JUDGMENT : **Brereton J** : New South Wales Supreme Court : 8th November 2005

1 The plaintiff Holmwood Holdings Pty Limited is the proprietor of a building project at Illiffe Street, Bexley, involving the refurbishment, renovation and extension of a nursing home. Through its construction manager, Tricon Projects Pty Ltd, it contracted the first defendant, Halkat Electrical Contractors Pty Limited, to perform the electrical works for the project. Halkat made a claim for a progress payment, which Holmwood disputed. The claim was referred to the second defendant, Mr Davenport, for adjudication. The adjudicator determined the claim in the sum of $116,598.35, as claimed by Halkat, and that the due date for payment was 21 June 2005. Holmwood alleges that the adjudication is void by reason of the adjudicator not having made a bona fide endeavour to perform the function entrusted to him, and by reason of denial of procedural fairness.

The Construction Contract

2 The construction contract was expressed to be made between Homewood Holdings Pty Limited (sic) by its construction manager and agent Tricon (as principal), and Halkat (as contractor), and was dated 16 September 2004.

3 Item B in the main Schedule specifies that the relevant contractual documents are "Schedule 1 – Scope of Works (attached)", and "Schedule 2 - Document Transmittal (attached)".

4 Sub Schedule 1 refers to drawings at item 7.0, and to specifications at item 8.0. Sub Schedule 2 comprised a document entitled "Quotation Request" by Tricon to Halkat dated 26 May 2004, which invited submission of a firm price tender for electrical sub-contract work "in accordance with the attached Specifications/Drawings/Special Conditions of contract" and apparently attached some 27 drawings and specifications. These documents were collected by Mr Halias of Halkat on 22 May 2004. According to Mr Spare of Tricon, the two page covering quotation request was forwarded to Halkat by post on 24 May 2004.

5 According to Mr Katerinis, a director of Halkat, although Halkat quoted on plans and specifications provided, they were not ultimately included in the contract. Not all the work performed by Halkat was referred to in the drawings, as extra items were included; drawings were marked up as the works progressed.

6 Clause 10(a) of the contract provides that payment claims "must relate to the contract price". Clause 10(c) requires that any payment claim identify and relate to the work actually done by the contractor and properly value the work "with reference to the contract price". Item D in the main Schedule provides that claims are to be made by the contractor on the 30th day of each month, and to be paid within 30 days of the claim. However, clause 10(f) of the contract provides that if a payment claim is submitted after the 30th day of the month has passed, then payment is postponed to the next payment period. Thus, payment claims submitted after the 30th day of any month are treated as if received on the 30th day of the next month, and are payable 30 days after that 30th day of the next month.

7 Clause 13(a) provides that the principal, or the construction manager on his behalf, may retain 10 percent of the moneys becoming due and payable under the contract, until the sum retained is equal to 5 percent of the total amount payable to the contractor.

The Claim

8 On 3 June 2005, Halkat, as it was entitled to do under *Building & Construction Industry Security of Payment Act 1999* ("the Act"), s 13(1), served a document purporting to be a payment claim on Holmwood. The total claim was for $180,808.17, less $53,401.50 already received, leaving a balance said to be owing of $127,406.67.

9 The claim identifies, for each element of the contract works, the contract sum attributable to that element, the percentage claimed to date, and the amount claimed. However, in several instances, the amount claimed did not reflect, mathematically, the claimed percentage of the contract sum.

10 The payment claim included the following:- *Note: Refer drawings attached to application for an indication of the work completed and how the percentages were derived.*

11 Despite this reference to drawings, said to be attached, for an indication of the work completed and how the percentages claimed were derived, and although the supporting material contains references to works "as per drawings" in respect of numerous of the items of the claim, no such drawings in fact accompanied the claim.

The Payment Schedule

12 Holmwood responded to the payment claim with a payment schedule under s 14 of the Act. The adjudicator accepted that the schedule was served within the time allowed by s 14(4).

13 The payment schedule set out, as one of the reasons for withholding payment, that the claim had been made on the basis of percentages complete, but that the monetary amounts claimed did not reflect the percentages claimed by Halkat to have been completed. It incorporated a schedule, which set out the value of the claim upon assumption that the percentages claimed by Halkat to have been completed were correct, and which also showed the different (lesser, in some cases) percentages completed which Holmwood was prepared to allow, and the value on that basis also. The schedule also deducted from the approved amounts "contra charges" (including for liquidated damages and rectification works), and the retention sum from previous progress payments, with the result that it asserted that Halkat owed Holmwood $83,265.50.

14 In this way, the payment schedule raised as issues (in addition to the "contra charges"):-

- How the claim as put could be justified, having regard to the percentage work said to be complete, which supported a significantly lower figure than that claimed by Halkat;

- Whether the percentages claimed by Halkat to have been completed had in fact been completed; and
- That provision should be made for a ten percent retention.

The Adjudication Application

15 In those circumstances Halkat, as it was entitled so to do under s 17 of the Act, made an adjudication application on 27 June 2005. The authorised nominating authority referred it to the adjudicator, who accepted it on 1 July 2005.

16 The adjudication application included the drawings which had been referred to in, but not in fact attached to, the payment claim, indicating the work completed and how the claimed percentages were derived. The adjudication application did not, however, include the plans and specifications referred to in the contract.

The Adjudication Response

17 Holmwood lodged an adjudication response, in accordance with s 20, on 5 July 2005.

18 The adjudication response raised two "jurisdictional" issues and five other grounds for withholding payment. The so-called jurisdictional issues were:-

- That there was no construction contract between the parties, because in the contract the principal was named not as Holmwood but "Homewood"; and
- That the payment claim was not validly served, because it was served by the claimant's solicitor and not by the claimant personally.

19 The five grounds for withholding payment were as follows:-

- Holmwood alleged that Halkat had received payment in excess for the work it had done, asserting the value of the work completed to be $59,376 (before deduction of "contra charges" of $90,707), whereas Halkat claimed the value of the work completed to be $152,000;
- Holmwood contended that Halkat had repudiated the contract and that the repudiation had been accepted and the contract terminated by Holmwood;
- Holmwood claimed that it had cost it more to complete the contract work than it would have cost had Halkat completed it under the contract, and asserted a set-off for the difference;
- Holmwood sought to set-off against the amount of any progress payment "the negative variations and liquidated damages"; and
- Holmwood claimed that defects in Halkat's work were rectified by another contractor following termination.

20 The adjudication response included an assessment by Mr Dann of the value of the work completed. It was supported by a report of Enginuity, which in turn was based on an assessment by Yorkshire Electrical Services of outstanding work and remedial work allegedly required, and an assessment of the payment claim by Tricon dated 14 June 2005 (apparently, Mr Dann's assessment).

Adjudicator's Determination

21 The adjudicator gave his determination on 7 July 2005. He determined that the amount of the progress payment to be made by Holmwood to Halkat was $116,598.35 (including GST), that the date upon which the payment became due was 21 June 2005, that the rate of interest was the rate payable on unpaid judgments of the Supreme Court, and that Holmwood was liable to pay 100 percent of the adjudication fee.

22 The adjudicator, understandably, rejected as "totally lacking in merit" the "defence" that there was no construction contract between the parties, based on the misnomer of "Homewood", and indicated that this would influence the creditworthiness of Holmwood's other submissions:- *The mere fact that the name of the respondent was not correctly spelt on the written contract prepared by Tricon is no bar to the claimant making this payment claim. … This "defence" is totally lacking in merit and the fact that the respondent raises it reflects upon the credit to be given to the respondent's other contentions.*

23 He described the point about service, legitimately, as "nonsense".

24 Turning to the five grounds advanced by Holmwood for withholding payment, the adjudicator rejected the last four for reasons and in circumstances about which no complaint is now made.

25 However, as to the first ground – that Halkat had received payment in excess for the work it had done – the adjudicator reasoned that:-

- It was common ground that the contract price if all work was complete was $262,489, and that Halkat had been paid $53,401.
- Halkat assessed the value of work completed at $152,000, whereas Holmwood assessed it at $59,376 (before deducting "contra charges").
- Faced with two quite different assessments of the value of work carried out, and finding the Enginuity report of little assistance (because it was based on an inappropriate method of assessing the value of work carried out, and was not an independent assessment), he was left with the competing assessments of the parties, but no evidence upon which he could independently arrive at a value.
- Having regard to Holmwood's unmeritorious points about misnomer and service, and its completely unjustified deduction of alleged liquidated damages, he preferred Halkat's assertion to Holmwood's, and adopted Halkat's valuation of $152,000 in preference to Holmwood's $59,376. Because of the importance of this part of the adjudicator's reasoning to this case, it is set out in full:-

The claimant assesses the value of work completed at $152,000. The respondent assesses the value at $59,376 before deducting "contra charges" of $90,707. I am faced with two quite different assessments of the value of work carried out. The respondent relies upon the assessment of Mr. Dann … . Mr. Dann says that the report of Enginuity has been prepared to provide an assessment of the value of work completed. I find that report of no assistance. It is based upon the assessment by Yorkshire Electrical Services … of outstanding work and remedial work allegedly required. That assessment is merely Yorkshire Electrical's "approximate breakdown of hours spent on rectification of works". I don't consider that the time allegedly spent by Yorkshire Electrical on "rectification works" is a valid method of assessing the value of work carried out by the claimant.

The report of Enginuity is also said to be based upon an assessment of the payment claim by Tricon Projects dated 14/06/2005. This appears to be the assessment of Mr. Dann. It seems to me that the report of Enginuity cannot be said to be an independent assessment of the value of work carried out by the claimant. In assessing the value of work completed, I have the assessments by the parties but I do not have evidence upon which I could independently arrive at a value.

In deciding whether to adopt the assessment of the claimant or that of the respondent I am mindful of the respondent's unmeritorious challenges to the validity of the payment claim [the allegation that the respondent was not a party to the construction contract and that service by an agent is not valid service] and the respondent's completely unjustified deduction of alleged liquidated damages of $89,100. In the light of these matters, I am more inclined to believe the claimant rather than the respondent and I will adopt the claimant's valuation of $152,000 in preference to the respondent's valuation of $59,376 for the value of completed work before adding the amount for variations.

