding the obiter view of Hodgson JA in *Transgrid v Siemens Ltd* [2004] NSWCA 395; BC200407257 that 'calculated in accordance with terms of the contract' meant calculated on the criteria established by the contract rather than reached according to mechanisms provided by the contract, the RTA argued that 'calculated in accordance with the terms of the contract' meant determined according to mechanisms provided by the contract. Thus, the RTA's position was that Sundercombe should have adopted the determination of the superintendent, which was arrived at using the contractual mechanisms, rather than calculate the value of that claim himself in accordance with the terms of the contract.

Hodgson JA regarded the RTA's argument as not jurisdictional in nature, but rather as an argument regarding how power is exercised within the jurisdiction, and held that this submission was a 'reason for withholding payment' within s 20(2B).

As a result, the jurisdiction submission was in breach of s 20(2B) and was not duly made.

### ***Did the adjudicator consider the submissions?***

Hodgson JA held that the adjudicator took the jurisdiction submission into account when he determined that that submission had not been included in the payment schedule.

### ***Was the adjudicator required to consider the submissions?***

Hodgson JA held that Sundercombe was only required to consider the jurisdiction submission pursuant to s 22(2)(a) and/or s 22(2)(b) of the Act if he considered them relevant to the consideration of the provisions of the Act and/or the contract. There was no reason to conclude that Sundercombe did consider them relevant.

### ***Was the adjudicator's determination void?***

This question only arose if the jurisdiction submission was duly made. Hodgson JA noted that even if the jurisdiction submission was duly made, the adjudicator's failure to consider those submissions pursuant to s 22(2) did not render the determination void because an accidental or erroneous omission by the adjudicator to consider

a particular submission will not void a determination.

Finally, Hodgson JA held that Sundercombe had made a bona fide attempt to exercise his power and no denial of natural justice occurred if the jurisdiction submission was not 'duly made'.

Basten JA agreed with the orders of Hodgson JA but added that the court was regularly requested to address issues raised by counsel in argument, notwithstanding the fact that the resolution of those issues was often unnecessary and effectively cautioned against straying beyond what was essential to decide cases.

### ***Conclusion***

This case protects the power an adjudicator has to determine a variety of contractual claims and illustrates that the court will not intervene to render such determinations void where there is an accidental or erroneous omission. In this context, it is a further example of the very limited appeal rights available to a dissatisfied party.

In addition, the court rejected the attempt to distinguish between reasons 'why the scheduled amount is less' and 'reasons for withholding payment' in s 14(3).

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