Fifty Property Investments P/L v Barry J O'Mara & Impero Stone [2006] Adj.L.R. 04/18

JUDGMENT HIS HONOUR BRERETON J : New South Wales Supreme Court : 18th April 2006 (ex tempore)

1 The first defendant Barry J O'Mara determined an adjudication application by the second defendant Impero Stone, against the plaintiff Fifty Property Investments Pty Limited, which I shall call FPI, under the *Building and Construction Industry Security of Payment Act*, 1999. He decided that FPI should pay Impero $72,833.40 plus interest, and that each party should pay half the costs of the adjudication. FPI claims a declaration that the adjudicator's determination is void, and an order restraining Impero from taking any step to enforce or otherwise act on any ensuing adjudication certificate. In the meantime, Impero has undertaken not to take any step to enforce or otherwise act on the judgment which it has obtained by registering the adjudication certificate in the District Court. Mr O'Mara, the adjudicator, has submitted to such orders as the Court might make, save as to costs.

2 The grounds upon which an adjudication determination under the Act can be impugned in judicial review proceedings were considered by the Court of Appeal in ***Brodyn Pty Limited v Davenport*** (2004) 61 NSWLR 421. McDougall J concisely distilled their essence in ***Timwin Construction Pty Limited v Facade Innovations Pty Limited*** [2005] NSWSC 548, [1], where his Honour said that judicial review was available in the following circumstances:

- First, where an adjudicator fails to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination;
- Secondly, where the adjudication determination does not amount to an attempt in good faith to exercise the relevant power, having regard to the subject matter of the legislation;
- Thirdly, where a party has been denied natural justice (for which purpose the narrow statutory scheme limits the extent of natural justice required); and,
- Fourthly, where the adjudication determination was procured by fraud in which the adjudicator was complicit.

3 Where any of those circumstances apply, an adjudicator's determination is not a "determination" within the meaning of the Act at all, and is not merely voidable, but void [*Brodyn*, [52]].

4 In ***Holmwood v Halkat*** [2005] NSWSC 1129, I expressed the view that *Brodyn* was correctly to be understood as saying that mere error of fact or law, including in the interpretation of the Act or contract, does not invalidate an adjudicator's determination, and endeavoured to explain that although Hodgson JA eschewed the terminology of jurisdictional error - at least in the context of when non-compliance with what his Honour called the *"more detailed requirements"*, as distinct from the *"basic and essential requirements"*, would result in invalidity - the concept of jurisdictional error remains a useful one in identifying which requirements were intended to be essential pre-conditions to a valid determination, since traditionally jurisdictional error results in the decision being void, and, although the Act contains no privative clause, *Brodyn* limits the availability of judicial review to decisions which are void [***Holmwood v Halkat***, [45]-[51]].

5 For FPI, Mr Zikmann submits:

- First, that there was non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that there was no construction contract between FPI and Impero, and the adjudicator erred in finding that there was;
- Secondly, that there was non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the adjudicator did not have regard to the provisions of the construction contract and/or the submissions contained in the adjudication response;
- Thirdly, that there was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the adjudicator did not give adequate reasons for his determination;
- Fourthly, that the adjudicator did not make a good faith attempt to perform his function, by failing to give adequate and proper consideration to FPI's payment schedule and adjudication response; and
- Fifthly, that there was a denial of natural justice by reason of (1), the adjudicator failing to consider all the evidence and submissions offered by FPI, (2) bias, and (3) private communications between the adjudicator and Impero - although in oral submissions only the third of those was pressed.

6 On 31 January 2002, FPI as owner contracted with a builder, Maurice Tarabay (or an entity associated with him) as contractor, for the construction of 42 home units and townhouses at 403 - 409 Liverpool Road Ashfield, for an initial contract price of $5,460,000. The contract made no specific provision for the supply and installation of natural stonework, envisaging that the stonework would be face brick. It provided that the builder could charge a margin for profit and supervision on work performed for the builder by subcontractors.

