

SECURITY FOR PAYMENT DETERMINATIONS BY ADJUDICATORS

John Holland Pty Ltd v Roads & Traffic Authority [2007] NSWCA 19

Building and Construction Team

Dibbs Abbott Stillman, Sydney

The NSW Court of Appeal has handed down a significant decision in relation to security for payment determinations by adjudicators.

FACTS

The Roads & Traffic Authority of New South Wales ('the RTA') entered into a contract with John Holland Pty Limited ('John Holland') for construction of a dual carriageway and associated bridges in an area north of Kiama, NSW.

John Holland served on the RTA a payment claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('Act') claiming \$8 million. The RTA responded with a payment schedule proposing to pay \$738,033.42.

John Holland then served an adjudication application and the RTA responded contending that the adjudicator had no jurisdiction to determine the adjudication as he was being asked to perform a dispute resolution role under the contract and not a valuation role in relation to an amount of a progress payment. Further, the RTA argued that the adjudication of the claim was beyond the object of the Act as the claim had been determined by the superintendent and referred to expert determination under the contract.

The adjudicator rejected the RTA's submissions on the grounds that they were not included in its payment schedule and determined that the RTA was to pay \$5.5 million. The Supreme Court found that the adjudicator failed to consider the RTA's jurisdiction submission. John Holland challenged the decision in the Court of Appeal submitting that the adjudicator was under no obligation to consider the jurisdiction submission as it was not raised in the payment

schedule and the RTA had no grounds to withhold payment.

ISSUE

Whether the adjudicator considered, and was obliged to consider, the jurisdiction submission notwithstanding that it was not included in the payment schedule.

DECISION

The NSW Court of Appeal allowed the appeal. Despite the Supreme Court's finding, the Court of Appeal held that since the RTA's jurisdiction submissions were not included in the payment schedule, they were not considered to be 'duly made'. However, the court held that a failure by the adjudicator to consider these submissions would not amount to a jurisdictional error invalidating the decision.

IMPACT

In such circumstances it would be wise to include in a payment schedule argument that the payment claim is invalid on the basis that the adjudicator lacks jurisdiction. This would ensure that the respondent can later raise such a submission in adjudication.