JUDGMENT : McDougall J : New South Wales Supreme Court : 18th February 2004.

1 The plaintiff and the first defendant are parties to a construction contract as that term is defined by the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"). The first defendant claimed to be entitled to a progress payment from the plaintiff under that contract and accordingly served on the plaintiff a payment claim in accordance with s 13. The plaintiff disputed the first defendant's entitlement and accordingly served a payment schedule under s 14. The first defendant thereupon referred the matter to adjudication in accordance with the provisions of s 17 and the matter was referred to the second defendant accordingly. On 7 January 2004 the second defendant notified the plaintiff and the first defendant of his acceptance of the adjudication application that had been made. It followed, among other things, that by operation of s 21(3)(a) in the events that have happened, the second defendant was required to determine the adjudication application within ten days of 7 January 2004. It was put in submissions, and I think is correct, that therefore, the last day for determination was 21 January 2004.

2 However, the second defendant did not determine the application until 27 January 2004 when, his fees having been paid, he made available to the parties his determination. The determination bears date 25 January 2004. The plaintiff uplifted the determination from the second defendant on 28 January 2004. I should note that the second defendant swore an affidavit stating that, in effect, he mistakenly calculated the relevant time limit as expiring on 27, rather than 21, January 2004. This evidence was not challenged.

3 The second defendant determined an adjudicated amount of $96,560.93 in addition to an amount that had already been paid (the details of payment are irrelevant) of $29,154.37. He determined further that the plaintiff was liable for $8,250 of the total costs of the adjudication and that the first defendant was liable for $2,750. It appears that each party had already paid $3,000 on account.

4 The plaintiff took the view that the adjudication determination was invalid because it was made outside the time limit prescribed by s 21(3)(a). Accordingly, on 28 January 2004, it obtained an order from this Court ex parte restraining the first defendant up to 2 February 2004 from, in substance, seeking to enforce the determination. The substance of that relief has been continued up until and including today.

5 When the proceedings came on for hearing before me, I indicated my view that if the matter were purely one of the effect of a determination given out of time, then it would be appropriate to proceed to a final hearing. The plaintiff and the first defendant agreed to that, although I should note that the first defendant maintained an alternative argument of waiver and that in support of that argument there was brief cross-examination of Mr Matthew Carolan, the sole director of the plaintiff, whose affidavit of 28 January 2004 formed the plaintiff's evidence in these proceedings.

6 The question that is raised is whether the prescription of ten business days in s 21(3)(a) goes to the jurisdiction of an adjudicator or whether a determination handed down beyond the ten business day period can nonetheless be effective. The Act contains no express provision which assists in the resolution of this question.

7 The background to the Act and its objects and the means by which they are to be achieved have been referred to in at least two prior decisions of this Court, namely, the decision of Bergin J in ***Paynter Dixon Constructions Pty Limited v J & C T Pty Limited*** [2003] NSWSC 869 and in my own decision in ***Musico v Davenport*** [2003] NSWSC 977. I shall not repeat what her Honour and what I said, but I will set out s 3 of the Act that sets out its objects and the means by which those objects are to be ensured.

8 Section 3 sets out the object of the Act. It provides as follows:

> ***"3 Object of Act***
>
> *(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
>
> *(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
>
> *(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
>
> *(a) the making of a payment claim by the person claiming payment, and*
>
> *(b) the provision of a payment schedule by the person by whom the payment is payable, and*
>
> *(c) the referral of any disputed claim to an adjudicator for determination, and*
>
> *(d) the payment of the progress payment so determined.*
>
> *(4) It is intended that this Act does not limit:*
>
> *(a) any other entitlement that a claimant may have under a construction contract,*
>
> *or*
>
> *(b) any other remedy that a claimant may have for recovering any such other entitlement."*

9 In considering the question there are at least two other provisions of the Act that in my view assist in its resolution. The first of those is s 26 which reads as follows:

> ***"26 Claimant may make new application in certain circumstances***
>
> *(1) This section applies if:*

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).

(2) In either of these circumstances, the claimant:

(a) may withdraw the application, by notice in writing served on the adjudicator or authorized nominating authority to whom the application was made, and

(b) may make a new adjudication application under section 17.

(3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17."

