JUDGMENT : Hodgson JA ; Ipp JA ; Basten JA New South Wales Court of Appeal. 13th July 2005

1 **HODGSON JA:** On 22 February 2005, judgment was delivered by McDougall J in proceedings in which the appellant (Coordinated) sought a declaration that certain adjudication determinations made by the second respondent (Mr. Parnell) and the third respondent (Mr. Sarlos) were void, or alternatively an order quashing these determinations; and also sought consequential relief against the first respondent (Hargreaves) and the fourth respondent (LEADR). The primary judge refused to grant the relief sought, dismissed Coordinated's summons and ordered it to pay the respondent's costs. Coordinated has appealed from that decision.

CIRCUMSTANCES

2 On 12 June 2003, Coordinated and Hargreaves entered into a sub-contract under which Hargreaves agreed to carry out certain design and construction works for Coordinated in connection with the redevelopment of the former Gazebo Hotel at Elizabeth Bay. The sub-contract was an amended version of AS 4903-2000.

3 By cl.2, the sub-contract sum was stated to be $3,578,816.00 plus GST "or such other sums as shall be determined from time to time in accordance with the provisions of this agreement".

4 The agreement contained definitions of "compensable cause", "EOT" and "WUS", as follows:

Compensable cause *means:*

(a) an act, default or omission of the Subcontract Superintendent, the Main Contractor or its consultants, agents or other contractors (not being employed by the Subcontractor);

(b) any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Subcontractors); or

(c) those listed in Item 35

EOT (from 'extension of time') *has the meaning in subclause 34.3*

WUS (from 'work under the Subcontract') *means the work which the Subcontractor is or may be required to carry out and complete under the Subcontract and includes variations, remedial work, construction plant and temporary works;*

and like words have a corresponding meaning.

In the Subcontract:

a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;

b) time for doing any act or thing under the Subcontract shall, if it ends on a Saturday, Sunday or Statutory or Public Holiday, be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday;

c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the Subcontract;

d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;

e) communications between the Main Contractor, the Subcontract Superintendent and the Subcontractor shall be in the English language;

f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in Item 12;

g) unless otherwise provided, prices are in the currency in Item 13(a) and payments shall be made in that currency at the place in Item 13(b);

h) the law governing the Subcontract, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in Item 12; and

i) if pursuant to Annexure Part E to these Subcontract Conditions, clauses or their parts in these Conditions are deleted, the Subcontract shall be read and construed as though the clause or its part has been deleted, whether or not that particular clause or its part has been struck from these Conditions.

In relation to the definition of "compensable cause", there was nothing listed in Item 35.

5 Clause 34 dealt with "time and progress". It provided, among other things, for EOTs (cl.34.5) and "delay damages" (cl.34.9). Clause 34.9 was as follows:

> For every day the subject of an *EOT* for a ***Compensable Cause*** and for which the *Subcontractor* gives the ***Subcontract Superintendent*** a claim for delay damages pursuant to sub clause 41.1, damages certified by the ***Subcontract Superintendent*** under sub clause 41.4 shall be due and payable to the *Subcontractor*.
>
> The payment by the *Main Contractor* of such delay damages shall be the sole remedy of the *Subcontractor* for the events or circumstances giving rise to the delay in respect of which the delay damages are payable and are accepted by the *Subcontractor* in full and final satisfaction of any claim.
>
> Italicised words or phrases appear thus in the sub-contract, and are defined terms.

6 Clause 37 dealt with "payment". By cl.37.5, interest (at the contractual rate of 8% per annum) was "due and payable after the day of default in payment".

7 Clause 41 dealt with notification and assessment of monetary claims.

8 On 26 March 2004, Hargreaves served on Coordinated a document claiming "an extension of time of 11.5 working weeks and associated costs of $201,102.92 … for recovery of overheads, plant, staff and supervision costs … due to architectural design changes which impacted on contract programme …". This claim has been

called EOT1. The material supporting this claim showed that the delay alleged commenced on 18 June 2003 and finished on 5 September 2003.

9 On the same day, another document was served claiming "an extension of time of 9 working weeks and associated costs of $157,384.89 … for the recovery of overheads, plant, staff and supervision costs … due to fire on 07/11/03 where all work … ceased until 12/01/04". This claim has been called EOT2. It appears that the fire identified in this claim delayed not only construction progress, but also payment to sub-contractors until after the fire damage insurance claim had been settled.

10 There was an adjudication determination in relation to EOT1 and EOT2 made by an adjudicator Mr. Makim on 12 May 2004, in which he determined the value of these claims as nil.

11 On 22 July 2004 and 29 July 2004, documents were served by Hargreaves on Coordinated claiming interest on overdue payments pursuant to cl.37.5, on the basis of delay in payment due to the fire.

