**Brambles Australia Limited v Philip Davenport [2004] Adj.L.R. 03/12**

**Brambles Australia Ltd v Philip Davenport (1) : Demtech P/L (2) : Adjudicate Today (3)**

**JUDGMENT: Einstein J** : Supreme Court New South Wales 12th March 2004.

**The proceedings**

1 These proceedings relate to an adjudication determination dated 24 November 2003 ["the determination"] by the first defendant, Mr Philip Davenport ["the adjudicator"], under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"].

2 By the determination, the adjudicator determined that the plaintiff, Brambles Australia Limited ["Brambles"], should pay the second defendant, Demtech Pty Ltd ["Demtech"], the sum of $274,153.52 and that Brambles should pay 100% of the adjudication fees. The adjudicator was appointed by the third defendant, 'Adjudicate Today', an authorised nominating authority pursuant to the Act.

3 Brambles seeks:

- a declaration that the contract between the plaintiff and the second defendant, to which the first defendant's adjudication relates, is not a contract to which the Act applies;
- a declaration that the first defendant did not have jurisdiction under the Act to consider and determine the adjudication before him;
- in the alternative, a declaration that to the extent the first defendant did have jurisdiction to consider and determine the adjudication under the Act, he breached the Act in failing to give reasons therefore;
- an order restraining the second defendant from taking any steps to enforce the determination against the plaintiff under the Act;
- an order restraining the second defendant from applying for an adjudication certificate pursuant to section 24 of the Act;
- an order restraining the third defendant from issuing an adjudication certificate pursuant to section 24 of the Act;
- an order in the nature of certiorari to quash the determination of the first defendant for jurisdictional error in that:
- by reason of section 7(2) of the Act, the subcontract between the plaintiff and the second defendant was not amenable to adjudication under the Act since the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the sub-contract, was to be calculated by reference otherwise than to the value of the work carried out or the value of the goods and services supplied;
- in determining that the Act applied to the contract, the first defendant failed to give reasons therefore as he was required to do;
- in breach of section 22(2)(b) of the Act, the first defendant failed to deal with, entirely ignored or misunderstood the payment terms and conditions in the sub-contract;
- the first defendant otherwise entirely ignored, misunderstood or misconceived the terms and conditions in the sub-contract relating to progress payments;
- the first defendant failed to deal with or misunderstood the terms and conditions in the sub-contract relating to set-offs and deductions;
- the first defendant denied the plaintiff natural justice by:
- determining costs of the adjudication adverse to the plaintiff when such had not been claimed by the second defendant; and
- failing to give the plaintiff notice of his intention to make such a finding and thereby denying the plaintiff an opportunity to be heard.

**The facts**

4 There is little issue as to the central facts. These are conveniently summarised in the plaintiff's overview submissions which, slightly edited, are as follows:

***"The Subcontract***

- *Brambles and BHP Billiton Pty Limited (previously BHP Limited) (**BHP**) entered into an agreement (the **Head Contract**) whereby Brambles agreed to demolish and remove buildings, structures, offices, equipment, services and the like in the areas generally referred to as the Coke Ovens and Power Plant Boilers (**Brambles' Work**), located on BHP's Newcastle Steelworks Main Site (the **Site**).*

- *The Head Contract consists of the following:*
  - *(a) BHPMS004 form of contract conditions signed by Brambles and BHP and dated in or around March 2001;*
  - *(b) Standard Conditions of Contract – Part A (General Conditions of Contract) (**GCC**);*
  - *(c) Standard Conditions of Contract – Part B (Occupational Health and Safety Conditions);*
  - *(d) Standard Conditions of Contract – Part C (Environmental Conditions for Contractors);*
  - *(e) Standard Conditions of Contract – Part D (Code of Conduct for Contractors);*
  - *(f) Standard Conditions of Contract – Part F (Insurance Provisions for Site Works);*
  - *(g) Special Conditions BHPMS004 (the **Special Conditions**);*
  - *(h) Specification BHPMS004 – Demolition and Removal of the Coke Ovens and Power Plant Boilers and Associated Plant and Equipment (the **Specification**); and*
  - *(i) Appendices 1 to 6.*

· *By a letter dated 12 July 2001 (the **Letter of Award**), Brambles awarded the Subcontract to Demtech for Brambles' Work except for the cleaning of certain vessels, as set out in the Letter of Award. The Letter of Award expressly incorporated the Head Contract as part of the Subcontract.*

· *On 16 July 2001, Brambles signed and thereby agreed to the Schedule of Progress Payment submitted by Demtech dated 10 July 2001 (the **Schedule of Progress Payment**)*

· *Accordingly, the Subcontract is comprised of:*
*(i) the Letter of Award dated 12 July 2001;*
*(ii) the Head Contract between Brambles and BHP; and*
*(iii) the Schedule of Progress Payment,*

***(the Subcontract).***

· *Under the Schedule of Progress Payment, there were to be 24 progress payments in total... It is not in dispute that the first 19 progress claims by Demtech have already been paid by Brambles. The first 19 progress claims were all made prior to the Collapse.*