10 The second is s 29 which deals with the question of adjudicator's fees. Subsection (4) provides as follows:

"*(4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3).*"

11 It was not suggested that there was any regulation relevant to the non-application of s 29(4) (cf s 29(5)(b)).

12 Mr Dowdy of Counsel, who appeared for the first defendant, submitted that the principles of construction that are relevant to the disposition of this case were stated by the High Court of Australia in *Project* ***Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355. In that case the majority (McHugh, Gummow, Kirby and Hayne JJ) said at 392 [97]: *"Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act. Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s 160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA."* (Footnotes omitted.)

13 Their Honours had earlier posed the relevant questions of principle as follows at 388-390 [91-93]: *"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various facts that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.*

Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. In ***Pearse v Morrice****, Taunton J said* ***'a clause is directory where the provisions contain mere matter of direction and nothing more'****. In* ***R v Loxdale,*** *Lord Mansfield CJ said* ***'[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory'****. As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been 'substantial compliance' with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorizing the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in* ***Hunter Resources Ltd v Melville*** *when discussing the statutory provision in that case:* ***'substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not.'***

In our opinion, the Court of Appeal of New South Wales was correct in ***Tasker v Fullwood*** *in criticizing the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue*

of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'." (Footnotes omitted.)

14 What their Honours said may be compared with what Brennan CJ said at 373-374 [37-39]: *"A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power – that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs. In one case, power is available for exercise by the repository but the power available is no wider than the direction as to the manner of its exercise permits; in the other case, no power is available for exercise by the repository unless the condition is satisfied. A provision which prescribes such a condition has traditionally been described as mandatory because non-compliance is attended with invalidity. A purported exercise of a power when a condition has not been satisfied is not a valid exercise of the power.*

A third kind of provision must be distinguished from provisions which restrict the ambit of the power and provisions which prescribe conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power: the provision does not condition the existence of the power. Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done or not done within the prescribed period. The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory.

The terms of the statute show whether a provision governs the manner of exercise of a general power, or is a condition on a power, or merely directs the doing or refraining from doing an act before a power is exercised. The distinction between conditions on a power and provisions which are not conditions on a power is sometimes difficult to draw, especially if the provision makes substantial compliance with its terms a condition. Then an insubstantial non-compliance with the same provision seems to give the provision a directory quality, although in truth such a provision would have a dual application: substantial non-compliance is a condition; insubstantial non-compliance is not." (Footnotes omitted.)

15 Although his Honour was in dissent as to the resolution in that case, I think, with respect, that his statement of principle is entirely consistent with what the majority said and provides valuable guidance as to the approach I should take in resolving this case.

16 Mr Dowdy also referred to the decision of the Court of Appeal in this Court in ***Tasker v Fullwood*** (1978) 1 NSWLR 21 and in particular to what their Honours said at 23. What their Honours said was cited with approval in the majority in ***Project Blue Sky*** and I do not think it needs to be repeated in these reasons.

17 In accordance with what the majority said in ***Project Blue Sky*** at 397 [97], I start from the proposition that it is unlikely in this case that the legislature intended that an act done in breach of the time limit set out s 21(3)(a) would be invalid. I say that because the consequences of invalidity seem to me to be susceptible of undermining the purpose of the legislation both as set out in s 3 and as expanded upon by the Minister in the Second Reading Speech to which Bergin J referred in ***Paynter Dixon*** and to which I referred in *Musico*. That is to my view confirmed because where a determination is not made within the relevant time limit, the only relief that a claimant seems to have under the Act is that for which s 26 applies, namely, to withdraw the application and make a new application. However, by s 26(3) that course may only be taken within five business days after the claimant becomes entitled to withdraw the previous adjudication application. Relevantly for present purposes, that means that the application must have been withdrawn within five days of the expiry of the s 21(3) time period. It would be, to put it mildly, anomalous if the effect of non-compliance with the time period allowed by s 21(3) were to render any subsequent adjudication a nullity, but if because of non-compliance of s 26(3) the claimants were unable to seek adjudication of the dispute. That would not seem to me an outcome consistent with the evident objects of the legislation and, therefore, something to be avoided unless no other view is available.

