Joseph Musico (aka Giuseppe Musico), Rosemary Musico, Luigi Genua & Rose Genua v Philip Davenport & Grosvenor Constructions (NSW) P/L *[Administrators appointed]*

JUDGMENT : His Honour McDougall J : Supreme Court of New South Wales. 31st October 2003

Introduction and factual background

1 This case raises for consideration the following issues:

1. Is the determination of an adjudicator made pursuant to s 22 of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act") in principle susceptible to judicial review?
2. If the answer to the first question is "yes", what are the grounds upon which judicial review may be available?
3. If the answer to the first question is "yes", are any available grounds of review made out on the facts of this case?
4. If the answer to the third question is "yes", are there discretionary reasons why relief should be refused?

2 The dispute between the parties arises out of work carried out by the second defendant ("Grosvenor") for the plaintiffs ("Musico"), pursuant to a contract for additions and alterations to the Edensor Park Plaza Shopping Centre on 19 December 2001.

3 The relevant "payment claim" under s 13 of the Act was served by Grosvenor on Musico on 12 June 2003. It was described as "progress claim No. 11" and was for an amount of $1,544,181.30, inclusive of GST. It is accepted that the payment claim complied with the relevant requirements of s 13.

4 On 26 June 2003, Musico served on Grosvenor a "payment schedule" under s 14 of the Act. By that payment schedule, Musico asserted that they owed no money to Grosvenor in respect of the payment claim, and asserted further that Grosvenor owed Musico $550,839.64 (exclusive of GST) for various reasons including disputed variation claims, uncompleted works, non conforming works and liquidated damages. It is accepted that the payment schedule complied with the relevant requirements of s 14, and that it was served within the applicable relevant time permitted by that section.

5 On 9 July 2003, Grosvenor applied to an organisation known as "Adjudicate Today", an authorised nominating authority for the purposes of s 17 of the Act (and see the definition of "nominating authority" in s 4 and the provisions of s 28).

6 On 10 July 2003, Adjudicate Today referred Grosvenor's adjudication application to the first defendant ("Mr Davenport), who accepted it and was thereby taken to have been appointed to determine the application for adjudication of the payment claim (see s 19(2) of the Act).

7 On 15 July 2003, Musico lodged its adjudication response to the adjudication application (see s 20 of the Act).

8 On 18 July 2003, Mr Davenport made his determination. He determined that Grosvenor was entitled to be paid $712,757, together with interest at the rate applicable to Supreme Court judgments, from 26 June 2003. He determined further that Grosvenor should pay his fees and the fees of Adjudicate Today.

9 On 23 July 2003 Musico, by their solicitors, wrote to Adjudicate Today pointing out what were said to be errors in Mr Davenport's determination and asking that they be corrected. Grosvenor's solicitors made submissions in relation to this. On 23 July 2003, Adjudicate Today notified the parties that Mr Davenport, having considered the matters raised, "does not consider that he should change his determination".

10 On 31 July 2003, Musico not having paid the adjudicated amount within the time prescribed by s 23, Adjudicate Today, upon the application of Grosvenor, issued an adjudication certificate (see s 24). It is agreed that the adjudication certificate complies with the formal requirements of s 24.

11 On 4 August 2003, Grosvenor filed the adjudication certificate with the Court, together with a supporting affidavit under s 25(2) of the Act. The result is that the adjudication certificate is a judgment for a debt in the amount stated by it and enforceable accordingly (see s 25(1) of the Act).

Relevant provisions of the Act

12 I have referred already to a number of relevant provisions. There are other provisions of significance.

13 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 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."

14 Section 8 creates rights to progress payments. It is those rights, as and when they arise, that enliven the procedure set out in s 3(3), that I have described, in the context of this case, in paras [3] to [11] above.

15 Section 22(5) provides a "slip rule". An adjudicator is entitled, either on the adjudicator's own initiative or on the application of a party to the adjudication, to correct a determination for a number of specified reasons, including (para (b)) "a material miscalculation of figures ...".