26 The adjudicator did not otherwise refer to or address Holmwood's submission that the amounts claimed by Halkat did not reflect, but considerably exceeded, mathematically, the result obtained by applying the claimed percentage of works completed to the contract value of the works.

These Proceedings

27 By summons filed on 4 August 2005, Holmwood claims a declaration that the adjudication determination is void and of no effect, and an order that Halkat be restrained from taking any step to recover any moneys the subject of the determination, including making any request for the issue of an adjudication certificate or filing any such certificate with any court.

28 On 4 August 2005, McDougall J indicated that upon payment into court of $125,000 or production of a bank guarantee in that amount, to abide the outcome of the proceedings, he would be minded to grant an interlocutory injunction for a short time, and stood the proceedings over to 8 August 2005. On 8 August, the court ordered that, upon Holmwood providing a bank guarantee to the Registrar in an acceptable form in the sum of $125,000 to abide the outcome of the proceedings and upon Holmwood giving the usual undertaking as to damages, Halkat be restrained until 12 August from taking any step in or concerning the adjudication determination or the recovery of any moneys the subject of it, including making any request for the issue of an adjudication certificate and filing any such certificate with any court. The proceedings were stood over to 12 August 2005. On 12 August, the proceedings were tentatively fixed for final hearing on 14 September, and, Holmwood having provided a bank guarantee, the court ordered that, upon Holmwood giving the usual undertaking as to damages, Halkat be restrained in the same terms as the injunction of 8 August, until 16 September.

29 The fixture for hearing was subsequently varied to 16 September 2005. Following the conclusion of that hearing, the injunction was extended until further order.

Review of adjudications

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

- *Where an adjudicator fails to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination;*
- *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;*
- *Where a party has been denied natural justice (for which purpose the narrow statutory scheme limits the extent of natural justice required); and*
- *Where the adjudication determination was procured by fraud in which the adjudicator was complicit.*

31 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.

32 For Holmwood, Mr Kalyk submits that:-

- *the adjudicator failed to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination, in that the adjudicator failed to consider the provisions of the construction contract;*

- *the adjudication determination was not an attempt in good faith to exercise the relevant power, because the adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, and rejected issues raised in the payment schedule for reasons unrelated to their merit; and*
- *Holmwood was denied natural justice (or procedural fairness), by reason of:-*
  - *a the payment claim being incomplete and therefore invalid;*
  - *b the inclusion in the adjudication submission of the highlighted drawings which were said to be part of the payment claim but had not accompanied it; and*
  - *c the determination of the value of the works based upon findings of credit in respect of which no submission had been made and which Holmwood was not otherwise afforded an opportunity to address.*

Failure to have regard to relevant considerations

33 Mr Kalyk's first ground is that the adjudicator failed to comply with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that he failed to consider the provisions of the construction contract, which s 22(2)(b) required him to consider. In particular, Mr Kalyk submits that the adjudicator could not have considered the provisions of the contract, as s 22(2)(b) required him to do, because:

- *The entirety of the contract was not before him, since he was never provided with the specification and plans which formed part of it;*
- *He determined the due date of payment to be 21 June 2005, when any consideration of the terms of the contract would have led to a different result; and*
- *He determined amounts to be payable to Halkat without consideration of the deduction of retention pursuant to clause 13(a) and ignoring the retentions already deducted.*

34 This raises for consideration the extent to which, if at all, a failure to consider a provision of the construction contract will invalidate an adjudication.

35 Section s 22(2) has a dual function: it prescribes matters to which the adjudicator is required to have regard, and it identifies those as the only matters to which the adjudicator is to have regard, on its face making the list exclusive [***Co-ordinated Construction Co Pty Ltd v J. M. Hargreaves (NSW) Pty Limited*** [2005] NSWCA 228, [65] (Basten JA)]. One of the prescribed matters is "the provisions of the construction contract from which the application arises".

36 At least in administrative tribunals (as distinct from inferior courts of law), failure to consider a matter, consideration of which is required, usually results in a decision being void. However ***Brodyn,*** although establishing that a purported adjudication will be void if the adjudicator fails to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination, suggests that compliance with the requirements of s 22(2) - to consider the specified matters and those matters only - is not a precondition to the existence of authority to make a decision, and that non-compliance does not result in invalidity if an adjudicator ***either*** considers (only) the matters referred to in s 22(2), *or* bona fide addresses the requirements of s 22(2) as to what is to be considered [***Brodyn***, [56]].

37 In ***Hargreaves***, and in ***Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Limited*** [2005] NSWCA 229, application was made for leave to reargue *Brodyn*, relevantly as to whether it set too low the requirements for validity, particularly in relation to the application of s 22. Hodgson JA was not persuaded that there were grounds to give leave to reargue *Brodyn*, but held that the case was not an appropriate vehicle for such reargument in any event. Ipp JA did not address the question of leave to reargue in circumstances where it did not arise on the narrow basis on which the case could be resolved. Basten JA thought that several elements of ***Brodyn*** could require further consideration [***Hargreaves***, [72]], including the view that it was sufficient to avoid invalidity that an adjudicator *either* considered (only) the matters referred to in s 22(2), *or* bona fide addressed the requirements of s 22(2) as to what was to be considered [***Hargreaves***, [74], [77]], but whether this was so may depend upon a particular understanding of what ***Brodyn*** decided in this regard, which was yet to be debated.

38 Does ***Brodyn*** preclude, except in the absence of good faith, the application to failures to consider matters consideration of which is required by s 22(2), of the principle that failure to consider a matter which the statute requires to be considered is jurisdiction error in the broad sense and results in invalidity? The Act does not contain a traditional privative clause. Although s 25(4) provides that if a respondent to an adjudication application commences proceedings to have a judgment entered as a result of filing an adjudication certificate set aside, it is not entitled to challenge the adjudicator's determination, this has been held not to preclude the Supreme Court making an order quashing the determination or declaring it to be void, even where an adjudication certificate has already been filed as a judgment [***Brodyn***, [40]-[42]]. However, even in the absence of a traditional privative clause, the Court of Appeal has held that the scheme of the Act is strongly against the availability of judicial review on the basis of non-jurisdictional error of law [***Brodyn***, [51]]. In particular, relief in the nature of *certiorari* is not available to quash a determination which is not void [***Brodyn***, [59]]. ***Brodyn*** appears to hold that a remedy in the nature of *certiorari* is not available in respect of an adjudication determination, except where it is void by reason of the types of defect which the broadest privative clause would not save, such as were described in ***R v Hickman; ex parte Fox and Clinton*** (1945) 70 CLR 598, 615.

39 The context of ***Brodyn*** was an adjudication which had already been registered as a judgment, so as to attract the protection of s 25(4). A consequence was that while it was necessary for the Court to consider whether the determination was at law a determination at all, it was unnecessary to consider circumstances in which the

adjudication determination had not yet been registered so as to obtain the protection of s 25(4) – and, in particular, whether in such circumstances judicial review of a determination might be available on grounds which fell short of jurisdictional error. However, this distinction has not been recognised in subsequent cases – such as ***Hargreaves*** and ***Climatech -*** which have applied *Brodyn* in circumstances where the adjudication determination had not yet been registered, although it might be expected that judicial review would be more liberally available before an adjudication certificate was filed to take effect as a judgment, thereby gaining the protection of s 25(4), than after [cf ***Solution 6 Holdings Pty Ltd v Industrial Relations Commission of New South Wales*** (2004) 60 NSWLR 558, 588 [122], 589 [125] (Spigelman CJ, 597 [160] (Mason P), [161], 600 [183])]. It is not, therefore, open to me to distinguish ***Brodyn*** on that ground.

40 I turn, therefore, to consider what ***Brodyn*** decides in respect of failure to have regard to matters specified in s 22(2).

41 The well-established ground of judicial review, that an inferior court or tribunal has disregarded a relevant consideration (or taken into account some irrelevant consideration), is a species of jurisdictional error amenable to *certiorari*, although in the case of an inferior court (as distinct from an administrative tribunal) only where its constitutional statute requires that that matter be considered (or ignored) as a precondition of the exercise of any authority to make an order or decision, as the High Court pointed out in ***Craig v South Australia*** (1995) 184 CLR 163, 177:- *Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the exercise of any authority to make an order or decision in the circumstances of the particular case.*

42 At least in the case of an administrative tribunal as distinct from a court of law, a tribunal's decision will be a nullity if, *inter alia*, it refuses to take into account a relevant consideration or it takes into account an irrelevant consideration, as Lord Reid pointed out in ***Anisminic v Foreign Compensation Commission*** [1969] 2 AC 147, 171:- *… There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it.* ***It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.*** *I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.*

43 In ***Craig***, the High Court emphasised the "*critical distinction*" which exists in this field between administrative tribunals and courts of law [at 197] (emphasis added):- *That distinction [between jurisdictional error and error within jurisdiction] has not, however, been discarded in this country and, for the reasons which follow, we consider that Lord Reid's comments should not be accepted here as an authoritative statement of what constitutes jurisdictional error* ***by an inferior court*** *for the purposes of certiorari.* ***In that regard, it is important to bear in mind a critical distinction which exists between administrative tribunals and courts of law****.*

44 On no view is an adjudicator a court of law. Indeed, the Court of Appeal entertained some doubt as to whether an adjudicator was even a tribunal exercising governmental powers to which certiorari lay [***Brodyn***, [46], [58]]. But as Basten JA has pointed out, relief by way of certiorari has been held to be available in relation to decisions of arbitrators [***Hargreave***s, [79]; citing ***R v National Joint Council for Craft of Dental Technicians; ex parte Neate*** [1953] 1 QB 704, 707-708 (Lord Goddard CJ), 709 (Croom-Johnson J), 710 (Pearson J); ***Re Real Estate and Business Agents Supervisory Board; ex parte Cohen*** (1999) 21 WAR 158, 189 (Malcolm CJ); ***Multiplex Constructions Pty Ltd v Luikens*** (2003) NSWSC 1140, [23] (Palmer J)]. **In *Luikens***, Palmer J said that, while an adjudicator was plainly not an "inferior court", it was unnecessary to decide whether an adjudicator was a "tribunal" – which was debatable - because the reach of the prerogative writs extends beyond courts and tribunals properly so called, to any person or body having legal authority to determine questions affecting common law or statutory rights or obligations of others, so long as in making such a determination that person or body is required expressly or by implication to act judicially - meaning to observe the basic rules of natural justice by affording a person who might be adversely affected a reasonable opportunity of presenting an informed case in opposition and arriving at the relevant decision uninfluenced by bias or self interest [citing ***R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Limited*** [1924] 1 KB 171, 205; ***Ridge v Baldwin*** [1964] AC 40, 74-79; ***O'Reilly v Mackman*** [1983] 2 AC 237, 239; ***Craig v South Australia***, 175; ***Musico v Davenport*** [2003] NSWSC 977, [28]ff]. It follows that an adjudicator not being a court, the broader scope of jurisdictional error appropriate to tribunals, rather than the narrower scope appropriate to inferior courts, would *prima facie* be applicable.

