Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) P/L, Institute of Arbitrators & Mediators Australia & Peter Loveday

HIS HONOUR JUDGE McDougall J : New South Wales Supreme Court. 13th September 2004

1. The plaintiff ("the Minister") and the first defendant ("Contrax") are parties to a construction contract whereby Contrax as builder undertook to carry out construction work for the Minister as principal. Contrax claims to be entitled to a payment of $1,519,014.99 (including GST), pursuant to a determination dated 29 July 2004 made by the third defendant ("the adjudicator"), pursuant to s 22 of the ***Building and Construction Industry Security of Payment Act* 1999** (NSW) ("the Act"). The Minister says that the determination is vitiated by jurisdictional error in a number of ways, and by denial of natural justice. In these proceedings, he claims an order that the determination be quashed.

The issues for decision

2. The Minister says that the determination should be quashed for the following reasons. (I paraphrase those of the particulars to s 16 of the statement of contentions in the summons that were pressed):
   (1) The adjudicator erred in law in his construction of s 34 of the Act and by concluding, as a result, that provisions of the contract on which the Minister relied in support of the proposition that nothing was owing to Contrax were void. Accordingly, the Minister says, the adjudicator failed to determine the entitlement of Contrax in accordance with the terms of the contract.
   (2) The adjudicator erred in reaching his determination on a basis not advanced by Contrax in its payment claim and, therefore, not considered by the Minister in his payment schedule.
   (3) The adjudicator erred in making his determination by reference to s 34 of the Act (see the first issue), but (purportedly applying s 20(2B)) did not consider the Minister's submissions on this point, thereby denying the Minister natural justice.
   (4) The adjudicator committed jurisdictional error by determining the adjudication application on the basis of arguments advanced by Contrax for the first time in that application, thus determining a dispute over which he had no jurisdiction.
   (5) The adjudicator committed jurisdictional error because (purportedly relying on s 20(2B) of the Act) he did not consider the Minister's response to the matters advanced by Contrax for the first time in its adjudication application.

3. The first issue raises the question of the proper construction of s 34 and its application to those provisions of the contract on which the Minister relied. The second and fourth issues (which may be called, for convenience, "the *John Holland* issues" – ***John Holland Pty Limited v Cardno MBK (NSW) Pty Ltd*** [2004] NSWSC 258), are really alternative formulations of one basic complaint: that the adjudicator could not entertain an argument in support of Contrax' claim raised by it for the first time in its adjudication application. The third and fifth issues (which may be called, for convenience, the s 20(2B) issues) are closely related to the ***John Holland*** issues.

Relevant provisions of the contract

4. In cl 2, the expression "Contract Price" is defined in effect to mean the Contract Sum (another defined term) increased or decreased by such amount as the Minister and Contrax may agree between them, or otherwise determined under cl 46.

5. Clause 33.1 deals with the rate of progress of works under the contract. The Superintendent under the contract may direct in what order and at what time stages or parts of the work are to be performed. Contrax must comply if reasonably it can do so. If compliance with a direction given by the Superintendent under cl 33.1 causes Contrax to incur more or less cost than otherwise would have been incurred, the difference must be valued under cl 40.2.

6. Clause 40.2 deals with valuation of work under the contract. It provides for some six alternative methods of valuation:
   "40.2 Valuation …
   Where the Contract provides that a valuation shall be made under Clause 40.2, the Principal or the Contractor may claim an entitlement to an adjustment of the Contract Price. The adjustment will be the amount agreed between the Principal and the Contractor. If they cannot agree, the Expert under Clause 46 shall decide the amount on the following basis [The alternative methods were then set out.]"

7. Clause 42 dealt with payment. By cl 42.1, Contrax was given an entitlement to progress payments. In aggregate, progress payments were not to exceed the Contract Price. Clause 42.2 provided for the valuation of Progress Payments: either by reference to a method specified in "the Annexure" or by reference to the Contract Price. The relevant provisions of cl 42 are as follows:
   "42 PAYMENT
   Payment Claims and Payment Periods
   The Contractor's only entitlement to payment for carrying out work under the Contract is the Contract Price.