· ***[Further]:***
*(a) under the Head Contract, Brambles took ownership of HM1 classified ferrous scrap once it was severed from the land. The different types of scrap recovered by Demtech from the Works were HM1 (steel), black iron (such as corrugated roofing materials and lesser value steel) and non-ferrous materials. The salvageable material included such things as reusable beams, electric motors, valves, pump and pipes;*
*(b) the provisions of the Subcontract contemplated that once buildings, equipment and structures (except hazardous materials) were severed from the land, they became the assets of Demtech (Special Conditions Clause 4, and Clause 2 of the Specification, of the Subcontract).*
*(c) under the Letter of Award:*
*(i) for ferrous scrap of HM1 quality, Brambles' right of ownership upon severance transferred to Demtech and Demtech then re-sold the scrap to Brambles for $80 per tonne;*
*(ii) for other ferrous scrap called "black iron", the same arrangements applied except that Demtech resold this scrap to Brambles for $50 per tonne; and*
*(iii) for any items which are not sold to Brambles, a charge of $80.00 per tonne is payable by Demtech to Brambles within 14 days;*
*(d) the actual arrangements between Brambles and Demtech were as follows:*
*(i) for ferrous scrap of HM1 quality, Brambles' right of ownership upon severance transferred to the Respondent and Demtech then re-sold the scrap to Brambles for $80 per tonne; and*
*(ii) for other ferrous scrap called "black iron" or lightweight pipe, the same arrangements applied except that Demtech resold this scrap to Brambles for $50 per tonne and $45 per tonne respectively; and*
*(e) Brambles' ownership of non-ferrous scrap and salvageable material was transferred to Demtech on severance and it on sold it, but paid $80 per tonne to Brambles regardless of its nature.*

***The Collapse***

· *Demtech commenced demolition and removal of the Assets in August 2001.*

· *On 19 September 2002, in the course of executing the Works, [an] uncontrolled partial structural collapse of the building that housed No. 6 Boiler (the **Collapse**) [occurred]. The Collapse resulted in the death of an employee of Demtech, injury to other Demtech personnel and the uncontrolled release of asbestos dust and synthetic fibre.*

· *Following the Collapse, the part of the Site occupied by Demtech where Boilers 1 to 7 were to be located (the **Demtech Site**) was closed by Workcover. Workcover issued a Prohibition Notice to Demtech stopping further demolition of structures and Improvement Notices relating to:*
*(a) the risks caused by structural instability of Boilers 6 and 7;*
*(b) the risks to health, safety and welfare in the vicinity of Boilers 6 and 7 from asbestos; and*
*(c) the risks to health, safety and welfare to persons working in the vicinity of Boiler 6 and 7 from synthetic mineral fibre.*

· *Following the Collapse, WorkCover permitted Demtech to undertake asbestos removal works and Demtech obtained letters from HLA Envirosciences (**HLA**) indicating that "designated areas" of the site were free of visible asbestos.*

***Curial proceedings***

· *On 27 November 2002, Demtech initiated proceedings in the Supreme Court against Brambles concerning matters in relation to or arising out of the Subcontract (**Demtech's Action**).*

· *On 15 January 2003, Brambles commenced cross-claim proceedings against Demtech (**Brambles' Cross-Claim**).*

· *In the morning of 6 June 2003, Brambles sought security for its costs in defending Demtech's Action. Security arrangements were agreed with Demtech. On 6 June 2003, Court orders, were made by McClellan J, inter alia, staying Demtech's Summons until the provision by it of security for Brambles' costs of defending the Summons. As at the date of these submissions, Demtech has not provided that security and by the terms of the order, its action is stayed. In relation to the security for costs matter, Demtech provided financial information to Brambles.*

***The adjudication***

- *On 13 October 2003, Brambles received two invoices from Demtech in respect of progress claims Nos. 20 to 24 under the Subcontract, purporting to be payment claims made under section 13 of the Act (the **Payment Claim**). The Payment Claim, in the sum of $274,153.52, was made by Demtech more than a year after the Collapse.*
- *On 27 October 2003, Brambles served on Demtech its payment schedule pursuant to section 14 of the Act comprising reasons and submissions in response to the Payment Claim, together with the first statutory declaration of Stephen Dale Merritt (collectively, the **Payment Schedule**). Brambles submission was that nothing was owed to Demtech and that the Act did not apply to the Subcontract.*
- *By an application dated 10 November 2003, Demtech applied to Adjudicate Today, an authorised nominating authority pursuant to the Act, for adjudication of the Payment Claim pursuant to section 17 of the Act (the **Adjudication Application**). Brambles received a copy of Demtech's adjudication application on 11 November 2003.*
- *By a fax dated 12 November 2003, Adjudicate Today notified Brambles that it had requested the Adjudicator to determine Demtech's Adjudication Application, and that the Adjudicator had accepted the appointment.*
- *On 18 November 2003, Brambles lodged the Adjudication Response and submissions in support of the Payment Schedule (the **Adjudication Response**) with the Adjudicator. A copy of the Adjudication Response was also served on Demtech.*
- *On 2 December 2003, Brambles received a fax from Adjudicate Today attaching the purported Determination by the Adjudicator, dated 24 November 2003 made pursuant to section 22 of the Act.*

***The determination***

- *The Adjudicator's reasons for his Determination included, inter alia, the following:*
  - *(a) consideration for the Subcontract is calculated by reference to the value of the work carried out or goods supplied and therefore the Act applies;*
  - *(b) there were no provisions that the date for payment of progress claims pursuant to the Schedule of Progress Payments would be postponed until the specified work was completed and that such completion was a condition precedent to Demtech's entitlement to progress payment;*
  - *(c) Brambles had not made out an entitlement to set off any specific debt against the progress payment; and*
- *Brambles was liable to pay 100% of the adjudication fees, on the basis that Brambles had allegedly unnecessarily increase the costs of the purported adjudication by submitting "a mass of irrelevant materials".*"

