JUDGMENT : GZELL J : Supreme Court of New South Wales, Equity Division, T&C List. 17th November 2006.

Introduction

1 The plaintiff, John Holland Pty Ltd, challenges the adjudication determination made by the second defendant, Sean O'Sullivan, under the *Building and Construction Industry Security of Payment Act* 1999. John Holland seeks a declaration that the adjudication determination is void. Mr O'Sullivan has entered a submitting appearance.

2 John Holland entered into a contract with the first defendant, Roads and Traffic Authority of New South Wales, to construct a dual carriageway and associated bridges in Kiama.

3 Because practical completion was more than 52 weeks from the tender acceptance date, payments to John Holland were, *prima facie*, to be adjusted in accordance with a rise and fall provision. Clause 3.1.3 of the contract was, so far as is material, in the following terms:

"If the time stated in the Annexure for Practical Completion of the Works is more than 52 weeks from the Tender Acceptance Date, each payment under sub-clause 42.1 shall be adjusted in accordance with this sub-clause 3.1.3.

The method of adjustment is as follows…"

4 John Holland served a payment claim for in access of $17 million. It included a claim for cost adjustment of $1,833,308.28. RTA served a payment schedule of nil. John Holland lodged an adjudication application. It claims that Mr O'Sullivan failed to give any consideration in his adjudication determination to part of John Holland's adjudication application, that part being concerned with cost adjustment.

5 John Holland's adjudication application was 94 pages long and, with annexures, was contained in two lever arch files. It sought payment of $4,824,163.64. RTA's adjudication response was 84 pages long and, with annexures, was contained in one lever arch file.

6 John Holland's claim for cost adjustment in its adjudication application was reduced from the amount claimed in its payment claim to $1,163,549.63. It was derived by applying an index to amounts claimed under three headings: item 1, the amount for a latent condition; item 2, the amount for two elements of a variation; and item 3, the amounts determined under the adjudication.

7 John Holland claims that Mr O'Sullivan failed to pay any regard to its submissions with respect to item 1 and item 2

The adjudication application

8 At the beginning of the adjudication application, John Holland provided a summary of five issues. Of the fourth issue, entitlement to payment of the contract's cost adjustment on amounts determined by an adjudicator, John Holland stated: *"Clause 3.1.3 of the RTA's Conditions of Contract (copy at Attachment C) states that each payment "shall" be subject to Cost Adjustment, using the formula which is contained in RTA's Conditions of Contract."*

9 The adjudication application went on to state that RTA had refused to pay cost adjustment and identified the three items mentioned above, the amount of each item, and applied an index to arrive at the figure of $1,163,549.63.

10 The *Building and Construction Industry Security of Payment Act* 1999, s 20(2B) provided that a respondent could not include in an adjudication response any reasons for withholding payment unless those reasons had already been included in the payment schedule provided to the claimant. The summary of the fourth issue continued: *"Furthermore, in the Payment Schedule the RTA have provided no reason why the Contract's Costs Adjustment provision is not applicable/due for such items.*

Since no reason for withholding payment of Cost Adjustment on such items was provided by the RTA in the payment schedule (the RTA's payment schedule deals only with which Cost Adjustment indices are to be adopted) then, pursuant to Section 20(2B) of the Act, the RTA is precluded from putting forward any reason in its adjudication response and therefore this item falls to be adjudicated in favour of John Holland."

11 John Holland thus summarised its claim to cost adjustment on the basis that the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B) precluded RTA from raising any argument in its adjudication response against John Holland's entitlement to a cost adjustment under cl 3.1.3 of the contract.

12 John Holland returned to this theme in Pt 6.3 of the adjudication application. It set out the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B), referred to the RTA's payment schedule which was attached to the adjudication application, submitted that the payment schedule provided the extent of RTA's permissible reasons for withholding payment, and submitted that the adjudicator ought to disregard any new reasons not stated in the payment schedule that might be put forward in RTA's adjudication response.