16 Section 25(4) provides that if the respondent to an adjudication application commences proceedings to have set aside the judgment that comes into existence upon the filing of an adjudication certificate, the respondent is not entitled to bring any cross-claim, or to raise any defence, or to challenge the adjudicator's determination. Further, the respondent is required to pay into Court as security the unpaid portion of the adjudicated amount pending the final determination of the proceedings.

17 Section 30 provides as follows:

"***30 Protection from liability for adjudicators and authorised nominating authorities***

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:

(a) in exercising the nominating authority's functions under this Act, or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act."

18 Section 32 provides as follows:

"***32 Effect of Part on civil proceedings***

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the Contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings".

Background to the Act

19 The Act was originally enacted in 1999. It was substantially amended by the *Building and Construction Industry Security of Payment Amendment Act* 2002. It is with the Act as so amended that I am concerned.

20 In his Second Reading Speech on the amending Bill, the Minister made the following comments (NSW Legislative Assembly Hansard, 12 November 2002, at 6541 and foll): "*Just over three years ago this Parliament enacted the Building and Construction Industry Security of Payment Act 1999. The Act was the first of its kind in Australia. It has set a benchmark for dealing with payment problems in the building and construction industry and similar legislation has already been adopted in Victoria. I understand other States are also considering adopting a similar approach. The main purpose of the Act is to ensure that any person who carries out construction work or provides related goods or services is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying or simply delaying payment. ...*

The Act was designed to ensure prompt payment and, for this purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid. However, some claimants have had difficulty enforcing payment of the debt due under the Act. To enforce payment, the claimant has had to obtain a judgment of a court. At present this involves taking out a summons in the appropriate court. The respondent has 28 days to lodge a defence or cross-claim. Then there is a hearing before a magistrate or judge, who has to decide whether to enter summary judgment for the statutory debt or set the matter down for a full hearing.

By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and will not be able to raise any defence in relation to matters arising under the contraction contract. A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings.

Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act. To reinforce this determination, the bill provides that after an adjudication the respondent must pay the claimant the adjudicated amount. The existing legislation gives the respondent the options of paying the adjudicated amount or providing security for payment of the amount. Experience has shown that where respondents have taken the security option, they have then not taken steps to expedite the final resolution of the dispute. ...

"There will be some instances where a court may set aside the judgment. The respondent may be able to demonstrate to the court that the requirements of the Act have not been complied with; for example, that there has not been a valid adjudication. But in proceedings to set aside the judgment the respondent will not be entitled to bring a cross-claim or to raise any defence in relation to maters arising under the construction contract or to challenge the determination by the adjudicator. Adjudication is an expedited procedure. The adjudicator has only 10 business days in which to make a decision. There will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined. ..."

First issue: is relief in principle available?

21 The first issue really resolves into two questions.

22 The first question is whether, apart from any privative effect the Act might have, relief in the nature of prerogative relief would be in principle available, under s 69 of the *Supreme Court Act* 1970, against an adjudicator appointed under s 19 of the Act. (I do not think that it is relevant that the adjudicator is "taken to have been appointed", and shall use the simpler form "appointed" where necessary to describe what it is that happens when an adjudicator accepts, under s 19(2), an adjudication application.) In other words, is an adjudicator a "tribunal" against whom relief under s 69 of the *Supreme Court Act* might lie?

23 The second question is whether (assuming that the answer to the first question is "yes") the Act, on its proper construction, excludes judicial review in the nature of prerogative relief.