45 In that context, since ***Brodyn*** ties the availability of relief to invalidity, and since the result of jurisdictional error by a tribunal in failing to have regard to a relevant consideration is invalidity, it would follow that failure to have regard to a matter specified in s 22(2) would result in invalidity and would be a ground for judicial review.

46 The statement in ***Brodyn*** that compliance with the requirements of s 22(2) is not a precondition to the existence of authority to make a decision, and that non-compliance does not result in invalidity if an adjudicator *either* considers (only) the matters referred to in s 22(2), *or* bona fide addresses the requirements of s 22(2) as to what is to be considered [***Brodyn***, [56]] appears to proceed on the assumption that s 22(2) requires (though not as a condition of validity), not merely consideration of the matters (and only the matters) identified in that section, but also reaching a legally correct conclusion on those matters [***Hargreaves***, [74] (Basten JA)]. [As Basten JA has observed, the section does not require that: statutory directions to decision-makers to take into account (only) certain specified parameters, including legal parameters to be found in statutes and/or contracts, may not mean that the decision-maker must, as a condition of validity, correctly apply those parameters; so long as he or she takes them into account, an incorrect understanding of their principles does not amount to a failure to have regard to them, though it may amount to non-jurisdictional error of law]. But my understanding of what Hodgson JA was saying in ***Brodyn*** is to the effect that mere error of law by an adjudicator in the consideration and application of the specified considerations does not invalidate a determination. As Basten JA has suggested, ***Brodyn*** may be correctly understood as saying that the structure of the Act demonstrates that, contrary to the general rule with respect to administrative tribunals, an adjudicator is authorised to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract - whether or not the decision actually reflects a correct understanding and application of them [***Hargreaves***, [78]].

47 That this was in fact what was intended by Hodgson JA is suggested by the illustrations which his Honour offered – of "*extremely doubtful questions of fact or law ; for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is 'duly made' by a claimant, if not contained in the adjudication application*" – which suggest that what his Honour was intending to convey was not that an adjudication would be valid, even if a relevant consideration was entirely disregarded, unless there was a want of good faith, but rather that the requirement to take into account the provisions of the construction contract did not mean that there was jurisdictional error if the adjudicator, having considered the question, wrongly concluded that a particular provision was or was not a provision of the contract, and therefore did or did not apply it.

48 This conclusion is also supported by ***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142, in which Hodgson JA said, of s 22 [at [49]], that while it requires the adjudicator to consider the provisions of the Act and the provisions of the contract, so long as the adjudicator did so, or at least bona fide addressed the requirements of s 22 as to what was to be considered, an error on those matters did not render the determination invalid, and that an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what were valid and operative terms of the contract, did not prevent a determination from being an "adjudicator's determination" within the meaning of the Act.

49 So understood, ***Brodyn*** accords with the well-established place in this area of the law of failures to take into account relevant considerations. Indeed, it would be a surprising result that, in the absence of a privative clause, a prescribed relevant consideration could be disregarded without affecting the validity of the decision. Accordingly, it is a condition of validity of a determination that an adjudicator consider the matters specified in s 22(2), although error in considering those matters, so long as they are in fact considered, will not result in invalidity.

50 However, that does not mean that the requirement in s 22(2)(b) to consider the provisions of the contract has the effect that in each adjudication the adjudicator must consider ***every*** provision of the contract – any more than the requirement in s 22(2)(a) to consider the provisions of the Act has the effect that in each adjudication the adjudicator must consider ***every*** provision of the Act; both the paragraphs are to be read as requiring consideration of the provisions only to the extent that they are relevant to the adjudication application in question. In other words, the adjudicator is not required to consider provisions of the Act or the contract which have no bearing on, or relationship to, the adjudication application under consideration. This follows from the stated function of the considerations required by s 22(2) - which is, as its opening words express, "*in determining an adjudication application*" – and from the great inconvenience without utility which any other construction would involve.

51 Accordingly, I conclude that a failure by an adjudicator to have regard to a provision of the construction contract which is relevant to the adjudication under consideration is jurisdictional error, resulting in invalidity of the determination.

52 Mr Kalyk conceded that provision to the adjudicator of the plans and specifications which were not provided to him with the contract would have made no difference to the outcome. He was unable to identify any basis on which they were relevant to the dispute under adjudication. But he relied on them as indicating that the adjudicator could not have considered the provisions of the construction contract as required, if the plans and specifications, which were by definition part of the construction contract, were not before him.

53 I reject this submission, because to the extent that the adjudicator did not consider the plans and specifications, it is not apparent that they had any relevance to what the adjudicator had to decide. In short, in this respect it is not established that the adjudicator failed to have regard to a provision of the construction contract which was relevant to the adjudication under consideration. Accordingly, the first basis of complaint advanced under this

ground – that the entirety of the contract was not before the adjudicator, since he was never provided with the plans and specifications which formed part of it – fails.

54 As to the second basis of complaint under this ground – that the adjudicator determined the due date of payment to be 21 June 2005, when any consideration of the terms of the contract would have led to a different result - s 11 of the Act, entitled "*Due Day for Payment*", provides that a progress payment under a construction contract becomes due and payable on the date on which it becomes due and payable in accordance with the terms of the construction contract, or, if the contract makes no express provision with respect to the matter, on the date occurring ten business days after a payment claim is made in relation to it.

55 As to due date for payment, the adjudicator said: "*Neither party has made a submission as to the due date for payment of the progress payment. Therefore, applying s 11(1)(b) of the Act, I determine that it is ten business days after the payment claim was served. … That makes the due date for payment 21 June 2005*". The adjudicator did not refer to Part D of the Schedule to the contract, which provided for claims to be made by the contractor on the 30th day of each month, and the contractor to be paid within 30 days of claim; nor to clause 10(f), which provided that if a payment claim was required to be submitted by a specified date but was submitted after that date had passed, then it is postponed until the next payment period.

56 If, having considered the relevant provisions of the contract, the adjudicator wrongly interpreted and applied them so as to err in fixing the due date, invalidity would not be established: an error of fact or law including an error in interpretation of the Act or of the contract, or as to what were valid and operative terms of the contract, would not prevent a determination from being an "*adjudicator's determination*" within the meaning of the Act [***Contrax Plumbing***, [49]).

57 But here, the adjudicator made no reference to the terms of the contract at all. Because the adjudicator is obliged to include in the determination the reasons for it [s 22(3)(b)], it can be inferred from the absence of any reference to Part D of the Schedule that he did not consider it, and further that he did not consider whether or not the contract made express provision with respect to the due date for payment of the progress payment. This is not a mere error in consideration of the provisions of the contract, but a failure to consider a relevant provision at all.

58 Even if, as Mr Davie, who argued the case persuasively for Halkat, submits, a claim in respect of the same work had been made previously, which was, under the terms of the contract, payable at an earlier date, that does not overcome the difficulties, *first*, that the claim which the adjudicator had to consider was one made on 3 June 2005, and therefore treated as made on 30 June 2005, and payable on 30 July 2005; and *secondly,* that it appears that the adjudicator has entirely disregarded the contractual provision.

59 As to the third basis of complaint under this ground – that the adjudicator determined amounts to be payable to Halkat without consideration of the deduction of retention pursuant to clause 13(a), and ignoring the retentions already deducted - the interest schedule submitted by Halkat as part of its claim showed that Halkat's first eight invoices to Holmwood had been paid subject to the withholding of 10% retention from each. Holmwood's payment schedule showed the retention held. Yet the effect of the adjudicator's determination is not only that the adjudicated amount allows no provision out of it for retention, but that the retentions already withheld are required to be paid over to Halkat.

60 There is nothing in the adjudicator's reasons to suggest that he gave any consideration at all to clause 13(a) of the contract, providing for retention, and it is to be inferred that he did not. Again, this is not a mere error in consideration of the provisions of the contract, but a failure to consider a relevant provision at all.

61 It follows that in my opinion the adjudicator failed to have regard to relevant provisions of the construction contract, and in particular clause 10, Part D of the Schedule, and clause 13(a). This was not a mere error of fact or law in determining whether or not particular provisions were provisions of the construction contract, or in the interpretation and/or application of those provisions, but a complete failure to have regard to them at all, in circumstances where those provisions were relevant to the adjudication under consideration.

62 On the view which I take of *Brodyn*, such a failure invalidates the adjudication. Were the failure to have regard to relevant provisions of the construction contract limited to clause 10 and Schedule D, the consequences might have been limited to so much of the determination as fixed the payment date, as distinct from the quantum of the determination – and, as no interest was awarded, a question might have arisen as to whether relief should be withheld on discretionary grounds, since the error would have had no practical consequence. But as the failure to have regard to the provision relating to retention affects the quantum of the award, the consequence of invalidity extends to the adjudicated amount also.

