

JUDGMENT : Campbell J : New South Wales Supreme Court. 25th November 2005.

1 This judgment relates to separate questions which have been tried concerning whether the defendant is entitled to apply for an adjudication of a particular payment claim under the **Building and Construction Industry Security of Payment Act 1999** ("the BACISOP Act"). The plaintiff alleges that the defendant is not entitled to submit the payment claim to adjudication because that payment claim purported to be in respect of a date which in truth was not a reference date under the construction contract, the defendant has already submitted to adjudication a payment claim for the last of the reference dates under the contract, and the defendant has been paid the amount the adjudicator held was due.

Factual Background to the Contract

2 The defendant specialises in drilling large diameter holes in marine environments. The plaintiff is in the business of seeking to produce electricity by using a device which is moored in the sea to harness the energy of the waves. It engaged the defendant to do work which involved attaching the electricity-producing device to the seabed at a location on the seaward side of the eastern breakwater of the outer harbour at Port Kembla.

3 The tender documentation pointed out that the site was an extreme one, and indeed that was the reason why it had been chosen for power generation. It pointed out that sea conditions and weather were the sort of things which were likely to impede work from time to time.

Relevant Provisions of the Contract

4 The contract between the plaintiff and defendant was entered on 7 June 2004. In it, the plaintiff was referred to as "the Company", and the defendant was referred to as "the Contractor". Relevant provisions of it are as follows:

"11.3 Practical Completion is that stage of the Contract when the Company Determines that the Works are complete to the extent that they are fit for their intended purpose with the exception of any minor omissions or defects. ...

11.6 When the Contractor has fulfilled all its obligations pursuant to the Contract, the Company must issue a Certificate of Discharge to the Contractor. ...

12.2 The Company may at any time before the issue of the Certificate of Practical Completion of the Works direct the Contractor to do all or any of the following: ...

4. execute additional work;

5. change any program or the order of the Works; ...

12.3 The implementation of a direction by the Company pursuant to clause 12.2 constitutes a Variation to the Works."

5 Another part of the contract (Clause 3.2 of the Form of Agreement) had fixed 11 October 2004 as the Date for Practical Completion.

6 Clause 2 of Annexure A3 fixed a Defect Liability Period of a continuous 90 days commencing from Practical Completion. Clause 23 provided:

"23.1 The Contractor warrants that the Works will comply in all respects with the Contract and will be free from defects and failures for the Defects Liability Period or for such other period as specified in the Contract.

23.2 The Contractor must rectify as soon as possible any failure of the Works to comply strictly with the terms of the Contract, which becomes apparent during the Defects Liability Period. ..."

7 The manner of payment for work done was dealt with by Clause 24, which provided:

"24.2 Unless otherwise stated, on completion of the Works or of agreed milestones, the Contractor must submit to the Company's Representative a detailed invoice in a form satisfactory to the Company for payment in respect of the Works executed. ...

24.4 Subject to the Contractor having satisfied the requirements of clause 24.1, the Company must pay the Contractor within 30 days of receipt of his invoice.

8 As well, Annexure B Clause B 2.3 provided: "Progress payments are to be based on the achievement of milestones as defined in the Milestone Payment Schedule.

The Contractor will be entitled to make claims for payment only upon achievement (such achievements to be agreed to by the Company) of defined Milestones. ..."

9 The Milestone Payment Schedule said:

MILESTONE DELIVERABLES	ESTIMATED DATE	CONTRACT VALUE OR PERCENTAGE OF CONTRACT SUM
1. Mobilisation of drilling spread to offshore site, ready to commence drill pile hole	5/8/04	450,000.00
2. Practical Completion	22/8/04	467,000.00

10 The contract also provided:

"30.1 The Contractor will be entitled to an extension for such period and on such terms as the Company directs if the Contractor:

1. demonstrates to the satisfaction of the Company that the delay was caused by: ...

2. inclement weather and/or sea conditions; ...

2. demonstrates to the satisfaction of the Company that the delay affects the critical path as shown on the Contract Program; ...

30.2 Subject to the Contractor having been granted an extension of time by the Company in respect of one of the events referred to in clauses ... 30.1.1.2, ... and providing the Company with a suitably detailed claim ... the Contractor will be entitled to claim extra costs incurred by it as a result of the delay. ...

Force Majeure

30.3 Either party will be excused from the performance of an obligation under this Contract to the extent of and for so long only as the failure to perform is directly caused by a Force Majeure Event.

30.4 A party excused from performance of an obligation as a result of a Force Majeure Event is not entitled to any remedy against the other and is not entitled to be reimbursed any cost loss or expense other than as set out in this clause."

- 11 The amount of the payment to be made by the plaintiff to the defendant was fixed by the following provisions:
"1.0 **"Contract Price"** means the total amount payable by the Company to the Contractor in full consideration for the performance of the Contractor's obligations pursuant to the Contract.
"B1.1 Provided the Contractor shall perform its obligations under the terms and conditions of the contract, the Company will pay the Lump Sum Contract Price. The Contract Price can only be varied by approved Variation."
- 12 A pricing schedule, Schedule B1, allocated prices to five different tasks to be performed to carry out the Contract. The total of the prices so allocated was \$905,000. There was thus a discrepancy between that schedule, and the Milestone Payment Schedule (para [9] above) which showed contract values totalling \$917,000.
- 13 A liquidated damages clause (Clause 3 of Annexure A3) provided that liquidated damages of \$16,000 per day were payable by the Contractor if it did not achieve Practical Completion by 11 October 2004 or within any extended time permitted pursuant to the Contract.
- 14 Clause 4 of Annexure A3 required the Contractor to provide "two unconditional securities for performance of the Works ... as security for the performance of its obligations pursuant to the Contract." The first of these securities was to be for \$400,000, and the second for \$50,000. Upon issue of the certificate of Practical Completion the first security was to be released, while upon issue of the Certificate of Discharge the second security was to be released. That security was eventually provided, in the form of bank guarantees.
- 15 There was no provision in the Contract allowing for interest to be paid on any outstanding amounts.