13 Not all variations were subject to cost adjustment. Clause 3.1.8 of the contract provided:
"Payments made to the Contractor for the following items will not be adjusted at all:-
(a) extra works ordered by the Superintendent under clause 40 to be executed by the Contractor at a price or prices agreed between the Superintendent and the Contractor unless the agreement expressly provides for cost adjustment;
(b) extra work ordered by the Superintendent under clause 40 and carried out as Daywork in accordance with clause 40 unless expressly determined by the Superintendent;
(c) items paid for as provisional sums in accordance with the Contract; and
(d) items subject to a separate cost adjustment under sub-clause 3.1.9."

14 Clause 3.1.9 provided for adjustments for variations in the cost of bitumen supplied by John Holland.

15 The fourth issue of the adjudication application was set out in Pt 11. Reference was again made to cl 3.1.3 in attachment C and its first paragraph was set out, followed by:

"The remainder of clause 3.1.3 then sets out the method of calculating the amount of Cost Adjustment. Previous payments are deducted from the total amount stated in the payment schedule (or which should have been confirmed in the payment schedule) and also deducted are those amounts that are not subject to Cost Adjustment (as stated at clause 3.1.8). Those are only:-

a) Extra works ordered by the Contractor at a price agreed between the Superintendent and the Contractor. One presumes that this affords the Contractor and the RTA the opportunity of incorporating an allowance for Cost Adjustment within the agreed price. This has not occurred in regards to any of the above items which have had to be decided by adjudication rather than agreement.

b) Works carried out as daywork. None of the above work has been carried out as daywork.

c) Items paid for as provisional sums. Not applicable for any of the above items.

d) Items subject Cost Adjustment for the supply of bitumen. Not applicable for any of the above items.

Work included in each payment, conforming to all other criteria not stated in items a) to d) above must be subject to Cost Adjustment."

16 Reference was then made to the fact that practical completion was 104 weeks from the tender acceptance date. The submission went on: *"However, despite the clear and express requirement of clause 3.1.3, there are certain items for which the RTA has failed to include Cost Adjustment in its Payment Schedule.*

On page 4 of the Payment Schedule, the RTA has identified that there is a shortfall of $1,833,308.28 between the Cost Adjustment amount calculated by John Holland, versus that calculated by the RTA. The RTA has stated that such a deficit arises out of the differences between certain amounts claimed and valued by the RTA, plus a difference in the indices used by each party.

However, the RTA has failed to specifically state in its Payment Schedule that there are certain other items for which, although scheduled for payment by the RTA, the RTA have failed to include Cost Adjustment (even though Cost Adjustment has been claimed by John Holland)."

17 The submission referred to the *Building and Construction Industry Security of Payment Act* 1999, s 14(3) and s 20(2B) and continued: *"Furthermore, such reasons put forward in the payment schedule must be specific reasons in regards to an item for which the respondent intends to withhold payment: Not a blanket statement which the respondent may subsequently seek to use as a cover to allow the respondent to slip-into the adjudication response, new reasons to overcome any perceived failings or insufficiencies of its Payment Schedule. The claimant must be provided an opportunity of knowing, with a degree of certainty, the respondent's reasons for withholding payment.*

In this instance, no reason was provided by the RTA in the Payment Schedule to explain why payment of Cost Adjustment on certain items had been withheld."

18 Item 1, item 2 and item 3 above were then identified and the submission stated: *"Given that no reason had been included in the Payment Schedule, John Holland submits that this matter falls to be adjudicated in favour of John Holland."*

19 There followed a two page submission headed "*Item 1 – Cost Adjustment on the Latent Condition Amount.*"

20 John Holland referred to an adjudication determination to the effect that conditions encountered were latent conditions and John Holland was entitled to give notice and was entitled to a variation for the latent condition in an amount determined by the adjudicator. It was submitted that reference to an earlier payment claim confirmed that the amount of the latent condition entitlement was subject to cost adjustment and that cost adjustment had been claimed in the payment claim. It was pointed out that in the payment schedule RTA had put "(CA)" against items it admitted were subject to cost adjustment but had not put "(CA)" against this item and had thereby failed to include any cost adjustment on the amount in question.