7 In about April 2005 Impero began to supply and install natural stonework for the project. Impero was introduced to the project by the builder, Mr Tarabay. Whether Impero was Mr Tarabay's subcontractor or was directly contracted by FPI is at the heart of this dispute.

8 On 8 September 2005, Mr Tarabay submitted a variation claim, which included a claim for work performed on its behalf by subcontractors. One of the subcontractors listed was Impero, for stonework; and attached to the claim was Impero's invoice number 503, for Progress Claim No. 1, in the amount of $25,000 plus GST (against a total price of $30,000 plus GST), addressed to FPI and dated 5 August 2005.

9 On or about 7 November 2005, Mr Tarabay purported to terminate the building contract for repudiation by FPI, and on 18 November 2005, Mr Tarabay filed a summons in proceedings 55095 of 2005, claiming $1,103,314, said to be the balance due to Mr Tarabay under the contract after deducting from the value of work done (including variations) of $8,196,203, the payments to date made of $7,092,889. FPI's solicitors sought particulars, including of the claim for variations. Mr Tarabay's solicitors' answer included, amongst those

variations, under the heading "work done by others", Impero - for an amount of $30,000 plus GST, to which the builder's margin was then applied.

10 On 24 November 2005, Impero made a payment claim under the Act directly on FPI, comprising an invoice dated 4 April 2005 for $48,833.40 (for stone supplied), and a revised invoice number 503 for $28,050 (being a progress claim for labour against a total claim of $33,000 inclusive of GST, and thus being in respect of the same work for which Mr Tarabay is claiming in proceedings 55095 of 2005). This invoice 503 was a revised version of the earlier invoice 503, taking into account further work completed since the 5 August version had been issued.

11 No payment schedule having been served, Impero gave FPI a notice under section 17(2)(b) of the Act on 9 December 2005. On 16 December 2005, FPI served a payment schedule indicating that it proposed to pay nil, and giving as the reason for this that any contract which Impero had was (as a subcontractor) with Mr Tarabay, and not with FPI.

12 On 9 January 2006, Impero made an adjudication application to LEADR, an approved nominating authority under the Act, claiming the sum of $76,883.40. The adjudication application asserted that there was an oral contract between Impero and FPI. On 10 January, LEADR referred the adjudication application to Mr O'Mara for adjudication.

13 On 11 January 2006, FPI wrote to Impero, LEADR and Mr O'Mara, objecting that the adjudication application was made out of time. There was no response. After renewing that objection, FPI on 16 January served an adjudication response. In it, the argument that Impero was a subcontractor of the builder, and not directly engaged by FPI, was reiterated. The adjudication response also repeated the argument that the adjudication application was out of time.

14 On 20 January 2006, the adjudicator gave his determination. He found that the adjudication application was within time (and this is no longer in dispute). He found that there was an "arrangement" by which Impero undertook to carry out construction work for FPI sufficient to amount to a "construction contract" within the definition in section 4 of the Act. He otherwise preferred the assertions of Impero in the adjudication application to those of FPI in its adjudication response, and determined that $78,833.40 was payable by FPI to Impero, plus interest at nine percent from 8 December 2005, and that each party should pay half of the costs of the adjudication.

15 FPI instituted these proceedings on 13 February 2006. On the same day, Impero registered the adjudication certificate in the District Court and obtained a judgment for $78,833.40. Impero has undertaken not to seek to enforce the judgment against FPI pending the determination of these proceedings.

16 The first issue is whether there was no construction contract between FPI and Impero. FPI submits that there was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that there was no construction contract between FPI and Impero, and that the adjudicator erred in finding that there was.

17 The basic and essential requirements which are preconditions to a valid adjudicator's determination include "the existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8)" [*Brodyn*, [53]]. *Brodyn* thus establishes that it is an essential precondition of an adjudication that there be a construction contract between the claimant and respondent; here, between Impero and FPI. In other words, the jurisdiction of an adjudicator to make a determination is dependent upon the existence of a relevant construction contract.

