Brodyn P/L t/a Time Cost & Quality v Philip Davenport [2003] Adj.L.R. 11/06

JUDGMENT : Einstein J : Supreme Court NSW Equity Division. 6 November 2003

The Proceedings

1 The plaintiff, Brodyn Pty Ltd, seeks relief under section 69 of the Supreme Court Act 1970 (NSW) in the nature of certiorari quashing an adjudication determination made by the first defendant pursuant to the provisions of the Building and Construction Industry Security of Payment Act 1999 (NSW) ["the Act"]. Further, claims to injunctive relief are sought including:

"2. An order that the Third Defendant, its servants or agents, be restrained from requesting the Second Defendant, being the authorised nominating authority within the meaning of those words contained in s 24 of the Building and Construction Industry Security of Payment Act 1999 (the Act), to provide an adjudication certificate under s 24 of the Act;

3. An order that the Third Defendant, its servants or agents, be restrained from providing the Second Defendant with an adjudication certificate;

4. In the alternative to the order sought at 3 above, an order that the Third Defendant, its servants or agents, be restrained from filing any such adjudication certificate as may have been obtained as a judgment for a debt in any Court of competent jurisdiction under s 25 of the Act."

2 The second defendant is the nominating authority authorised by the Minister under section 28 of the Act to nominate the first defendant to determine the adjudication application. The third defendant is the builder claimant who as a subcontractor to the plaintiff, made the adjudication application [I note that as the proceedings were litigated only by the plaintiff and the third defendant I shall refer to them as "the parties" or "both parties"]

The works

3 It is common ground that the works the subject of the subcontract [which both parties accept was a "construction contract" within the meaning of the Act] were the plumbing and hydraulics works part of the construction of residential apartments at 301-313 Stanmore Road, Petersham.

The third defendant's chronology

4 The third defendant furnished a chronology to the Court. While some of the detail in the chronology was not the subject of formal proof, the document serves to generally summarise the background to the adjudication. What was proved was that most of the chronology is taken directly from the third defendant's written submissions furnished to the Adjudicator and that the plaintiffs response to the adjudication application did not take issue, at least expressly, with most of this detail. Albeit that a deal of what is in the chronology has little relevance to the proceedings in terms of the issues as I see them, it seems convenient to set out this chronology and I proceed to do so:

"1. In or about February 2002, the Third Defendant, Linisil Pty Limited ("Linisil") was invited to submit a tender for certain plumbing and hydraulics works (the "Works") as a subcontractor to the Plaintiff, Brodyn Pty Limited, trading as "Time Cost & Quality" ("Brodyn").

2. The works were part of the construction of residential apartments at 301-313 Stanmore Rd, Petersham.

3. In or about February 2002, Linisil submitted a tender price of $164,000 plus GST for the Works.

4. On or about 13 February 2002, a pre-award meeting took place between representatives of Linisil (Bill Reid and Scott Reid) and Brodyn (Anthony Trinh and Brett Matterson). At this meeting, a number of matters concerning the Works were discussed. Relevantly, the following was discussed and noted in the minutes of the pre-award meeting:
a. the scheduled start date for the Works was noted as "14/2/02"; and
b. the scheduled completion date for the Works was noted as "TBA".

5. Linisil was engaged to perform the works on the basis of its tender and the discussions at the meeting on 13 February 2002.

6. Linisil commenced the performance of the works on or about 26 February 2002.

7. Importantly, further to the matters discussed at the pre-award meeting, at no stage prior to commencing the Works, or indeed before 26 June 2002, did Brodyn inform Linisil, either orally or in writing, that:
a. Linisil had to substantially complete the whole of the Works by a certain date;
b. liquidated damages would be applied in the event that Linisil did not achieve substantial completion by a certain date; and/or
c. Brodyn had assessed the sum of $1,927 per day as the liquidated and ascertained damages for the subcontract works in the event that substantial completion was not achieved by a certain date by reference to any items or considerations.

8. As at the commencement of the Works, and to the date that Linisil sought payment on its first Progress Claim, being 26 June 2002, the Subcontract comprised the following documents:
a. General Conditions of Subcontract SCJCC-D 1994 (as amended) (the "General Conditions");
b. A document entitled "Hydraulic Services Performance Specification" dated 13 August 2001 (the "Specification");
c. A document entitled "Hydraulic Scope of Work: - Revision A: 25/02/02 For Construction" which identified the scope of the Works, the Specification and a number of plans/drawings (the "Scope of Works document");
d. Four Appendices, being:
i. Appendix A - "Subcontractor Order"; ii. Appendix B - "Hydraulics";
iii. Appendix C - "Quality Assurance/Safety";
iv. Appendix D - "Subcontractor Employee Details" (the "Appendices")

9. On or about 26 June 2002, Bill Reid attended the head office of Brodyn to collect payment in respect of Linisil Progress Claim No. 1. On this occasion, Anthony Trinh said that, in order for Linisil to be paid, Bill Reid had to sign a document entitled "Subcontract Information".