21 The submission went on to state: *"Furthermore, The RTA did not provide any reason for withholding payment of the Cost Adjustment due for that $1,818,119.95. Section 20(2B) of the Act forbids the RTA from now advancing, as part of the RTA's adjudication response, any "**reason**" for its action.*

Accordingly, John Holland submits that, in relation to this matter, the determination ought to be in favour of the amount of John Holland's Payment Claim."

22 There followed a similar submission with respect to "*Item 2 – CA on The Valuation of RTA's Instructions Affecting Excavation of Cut 4.*"

23 Reference was made to an adjudication application issued by John Holland in an amount just under $8 million whereas the RTA had scheduled payment of only approximately $1.8 million. An adjudication determination in John Holland's favour entitled it to a further $4.8 million approximately. Again, reference was made to a payment claim and it was said that it confirmed that the amount for the valuation of RTA's instructions affecting excavation of Cut 4 was subject to cost adjustment and that cost adjustment had been claimed by John Holland. Reference was made to the current payment schedule in which RTA had not put "(CA)" against the item and it was pointed out that the RTA had not applied the cost adjustment to the further amount of approximately $4.8 million.

24 The submission with respect to item 2 concluded with the two paragraphs set out above that concluded the submission with respect to item 1, the only difference being change in quantum.

The adjudication determination

25 In dealing with cost adjustment, Mr O'Sullivan dealt first with the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B) point. He said he was satisfied that the RTA had provided adequate reasons to allow John Holland to understand the basis for the withholding of the disputed amount of $1,833,308.28 for which John Holland was seeking the reduced amount of $1,163,549.63.

26 Mr O'Sullivan went on to indicate that he had to be satisfied that there was a contractual entitlement to any amount claimed, so that it was not sufficient to ground an entitlement simply upon a respondent's failure to provide a reason in a payment schedule.

27 In respect of the entitlement to cost adjustment on the three items identified by John Holland, Mr O'Sullivan noted that the relevant contractual provision was cl 3.1.3 which had been reproduced by both parties.

28 Mr O'Sullivan then said of the submissions of RTA in respect of item 1 and item 2 which he identified as the latent condition claim and RTA instructions affecting the excavation of Cut 4, that the RTA submissions were primarily that there was no entitlement to cost adjustment in circumstances where the items were variations which fell within the operation of cl 3.1.8. He recorded that the RTA asserted that item 1 and item 2 were variations within the meaning of this clause and therefore did not attract cost adjustment.

29 Mr O'Sullivan determined that John Holland was not entitled to a progress payment. Indeed he determined that John Holland had been overpaid by $1,194,583.96.

30 Having identified the RTA's position with respect to item 1 and item 2, Mr O'Sullivan turned his attention to item 3 and said that this issue fell away due to his determination that there were no amounts on which cost adjustment might be levied.

31 Mr O'Sullivan then turned to John Holland's submissions with respect to item 1 and item 2. He said:

> "*In respect of the first 2 items, the Claimant has not made submissions in the adjudication application for Item 1 or 2 regarding its entitlement to cost adjustment for which may be captured by the operation of clause 3.1.8, primarily, I understand, because the Claimant is relying on the fact that the Respondent did not give detailed reasons in the payment schedule for its deductions and therefore is entitled (absent such detailed reasons) to payment.*"

32 John Holland submits that this passage indicates that Mr O'Sullivan failed to have any regard to the submissions on item 1 and item 2 in its adjudication application.