5 Brambles further contends as follows:

- "*pursuant to General Conditions Clause 14.1 of the Subcontract, Brambles took the remaining part of the Works (the **Remaining Works**) out of the control of Demtech;*
- *Demtech vacated the Demtech Site on 4 November 2002, although some of its equipment and materials were removed at a later time;*
- *in November 2002, Brambles entered into a subcontract with Moltoni Adams Pty Ltd (**Moltoni**) for the performance of the Remaining Works which had been taken out of Demtech's control (the **Moltoni Subcontract**);*
- *shortly after the Moltoni Subcontract was executed, Moltoni had started removing scrap from the Site but within a few days, it encountered asbestos still present at the Site;*
- *the asbestos encountered by Moltoni was present at the Site due to Demtech's failure to safely collect, remove and dispose of hazardous waste materials, including contaminated soil and materials containing asbestos and synthetic mineral fibre not only from Boiler 6 but also from other demolition work on site. The site was in a highly contaminated and unsafe condition due to Demtech's actions;*
- *in November 2002, Workcover directed that Moltoni provide an asbestos audit and management plan and carry out a proper clean-up and removal of asbestos before Moltoni could undertake further demolition work on the Site.;*
- *on 11 December 2002, HLA produced an asbestos management plan which identified areas of the former Demtech Site where asbestos had been found;*
- *under the Moltoni Subcontract, Brambles did not receive any proceeds from the sale of scrap. Brambles agreed on a payment of $50,000 in addition to Moltoni retaining all scrap and salvageable material. Further, under the Moltoni Subcontract, Moltoni agreed to undertake work to remove hazardous materials, including asbestos and synthetic mineral fibre, but this was charged as an extra to Brambles;*
- *in November 2002, Brambles retained the services of Davis Langdon, Quantity Surveyors, to:*
  - *(a) record the work which was to be undertaken by Moltoni;*
  - *(b) identify and record the movement of all scrap; and*
  - *(c) enable Brambles to confirm the quantities of asbestos and other hazardous materials to be removed during the course of the Remaining Works.*
- *in April 2003, Davis Langdon produced a report describing and quantifying the work which was necessary to complete the Remaining Works after they were taken over by Moltoni, including the removal of scrap and hazardous materials.*"

**Dealing with the case**

6 There are a number of provisions of the Act which are relevant to the issues. Without being exhaustive, these include the following:

**" Object of Act**

*3(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to*

*recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services. ...*

***7. Application of Act …..***

*(2) This Act does not apply to: ...*

*(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied. ...*

***9. Amount of progress payment***

*The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:*

*(a) the amount calculated in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.*

***10. Valuation of construction work and related goods and services***

*(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:*

*(a) in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, having regard to:*

*(i) the contract price for the work, and*

*(ii) any other rates or prices set out in the contract, and*

*(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and*

*(iv) if any of the work is defective, the estimated cost of rectifying the defect.*

*(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:*

*(a) in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, having regard to:*

*(i) the contract price for the goods and services, and*

*(ii) any other rates or prices set out in the contract, and*

*(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and*

*(iv) if any of the goods are defective, the estimated cost of rectifying the defect,*

*and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out. ...*

***22. Adjudicator's determination***

*(1) An adjudicator is to determine:*

*(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), and*

*(b) the date on which any such amount became or becomes payable, and*

*(c) the rate of interest payable on any such amount.*

*(2) In determining an adjudication application, the adjudicator is to consider the following matters only:*

*(a) the provisions of this Act,*

*(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 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.*

*(3) The adjudicator's determination must:*

*(a) be in writing, and*

*(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination). ...*

***29. Adjudicator's fees***

*(1) An adjudicator is entitled to be paid for adjudicating an adjudication application:*

*(a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or*

*(b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.*

*(2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.*

*(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.*

*(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3).*"

**Judicial review of adjudications**

7 There have been a number of recent decisions at first instance dealing with the Act. These include ***Walter Construction Group Limited v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266, a judgment of Nicholas J, 9 April 2003; ***Paynter Dixon Constructions Pty Limited v JF & CG Tilston Pty Limited*** [2003] NSWSC 869, a judgment of Bergin J, 25 September 2003; ***Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited*** [2003] NSWSC 903, 26 September 2003, a judgment of my own; ***Abacus Funds Management Ltd v Davenport*** [2003] NSWSC 935, 20 October 2003, an interlocutory judgment of Gzell J; the judgment of McDougall J in ***Musico v Davenport*** [2003] NSWSC 977, 31 October 2003; and my own judgments ***Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors*** [2003] NSWSC 1019 and ***Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited*** [2003] NSWSC 1103.

**The jurisdictional issue**

8 In approaching the jurisdictional issue it is to be noted that the definition [section 5 of the Act] of "*construction work*" includes "*the demolition or dismantling of buildings or structures*".

9 The instant jurisdictional issue lies in short compass. It concerns the proper construction of section 7(2)(c) of the Act. Clearly enough, this sub-section serves to exclude certain construction contracts from the reach of the Act. The construction contracts so excluded are identified by reference to whether or not the consideration payable for construction work carried out under the contract or for related goods and services supplied under the contract is to be calculated:

· by reference to the value of the work carried out or the value of the goods and services supplied; or

· *otherwise than* by reference to the value of the work carried out or the value of the goods and services supplied.