10. The document entitled "Subcontract Information" purported to set out further matters in respect of the Contract between Linisil and Brodyn. In particular, as a notation in respect of commencement and completion of the Works (items B9 and B 10 respectively) certain dates for the start and finish of various parts of the Works were nominated as follows:

a. Basement Roughin - start 25/03/02 and finish 26/03/02 (2 day activity); b. Basement Fitout - start 1/05/02 and finish 2/05/02 (2 day activity);

c. Ground Roughin - start 20/02/02 and finish 26/02/02 (6 day activity); d. Ground Fitout - start 23/04/02 and finish 30/04/02 (7 day activity); e. Level 1 Roughin - start 20/03/02 and finish 26/03/02 (6 day activity); f. Level 1 Fitout - start 21/05/02 and finish 28/05/02 (7 day activity); g. Level 2 Roughin - start 27/06/02 and finish 3/07/02 (7 day activity); h. Level 2 Fitout - start 23/07/02 and finish 29/07/02 (6 day activity); i. Level 3 Roughin - start 1/08/02 and finish 7/08/02 (7 day activity);

j. Level 3 Fitout - start 20/08/02 and finish 27/08/02 (7 day activity);

No date for substantial completion for the whole of the Works was nominated.

11. Further to the document entitled "Subcontract Information" referred to above, some months later, Linisil received a further document entitled "Provisions relating to the Home Building Act, 1989" dated 12 November 2002. This document appeared to have been executed in respect of obligations under the Head Contract, and contained a number of Special Conditions, provisions relating to the Development Approval, and other items.

The Progress Claims and the performance of the Works

12. Linisil performed the Works and was further instructed to perform variations.

13. Linisil submitted Progress Claims in respect of its performance of the Works as set out below.

Schedule of Payment Claims and responses

Progress Claim	**Amount claimed for the Works performed (not including retention)**	**Response and amount paid for the Works performed (Amount is sum paid or stated not including retention monies)**
No. 1 2 June 2002	$56,921.15	Remittance Advice (21 June 2002). $53,926.00 actually paid.
No. 2 26 June 2002	$81,499.55 (includes work claimed for in Progress Claim 1)	Remittance Advice (26 July 2002). Payment Schedule (26 July 2002). $14,850.00 actually paid.
No. 3 30 July 2003	$45,745.00 (includes work claimed for in Progress Claims 1 & 2, less payment for progress Claim 1)	Remittance Advice (6 September 2002). Credit Request Form (22 August 2002). $13,262 actually paid.
No. 4 30 August 2003	$77,855.98 (includes work claimed for in Progress Claims 1, 2 & 3, less payment for Progress Claims 1 & 2).	Remittance Advice (16 Sep 2002). Payment Schedule (13 Sep 2002). Credit Request Form (16 September 2002). $45,633.50 actually paid
No. 5 24 Sept 2003	$82,232.48 (includes work claimed for in Progress Claim 1, 2, 3 & 4, less payment for Progress Claims 1, 2 & 3)	Remittance Advice (17 October 2002). Credit Request Form (16 October 2002). $14,388 actually paid.
No. 6 27 October 2003	$45,310.88 (includes work claimed for in Progress Claims 1, 2, 3, 4 & S, less payments for Progress Claims 1, 2, 3 & 4).	Remittance Advice (16 September 2002). Payment Schedule (13 September 2002). Credit Request Form (16 September 2002). $6, 000 actually paid.
No. 7 27 November 2003	$58,070.88 (includes work claimed for in Progress Claims 1, 2, 3, 4, 5 & 6, less ayments for Progress Claims 1,2, 3, 4 & 5)	Payment Schedule (28 November 2002). Credit Request Form (7 January 2003). $25,808.40 actually paid.
No. 8 16 Feb 2003	$106,755.98 (includes work claimed for in Progress Claims 1, 2, 3,4,5,6 &7, less payments for Progress Claims 1,2, 3, 4, 5, 6 & 7)	Payment Schedule (10 March 2003) Asserted that Linisil owed Brodyn $46,911.08.
No. 9 28 April 2003	$107,360.98 (includes work claimed for in Progress Claims 1, 2, 3, 4, 5, 6, 7 and 8, less payments for Progress Claims 1,2, 3, 4, 5, 6 & 7)	Payment Schedule (1 May 2003) Responded dealing with variations. Nil allowed or paid for Progress Claim o.9.