   Prior to becoming entitled to the Contract Price, the Contractor can make payment claims. In aggregate, payment claims shall not exceed the Contract Price. …

   Amount of progress payments
   If the amount of a progress payment or the method of valuing a progress payment is not specified in the Annexure, the progress payment shall be an instalment of the Contract Price which reflects the value of the work carried out by the Contractor in performance of the Contract to the end of the payment period to which the Progress Claim relates less: [Amounts to be deducted were then specified] …

In valuing work, regard shall not be had to the value of variations which value has not been included in the Contract Price. … "

8. Clause 46 dealt with claims for adjustment of the Contract Price (cl 46.1) and with what were called ***"Ex-contractual Claims"*** (cl 46.2). The valuation of those claims was to be by a cascading regime of submissions to the Superintendent's representative (cl 46.3), submission to the Superintendent (cl 46.4 or cl 46.5), submission to Expert Determination (cl 46.6; the process was set out in cl 46.7) and Submission to Arbitration (cl 46.8). It is to be noted that in some cases all of those processes might be engaged sequentially if the parties did not accept the outcome at any stage.

9. Expert determination was binding where the net effect was that less than $500,000 was due from one party to the other. Where, however, the outcome was that the net amount due from one to the other exceeded $500,000, then a party that was dissatisfied with the outcome could refer the dispute to arbitration.

10. Contrax said, without dispute, that if all the cl 46 processes were engaged then the total time taken to reach a binding valuation of a claim for adjustment of the Contract Price (or, for that matter, an Ex-contractual Claim) would be in excess of 200 days.

11. Clause 46.1 reinforced the limits on the entitlement of Contrax to be paid. It stated: *"The Contractor's only entitlement to payment for carrying out work under the Contract is the Contract Price [see cl 2 for definition and cl 42.1]."*

The payment claim

12. The payment claim was dated 5 June 2004. It set out the work that had been completed and a total contract price, exclusive of GST (as are all amounts through to para [15] below), of $4,929,300 for those works. It then set out details of some additional works that, it asserted, were agreed. These total $810,000 for what was called the Burns Unit and $732,722.18 for a large number of agreed variations. Assuming that those figures were correct (and they were not challenged in the evidence or in submissions), the adjusted Contract Price, exclusive of GST, would be $6,472,022.18.

13. The payment claim then referred to further variation claims said to have been determined by expert determination in the sums of $30,890.37 and $26,478.60. Presumably, since these amounts were below $500,000, the expert determinations were binding and those amounts should be added to the Contract Price.

14. Next, the payment claim set out the value of work not agreed but determined by a prior adjudication under the Act. The amount of that entitlement was $731,222.06. Presumably this is disputed by the Minister (in the sense that the Minister reserves the right to challenge the amount determined in a final resolution of disputes between him and Contrax) so that it should not be added to the Contract Price.

15. The payment claim then set out the work for which payment was claimed. The most substantial item – said to be $1,871,059 – was for time-related costs arising from directions under cl 33.1. The next most substantial item - $277,070.25 – was for a "project incentive". The majority of the other items appear to relate to variations. The total amount claimed was $2,397,758.03.

16. A final amount inclusive of GST was then calculated; payment to date was subtracted; and the claim of $2,662,645.35 inclusive of GST was thereby quantified.

The payment schedule

17. In his payment schedule dated 18 June 2004, the Minister took the point that the payment claim *"has ignored the express provisions in the Contract, in particular clause 42.2 of the General Conditions … ".*

    The Minister pointed out that the amount claimed exceeded the Contract Price. He asserted that *"the amounts claimed have not been calculated in accordance with the requirements of ss 9 and 10 of the Act."*

18. The substantial point taken by the Minister was that the progress payment should be calculated in accordance with the terms of the contract (s 9(a) of the Act) and that, under cl 42.2, regard could not be had to the value of variations which value has not been included in the Contract Price.

The adjudication application

19. The adjudication application was dated 5 July 2004. It referred to the payment claim and the payment schedule. It relied on s 34 of the Act to answer the Minister's reasons, based on the relevant provisions of the contract (including specifically cls 42.1 and 46), for denying any liability. Contrax submitted that, to the extent that the contractual regime purported to disentitle it from being paid for construction work actually done, it was void.

The adjudication response

20. The Minister's adjudication response (apparently undated) set out, in supporting submissions, his view that the calculation of the amount was governed by the terms of the contract. He denied that cl 42.2 (or any other relevant provision of the contract) defeated the objects of the Act, relying on the Second Reading Speech in support of his submissions on this point. The Minister submitted further that the adjudication application went beyond the payment claim and that, to the extent that it did, the adjudicator had no power to deal with it (the *John Holland* point). In particular, the Minister submitted that it was not open to Contrax to rely on its s 34 argument. A copy of Einstein J's decisions in ***John Holland*** was attached to the Minister's submissions in support of his adjudication response.