18 Where jurisdiction depends on the existence of a state of facts, a decision maker's finding that the necessary facts to found jurisdiction exist can be reviewed by a court, notwithstanding that judicial review does not ordinarily extend to errors of fact, as there is an exception in the case of the "jurisdictional fact" doctrine, under which an erroneous finding of fact, the existence of which is an essential precondition upon which jurisdiction depends, is jurisdictional error, notwithstanding its factual character. Thus the inherent jurisdiction of superior courts to review decisions on the ground of jurisdictional error includes the power to consider whether there was an absence of jurisdiction because the decision maker made a wrong finding as to the existence of such an essential precondition [***Bunbury v Fuller*** (1853) 9 Exch 111; 156 ER 47; ***Ex parte Tooheys Limited; re Butler*** (1934) 34 SR (NSW) 277; 51 WN (NSW) 101; ***Manning v Thompson*** [1976] 2 NSWLR 380; affirmed [1979] 1 NSWLR 384; ***Craig v South Australia*** (1995) 184 CLR 163, 177; ***Timbarra Protection Coalition Inc v Ross Mining NL*** (1999) 46 NSWLR 55, 63 - 65]. While a decision maker has to decide whether or not facts which are essential preconditions of jurisdiction exist [***R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*** (1950) 82 CLR 54, 69-71, 90-91], he or she can not give himself or herself additional jurisdiction by making a wrong decision on the collateral question as to the existence of such facts [***Bunbury v Fuller; R v Judges of the Federal Court of Australia; Ex parte Western Australia National Football League Inc*** (1979) 143 CLR 190, 214].

19 Although there is a rule that, in the case of inferior courts, references to facts are not taken to be jurisdictional "unless the intention is clearly expressed" [***Parisienne Basket Shoes Pty Limited v Whyte*** (1938) 59 CLR 369, 391], no such rule of construction applies to statutory decision makers [***Sutherland Shire Council v Finch*** (1970) 71 SR (NSW) 315, 325 - 326 (Mason JA)].

20 ***Brodyn*** establishes that absence of the essential and basic preconditions results in an adjudication being void. It follows that whether or not there was a construction contract is a "jurisdictional fact", and the adjudicator's finding that there was such a contract is open to review in this Court.

21 Where the existence of an essential preliminary precondition to jurisdiction is a question of objective fact (as distinct from where it depends on the tribunal having a state of satisfaction or opinion), it is for the reviewing court to determine, on the evidence before it, whether or not the fact exists, and evidence of the existence or non-existence of the fact is admissible in the reviewing court [***R v Blakeley***, 91 - 92; ***R v Ludeke; Ex parte Queensland Electricity Commission*** (1985) 159 CLR 178, 183 - 184; ***DMW v CGW*** (1982) 151 CLR 491, 510; ***Timbarra Protection Coalition Inc v Ross Mining NL***], although courts exercise some restraint in interfering with findings with respect to the jurisdictional fact and do so only if satisfied that the decision maker's finding of the jurisdictional fact is wrong [***Parisienne Basket Shoes Pty Limited v Whyte***, 291; ***Queensland v Wyvill*** (1989) 25 FCR 512; 90 ALR 611, 618, (Pincus J)].

22 The extent to which the reviewing court gives weight to the view of the facts taken by the decision maker in determining whether a jurisdictional fact exists varies with the circumstances [***R v Blakeley***, 92-93; **Sankey v Whitlam** [1977] 1 NSWLR 333, 347; ***R v Ludeke; R v Williams, Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation*** (1982) 153 CLR 402, 411], relevant factors including the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions, and the extent to which its decisions are supported by disclosed processes of reasoning [***Minister of Immigration and Multicultural Affairs v Eshetu*** (1999) 197 CLR 611 (Gummow J)]. The principle that weight may be given to the tribunal's view of the relevant jurisdictional fact applies more where the tribunal's expertise especially equips it to provide an answer, and less where the jurisdictional fact is an expression which is a matter of ordinary usage [***R v Williams, Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation***, **411**; ***Queensland v Wyvill***].

23 Although the qualifications and experience in the construction industry of the adjudicators appointed under the Act would give them specialist skills in determining technical construction issues, I do not think they have any claim to superior expertise, nor any position of advantage, in determining whether or not a construction contract was made. As will become apparent in this case, it is also relevant that the adjudicator's reasoning cannot be said to be supported by disclosed processes of reasoning.