10 Critically, the search is for the manner of calculation of the consideration payable for the relevant construction work or for the relevant goods and services supplied.

***Walter Construction Group Limited v CPL (Surry Hills) Pty Ltd***

11 In this regard, the proper approach to section 7(2)(c) of the Act was considered by Nicholas J in ***Walter Construction***. His Honour approached the matter by reference to the onus of proof. The judgment includes the following:

*"70 At the outset the application of the Act to construction contracts must be kept in mind. Section 7(1) provides:*

*"7(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales".*

*71 Contracts to which the Act does not apply are described in s 7(2). The Defendant submits that this contract is within s 7(2)(c). A lump sum contract is not specifically excluded.*

*72 The determination of the Defendant's submission involves deciding where the onus of proof lies as to whether a contract is within a category under s 7(2) having regard to the proper construction of s 7 as a whole in its general statutory context. The relevant principle was stated in **Vines v Djordjevitch** (1955) 91 CLR 512 at 519:*

> *"But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the parties seeking to rely upon the additional or special matter".*

*73 Further consideration to the question was given in Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249. The judgment of Dawson, Toohey and Gaudron JJ at 258-259 includes the following passage:*

> *"Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined "upon considerations of substance and not of form": Dowling v Bowie. And, of course, the necessity to have regard to substantive and not merely formal considerations is emphasized by the words of s. 168(1) of the Magistrates (Summary Proceedings) Act and like legislative provisions which make it clear that a matter may be classified as a statutory exception "whether it does or does not accompany the description of the offence".*

*One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. See **Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen,** per Dixon J. Such is ordinarily the case where, in the terms used in Reg. v Edwards, there is a prohibition on the doing of an act "save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities". See **Reg. v Hunt**, where Lord Griffiths considered the statement from "**Reg. v Edwards** "an excellent guide to*

*construction". If the new matter is a matter peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof".*

(See also ***ADI Limited v Environmental Protection Authority; Environmental Protection Authority v ADI Limited*** (2000) 118 A Crim R 335 per Foster AJA, paras 11-19.)

*74 A stated object of the Act is in s 3(1) which provides:*

*"3(1) The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services"."*

12 His Honour, after setting out an excerpt from the second reading speech to the Act, continued [at 77]: *"It seems clear to me that the intention of the legislature is that the Act applies to any construction contract, section 7(1) being a statement of general application. It is also clear that its intention is that the classes of contract described in section 7(2) are exceptions to the general rule that if a party wishes to avoid its application it must demonstrate that the contract is within an excepted class. Obviously, it is probable that the features of a contract which might bring it within an excepted class will be within the knowledge of the party seeking to avoid the Act. Consistent with the principles referred to, that circumstance is further indication of the intention that the onus of proof concerning the exception is on the party claiming that the contract is within it. "*

**The second reading speech**

13 Demtech has sought to derive assistance from the second reading speech to the Act (Hansard, Assembly, September 1999, page 104) where the relevant minister said: *"With certain exceptions, the bill benefits anyone who is party to a construction contract, whether written or oral. Construction contracts include contracts for the supply of related goods and services, such as the provision of architectural, engineering and surveying services, the supply of building materials or components to form part of a building or structure, and the supply or hire of plant or materials for use in construction work. Builders are also able to use the legislation in relation to obtaining payments from their clients.*

*Particular types of contracts are excluded from the operation of the legislation. The main exclusions are: contracts for residential building work with the person who resides in or proposes to reside in the premises on which the work is carried out; employment contracts; contracts of insurance or loans or guarantees with recognised financial institutions;* ***contracts where the payment is not made in monetary terms, for example, a contract where in return for carrying out construction work the contractor is to receive the right to lease or operate the building or structure;*** *and contracts for construction work carried out outside New South Wales".* [emphasis added]

14 Demtech submits that it gains support from the above words in emphasis said to be a description of the exclusion in section 7(2)(c). The submission is that the second reading speech makes clear that the intention of section 7(2)(c) of the Act is to exclude what are commonly known as BOOT contracts (Build, Own, Operate and Transfer) and similar contracts where the consideration for the construction work is either *not* monetary or is determined by matters *entirely extrinsic* to the construction work to be performed. The submission is that in those circumstances it would clearly be inappropriate to impose an obligation to make progress payments. The submission is that the same cannot be said of the contract in this case.

15 Brambles submits that Demtech's citation of the second reading speech in this regard is an attempt at creating an ambiguity in legislation where none in fact exists: ***R v Maclay*** (1990) 19 NSWLR 112 at 125E; see also, ***Monier Ltd (t/as Reliance Roof Tiles) v Szabo*** (1992) 28 NSWLR 53 at 66G.

**Dealing with the issue**

16 The use of parliamentary materials, such as second reading speeches, as extrinsic materials to aid in the interpretation of a statute is permissible [*Interpretation Act 1987 (NSW)*, section 34(2)(f)], although it cannot of itself be determinative: *"The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."* [***Re Bolton ex parte Bean*** (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ]

17 The second reading speech does not explicitly seek to treat with the concept of severable consideration in a contract. It does give some direction insofar as identifying as falling outside the ambit of the Act, contracts where the payment is not made in monetary terms.