Facts Leading to the Present Dispute

- 16 There were various delays once the work had started. The most significant of these delays occurred when a barge which the defendant used in carrying out the work was damaged by large seas on 28 October 2004 – seas so large that the defendant says that they were unpredictable.
- 17 The first milestone under the Contract was achieved, and payment was made in connection with that milestone, without any incident which is now relevant. It was after that milestone had been achieved that the defendant's barge was damaged, resulting in significant delay in completing the contract.
- 18 The defendant contended that it had achieved practical completion on 14 April 2005. The plaintiff did not accept that practical completion had been achieved on that day, because some debris on the sea floor, resulting from the large seas which had damaged the barge, had not been removed.
- 19 On 18 April 2005 the defendant submitted a document to the plaintiff which it described as a "final payment claim" seeking payment of \$674,058.83.
- 20 On 27 April 2005 the plaintiff called on the two bank guarantees, and was paid a total of \$450,000 by the issuer or issuers of those guarantees.
- 21 On 25 May 2005 the defendant served on the plaintiff a payment claim under the **BACISOP Act**. It nominated 18 May 2005 as the reference date by reference to which it was served. I will refer to that document as "the First Payment Claim".
- 22 In response to the First Payment Claim the plaintiff served a payment schedule under section 14 of the **BACISOP Act**, dated 8 June 2005. It asserted that practical completion had still not been achieved (for reasons including that the debris on the sea floor had not been removed), and hence the second milestone payment was not due. It also asserted that the contractual date for achievement of Practical Completion had never been extended beyond 24 October 2004, in consequence of which the defendant owed to the plaintiff \$2.72m as liquidated damages. The net result, according to that payment schedule, was that the defendant owed the plaintiff more than \$2.26m.
- 23 On 22 June 2005 the defendant lodged an adjudication application concerning the First Payment Claim.
- 24 By 7 July 2005 the sea floor debris had been removed to the plaintiff's satisfaction. On 7 July 2005 it issued a Certificate of Practical Completion.
- 25 On 22 July 2005 the adjudicator who had been appointed issued an adjudication, holding \$559,457.20 to be due, inclusive of GST.
- 26 On 3 August 2005 the defendant obtained a judgment for the amount awarded by the adjudicator, plus interest to that date, plus the part of the adjudicator's fees which the plaintiff had been ordered to pay. The defendant issued various garnishee orders, which resulted in the defendant receiving payment of that judgment debt on 26 August 2005.

- 27 Some dynabolts had been placed in the harbour breakwater in connection with the work which the defendant had carried out. On 8 August 2005 the plaintiff requested the defendant to return to the site to remove or cut those dynabolts, to make the breakwater safe. The defendant, on 12 August 2005 agreed to do the work, but complained about both the lateness and the vagueness of the request, and said that it intended to charge for carrying out the work.
- 28 The defendant engaged Hope Diving Services Pty Ltd to do the work. It was achieved by two labourers in four hours, on 16 August 2005. Hope Diving Services sent a bill to the defendant for \$684.92, which the defendant forwarded to the plaintiff for payment. The plaintiff did not pay that bill immediately.
- 29 On 31 October 2005 the defendant served another document, purporting to be a payment claim under the **BACISOP Act**, on the plaintiff. I will refer to this document as the "Second Payment Claim". It claimed a total of \$983,992.09, after giving credit for the amount of the judgment debt it had received. It stated that it was made by reference to a reference date of 31 August 2005.
- 30 It is common ground that the Contract between the plaintiff and defendant is a "construction contract" within the meaning of the **BACISOP Act**, and that at least some of the work for which payment is claimed in the Second Payment Claim is "construction work" within the meaning of that Act.

These Proceedings

- 31 The present proceedings were begun on 7 November 2005, and have been brought on for hearing urgently. When the time periods under the **BACISOP Act** for taking steps, once a payment claim is served, are quite short, unless the matter was brought on for hearing very quickly any legal rights which the plaintiff might have had, which were claimed in the summons, could have become of no practical benefit through effluxion of time.
- 32 As amended in the course of the hearing, the relief which the plaintiff will ultimately seek is in substance:
1. A declaration that service of the Second Payment Claim does not entitle the defendant to apply for adjudication of that claim pursuant to section 17 of the **BACISOP Act**.
 2. A declaration that the reference date of 31 August 2005 referred to in the Second Payment Claim is not a reference date as defined in section 8 of the **BACISOP Act** in relation to the construction contract between the plaintiff and the defendant.
 3. An order restraining the defendant from taking any further step to proceed with making claims pursuant to the Second Payment Claim, including applying for adjudication in relation to it.
 4. An order restraining the defendant from making any further payment claim pursuant to the **BACISOP Act**, in relation to the same subject matter as the First Payment Claim.
- 33 The defendant wished to contend that there were discretionary reasons why an injunction should not issue. In particular, it wished to contend that the circumstances in which the plaintiff called on the bank guarantees amounted to unclear hands. There had been insufficient time, before the date on which the matter was set down for hearing, for the defendant to prepare its factual case on that issue. Further, the defendant wished to make submissions about the type of relief which was appropriate, if I was otherwise in favour of the plaintiff's contentions, to ensure that appeal rights of the defendant from my decision were not rendered negatory.
- 34 If the plaintiff were to be incorrect in its central contention, that service of the Second Payment Claim did not entitle the defendant to take any steps under the **BACISOP Act**, that would be a sufficient reason why the plaintiff would not be entitled to any of the relief which it claims. Mr Doyle, solicitor for the defendant, wished to contend that the terms of, and policy underlying, the **BACISOP Act** were such that even that central question ought not be determined by the Court, but should be left to be decided by an adjudicator.
- 35 To enable those questions to be decided, preliminary questions have been framed in the following terms:
- (1) Is it appropriate to answer question 2 at all.
 - (2) Whether, on the true construction of the contract between the plaintiff and the defendant and of the Building and Construction Industry Security of Payment Act 1999 ("the Act") the service by the defendant on the plaintiff of the document entitled "payment claim" and dated 31 October 2005 ("the Second Payment Claim") is the service of a document which would entitle the defendant to apply for adjudication of the Second Payment Claim pursuant to section 17 of the Act.

Other Facts

- 36 On 29 July 2005 the defendant began proceedings against the plaintiff in the Federal Court, seeking to recover the amount it asserts it is entitled to receive from the plaintiff. The plaintiff has filed a cross-claim in those proceedings, which alleges an entitlement to recover liquidated damages from the defendant. Those proceedings are progressing under the direction of the Federal Court, but have not yet been set down for hearing.
- 37 On 15 November 2005 the plaintiff posted a cheque to the defendant for \$684.92, in payment of the invoice from Hope Diving. It was sent under a covering letter which said that it was paid on the basis that it was without prejudice to the plaintiff's contention that the work was not a variation which entitled extra payment, and to various other of its legal positions.
- 38 It is common ground that the plaintiff has served a payment schedule in response to the Second Payment Claim. That payment schedule contends, I gather, that the defendant was not entitled to serve the Second Payment Claim. The payment schedule was not tendered in the proceedings before me.