The determination

21. At para 81, the adjudicator said that the Minister could not rely on the ***John Holland*** point because he had not referred to it in his payment schedule. He said: *"To the extent that the Respondent [the Minister] is relying upon that*

authority as a reason for withholding payment then based on Section 20(2B) of the Act then [sic] the Respondent cannot include any such reasons. Without detracting from that position I set out below further outcome [sic] of my consideration."

22. In para 85, the adjudicator considered the effect of the contractual scheme. He said *"that the cumulative effect of the definition of Contract Price and the provisions [of] … Clauses 42.1, 42.2 and 46.2 is to "* ***exclude, modify or restrict the operation of the Act***. He therefore agreed, in para 86, with Contrax' submission that, to the extent that the provisions of the contract had that effect, they were void. In reaching his conclusions, the adjudicator (notwithstanding what he had said in para 81) appears to have considered and relied upon the decision of Einstein J in ***John Holland***, and to have considered the Minister's submissions based on that decision.

23. In para 87, the adjudicator said that *"the residual provisions of … [clause] 42.2 after deleting the provisions which offend Section 34 of the Act"* remained relevant to the calculation to the amount of the progress payment. He did not specify what were the provisions of cl 42.2 that he found to be void.

Relevant provisions of the Act

24. Section 8(1) establishes the right to progress payments. It gives that right on and from each reference date under a construction contract to a person who (relevantly) has undertaken to carry out construction work under that contract. The expression "progress payment" is defined in s 4, less than helpfully, to mean a payment to which a person is entitled under s 8.

25. Section 9 sets out how a progress payment is to be quantified. It is either the amount calculated in accordance with the terms of the contract (para (a)) or, if the contract makes no express provision, the amount calculated (relevantly) on the basis of the value of construction work carried out or undertaken to be carried out (para (b)).

26. Section 10(1) specifies how construction work is to be valued. That is either in accordance with the terms of the contract (para (a)) or, if the contract makes no express provision, having regard to certain other matters that are then specified (para (b)).

27. Section 13 deals with the content of payment claims and s 14 deals with the content of payment schedules. Sections 17 and following deal with adjudication of disputes (ie, where a payment claim and a payment schedule have been exchanged and where the parties remain unable to agree on the amount of the progress payment). Section 17 deals, among other things, with the contents of an adjudication application. Section 20 deals, among other things, with the contents of an adjudication response. By s 20(2B) the respondent cannot include in its adjudication response any reasons for withholding payment unless those reasons have been included in the payment schedule.

28. Section 22(2) sets out the matters that the adjudicator must consider. It reads as follows:

" (2) In determining an adjudication application, the adjudicator is to consider the following matters only:

- *the provisions of this Act,*
- *the provisions of the construction contract from which the application arose,*
- *the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,*
- *the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,*
- *the results of any inspection carried out by the adjudicator of any matter to which the claim relates."*

29. Section 34 prohibits contracting out. It reads as follows:

"34 No contracting out

The provisions of this Act have effect despite any provision to the contrary in any contract.

A provision of any agreement (whether in writing or not):

under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void."

30. Sub section (1), the words "*or is purported to be*" in sub s 2(a) and the whole of sub s 2(b) were added as part of the amendments made by the *Building and Construction Industry Security of Payment Amendment Act* 2002. Those amendments seem to me to have been intended both to strengthen and to extend the reach of s 34.

The section 34 issue

The parties' submissions

31. Mr M A Pembroke SC, who appeared with Mr F P Hicks of Counsel for the Minister, submitted that the relevant provisions of the contract did not offend s 34. He submitted that there was no entitlement to any money, by way of progress payment, unless and until the requirements of cls 42 and 46 of the contract were satisfied. Accordingly, he submitted, an amount calculated in accordance with the terms of the contract (s 9(a)), or valued in accordance with the terms of the contract (s 10(1)(a)) must necessarily take account of, among other things, those clauses.