18 Nor does section 7(1)(c) explicitly treat with anything other than a contract in which the consideration is entire and indivisible. As is apparent in relation to total failure of consideration issues where all that can be proved is a partial failure in performance of a contractual promise, the law encounters "*difficulty with apportionment in respect of an entire obligation, namely one in which the consideration for the payment of money is entire and indivisible*": ***Roxborough & Ors v Rothmans of Pall Mall Australia Limited*** (2001) 208 CLR 516 at [106] per Gummow J.

19 It is possible to follow the underlying rationale for the subject sub-section when one takes into account the fact that even where a construction contract makes no provision for the making of progress claims, a claim to a progress payment is permitted to be made and in that circumstance the amount of a progress payment to which a person is

entitled is to be: *"...calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract." [Section 9(b)]*

20 It is then necessary to refer to the terms of the contract. These are not in issue.

21 The 12 July 2001 letter of award [Exhibit P 7] states, inter alia:
*"The scope of works are detailed within our head contract with BHP, namely contract BHPMS004. [Copy is attached, and acknowledgment of receipt is required prior to the commencement of any work on site]. Excluded from the work scope is the cleaning of vessels numbers 52,53,54,55,56,57 and 76.*

*The agreed lump sum price is $1,854,692.11. Demtech will re-sell to Gardner Perrott all ferrous scrap, able to be processed to HMI, at $80,00 per tonne. Scrap classified as 'black iron' will be re-sold to Gardner Perrott at $50.00 per tonne.*

*Any items that are not sold to Gardner Perrott, a charge of $80,00 per tonne to Demtech will apply, which is payable to Gardner Perrott within 14 days. Gardner Perrott reserve the right to offset amounts owing by Demtech against funds due from Gardner Perrott. Additionally, it is expected that there will be no material amounts ie., 10% of contract value of non-ferrous scrap, to be recovered from the site. In the event of any material items being discovered during the demolition activities, a profit share agreement will be agreed upon.*

*The terms and conditions of this subcontract agreement are those that are expressly contained in the above-mentioned contract. In relation to the payment terms for this agreement, the conditions contained within contract BHPMS004, are to apply, with the exception that payments for scrap will be made 14 days after receipted on an approved invoice together with supporting documentation. No other terms and conditions will be applied, unless confirmed in writing by Gardner Perrott. The OH & S and Work Method Statements as submitted by Gardner Perrott and approved by BHP and Newcastle City Council will apply."*

22 The special conditions [MFI 1 at 116] included the following [it being necessary to by reference read "*Contractor*" as "*Sub-contractor*"]:
"**1 PRICE**
The above prices are exclusive of GST and based on:
- The Contractor owning all materials resulting from the demolition as set out in Clause 2 (OWNERSHIP OF MATERIALS) of the Specification.
- The Contractor's independent assessment of the condition of the Assets.
- The Contractor's independent assessment of the extent and location of contaminants and hazardous material within the Asset areas that will require disposal under the requirements of the EPA and Newcastle City Council. The removal of contaminated water from bunds and the like is based on average rainfall only. Violent storms and long periods of rainfall, which necessitate multiple pumpouts, will be an additional cost.
- The Contractor delivering all Coke Ovens gas mains, pipes and valves to BHP's Coke Ovens Gas residue disposal contractor in the old Steel Foundry building for BHP to remove and dispose of the residues at BHP's cost. The cleaned mains, pipes and valves will be picked up by the Contractor for processing into scrap and subsequent sale.
- The Contractor maximising the hours of work available as set out in Condition 4.7 of the NCC Development Approval.
- The Contractor receiving $160.00 per tonne for processed environmentally clean scrap."

23 The special conditions further included [MFI 1 at 121]:
"***3 SETTLEMENT***
*Payment will be made for each section in each area in the schedule on completion of the removal of the Assets from that area or as otherwise described. Material accepted by the Contract Coordinator as acceptable for fill and stockpiled in nominated areas may remain the site. Removal of steelwork will be accepted as completed when delivered to the Contractor's approved scrap processing area.*

*Payments will be based on the work being completed for each area within the time schedule set out in the pricing schedule. Settlement discounts will be withheld from payments until final Contract completion where the Contractor fails to meet the agreed time schedule. The following settlement discounts will apply.*

| | |
|---|---|
| Up to 30 days late | No Discount |
| Over 30 days and under 60 day | Less 5% |
| Over 60 days and under 90 day | Less 15% |
| Over 90days | Less 30% |

...
***PROPERTY AND RISK IN THE ASSETS***
*All property in the Assets passes to the Contractor as each component part of the Asset is severed from the Premises. All risk in the Assets passes to the Contractor on the Commencement date."*

24 The specification for demolition further included [MFI 1 at 124]:
***"2 OWNERSHIP OF MATERIALS***
*All steelwork, mechanical equipment and fittings, all electrical equipment, motors, controls, cables and fittings, refractory and other bricks, building and office materials and all other items and materials forming part of the Assets shall become the property of the Contractor. Ownership in the Assets shall pass to the Contractor as set out in Clause*

*4 of the Special Conditions. The Coke Ovens Gas Mains shall be treated in accordance with Clause 4.4 below. Ownership of all hazardous substances shall remain with BHP. The Contractor shall dispose of these hazardous substances on behalf of BHP as set out in Clause 5 (HAZARDOUS MATERIALS).*"

25 In those circumstances one question would appear to be as to whether the contract properly construed:
· involved consideration which was entire and indivisible; or
· involved severable consideration.