The adjudication process

14. Progress Claim No.9 was made under the Building and Construction Security of Payment Act (NSW) 1999 (the "Act").

15. Following the response of Brodyn dated 1 May 2003, Linisil made an application for adjudication on 14 May 2003.

16. The matter was referred to adjudication by Philip Davenport (the First Defendant) by Adjudicate Today (a division of Mediate Today Pty Limited, the Second Defendant), being an Authorised Nominating Authority under the Act.

17. Linisil served written submissions with its application for Adjudication.

18. Brodyn served its response in respect of the Adjudication on 21 May 2003.

19. Mediate Today informed the parties that Philip Davenport had made his Adjudication by fax dated 26 May 2003. By that fax, Adjudicate Today stated that:

a. the adjudication of Philip Davenport included a determination that Brodyn pay 100% of the fees and expenses of the adjudicator;

b. the fees and expenses of the adjudicator were $7,260; and

c. pursuant to subsection 29(5)(a) of the Act, the decision was withheld the fees and expenses of the adjudicator had been paid by Brodyn or any other party.

20. Brodyn, without knowing the substance of the determination, failed or refused to pay the fees and expenses of the adjudicator as determined. In this way, Brodyn prevented Linisil from having the benefit of the adjudication for approximately three months.

21 On 28 August 2003, Linisil paid the fees and expenses of the adjudicator as quantified in order to obtain the adjudication.

22. The adjudicator determined that Linisil was entitled to payment of the sum of $92, 256.91, plus interest at the Supreme Court rate. As noted above, the adjudicator also determined that Brodyn was to pay 100% of the fees and expenses of the adjudicator.

23. By fax dated 28 August 2003, the solicitors for Linisil served the adjudication of Philip Davenport and requested payment in accordance with that adjudication.

24. Brodyn then commenced these Supreme Court proceedings on 9 September 2003."

The submissions

5 Both parties addressed detailed submissions broadly dealing with:
whether, and if so to what extent, judicial review of adjudications made pursuant to section 22 of the Act is, in principle, available; and
if so, whether the relief sought should be granted.

6 It is convenient to treat with these matters seriatim.

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; and on 31 October 2003 the judgment of McDougall J in ***Musico v Davenport [2003] NSWSC 977.***

8 The particular issue presently before the Court was examined in Abacus Funds Management, was dealt with to an extent in terms of the entitlement to declaratory relief in Emag, but has been particularly closely analysed in Musico.

9 In ***Abacus,*** Gzell J, after noting the importance of sections 30 and 32 of the Act in respect of the question currently before the Court (see paras [10]-[14]), said:

*"21 Section 30(1) of the Act is not a privative clause. It does not seek to exclude judicial review. It is not of the nature of such provisions as were considered in **R v Hickman; Ex parte Fox and Clinton** (1945) 70 CLR 598 and does not fall within the principles discussed in **Deputy Commissioner of Taxation v Richard Walter Pty Ltd** (1995) 183 CLR 168 and more recently **in Plaintiff 5157/2002 v Commonwealth** (2003) 77 ALJR 454. Indeed, the current provision is less restrictive than it was in the original legislation which provided that no action lay against an adjudicator or any other person with respect to anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the Act.*

22 I do not construe the present legislation as seeking to exclude review by the courts of adjudicators' determinations by way of orders in the nature of prerogative writs...

*33 Nonetheless, that certiorari lies to quash a decision for error of law on the face of the record is clearly established (**R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw** [1952] 1 KB 338). In **R v Tennant; Ex parte Woods** [1962] Qd R 241 a Full Court of the Supreme Court of Queensland sought to exclude from the ambit of the writ trivial errors of law by limiting them to those that were fundamental or vital so as to make the impugned decision unwarrantable. That approach was criticised in Aronson and Dyer, Judicial Review of Administrative Action, Law Book Company, Sydney, 2000, at 178-179 on the basis that it equates patent error of the law with jurisdictional error.*

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34 In light of this controversy, I am not prepared on this interlocutory application to find that the plaintiff has such slim prospects of success that the balance of convenience favours a dismissal of the notice of motion.