Findings of the Adjudication on the First Payment Claim

- 39 In his determination of 22 July 2005 the adjudicator made the following findings:

1. On the proper construction of the Contract, the lump sum contract price was \$905,000, not \$917,000.
2. The defendant had achieved Practical Completion on 14 April 2005, as the Works were fit for their intended purpose on that date.
3. The damage to the defendant's barge on 28 October 2005 was caused by abnormal waves which constituted a force majeure event. The defendant was excused from performance of its obligations under the Contract during the period of the delay caused by that event.
4. The delay caused by the damage to the barge lasted from 28 October 2004 until 17 February 2005.
5. There was no requirement for the defendant to apply for an extension of time concerning the force majeure event, as it was not an event which was listed in Clause 30.1.
6. On the true construction of Clause 30, no reimbursement of costs was permissible for delay which was caused by a force majeure event. That was because the payment for extension of time allowed by Clause 30.1.2 related to the kind of inclement weather and/or sea conditions which could be expected in the course of performing the contract, and did not extend to something so extreme as a force majeure event.
7. The plaintiff's representative did not issue a direction to suspend work on 28 October 2004. Thus the defendant had no entitlement to the costs of suspension pursuant to Clause 13.4 for the period 28 October 2004 to 16 February 2005 inclusive. In the result, the plaintiff was not entitled to any additional payment under the Contract for the period 28 October 2004 to 16 February 2005.
8. Concerning delays other than the damages to the barge, even though the notification regime in clause 30.1 of the Contract had not been followed, the plaintiff had waived its right to rely upon that regime. Further, the plaintiff was estopped from asserting strict compliance with the requirements of clause 30.1 as a prerequisite to both extensions of time for delays arising from weather and the state of the sea, and for the costs associated with those delays. This entitled the defendant to extensions of time totalling 60 days, up to 14 April 2005.
9. The defendant was entitled to payment for standing-by by reason of weather and sea conditions, for a particular number of hours, over a particular period of time, at a particular rate per hour. That rate was arrived at by allowing a claim for a barge being on standby, and rejecting a claim for a boat also being on standby.
10. The plaintiff had no entitlement to liquidated damages under the Contract because Practical Completion had been achieved within the time allowed by the Contract, after taking into account those extensions of time which the adjudicator permitted.
11. The plaintiff had no entitlement to draw on the bank guarantees.
12. It was outside the adjudicator's powers to add the amount which the plaintiff had received under those bank guarantees to the amount which was otherwise due by the plaintiff to the defendant. This was because sections 9 and 10 of the Act set out the matters which would be taken into account in calculating the amount of a progress payment, and they were all matters to do with the value of the works performed.
13. An amount of \$559,457.20 inclusive of GST had become payable by the plaintiff to the defendant, and became due on 24 June 2005. Interest would accrue at the rate prescribed under the **Supreme Court Act 1970** for unpaid judgments from 24 June 2005.

Content of the Second Payment Claim

- 40 The Second Payment Claim seeks to re-agitate claims which the defendant made in the First Payment Claim, and which were disallowed by the adjudicator. These include what is the correct amount of the contract sum, whether the defendant is entitled to compensation for the period of delay which the adjudicator held was due to a force majeure event, and whether it is entitled to receive an extra \$450,000 by reason of the plaintiff having called on the bank guarantees.
- 41 It is common ground between the parties that the Second Payment Claim makes only one claim for work done which was not contained in the First Payment Claim. This is a claim to recover the \$684.92 for removing the dynabolts.
- 42 The Second Payment Claim also makes three different types of claims for interest. One is for interest on the bank guarantees. The second is described as "interest on progress payment", and the other as "interest on first payment claim".
- 43 Two of the claims for interest relates to amounts of interest which the plaintiff has already paid, but which enter into what the defendant says is the calculation of the amount now due. Those two claims for interest are in effect cancelled out by the defendant giving credit, in the Second Payment Claim, for a lump sum payment that the plaintiff has made, which includes those two amounts of interest. The claim for interest on the bank guarantee depends upon whether the adjudicator who decided the amount due on the First Payment Claim made a mistake in not giving a credit for the amount which the plaintiff has recovered under the bank guarantees.

Relevant Provisions of the BACISOP Act

- 44 Relevant provisions of the Act are set out in an appendix to these reasons for judgment.

Trade Practices Act

- 45 The plaintiff's contentions raise an alternative ground upon which it seeks an injunction. It is that the Second Payment Claim was likely to be submitted, in trade or commerce, to an adjudicator, that to do so would be conduct that is misleading or deceptive, or likely to mislead or deceive, and that the **Trade Practices Act 1974** (Cth) provides a basis

for the granting of an injunction to prevent that conduct. To deal with that question, an additional preliminary question has been formulated, namely:

- “3. Whether, if the defendant were to submit the Second Payment Claim to an adjudicator for adjudication under the Act, so doing would constitute, in trade or commerce, conduct which was misleading or deceptive or likely to mislead or deceive, contrary to the **Trade Practices Act 1974** (Cth).”

That question was formulated because, if answered in the negative, it would terminate the plaintiff’s claim on that head. It was not possible for the totality of the defendant’s case concerning whether an injunction should be granted to be tried, because by the time of the hearing it had not had adequate time to gather material relevant to discretionary defences which it wished to present.

- 46 The plaintiff’s summons was in the form prescribed for the Technology & Construction List. Thus, it contained a detailed statement of the plaintiff’s contentions, in a form analogous to that found in a pleading. Those contentions alleged that the Second Payment Claim was misleading or deceptive or likely to mislead *the adjudicator* in two respects. The first was that it represented that the work done in removing the dynabolts was a variation under the Contract for which the defendant was entitled to be paid a progress payment subsequent to the progress payment to which the defendant had become entitled on the Practical Completion milestone. The second was that it represented that 31 August 2005 was a reference date under the Contract.
- 47 Directions were given for the plaintiff to serve an outline of submissions before the hearing. Those submissions repeated in substance the contentions which had been made in the summons on the topic of contravention of the **Trade Practices Act 1974** (Cth).

A Misleading or Deceptive Claim?

- 48 The plaintiff does not claim that it is in any way misled by the Second Payment Claim. That the Second Payment Claim is alleged to be one which has a tendency to mislead the adjudicator, rather than the plaintiff, is not in itself a reason why it cannot be misleading and deceptive within the meaning of section 52. However, the Second Payment Claim does not purport to be a statement of anything more than what the *defendant claims* it is owed by the plaintiff. The defendant really does claim that it is owed the amount of money referred to in the Second Payment Claim. Insofar as the Second Payment Claim sets out facts, they are the basis upon which the claim to payment is made. The two matters which the plaintiff alleges are misleading are not simple matters of fact, but mixed conclusions of fact and law. In the context in which they are made in the Second Payment Claim, they are not likely to be read by an adjudicator as anything other than a contention by the defendant. Nor are they the sort of contention that is likely to be simply accepted by the adjudicator, without applying his or her own mind to whether it ought to be accepted.
- 49 Further, assuming for the moment that the Second Payment Claim will lead to an adjudication, it is a claim which will be dealt with by the adjudicator in a context where it will be fully open to dispute and argument. There has been an opportunity for the plaintiff to serve a payment schedule, which can point out anything which it contends is an error. The Second Payment Claim will not be acted upon by the adjudicator in any way until the plaintiff has had the opportunity to serve a payment schedule within the time allowed by section 14 of the Act. The adjudicator will not issue a determination until the plaintiff has also had an opportunity to lodge an adjudication response with the adjudicator within the time allowed by section 20 of the Act.
- 50 Finally, I accept the plaintiff’s argument that anyone reading the payment claim who had knowledge of the background to the Contract would realise that it was an attempt to overcome the ways in which the earlier adjudication was not entirely successful so far as the defendant was concerned. Any adjudicator who might be appointed to consider the Second Payment Claim would come to be in a situation of having that knowledge of the background to the Contract.
- 51 For these reasons, I do not accept that the payment claim is misleading and deceptive or likely to mislead and deceive the adjudicator, within the meaning of section 52 **Trade Practices Act 1974** (Cth).