26 Mr Inatey SC appeared to eschew the proposition that the consideration was severable [transcript 36.35].

27 A threshold question would appear to be whether there were in truth two contracts, the first dealing with the agreed lump sum price for the subject scope of works as described in the 12 July 2001 letter award [exhibit P7], and the second dealing with the provisions concerning scrap retention or resale.

28 Ultimately the matter is one of impression. Has Brambles satisfied the onus of establishing that the subject contract was within the excepted class?

29 To my mind the answer to this question is in the negative. The contract was for an agreed lump sum. It contained a profit share arrangement with respect to material items being discovered during demolition activities. It also contained terms and conditions treating with scrap, the property in which immediately passed to Demtech as and when severed from the premises. The same terms and conditions essentially dealt with the resale by Demtech of all ferrous scrap and of scrap classified as 'black iron'. These terms and conditions also dealt with a charge to Demtech in respect of items not so resold. And there was a provision within the scrap terms and conditions by which there was a right reserved to offset amounts owing by Demtech to Gardner Perrot [another division of Brambles].

30 Brambles has not discharged the onus which lay upon it of establishing that all or any part of the consideration payable for construction work carried out under the contract or for related goods and services supplied under the contract was to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied. There are too many imponderables left for consideration.

31 Brambles has not established that the subject contract did not involve payment in monetary terms. The agreed lump sum price was $1,854,692.11. I do not see that the terms and conditions dealing with sale or retention of scrap can be said to *establish* that the contract did not involve payment in monetary terms. Nor do those terms and conditions otherwise answer the question as to whether the consideration payable for c*onstruction work* was to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied. In all likelihood the terms and conditions dealing with the sale or retention of scrap simply cannot, upon the proper construction o*f the instant contract,* be said to fall within the meaning of the phrase in section 7(2)(c) "the consideration payable for construction work carried out under the contract". Arguably, this is recognised in the payment schedule [Exhibit P 5] by Brambles reference to the extent of work done by Demtech to maximise the value of the scrap and salvageable material being neither construction work nor related goods and services but rather being "*asset recovery work for its own account"*.

32 That there was an internal offset arrangement under the scrap provisions does not carry Brambles the distance of having discharged the onus which lay upon it.

33 Whilst it is arguable that the consideration payable for the construction work is shown to have been severable, the elements of the severable consideration including:
· the agreed lump sum price;
· the receipt by Demtech of ownership of materials resulting from demolition; and
· terms entitling Demtech to resell to Gardner Perrot particular of the salvaged material or to be charged in the event of particular of such material not being so resold,

to my mind the better analysis is that earlier set out.

34 I do not see it as necessary to presently determine whether the sub-section is concerned o*nly* with contracts in which the consideration is entire and indivisible.

35 In those circumstances it seems to me that Brambles has failed on the jurisdictional issue.

**The suggested jurisdictional error of law in the adjudicator's acceptance that he had no power to determine his own jurisdiction**

36 The Court has now held that the adjudicator had jurisdiction. Whilst it is true that the adjudicator accepted that he had no power to determine his own jurisdiction, but nonetheless proceeded to determine the matter on the assumption of the existence of jurisdiction and did not provide reasons in support of that approach, the matter becomes de minimus in the present context. In the circumstances there is no question of the Court exercising its discretion to make an order in the nature of certiorari quashing the subject determination.

**Contractual payments said not to have been dependent on completion of the works to any particular stage**

37 The adjudicator determined that the schedule of progress payments provided a timetable for progress payments which was not subject to proof of completion of the work to the stages identified on the page attached to the schedule. The adjudicator gave priority to the statement at the foot of the schedule of progress payments: "*The above claims will be submitted on a fortnightly basis. Payment terms 14 days from date of invoice*".

38 The adjudicator determined that the statement on the page [attached to the schedule] that various progress payments would correspond with the completion of various stages of the work, was not intended *to override* the express provision on the schedule of progress payments.

39 The adjudicator stated, at page 3 of his determination, that: *"At the foot of the progress payment schedule is, 'The above claims will be submitted on a fortnightly basis. Payment terms 14 days of invoice.'*

On the next page of the letter there is the statement. "Payment No.20 will correspond with the completion of ..." and there follows a description of 5 separate aspects of the work. Similarly, there is the statement, "Payment No.24 will correspond with the completion of ..." and a description of 8 separate aspects of the work. *But there is nothing to say what will happen if Payment No.20 does not correspond with completion of all the 5 separate aspects of the work referable to Payment No.20. There is nothing to say the time for Payment No.20 will be delayed until completion of all 5 aspects. There is nothing to say that the amount of Payment No.20 will be reduced if Payment No.20 corresponds with some but not all aspects*. Similarly with Payment No.24.

It is not even clear just what 'Payment No.20' and 'Payment No.24' mean. They appear to mean the amounts of $57,324.24 and $43,326.46. They are the respective payments. But that does not make sense. Perhaps Payment No.20 means 'Progress Payment No.20' and similarly for Payment No.24. But that might, on basis [sic] the respondent's submission, result unfairly in the whole progress payment, and presumably all subsequent progress payments, being totally withheld because one very minor item of the work referable [sic] Payment No.20 was incomplete. I am not prepared to give the provisions an interpretation which would have such a potentially unjust consequence.