Good faith attempt

63 Mr Kalyk's main submission, however, is that the adjudicator did not make a bona fide attempt to determine the matter entrusted to him. Although this is put in various ways (including "*failure to consider the payment claim*" and "*failure to consider the payment schedule*"), in substance all amount to a complaint that the decision-making process of the adjudicator did not amount to a good faith attempt to determine the matter remitted to him for adjudication.

64 The payment schedule set out, as one of the reasons for withholding payment, that while the payment claim was made on the basis of percentages complete, the monetary amounts claimed did not correspond with the

percentages of work said by Halkat to be complete. The payment schedule put in issue both the percentage of works said to be complete, and the monetary entitlements on a mathematical basis if Halkat was found to have completed as much of the work as it claimed to have. The adjudication response repeated that the claim contained numerous mathematical errors, and emphasised reliance on "point 7 of the payment schedule and the tables contained therein", which had raised these issues.

65 As is apparent from the passage from the adjudicator's reasons set out earlier in this judgment, the adjudicator did not attempt to address, let alone, resolve, these issues. Rather, having (understandably) characterised some of Holmwood's submissions as unmeritorious, he decided to prefer Halkat's assessment of the value of works done to Holmwood's. This involved resolving in favour of Halkat the disputes as to what percentage of the works it had completed, and the mathematical application of those percentages to the contract value, by reference to the merits of Holmwood's submissions on unrelated technical points. Given the issues raised by the payment schedule and adjudication response in this respect, this was an entirely illogical and inappropriate approach. In effect, the adjudicator, having been unimpressed by the merits of the two "jurisdictional" points taken by Holmwood, decided to prefer Halkat's claim on the main issue without examination either of its merits or of the defects in it which had been pointed out by Holmwood. This was not a case in which such examination was difficult: the adjudicator could have inspected the works to see how much had been completed, and the mathematical issue was self-evident on the papers. The position is analogous to a judge, having rejected a party's objection to jurisdiction as unmeritorious, then proceeding to reject that party's case on other issues, without examination of the merits, because of the unmeritorious jurisdictional point. Mr Davie, responsibly, did not attempt to justify the logicality of the adjudicator's reasoning in this respect.

66 The question, then, is whether this amounts to a want of a *"bona fide attempt by the adjudicator to exercise the relevant power"*: cf ***Brodyn***, [55]. This requires consideration of what is involved in the concept of "*good faith*" as a criterion of the valid exercise of a discretionary power.

67 In expressing that criterion of validity in ***Brodyn***, Hodgson JA referred to *Hickman,* where Dixon J, speaking of privative clauses, said [at 615] (emphasis added):- *They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority,* ***provided always that its decision is a bona fide attempt to exercise its power,*** *that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.*

68 By recognising such limits on the operation of privative clauses, Dixon J effectively established that there were certain minimum criteria which a discretionary decision had to satisfy, notwithstanding the protection of a wide privative clause. Although Basten JA has questioned whether reliance on *Hickman* might arguably be misplaced in the present context [***Hargreaves***, [75]], I think Hodgson JA was articulating the principle that there were certain minimum requirements of validity which could not be ousted by the scheme of the Act, which minimum requirements included, at least, those referred to by Dixon J in ***Hickman;*** just as even stringent privative clauses (for example, *Industrial Relations Act 1996*, s 179) do not exclude judicial review of a purported "decision" which does not comply with the *Hickman* criteria [***Solution 6*, 582** [96], 585 [105] (Spigelman CJ), 597 [160] (Mason P)]. An adjudication which does not satisfy the *Hickman* criteria would not be a valid determination, because it would not comply with the minimum criteria of validity for such a decision.

69 Thus in this context, the phrase "***bona fide attempt***" describes an implied condition of validity of discretionary decisions. This is not the same as the use of the concept of "***bona fide***" as an express statutory condition of immunity or exemption, in which context it is also used [cf *Local Government Act 1993* (NSW), s 733(1); ***Mid-Density Developments Pty Ltd v Rockdale Municipal Council*** (1993) 44 FCR 290; ***Forbes Shire Council v Pace*** (2002) 124 LGERA 37; [2002] NSWSC 966; ***Lamont v Wyong Shire Council*** (NSWSC, Palmer AJ, 13 December 1991); ***Bankstown City Council v Alamdo Holdings Pty Ltd*** (2005) 79 ALJR 1511; [2005] HCA 46]. Thus the concept in the present context is one derived directly from ***Hickman***. It is not necessarily the same concept of good faith as is involved as a condition of the immunity conferred on an adjudicator by s 30(1) of the Act. But the cases just mentioned show that, even as a statutory condition of immunity from liability, "honest ineptitude" may not be enough for good faith.

70 The role of "good faith" as a minimum criterion of validity appears to have had its origin in the dissenting speech of Lord Lindley in ***General Assembly of Free Church of Scotland v Lord Overtoun*** [1904] AC 515, 695:- *I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred. If, therefore, a synod or council, under cover of exercising their authority, were to destroy the church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be ultra vires and invalid in point of law; and it would be the duty of every court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision.*

71 That passage is apparently provided the foundation for what was said by Isaacs J in ***Baxter v New South Wales Clickers' Association*** (1909) 10 CLR 114, 162, and in turn by Dixon J in ***Hickman.*** It therefore provides important contextual illustration of what in this context was originally intended by the concept of "***bona fides".*** It is notable that it focuses on the concept of "bona fide for the purposes for which the power was conferred".

72 Two earlier decisions of the High Court of Australia were referred to by Dixon J in *Hickman* in explaining the limits on the operation of a privative clause – and, as a corollary, the minimum criteria of validity for a decision. The first was the ***Clickers'*** case, in which O'Connor J had said only that such a provision should be construed as freeing the court or authority from the control or supervision of a superior court in all cases where the proceedings of the lower body *prima facie* have relation to the subject matter over which the statute has given it jurisdiction [at 148]. Isaacs J, however, in a passage which appears to be the source of Dixon J's formulation, regarded such a provision as excluding prohibition in relation to any decision *so long as the power of the judicial authority is exercised bona fide for the purpose for which it is conferred* [at 162]. Isaacs J observed that Lord Lindley in the ***Free Church*** case [at 695] referred to *"the condition implied in all instruments creating powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred"*. His Honour then added: *And if the Industrial Court were to sentence an employer or employee to penal servitude, or to eternal deprivation of industrial rights, or to fine him 1,000 pounds, the order would be so outrageous and unreasonable as to be altogether beyond the pall of the act, and could not be supported as a bona fide exercise of judicial power. I make no doubt the Supreme Court would prohibit an act so manifestly lawless from being carried into execution. But the legislature, in reposing its confidence in the Industrial Court, of course leaves out of consideration all such wild and irrational conduct, and so should we.*

73 The second earlier High Court decision referred to by Dixon J was ***Australian Coal & Shale Employees Federation v Aberfield Coal Mining Co Limited*** (1942) 66 CLR 161, in which Latham CJ had said [at 177] that such a privative provision did not give validity to an invalid award, and that if a pretended award was so completely beyond any possible jurisdiction that it could not reasonably be said to be an award, other questions would arise such as were considered in the ***Clickers* c**ase; while Starke J said [at 182] that such a provision protected acts in fact done by the tribunal in the supposed exercise of the powers entrusted to it (and not just acts done lawfully and within jurisdiction).

74 None of these cases, so far as they touch on **"bona fides"**, suggest that deficiencies in reasoning, even of an egregious character, deprive a decision of "**good faith**"; what they seem to require to produce that result is that the purported exercise of power be foreign to the purpose for which it was conferred.

75 Meanwhile, however, in ***Roberts v Hopwood*** [1925] AC 578, the House of Lords held that a discretion, conferred upon a Council, to fix "fit" wages must be exercised reasonably, and that the fixing of an arbitrary sum without regard to existing labour conditions was not an exercise of that discretion. Lord Sumner, noting that the words of the section conferring the power were not absolute, but subject to an implied qualification of good faith, said [at 603] (emphasis added):- *Is the implication of good faith all? That is a qualification drawn from the general legal doctrine, that persons who hold public office have a legal responsibility towards those whom they represent – not merely towards those who vote for them – to the discharge of which they must honestly apply their minds. **Bona fide** here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. **It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public, whose money and local business they administer.***

76 Lord Buckmaster [at 589] observed that the absence of bona fides was not alleged. His Lordship appears to have decided the case on the basis that the council acted arbitrarily and did not in fact take into account the considerations which they said influenced them [at 590]. Lord Atkinson though that "fit" meant "fitting and proper" for the services rendered and did not authorise gratuities or gifts, and that the generous wages fixed were to a great extent gifts or gratuities and therefore outside what was authorised [at 599-600]. Lord Wrenbury took a similar view [at 613]. Lord Carson referred to the judgment of Atkin LJ in the Court of Appeal, who had said [***R v Roberts; ex parte Scurr*** [1924] 2 KB 695, 725]:- *The answer, I think, is to be found in the restriction that the council must act in good faith. They must determine the amount of wages as wages in an existing industrial system; they must not fix the amount as a dole or as a bribe, or with any object other than that of fairly remunerating the servant. … In this case bad faith is not alleged by the auditor or found by the provisional court. Indeed, it is stated in the judgment below that it is admitted that the Council exercised their discretion honestly.*

77 While Lord Carson concluded that he could not confidently support those conclusions, and that the admission that bad faith was not alleged and that the Council exercised its discretion honestly had been misapplied, he added:- *I do not myself know what these expressions are meant to cover, but, having regard to the statements made in paragraph 14 of the affidavit of the auditor that the Council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers, whose funds they administered, had imposed unreasonable charges upon these funds and made payments which were far in excess of those necessary to obtain the services of those required and to maintain a high standard of efficiency, and were thus in realities gifts to their employees in addition to remuneration for their services, I find it difficult to come to a conclusion that the admissions referred to meant anything more than that the Council honestly thought they were entitled to take the course they did, and in my opinion it was open to the auditor, upon coming to the conclusions as stated in his affidavit, to draw the inference that the Council were not engaged in merely fixing a rate of wages, but were affected by considerations which could not be held to come within the ambit of the discretion entrusted to them.*

78 Only the speech of Lord Sumner directly supports the view that the implied condition of validity, that the exercise of power be bona fide, is concerned with the manner in which the decision-maker considers and

reasons its decision. The speeches of Lord Buckmaster and Lord Carson, however, suggest that the decision was reviewable because though honestly made, it was arbitrary.