Made in Trade or Commerce?

- 52 The defendant also contended that the payment claim was not one which would be submitted to an adjudicator in trade or commerce. The defendant relied on the judgment of Master Macready (as his Honour then was) in **Paynter Dixon v Tilston** [2004] NSWSC 85 at [30]-[31]. There, some remarks of Lee J in **Merman Pty Ltd v Cockburn Cement Ltd** (1988) 84 ALR 521 at 532 were quoted: “The test of whether conduct has the characteristic of activity in trade or commerce is not difficult to apply. For example, the issue of legal proceedings or the commencement of arbitration proceedings would be acts that do not on their face bear the stamp of acts in trade or commerce and do not become so merely because a person engaged in trade or commerce has resorted to their use.”
- That learned Master applied those remarks to the supplying of a payment claim to an adjudicator under the **BACISOP Act**, and held that such a supplying of the payment claim was not in trade or commerce.
- 53 Those remarks of Lee J in **Merman Pty Ltd v Cockburn Cement Ltd** (1988) 84 ALR 521 were not the ratio of that case. **Merman** concerned an application for striking out or staying of a statement of claim which alleged misleading and deceptive conduct in the making of a submission to the Australian Customs Service seeking the imposition of an anti-dumping duty – not in the commencement of proceedings of any kind. As well, the outcome in **Merman** was that the statement of claim was not struck out or stayed. Further, as Von Doussa J noted in **Chapman v Luminis Pty Ltd (No. 5)** (2001) 123 FCR 62; [2001] FCA 1106 at [185] **Merman** was decided before the High Court had given its decision in **Concrete Constructions (NSW) Pty Ltd v Nelson** (1990) 169 CLR 594. Thus, I shall consider the question for myself.

- 54 In **Concrete Constructions** Mason CJ, Deane, Dawson and Gaudron JJ, at 603, expressed their preference for a meaning of “in trade or commerce” in section 52: “... as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.”
- 55 Their Honours said, at 603-4: “Indeed, in the context of Pt V of the Act with its heading “Consumer Protection”, it is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct “in trade or commerce” may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.”
- 56 Applying that test, the submitting to an adjudicator – a person appointed under statutory authority and given statutory powers – of a payment claim which has been disputed, for the purpose of the adjudicator making an adjudication upon the correctness of that payment claim, is not conduct “in trade or commerce” within the meaning of section 52 **Trade Practices Act 1974** (Cth).
- 57 For these reasons, the plaintiff’s contention that the submitting of the Second Payment Claim to an adjudicator would contravene section 52 **Trade Practices Act 1974** (Cth) is rejected. Preliminary question 3 will be answered “no”.

Unconscionable Conduct?

- 58 At the hearing, the plaintiff also sought to submit that the making of the Second Payment Claim amounted to unconscionable conduct within the meaning of either section 51AA or section 51AB **Trade Practices Act 1974** (Cth). The plaintiff had sought, and been granted, an urgent final hearing. There had been no foreshadowing, prior to the hearing, that any such claim would be made. It is an allegation which is dependent upon the factual context in which the Second Payment Claim came to be made. The defendant has had no opportunity to come to understand the basis upon which the plaintiff contends that the conduct is unconscionable, or to prepare its own factual case about why it is not unconscionable. At the hearing I informed Mr Doyle that I did not need to hear him on the unconscionability point. I decline to permit the issue to be raised at the late stage at which it was raised.

Brodyn v Davenport – When a Determination is Valid

- 59 In **Brodyn Pty Ltd v Davenport** (2004) 61 NSWLR 421 Hodgson JA (with whom Mason P and Giles JA agreed) said at [51]-[55], 440-442:
- “51 ... The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) and s 25(4). The remedy provided by s 27 can only work if a claimant can be confident of the protection given by s 27(3): if the claimant faced the prospect that an adjudicator’s determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap.
- 52 However, it is plain in my opinion that for a document purporting to be an adjudicator’s determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator’s determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.
- 53 What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
 2. The service by the claimant on the respondent of a payment claim (s.13).
 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
 4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
 5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).
- 54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator’s determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the

net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. **Project Blue Sky Inc. v. Australian Broadcasting Authority** (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), 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 (cf. **R v. Hickman; Ex Parte Fox and Clinton** (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."

The Plaintiff's 'No Reference Date' Argument

- 60 As Mr Christie, for the plaintiff, ultimately formulated his argument, he did not dispute that the Second Payment Claim was a "payment claim" within the meaning of the **BACISOP Act**. Nor was there any issue that the Second Payment Claim had in fact been served.
- 61 Rather, what he contended was that there was no reference date under the Contract to which the Second Payment Claim could be attached. He put that contention in two alternative ways. One was that the payment claim really was alleging that 31 August 2005 was a reference date under the Contract. He submits that 31 August 2005 is, on the proper construction of the Contract, not a reference date. The alternative was that the identification of 31 August 2005 as a reference date was a mistake, but an inessential mistake, and that the payment claim should be construed as referring to the last of the available reference dates under the Contract. In that event, a payment claim had already been made for the last reference date under the Contract, so service of the Second Payment Claim was not a service which was permitted by section 13(5) of the Act. Whichever of these ways the Second Payment Claim is read, he submitted it is incapable of leading to a adjudicator's decision which is legitimately arrived at in accordance with the Act.
- 62 There are two tasks to be performed to decide the correctness of the plaintiff's argument. The first is identification of the reference dates applicable to this Contract. The second is deciding whether, in the event that 31 August 2005 is not a reference date under the Contract, and if payment claims have already been made with respect to all of the reference dates under the Contract, service of a payment claim which alleges a reference date of 31 August 2005 is something which can give rise to an adjudication application within the scope of the Act.

The Parties' Arguments – Identification of Reference Dates

- 63 Mr Christie submits that, in construing section 8(2)(b), "the matter" there referred to is the topic of when progress claims can be made. He submits that the Contract in the present case is one to which section 8(2)(b) does not apply, because the Contract makes express provision with respect to when progress claims can be made. The Contract says, explicitly, that they can be made when, and only when, the milestones are reached. Thus, Mr Christie submits, those are the only reference dates under this particular Contract. Further, he submits, the defendant has already served a payment claim in respect of the reference date of Practical Completion. Thus, the Second Payment Claim could not relate to that date.
- 64 The plaintiff submits that, because section 8(2)(b) does not apply to this particular contract, the basis on which the Second Payment Claim nominated 31 August 2005 as being the reference date by reference to which it was made is mistaken.
- 65 Mr Doyle, for the defendant, submits that the Milestone Dates are not the only dates when the Contract permits a payment claim to be submitted. In particular, the Contract does not restrict the plaintiff's right to submit a payment claim for work carried out after Practical Completion. Mr Doyle points to Clause 24.2 (para [7] above), and says that it permits an invoice for payment to be submitted "on completion of the Works or of agreed milestones". Thus, he says, at the least the defendant has a contractual entitlement to submit a further invoice on completion of the Works, and it has not previously submitted an invoice in relation to that reference date.
- 66 In response to that argument, Mr Christie makes three separate points:
1. Clause 24.2 allows submission of an invoice for payment on completion of the Works or of agreed milestones only "unless otherwise stated". The terms of Clause B2.3 and Schedule B4 (paras [8] and [9] above) make clear that claims for payment can be made only upon achievement of the Milestones. Thus, they are clauses whereby it is "otherwise stated", within the meaning of Clause 24.2.
 2. Clause 24.2 is in a part of the Contract which has the appearance of a standard form (though each page is headed with a title which relates only to this particular Contract). There are other parts of the Contract, the annexures, which are clearly tailor-made for this Contract. Clause B2.3 and Schedule B4 are part of those annexures. The principle of construction whereby a clause which is tailor-made for a particular contract prevails over a standard form to the extent of any inconsistency also leads to the conclusion that completion of the Works is not a reference date.