24 The building contract between FPI and Mr Tarabay does not refer to natural stonework. It authorises the builder to charge a margin on work performed by subcontractors.

25 According to a search of the Australian Business Register as at 21 August 2005, the proprietors of Impero were "E Tabet and R Tabet and M Tarabay". According to Impero's adjudication application submissions, Mr Tarabay was a relative of the Tabet brothers and aided the establishment of Impero by providing a loan to assist the partnership, and his name was registered as a partner as security for the loan, but he had no authority to make decisions, and did not and does not participate in management or in the profits and was in the process of being removed from the Register as a partner. According to a New South Wales Business Extract as at 24 February 2006 the only proprietors of Impero were Eli and Rabih Tabet. I can see no reason why I should not accept the version proffered by Impero in this respect, and to the extent necessary I proceed on that basis. However, ultimately this matter is not determinative.

26 According to Impero's adjudication application submissions, Impero's principals asked Mr Tarabay to introduce them to the developer of the project, in order to discuss possible application of their unique imported stone to the facade of the building. Mr Tarabay introduced Mr Albert Tabet - the father of Rabih and Eli - to Ms Maria Bechara in March 2005. Stone samples were provided and the design was discussed, and Ms Bechara requested that Impero's stone be installed to the first three levels of building. It is said that Ms Bechara agreed to a price of $45,000 for supply and fitting of the stone. Work commenced on 18 April 2005, and it is said that after the first delivery of the stone Ms Bechara requested that stone be installed to all levels, and accepted the additional cost involved.

27 In an affidavit which was provided by FPI to the adjudicator with its adjudication response, Ms Maria Bechara - who is a solicitor and sister of the directors of FPI, and who had been involved in the day-to-day management of the project - denied having ever dealt directly with Impero's principals, asserted that all her dealings were through Mr Tarabay, and denied the conversations which Impero asserted had given rise to the oral contract which Impero asserted.

28 Although Impero's invoice 501 for the supply of stone is dated 4 April 2005, there is no suggestion that it was issued on that date. Why it was not issued then is unclear. Impero initially issued invoice 503 in August, for the progress payment of $20,000. It was addressed to FPI, but was handed to Mr Tarabay. Impero says, in its adjudication application submissions, that by 21 August that invoice had not been paid and Mr Tarabay told them that he had not been paid, and that they should pursue FPI themselves. It is not without significance that it was only after Mr Tarabay told them that they should pursue FPI themselves that they began to do so, not having previously done so. They said that they then endeavoured, without success, to contact Ms Bechara and left voicemail messages for her, which were not returned. They sent a letter to Mr Camille Bechara, one of FPI's directors, on 29 August, which was returned undelivered.

29 Mr Tarabay's letter to FPI of 8 September 2005 included Variation Claim No. 2, for work performed by subcontractors, including as item 5 Impero Stone, and attaching Impero's invoice 503 addressed to FPI dated 5 August 2005 for "Progress Claim No. 1" for $22,000 (GST inclusive) of a total value of $33,000, yet claimed the whole $33,000 and added builders margin. On 19 September, FPI's project manager, Mitchell Brandtman, wrote to Mr Tarabay, requesting particulars of the variations claimed, including, in respect of the claim relating to Impero, particulars of: *The instruction to provide stonework, the extent of work, the type of stone and the finishing detail.*

30 Mr Tarabay's response dated 27 September 2005 asserted that there was an oral agreement with Ms Maria Bechara, and attached a letter from Impero to FPI "care of" Mr Tarabay, relevantly as follows:
Dear Mr Tarabay:
Re: The development project at 403 - 409 Liverpool Road Ashfield
Please find outlined below, the scope of work you requested for Impero Stone for the above-mentioned development project.

31 Impero says, in its adjudication application submissions, that they left a further voicemail message for Ms Bechara on 23 September.

