

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

JUDGMENT : New South Wales Court of Appeal before Hodgson JA ; Bryson JA ; Brownie AJA : 6th May 2005

1 **HODGSON JA:** On 15 September 2004, pursuant to reasons given by McDougall J on 13 September 2004, a summons brought by the appellant (the Minister) against the first respondent (Contrax) and the second and third respondents was dismissed, and the Minister was ordered to pay Contrax's costs of the proceedings. The Minister appeals from those orders.

CIRCUMSTANCES

- 2 On or about 13 December 2000, the Minister entered into a contract with Contrax for certain works to be carried out by Contrax at Concord Repatriation General Hospital for \$5,423,000.00.
- 3 On 5 June 2004, Contrax submitted a payment claim under the Building & Construction Industry Security of Payment Act 1999 (the Act) to the Minister. This payment claim, identified as progress claim 39, sought payment of \$2,622,645.00 including GST. It substantially concerned claims for additional moneys by way of adjustment or increase of the contract price.
- 4 On 21 June 2004, the Minister issued a payment schedule under the Act, in response to this payment claim, which indicated that the amount the Minister proposed to pay in respect of the payment claim was nil, and gave reasons why this amount was less than the claimed amount. Those reasons included reasons based on certain clauses of the contract, in particular clauses 2, 40.2, 42 and 46.
- 5 On 5 July 2004, Contrax applied to the second respondent, an authorised nominating authority under the Act, for adjudication of the dispute arising upon the payment schedule. In its application, Contrax asserted it was entitled to the progress payment claimed, despite the terms of cls.2, 40.2, 42 and 46 of the contract, because s.34 of the Act rendered parts of those clauses void.
- 6 On 15 July 2004, the third respondent (the adjudicator) accepted a nomination as the adjudicator on this matter.
- 7 On 29 July 2004, the adjudicator issued a purported determination under the Act, which purported to determine the amount of the progress payment to be paid by the Minister to Contrax at \$1,519,014.99.
- 8 On 12 August 2004, the Minister filed a summons in the Supreme Court of New South Wales seeking orders quashing the determination and associated injunctive relief. This summons was heard by the primary judge on 26 August 2004, resulting in the reasons and orders referred to earlier.

STATUTORY PROVISIONS

9 The object of the Act is dealt with in s.3, 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.*
- 10 Sections 4 and 5 contain definitions. It is common ground that the contract in this case was a construction contract as defined in s.4, and that the relevant work was construction work as defined in s.5. The only significant definition for this case is that of "progress payment" in s.4, which is as follows:
progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
 - (a) *the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or*
 - (b) *a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or*
 - (c) *a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").*
- 11 Part 2 of the Act deals with rights to progress payments, and ss.8, 9, 10(1) and 11(1) in that Part are as follows:
8 Rights to progress payments
 - (1) *On and from each reference date under a construction contract, a person:*

- (a) who has undertaken to carry out construction work under the contract, or
(b) who has undertaken to supply related goods and services under the contract,
is entitled to a progress payment.
- (2) In this section, **reference date**, in relation to a construction contract, means:
- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
(b) if the contract makes no express provision with respect to the matter - the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.
- 9 Amount of progress payment**
The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:
- (a) the amount calculated in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.
- 10 Valuation of construction work and related goods and services**
(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:
- (a) in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, having regard to:
- (i) the contract price for the work, and
(ii) any other rates or prices set out in the contract, and
(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
(iv) if any of the work is defective, the estimated cost of rectifying the defect. ...
- 11 Due date for payment**
(1) A progress payment under a construction contract becomes due and payable:
- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment. ...
- 12 Part 3 deals with the procedure for recovering progress payments. It is common ground in this case that Contrax did serve a payment claim as contemplated by s.13 of the Act, and that the Minister did serve a payment schedule as contemplated by s.14. Division 2 of that Part (ss.17-26) deals with adjudication of disputes. It is common ground that Contrax in this case made an adjudication application in accordance with s.17, that the adjudicator was appointed as contemplated by s.19, and that the Minister lodged an adjudication response in accordance with s.20. Section 20(2B) has the following provision:
20 Adjudication responses ...
(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. ...
- 13 Section 22 is in the following terms:
22 Adjudicator's determination
(1) An adjudicator is to determine:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
(b) the date on which any such amount became or becomes payable, and
(c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
- (a) the provisions of this Act,
(b) the provisions of the construction contract from which the application arose,
(c) 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,
(d) 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,
(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must:
- (a) be in writing, and
(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
- (a) the value of any construction work carried out under a construction contract, or
(b) the value of any related goods and services supplied under a construction contract,
the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and

services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

- (5) If the adjudicator's determination contains:
- (a) a clerical mistake, or
 - (b) an error arising from an accidental slip or omission, or
 - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
 - (d) a defect of form,
- the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

- 14 The other section relevant to these proceedings is s.34, which is in the following terms:

34 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement (whether in writing or not):
- (a) 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
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.