12 On 18 August 2004, a claim was served by Hargreaves on Coordinated claiming $61,978.12 for the increased cost of completion as a result of the delays identified in EOT1 and EOT2.

13 On 31 August 2004, a document that has been called EOT3 was served by Hargreaves on Coordinated, claiming $15,274.61 for a period of further delay from 23 August to 28 August 2004, following the period of 9 weeks covered by EOT2. On the same day, a further claim for interest was served.

14 On 3 September 2004, the sub-contract superintendent sent Hargreaves a letter directing Hargreaves "in accordance with all sub-clauses of contract clause 34 to complete your agreements for the nominated levels as the determined practical completion dates as listed in the attached schedule". The schedule set out amended dates for completion of nominated levels.

15 On 30 September 2004, Hargreaves served what has been called the first payment claim applying for a progress payment of $1,205,280.25 pursuant to s.8 of the Building & Construction Industry Security of Payment Act 1999 (the Act).

16 On the same day, a claim that has been called EOT4 was served by Hargreaves on Coordinated, claiming $62,579.64 for the period of further delay from 30 August to 25 September 2004, following the period covered by EOT3. Also on that day, a further claim for interest was served.

17 Coordinated responded to the first payment claim with a payment schedule dated 15 October 2004, in which it proposed to pay a "scheduled amount" of $82,928.04.

18 On 29 October 2004, Hargreaves served a document that has been called EOT5, claiming $73,410.65 for a further period of delay, from 27 September to 29 October 2004, following the period covered by EOT4. It also served a variation claim, claiming $26,176.98 due to labour cost increases.

19 On the same day, Hargreaves applied to LEADR, an authorized nominating authority under the Act, for adjudication of the payment claim of 30 September 2004.

20 On 4 November 2004, Mr. Parnell accepted nominated by LEADR as adjudicator.

21 On 8 November 2004, Coordinated served an adjudication response.

22 On 21 November 2004, Mr. Parnell issued an adjudication determination determining the amount of the progress payment to be made by Coordinated to Hargreaves to be $737,221.51 plus GST. The primary judge made the following comments about his reasoning:

27 Mr Parnell's determination shows that Coordinated submitted that he could not allow EOTs 3 and 4, or the interest claims, because they were "beyond my jurisdiction and outside the scope of the Act". That was because (see p 10 of his determination):

(1) "unless it can be positively established the delay cost component claimed is included in the value of the variation (as defined in the sub-contract) works it is in the nature of damages and not properly "claimable" … "; and

(2) "delay costs claimed … do not clearly arise as part of the valuation of variation works as defined in the sub-contract" and (Coordinated said) must be rejected. …

*30 Similarly, Mr Parnell reasoned that V 65 was for "the additional cost to the Claimant through delays attributable to the Respondent which had extended the completion date ie "the works took longer to complete".". He reasoned, by reference to both the decision of Barrett J in **Quasar Constructions v Demtech Pty Ltd** [2004] NSWSC 116 and my decision in **Kembla Coal**, that the claim was for construction work "within the scope of that envisaged in the quoted references from" **Quasar**.*

31 As to the interest claims, Mr Parnell appears to have reasoned that each claim was sufficiently related to construction work because it related to interest on overdue amounts for subcontract works, where payment had been delayed by reason of the fire.

23 On 30 November 2004, Hargreaves served on Coordinated a claim that has been called EOT6 for $68,486.04 to cover a further period of delay from 1 November to 27 November 2004, following the period covered by EOT5.

24 On the same day, Hargreaves served what has been called the second payment claim for the sum of $1,048,340.76. Coordinated responded by serving a payment schedule on 13 December 2004, proposing to pay a scheduled amount of $155,351.13.

25 On 22 December 2004, Hargreaves applied to LEADR for an adjudication of the second payment claim.

26 On 23 December 2004, Mr. Sarlos accepted nomination as adjudicator. Coordinated served its adjudication response on 4 January 2005.

27 On 20 January 2005, Mr. Sarlos issued an adjudication determination determining the progress payment payable by Coordinated to Hargreaves in the sum of $199,384.53 including GST. The primary judge made the following comments about Mr. Sarlos's determination:

33 The payment claim that was the subject of the adjudication application determined by Mr Sarlos included EOTs 5 and 6 and escalation claim V 94. He allowed those claims on the basis that they were in fact "delay and disruption related claims". He said that "[d]elay and disruption related costs are costs generated by related goods and services as defined by s 6 of the Act". He found that the relevant delay and disruptions had in fact occurred (see para 43 of his determination).

34 Coordinated submitted to Mr Sarlos, as it had submitted to Mr Parnell, that the relevant claims were not "for" construction work. However, as noted, he decided that they were allowable as claims for related goods and services.