79 As Mr Davie has pointed out in his submissions, in ***Pickwell v Camden London Borough Council*** [1983] QB 962, Forbes J (in the Queens Bench Divisional Court) said of ***Roberts v Hopwood***:- *It should be noted, however, that, although traces may be found in that case of a consideration by their Lordships of failure to take into account relevant matters, the fact is that the case of the Poplar Councillors was that in reality their decision was based on the concept that 4 pounds a week was the minimum wage that they thought – without regard to current wage rates but having regard to the dignity of labour – ought to be paid to an adult worker. Looking at the wage itself and the reasons advanced for paying it the inference was irresistible that no question of whether the remuneration was appropriate for the work required or whether it compared in any wage with wage rates paid elsewhere could possibly have been taken into account. The case seems to me to decide no more than this, that where the inevitable inference which must be drawn is that an obviously excessive wage payment was agreed to be paid without any regard to any commercial consideration and solely on some extraneous principle, as, for instance, philanthropy, such a payment can only be regarded as a gift and is not covered by a statutory power to pay reasonable wages.*

80 Were things to rest with the ***Free Church*** case, the ***Clickers***' case and ***Roberts v Hopwood***, a narrow view of the good faith criterion, focussing on whether objectively the exercise of power could be regarded as honestly referrable to the purpose for which the power was conferred, and excluding from its ambit the reasoning process leading to the decision, might well prevail.

81 After ***Hickman***, Dixon J returned to the subject in ***Little v Commonwealth*** (1947) 75 CLR 94, in which His Honour said [at 108] that provisions protecting persons from liability when acting in pursuance of an enactment were construed as extending protection from liability not where there was compliance with the statute (in which case the protection would be superfluous) but "*where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment*". His Honour added [at 109]: *It has, however, been found not easy to define the exact conditions which must be fulfilled to qualify for protection. **Bona fides** has been regarded as indispensable. But the difficulty has been to give such provisions an operation which, on the one hand, will not be so narrow that it goes little, if at all, beyond what is authorised by the substantive parts of the enactment, and, on the other, will not be wide enough to cover wrongful acts so outside the scope of the authority given by the statute that it can hardly be supposed that it was intended to protect those responsible. In **Cann v Clipperton** (1839) 10 Ad 582, 589; 113 ER 221, 224, Williams J said:*

> *"It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no-one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must be lie between a mere foolish imagination and a perfect observance of the statute".*

*As might be expected recourse was made to conception of **"reasonableness"** in an attempt to pass between these Symplegades. Accordingly, some decisions added to good faith the further condition that the defendant must have proceeded on reasonable grounds in supposing that he was acting in pursuance of the statute. Thus, in **Hughes v Buckland** (1846) 15 M&W 346, 355-356; 153 ER 883, 887, an action for wrongful arrest, Parke B speaking of a provision limiting the time for "an action against any person for anything done in pursuance of this Act" said:*

> *"The Act is general in its terms, and gives protection to all persons for acts done in pursuance of it. Those words do not mean acts done in strict pursuance of the Act, because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must bona fide and reasonably believe himself to be authorised by the Act".*

82 And in ***R v Murray; ex parte Proctor*** (1949) 77 CLR 387, Dixon J [at 400], in the context of a privative clause, characterised the good faith requirement as: "*the traditional or established interpretation which makes the protection it purports to afford inapplicable unless there has been an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province*". By way of illustration His Honour said: "*There is nothing artificial in such an interpretation. For it could hardly be supposed, to take perhaps an extreme example, that it was intended that Reg 17 should give validity and protection to the awards of a tribunal established in relation to one industry when the tribunal intentionally stepped outside its allotted industrial field and proceeded to regulate an entirely different industry*".

83 In ***R v Connell; ex parte Hetton Bellbird Collieries Ltd (No 2)*** (1944) 69 CLR 407, Latham CJ described the limitations upon the exercise of a statutory power, which depended upon formation of a state of satisfaction or opinion, in terms which equated capriciousness with lack of good faith [at 432] (emphasis added):- *If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. **In that event the basis for the exercise of the power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.***

84 This was reflected in ***Buck v Bavone*** (1976) 135 CLR 110, where Gibbs J, as he then was – albeit again in the context not of a privative clause, but of a power the exercise of which depended upon the decision-maker being satisfied of certain specified matters - equated a bona fide exercise of power with the absence of

arbitrariness or capriciousness [at 118-119] (emphasis added):- *Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied.* ***In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously.***

85 This passage received the approval of Brennan CJ, Toohey, McHugh and Gummow JJ in the High Court in ***Minister for Immigration and Multicultural and Indigenous Affairs v Wu Shan Liang*** (1996) 185 CLR 259 [at 276].

86 In ***Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation*** (2001) 184 ALR 576, Finn J, considering the ***Hickman*** principle in the context of a privative clause in the *Income Tax Assessment Act* 1936 (Cth), and while emphasising that want of good faith is an extreme circumstance, nonetheless recognised that it may be established where there was no actual attempt to ascertain or calculate the taxpayer's income [at 586-587]:-

[32] *In* ***Kordan's*** *case, the Full Court observed (at [4]) that:*

> *… [t]he allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case. As Hill J said in* ***San Remo Macaroni Co Pty Ltd v FCT*** *99 ATC 5138 at 5154 it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside.*

This view resonates with observations of other judges of this court: see, for example, Dan v FCT 2000 ATC 4350 at 4356 affirmed in ***Kordan's*** *case: "****proof of bad faith necessitates proof of extreme circumstances".***

[33] *It is unsurprising that the above view has been expressed. A premise of the rule of construction embodied in the* ***Hickman*** *principle is that, but for the privative clause in question (here s 175 with its s 177(1) overlay), a decision taken in the exercise of a power to which the clause relates might otherwise be invalidated in judicial review proceedings because, for example, the decision-maker* ***"has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority": Hickman's*** *case at 615. To the extent that it is effective the clause saves from invalidation an assessment that would otherwise be potentially reviewable for defect or irregularity:* ***Richard Walter Pty Ltd*** *at CLR 180. Something more is required.*

[34] *It is likewise unsurprising that courts have shrunk from attempting a comprehensive exposition of what is and is not countenanced by the formula* ***"a bona fide attempt to exercise [a] power"****. Rather, the burden of the formula has been illustrated by example as in the observations: (i)* ***"[p]lainly enough, an incorrect assessment does not demonstrate an absence of bona fides": Briglia*** *at 4250; or (ii)* ***"once the Commissioner forms the view that there is no substantial possibility that the item of income is assessable income of a person, it could not be a bona fide exercise of the assessing power to assess that person to tax in respect of that income. Likewise here where it is conceded that there is no possibility at all that the assessments made were correct, there can be no assessment": Darrell Lea Chocolate Shops Pty Ltd v FCT*** *(1996) 72 FCR 175 at 187; 141 ALR 713.*

[35] *The formula likewise has been illustrated by resort to some alternate formula which is appropriate to the particular context in which it is used. In* ***R v Deputy Commissioner of Taxation (WA); Ex parte Briggs*** *(1986) 12 FCR 301; 69 ALR 185, for example, the formula used (at FCR 308) was "****a genuine attempt to ascertain the taxable income of the taxpayer"*** *in a setting in which it was conceded that the commissioner never intended to, and did not, embark upon the process of ascertaining the taxpayer's income. And references commonly have been made to the terminology of "****abuse of power"*** *to characterise what was not a bona fide exercise of a power: see, for example,* ***Richard Walter Pty Ltd*** *at CLR 219.*

[36] *What is clear both from the premise of the Hickman principle itself and from judicial treatment of the "bona fide attempt" formula is that, in the setting of ss 175 and 177(1), the cases will be rare and extreme in which a bad faith assessment will be able to be made out for* ***Hickman*** *purposes. Often, I do not say invariably, they will be cases: (i) where, knowingly, the assessment power has been exercised for an improper purpose; or (ii) where the purported assessment involved no actual attempt to ascertain or calculate the taxpayer's income as, for example, where the assessment was made on facts* ***"known … to be untrue": Darrell Lea Chocolates*** *at FCR 188.*

87 The proliferation of privative clauses has led to more frequent resort to the "***good faith***" ground in recent times, particularly in the immigration context. Two schools of thought have emerged. The dispute between them essentially relates to whether there is a dichotomy between good faith and bad faith, or some middle ground between them; and more fundamentally whether want of good faith can be established by recklessness or by capriciousness in the exercise of the power short of a wilful and deliberate failure to attempt to perform the function entrusted.

88 In ***SAAG v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 547, Mansfield J held that the Refugee Review Tribunal had not acted in good faith because it approached its review of the applicant's claims on the basis that it should look for reasons why it could reject them [36]. In ***SBAN v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 591, Mansfield J concluded that the Refugee Review Tribunal had failed to conduct the review in good faith, where it had failed to make findings about the applicant's claims and prejudged the case in a manner which amounted to actual bias. His Honour said [at 16]

that it was not sufficient to establish a want of good faith that the court disagree with the tribunal's findings of fact or processes of reasoning, or even regard its findings or processes as unreliable or unreasonable, and "it will only be if the analysis of the tribunal's findings of fact or law or its processes of reasoning leads the court to the firm conclusion that it did not in fact conduct its review of the decision in good faith that the particular proviso to the *Hickman* principles will be enlivened".

89 In ***SBAP v Refugee Review Tribunal*** [2002] FCA 590, Heerey J equated good faith to the absence of bad faith. His Honour said that in the context of administrative decision-making, bad faith was a serious matter involving personal fault on the part of the decision-maker going beyond the errors of fact or law which are inevitable in such a process; as such, the allegation was one, not lightly to be made, which must be clearly alleged and proved. His Honour added that the ways in which bad faith can occur are infinite and admit of no comprehensive definition but "It can be said that the presence or absence of honesty will often be crucial. So also will be a purpose to achieve some end (perhaps even one not in itself reprehensible) which is not an end for which the statutory power was conferred". This decision supports the narrower view of the "good faith" requirement.