32. Mr Pembroke relied on my decision in ***Abacus v Davenport*** (2003) NSWSC 1027 at [38] where I said, referring to ss 9(a) and 10(1)(a), that a reference to calculation or valuation "in accordance with the terms of the contract" is a reference to the contractual mechanism for determination of that which is to be calculated or varied, not to the person who, under the contract, is to make that calculation or valuation. I said further that it meant that the adjudicator in that case "was bound to calculate the progress payment in accordance with" the provision of the contract there relevant.

33. Mr Pembroke submitted further that the adjudicator had no power under the Act to determine that any part of the contract was void by reference to s 34. He referred to the decision of Palmer J in ***Multiplex Constructions Pty Ltd v Luikens and Anor*** [2003] NSWSC 1140 at [58]. His Honour said that the reference in ss 9(a) and 10(1)(a), 2(a) to "*the terms of the contract*" was a reference to the relevant or applicable terms of the contract. He said that what were the relevant or applicable terms bearing on the adjudicator's task might depend on construction of the express terms of the contract, implication of a term, or whether a term could not be relied upon because of waiver or estoppel. His Honour said: "*If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.*"

34. I interrupt to note that I respectfully agree with, and accept, his Honour's analysis. Applied to the present case, it means (contrary to the submission for the Minister) that the adjudicator had power to determine whether the contractual provisions relied upon by the Minister to defeat Contrax' claim were rendered void by the operation of s 34 of the Act. That is no more than determining that (by reference to Palmer J's examples) that a term had been waived or could not be relied upon because of some estoppel.

35. Mr F C Corsaro SC, who appeared with Mr Justin Young of Counsel for Contrax, submitted that if the relevant contractual provisions had the effect for which the Minister contended, they did indeed breach s34

34. He submitted that the Act created a statutory entitlement to a progress payment in respect of construction work and that a mechanism that displaced or delayed that entitlement was caught by s 34. At the very least, he submitted, the contractual scheme modified or restricted the operation of the Act and could properly be regarded as an attempt to deter a person from taking action under the Act.

36. In his submissions in reply, Mr Pembroke accepted that if the valuation of construction work were required, the adjudicator could value it by reference to the matters set out in paras (a) to (h) of cl 40.2 of the contract. However, he submitted, "*the Adjudicator does not have the power to calculate the amount of a progress payment arising in respect of a construction contract by disregarding* ***those terms that define and limit that entitlement***." (emphasis supplied)

37. Mr Pembroke relied on my decision **in *TransGrid v Walter Construction Group*** [2004] NSWSC 21 at [24] - [27]. I was there dealing with a provision of a construction contract that disentitled the builder to be paid for variations which had not been directed or approved in writing. Mr Pembroke submitted that the reasoning in those paragraphs showed that, if the relevant work had not been directed or approved in writing, the builder would have no claim to payment. He said that this "*illustrates that an adjudicator is bound by the contractual provisions which* ***define and limit the circumstances in which an entitlement to a progress payment arises.***" (emphasis again supplied)

Analysis

38. In ***TransGrid***, the adjudicator found in some cases that the requisite direction or approval had been given. I concluded that, even if he had been in error in so finding, that was an error within jurisdiction. It was therefore unnecessary for me to consider the alternative position – ie, what would be the case if there had been no written direction or approval. The question for decision was whether the adjudicator had erred in finding that there was an entitlement to be paid and, if he had, whether that error was of a jurisdictional kind. There was no submission put as to the operation of s 34. I do not think that the reasons that I gave in ***TransGrid*** should be taken out of context and applied in the circumstances of this case.

39. The "***amount"*** that is to be valued in accordance with s 9 is the amount of a progress payment to which a person is entitled in respect of a construction contract. The entitlement in question is that given by s 8(1). It is given to a person who has undertaken to carry out construction work and it is given on and from each reference date under the contract. It may be correct to say that the Act operates to supplement rather than to displace contractual entitlements. As Austin J put it in ***Jemzone v Trytan*** [2002] NSWSC 395 at [37], "*the Act … generally leaves it to the construction contract to define the rights of the parties but makes "default provisions" to fill in the contractual gaps*". However, as s 34 makes clear, the contractual regime cannot diminish rights given by the Act.

40. Generally speaking, the Act seeks to strike a balance between freedom of contract on the one hand and protection of the statutory right to a progress payment on the other. It is at least arguable that the amendments to s 34 effected in 2002 (see para [30] above) have swung the balance somewhat away from freedom of contract, and somewhat towards strengthening the rights given by the Act.