32 In response to Mr Tarabay's variation claim, FPI delivered a payment schedule on 5 October 2005, which said that payment was being withheld pending assessment by a quantity surveyor, contended that the claim was miscalculated, and set out a revised calculation which nonetheless allowed builder's margin on the amount claimed, and alleged that the builder had introduced Impero as close family friends who wished to provide stonework at cost in return for advertising, and that the costs would not exceed $20,000 to $25,000. This is a significant piece of correspondence, because it predates any claim by Impero; it concedes builder's margin on Impero's invoice (when it would have been to FPI's advantage to assert that Impero was directly contracted, so that no margin was payable); and it is entirely consistent with the position later adopted by FPI, when Impero did make a claim.

33 Impero says that Rabih Tabet met Mr Licha Bechara, another of FPI's directors, on 5 November, and that Mr Bechara said that the progress claim had been paid to the builder; and that in a further conversation between them on 21 November, Mr Bechara said that Impero should take the matter up with the builder.

34 On 24 November 2005, Impero served its invoices of 4 April (No. 501) and 23 November (No. 503), bearing endorsements that they were payment claims under the Act, on the registered office of FPI. On 9 December, they sent their section 17(2)(b) notice to the registered office of FPI, addressed to its directors and to Ms Bechara.

35 As already mentioned, Mr Tarabay's claim in proceedings 55095 of 2005 includes a claim for the labour performed by Impero on the basis that Impero was a subcontractor, plus margin.

36 The adjudicator reasoned as follows:

1. *He said that it was not disputed that Ms Bechara personally selected the stone and grouting to be used. While that is so, it is entirely equivocal as to whether she contracted with the builder or Impero;*
2. *He said that it was agreed that the initial price was to be $45,000. If this was intended to be a finding that that the parties before him agreed that the initial price was to be $45,000, it was erroneous, as FPI's material disputed that that was the initial price, asserting that the maximum was to be $20,000 to $25,000. If, however, it was intended to convey no more than that the adjudicator accepted Impero's version that that was the agreed price, then it does not bear one way or the other as to with whom any contract was made;*
3. *The adjudicator said that it was not disputed that Ms Bechara was present on an almost daily basis over seven months while the work was performed. That is correct, but it is entirely equivocal as to whether the work was performed by Impero as a direct contractor of FPI, or as a subcontractor of the builder;*
4. *The adjudicator said that it was apparently FPI's position that it did not authorise the extension of the work to additional areas, which he could not accept. However, this mistook FPI's response, in which it denied not that it had authorised the additional work, but that it had done so directly with Impero, (as distinct from with Mr Tarabay);*
5. *The adjudicator noted that the Mitchell Brandtman letter had "sought an instruction to provide stonework to the facade, etc … so that these outstanding matters may be assessed and resolved as soon as possible." But the adjudicator seems completely to have overlooked that the letter was a request for particulars of Mr Tarabay's variation claim. It may be, as Mr Hyde who appears for Impero submits, that the adjudicator referred to it only to indicate Ms Bechara's on going involvement, but in that case this letter is entirely equivocal as to with whom any contract was made;*
6. *The adjudicator said that from Impero's letter of 29 August it was apparent that Impero was of the view that its contract was with FPI. But that same letter also indicates that the invoice had been initially given not to FPI but to the builder, and the letter was returned undelivered. Moreover, a reading of the material as a whole - particularly, the adjudication application - does not persuade me that Impero was alert to the distinction between a contract with FPI and a subcontract with the builder;*
7. *The adjudicator said that, in the light of Impero's letter of 29 August, its payment claim of 24 November and its section 17(2)(b) notice, he could not accept FPI's assertion that it was aware of "these further claims", and had not been provided with any document that would indicate that FPI drew to Impero's attention that its contract was not with FPI but with the builder. However, the reference to "these further claims" misconceives the adjudication response, which was pointing out only (and correctly) that the allegations of an oral contract made with Ms Bechara at an initial maximum price of $45,000, and of subsequent oral authorisation by Ms Bechara of the*

additional works, had not been foreshadowed in the payment claim and were being propounded for the first time in the adjudication application. It overlooks also the evidence tendered on behalf of FPI that the payment claim of 24 November did not come to FPI's notice until the section 17(2)(b) notice was served. As to any inference which might be drawn from failure on the part of FPI to alert Impero that its contract was with the builder, no occasion arose to do so until Impero made its claim, especially as Mr Tarabay was claiming for its work as a subcontractor. And the adjudication application itself acknowledges that when Mr Bechara was approached directly in November, his response was that the progress claim had been paid to the builder, and that Impero should take matters up with the builder.