33 Mr O'Sullivan went on to decide the issue of the operation of cl 3.1.8 for himself. He said:

> "*However, pursuant to section 22(2) of the Act I am required to have regard to both the Act and Contract in determining the entitlement and the valuation of a progress payment to a Claimant.*
> *In this instance, in respect of the first 2 items:*
> *(a) the latent condition claim; and*
> *(b) the variation claim for Cut 4;*
> *I am satisfied that these are both variations for the purposes of the Contract and therefore do not attract cost adjustment under the Contract (absent agreement). In this respect I agree with the submissions of Respondent.*"

34 As a whole, the adjudication determination of some 37 pages evidences a careful appraisal of the issues raised by the parties.

Legal principles

35 In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at [53] Hodgson JA with whom the other members of the Court of Appeal agreed identified five, not necessarily exhaustive, basic and essential requirements – a construction contract to which the *Building and Construction Industry Security of Payment Act* 1999 applies, a payment claim, an adjudication application, reference to an eligible adjudicator, and determination in writing by the adjudicator.

36 At [55] his Honour said that excluding judicial review on the basis of non-jurisdictional error justified the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements of legislation was essential to the existence of a determination:

> "*What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf* ***R v Hickman; Ex parte Fox and Clinton*** *(1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*"

37 The *Building and Construction Industry Security of Payment Act* 1999, s 22(2) requires an adjudicator to consider, and to consider only, the provisions of the Act, the provisions of the construction contract, the payment claim together with all submissions in support of the claim, the payment schedule together with all submissions in support of the schedule, and the results of any inspection.

38 In ***The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 Hodgson JA again spoke for the Court of Appeal. With respect to the details requirements of the *Building and Construction Industry Security of Payment Act* 1999, s 22(2), his Honour said at [49]:

"*In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error on these matters does not render the determination invalid.* "

39 Palmer J put it this way in ***Brookhollow Pty Ltd v R&R Consultants Pty Ltd*** [2006] NSWSC 1 at [57]:

"*Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.*"

40 In ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385 at [75], Basten JA questioned whether the reliance upon ***Hickman*** in ***Broydn*** with respect to the bona fide attempt to exercise power element was arguably misplaced.

41 An analysis of the authorities on the role of good faith as a minimum criterion of validity in the exercise of powers is to be found in the judgment of Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** (2006) 22 BCL 285 at [66] – [109].

42 I was invited by John Holland to deal with the matter on the basis of a denial of natural justice. It was suggested that this approach was sufficient to dispose of the matter and it was unnecessary to consider the bona fide exercise of power.

43 McDougall J pointed out in ***John Goss Projects v Leighton Contractors*** [2006] NSWSC 798 at [57], by reference to ***Holmwood,*** that the content of the concept of good faith is unsettled and it is preferable to deal with most applications on the basis of a denial of natural justice:

"*The content of the concept of good faith (in the* ***Brodyn*** *sense, if I may call it that) is unsettled – see the judgment of Brereton J in* ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** *[2005] NSWSC 1129 at paras [63] and following. There is possibility for that concept to overlap with the reference to* ***"good faith"*** *in s 30(1). In those circumstances, I think that courts should be slow to decide applications on the basis of a lack of "Brodyn" good faith unless it is necessary to do so. In many cases, it will be possible to decide the application on the basis of denial of natural justice; and if this is so, then that should be sufficient.*"

44 I adopt that course.

Denial of natural justice

45 The *Building and Construction Industry Security of Payment Act* 1999, s 17(2) provides that an adjudication application based upon a respondent's failure to provide a payment schedule cannot be made unless the claimant notifies the respondent of its intention to apply for adjudication and the respondent has been given an opportunity to provide a payment schedule. Section 20 enables a respondent to lodge an adjudication response to an adjudication application. Section 21(1) prevents an adjudicator from determining an adjudication application until after the end of the period within which a respondent may lodge an adjudication response. Section 22(2)(d) provides that one of the only matters to be taken into account in determining an adjudication application is a payment schedule to which the application relates together with all submissions made by the respondent in support of the schedule.

46 In *Broydn* at [57] Hodgson JA pointed to these provisions and said that the circumstance that the legislation required notice to the respondent and an opportunity to the respondent to make submissions confirmed that natural justice is to be afforded to the extent contemplated by those provisions.