41. The right to a progress payment is, in substance, a right to a payment for construction work: "for" work done or undertaken to be done. See the decision of Barrett J in ***Quasar Constructions v Demtech Pty Ltd*** [2004] NSWSC 116 at [34]. That must be a reference to construction work done (or undertaken to be done) under, or by reference to, the contract.

42. The effect of the contractual regime in the present case is that Contrax has no entitlement to be paid, on a progress payment basis or otherwise, for certain kinds of construction work done under or by reference to the contract until a particular contractual regime is worked through. It is apparent that the working through of that contractual regime may mean that any progress payment in respect of that work is payable not from the reference date occurring next after the work is done, but from the reference date occurring next after the contractual process is worked through. If Contrax' submission is correct (see para [10] above), the latter reference date may be 200 days, or in excess of 6 months, after the former.

43. In my judgment, it is plain that the relevant contractual provisions exclude, modify or restrict the operation of the Act. They do so because, if relied upon, they defer the entitlement given by s 8(1) of the Act to be paid from a reference date for construction work carried out prior to that reference date.

44. Clause 42.1 gives an entitlement to progress payments, but specifies that payment claims in the aggregate must not exceed the Contract Price. Where, as here, the Contract Price (including agreed adjustments and adjustments determined in a binding way) has been exceeded, the contractual entitlement to a payment claim (ie, a progress payment) is exhausted. It follows, on the wording of the second (unnumbered and unlettered) para of cl 42.1, that the contract denies an entitlement to progress payments once the Contract Price as it stands from time to time has been paid. That, in itself, contravenes s 34, which imposes no such limitation. Under the contractual regime, once the Contract Price had been paid out, Contrax would not be entitled to a further progress payment until the Contract Price had been adjusted under the cl 46 regime, and then would be entitled only to a progress payment that did not exceed the amount of that adjustment.

45. Clause 42.1 is more than a valuation provision. It does not simply provide how the amount of a progress payment is to be calculated. In the sub paragraph to which I have referred, it stipulates a cap or limitation on the entitlement to a progress payment.

46. Clause 42.2 is also problematic. In the introductory sub paragraph, it specifies that a progress payment is to be an instalment of the Contract Price that reflects the value of the work carried out. It is clear that regardless of the value of the progress payment, it is to be limited to the appropriate fraction of the Contract Price. This is reinforced by the third unnumbered and unlettered sub paragraph, which specifies that in valuing work regard must not be had to the value of variations not included in the Contract Price. Although cl 42.2 on its face deals with the amount of progress payments – ie, with quantification or valuation – the effect of the third unnumbered and unlettered sub paragraph is to exclude an entitlement to be paid for variations that have not (or the value of which has not) been included in the Contract Price. In my judgment, that suffers from precisely the same defect as the relevant part of cl 42.1.

Conclusions on s 34 issue

47. It follows, in my judgment, that the following provisions of cl 42 are void under s 34:
    (1) In cl 42.1, the sentence "In aggregate, payment claims shall not exceed the Contract Price" in the second unnumbered and unlettered sub paragraph.
    (2) In cl 42.2, the third unnumbered and unlettered sub paragraph, reading "In valuing work, regard shall not be had to the value of variations which value has not been included in the Contract Price".

48. It follows that the adjudicator was correct to disregard those provisions of the contract in assessing and making his determination upon Contrax' adjudication application. It may be that the expression of the adjudicator's reasons erred because he did not set out the precise provisions that he found to offend s 34; and it may be that his reasons for finding that s 34 was offended were different to mine. However, in considering whether or not to quash the determination, it is in my judgment the outcome and not the particular mode of expression or process of reasoning that requires analysis.

The *John Holland* issues

***The decision in* John Holland**

49. In ***John Holland***, it was submitted to Einstein J that considerations of procedural fairness demanded that a restriction similar to that contained in s 20(2B) be read into s 17(3), to the effect that a claimant in an adjudication application is restricted to raising only matters canvassed in its payment claim. While his Honour thought that considerations of ***"logic"***, and "***consistency"*** with the situation of respondents, suggested that this submission be accepted (at [4]), his conclusion was that the ***"accepted principles of statutory construction"*** would not permit the suggested implication to be made (at [21]). This conclusion was bolstered by the fact that, in contrast to the situation of respondents when preparing payment schedules pursuant to s 14(3), it is not an ***"essential condition"*** of s 13 that the claimant include *any* reasons whatsoever in a payment claim (at [18]).