24 It is necessary to go into these matters at some length because it was by no means clear from the submissions for Grosvenor whether or not it conceded that judicial review was, in principle, available. Thus, in para 29 of Grosvenor's written submissions, it was said that: "*... at the very broadest level, at the conceptual level so to speak, - beyond verbal ambiguity – the legislation is not immediately declarative of the right of the parties to judicial review. ... The structure of the Act takes the allegedly public official, the Adjudicator, is to take away resort in the prerogative writs for ordinary errors of law by effectively providing that the only way in which the Adjudicator's Determination may be set aside is by the issue of traditional process in litigation or arbitration.*"

25 However, in paras 32-36 and following of those submissions, Grosvenor appeared to concede that judicial review may be available where there was "jurisdictional error" that went "to a fundamental matter of jurisdiction". Again, in para 41, Grosvenor appeared to concede that judicial review might be available where there was denial of natural justice, although it appeared to be submitted (and if it were, it was in my view correctly submitted) that the requirement of natural justice must be considered having regard to the legislative scheme.

26 As to the first question: an adjudicator who is appointed under the Act has the power to make a determination that is binding on the parties to the adjudication. The ultimate enforceability of that determination follows from the provisions of ss 24 and 25 of the Act whereby, if the adjudicated amount is not paid in accordance with s 23, the claimant may obtain an adjudication certificate and file it with the court "as a judgment for a debt" which is "enforceable accordingly".

27 Certainly, the adjudication is not final, in the sense that, if it later be found that the adjudicated amount was excessive, restitution may be ordered (s 32(3)(b)); and, in any event, the adjudicated amount must be taken into account in any proceedings that finally determine the balance due between the parties to the adjudication (s 32(3)(a)). However, subject to those provisions, the determination of the adjudicator is binding upon the parties. That is confirmed by s 25. An adjudication certificate has effect as a judgment when it is filed in a court of competent jurisdiction. That judgment may be set aside in some circumstances: see sub s (4). But it cannot be set aside by reason of any cross-claim or matter or defence, or any *"challenge [to] the adjudicator's determination"*.

28 In ***Craig v The State of South Australia*** (1995) 184 CLR 163, the court at 174-5 considered the jurisdiction of a superior court to grant relief in the nature of prerogative relief. Their Honours said that relief in the nature of certiorari "went only to an inferior court or to certain tribunals exercising governmental powers" (citations omitted). Their Honours referred to ***R v Electricity Commissioners; ex parte London Electricity Joint Committee Co***

(1920) Ltd [1924] 1 KB 171, 205, ***Ridge v Baldwin*** [1964] AC 40, 74-9 and ***O'Reilly v Mackman*** [1983] 2 AC 237, 279, as indicating "the tribunals other than courts which are amenable to the writ".

29 In the first of those cases, Atkin LJ, at the reference given, said: "*Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings' Bench Division exercised in these writs.*"

30 In the second of those cases, at the reference given, Lord Reid considered a number of the earlier cases, including the judgment of Atkin LJ just referred to. His Lordship said, at 75, that the duty to act judicially could arise simply from the tribunal's duty to determine what the rights of an individual should be: it was not necessary that there should be something more to impose on it such a duty.

31 In the third of those cases, at the reference given, Lord Diplock referred to and, as he put it, "broadened" what Atkin LJ had said by omitting, as a separate requirement (in terms of Atkin LJ's formulation) the reference to "*having the duty to act judicially*". Having referred to what Lord Reid had said in *Ridge,* Lord Diplock said: "*Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described [i.e., by reference to an earlier passage, determinations of questions affecting the common law or statutory rights or obligations of other persons as individuals] it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of any personal bias against him on the part of the person by whom the decision falls to be made.*"

32 I therefore conclude, in answer to the question posed in para 22 above, that, apart from any privative effect the Act might have, relief under s 69 of the *Supreme Court Act* would, in principle, lie against an adjudicator appointed under s 19 of the Act.

33 I turn now to the second question under this issue (see para 22 above).

34 Statutes that seek to limit or exclude the right of judicial review of administrative decisions are to be construed by reference to a presumption that the legislature does not intend to deprive citizens of their right of access to the courts, other than to the extent expressly stated or necessarily implied: ***Public Service Association (SA) v Federated Clerks Union of Australia, South Australian Branch*** (1991) 173 CLR 132, 160; ***Darling Casino Ltd v New South Wales Casino Control Authority*** (1997) 191 CLR 602, 633. Thus, a statement that a decision is final and conclusive is construed not to exclude certiorari for error of law on the face of the record; and a statement that a decision may not be called into question in a court of law is construed not to exclude review on the ground of jurisdictional error (at least, in the sense that it involved either a refusal to exercise jurisdiction, or an excess of jurisdiction): *Darling Casino,* loc. cit.