35 Coordinated also submitted to Mr Sarlos that the payment claim did not satisfy the requirements of s 13 of the Act (in what respect, does not appear from his determination). Coordinated referred to the decision of the Court of Appeal in Brodyn. However, Mr Sarlos concluded that the claim did comply with the provisions of s 13 (see para 25 of his determination).

28 The proceedings that resulted in the judgment appealed from were then commenced by Coordinated.

STATUTORY PROVISIONS

29 The provisions of the Act of particular relevance to this case are s.3(1), the definitions of "claimed amount" and "progress payment" in s.4, and ss.6, 8, 9, 10(1), 11(1), 13, 17(1) and 22 of the Act. Those provisions are as follows:

3 Object of Act

(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.

***claimed amount** means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.*

***progress payment** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):*

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

6 Definition of "related goods and services"

*(1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:*

(a) goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work,

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,

(b) services of the following kind:

(i) the provision of labour to carry out construction work,

(ii) architectural, design, surveying or quantity surveying services in relation to construction work,

(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,

(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

*(2) Despite subsection (1), **related goods and services** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.*

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

*(2) In this section, **reference date**, in relation to a construction contract, means:*

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

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.

11 Due date for payment

(1) A progress payment under a construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

13 Payment claims

*(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

*(b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and*

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

17 Adjudication applications

*(1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:*

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

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).
(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
(a) the value of any construction work carried out under a construction contract, or
(b) the value of any related goods and services supplied under a construction contract,
the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.
(5) If the adjudicator's determination contains:
(a) a clerical mistake, or
(b) an error arising from an accidental slip or omission, or
(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
(d) a defect of form,
the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

DECISION OF PRIMARY JUDGE

30 The primary judge identified a number of issues, of which those presently relevant are the following:
(1) Was each determination void because each adjudicator determined that Hargreaves was entitled to be paid, as a component of a progress payment under the Act, an amount by way of "delay damages" claimed pursuant to an express provision (cl 34.9) of the subcontract?
(2) Was Mr Parnell's determination also void because he determined that Hargreaves was entitled to be paid, as a component of a progress payment under the Act, an amount by way of "interest" claimed pursuant to an express provision (cl 37.5) of the subcontract?

31 The primary judge subsequently noted that each of those issues involved two questions:
(1) Was it open to the adjudicators, Messrs Parnell and Sarlos, to include in their determination of the amount of the progress payment to be paid by Coordinated to Hargreaves an amount of delay damages pursuant to cl 34.9 and an amount of interest pursuant to cl 37.5?
(2) If it was not open to them to do so then, because in each case they did, is their determination thereby void?

32 The primary judge noted a formal submission that the decisions of the Court of Appeal in ***Brodyn Pty. Ltd. v. Davenport*** [2004] NSWCA 394 and ***Transgrid v. Siemens Ltd***. [2004] NSWCA 395 were wrong, and then proceeded to consider the two questions he had specified. The primary judge assumed without deciding that the answer to the first question was no; but nevertheless he found that the answer to the second question was no, on the basis of the decision of the Court of Appeal in ***Brodyn***.

GROUNDS OF APPEAL

33 Coordinated relied on the following grounds of appeal:
1. His Honour erred in holding that, on the assumption that it was not open to the Second and Third Respondents ("the Adjudicators") to include in their respective Adjudication Determinations an amount which was not "for construction work", each Adjudication Determination was nonetheless a valid Adjudication Determination for purposes of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act").
2. His Honour ought to have held that by allowing an amount of delay damages pursuant to clause 34.9 of the contract and an amount of interest pursuant to clause 37.5 of the contract, each of the Adjudicators allowed an amount which was not "for construction work", that each Adjudicator thereby failed to comply with an essential requirement under the Act and that the respective Adjudication Determinations were void.
3. His Honour erred in holding that even on the assumption that the Adjudication Determinations included an amount that was not "for construction work", the Adjudication Determinations were not relevantly unlawful for the purposes of the principle stated in Project Blue Sky v The Australian Broadcasting Authority (1998) 194 CLR 355 at 393 [100].

4. On the assumption that each Adjudication Determination included an amount that was not "for construction work", and that it was not open to the Second and Third Respondents to include such amounts in the Adjudicated Amount of the respective Adjudication Determinations:
(a) His Honour ought to have held that the Adjudication Determinations were unlawful; and
(b) the Court ought to have made an order restraining any party from taking further steps on the basis of the Adjudication Determinations.
5. His Honour ought to have held that the amount of delay damages pursuant to clause 34.9 of the contract and the amount of interest pursuant to clause 37.5 of the contract, allowed by the Second and Third Respondents, were not "for construction work", and that it was not open to the Second and Third Respondents to include in their respective Adjudication Determinations such amounts.
6. His Honour erred in holding that certiorari was unavailable pursuant to s.69 of the Supreme Court Act 1970 (NSW).
7. His Honour ought to have held that:
(a) the Adjudicators made a jurisdictional error; or
(b) there was an error of law on the face of the record,
because the Adjudication Determinations allowed an amount for delay damages pursuant to clause 34.9 of the contract, and interest pursuant to clause 37.5 of the contract.
8. His Honour ought to have made an order in the nature of certiorari, pursuant to section 69 of the Supreme Court Act 1970 (NSW), quashing the Adjudication Determinations.