The respondent asserts [para. 15 of the payment schedule], 'It is clear from the subcontract ... that the schedule of fortnightly payments required that milestones be met. They did not comprise fixed payments which has to be paid 14 days later regardless of the stage to which Demtech's works had progressed'. *It seems to me that the schedule of specific payments at specific intervals stands unqualified by the statement on the next page that some of those payments (in particular 20 and 24) will correspond with certain stages of the work*. It seems to me that if the payments don't correspond with the completion of all aspects of the work referable to the payment number, the claimant might possibly be said to be in breach of a promise that completion of specified work would correspond with a certain progress payment. That might give the respondent certain rights under the contract or to damages for breach of contract but *I can't see any provision to the effect that the date for payment will be postponed until the specified work is completed. If it was intended that completion of the specified work was to be a condition precedent to the entitlement to the progress payment, I would have expected an express provision to that effect*. It is not necessary that the amount of progress payments specified in a construction contract should bear any relationship to the value of work carried out or remaining to be carried out.

For these reasons, I don't accept the respondent's interpreation [sic] of the progress payment provisions of the contract." [emphasis added]

**The record**

40 Brambles submissions in this regard included that:

- the adjudicator has misconceived, misunderstood or failed to have regard to all the relevant provisions of the sub-contract concerning progress payments;
- he interpreted the sub-contract in such a way as to entitle Demtech to progress payments every 14 days without having to complete the relevant milestones.

41 It is convenient to commence by a consideration of whether or not the record [for the purpose of section 69(3), (4) and (5) of the *Supreme Court Act 1970 (NSW)* and in the present case] is seen to include provisions of the contract to which the adjudicator had not specifically referred.

42 In ***Musico & Ors v Davenport & Ors*** [2003] NSWSC 977 [which involved a determination by the same adjudicator], McDougall J put the matter as follows: *"In his determination, Mr Davenport referred to a number of the provisions of the contract, and expressed views as to their meaning and application. In my opinion, in determining whether there is error of law on the face of the record, it is open to me to have regard at least to those provisions of the contract to which Mr Davenport referred. Applying by analogy what was said in Craig at 181-2, I think that at least those clauses of the contract that are specifically referred to and analysed by Mr Davenport should be taken to be incorporated into his determination; and, as I have noted, his determination itself forms part of the record. In substance, it seems to me that the way Mr Davenport dealt with those particular contractual provisions makes them an integral part of his determination, as opposed to "a merely introductory or incidental reference"."*

43 In the present case, the approach taken in the determination was for the adjudicator to state that he could not see [plainly intending to refer to the provisions of the contract] any provision to the effect that the date for payment would be postponed. This clearly, it seems to me, means that the whole of the contract should be taken to be incorporated into the determination and therefore to form part of the record.

44 Brambles submits that the adjudicator is clearly shown to have fallen into error in having failed *to have regard to* the critical relevant terms of the contract. The proposition put forward is that the general conditions of contract clearly provided in clause 24.1, inter alia, that unless otherwise specified in the contract, the principal would effect payment to the contractor only upon completion of the work. Reliance is also placed upon special condition 3 which provided for payment to be made for each section in each area in the relevant schedule on completion of

the removal of the assets from that area or as otherwise described and that payments *would be based on the work completed* for each area within the time schedule set out in the pricing schedule.

45 Clearly enough the adjudicator did not, *in the determination*, expressly refer to general condition 24 or to special condition 3. However, Demtech contends that there is a basis upon which the determination was grounded, in that the schedule of progress payments was appropriately seen as a specific document which overrode any inconsistent provisions in other contractual documents. Whilst this may have been the reasoning process of the adjudicator it was certainly not made explicit.

46 It does not seem to me that the Court can or should presently infer from the determination that the adjudicator could not possibly have looked at general condition 24 or special condition 3. However, even if that inference was appropriate questions which would arise would include:

- whether it is presently open to Brambles to make a complaint about the failure of the adjudicator to refer in his determination to general condition 24: the Demtech proposition being that general condition 24 was not referred to in the payment schedule nor in any adjudication response;
- whether such relevant error is properly described as *"jurisdictional error*";
- discretionary grounds relevant to the grant or withholding of an order in the nature of certiorari.

**Whether Brambles is entitled to make the relevant complaint**

47 Section 20(2B) of the Act expressly provides that the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

48 A careful reading of the *payment schedule* discloses that there was no reference made at all to clause 24.1. However, the *adjudication response* did refer to clause 24.1 [Exhibit P2 at page 15].

49 Section 22(2) of the Act provides that in determining the adjudication application the adjudicator is to consider *only* the particular matters thereafter set out. Those matters include [section 22(2)(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".*

50 The Court has been referred in this regard to the approach taken by Palmer J in ***Multiplex Constructions Pty Ltd v Luikens and Anor*** [2003] NSWSC 1140 at [76 - 78]:

> *"76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.*
>
> *77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.*
>
> *78 Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication."*

51 In my own view, the proper approach, bearing in mind the time constraints built into the scheme, is to be reasonably strict where, as here for example, enforcing the injunction to be found in section 20(2B). Precision and particularity was required in the payment schedule to a degree reasonably sufficient to apprise the parties of the real issues in the dispute. If clause 24.1 was to have been relied upon it had to be expressly identified. Insofar as the adjudication response here went outside the reasons for withholding payment which were included in the payment schedule, it was appropriate for the adjudicator to disregard the adjudication response.