3. There is no occasion, under the Contract, for the defendant to be paid money for any work which is done after Practical Completion is achieved. Clause B1.1 (para [11] above) made the Contract a lump sum contract. The power under Clause 12.2 and 12.3 for the plaintiff to require a variation of the works (and incur the corresponding obligation to pay for that variation) (para [4] above) did not apply after Practical Completion had been achieved. Further, the entitlement of the defendant to be paid for any extra costs arising by reason of delay, under Clause 30.2, arises only when there has been an extension of time granted in respect of one of the events referred to in Clause 30.1.1 (para [10] above). The time which is so extended is the time for achieving Practical Completion. Thus, necessarily, there could not be an extension of time under Clause 30.1.1, triggering an obligation on the plaintiff to make a payment for delay costs under Clause 30.2, concerning any delay sustained after Practical Completion. Finally, while there was an obligation on the defendant to remedy minor omissions and defects after Practical Completion (Clause 11.3, 23.2) the defendant is not entitled to receive any additional money, beyond the lump sum price as varied and extended up to the date of Practical Completion, for the work of remedying those minor omissions and defects. Thus, there is no way any obligation to make a payment could arise under the Contract after the date of Practical Completion. This supports, Mr Christie submits, the conclusion that on the construction of the Contract as a whole, there is no entitlement to any payment which accrues later than the date of Practical Completion.
- 67 Mr Doyle's riposte is to say that the Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, at [62], recognises that a right to submit a payment claim can arise after practical completion. In *Brodyn* at para [62]-[64] Hodgson JA said:
- "62 Brodyn's submission was that the payment claim served on 28 September 2003 was not a valid payment claim under the Act, because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made. This submission was supported by the decision of McDougall J in *Holdmark Developers Pty. Limited v. G.J. Formwork Pty. Limited* [2004] NSWSC 905.
- 63 However, s.8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s.8(2)(a) if the contract so provides but not otherwise; while s.8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s.13(4): reference dates cannot support the serving of any payment claims outside these limits.
- 64 In my opinion, as submitted by Mr. Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively."
- 68 To that, Mr Christie submits that these paragraphs in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 need to be seen in the context of the particular case. In *Brodyn* it was common ground that the contract there in question had come to an end at a time before all the work due to be performed under it had been completed. The parties in *Brodyn* differed about which of them had been entitled to terminate the contract, and which of them had effectively terminated the contract, but were agreed that, one way or another, it was terminated. At paras [62]-[64] Hodgson JA was recognising that there could be a reference date which arose *after termination of the contract or cessation of work*. It is, Mr Christie submits, perfectly sensible that this should be so. Unless a construction contract is unusually meticulous in its drafting, so that it includes express provision for when progress claims can be made even after termination, it will make no express provision with respect to that matter, and hence section 8(2)(b) of the Act will have room to operate in relation to that situation for which the Contract has not provided.
- 69 Mr Christie submits that the present is a case which does not fall within the topic which Hodgson JA was addressing at para [62]-[64] of *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. Even in relation to the question of reference dates occurring after a termination of a contract or cessation of work, Hodgson JA recognised, in para [63], that reference dates might, by reason of section 8(2)(a) cease on termination of the contract or cessation of work if the contract so provided. The Contract in the present case, submits Mr Christie, is one which covers the entire field of when progress claims may be made if the Contract is (as this one was) performed in its entirety.
- 70 Mr Doyle also contends that 31 August 2005 was validly nominated as a reference date in the Second Payment Claim. He submits that: "If, however, the contract does not provide a date on which a payment claim may be submitted for work carried out after Practical Completion, then s 8(2) of the Act is operative, and the relevant reference date is as provided by s 8(2) and the [Second] Payment Claim is valid because, as required by s 8(2), its reference date is "the last day of [a] subsequent named month"."
- 71 Mr Christie submits that this argument mis-states section 8 in a critical way – that section 8(2)(a) applies if the Contract provides for the date on which a claim for a progress payment may be made in relation to work under the Contract, and it is only if there is no express provision with respect to that matter that section 8(2)(b) has room to operate. In the present case, Mr Christie submits, for the reasons already outlined, that the Contract, in the circumstances which have arisen, covers the field of when claims for progress payment may be made, and hence section 8(2)(b) has no room to operate.
- 72 Mr Christie submits that a powerful factor in favour of his submission is that, if Mr Doyle is right, it would be open to the defendant to submit a fresh payment claim not only with respect to the last day of August 2005, but also with respect

to every single calendar month, until the twelve months from Practical Completion, laid down by section 13(4)(b) had run out. By doing that, the defendant could re-agitate, in nine separate adjudications, the topics on which it had lost before earlier adjudicators. It is hardly likely, he submits, that Parliament would have intended such oppression to occur.

73 Mr Christie also submits that the performance of the work covered by the Hope Diving invoice is not something which resulted in the defendant having an entitlement to receive extra money under the Contract, and so could not provide an additional reference date under the Contract. The request to perform that work could not have been a variation, because, under Clause 12.2 and 12.3, a variation could be directed only prior to Practical Completion, and both parties agree that Practical Completion had been achieved by the time the plaintiff requested that work be performed. The work is either, the plaintiff submits, rectification which the defendant is obliged to carry out under Clause 23.2 without any extra payment, or is work done pursuant to a separate contract.

74 Mr Doyle made no specific riposte to that argument. As the defendant presented its case, its right to present the Second Payment Claim depended upon more general considerations than the circumstances in which that particular work of removing dynabolts came to be performed. Mr Doyle did submit, however, that payment of the Hope Diving invoice after the Second Payment Claim had been served could not affect whether that service was efficacious. The efficacy of the service, for the purposes of the Act, needed to be decided as at the time the service was made, and was not affected by subsequent events.