47 The *Building and Construction Industry Security of Payment Act* 1999, s 21(4)(a) enables an adjudicator to request further written submissions from either party, in which event the other party must be given an opportunity to comment on the submissions. In ***Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd*** [2005] NSWSC 1152 at [13], Barrett J pointed to this provision and said it must follow that any such further submissions, and any comments thereon by the other party, are among the matters to be considered in conformity with s 22(2) and they must also delineate the measure of natural justice that the Act requires be given.

48 There is no specific requirement in the *Building and Construction Industry Security of Payment Act* 1999 that the adjudicator must consider an adjudication application which, in terms of s 17(3)(h), may contain such submissions

relevant to the application as the claimant chooses to include. Nor is there a specific requirement that the adjudicator consider an adjudication response which, in terms of s 20(2)(c), may contain such submissions relevant to the response as the respondent chooses to include. Leaving to one side any question of limitation of these submissions because of the limitation to the only matters an adjudicator may consider under s 22(2), an adjudicator's obligation to determine an adjudication application under s 21(3) must mean that submissions in an adjudication application and an adjudication response are among the matters to be considered by an adjudicator and they, too, delineate the measure of natural justice that the Act requires be given.

49 It is to an alleged failure to have regard to John Holland's submissions with respect to cl 3.1.8 in its adjudication application that John Holland claims a denial of natural justice.

Authorities relied upon

50 Factual decisions said to be similar to the instant circumstances were urged upon me. The rule of precedent is not so based. It requires a court loyally to follow any deliberate decision of a superior court on a question of law (***Broome v Cassell & Co Ltd*** [1972] AC 1027 at 1054, 1131; ***Proctor v Jetway Aviation Pty Ltd*** [1984] 1 NSWLR 166 at 177-180).

51 In any event, the factual decisions relied upon were clearly different from this case. Those upon which greater reliance was placed, I discuss below.

52 In ***Timwin Constructions Pty Ltd v Façade Innovations Pty Ltd*** (2005) 21 BCL 383, McDougall J decided that a determination was void as a result of the adjudicator's failure to act in good faith. But he also said that the adjudicator had denied natural justice. But that was a case very different from the present. At [37] his Honour said that in so far as one could gather from reading the determination, the adjudicator appeared not have read the submissions at all.

53 In similar vein was John Holland's reliance upon ***Reiby Street Apartments v Winterton Constructions*** [2006] NSWSC 375. Because of the view the adjudicator took of the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B), he made a cursory examination only of the adjudication response and concluded that it should be "quarantined" as offending that provision. His statement that the superintendent's site instructions were not provided by the parties was inaccurate because they were included in the adjudication response. White J concluded that the determination was void on the basis that the adjudicator did not consider at all, as he was required to do under the *Building and Construction Industry Security of Payment Act* 1999, s 22(2)(d), the adjudication response. He misconceived the jurisdiction he had to determine the payment claim. His Honour concluded at [75] that the adjudicator's error meant that natural justice had not been afforded to the principal. Again, that is a situation vastly different from the instant circumstances.

54 ***Holmwood*** was also a vastly different case from the instant circumstances. There the adjudicator rejected two unmeritorious arguments as to jurisdiction and simply adopted the other party's valuation.

Resolution of the issue

55 John Holland submitted that it was not correct to state, as RTA had in its written submissions, that the overwhelming thrust of John Holland's submissions to the adjudicator related to the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B). John Holland submitted that this was the secondary and distinct submission unrelated to the applicability of cl 3.1.3 and cl 3.1.8. It submitted that the main argument relied upon by John Holland related to its entitlement under cl 3.1.3 and why cl 3.1.8 did not apply.

56 I do not agree with these submissions. The only reference to the inapplicability of cl 3.1.8 was as set out above and in the context of major emphasis on the failure of RTA to specify any reason for its failure to include cost adjustment and the invocation of the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B).