90 In ***NAAG v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 713, Allsop J [at [24]] agreed with what Heerey J had said in *SBAP* - that bad faith was not just a matter of poor execution or poor decision-making involving error, but a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the decision-maker. His Honour rejected the proposition that objective bad faith could be found in the absence of personal fault on the part of the decision-maker. This decision generally endorses the narrower view, but accepts that lack of a genuine attempt to undertake the task in a way which merits personal criticism of the decision-maker may amount to a lack of good faith.

91 In ***NACL v Refugee Review Tribunal*** [2002] FCA 643, Conti J echoed the views of Heerey J, that the suggestion that a purported exercise of power was not bona fide was a serious allegation not lightly to be made, necessitating proof of extreme circumstances and requiring evidence that the decision-maker had been in extreme default of its administrative function - for example by proceeding to a determination on the premise of facts or circumstances which it knew to be untrue, *or by making no real attempt to address the applicable statutory criteria*. While tending to support the narrower view, this decision admits that a decision-maker who makes no real attempt to address the applicable criteria might thereby fail to make a good faith attempt.

92 In ***NAAP v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 805, Hely J endorsed the approach of Heerey J in *SBAP* and Allsop J in *NAAG*, adding [at [41]] that a failure to act in good faith involves a lack of honest or *genuine* attempt to undertake the task in a way meriting personal criticism of the decision-maker, and that bad faith was not just a matter of poor execution or poor decision-making involving error, though His Honour accepted that whether an inference of want of good faith should be drawn could depend on the cumulative effect of the circumstances even though no one of them alone would be sufficient to sustain the conclusion. Although generally endorsing the narrower approach, this decision allows that absence of a genuine attempt to undertake the relevant task, though not dishonest, may amount to a failure to act in good faith.

93 In ***NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*** (2002) 193 ALR 449, the Full Federal Court considered the first of the *Hickman* conditions in a manner which was summarised by Sackville J in ***Wu v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 1242 [at [59]] as follows:- *The touchstone that emerges from the judgment in NAAV is that a decision of the MRT will satisfy the first Hickman condition if it is the consequence of an honest attempt to act in pursuance of the powers of the tribunal. There may be cases where the disregard of statutory requirements or, indeed, of the evidence, is so "blatant" (to use Von Doussa J's word) that an inference can be drawn that the decision-maker has not honestly attempted to exercise the relevant statutory power. There may also be cases where the decision-maker has knowingly exercised a power for an improper purpose:* ***Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation*** *(2001) 184 ALR 576, at 587, per Finn J. But the fact that the tribunal has misconstrued the legislation or committed procedural errors will not, of itself, ordinarily establish that it has not honestly attempted to exercise its power:* ***Daihatsu v FCT****, at 590.*

94 In ***SBAU v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 1076, Mansfield J said that the circumstances in which the court might find an administrative decision-maker had not acted in good faith were likely to be rare and extreme, particularly where the only attempt to demonstrate lack of good faith is by reference to the reasons for decision themselves [at [28]]. His Honour observed that mere error or irrationality or apparent irrationality would not of itself demonstrate a lack of good faith, but might do so in conjunction with other factors or in all the circumstances of the case [at 29], there being no simple step between unreasonableness and a finding of absence of good faith, which were not co-relatives [at 33]; a combination of factors might produce a conclusion that a decision-maker has not exercised its powers in good faith. While accepting that mere irrationality is not to be equated with an absence of good faith, this decision generally follows the broader view, that dishonesty is not an essential element and failure to make a genuine attempt will suffice.

95 In ***NADR v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCAFC 293, Kiefel J, with whom Spender and Moore JJ agreed, endorsed the view of Allsop J in *NAAG* that bad faith implied a lack of an honest or genuine attempt to undertake the task and involved personal criticism of the decision-maker. While generally favouring the narrower view, this decision again allows that in the absence of dishonesty, failure to

maker a genuine attempt to undertake the task, such as to warrant personal criticism of the decision-maker, may amount to a lack of good faith.

96 In ***NAAQ v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCAFC 300 a Full Court of the Federal Court (Sackville, Allsop and Jacobson JJ) held that there was no basis for concluding that the RRT had not made a bona fide attempt to discharge its statutory functions; if its reasoning on some factual issues might be thought to be less than wholly convincing, that did not show that it did not make an "honest attempt" to deal with the subject matter entrusted to it [at 29]. This decision tends to support the narrower approach to the "good faith" requirement.

97 **In *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs*** (2002) 194 ALR 749; [2002] FCAFC 361, another Full Court of the Federal Court (Tamberlin, Mansfield and Jacobson JJ), distilled nine propositions from the authorities, which may be summarised as follows:-

- *First, an allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker;*
- *Secondly, the allegation is not to be lightly made and must be clearly alleged and proved;*
- *Thirdly, there are many ways in which bad faith can occur, and it is not possible to give a comprehensive definition;*
- *Fourthly, the presence or absence or honesty will often be crucial;*
- *Fifthly, the circumstances in which the court will find that an administrative decision-maker has not acted in good faith are rare and extreme; especially where all the applicant relies upon is the written reasons for the decision under review;*
- *Sixthly, mere error or irrationality does not of itself demonstrate lack of good faith, and bad faith is not to be found simply because of poor decision-making, it being a large step to jump from a decision involving errors of fact and law to a finding that the decision-maker did not undertake its task in a way which involves personal criticism;*
- *Seventhly, errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness;*
- *Eighthly, the court must make a decision as to whether or not bad faith is shown by inference from what the tribunal has done or failed to do and from the extent to which the reasons disclose how the tribunal approached its task; and*
- *Ninthly, it is not necessary to demonstrate that the decision-maker knew the decision was wrong. It is sufficient to demonstrate recklessness in the exercise of the power.*

98 For the seventh proposition, their Honours cited the decision of Mansfield J in ***SBAU***, at [31], where His Honour had said that errors or illogicality in a decision might, either alone or in conjunction with other matters, demonstrate or tend to demonstrate a lack of good faith on its part, by showing capriciousness (emphasis added): *Errors of fact or law apparent in its reasons will not of themselves demonstrate a lack of good faith on its part, at least other than in exceptional circumstances. Illogicality in its reasons also will not of itself demonstrate a lack of good faith on its part. But such errors or illogicality might, either alone or in conjunction with other matters, demonstrate or tend to demonstrate a lack of good faith on its part.* ***They may show such capriciousness on the part of the tribunal that only one conclusion is open to the court.***

99 For the ninth proposition, their Honours cited ***SCAZ v Minister for Immigration and Multicultural and Indigenous Affairs*** [2002] FCA 1377, in which Von Doussa J, with reference to ***NAAV*** at [107] – where Black CJ had cited with approval a passage from the judgment of Allsop J in ***NAAG***, [24] - and to the approval by the High Court in ***MIMIA v Wu Shan Liang*** [at 276] of the statement by Gibbs J in ***Buck v Bavone*** [at 118-119], equating a bona fide exercise of power with the absence of arbitrariness or capriciousness - concluded that to establish that an attempted exercise of power was not bona fide it may not be necessary for the applicant to go so far as to show that the power was exercised in a way that the decision-maker actually knew was wrong, and that an exercise of power that was reckless as to whether it was in a manner required by law may not be a bona fide exercise of it.

100 ***SBBS***, while recognising many of the constraints propounded by those who endorse the narrow approach, fundamentally supported the broader approach by holding that actual dishonesty was not required, and that capriciousness, which might be inferred from a range of matters, could be sufficient to establish a want of good faith.

101 In ***WAFV v Refuge Review Tribunal*** (2003) 125 FCR 351, French J undertook a comprehensive review of the authorities, and concluded that good faith required more than the mere absence of bad faith, and that absence of good faith was not limited to cases of dishonesty or malice or personal interest, but may be found in a reckless or capricious approach to the exercise of the power in question [at [52]]:- *Consistently with the language of Dixon J in* ***Hickman*** *and* ***Proctor*** *and in* ***Little,*** *the term "****good faith****" is not to be considered in isolation from the process to which it is applied. An authority exercising a statutory power is required to act in good faith in the sense that the authority is required to make an honest attempt to exercise the power entrusted to it. An honest attempt to exercise the power is not demonstrated merely by the absence of dishonesty or malice or personal interest. And with respect to the contrary view expressed by Heerey J in SBAP it seems to me on the authorities that bad faith is not necessarily the obverse of good faith. Good faith requires more than the absence of bad faith. It requires conscientious approach to the exercise of power.*

Neither unreasonableness nor irrationality nor error of law or fact nor failure of procedural fairness is sufficient of itself to establish want of good faith. But a substantial departure from minimal standards of decision-making may be such as to indicate that a decision-maker has failed to adopt a conscientious approach to the task before it. It may be indicative of dishonesty or malice or actual bias or recklessness or capriciousness in the exercise of the power. The concept of "good faith" is evaluative. The threshold for finding its absence is high. It may in practice vary according to the nature and subject matter of the power being exercised as well as according to the circumstances of the particular case. In this sense it may be analogous to the variable standard imposed by the requirements of procedural fairness.

102 In ***NAMM v Minister for Immigration and Multicultural and Indigenous Affairs*** [2003] FCAFC 32, a Full Federal Court (French, Lindgren and Finkelstein JJ) endorsed the passage cited above from French J's judgment in *WAFV* [at [50])] By recognising that a substantial departure from minimal standards of decision-making, such as to indicate that a decision-maker has failed to adopt a conscientious approach to the task before it, may be sufficient to establish a want of good faith, it endorsed the broader view of the good faith requirement.