8. The adjudicator said that FPI had the benefit of the installed stone. That is no doubt true, but it is entirely equivocal as to whether there was a direct contract or a subcontract.

37 Faced with the fragility of the adjudicator's reasoning on these issues, Mr Hyde identified three matters which he submitted pointed to a conclusion that there was an oral construction contract between Impero and FPI.

38 The first was said to be the consistency of the invoices with that assertion, namely, that when Impero issued invoices, they were addressed to FPI and not to Mr Tarabay. However, the provenance of the invoice of 4 April 2005 has not been established. The invoice of 5 August, although formally addressed to FPI, was delivered in the first place to Mr Tarabay, which does not assist Impero. The later invoices postdated the arising of the dispute and are not entitled to much weight.

39 The second matter to which Mr Hyde referred was the absence of any provision in the contract between FPI and Mr Tarabay for stonework, and the corresponding absence of any such reference in the detailed estimate of 3 November 2003. There is no doubt that the contract did not originally provide for natural stonework. There are two ways in which such stonework could be introduced: one was by variation of the contract with the builder, and the other by separate contract with Impero. There was at least some evidence, in the form of the variation claims made by Mr Tarabay of the former. In those circumstances I do not see how the absence of reference to stonework from the original contract, or from the detailed estimate, is supportive of a conclusion that this was a direct contract made between FPI and Impero.

40 The third matter to which Mr Hyde referred was that Impero's correspondence was sent formally to the business address of FPI, and not disputed by FPI until after the s 17(2)(6) notice. Once again, it has to be noted that the correspondence to which this applies postdated the dispute between FPI and Mr Tarabay having arisen, and that receipt of it, at least by the directing minds of FPI, was denied. In order to attribute any weight to FPI's failure to raise the issue earlier I would have to reject FPI's evidence to the effect that that material did not come to its notice until the section 17(2)(b) notice, and I can see no reason why I should do so.

41 The adjudicator did not refer, in his reasons, to the following matters:

1. That Impero's invoice 503 was initially delivered not to FPI, but to Mr Tarabay;
2. That Impero's letter of 15 September 2005, to which I have referred, suggests that it was Mr Tarabay who had requested it to perform the works;
3. That the variation claim which was made by Mr Tarabay was propounded on the basis that Impero was his subcontractor;
4. That FPI's payment schedule to Mr Tarabay's claim dated 5 October 2005, which I have mentioned - before it was apparent that there would be any separate claim by Impero, adversely to FPI's interest at that time, and quite consistently with FPI's present position - allowed builder's margin on Mr Tarabay's claim in respect of it, and alleged that the builder had introduced Impero as close family friends who wished to provide stonework at cost in return for advertising, and that the costs were not to exceed $20,000 to $25,000;
5. That Mr Tarabay in his separate proceedings included the work done by Impero in his claim and the particulars of it.

42 It follows that, on the material before the adjudicator, so analysed, the matters on which the adjudicator relied did not in fact support his conclusion that there was a construction contract between FPI and Impero, and the matters to which he did not refer pointed against it. I would conclude, for those reasons, that there was no construction contract between FPI and Impero, and that a basic and essential requirement of jurisdiction was not satisfied.

43 The second main issue is whether there was a denial of natural justice. FPI submits that there was a denial of natural justice, chiefly by reason of private communications between the adjudicator and Impero.