34 I will consider in turn the following issues:
1. Were the amounts in question not for construction work and for that reason not amounts that could be included in a determination of the amount of a progress payment under the Act (Grounds 2 and 5)?
2. If so,
   (a) was this a vitiating error within *Brodyn* (Ground 1)?
   (b) did the adjudicator act unlawfully, so that an injunction could be issued as contemplated in ***Project Blue Sky v. The Australian Broadcasting Authority*** (1998) 194 CLR 355 (Grounds 3 and 4)?
3. Should leave be granted to re-argue ***Brodyn***, in particular:
   (a) in setting narrow limits to what kind of errors made a decision void, and
   (b) in excluding certiorari to quash decisions that are not void, especially on the basis of error of law on the basis of the record (Grounds 6, 7 and 8)?

SHOULD THE AMOUNTS HAVE BEEN EXCLUDED FROM THE DETERMINATIONS BECAUSE NOT "FOR" CONSTRUCTION WORK?

Submissions

35 Mr. Rudge SC for Coordinated submitted that a claim for delay damages was not a claim for construction work (***Quasar Constructions Pty. Ltd. v. Demtech Pty. Ltd***. [2004] NSWSC 116, 20 BCL 276); and that to the extent that the decision of McDougall J in ***Kembla Coal & Coke Pty. Ltd. v. Select Civil Pty. Ltd***. [2004] NSWSC 628 diverged from that of Barrett J in ***Quasar***, the decision of Barrett J was to be preferred. It was not material that there may be an express contractual right to such damages: cf, a claim for liquidated damages as considered in ***Baese Pty. Ltd. v. G.A. Bracken Building Pty. Ltd***. (1990) 6 BCL 137.

36 Mr. Rudge submitted that the expression "for construction work" in the definition of "claimed amount" was not equivalent to "in respect of construction work" or "relating to construction work", because the statutory context differed from that considered in ***State Government Insurance Office (Qld) v. Crittenden*** (1996) 117 CLR 412 at 416; and it was not consistent with the legislative intent in the Act (***CIC Insurance Ltd. v. Bankstown Football Club Ltd.*** (1997) 187 CLR 384 at 408, ***Theophanous v. Herald & Weekly Times Ltd.*** (1994) 182 CLR 104 at 196, ***Solution 6 Holdings Ltd. v. Industrial Relations Commission of NSW*** [2004] NSWCA 200, 60 NSWLR 558 at [81]-[84]) that the mere existence of a connection with construction work (cf. ***Project Blue Sky*** at [87]) would be sufficient to justify inclusion in a progress payment.

37 Mr. Rudge submitted that in this contract, delay damages were made a monetary remedy to compensate a sub-contractor for the head contractor's wrong: cf. ***Lawson v. Wallasey Local Board*** (1883) 11 QBD 229. Off-site costs, such as office overheads, were plainly not for construction work. On-site overheads were perhaps less clearly so, but still were claims for damages by reason of the sub-contractor being unable to carry out construction work, rather than being for construction work.

Decision

38 The object of the Act is stated in s.3(1) as being "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". The definition of "progress payment" refers to s.8, which does not limit the payment to payment for construction work and/or related goods and services; and the amount of the progress payment is dealt with in s.9, which also does not impose such a limit.

39 It is true that s.13 requires a payment claim to indicate the claimed amount, and that this expression is defined to be an amount claimed to be due for construction work carried out or for related goods and services supplied; and, pursuant to s.17, what is adjudicated is the payment claim. That gives some support to the argument that the adjudicator can only include in progress payments amounts claimed to be due for construction work carried out

and/or for related goods and services supplied; but the terms of s.13 itself, in particular s.13(3), tell against it. Further, as submitted by Mr. Feller SC for Hargreaves, it is by no means clear that the words "carried out" and "supplied" should be given a strict temporal connotation.

40 Further, in the case of a construction contract that provides that progress payments include certain amounts, s.9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s.13 and the definition of "claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.

41 In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

42 Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl.34.9) and which are then to be included in progress payments (cl.37.1). They are therefore prima facie within s.9(a) of the Act.