75 Mr Christie also points out that the contract in dispute in this litigation has been considered, in litigation between the same parties as the parties to this litigation, by McDougall J in *Energetech v Sides Engineering & Anor* [2005] NSWSC 801. His Honour said, at [6]-[7]:

“6 In the present case, the combined effect of cl 24 of the general conditions of contract and cl B2.3 of appendix B to the contract is that Sides is “entitled to make claims for payment only upon achievement (such achievements to be agreed to by [Energetech]) of defined Milestones”. Schedule B(4) sets out the two milestones in question of which the second, as I have said, is “practical completion”.

7 It is therefore apparent from the terms of the contract that the milestone dates set out in schedule B4 are the reference dates for the purposes, relevantly, of s 8(1) of the Act. The entitlement to the progress payment in suit, therefore, arises on and from the achievement of practical completion. If practical completion is not achieved, there is no entitlement.”

76 Those paragraphs give rise, he submits, to an issue estoppel, or alternatively a binding precedent, or alternatively a highly persuasive precedent on the question of when the reference dates under this Contract arise.

77 Mr Doyle points out that the issue before McDougall J in that case was whether the adjudication determination given in relation to the First Payment Claim was void because it had been served too early, as (notwithstanding the adjudicator’s finding) Practical Completion had not actually occurred at the date it was served. Thus, Mr Doyle submits, that it was not an issue, in the case before McDougall J, whether there were any reference dates after the date of Practical Completion.

78 Mr Doyle’s final argument concerning the reference dates is that, if the Contract prevents the plaintiff from submitting a payment claim for work carried out after Practical Completion, then pursuant to section 34(2) of the Act any provision of the Contract which has that effect is void.

79 Mr Christie says that section 34 has no scope to operate in the present case – that what the Act envisages is that claims for progress payment will be made on the dates which the contract provides for, and may be made on the last day of the month only if the contract makes no such provision, and here the Contract has covered the field of when payment claims may be made. Thus, there is no provision of the Contract which excludes, modifies or restricts the operation of the Act.

The Arguments – Whether Service of Second Payment Claim is Within the Act

80 Mr Christie acknowledges that there is a fundamental difference between Part 2 of the Act, and Part 3 of the Act. Section 8 is a section which confers a substantive right for a contractor to receive a progress payment. That substantive right can be enforced in court proceedings, and in the course of ordinary administration of a building contract when there is no involvement of either a court or an adjudicator. Similarly, the other sections in Part 2 confer substantive rights. Section 8 conditions the entitlement to a progress payment on the existence of a reference date. That is not a matter of anyone’s opinion, or claim – it is a matter of the actual existence of a reference date.

81 By contrast, Part 3 of the Act is concerned with a procedure by which progress payments may be recovered. Mr Christie recognises that, under section 13(1), entitlement to serve a payment claim does not depend upon whether a claimant is actually entitled to a progress payment – it is sufficient if the claimant *claims* to be entitled to a progress payment. He recognises that the rest of Part 3 is concerned with a procedure whereby an interim effect can be given to that claimed right to a progress payment.

82 Mr Christie stresses, however, that service of a payment claim is a necessary step in the triggering of all the various procedures set out in Part 3. What section 13(1) confers is an entitlement to serve a payment claim. The right of a person to provide a payment schedule, under section 14(1), depends upon that person having been served with the payment claim. The liability which arises under section 14(4) is dependent upon service of a payment claim, both because of the express terms of section 14(4)(a) and section 14(4)(b)(ii), and also because the liability established by section 14(4) is one to pay the claimed amount “on the due date for the progress payment to which the payment claim relates”. Pursuant to section 4, “due date” means the date established by section 11. At least in the situation where section 11(1)(b) applies, that depends upon the time at which “a payment claim is made under Part 3 in relation to the

payment” – and the only way that Part 3 permits a payment claim to be “made” is by serving it. Under section 15(1) section 15 applies only when a respondent has become liable to pay the claimed amount *under section 14(4)* – and such a liability can arise only when there has been service of the payment claim.

- 83 Section 16(1)(a), and section 16(1)(b)(ii) likewise depend upon service of the payment claim.
- 84 An application for adjudication may be made under section 17(1)(a) if the respondent has provided a payment schedule under Division 1 – but that can be done only if there has been a payment claim served.
- 85 When service of a payment claim plays this pivotal role in the provisions of Part 3 of the Act, the requirements of section 13(5) are shown to have an especial importance. If there were to be an adjudication on this payment claim, which had no reference date properly attached to it, the adjudicator would, Mr Christie submits, be acting in a way which was very significantly outside the scope which Part 3 intended the adjudicator to act within. The departure would be so serious that the Court should act now, he submits, to ensure that it does not happen.
- 86 Mr Christie accepts that, if an adjudication were to proceed in relation to the Second Payment Claim, and the adjudicator were to hold (Mr Christie submits, mistakenly) that any additional sum of money was owing to the plaintiff, that determination would probably not be void. As explained in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, the attributes which section 13(2) of the Act says that a payment claim “must” have are not essential for there to be a valid determination. Mr Doyle submits, and Mr Christie is inclined to accept, that the requirement in section 13(5) is likewise not a condition which is essential for there to be a valid determination.
- 87 In my view, Mr Christie’s inclination is correct. It has already been held that the constraint imposed by section 13(4) on when a payment claim may be served is not one of the “*basic and essential*” matters which, if not complied with, render an adjudicator’s adjudication void: *Energetech v Sides Engineering & Anor* [2005] NSWSC 801 at [25]; *Lifestyle Retirement Projects No 2 v Parisi Homes* [2005] NSWSC 705 at [19]. If section 13(4) is not essential, it is hard to see why section 13(5) should be.
- 88 The conclusion is also supported by the remark of Hodgson JA (with whom Bryson JA and Brownie A-JA agreed on this point) in *The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142 at [49]: “*In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator’s determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s.22(2) as to what is to be considered, an error on these matters does not render the determination invalid.*”
- 89 I note that the reasons given by Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229 at [44]-[46] why section 13(2) does not identify factors which must objectively be present before an adjudicator may proceed to make a determination which is valid apply equally to whether an adjudicator may make a determination which is valid if the requirement of section 13(5) is not objectively satisfied. I am inclined to accept Basten JA’s analysis that it is the *bona fide* opinion of the adjudicator that section 13(2) has been satisfied which is a precondition of there being a valid determination, and the corollary that likewise it is the *bona fide* opinion of the adjudicator that section 13(5) has been satisfied which is another precondition of there being a valid determination. However, when those observations of Basten JA have been neither adopted by a majority in the Court of Appeal, nor declined to be adopted by a majority in the Court of Appeal, I shall refrain from relying upon them, or upon my own inclination, as a reason for my conclusion.
- 90 To say that an adjudicator can make a valid determination under the Act even if the service of the payment claim to which the determination relates contravenes section 13(5), or the payment claim itself contravenes section 13(2), is not, however, to detract from the significance of either section 13(2) or section 13(5), for the purpose of an adjudicator making his or her decision. If a payment claim which lacked the attributes which section 13(2) says it “must” have were to be submitted to adjudication, or if, notwithstanding section 13(5), a claimant served more than one payment claim in respect of a particular reference date and that claim was submitted to adjudication, the breaches of section 13(2) and section 13(5) would provide a sound reason for the adjudicator to decline to order any payment pursuant to that payment claim. To say that such a payment claim can give rise to a valid determination means that, even if the adjudicator makes a mistake by giving effect to a payment claim which does not comply with section 13(2), or a payment claim which does not comply with section 13(5), the adjudicator will still have made a determination which gives rise to an obligation to make a payment, and can be registered as a judgment.
- 91 Mr Christie submits that, because there is scope for an adjudicator to make an error of this kind, yet still produce a valid decision, that makes it all the more important for the Court to intervene, where a contravention of section 13(5) is demonstrated, to foreclose the possibility of such an error being made.