THE CONTRACT

- 15 The general conditions of contract followed the terms of Australian Standard AS2124-1986, with some amendments.

- 16 Clause 2 of the contract related to interpretation. Relevant to this case is the definition of "contract price" which is as follows:

'Contract Price' at any particular date means the Contract Sum [excluding any provisional sums] increased or decreased by:

- (b) if the Principal and the Contractor agree in writing on a specific amount to be added to or deducted from the Contract Price, the agreed amount; or
- (c) if by a final decision under Clause 46, it is decided that a specific amount is to be added to or deducted from the Contract Price, the amount decided.

(There appears to be no paragraph (a)).

- 17 It was common ground that the "Contract Sum" referred to in that definition was the lump sum referred to earlier.
- 18 A substantial part of the claim in this case related to costs caused by extensions of time and compliance with directions of the Superintendent. Provision for such additional costs is made by cl.12.3 and part of cl.33.1 of the contract. Those provisions are as follows:

12.3 Extension of Time and Costs.

Delay caused by a Latent Condition may justify an extension of time under Clause 35.5.

If a Latent Condition causes the Contractor to –

- (a) carry out additional work;
 - (b) use additional Constructional Plant; or
 - (c) incur extra cost (including but not limited to the cost of delay or disruption);
- which the Contract could not reasonably have anticipated at the time of tendering, a valuation shall be made under Clause 40.2.*

33.1 Rate of Progress ...

The Superintendent may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Superintendent in writing, giving reasons.

If compliance with the direction causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference shall be valued under Clause 40.2.

- 19 Clause 40 of the contract deals with variations. Clause 40.1 provides inter alia that: *Unless the Superintendent and the Contractor agree upon the price for the variation, the variation directed or approved under Clause 40.1 shall be valued under Clause 40.2.*

- 20 Clause 40.2 deals with valuation, as follows:

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

- (a) *If the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used.*
- (b) *If Clause 40.2(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used to the extent that it is reasonable to use them.*
- (c) *To the extent that neither Clause 40.2(a) or 40.2(b) apply, reasonable rates or prices, as valued for Daywork under Clause 41, shall be used.*

- (d) In determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads.
- (e) Omitted
- (f) Omitted
- (g) If Clause 11 (b) applies, the percentage referred to in Clause 11 (b) shall be used for valuing the Contractor's profit and attendance.
- (h) Daywork shall be valued in accordance with Clause 41.

- 21 The question of progress payments is addressed in cl.42 of the contract. Clauses 42.1 and 42.2 are in the following terms:

42 PAYMENT

42.1 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.

At the expiration of each payment period, the Contractor shall make a payment claim. If the Contractor fails to make a payment claim, the Principal may nevertheless make a payment.

The payment period for all work under the Contract is a period ending on the expiration of the Defects Liability Period, or where there is more than one, the last to expire. Not later than 28 days after the end of this payment period, the Contractor shall lodge with the Superintendent a payment claim marked "Final Payment Claim" stating the Contract Price, all payments received on account of the Contract Price and the balance, if any, due to the Contractor. The Final Payment Claim must be accompanied by such information as the Superintendent may reasonably require.

Payment periods for progress payments are the periods specified in the Annexure or, if not specified, then monthly. At the end of each of these payment periods, the Contractor shall lodge with the Superintendent a payment claim marked "Progress Claim" and setting out the progress payments which the Contractor claims to be entitled and how the amount has been calculated. The Progress Claim must be accompanied by such information as the Superintendent may reasonably require.

42.2 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:

- (a) amounts already paid by the Principal on account of the Contract Price;
- (b) an amount on account of liquidated damages, if any, calculated in accordance with Clause 35.6 up to and including the date of the Superintendent's payment schedule in respect of the progress claim;
- (c) amounts equivalent to any liability of the Contractor to the Principal, whether liquidated or not, and whether the liability arises under the Contract or otherwise;
- (d) amounts which the Principal is entitled to deduct or withhold under any provision of the Contract.