43 If in substance they represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out.

44 If they represent off-site costs (such as office overheads) or other on-site costs, it may be a question of fact and degree whether they are for construction work carried out or for related goods and services supplied. They would in my opinion properly be regarded at least as part of the price for the totality of the construction work when completed. And it would seem artificial to say that they are excluded from the Act if they are not referable to work that has already been carried out, particularly when s.9(b) refers to the value of construction work undertaken to be carried out and related goods and services undertaken to be supplied. However, it is not necessary in this case altogether to exclude the possibility that some delay damages claimed under this contract might possibly not be for construction work carried out or related goods and services supplied within the definition of "claimed amount" in s.4; but it is certainly not obvious that this is so in relation to any of the claims in this case.

45 It follows from this discussion that delay damages and interest under this contract could be claimed to be due for construction work carried out or for related goods and services supplied; and in my opinion, even if s.13 is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s.9(a) and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision.

IF SO, WAS THERE VITIATING ERROR OR AN UNLAWFUL ACT?

46 It follows there was no error of the kind that, according to ***Brodyn***, could invalidate a decision; and also that there was no unlawful act by an adjudicator which, according to ***Blue Sky***, could justify the grant of an injunction. I would add that in my opinion, if a determination is valid because the basic and essential requirements of the Act are complied with, an error of law by the adjudicator, even in interpreting the Act itself, would not make the determination unlawful and thus liable to restraint by injunction.

LEAVE TO RE-ARGUE *BRODYN*

47 As noted earlier, there appear to be two possible aspects to any application to re-argue ***Brodyn***, namely (1) the question of whether of challenges to determinations are limited to cases where determinations are invalid or whether they may extend to cases where determinations are not invalid but may be quashed, for example for error of law on the face of the record; and (2) the question of whether ***Brodyn*** set the requirements for validity too low, particularly in relation to the application of s.22 of the Act.

48 Coordinated's application appears to focus on the availability of certiorari, and thus essentially on the first of those two questions; and it challenged the view expressed in ***Brodyn*** that there was a legislative intent that certiorari not be available, and that it was by no means clear that an adjudicator was a tribunal exercising governmental powers.

49 For my part, I am not persuaded that there are grounds to give leave to re-argue the first question identified above; but in any event, for reasons already given, even if certiorari could issue for error of law on the face of the record, it would not issue in this case. I would not give leave in this case to re-argue ***Brodyn***.

POSSIBLE ERROR OF PRIMARY JUDGE

50 Before concluding, I wish to note what I believe may be an important error in the judgment of the primary judge, not bearing on the outcome of the case. In the second half of para.[51] of his judgment, the primary judge said this: *An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.*

51 That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.

52 The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see ***The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Ltd.*** [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.

53 Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.

ORDER

54 For those reasons, in my opinion the appeal should be dismissed with costs.

55 **IPP JA:** I agree with Hodgson JA, for the reasons set out in [38] to [45] of his reasons that "delay damages" can amount to payments "for construction work".

56 This is sufficient, in my view, to dispose of the appeal. I agree with the orders proposed by Hodgson JA.

57 I would not comment on the other issues raised. These are not essential to the decision.

58 **BASTEN JA**: The background to this appeal is fully stated in the judgment of Hodgson JA. The point of law raised is whether a claim for a progress payment under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act") can be made for expenses incurred which were not directly attributable to the carrying out of the construction works, as that term is used in the Act. In my view it can: I agree with the reasoning of Hodgson JA at [38]-[45] above and his Honour's conclusions. I add some comments of my own in relation to the construction argument. I differ in part from his Honour's comments at [50]-[53] in relation to the operation of s.22(2) of the Act, and at [47]-[49] in relation to the application of ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394.

The construction issue

59 The principal operative provisions of the Act, are ss 8 and 9. These are set out at [29] above and need not be repeated here. Section 8 confers, in identified circumstances, on a person who has undertaken to carry out construction work an entitlement to a "progress payment". It is clear that sub-s 8(1) confers such a right on a person who has "undertaken" to carry out such work, not merely on a person who has carried out such work. To similar effect, s 9 permits the amount to be calculated in accordance with the terms of the contract or, if no express provision is made to that effect, "on the basis of the value of construction work carried out or undertaken to be carried out" by the person under the contract.