18 Section 26 is in my opinion relevant for another reason. As subsection (1) provides, it applies relevantly if an adjudicator accepts an adjudication application but fails to determine the application within the time allowed by s 21(3). Subsection (2) applies in that circumstance: the claimant "may withdraw the application". If the effect of non-compliance with the s 21(3) time limit were to render it no longer possible for the adjudicator to proceed to determination, or to render any purported determination a nullity then it must be the case that, effectively, the adjudicator becomes functus officio upon the expiry of the relevant time limit under s 21(3). If that were the case then there would be nothing to withdraw. The application would come to an end as a consequence of the presumed operation of s 21(3).

19 Section 29(4) is also significant in this context. It disentitles the adjudicator to payment of his fees if he does not comply with the provisions of s 21(3). It says nothing about the validity of any determination or purported determination issued outside the time limit.

20 The position, therefore, is that in two places the Act makes provision for what can or may happen if the time limits in s 21(3) are not complied with. It does not make provision in terms of that for which the plaintiff contends in

these proceedings. That is to say it does not in terms go beyond s 26 and s 29 and provide in addition that a determination made outside the time limit for which s 21(3) provides is a nullity.

21 Those considerations suggest to me very strongly that as a matter of construction s 21(3) should not be construed as imposing, to adopt the language of the majority in ***Project Blue Sky*** at 389 [92], *"an essential preliminary to the exercise of a statutory power or authority"*. I interpose to say that in this case, if it were thought to be open to question, I regard my decision in ***Musico*** as establishing, sufficiently for present purposes, that an adjudicator under the Act exercises a statutory power or authority. It was for that reason I held that relief in the nature of prerogative relief would lie in an appropriate case. In this case, I think, the considerations to which I have referred are better described (and again I borrow the language of the majority in ***Project Blue Sky***) as *"a procedural condition for the exercise of statutory power or authority"*.

22 The considerations that in substance support this view are those that I have already mentioned. Firstly, there is the statement of the object of the Act and the means by which that object is to be attained: s (3). Secondly, the Act provides in two specific ways for the consequences of non-compliance with the s 21(3) time limits. Thirdly, the Act does not provide specifically for the further consequence for which the plaintiff in these proceedings contends. In those circumstances, if one asks "whether it was the purpose of the legislation that an act done in the provision should be invalid" (see the majority in *Project Blue Sky* at 390 [93]), those matters to my mind would suggest that the answer should be "no". Indeed, I think, the contrary answer would not be consistent with the stated purposes of the legislation.

23 The decision in ***Project Blue Sky*** is in itself instructive. The relevant question concerned the construction of s 160 of the *Broadcasting Services Act* 1992 (Cth). That section, at least as it then stood, provided that the respondent, the ABA, "is to perform its functions in a manner consistent with" four stated things. In at least one respect it did not perform its functions in a manner consistent with those things. Nonetheless, the majority held that the contravention of s 160, that is to say the performance of a function that was not consistent with at least one of the four stated things, was not invalid. Although that construction clearly depended upon the wording of the section read in context and on an analysis of the purposes of the relevant legislation, it provides an interesting indication that a provision expressed in what in days gone by was called "mandatory" terms does not necessarily have the effect that non-compliance leads to invalidity.

24 For those reasons I conclude that the stated ground of challenge to the second defendant's determination, namely, that it was invalid because it was made outside the relevant time under s 21(3) of the Act, fails.

25 That, therefore, makes it unnecessary for me to consider the question of waiver. However, in case I am wrong in what I have just said, I will briefly indicate that I would not have found that the defence of waiver was made out. The first defendant relied upon the following matters:

(1) The plaintiff through its sole director Mr Matthew Carolan was aware of the basic provisions of the Act and, in particular, of the time limits within which an adjudication determination must be made.
(2) The plaintiff was aware that the second defendant had accepted the application on 7 January 2004 (it would follow from that, given Mr Carolan's state of knowledge, that the plaintiff through him must have been aware that the time limit of the ten business days started to run.)
(3) The plaintiff paid the second defendant's fees on 27 January 2004.
(4) The plaintiff uplifted the determination on 28 January 2004.

26 Mr Dowdy, relying on the decision of the High Court in ***Vakauta v Kelly*** (1989) 167 CLR 568, submitted that as at 27 January 2004, the plaintiff was put to an election to take the determination or not. He submitted that having taken the determination, the plaintiff had elected to accept it, in effect, for better or for worse.