44 A denial of natural justice, to the extent that natural justice is to be afforded as contemplated by the procedure established by the Act invalidates an adjudication [***Brodyn*** [57]]: *The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions and, in my opinion, such is the importance generally of natural justice that one can infer a legislative intent that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.*

45 The ambit of the measure of natural justice required by the Act extends beyond the "basic and essential requirements" which are preconditions to validity, to the particular process during the adjudication of receiving and considerating the submissions referred to in the Act [*Tolfab Engineering Pty Limited v Tie Fabrications Pty Limited* [2005] NSWSC 326, Macready AsJ]. Thus a denial of natural justice will invalidate an adjudication, but

only if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act.

46 FPI contends that there was a denial of natural justice arising from the circumstance that, following the referral to him of the adjudication application on 12 January 2006, the adjudicator wrote to Impero, relevantly as follows:
A reading of the adjudication application indicates, at paragraph 4 to page 6, that the builder for the project as a Mr Tarabay. Please confirm and provide his registered business name and license number.
The adjudication application also claims that the build contract does not include any natural stonework to the building. Please provide documented evidence of that claim.
This information, if available, is to be provided by facsimile at no 02 4577 4949 by close of business on Monday the 16th January 2006. Please comply with the request therein.

47 The adjudicator sent an identical letter to FPI, but in neither case notified the addressee that a similar letter had been sent to the other party.

48 On 16 January, Impero responded to the adjudicator, relevantly, as follows:
We refer to your fax dated 13 January 2006, and respond as follows:
To our understanding and knowledge, Mr Maurice Tarabay t/as M L Tarabay was the builder...
A copy of the building contract between M & L Tarabay and Fifty Property Investments Pty Limited has not been provided to us to forward to your office. However, Mr Tarabay provided us with the following; a revised estimate of the project, which were provided to Fifty Property Investments Pty Limited on the 3rd of November 2003:
1. Schedule of finishes.
2. Trade break-up with mark up rates.
3. Full estimating summary.
As per the above documents (attached), there is no mention of natural stonework to be applied to the facade of the building at 403 - 409 Liverpool Road Ashfield.

49 The enclosed "full estimating summary" dated 3 November 2003 indeed contained no reference to natural stonework, as Impero pointed out in its letter.

50 FPI responded to the adjudicator's letter as follows:
I refer to letter received today from Ms Annie Brown of LEADR attaching a copy of your letter to us dated 13 January 2006. Please note that I have not previously received your letter.
In response to your letter dated 13 January 2006:
1. In relation to paragraph 1, please refer to our adjudication response which is attached to my letter. Please not that I have faxed you only a copy of the response and I have made arrangements for the courier to deliver to you today the response together with the attachments.
2. In relation to paragraph 2, I advise that the original finish to the building was to be face brick.
I have also forwarded a copy of the response to the claimant by fax and a courier has been arranged to deliver the original documents.
I have also faxed a copy of the response to LEADR.
Please also find attached a signed adjudicator's fees form.

51 Neither the adjudicator, nor either party, thought to inform the other of the correspondence which each had respectively sent to the adjudicator.

52 The receipt and consideration by the adjudicator of Impero's letter of 16 January, and enclosures, without notice to FPI, was a denial of natural justice. The receipt and consideration from one party of material, whether in the nature of evidence or submissions, which is not made known to the other, is a denial of natural justice [*TQM Design & Construct Pty Limited v Dasein Constructions Pty Limited* [2004] NSWSC 1216, [28]]. If, in pursuance of section 21(4)(a), the adjudicator seeks further information from a party, an opportunity must be afforded to the other to comment. This is specifically required by section 21(4)(a), which provides as follows:
(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions...

53 The result of a denial of natural justice is that the decision is void, even if the decision would not have been affected by any submissions which might have been made had an opportunity to make them been afforded. While, as a matter of discretion, relief might be declined if it can be shown that the denial of natural justice could not possibly have made a difference to the outcome, all that a plaintiff need establish is that the denial of natural justice deprived it of the possibility of a better outcome, and in order to negate that possibility it is necessary to conclude that a properly conducted adjudication could not possibly have produced a different result [***Stead v State Government Insurance Commission*** (1986) 161 CLR 141, 147; ***Kioa v West*** (1985) 159 CLR 558, 633; ***Murray v Legal Services Commissioner*** (1999) 46 NSWLR 224, 250 - 251; ***Barwick v Council of the Law Society of New South Wales*** [2004] NSWCA 32, [111] - [121]; ***Stanoevski v Council of the Law Society of New South Wales*** [2005] NSWCA 429, [54]].