60 The Appellant argued for a different conclusion on three bases. First, it was suggested that, even though the contract might provide an entitlement to such a payment and a basis for calculation of the amount, such a payment would not fall within the statutory entitlement unless it was "for" work which had been carried out. That result was sought to be reached by reference to the use of the term "progress payment" in both the headings and the express terms of ss 8 and 9. The headings to the section take the matter no further than the express terms: generally speaking, such headings must be treated as part of the extrinsic material and not part of the Act: *Interpretation Act* 1987 (NSW) ss 34 and 35. However, the term "progress payment" occurs in each section and is a defined term. The definition, contained in s 4, has two parts. First, in common with numerous other definitions set out in s 4, it is said to have the meaning identified in another specific section – in this case s 8. The second part, which is unique amongst the definitions in s 4, includes three particular matters (a), (b) and (c), none of which

obviously falls within the terms of s 8, taken alone. It is not possible to construe the inclusion of those matters as in some way making exhaustive provision with respect to the definition. However, it is only at pars (a) and (b) that reference is made to a payment "for construction work", or "for carrying out construction work". The word "for" in these paragraphs is said to carry a narrow connotation of direct relationship. Even if it had such a narrow connotation, that could not require, by any reasonable process of construction, reading down either paragraph (c) or the primary element of the definition in s 8, as if those words were added to those other provisions, where they do not appear.

61 This conclusion is given support by the definition in s 5(1) of "construction work" itself, which has several paragraphs, but provides, in the chapeau to par (e): *"Any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c)."*

Thus it is clear that even the term "construction work" is not limited to such physical activities as pouring concrete or erecting girders.

62 The second argument put by the Appellant was that the right to a progress payment conferred by the combination of ss 8 and 9 should be read down by reference to the mechanism for claiming a payment, set out in s 13. On one view, this argument took the matter no further, because it was dependent upon construing the phrase "progress payment" in s 13(1) and (2), according to the argument set out above, which has been rejected. One further element, however, relied on s 13(2)(a) which requires that a claim "must identify the construction work … to which the progress payment relates". To the extent that a payment is permitted under a contract for work or expenses incurred otherwise than in undertaking work within the definition of "construction work", the contention was that the claim mechanism must be understood as imposing a constraint on the right to a progress payment, however otherwise defined. Again, the argument is not sustainable: if there is a level of inconsistency, the mechanical provision should be read in a way which is consistent with the full extent of the entitlement, rather than the other way around. But inconsistency may in any event be avoided. If administering a contract involves work or expenses which cannot be related directly to a particular part of the physical construction, such work or expenses may nevertheless be related indirectly to the overall work, or some segment thereof. If so, s 13(2)(a) requires that part of the work, or the whole as appropriate, to be identified. It is inherently unlikely that a contract will provide for a payment unrelated to anything in the nature of physical activities identifiable as construction work.

63 Thirdly, the Appellant placed some reliance on s 3(1) which stated: *"The object of this Act is to ensure that any person who undertakes to carry out construction work … 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."*

To the extent that the Appellant's argument required that the progress payment be "for" construction work, the object provided little assistance, because it used the phrase "in relation to" which is, on the Appellant's own argument, broader than its interpretation of "for".

Construction of s 22 of the Act

64 At [50]-[53] Hodgson JA takes issue with a passage in the judgment of McDougall J below, part of which is set out at [50]. In substance the issue in dispute, as I understand it, is this: if, on a proper construction of the Act and the contract, the adjudicator comes to the view that a particular item in the payment claim is not justified, he or she will nevertheless be required to allow the item if an appropriate objection was not taken by the respondent in its payment schedule. In the passage from the judgment below, set out at [50] above, reliance for this conclusion would appear to be rooted squarely in s 22(2) of the Act. However, when read in context, the primary judge expressly placed weight upon a number of other provisions of the Act, to which attention should be given. Before turning to those, it is convenient to note the scope and operation of s 22(2). The provision is set out in full at [29] above.

65 According to the well-known principles governing judicial review under the general law, a decision-maker will fail to exercise a statutory power if he or she fails to take into account a mandatory consideration. Similarly, there will be a failure properly to exercise the statutory jurisdiction where the decision-maker takes into account an impermissible consideration. The same principles are found in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), discussed by Mason J in ***Minister for Aboriginal Affairs v Peko Wallsend Ltd*** (1986) 162 CLR 24 at 39-40. As his Honour noted (at p.40), many statutory discretions are in their terms unconfined and the considerations will therefore be unconfined *"except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard …"*. Section 22(2) of the Act is an exception to this rule: indeed, it has a dual function. On the one hand, it prescribes matters to which the adjudicator is required to have regard; on the other hand, it identifies those matters as the "only" matters to which the adjudicator is to have regard. At least on its face, the list is exhaustive.