27 However, as against this, it seems to me that the plaintiff was entitled to consider whether it needed to incur the expense of going to court. It could hardly be rational for the plaintiff, having become aware that the time limit had passed, to rush off to court to seek an injunction to restrain the handing down of the determination. One of the considerations to be considered would be whether the plaintiff had suffered, or was likely to suffer, sufficiently serious consequences so as to justify this Court in granting urgent injunctive relief. That question could not be answered - that is to say, the Court could not assess whether there was in fact a significant threat to the plaintiff's rights - unless the determination were available.

28 Further, the situation presently under consideration is significantly different from that considered by the Court in ***Vakauta.*** In that case a trial judge had made remarks that the Court held could convey to an impartial observer that he had prejudged the matter. The defendants were present in Court when these remarks were made but took no objection to them and did not ask the trial judge to disqualify himself. Having taken the judgment (which was, of course, adverse) and appealed, it sought to rely on what happened as undermining the judgment that had been given - that is to say, as an additional ground of appeal. The High Court held that it was not open to the defendant to take that course of action. However, their Honours' decision was informed by significant public policy considerations including, of course, that in the public interest any challenge on the ground of apprehended bias should be brought as soon as possible. (See, for example, the majority decision of Brennan, Deane and Gaudron JJ at 572; and compare the observations of Toohey J at 587-588.) It is significant to note, as Toohey J recognised at 587, that premature objection was equally offensive as an objection made too late.

29 In the present case, there is no equivalent public policy interest. Further, as the reasons of Toohey J indicate, and as I sought to make clear, an objection taken before the determination had been delivered might be thought to be premature.

30 Had it been necessary for me to decide the matter on the basis of waiver, I would have held that the plaintiff had not waived its right to complain of the lateness of the making of the determination.

31 There are two matters that should have been dealt with when these reasons were given ex tempore. They do not, individually or together, affect the view to which I came or the order that I made. The parties have agreed to them being included in the revised version of my reasons.

32 The first is that Mr Snelgrove, solicitor, who appeared for the plaintiff, referred me to the decision of Einstein J in ***Emag Constructions Pty Ltd v High Rise Concrete Contractors (Aust) Pty Limited*** [2003] NSWSC 903. Mr Snelgrove relied in particular on what his Honour said in para [36], that an adjudicator under the Act must adhere to strict time frames and, in any event, could not extend the times fixed by s 20 (which, I interpose, deals with the time within which the respondent to an adjudication application must deliver an adjudication response). I accept what his Honour said but, as indicated in argument, do not think that it bears on the resolution of the issues in this case.

33 The second is that Mr Dowdy referred me to the judgment of Lord Wheatley, in the Outer House of the Court of Session, in ***St Andrews Bay Development Limited v HBG Management Limited*** (P 370/03, 20 March 2003 unreported). It appears from his Lordship's reasons that a question arose as to whether the decision of an adjudicator under the relevant English and Scottish legislation, the *Housing Grants, Construction and Regeneration Act* 1996, was invalid if given out of time. In para [21], his Lordship, having referred to ***Ballast plc v The Burrell Co (Construction Management***) 2003 SLT 137, said: "*While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity*."

34 It appears that in ***Ballast,*** Lord Reid had said that the decision of an adjudicator would be binding "*notwithstanding his failure to comply with the express or implied requirements of the scheme, unless the decision is a nullity*". His Lordship further said that the decision would be a nullity if the adjudicator had acted ultra vires (including acting beyond jurisdiction, denial of natural justice or jurisdictional error of law).

35 There are substantial differences between the legislation considered by their Lordships and the legislation with which I am concerned: cf ***Musico*** at para [41]. As a result, whilst according every respect to decisions given under the English and Scottish legislation, care must be exercised in relying upon them in construing the Act. Nonetheless, I do regard the decision of Lord Wheatley as providing some support for the view to which, independently, I have come.

36 Having come to the view that I have on the proper construction of the Act, the challenge must fail. I therefore order that the amended summons be dismissed with costs.

Mr P J Snelgrove, Solicitor (Plaintiff) instructed by Snelgroves Construction and Commercial Lawyers
Mr P J Dowdy (Defendant) instructed by Deacons (