Where work is defective or omitted, the estimated cost of rectifying the defect or omission shall be taken into account.

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

If the Contractor claims payment for plant or materials intended for incorporation in the Works but not yet incorporated, the Principal shall not be obliged to make payment for the plant or materials unless the Contractor provides security additional to and in one of the forms provided by Clause 5.3 in an amount equal to the payment claimed for the plant or materials.

The only plant or materials to be included in the valuation are those that have become (or on payment) will become the property of the Principal. If requested by the Superintendent, the Contractor shall provide evidence of ownership.

The Principal shall not be obliged to pay for an item to be imported into Australia if the Contractor has not given the Principal a clean on board bill of lading for the item drawn or endorsed to the order of the Principal and a Customs invoice for the item.

With the exception of items to be imported into Australia and items listed in the Annexure, the Principal shall not be obliged to pay for unfixed plant and materials which plant or materials are not on the Site.

- 22 In Cl.40.2 set out above, there is provision that if the Principal and the Contractor cannot agree on a valuation, the amount should be decided under Cl.46 by "the Expert". Clause 46 contains elaborate provisions for the submission of disputes to an expert, including provision for times for the taking of various steps which suggest that it would be in the order of six months or more before an expert's decision would be obtained.

ADJUDICATOR'S DETERMINATION

- 23 In his payment schedule, the Minister had contended that Contrax was not entitled to additional moneys unless certain contractual preconditions were satisfied, including, in the case of additional costs, agreement as to the amount of such costs or determination under Cl.46 of the amount of such costs.

- 24 Contrax asserted in its adjudication application that s.34 of the Act rendered parts of the contract void, so that it was entitled to a progress payment in respect of additional costs notwithstanding non-fulfilment of certain conditions precedent to entitlement to payment of such costs specified by the contract.
- 25 In its adjudication response, the Minister submitted that Contrax was not entitled to raise s.34 in its adjudication application, because s.34 had not been raised in its payment claim; and in support of that submission the Minister referred to *John Holland Pty. Limited v. Cardno MBK (NSW) Pty. Limited* [2004] NSWSC 258.
- 26 The adjudicator, in his reasons, said he excluded from his consideration the submission of the Minister based on *John Holland*, because of s.20(2B) of the Act, and he concluded that s.34 rendered void certain provisions of the contract because of the cumulative effect of the definition of contract price and the provisions of cls.42.1, 42.2 and 46. On that basis, he arrived at the adjudicator's amount indicated above.

DECISION OF PRIMARY JUDGE

- 27 Before the primary judge, the Minister submitted that the adjudication determination was vitiated by three errors:
(1) error of law in the construction of s.34 of the Act;
(2) error by basing the determination on a matter raised for the first time by Contrax in its adjudication application, contrary to *John Holland* ;
(3) denial of natural justice, in not considering the Minister's response to this point.
- 28 On the first issue, the primary judge held that certain provisions of cl.42 were void pursuant to s.34, namely the sentence in cl.42.1 "*In aggregate, payment claims shall not exceed the Contract Price*" in the second unnumbered and unlettered subparagraph; and in cl.42.2 the third unnumbered and unlettered subparagraph, reading "*In valuing work, regard shall not be had to the value of variations which value has not been included in the Contract Price*".
- 29 In relation to the Minister's reliance on *John Holland*, the primary judge expressed the view that this case was authority for the proposition that where a claimant did not provide sufficient details in its payment claim to enable a respondent to verify or reject the claim, these missing details could not be included in the adjudication application. The reliance by Contrax on s.34, raised for the first time in its adjudication application, did not mean that its adjudication application raised details or materials that were outside its payment claim: it merely amounted to submissions to answer an argument raised by the Minister in his payment schedule. Accordingly, the primary judge rejected this contention of the Minister.
- 30 As regards the third issue, the primary judge said that he considered the adjudicator was wrong in saying that the Minister was precluded by s.20(2B) from putting submissions in answer to Contrax's reliance on s.34; but said this did not matter, because the adjudicator did consider the substance of the Minister's submission anyway, and because the conclusion reached by the adjudicator was correct, as the primary judge had found in relation to the first issue. Accordingly, the primary judge dismissed the summons and ordered the Minister to pay Contrax's costs.