35 It is clear that Parliament has sought to limit challenges to the decisions of adjudicators: see, in particular, ss 25(4) and 30 of the Act. Those sections limit the right that a party to an adjudication might otherwise have to seek relief. However, consistent with what was said in *Public Service Association* and *Darling Casino,* they should not be taken to deprive parties of access to the courts other than to the extent that is expressly stated in them, or necessarily to be implied from them.

36 The relevant provisions of the Act – including principally, as I have indicated, ss 25(4) and 30 – do not approach, in their statement of privative intent, the language of the privative regulation considered by the High Court in ***R v Hickman: ex parte Fox and Clinton*** (1945) 70 CLR 598. In that case, the regulation provided that the decision of the relevant tribunal "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". That clause was held insufficient to protect either manifest jurisdictional errors or acts beyond power. See also ***Church of Scientology v Woodward*** (1982) 154 CLR 25, 55-56; ***Deputy Commissioner of Taxation v Richard Walter Pty Ltd*** (1995) 183 CLR 168, 180; ***Plaintiff S157/2002 v The Commonwealth*** (2003) 77 ALJR 454, 457, 459.

37 The limitations on the ability of a respondent to set aside a judgment flowing from the filing of an adjudication certificate cannot in terms apply where the respondent is seeking not to pursue that course but to quash the determination upon the ground that it is fatally vitiated by (for example) denial of natural justice, or manifest error of law. There is no basis for reading the prohibitions in s 25(4)(a) as extending beyond the context to which they are expressed to apply: namely, an application to set aside judgment.

38 Equally, there is nothing in s 30 to indicate that the legislature intended to exclude judicial review. On the contrary, in my view, the reference in sub s (1) to personal liability of an adjudicator is an indication that the legislature was seeking to protect adjudicators from civil liability for (by way of example) erroneous adjudications. It is not an apt use of language to describe an application for relief in the nature of certiorari or prohibition as one that seeks to enforce a personal liability against the person or body to whom the application is directed.

39 It must follow, I think, that the Act does not exclude the power of the Court to review, and where necessary grant relief, under s 69 of the *Supreme Court Act,* the determinations of adjudicators made under s 22 of the Act.

40 I therefore conclude that the determination of an adjudicator made pursuant to s 22 of the Act is in principle

susceptible to judicial review.

41 I should say that both Musico and Grosvenor made extensive reference to English and Scottish decisions, dealing with the equivalents in England and Scotland of the Act. I have not referred to those decisions because there are substantial differences between the scheme and text of the Act and the scheme and text of the legislation considered in those English and Scottish decisions. Nonetheless, those decisions may be said to confirm two things. Firstly, in general, they confirm that judicial review is in principle available. Secondly (and this is particularly relevant to the second issue), they suggest that the courts should not be quick to intervene.

Second issue: on what grounds may judicial review be available?

42 In general, as the authorities to which I have already referred establish, where judicial review is available, it may lie by reason of refusal to exercise jurisdiction, excess of jurisdiction (i.e., acting beyond power) or denial of natural justice. Further, Musico rely on s 69(3) of the *Supreme Court Act* for the proposition that relief in the nature of certiorari may lie to quash a determination made on the basis of an error of law that appears on the face of the record of the proceedings.

43 In principle, I think that review of adjudications made under the Act could be undertaken on jurisdictional grounds (i.e., refusing to exercise, or acting in excess of, jurisdiction) or denial of natural justice. Although Grosvenor's written submissions on this issue were unclear, it appears to be the case, from what was said in oral submissions, that Grosvenor accepted that review could be undertaken on jurisdictional grounds, although I think that Grosvenor took a narrower view than did Musico of what might fall under this general rubric. I deal below with the question of jurisdictional errors of law.