103 In ***Minister for Immigration and Multicultural and Indigenous Affairs v SBAN*** [2002] FCAFC 431, a Full Court of the Federal Court considered the nine propositions from ***SBBS***. Heerey and Kiefel JJ adopted the first eight propositions but qualified the ninth, saying that while reckless indifference may be the equivalent of intent, the test is not objective and the enquiry (as to want of good faith) is directed to the actual state of mind of the decision-maker, there being no such thing as deemed or constructive bad faith. "It is the ultimate decision which must be shown to have been taken in bad faith and illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith, since they can equally well be explained as the result of obtuseness, overwork, forgetfulness, irritability or other human failings not inconsistent with an honest attempt to discharge the decision-maker's duty" [at [8]]. This decision favours the narrower view of the good faith requirement.

104 In ***Minister for Immigration and Multicultural and Indigenous Affairs v NAOS*** [2003] FCAFC 142, another Full Court of the Federal Court (Whitlam, Finn and Goldberg JJ) set aside a judgment of the Federal Magistrates Court which had upheld a complaint of lack of good faith in a decision of the Refugee Review Tribunal. The Full Court reviewed the nine propositions enunciated in *SBBS*, and the qualification of the ninth in *SBAN*, which qualification their Honours endorsed, adding that it should be extended to the seventh proposition so as to make clear that want of bona fides would only be made out in circumstances where whim or fancy has consciously been preferred to considered judgment. Their Honours suggested [at [21]] that the seventh proposition in *SBBS "may be of doubtful assistance"*, as *"the concept of capriciousness is encountered in the law in circumstances which are concerned with unreasonableness"* [at [21]].

105 This decision clearly endorses the narrow view of the good faith requirement. However, insofar as it is based on the view that the concept of capriciousness is encountered in circumstances concerned with unreasonableness, it may, with respect, afford insufficient regard to its derivation in this field from what Gibbs J had said in ***Buck v Bavone***, where it was used as the antithesis of good faith.

106 In ***NAKF v Minister for Immigration and Multicultural and Indigenous Affairs*** (2003) 199 ALR 412, Gyles J said that an allegation that a decision-maker did not act in good faith was in substance and effect an allegation that the decision-maker acted in bad faith, and that bad faith cannot be constituted by recklessness in the sense of negligence no matter how gross; a decision-maker cannot blunder into bad faith no matter how stupid and careless, any more than a person can blunder into deceit or wilful blindness [24]. His Honour said (at [24]):- *What is required to make out this case is to find that the tribunal member was recreant to his duty by wilfully and deliberately making the impugned decision without attempting to carry out the statutory duty lying upon him – tossing a coin without reading the file, allowing in every third applicant, or allowing in applicants from various countries in rotation might be examples.*

107 This decision plainly endorses the narrow view.

108 ***Bropho v Human Rights and Equal Opportunity Commission*** (2004) 204 ALR 761, considered the meaning of "good faith" in the different context of the *Racial Discrimination Act* (Cth) 1975, s 18D, which provides that for certain conduct to be protected from attracting liability, it must be done in "***good faith***". However, French J [at [85]] referred to and drew on the review in ***WAFV*** of the authorities on "***good faith"*** in the context of the ***Hickman*** principle, and re-affirmed that absence of good faith which will amount to jurisdictional error vitiating the exercise of a statutory power was not limited to cases of dishonesty, malice or personal interest and may be found in a reckless or capricious approach to the decision-maker's task, the exercise of a power in good faith requiring an honest and conscientious approach, consistent with the idea that good faith involves not only honesty but fidelity – faith – to the obligation cast upon the decision-maker [at [85]-[93]]. Carr J, who joined French J in the majority, did not deal with the meaning of "good faith" so directly, but seems to have accepted that absence of good faith might be constituted by something less than dishonesty, fraud or callous and reckless indifference [at [168], [173]]. Lee J, who dissented, took the still broader view that in the context of the *Racial Discrimination Act*, the words "***good faith***" involved more than the absence of bad faith, dishonesty, fraud or malice, and imported a requirement to act with prudence, caution and diligence, citing ***Mid Density Developments*** [at [144]]. Overall, though not directly in the context of the *Hickman* principle, this case reaffirmed the broader view of the good faith requirement.

109 It has been said that the term "good faith" is protean, its meaning varying according to the context in which it is used [***Secretary, Department of Education, Employment, Training and Youth Affairs v Prince*** (1997) 152 ALR 127, 130 (Finn J); ***Bropho v HREOC***, [84]; cf ***Alamdo***, [49]-[51]. Because its source in the present context is the *Hickman* principle, cases which have considered its meaning in the *Hickman* context are important. The foregoing review of those authorities reveals that while the early authorities did not envisage "good faith" as requiring more than the exercise of the power for the purpose for which it was conferred (as distinct from for some other purpose), the significant influence of Sir Owen Dixon shifted the emphasis from the objective evaluation of whether the exercise of power was prima facie for the purpose for which the power was conferred, to a subjective evaluation of the decision-making process: the "bona fide attempt" formulation ties the requirement of good faith to the decision-makers' state of mind in exercising the power. In recent years, two schools of thought have emerged, particularly in the Federal Court of Australia. There is general acceptance by both schools of the first six propositions in ***SBBS***. The dispute essentially covers whether there is a dichotomy between good faith and bad faith, or some middle ground between them; and more particularly whether want of good faith is established by recklessness in the exercise of the power or by capriciousness without wilful and deliberate failure to attempt to perform the function entrusted. This contest has not yet been resolved in the Federal Court, there being Full Court decisions supporting both the wider and the narrower views of what is required to amount to good faith – or want of it – in that context.

110 I have concluded, for the reasons which follow, that, in the present context, the broader view should apply, and in particular that recklessness or capriciousness on the part of an arbitrator in the performance of his or her function, such as to establish the absence of a genuine or conscientious attempt to perform the adjudicator's function – short of a wilful and deliberate failure to attempt to perform the function - can amount to a want of good faith.

111 *First,* while there is no denying that the historical origins of the first ***Hickman*** requirement suggest that it was originally limited to the narrower view, that "good faith" required no more than the exercise of the power for the purpose for which it was conferred, there are too many references in subsequent cases to a requirement for an honest *and genuine* attempt, or an honest *and conscientious* approach, to so limit the requirement now. These expressions – "genuine" and "conscientious" - reflect that something more than mere honesty is required. The cases contain substantial authority, including in the High Court, for the view that capriciousness in decision-making amounts to an absence of good faith.

112 *Secondly*, "good faith" - or "bona fides" – in ordinary usage means something more than mere honesty; the words import also a concept of faith or fidelity. In ***Bropho v HREOC***, French J said [at [88]-[89]] that the words, despite their protean character, had a core meaning of general application which manifests itself in different ways according to the environment in which they must be applied. His Honour referred [at [90]-[92]] to the *Shorter Oxford English Dictionary* definition of "faith" - which included (1) "the duty of fulfilling one's trust; fealty; the obligation of a promise or engagement"; and (2) "the quality of fulfilling one's trust, fidelity, loyalty; noting the term "good faith" as reflecting fidelity and loyalty", in contrast to bad faith, meaning faithlessness or having an intent to deceive – and to the definition of "good faith" in *Black's Law Dictionary, 7*th ed, Minnesota, 1999, p 701, as "a state of mind consisting in (1) honesty and belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage". Thus, as French J pointed out in *Bropho v HREOC* [at [91]], while honesty is an element embedded in the ordinary meaning of good faith, the idea of fidelity or loyalty goes beyond honesty and involves adherence to a commitment or an obligation or a principle. I respectfully adopt his Honour's reasoning. In this context, that means that loyalty or fidelity to the task entrusted to the decision-maker is an element of its good faith performance.

113 *Thirdly*, while there may well be sound policy reasons for allowing that a privative clause may protect from judicial review errors in decision-making made within jurisdiction by those to whom relevant functions are entrusted, it is difficult to see any policy interest which is served by protecting the decisions of decision-makers who do not make a genuine or conscientious attempt to make the correct decision, or who act capriciously in performing their function, regardless of whether or not they are conscious of the defect of their approach.

114 *Fourthly*, in other fields of discourse, statutory requirements for "good faith" have been found, in their particular context, to demand more than honest ineptitude, and to require a "real attempt" to perform the function [***Mid Density Developments***]. So it has been said that although negligence, even gross negligence, will not be a want of good faith, a lack of honest endeavour to undertake the relevant function will be [***Lamont v Wyong Shire Council; Forbes Shire Council v Pace***].

115 *Fifthly,* in ***Brodyn***, Hodgson JA seems to have had the broader sense in mind: his Honour said that if a question were raised before an adjudicator as to whether the "more detailed requirements" of 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), had been exactly complied with, *a failure to address that question could indicate that there was not a bona fide attempt to exercise the power* [at [55]]. Such an approach does not accommodate with the view that want of good faith will be established only by deliberate bad faith. That his Honour had in mind the broader view is fortified by his Honour's observations in ***Hargreaves***, to the effect that if an adjudicator determined the progress payment at the amount claimed simply because he

or she rejected the relevance of the respondent's material, that could be such a failure to address the task (of determining the amount of the progress payment to be paid, which requires determination on the material available and to the best of the adjudicator's ability of the amount properly payable), as to render the determination void [at [50]-[53]]. Each example suggests that want of a conscientious attempt, without dishonesty, would suffice to deprive the decision of "good faith". In ***Timwin***, McDougall J thought that Hodgson JA was contemplating not mere dishonesty or its opposite, but that there must be an effort to understand and deal with the issues in the discharge of the statutory function [at [38]].

116 *Sixthly*, the use of the concept of "good faith" in s 30 of the Act as a condition of protection of an adjudicator from liability is not inconsistent with this: even if the protean concept of "good faith" bears a different and narrower meaning in that statutory context, than it has as a minimum criterion of validity of the exercise of a statutory power under the *Hickman* principle, it is the latter context that is relevant for present purposes.

117 Accordingly, good faith as a condition of validity of the exercise of an adjudicator's power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.