57 In neither of the submissions with respect to item 1 and item 2 was any argument raised that cl 3.1.8 did not apply. Both submissions again invoked the operation of the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B).

58 The way in which the inapplicability of cl 3.1.8 was addressed in a setting concentrating upon the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B) could lead an adjudicator, even on a careful reading of the adjudication application, to form the view that John Holland's entire argument was limited to the protection of that provision.

59 Not only could Mr O'Sullivan be excused for not dealing specifically with what John Holland had said about cl 3.1.8 in the context of apparent incidental mention in a submission directed to the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B), but also Mr O'Sullivan decided for himself the very issue about which John Holland complains.

60 Mr O'Sullivan understood John Holland's contention in terms of the *Building and Construction Industry Security of Payment Act* 1999, s 20(2B) because he said he understood John Holland was relying on the fact that RTA did not give detailed reasons in the payment schedule for its deductions and John Holland was therefore entitled to payment. To obtain that understanding, Mr O'Sullivan must have read John Holland's submissions.

61 Mr O'Sullivan said that both parties had set out cl 3.1.3. It was set out in the adjudication application on the very page on which the cl 3.1.8 argument was stated.

62 Furthermore, Mr O'Sullivan referred to the page numbers in which those submissions were contained.

63 It has been said that an adjudicator's statement that he or she has considered all the submissions and accompanying documents is unhelpful (***Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd*** [2006] NSWSC 94 at [27]). And that will generally be the case. What an adjudicator considers must be determined on consideration of the determination as a whole.

64 But in this case, the assertion is that Mr O'Sullivan failed to consider John Holland's submission on the inapplicability of cl 3.1.8 which was raised by John Holland in the very pages to which the adjudicator referred.

65 There is much to be said for the view that Mr O'Sullivan did not fail to have regard to John Holland's submissions with respect to cl 3.1.8. He was aware of the terms of cl 3.1.3 and must have also been aware of the terms of cl 3.1.8 because he considered the application of that provision and agreed with the RTA submission that it applied to the variations in question.

66 Furthermore, even at the highest for John Holland, it has failed, in my view, to demonstrate jurisdictional error. At its highest for John Holland, Mr O'Sullivan misunderstood that John Holland raised a secondary argument that cl 3.1.8 did not apply to the variations in question in item 1 and item 2. But that does not constitute a denial of natural justice in terms of *Broydn*. The submissions of John Holland were considered and, taking it at its highest to John Holland, a misapprehension as to one element arose.

67 That does not constitute a failure to comply with the obligation to consider an adjudication application under the *Building and Construction Industry Security of Payment Act* 1999, s 21(3). Nor does it constitute a denial of that level of natural justice that the statute requires. And for similar reasons it does not constitute a lack of good faith in terms of *Broydn*.

Conclusion

68 John Holland has failed to establish that Mr O'Sullivan failed to extend natural justice to it and Mr O'Sullivan's determination is void for that reason. Its failure in this regard is also sufficient for the conclusion that there was no failure of the exercise of power in good faith. And it has not established a breach of an essential requirement for a valid determination under the *Building and Construction Industry Security of Payment Act* 1999. In terms of *Brodyn,* the three elements for a proper adjudicator's determination are present in Mr O'Sullivan's determination.

69 RTA argued that it had not been shown that Mr O'Sullivan failed to consider any of John Holland's submissions, that the determination was not, in any event, void in terms of *Broydn*, and that the relief sought by John Holland should, in any event, be refused as a matter of discretion.

70 It is unnecessary for me to deal further with these matters and it is appropriate that I do not.

71 John Holland's amended summons is dismissed and it is ordered to pay the defendants' costs.

Mr M Christie/ Ms V Culkoff – Plaintiff instructed by Andrew McKeracher
Mr R Darke SC/ Mr R Scruby - 1st Defendant instructed by Clayton Utz
Submitting appearance - 2nd Defendant