54 As the evidence and argument on the construction contract issue was at best finally balanced, and as the adjudicator was sufficiently concerned by the point to seek further information from Impero, I cannot be satisfied that, had FPI been given an opportunity to respond, which they say they would have taken, their response could not possibly have made a difference. Mr Bechara says that he would have referred to the subsequent variations

in answer to Impero's reference to the detailed estimate of November 2003, and pointed out that the contract had been varied since that time. Given the adjudicator's failure to advert at all to the variation claims in his reasons, I cannot begin to be satisfied that there was no possibility that a properly conducted adjudication would have resulted in a different outcome. Indeed, if the adjudicator relied on the circumstance that neither the contract nor the detailed estimate covered natural stone, then whether or not there was a subsequent variation was a matter of great significance upon which a further submission, had the opportunity been permitted, might well have been very influential.

55 It follows that there was a contravention of the rules of natural justice, and that it is not established that that contravention was one in respect of which there was no possibility that the outcome would have otherwise been different.

56 In view of the conclusions which I have reached on the two major issues which I have addressed, it is not necessary that I deal with the remaining submissions made on behalf of FPI.

57 Although the adjudication certificate has already been registered as a judgment of the District Court, as Hodgson JA pointed out in ***Brodyn*** (at [61]), an application can still be made to set aside the judgment, including on the basis that there is in truth no adjudicator's determination. Thus, in ***Brodyn,*** the Court of Appeal thought that there could in such circumstances be substantial utility in granting relief:

[38] In my opinion, there was error by the primary judge in the last sentence of par [21] of his judgment, quoted above. If the determination was quashed by the Supreme Court, or declared by the Supreme Court not to be an adjudicator's determination within the meaning of the Act, this could have substantial utility.

[39] Under section 24 of the Act, a claimant may request the nominating authority to provide an adjudication certificate, if the respondent fails to pay any part of the adjudicated amount in accordance with section 23, that is, within a time that is at least five business days after service of the determination. In this case, the adjudication certificate was issued the day after the determination was made, and thus was irregularly issued; and this in turn meant that the ex parte injunction, obtained on 23 October 2003, was ineffective because the adjudication certificate had already been filed as a judgment.

[40] In my opinion, this irregularity could be a ground for setting aside the judgment: plainly, such a judgment can be set aside on appropriate grounds, whether this be considered as being authorised by rules of court allowing for the setting aside of judgments obtained in the absence of the other party, or implied by section 25(4) itself. If the judgment were set aside, the fact that the determination had been quashed or declared void would preclude the obtaining of another judgment by subsequent compliance with the requirements of section 24 and section 25. Accordingly, such an order would have utility.

[41] Further, in my opinion an order of the Supreme Court quashing the determination of declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within section 25(4): This wording assumes that there is a determination which is challenged.

58 Accordingly, I would not decline relief on the ground that there is no utility in granting it.

59 My conclusions may be summarised as follows:

1. There was no construction contract between FPI and Impero, and a basic and essential requirement of jurisdiction was therefore not satisfied. The adjudicator's determination is therefore void.
2. The determination is also void for contravention of the rules of natural justice.
3. Notwithstanding the registration of the certificate in the District court, it cannot be said that there is no utility in granting relief.

60 My orders are:

1. Declare that the determination of the first defendant dated 20 January 2006 purportedly made pursuant to section 22 of the *Building and Construction Industry Security of Payment Act*, 1999 is void.
2. Order that the second defendant be permanently restrained from taking any step to enforce the judgment in its favour in proceedings 506 of 2006 in the District Court of New South Wales in Sydney.
3. Order that the second defendant pay the plaintiff's costs.

Mr R Zikmann (plaintiff) instructed by Haylen McKenzie Solicitors (plaintiff)
Mr J Hyde (second defendant) instructed by Wright Stell Lawyers (second defendant)