118 Applying that test to the present facts, the arbitrator did not meet its requirements. He was entitled to be critical of Holmwood for having advanced the unmeritorious submissions which it did about misnomer and service. He was entitled to conclude that the reports relied upon by Holmwood were of no assistance to the extent that they proceeded on an inappropriate basis of valuation. He was also entitled to find those reports to be other than independent (although the same surely had to be said of Halkat's assessment). But left with Halkat's claim and Holmwood's assessment, he was not entitled to fail to evaluate the claim in the light of the payment schedule, and instead simply to accept it on the basis that other and unrelated submissions made by Holmwood were unmeritorious. A judge who rejected a party's submissions on the ground that other unrelated submissions made by that party were unmeritorious would rightly be criticised for acting capriciously, and an adjudicator is in no different plight. It is not correct to say, as Mr Davie submitted, that an adjudicator has to decide these matters on bare assertion by one party against bare assertion by another: the "bare assertions" can be evaluated against such evidence as is submitted in the adjudication application and adjudication response, and the adjudicator is given powers and procedures (including to require further submissions [s 21(4)(a)], to convene a conference [s 21(4)(c)], and to conduct a site inspection [s 21(4)(d)] which, albeit within tight constraints of time, are provided for the purpose of assisting an adjudicator sufficiently to inform himself or herself so as to be able to make a soundly-based decision.

119 In my opinion, when the adjudicator concluded that he was unable to decide for himself the extent and value of work completed, and instead would adopt Halkat's assessment because Holmwood had made some unmeritorious submissions unrelated to this issue (rather than evaluating the adjudication application and response and the arguments advanced in them, or convening a conference and/or conducting an inspection which might have resolved at least some of those issues), he ceased to make a genuine or conscientious attempt to perform the function entrusted to him of assessing the payment claim, and substituted caprice for conscientious judgment. The quality of his determination in that respect did not differ from one based on a mere like or dislike of a party, based on unrelated conduct of the party. His ultimate determination, which depended upon acceptance in that way of Halkat's claim, was therefore not the product of a good faith attempt at performing his function, but of caprice.

120 Alternatively, the adjudicator's reasons do not refer to or address Holmwood's submission that the amounts claimed by Halkat did not reflect, but considerably exceeded, mathematically, the result obtained by applying the claimed percentage of works completed to the contract value of the works.

121 This mathematical discrepancy between the percentage of works said to be complete in the payment claim, on the one hand, and the sum claimed for that work, on the other, was pointed out in the payment schedule. It was re-iterated in the adjudication response. The discrepancy is plain on the face of the payment claim, once attention is drawn to it.

122 The only explanation for the absence of any reference to this submission in the adjudicator's reasons is that he did not consider it. This amounts to a fundamental failure to consider the payment schedule "together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule", as required respectively by s 22(2)(d).

123 For the reasons set out above in respect of the failure to have regard to the provisions of the contract, I would hold that this failure to have regard to the payment schedule was a failure to consider, at all, a submission which the adjudicator was required to consider, and not a mere error in consideration of the submission. On this basis too, the adjudication determination is void.

Denial of procedural fairness

124 Mr Kalyk's third ground of complaint is that Holmwood was denied natural justice (or procedural fairness), by reason of (1) the omission from the payment claim, but inclusion in the adjudication submission, of the highlighted drawings, which were said to be part of the payment claim but had not accompanied it, with the supposed consequence that the payment claim was incomplete and therefore invalid; and (2) by determining the value of the works based upon findings of credit in respect of which no submission had been made and which Holmwood was not otherwise afforded an opportunity to address.

125 A denial of natural justice, to the extent that natural justice was to be afforded as contemplated by the procedure set up by the Act, would invalidate 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*.

126 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 receipt and consideration of the submissions referred to in the Act [***Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd*** [2005] NSWSC 326, Macready AsJ]. Thus a denial of natural justice (or procedural fairness) 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.

127 In ***TQM Design and Construct Pty Ltd v Dasein Constructions Pty Ltd*** [2004] NSWSC 1216, McDougall J found a "significant denial of natural justice" where first, an adjudicator was given material (including both evidence and submissions) both the fact and the content of which were withheld from TQM, and at least some of which was found by the adjudicator to be of extreme significance, and secondly, the adjudicator did not consider TQM's adjudication response.

128 The first supposed denial of natural justice asserted by Halkat is that the payment claim is said to have been incomplete, in that the "highlighted drawings" referred to in the payment claim were not in fact attached to the claim as served. So much appears to be common ground. Halkat says that this was not cured by the provision of those highlighted drawings with the adjudication application.

129 While I accept that, as a respondent to a payment claim is not able in its adjudication response to go beyond the matters raised in its payment schedule, so an adjudication application may not include materials which go outside, in the sense of falling outside the ambit or scope of the materials provided in the payment claim [***John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd*** [2004] NSWSC 258], neither this principle, nor the provisions of the Act - which plainly envisage that an "adjudication application" may contain such submissions relevant to the application as the claimant chooses to include [s 17(3)(h)] – have the consequence that no material which was not included in the payment claim can be included in the adjudication application. The test is whether the additional material is or is not within the scope or ambit of the payment claim. If it is, then evidentiary and argumentative material to support it can be included in the adjudication application.

130 Here, the payment claim identified the extent of works said to have been performed by a percentage, and their asserted value. The highlighted drawings were said to evidence the work completed and how the percentages were derived. Such material does not expand the scope or ambit of the claim, but is entirely within its scope. It supports, by evidence and/or argument, the matters alleged in the claim.

131 The absence of the highlighted drawings at the payment claim stage did not deprive Holmwood of the opportunity of disputing that the claimed percentage of work had been done. In distinction from the "timesheets" referred to in ***John Holland v Cardno***, at least reference was made in the payment claim to the drawings. The absence of the drawings did not deprive Holmwood of the ability to argue that lesser percentages than those claimed by Halkat had in fact been completed. Indeed, Holmwood did, in its payment schedule, dispute the percentages claimed. In due course, once the adjudication application was made and served, Holmwood received the highlighted drawings.

132 Holmwood has submitted that it was prejudiced in the preparation of its response, and in particular the reports on which it relied, by the unavailability of the highlighted drawings. However, at least once they were provided in the adjudication application, it had an opportunity to respond to them. In any event, being on notice, from the payment claim, of what Halkat asserted as to the percentage of work complete, though not of the precise material to be used to support it, Halkat was in a position to adduce its own evidence and make its own submissions as to the percentage of work which had been completed, if it wished to do so.

133 In my opinion, therefore, no denial of procedural fairness was involved in the omission from the payment claim of the highlighted drawings, and their omission did not make the payment claim "incomplete" in any legal sense.

134 The second supposed denial of procedural fairness is the adjudicator's determination of the competing assessments of the value of the completed work by reference to what Mr Kalyk characterises as "credit".

135 If an adjudicator proposes to make a determination on a basis for which neither party has contended and which has not been addressed, then natural justice requires that the adjudicator give the parties notice of what he or she is contemplating, so that they may put submissions on it, and where an adjudicator does not do so, there is a breach of the requirements of procedural fairness [***Musico***, [107]-[108]; ***John Holland v Cardno***, [13]].

136 Here, the adjudicator was faced with two competing assessments of the completed work. It was inevitable that he was going to adopt one or other of them, or perhaps find somewhere between them. While the content of the rules of natural justice extends to requiring that notice be given of a basis for determination of the case outside the scope of the dispute as defined and described by the parties and the pleadings (or equivalent), it does not in my opinion extend to requiring that notice be given that one party's assessment might be preferred

to another's. The issue as to which assessment might prevail was, and ordinarily will be, well and truly "on the table". While, as I have already concluded, the basis upon which the adjudicator reached resolved that issue was inappropriate, he did not in doing so go outside the scope of the dispute as defined and described in such a manner as to require notice of his intention to do so to be specifically given.

137 I therefore reject so much of Holmwood's case as relies upon denial of procedural fairness.

Conclusion

138 There was no denial of procedural fairness: Holmwood had ample opportunity to respond to the "highlighted drawings" after they were provided with the adjudication application, and they were within and did not extend the ambit or scope of the payment claim; and the adjudicator's decision to prefer the Halkat assessment to the Holmwood assessment of the extent and value of works completed was sufficiently within the scope of the dispute described by the payment claim and payment schedule, against the adjudication application and response, as not to require further notification by the adjudicator to the parties.

139 However, the amount of the adjudicator's ultimate determination made no provision for retention and required repayment of earlier retentions. The adjudicator did not consider, at all, the provisions of the construction contract in this respect, and thereby failed to consider provisions which he was required to consider. A failure by an adjudicator to have regard at all to a provision of the construction contract which is relevant to the adjudication under consideration (as distinct from an error in considering such a provision) is jurisdictional error, resulting in invalidity of the determination. Accordingly, the determination is invalid.

140 Moreover, in adopting Halkat's assessment because Holmwood had made some unmeritorious but unrelated submissions, without embarking on any course (such as convening a conference or conducting an inspection) which might have illuminated the issue, and thereby failing to address the issues raised by the payment schedule as to the quantum of work completed and its value, the adjudicator's determination was capricious and did not amount to a genuine and conscientious attempt to perform the adjudicator's function. Accordingly, the ultimate determination was not the result of a good faith attempt by the adjudicator to perform his function, and is void. Alternatively, it is void by reason of the adjudicator having failed to have regard, at all, to one of the main submissions made by Holmwood in its payment schedule, adjudication response and supporting submissions.

Orders

141 I make the following orders:-

1. Declare that the determination of the second defendant given on 7 July 2005 is void.
2. Order that the first defendant be permanently restrained from by itself, its servants, or agents taking any step to procure an adjudication certificate in respect of the adjudication, or to register any such adjudication certificate as a judgment of any court, or otherwise from acting upon any such certificate.
3. Order that the bank guarantee provided by the plaintiff to the Registrar be released to the plaintiff.
4. Order that the first defendant pay the plaintiff's costs.

F G Kalyk (plaintiff) instructed by KQ Lawyers (plaintiff)
T J Davie (first defendant) instructed by Nicholas G Pappas & Co (first defendant) :