Repeating the First Payment Claim

- 92 At one stage, the plaintiff was contending that it had a second argument, which depended upon the way in which the Second Payment Claim was almost entirely a repeating of the claims made in the First Payment Claim. Ultimately, however, Mr Christie came to accept that this was not something which went to the propriety of the claim. Rather, it is something which an adjudicator would be required to deal with by applying section 22(4). I accept that, as McDougall J said in *Coordinated Constructions Co v J M Hargreaves & Ors* [2005] NSWSC 77; (2005) 21 BCL 312 at [58]: “*section 22 is not a precondition to the existence of a valid determination. It is a matter interior, rather than anterior, to the determination.*”

Ought the Court Intervene?

- 93 Mr Doyle submits that it is inappropriate for the Court to intervene at all at this stage. This argument was put both as a matter of it not being the Court's role to answer the second question posed for decision ("*the plaintiff cannot raise as a challenge matters which are in the province of the adjudicator*"), and as a discretionary matter (that the court "*should not interfere at this stage*").
- 94 It was not contended that any of the arguments which the parties wish to raise were ones that an adjudicator would lack power to decide. In my view, the parties were right in not making any such contention.

The Court's Role

- 95 I recognise that the Act does not contain a privative clause. As well, "*... a superior court of law will not be deprived of jurisdiction except by express words or necessary implication; the provision of another tribunal would not of itself ordinarily be sufficient to do so*": *Law Society of NSW v Weaver* [1974] 1 NSWLR 271 at 272.
- 96 However, the scheme of the Act involves more than conferring on an adjudicator a power to make decisions which the Court already has power to make. There is a presumption that, when an enactment both creates an obligation and provides a means for securing compliance with the obligation, then the remedy so provided is exclusive: *Doe d Rochester (Bishop) v Bridges* (1831) 1B and Ad 847 at 859; 109 ER 1001 at 1006; *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387 at 394-395; *DCT v Brown* (1958) 100 CLR 32 at 42; *Houston v Dewi Thomas Pty Ltd* [1967] VR 300 at 305-6; *North Wind Pty Ltd v Proprietors - Strata Plan 3143* [1981] 2 NSWLR 809 at 811 (Rath J) *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185-6; *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 446, 415; *Kinzett v McCourt* (1999) 46 NSWLR 32 at 42 -43, [51] - [54] per Spigelman CJ (with whom Mason P, Priestley Meagher and Handley JJA agreed); *Preston v Star City Pty Ltd* [1999] NSWSC 1273 at [82] (Wood CJ at CL). In *Josephson v Walker* (1914) 18 CLR 691, this presumption was said by Griffiths CJ (at 697) to be: "*... a very strong presumption which may be rebutted if there are sufficient grounds for thinking that the language of the Act itself shows that the legislature intended that the mode of enforcing the obligation should not be the only mode, but that the party should also be entitled to have recourse to any ordinary means of enforcing it under the general law*".
- 97 The obligation to make a progress payment on the dates which are fixed by section 8 is an obligation which can be enforced in the courts, but that is an obligation to pay the amount which is, on the true construction of the contract and in the events which have actually happened, due. By the terms of section 32, the Act recognises that the amount which a court finds is really due under a contract might be different from the amount which is determined in an adjudication determination. The obligation to make payment of a progress payment *in the amount which has been found due by an adjudication determination* is a novel obligation created by the Act itself. The Act creates the procedural steps by which an adjudication determination comes to be made, and comes to be enforced. Thus, the preconditions for operation of the presumption exist, so far as the working through of those procedural steps is concerned.
- 98 Section 3(3) explicitly states that the means chosen to ensure that a person is able to recover a progress payment includes:
 "(c) the referral of any disputed claim to an adjudicator for determination, and
 (d) the payment of the progress payment so determined."
 That is consistent with the operation of the presumption.
- 99 The time limits which the Act imposes for the procedure which it establishes are extremely tight. A respondent has only ten business days after the payment claim is served in which to provide a payment schedule, unless the construction contract itself allows a different time (section 14(4)(b)). If no payment schedule is served within that time, the respondent becomes liable to pay the claimed amount either ten business days after the payment claim has been served, or within any different period which the contract might set (section 14(4), section 11(1)). The various time limits for the making of an adjudication application under section 17(3) are likewise matters of days. The nominating authority must refer the application to an adjudicator "*as soon as practicable*" after the adjudication application is made, under section 17(6). The time within which an adjudication response may be lodged is also measured in days, under section 20. The adjudicator is required, by section 21(3) to determine the adjudication application within ten business days after he has accepted the application, unless the parties agree to a different time. The ambit of the matters which an adjudicator can decide or take into account is restricted by section 22(2) and (4), with the evident aim of assisting the adjudicator to produce a determination quickly. Section 23 requires the amount which the adjudicator determines is due to be paid five business days after the adjudicator's determination is served, and other provisions of the Act make allowance for any unpaid adjudication determination to be turned into a judgment promptly.
- 100 The speed of that process is in itself not well suited to supervision or intervention by a court in the course of the process. It is sheer luck, arising from two cases which I was scheduled to hear having settled, that in the present case the Court was able to make the time available both for the hearing of the matter, and for the preparation of a judgment. As well, the interval between commencement of proceedings and hearing, even in this case, has not been enough to enable all of the discretionary issues which the defendant wished (legitimately) to ventilate to be prepared and argued. Such an opportunity to obtain the prompt attention of the Court is unlikely to be open to all recipients of a payment claim who wish to question whether it ought proceed to adjudication. It is not likely that Parliament intended to set up a regime where whether a person could obtain effective relief from a court would be a matter of luck concerning the state of the Court's lists in the few weeks after application for relief was made.