52 For those reasons it is not presently open to Brambles to make a complaint about the failure of the adjudicator to refer in his determination to general condition 24.

53 Special condition 3 becomes of little significance viewed separately.

**Jurisdictional error**

54 In these circumstances it is unnecessary to go further and to examine whether or not, if the above finding be incorrect [so that Brambles is now entitled to complain about the failure of the adjudicator to refer in his determination to general condition 24 or special condition 3], such relevant error is properly described as *"jurisdictional error*".

55 There is no jurisdictional error established in relation to the allegation of the adjudicator misunderstanding that the second statutory declaration of Mr Merritt did not in fact involve a *revision* of the relevant amounts, which were in fact differently based under the contract.

**Natural justice in relation to costs**

56 This matter is again in short compass. The Act [section 29(2), (3)] provides that:
- the claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses; and
- the claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

57 The complaint is that the adjudicator determined that the respondent was liable to pay 100 percent of the adjudication fees without affording the parties [Brambles in particular] the opportunity to address on the issue. This is said to offend the rules of natural justice which it is said require in this context each party to be given the opportunity to present an informed case to the adjudicator to be considered. Brambles submission includes:
"*While it may be that an adjudicator has a discretion as to how to award the costs of any determination, there is a presumption inbuilt into sections 28(4)(b) and 29(3) that those fees will be split equally – albeit the parties will remain jointly and severally liable to the adjudicator therefore – unless that adjudicator determines to the contrary. In the present case no submissions were made by any party, nor were they sought by the Adjudicator, to suggest a costs determination on any particular basis, let alone a 100% liability to Brambles.*

*An adjudication is amenable to review on the basis of a purported denial of natural justice;* ***Musico*** *at [107],* ***Transgrid v Walter Construction Group Ltd*** *[2004] NSWSC 21 at [60]ff. The Adjudicator's approach to this issue meant that Brambles was denied a reasonable (indeed, any) opportunity of presenting a case on this matter;* ***Russell v Duke of Norfolk*** *[1949] 1 All ER 109 at 188 per Tucker LJ. The Adjudicator failed in the circumstances to adopt and follow a reasonable and fair procedure before exercising his statutory discretion, see for example (in a trial sense)* ***Kioa v West*** *(1985) 159 CLR 550 at 627 per Brennan J;* ***Rose v Bridges*** *(1997) 79 FCR 378 at 386 per Finn J. His Honour's approach offended the notion of a contest or debate between parties before a detached and essentially passive tribunal, refer; Judicial Review of Administrative Action, Aronson & Dyer, LBC (2nd Ed) at 403.*"

58 The content of the obligation to afford natural justice to the parties plainly depends upon the circumstances of the particular case and here, the legislative scheme. The parties are aware as soon as an adjudication application is served that the adjudicator has the power to determine the proportions in which the claimant and respondent are to be liable to contribute to the payment of the adjudicator's fees and expenses. The legislation sets up a fast track tightly regulated set of procedures which, as earlier mentioned, have recently been the subject of extensive judicial consideration. The width of the discretion given to the adjudicator and the whole of the relevant legislative scheme, **importantly**, fixing a **time limit** within which the adjudication application is to be determined, appears to me to require that the parties, if they wish to put any particular matter to the adjudicator, do so in the course of and as part of their submission of the documents stipulated for by the Act: that is to say the payment claim, the payment schedule, the adjudication application and the adjudication response. In the absence of any submission of any type by either party in relation to the adjudicator's fees and expenses, the adjudicator may proceed to exercise, as here, his/her discretion to determine the issue. In that circumstance the adjudicator, in exercising that discretion, may take into account such matters as to the adjudicator appear relevant to the exercise. Whilst the discretion is not entirely at large, almost every matter which relates to the circumstances in which, and manner in which, the adjudication application has come forward and then been dealt with by the parties, may be taken into account.

59 There is no substance in the natural justice complaint.

**Reserved rulings on evidence**

60 During the hearing the course adopted was in certain instances to reserve rulings on the tender by Brambles of documentary material. The rulings allowed into evidence the following materials:
- the adjudication application;
- the adjudication response;
- the adjudication determination;
- the payment claim;
- the payment schedule;
- the schedule of progress payments;
- the letter of award;
- clause 26 of the general conditions of the head contract.

61 MFI P3 compromised 7 lever-arch folders and nine loosely bound reports. Certain of this material simply duplicates the above described documents which were allowed into evidence. There is no need to include the same material twice in the record.

62 The only document forming part of MFI P3 which it is appropriate to now allow into evidence is the entirety of the contract which is to be found in volume 1. That contract may be marked as exhibit 1D.

63 Every other document forming part of MFI P3 is rejected either:

- as not forming part of the record; or
- pursuant to section 135 of the *Evidence Act 1995 (NSW)* on the basis that the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the defendant or be misleading or confusing or cause or result in undue waste of time.

**Short minutes of order**

64 The parties are to bring in short minutes of order on which occasion costs may be argued.

Mr G Inatey SC, Mr D Miller (Plaintiff) instructed by Allens Arthur Robinson
Mr M Rudge SC, Mr D Robertson (Second Defendant) instructed by Dutton Lawyers (