GROUND OF APPEAL

- 31 The Minister relied on the following grounds in its Amended Notice of Appeal:
1. His Honour erred in his construction and application of section 34 of the *Building and Construction Industry Security of Payment Act (NSW) 1999* (the "Act").
 2. His Honour erred in concluding that the parts of clauses 42.1 and 42.2 of the contract, which his Honour found offended section 34 of the Act, were otherwise than terms of the contract by which the parties agreed that the amount of any progress payment was to be calculated within the meaning of section 9(a) of the Act [paragraph 47 of the judgment].
 3. His Honour, in circumstances where sections 8(2)(a) and 9(a) of the Act applied to the contract, erred in concluding that the relevant portions of clauses 42.1 and 42.2 of the contract were void by application of section 34 of the Act thereby giving to the First Respondent rights under the Act greater than those which the Act intended.
 4. His Honour erred in holding that the relevant portions of clause 42 of the contract were provisions under which the operation of the Act was excluded modified or restricted [paragraph 43 of the judgment].
 5. His Honour erred in holding that the relevant portions of clause 42 of the contract were void by reason of section 34 of the Act in that he failed to have regard to the true operation of the Act in circumstances where the contract was one to which sections 8(2)(a) and 9(a) of the Act applied.
 6. His Honour erred in determining that, consequent upon the right to a progress payment pursuant to section 8 of the Act, the amount of that progress payment is to be determined otherwise than in accordance with section 9(a) of the Act [paragraphs 38-40 of the judgment].
 7. His Honour erred in determining, in respect of additional cost claims of the First Respondent for delay and disruption and variations that were expressly agreed to be a matter of contractual entitlement rather than common law damages or quantum meruit, that such additional cost claims concerned certain kinds of construction work for which the First Respondent had a right to a progress payment under the Act [paragraphs 41-43 of the judgment].
 8. His Honour erred in determining, in respect of additional cost claims of the First Respondent for delay and disruption and variations that were expressly agreed to be a matter of contractual entitlement rather than common law damages or quantum meruit, that certain parts of the terms of the contract that set out the entitlement of the First Respondent to make and receive payment for such additional cost claims excluded, modified or restricted the operation of the Act [paragraphs 41-43 of the judgment].

9. His Honour erred in determining that certain parts of clause 42 of the contract between the Appellant and the First Respondent were void by reason of the application of section 34 of the Act [paragraphs 38-48 of the judgment].
10. His Honour erred in determining in respect of additional cost claims of the First Respondent for delay and disruption and variations that were expressly agreed to be a matter of contractual entitlement rather than common law damages or quantum meruit, that:
- a. certain parts of the terms of the contract that set out the entitlement of the First Respondent to make and receive payment for such additional cost claims were void by application of section 34 of the Act; and
 - b. thereby materially changed the intent of the contract in respect of claims for additional costs.
11. His Honour erred in failing to declare void the determination upon the basis that the amount of the Payment Claim was not an amount claimed for construction work as defined under the Act.
12. His Honour erred in holding that the Third Respondent (the adjudicator) had power or jurisdiction under the Act to declare parts of the contract void.
13. His Honour erred in determining that the First Respondent was entitled to raise new issues and arguments by its payment claim, adjudication application and submissions to the adjudicator under the Act [paragraphs 56-61 of the judgment].
14. His Honour erred in determining that the purported determination of the Third Respondent was not void.
- 32 I will deal briefly with the matters raised by ground 13, which relates to the Minister's *John Holland* point. I will then consider the issues relating to the remaining grounds, which were the matters principally relied on in the appeal.

WHAT CAN THE ADJUDICATOR CONSIDER?

- 33 The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s.34, when that matter had not been raised in its payment claim. This contention relied on *John Holland*, and also on a suggested anomaly arising from the prohibition in s.20(2B) on a respondent relying on reasons not included in its payment schedule.
- 34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.
- 35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).
- 36 Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s.34, when considering matters under paragraphs (a) and (b), even if that contention could not be taken into account under paragraph (c).
- 37 However, I agree with the primary judge that the circumstance that s.34 was not mentioned in the payment claim, and was mentioned for the first time in the adjudication application, does not have the consequence that it cannot be considered under paragraph (c) of s.22(2). I agree with the primary judge that this is not an addition to the payment claim or a departure from it that could be affected by the considerations given weight to in *John Holland*.