- 101 Section 32 of the Act makes clear that the adjudicator's determination is an interim one, and the parties have full opportunity to litigate who owes how much to whom under the construction contract, without the decision of the adjudicator having any effect other than as required by section 32(3).
- 102 These considerations, concerning the way in which the Act operates, and the practical difficulties involved in the Court having the opportunity, in most cases, to make a decision about whether a payment claim which has been served is within the ambit of the Act, reinforce the presumption. I see nothing in the Act to detract from the presumption.
- 103 The novel obligation which the Act creates, to pay an amount found due by an adjudication determination, is one which comes into contact with the rights and obligations recognised by the general legal system at the point where that obligation comes to be either performed or enforced. At that point, it is open to a party to ask the Court to decide: "*Is this piece of paper which purports to be an adjudication determination something which the law will recognise as being an adjudication determination, so that I am obliged to act in accordance with it?*" To ask the Court that question is not to impinge upon the exclusiveness of the means that the Act has created for enforcing the remedy that it has also created. Rather, it is to ask whether that remedy has really come into existence.
- 104 There are two other novel obligations that the Act creates, which have not been the subject of this litigation, as the litigation has been conducted on the footing that the defendant will submit the Second Payment Claim to adjudication. However I should mention them to show how they fit into the view that I take of the court's role concerning the operation of the Act. These other novel obligations are the obligation under section 14(4) to pay the amount claimed by a progress claim if a payment schedule is not served within the requisite time, and the obligation under section 16(2) for a person who has served a payment schedule to pay by the due date the amount which the payment schedule indicated would be paid. Each of these obligations is one that arises if a procedure, laid down by the Act, and which is capable of leading to an adjudication determination, stops short of an adjudication determination. When the procedure that the Act lays down is started, one cannot tell whether it will lead to an adjudication determination or not. In my view it would be impinging upon the exclusiveness of the remedies created by the Act for the court to intervene at any time before any obligation under section 14(4) or section 16 (2) was asserted to have arisen. However, once it was asserted that one or other of those obligations had arisen, it would be open to the court to decide whether the law would recognise that such an obligation had indeed arisen.
- 105 That it is the adjudicator who should decide questions involved in deciding whether a progress payment is due, and if so for how much, has been repeatedly recognised in the case law construing the Act. In *Brodyn* at [51] Hodgson JA recognised that "*the procedure contemplates a minimum of opportunity for court involvement*". I agree, with respect, with the remarks of McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* [2005] NSWSC 362 at [13] that: "*... the legislature has made it quite clear that it is adjudicators under the Act who are the primary organs for the resolution of these disputes. The power of this Court comes in either to enforce the determination (a power shared with other courts) or, in the limited circumstances described in Brodyn, to restrain enforcement of the determination. The whole scheme of the Act including, as Palmer J said in Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140, is one of "pay now, argue later". It is clear from the provisions of s32 of the Act that the time for final adjustment of rights and remedies is later.*"
- 106 For these reasons, it is not the Court's proper role to answer the second question posed for decision, when that answer is sought as a way of pre-empting the possibility that an adjudicator might make a mistake in coming to a determination.
- 107 There is one other matter I should mention. In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* [2005] NSWSC 362 at [13] McDougall J was considering an application for an injunction to restrain a person who had served a payment claim from proceeding with an application for an adjudication. His Honour referred to the fact that it would not be an easy or quick matter for the Court to determine the detailed arguments as one reason for declining the relief which was sought.
- 108 Mr Christie sought to distinguish those remarks, on the basis that, in the present case, the arguments which the parties present are within a confined focus, and able to be determined on the basis of the material now before the Court. I accept his characterisation of the arguments in that respect. However, that is not the relevant basis on which to distinguish those remarks of McDougall J.
- 109 It is of fundamental importance that the application before McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* [2005] NSWSC 362 was for an interlocutory injunction, not for final relief. The ease of determining a question of law, when the facts on which it is based are not challenged is a legitimate matter for the Court to take into account in deciding whether to determine that question of law on the interlocutory injunction application: see *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 538-9 (McLelland J) and other authorities collected at Meagher, Gummow & Lehane's *Equity Doctrines and Remedies*, 4th edition, para [21-390], cf *Kurt Keller Pty Ltd & Ors v BMW Australia Ltd & Ors* [1984] 1 NSWLR 353 at 369. However, it is not open to a Court to decline to grant final relief on the ground that the questions involved are too hard. There are reasons of principle, some of which go to discretion, on the basis of which the Court might decline to grant final relief, but the fact that the questions are too hard is not amongst them. As the present case is an application for final relief, my conclusion is not affected by any consideration of whether it would be easy or difficult to answer the second question which has been posed for consideration.

Discretion Concerning Intervention

- 110 In light of the conclusion I have arrived at, it is unnecessary to consider any further questions of discretion.

Orders

111 I give to following answers to the preliminary questions posed.

1. Q: Is it appropriate to answer question 2 at all.

Answer: **"No"**.

2. Q: Whether, on the true construction of the contract between the plaintiff and the defendant and of the Building and Construction Industry Security of Payment Act 1999 ("**the Act**") the service by the defendant on the plaintiff of the document entitled "payment claim" and dated 31 October 2005 ("**the Second Payment Claim**") is the service of a document which would entitle the defendant to apply for adjudication of the Second Payment Claim pursuant to section 17 of the Act.

Answer: **"Not Answered"**.

3. Q: Whether, if the defendant were to submit the Second Payment Claim to an adjudicator for adjudication under the Act, so doing would constitute, in trade or commerce, conduct which was misleading or deceptive or likely to mislead or deceive, contrary to the **Trade Practices Act 1974** (Cth).

Answer: **"No"**.

112 I shall hear the parties concerning what further orders are appropriate in the action, and concerning costs.

113 Relevant provisions of the **BACISOP Act** are as follows [in Appendix] :

M Christie – Plaintiff instructed by Clark McNamara
J Doyle, solicitor – Defendant instructed by Doyles Construction Lawyers

APPENDIX

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.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
 - (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and
 - (c) the referral of any disputed claim to an adjudicator for determination, and
 - (d) the payment of the progress payment so determined.
- (4) It is intended that this Act does not limit:
 - (a) any other entitlement that a claimant may have under a construction contract, or
 - (b) any other remedy that a claimant may have for recovering any such other entitlement.

4 Definitions

In this Act:

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.

Part 2 Rights to progress payments

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.
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:
 - (a) in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, having regard to:

- (i) the contract price for the goods and services, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect,
- and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

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.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:
 - (a) prescribed under the Supreme Court Act 1970 in respect of unpaid judgments of the Supreme Court, or
 - (b) specified under the construction contract,whichever is the greater.

Part 3 Procedure for recovering progress payments

Division 1 Payment claims and payment schedules

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.

14 Payment schedules

- (1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served,whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15 Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent:
 - (a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
 - (a) may:
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
 - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

16 Consequences of not paying claimant in accordance with payment schedule

- (1) This section applies if:
- (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent provides a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier, and
 - (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and
 - (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
- (a) may:
 - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

Division 2 Adjudication of disputes

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.
- (2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application:
- (a) must be in writing, and
 - (b) must be made to an authorised nominating authority chosen by the claimant, and
 - (c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and
 - (d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and
 - (e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
 - (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
 - (h) may contain such submissions relevant to the application as the claimant chooses to include.
- (4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.
- (5) A copy of an adjudication application must be served on the respondent concerned.
- (6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

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.

32 Effect of Part on civil proceedings

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
 - (a) may have under the contract, or
 - (b) may have under Part 2 in respect of the contract, or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

Part 4 Miscellaneous

34 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement (whether in writing or not):
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.