*35 It will be for the plaintiff to establish what the record is. Reasons for a decision do not, of themselves, constitute part of the record but may be incorporated by reference (**Public Service Board of NSW v Osmond** (1986) 159 CLR 656 at 667, 671, 675, 678). I assume for present purposes that the record includes the first defendant's adjudication determination and the contract...*

39 Notwithstanding my reluctance to do so in light of the legislative intention demonstrable in the Act, I am of the view that the plaintiffs second challenge raises an arguable case that there is error of law on the face of the record that may give rise to an order in the nature of certiorari quashing the determination. I am of the view that the status quo with respect to that issue should be preserved pending its determination. I reject the plaintiffs first challenge and decline to grant interlocutory relief in respect of it. I decline to make any order against the third defendant. No such order is necessary to protect the plaintiff pending determination of its summons." [2003] NSWSC 935

10 Section 25(4)(a)(iii) of the Act is extremely important in terms of any decision as to the extent to which judicial review of such adjudications is in principle available. As McDougall J has pointed out in Musico, this subsection prevents a respondent seeking to set aside a judgment based on an adjudication certificate, from challenging the adjudicator's determination. As McDougall J has indicated:

"55 That must mean that in any such proceedings, the judgment cannot be set aside upon the basis that the adjudicator (for example) erred in law in some step of his or her reasoning. It would be quite inconsistent with the legislative intention that is evident in s 25(4) to permit a challenge to be raised, by way of relief in the nature of prerogative relief, upon the ground of error of law. The legislature could hardly be taken to have intended that, having forbidden entry by the front door, it was nonetheless happy for access to be obtained from the rear." [2003] NSWSC 977

11 A further matter of particular significance is to be found in the fact that Part 2 of the Act in providing for the entitlement to progress payments specifically provides that there are two alternative routes to determining the amount of a progress payment to which a person is entitled in respect of a construction contract. Section 9 provides that the relevant amount 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."

12 Section 10 which then provides in subsection (1) for the manner in which construction work carried out or undertaken to be carried out under a construction contract is to be valued, provides for that valuation to be in accordance with the terms of the contract or, if the contract makes no express provision with respect to the matter, for the valuation to have regard to a range of matters including the contract price for the work, and in the case of defective work, the estimated cost of rectifying the defects. A similar approach is taken in subsection (2) to the method by which related goods and services supplied or undertaken to be supplied under a construction contract are to be valued.

13 In short, even where no express contractual provision is made with respect to the amount of a progress payment to which a person is entitled in respect of a construction contract or where no express provision is made with respect to the valuation of construction work carried out under a construction contract, the adjudicator has a judgmental role in determining those matters. And the adjudicator exercises that role by reference to the integers stipulated for by the Act.

14 What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders.

15 During the taking of submissions from the parties, Mr Davie, counsel for the plaintiff, addressed at length on the proposition that the adjudicator is a tribunal obliged to act judicially, making the following points:

that the adjudicator once appointed exercises power conferred on him or her by statute;

that the adjudicator has the statutory power to provide a determination which expressly confers rights upon the claimant, including the right to payment, carrying with it the right to suspend work in circumstances which might otherwise constitute a breach of contract; and

that the adjudicator in carrying out the determination is required to decide questions which confer and proclaim a legal right, namely the determination that a progress payment is payable.

16 In many circumstances a statutory provision providing a tribunal with such powers would inexorably result in the decisions of the tribunal being open to judicial review and in particular review in the nature of a writ of certiorari provided for in section 69 (3) of the Supreme Court Act. That subsection reads: *"It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings."*

17 The critical parameter of present significance in terms of the consideration of the extent to which an adjudication determination is amenable to judicial review is the fact that the determination does not finally determine the parties rights even where following the issue of an adjudication certificate, the determination in due course becomes enforceable as a judgment for a debt. All that such a judgment achieves and amounts to is an obligation for the judgment debtor to make a particular payment to the judgment creditor. That payment is regarded as a progress payment mandated by the Act when it has been regularly engaged and when each of the steps provided for have been carried out to the letter.