EFFECT OF SECTION 34

Submissions

- 38 Mr. Inatey SC for the Minister submitted that the parts of cl.42 found to be void by the primary judge did not exclude, modify or restrict the operation of the Act. Contrary to what was said by the primary judge at [43] of the judgment, the Act does not give an entitlement to be paid from a reference date for construction work carried out prior to that reference date: rather, it gives a right to make a progress claim, and the amount of the progress payment is to be determined in accordance with s.9; that is, if the contract makes express provision as to how it is to be calculated, the amount calculated in accordance with the terms of the contract.
- 39 Mr. Inatey submitted that the definition of progress payment in s.4, and in particular in paragraph (c) of the definition, shows that, contrary to what the primary judge said, the payment may not be related to construction work done to a particular date but could, for example, be a specified sum to be paid at a specified date or on the happening of a specified event. If that is what the contract provides in relation to the calculation of progress payments, then s.8(a) and s.9(a) require that effect be given to it. This is consistent with ss.10 and 11, which also give effect to provisions of the contract, where the contract makes relevant provision.
- 40 Mr. Inatey submitted that s.34 relevantly applied only if "the operation of the Act" is excluded, modified or restricted. Where the contract makes provision for the calculation of progress payments, the Act says that this is to have effect; so that effect is in accordance with the Act and not contrary to it.

- 41 Mr. Inatey referred to *Jemzone v. Tritan* [2002] NSWSC 395 at [37] and [38], and to *Quasar Constructions v. Demtech Pty. Limited* [2004] NSWSC 116 at [21] and [27], to support his contention that the content of a contractor's entitlement to progress payments was determined by the contract, where the contract makes provision. He submitted that it was in accordance with *Abacus v. Davenport* [2003] NSWSC 1027 at [38] that s.9 required the application of the contractual mechanism for determination of progress payments; and he referred also to *Transgrid v. Walter Construction Group* [2004] NSWSC 21 at [59], and *Transgrid v. Siemens Limited* [2004] NSWCA 395 at [35].
- 42 Mr. Inatey submitted that the adjudicator failed to comply with an essential pre-requisite for the making of a determination, because the determination was not produced in accordance with the requirements of ss.8 and 9; and he referred to *Brodyn Pty. Limited v Davenport* [2004] NSWCA 394 at [51]-[56].
- 43 Mr. Corsaro SC for Contrax submitted that s.8 of the Act establishes an entitlement to progress payments as and from each reference date, and makes no distinction as to the type of construction work in respect of which there is such an entitlement; in particular, no distinction between construction work included in the original contract and construction work pursuant to a variation or Superintendent's direction. The provisions of cl.42 referred to by the primary judge limited the effect of the Act, because they deprived the contractor of a right to make a progress claim for such work and to obtain an interim determination in relation to such work.
- 44 Mr. Corsaro submitted that, in any event, even if the adjudicator and the primary judge were in error as to the effect of s.34, this would not make the determination void: cf. *Siemens* at [31]-[35].

Decision

- 45 In *Brodyn* at [53], I set out what I considered to be at least some of the basic and essential requirements for there to be an adjudicator's determination under the Act, namely:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
 2. The service by the claimant on the respondent of a payment claim (s.13).
 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
 4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
 5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).
- 46 At [55] in *Brodyn*, I suggested that these requirements may not be exhaustive, and also that, in addition to compliance with such requirements, it was essential to the existence of a determination that there have been 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, and no substantial denial of the measure of natural justice that the Act requires to be given.
- 47 Mr. Inatey did not suggest that there was failure to comply with any of the first four of the five requirements mentioned above, or that there was any relevant denial of natural justice. Rather, he suggested that the fifth requirement, the making of the determination, involved compliance with s.9; that is, that it involved, in a case where the contract made express provision as to the calculation of the amount of progress payments, making a calculation in accordance with the terms of the contract. As I understood it, he also suggested, perhaps more faintly, that to do otherwise would be not to make a bona fide attempt to exercise the relevant power.
- 48 In my opinion, this argument fails, essentially for the reasons set out in *Siemens* at pars.[33] and [34].
- 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.
- 50 Accordingly, even if s.34 does not invalidate the relevant parts of cl.42, the adjudicator's determination would not be invalid; and it is not necessary for me to express a final view as to whether s.34 has that effect in this case.
- 51 However, I am of the view that it is strongly arguable that s.34 does have that effect, on either or both of two grounds.
- 52 First, consistently with the view expressed in *Siemens* at [35], the procedure in cl.46 might be regarded as merely a procedure for identifying when and by whom a calculation is to be made. The basis for the expert's decision set out in cl.40.2 could then be regarded as the relevant express provision made by the contract with respect to the calculation of the amount of progress payments under cl.42.2, with which s.9(a) engages. If that view is correct, then the relevant sentences in cl.42 would preclude the payment of progress payments calculated in accordance with the terms of the contract, and thus fall foul of s.34.
- 53 Second, although "progress payment" is defined in s.4 of the Act to mean "a payment to which a person is entitled under s. 8", and although s.4 does not contain a qualification by reference to context, nevertheless in my opinion it is plain that, in some places in the Act, the expression "progress payment" is used in a way that includes a more generalised meaning. For example, s.3(2) cannot mean that the means by which the Act ensures that a person is