66 If that were the whole of the story, the conclusion suggested by Hodgson JA, namely that the adjudicator would be entitled to disallow an item on the basis of the contract and the nature of the claim made, would be made good. The fact that the payment schedule prepared by the respondent did not identify the reason for disallowance would not mean that the adjudicator had failed to take account of a mandatory consideration, or had had regard to an impermissible consideration. However, McDougall J based his reasoning to a contrary conclusion in part on other statutory provisions, in addition to s 22(2), including ss 14(3) and 20(2B). Sub-section 14(3) requires that where a payment schedule indicates an amount of a payment which is less than that the amount of the claim, the schedule must indicate why the amount is less and, if a respondent is withholding

payment, the reason for that action. Where the payment schedule indicates an amount which is less than the amount claimed, the claimant may apply for adjudication of its payment claim: s 17(1)(a). Where such an application is made, the respondent may lodge a response to the claimant's adjudication application. That response may contain relevant submissions (s 20(2)(c)), but, subs (2B) provides: *"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."*

In the light of this express restriction on the response which can be provided to the adjudicator, there is merit in the conclusion that the adjudicator is not entitled to go beyond the terms of the response, in rejecting part or all of the claim. That was the conclusion reached by McDougall J.

67 It is not necessary to resolve this difference of opinion in the present case, nor would I wish to do so. There are factors, not referred to at [50] above and not expressly identified McDougall J, which militate against the conclusion just identified. For example, the claimant may make an adjudication application in circumstances where the respondent has failed to provide a payment schedule at all: see ss 15(1)(a) and (2)(a)(ii) and 17(1)(b). Whether, in the light of s 20(2B) the respondent can give any reasons for withholding payment at all in such a case, is unclear. It is also unclear whether it is intended, in that event, that the adjudicator must allow the claim in full. These issues require consideration. They are dealt with further in a different context in ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [40]-[42].

68 The judgment of this Court in ***The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 was handed down after the decision of McDougall J in the present case. Accordingly the reasoning relied on by Hodgson JA in that case at [33]-[36] and relied on at [50] above, was not considered by the primary judge. However, it follows from what I have said that I am not persuaded that the reasoning in those paragraphs of ***Contrax*** is correct, but a similar conclusion may be attainable by a different course.

The application of *Brodyn*

69 As noted by Hodgson JA at [47], there was an application to reargue the principles relating to the scope of the Court's supervisory jurisdiction set out in ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394. Although it is apparent that leave should not be granted in this case, because the issue does not arise (see [49] above), Hodgson JA also expresses the view that, perhaps for other reasons, he is not persuaded that there are grounds to give leave to reargue ***Brodyn***. That conclusion may be shown to be correct, but in my view there are aspects of the reasoning in ***Brodyn*** which may bear elucidation.

70 The principles which should be applied in considering such an application are set out in the judgment of Gleeson CJ in ***Clutha Developments Pty Ltd v Barry*** (1989) 18 NSWLR 86 at 99C-101C. Like the Full Court of the Federal Court, see eg ***Transurban City Link v Allan*** (1999) 95 FCR 553 at [26]-[31], this Court has accepted that it should follow an earlier decision unless satisfied that it was clearly wrong. The principles were reaffirmed in ***Roberts v White*** [1999] NSWCA 12 by five members of this Court: see Mason P at [42]-[45]. To the factors commonly addressed must be added a further and critical consideration, namely that the reasoning adopted in an earlier decision may be inconsistent with relevant High Court authority, particularly authority decided after the decision in question, or not referred to in that decision. Two factors which appear to weigh in favour of reconsideration in the present case are doubts about parts of the reasoning in ***Brodyn*** and the force of that reasoning in the light of the more recent decision of the High Court in ***SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*** [2005] HCA 24.

71 Subject to an expression of doubt on one issue – see below at [79], ***Brodyn*** accepted that relief could be sought in the Court in relation to a failure by an adjudicator to exercise his or her statutory powers, with the result that there was no valid determination. The judgment in *Brodyn* at [54] posited the relevant question as *"whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination"*. So much may be conceded: that description reflects the concept of ***"jurisdictional error"*** under the general law as identified in ***Craig v South Australia*** (1995) 184 CLR 163 at 179 and in ***Minister for Immigration and Multicultural Affairs v Yusuf*** (2001) 206 CLR 232 at [82]. The question in a particular case will be whether the adjudicator has, by acting in a particular way, exceeded or failed to exercise the authority or powers given to him or her by the Act.

72 The next step in the reasoning in ***Brodyn*** was to say, at [55], that all that was intended by the legislature was compliance with certain identified ***"basic requirements"***, which may not have been exhaustively stated in that case, and *"a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power"* – for which proposition ***R v Hickman; Ex parte Fox and Clinton*** (1945) 70 CLR 598 is cited – and that there be "no substantial denial of the measure of nature justice that the Act requires to be given". Each of these three elements could require further consideration.

73 First, although the statement of "basic requirements" is said not necessarily to be exhaustive, one of the factors which appears to have been excluded is compliance by the claimant with s 13(2) of the Act. According to that provision, a payment claim "must" do certain things. The basis for reading "must" as "must but need not" is not explained. It does not appear to accord with the approach adopted, albeit in relation to very different legislation, in *SAAP*. On the other hand, *Brodyn* may be read as saying that satisfaction of this condition depends on the opinion of the adjudicator: see *Climatech* [2005] NSWCA 229 at [43]-[48].