18 So read, none of the propositions put forward by Mr Davie is conclusive as to the extent to which, if at all, judicial review of the adjudicator's determination is available. And in determining the limited extent to which the procedures under the Act are open to judicial review, it is necessary to take into account the central mischief sought to be remedied as exposed by the second reading speech. Justice McDougall has relevantly set out that reading speech in ***Musico*** (see [2003] NSWSC 977 at [20]). It makes it very plain that the legislation was aimed at permitting contractors and subcontractors to obtain a prompt interim progress payment on account, pending final determination of all disputes. Were the Court to now hold that disappointed respondents may, following an adjudication determination, invoke general review by the courts of those determinations by way of orders in the nature of prerogative writs, the way would be open for a wholesale undermining of the mischief sought to be dealt with by the Act.

19 This then provides the essential reason as to why upon the proper construction of the Act the following conclusions may be drawn:

that apart from any privative effect the Act might have, relief under section 69 of the Supreme Court Act would in principle lie against an adjudicator appointed under section 19 of the Act;

that the determination of an adjudicator made pursuant to section 22 of the Act is in principle susceptible to judicial review;

that judicial review of adjudication determinations made under the Act may be undertaken on jurisdictional grounds (at least in the sense that involves refusing to exercise, or acting in excess of, jurisdiction);

that judicial review of adjudication determinations made under the Act may be undertaken for denial of natural justice or for fraud; and

that relief in the nature of certiorari will not lie to quash the determination of an adjudicator on the basis of non jurisdictional error of law on the face of the record [because the legislative scheme set out in section 25 (4) is inconsistent with the availability of this ground of review].

20 This conclusion generally follows the reasons for judgment given by McDougall J in ***Musico*** (see [2003] NSWSC 977 at [42]-[60]).

Were any grounds of review made out?

21 The particular alleged shortcomings in the determination upon which the plaintiff has sought to rely were put as follows:

"1. The last paragraph of the second page of the reasons for determination says:

The major item which the Respondent seeks to deduct from progress payments is an amount of $69,372.00 for liquidated damages. The Respondent says that the Contract provides for liquidated damages for delay. Item M1 of the Appendix to the Contract provides for liquidated damages of $1,927.00 per day. Clause 10.15 provides that if the Claimant fails to bring the Sub-Contract Works to Substantial Completion by the Date for Substantial Completion the Claimant may be liable to pay liquidated damages. The Date for Substantial Completion' is defined in clause 1.02.10 as the date stated in item B 10 of the Appendix. In item B 10 there are 10 dates shown for 10 different portions of the building. There is no single 'Date for Substantial Completion'. Consequently, there can be no breach under clause 10.15 and no liquidated damages.

2. It is submitted that the conclusion that there 'can be no breach under clause 10.15 and no liquidated damages' does not follow from the premise that 'there is no single 'Date for Substantial Completion'.

3. The task of the adjudicator was to calculate the amount due in accordance with the terms of the contract.

4. In doing so he was to apply the law as it relates to the construction of contracts, and include the reasons for his determination. ***Ss 9(a) and 22(2) and (3) of the Building and Construction Industry Security of Payment Act (the Act)***

5. It is submitted that in commercial transactions (such as this one) the correct approach to the interpretation of the contract is to strive to give effect to the expressed arrangements and expectations of those engaged in the business, notwithstanding that particular terms may have been omitted or not fully worked out.

*See, eg, **Vroon BV v Foster's Brewing Group Ltd** [1994] 2 VR 32 at 67 per Ormiston J*