entitled to receive “a payment to which a person is entitled under s.8” is by granting a statutory entitlement to such a payment, regardless of whether the relevant construction contract makes provision for “payments to which a person is entitled under s.8”. Plainly, in s.3(2), progress payment is meant in a more general sense; and the same must be true of its use in s.3(1). Similarly, where s.8(2)(a) refers to the date determined under the contract as the date on which a claim for a progress payment may be made, this provision was not meant to be ineffectual unless the contract provision relates to payments to which a person is entitled under s.8: again, in my opinion, plainly a more general sense of the phrase is intended to be included: cf. *Quasar* at [21]. And in my opinion, the more general sense is also intended in s.8(1), because otherwise s.8(1) would be circular and vacuous.

- 54 On that basis, in my opinion a provision of a contract as to the determination of reference dates, or as to the calculation of the amount of progress payments, could be such as to restrict the operation of the Act within the meaning of s.34, even though the Act in s.8(2)(a) and s.9(a) expressly defers to such provisions. For example, if a contract provided for yearly reference dates, or provided that progress payments should be calculated on the basis of 1% of the value of work done, in my opinion such provisions could be so inimical to s.3(1), s.3(2) and s.8(1) as to be avoided by s.34. If, contrary to the first ground, cl.46 is a provision as to calculation, the relevant parts of cl.42 could still be seen as restricting the operation of the Act. In my opinion, it is preferable not to finally determine this question in a case where it is not necessary to do so.
- 55 As noted in *Brodyn* at [84]-[88], there may be remedies available to a respondent by way of stay or injunction where a respondent alleges that there was a serious error in an adjudicator’s determination, and that money paid over would be irrecoverable.

CONCLUSION

- 56 For those reasons, in my opinion the appeal should be dismissed with costs.
- 57 **BRYSON JA** : In my opinion disposition of this appeal is governed by *Brodyn Pty Ltd v. Davenport & Anor* [2004] NSWCA 394. With an exception I will mention I agree with the judgment of Hodgson JA in the present appeal.
- 58 I respectfully say that I do not join in Hodgson JA’s observations at paras [51] to [54] to the effect that s.34 invalidates some parts of clause 42 of the construction contract. The avoidance provisions should be applied according to their terms and no more widely. Rulings by McDougall J on the interaction of the construction contract with the Act and s.34 are open to question because his Honour’s demonstration of the manner in which provisions of the contract excluded modified or restricted the operation of the Act, or otherwise fell within s.34(2), was not appropriately specific. As decision does not turn on this I do not pursue it further. If the application of the references in s.8(2) and s.9 to the terms of the contract and to whether or not the contract makes express provision with respect to specific matters with which ss 8 and 9 deal were fully considered, it may be that the parts of cl.42 which McDougall J considered would fall outside them and the relation between s.34 and cl.42 would not be important.
- 59 I agree with the orders proposed by Hodgson JA.
- 60 **BROWNIE AJA** : I agree with the orders proposed by Hodgson JA, and the reasons he gives.
- 61 At [51]–[55] his Honour expresses the view that s.34 of the Act has the effect that the two sentences of cl.42 of the contract identified at [28] are invalid. At [57]–[58] Bryson JA expresses a different view. Since it is not necessary to resolve this question in order to decide the appeal, I think it better not to express an opinion on this point.

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