50. Einstein J dealt with the problem in a different way. He said that when an adjudication application put a claim on a basis that had not been advanced in the payment claim, the adjudicator, as a matter of jurisdiction, could not deal with it; and there would also be denial of natural justice (at [41]). That was because (as his Honour explained at [40]), s 20(2B) would prevent the respondent from including in its adjudication response any reasons relating to the new claim; but it could not deal with a new claim except by doing that which was prevented by s 20(2B). To determine such a new claim upon a basis that the respondent could not answer was, his Honour said, a denial of natural justice.

51. In some cases, the point will be clear. For example, the particular challenge in ***John Holland*** was clearly grounded because the claimant, for the first time in its adjudication application, raised an alternative contractual basis for a particular entitlement. But in other cases, as Einstein J pointed out, there will be questions of fact and degree involved: for example, when no new basis is advanced for a claim but further documentation or other material is relied upon in support of it. The test would appear to be whether s20(2B) would prevent the respondent from dealing with that new material; and, if it did, whether that would amount to a denial of natural justice (see, for example, at [30], [31] and [47]).

52. Mr Pembroke submitted that Contrax' submissions attached to its adjudication application raised new issues in so far as they relied on s 34 to answer the Minister's reliance on, in particular, the relevant part of cl 42.1 of the contract. He submitted that the adjudicator should have accepted that submission; but, instead, treated that submission itself as

a new matter not raised by the Minister in his payment schedule, so that s 20(2B) precluded the Minister from raising it. Thus, Mr Pembroke submitted, the adjudicator acted beyond jurisdiction (in the sense explained by Einstein J in *John Holland)* and denied the Minister procedural fairness.

53. Mr Corsaro submitted that s 17(3)(h) of the Act permitted Contrax to make such submissions relevant to its adjudication application as it chose to include; and that, in relying on s 34 to answer the argument that had been flagged in the Minister's payment schedule, it had done no more than this.

54. Further, Mr Corsaro submitted, the underlying rationale of *John Holland* was to ensure that no issue could be raised against a party to an adjudication unless that party had the opportunity to answer it. In ***John Holland*** itself, the contractor raised for the first time in its adjudication application something that had not been raised by either party beforehand. In the present case, by contrast, the relevant contractual regime had been raised by the Minister in his payment schedule.

55. Finally, Mr Corsaro submitted, the adjudicator did in fact take account of the Minister's submissions (attached to his adjudication response) on the s 34 point.

Analysis

56. Section 20(2B) of the Act prevents a respondent from including in its adjudication response any reasons for withholding payment that were not included in the payment schedule provided to the claimant. There is no equivalent limitation, in the case of adjudication applications, in s 17 of the Act; and, as Einstein J held in ***John Holland*** at [21], no such limitation could be implied by any process of statutory construction.

57. What Einstein J said in ***John Holland*** was that a claimant that did not provide sufficient details in its payment claim to enable the respondent to verify or reject (ie, assess) the claim could not include the missing details in its adjudication application. That was because, since the respondent was barred by s20(2B) from replying to those details (ie, of responding in its adjudication response in a way that did deal with the merits of the claim) the result "***may indeed be to abort any determination***": at [23]. His Honour said, alternatively, that an adjudicator did not have power to consider materials supplied by a claimant in its adjudication application which went outside the materials provided in the payment: at [24]. Materials would go outside what had already been provided if they fell outside the ambit or scope of that earlier material.

58. The Minister does not suggest, in this case, that Contrax failed to supply sufficient details to enable its payment claim to be assessed. He does not suggest that Contrax supplied further details in its adjudication application. The submission was simply that, in relying on s 34 to answer an argument raised by the Minister himself in his payment schedule, Contrax was raising a "new issue".

59. I do not agree. The claim made by Contrax in its adjudication application is the same claim that was made in its payment schedule. What Contrax has done, in its submissions in support of the payment application, is rely, in its submissions made under s 17(3)(h), on an answer to the Minister's contractual defence.

60. It would be quite extraordinary if the statutory regime, on its proper construction, prevented an applicant for adjudication from dealing with issues raised by the respondent to adjudication in its payment schedule. Such a construction would mean, in effect, that the applicant would be required to anticipate in its payment claim, and deal with at length, every possible argument that the respondent might rely upon. That would have the effect of increasing enormously the complexity and expense of the statutory procedure: something quite at odds with the statutory objects set out in s 3 and reinforced in the Second Reading Speech. It would also mean that, notwithstanding the best attempts of the applicant to foresee and answer all possible arguments, it might be defeated if the ingenuity of the respondent or its lawyers turned up yet further arguments.