6. *It is submitted that there can be no doubt that the parties sought the application of liquidated damages, which would provide a limit to the damages which could be claimed from the sub-contractor and would enable the contractor to claim such damages without the necessity to prove them.*
7. *The intentions of the parties as expressed in clause 10.15 of the contract and the appendices have been disregarded. This (it is submitted) constitutes an error of law on the face of the record.*
8. *In the alternative the error of law is constituted by disregarding the relevant provision of the contract without providing reasons, in the face of a statutory obligation to do so. (To the extent to which it is said that the words 'there can be no breach under clause 10' constitutes giving reasons, it is submitted, first, that (with respect to the adjudicator) the assertion is without a legal basis and, secondly, there is again a fail to give reasons to justify the words).*
9. *It should be noted that the paragraph concludes 'The claimant has raised other cogent reasons why liquidated damages are not applicable. In view of my finding, it is not necessary for me to examine these reasons.' It is submitted that these words are irrelevant to the issue of whether or not there is an error on the face of the record.*
10. *The next paragraph of the determination says:*
    In the Sub-Contractor's Reconciliation Statement' of 12 May 2003 the Respondent shows. 'Total Variations Approved $23,748.10'. The Respondent contends that the Claimant is not entitled to add GST as the Claimant has done in the progress claims. However, it is apparent that the figures approved by the Respondent for variations are amounts which did not include GST. The Claimant quoted variation prices as a base price and, by necessary implication, that 10% was to be added [sic]. In arriving at the amount claimed in the progress claim, the Claimant took the Contract Price before GST and did not add GST to a price which already included GST. I am satisfied that GST has been properly calculated by the Claimant and properly included in the progress claim.
11. *The reasoning appears to be that because the claimant quoted variations prices as a base price ex GST, and the respondent approved the base price alone, it must be implied that GST was to be added to the base price.*
12. *It is submitted that:*
    (a) the party responsible for paying GST is the party that is paid in relation to a taxable supply;
    (b) that party can recover the GST it will have to pay if it has entered into a contractual relationship with the party to whom the supply is made enabling it to do so;
    (c) if there is no such contractual arrangement then there is no right to pass on the GST.
13. *In this particular case the claimant would have to pay GST on amounts paid to it for variations.*
14. *There is no indication that there was any agreement enabling the claimant to pass on the amount it would have to pay to respondent.*
15. *The implied agreement identified by the adjudicator appears to be based on nothing more than the absence of an express agreement. This, it is submitted, constitutes an error of law.*
16. *In the next paragraph the adjudicator says:*
    Clause 10.02.04 provides [of the Contract] says that the Respondent must pay to the Claimant an amount equal to the Respondent's valuation less, among other things,
    Progress claims and the value of work must not include Variations not agreed in writing
    Any claims for recompense over the contract sum unless agreed in writing
17. *He then goes on to assess the value of a number of variations which were not agreed in writing and/or claims for recompense over the contract sum not agreed in writing.*
18. *It is submitted that the task of the adjudicator in this case was to determine the amount of the claimant's payment claim that was payable to it pursuant to the terms of the contract.*
19. *In doing so the adjudicator determined the amount of the progress payment to be made by the respondent to the claimant.*
20. *The clear and express words of the contract were that progress claims must not include variations and other claims not agreed in writing.*
21. *(This does not mean that the claimant was not permitted to be paid those sums. Progress claims are merely on-account payments of a contract sum which is payable when the works the subject of the contract are carried out. They represent a contractual arrangement for prepayment in the course of a building contract.)*

21. In the face of such a clear and express contractual provision, the adjudicator's determination that a progress payment should be made which included sums referrable to variations which were clearly not agreed in writing is (it is submitted) an error of law."

Dealing with the matter

22 The short answer to each of these submissions is that:
for the reasons given by McDougall J the rights of the plaintiff under section 32 are not affected in terms of civil proceedings later taken to establish the rights of parties under the construction contract. In particular restitution may be ordered under section 32 (3) (b). It is at that stage and in those proceedings that no doubt submissions will be taken from both parties and every parameter of the subject rights will be extremely carefully traversed. The Court will not be tramelled by the stringent time constraints to which adjudicators are subjected by the Act. In

truth all that will have occurred will be that the interim regime for payment of progress claims pending final resolution of disputes under construction contracts will have operated according to the terms provided for in the Act;

insofar as the alleged failure to give reasons is concerned there is simply no substance in the complaint. Reasons were given. The essence of the complaint is in truth concerned with the soundness of the reasons which were given. But that complaint falls outside of the identified candidates for an order in the nature of certiorari; and

relief in the nature of certiorari does not lie to quash the determination upon the basis of the alleged non jurisdictional errors of law on the face of the record which upon proper examination are seen to be no more and no less than an attempt to impugn the adjudication determination. It cannot be suggested that any of the alleged errors of law caused the adjudicator to exceed his authority or powers. The proper occasion for an attempt to have the Court hold that the proper construction of the construction contract properly applied should not have led to that adjudication determination, will be when proceedings to establish those rights are commenced outside of the regime now stipulated for in terms of the interim payment of progress claims.

23 The matters of which complaint was made do not constitute jurisdictional error. They were not put otherwise than as founded upon error of law on the face of the record [Transcript at 18.3218.53]. They do not show a mistake in an assertion or denial of the existence of jurisdiction, nor do they misapprehend or disregard the nature or limits of the functions or powers of the adjudicator. Nor do they constitute a denial of natural justice or fraud.

24 The proceedings require to be dismissed.

Short minutes of order

25 Short minutes should be brought in. Costs may be argued.

Mr T Davie (Plaintiff) instructed by **SOLICITORS :** Schrader & Associates (Plaintiff)
Mr F Hicks (Third Defendant) instructed by LAC Lawyers (Third Defendant)