74 Further, at [56] ***Brodyn*** cast doubt on the proposition that *"compliance with the requirements of s 22(2)" is a precondition to a valid exercise of power. It is suggested that the matters identified in that provision could involve "extremely doubtful questions of fact or law"*. The judgment continues: *"… it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered."*

That is suggested to be inconsistent with views expressed by Palmer J in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140. This reasoning would seem to say that what might be required by s 22(2) is not merely consideration of the matters (and only the matters) there identified, but also reaching a legally correct conclusion. That, however, is not what the section requires. Nor did Palmer J, in my view, suggest otherwise.

75 Secondly, the reliance on ***Hickman*** is arguably misplaced. That case required the reconciliation of apparently mandatory provisions of certain regulations with a privative clause which purported to exclude all forms of prerogative relief. There are no such provisions requiring reconciliation in the Act.

76 Thirdly, the argument that a failure to accord the statutory measure of natural justice is only a basic requirement if the denial is "substantial" is inconsistent with the reasoning of the High Court in ***Re Refugee Review Tribunal; Ex parte Aala*** (2000) 204 CLR 82 at [17]. What may have been intended was a reflection that the content of procedural fairness, given the statutory context, was limited, but that is a different point.

77 These considerations suggest that there may be room for debate as to the second question identified by Hodgson JA at [47] above, namely whether ***Brodyn*** *"set the requirements for validity too low, particularly in relation to the application of s 22 of the Act"*. However, the answer to that question may well depend upon a particular understanding of what ***Brodyn*** decided in this regard, a matter which has yet to be debated.

78 The first question identified in relation to ***Brodyn***, at [47] above, implies that, according to *Brodyn*, a determination may be challenged if invalid, in the sense that it is attended by jurisdictional error, but may not be "quashed, for example for error of law on the face of the record". If *Brodyn* in fact drew a distinction in those terms, there is an arguable case for reconsideration. That is because, to state the question in this way, would appear to involve a departure from the question set out in *Brodyn* at [54] which asks whether a requirement was intended by the legislature to be an essential precondition to the exercise of power. In relation to questions of law, the issue is whether the adjudicator was intended by Parliament to have power to determine such questions or, as it is sometimes put, only to apply the law correctly. As ***Craig v South Australia*** demonstrates, there is an important distinction to be drawn (at least in this country) between administrative decision-makers and courts of law: 184 CLR at 179. Properly understood, ***Brodyn*** may be saying that the structure of the Act demonstrates that, contrary to the general rule with respect to administrative tribunals, an adjudicator has been given power to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract, and whether or not the decision actually made reflects a correct understanding of the legal principles to be derived from those sources. If that is the correct understanding of the judgment of ***Brodyn*** in this Court, it would appear to accord with the judgment of Einstein J at first instance, and with the approach adopted by McDougall J in ***Musico v Davenport*** [2003] NSWSC 977, as noted by Palmer J, in reaching a similar conclusion, in ***Multiplex Constructions Pty Ltd v Luikens*** (supra) at [42]. Nothing put to the Court in this case demonstrated any basis for reconsideration of that aspect of ***Brodyn***, so understood.

79 There was a further matter argued in this appeal, which, given the conclusion that there was no relevant error, need not be resolved. It was the proposition that prerogative relief, granted under s 69 of the *Supreme Court Act*, would not be available in relation to the determination of an adjudicator because, as noted in ***Brodyn*** at [46], there is *"a real question whether an adjudicator is properly considered [to be] a tribunal exercising governmental powers"*. This question was not determined, but rather ***Brodyn*** proceeded on the basis that such relief was, in principle, available, as had been held by McDougall J in ***Musico*** (supra) at [32]. That question was given more detailed consideration by Palmer J in ***Multiplex Constructions*** (supra), his Honour coming to the same conclusion. In particular, his Honour noted that such relief had been held to be available in relation to decisions of arbitrators in ***R v National Joint Council for Dental Technicians; Ex parte Neate*** [1953] 1 QB 704 at 707-708 (Lord Goddard CJ) and at 709 (Croom-Johnson J), Pearson J agreeing at 710. That holding was applied by Malcolm CJ in ***Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen*** (1999) 21 WAR 158 at 189; see ***Multiplex*** at [23]. The reason for doubting the correctness of this conclusion was not identified in ***Brodyn***, and need not be addressed further here.

80 I agree that the Court should make the orders proposed by Hodgson JA.

Mr. M.G. Rudge SC with Mr. M. Christie – appellant instructed by Colin Biggers & Paisley, Sydney
Mr. D.D. Feller SC with Mr. D.M. Loewenstein for respondents instructed by James R. Knowles Lawyers Pty.