61. I do not believe that the legislature intended such consequences to flow from the scheme that it enacted. Nor do I think that there is anything in what Einstein J said in *John Holland* that requires me to conclude, notwithstanding the views that I have expressed, that the legislature did intend such bizarre consequences to follow.

Conclusion on the* John Holland *issues

62. In my judgment, the *John Holland* issues must be resolved in favour of Contrax.

The section 20(2B) issues

The parties' submissions

63. The s 20(2B) issues are closely related to the *John Holland* issues. The parties' submissions are comprehended in their submissions on the *John Holland* issues: see paras [52] to [55] above.

Analysis

64. It is I think apparent from a reading of the determination as a whole that the adjudicator did consider the Minister's submissions on the s 34 point. These issues therefore fail on the facts.

65. In any event, even if it were correct to say, on the facts, that the adjudicator had not considered the substance of the Minister's submissions, I would not grant relief under s 69 of the *Supreme Court Act* on this basis alone. That is because, as I have explained, I think that the substance of the adjudicator's conclusions on the s 34 issue is correct. Whilst the adjudicator's reasoning process is less than clear, it would not be an appropriate exercise of discretion to quash a determination that came to the right result for the wrong reasons.

66. I think that the adjudicator was wrong when he said that the Minister was precluded, by s 20(2B), from putting submissions in answer to Contrax' reliance on the s 34 point. But this leads nowhere. First, as I have said, it appears

that the adjudicator (despite his avowed intention) did consider the substance of the Minister's submissions. Second (and again as I have said), I think that the adjudicator's conclusion on the point was correct.

Discretion

67. I have already dealt with one aspect of discretion: see para [65] above.

68. Mr Corsaro submitted that, even if I found that the Minister's complaints were made out, I should withhold relief on discretionary grounds. He relied on what Einstein J said in ***Brodyn Pty Ltd v Davenport & Anor*** [2003] NSWSC 1019 at [18], when his Honour referred to the ***"wholesale undermining [sic] of the mischief sought to be dealt with by the Act"*** that would follow if the Court were to grant relief in the nature of prerogative relief each time an adjudication application was shown to be affected by some reviewable error.

69. In ***Multiplex Constructions Pty Ltd v Luikens and Anor*** [2003] NSWSC 1140, Palmer J at [95] and [96] referred to some of the circumstances that the Court should take into account in deciding whether to exercise its discretion to grant relief under s 69. At the latter paragraph, he said that "*a weighty circumstance in the exercise of the discretion … is the fact that the scheme of the Act requires that a respondent* ***"pay now argue later"****: s. 25. In some cases adherence to this scheme by refusal of prerogative relief on discretionary grounds may produce no great hardship to the respondent; in other cases, it may*."

70. At [98], his Honour said that, prima facie, jurisdictional error in the adjudication process leading to an obligation on the part of one party to make a substantial payment should be corrected by the grant of relief under s 69 if there were no equally effective and convenient remedy.

71. It is not necessary that I should express a concluded view in the present case as to whether or not (assuming that the grounds for relief had been made out) relief should nonetheless be withheld on discretionary grounds. However, recognising as I do the public interest considerations to which Mr Corsaro pointed in his submissions, I find it difficult to see how the discretion could properly be exercised in favour of withholding relief where the amount at issue is substantial and where (as Palmer J showed in ***Multiplex*** at [101] and following) the consequence of quashing the determination would be to permit the claimant to make another adjudication application.

Conclusions and order

72. Each of the challenges advanced by the Minister to the adjudicator's determination fails. The consequence is that the interlocutory injunction should be dissolved; Contrax should have, if it wishes, an enquiry as to the damages that it may have suffered by the imposition of interlocutory relief; and the summons should be dismissed.

73. I direct the parties, within 7 days, to bring in short minutes of order to give effect to these reasons.

I will hear argument on costs if the parties cannot agree.

M A Pembroke SC/F P Hicks (Plaintiff) Corrs Chambers Westgarth (Plaintiff)
F C Corsaro SC/J Young (First Defendant) Colin Biggers & Paisley (First Defendant) Gadens (Second Defendant) Minter Ellison (Third Defendant)