44 Grosvenor's position, in relation to the availability of judicial review on the ground of denial of natural justice, was even less clear. It noted in para 41 of its submissions that, in the context of the procedure for which the Act provided, there must be some "relaxation in our expectations of the requirements of natural justice". If, by that, Grosvenor intended to submit that the application, or content, must be analysed by reference to the statutory context, then I agree. If, however, Grosvenor were intending to submit that the two fundamental rights, summarised by Lord Diplock in ***O'Reilly*** at 279 (see para [31] above), did not apply at all (recognising that the first of them must be read in the context of the statutory scheme), then I disagree. It was submitted that "[t]he Act must limit the application of the familiar principles of natural justice where the decision is only an interim decision". Again, if by this it were intended to submit that the content and application of the principles must be read in the context of the statutory scheme, then I agree. But if it were intended to submit that the basic principles had no application, then I disagree.

45 In my opinion, an adjudicator under the Act is obliged to afford the parties to the adjudication natural justice, there being no indication of any legislative intention to exclude that fundamental right: see ***Haoucher v Minister for Immigration and Ethnic Affairs*** (1990) 169 CLR 648; see also *O'Reilly*. However, the content must depend upon the circumstances of the particular case and, of course, the legislative scheme.

46 In some cases, an error of law may lead to jurisdictional error, although the distinction between jurisdictional and non-jurisdictional errors of law is easier to state than to apply.

47 In ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147, 171 Lord Reid said: *"[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some other question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* ***But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".*** *(emphasis supplied)*

48 His Lordship's statement was cited with apparent approval, in relation to administrative tribunals, in *Craig* at 178.

49 The decision in *Craig* at 179 established that, in the absence of a contrary intention in the statute or other constituting instrument, an administrative tribunal lacks power either authoritatively to determine questions of law or to make an order or decision otherwise than in accordance with the law.

50 Accordingly, there will be cases where a decision otherwise than in accordance with the applicable law involves jurisdictional error. As the court said in *Craig*, after stating the principles referred to in the preceding paragraph: *"If such an administrative tribunal [i.e., one lacking judicial power] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or,* ***at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion,*** *and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it".* (emphasis supplied)

51 The position of an adjudicator under the Act is not completely analogous to that of an administrative tribunal of the kind referred to by the court in *Craig*. Nor, of course, is it closely analogous to that of an inferior court (which, as the court pointed out in *Craig* at 179-180, has "authority to decide questions of law, as well as questions of fact", so that an error of law in the determination of issues before it will not ordinarily lead to jurisdictional error).

The position is, in my view, closely analogous to that of an expert by whose determination the parties have agreed to be bound (see, for example, ***A Hudson Pty Ltd v Legal & General Life of Aust Ltd*** (1985) 1 NSWLR 701). This approach was confirmed by the English Court of Appeal in ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** [2000] BLR 522 (although, for the reasons given in para [41] above, care needs to be taken in seeking to apply decisions on a different legislative scheme).

52 I therefore conclude that, where the determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues. It would be otherwise, as the High Court pointed out in *Craig* (echoing, I think, what Lord Reid said in *Anisminic*), if the error of law causes the adjudicator to make one or other (or more) of the jurisdictional errors that the court identified: in such a case, relief would lie, subject to any relevant discretionary considerations.

53 Musico submitted, by reference to the statement in *Craig* at 179 referred to in para [49] above, that an adjudicator would commit jurisdictional error if he or she made an error of law in the course of reaching his or her determination. The submission in effect is that, contrary to what Lord Reid said in *Anisminic* (see para [47] above), an adjudicator is not entitled to decide a question wrongly as rightly. I do not think that the High Court in *Craig* intended that the proposition on which Musico rely for this submission was unqualified and absolute; this is clear, if from nothing else, from the passage that I have set out in para [50] above. Indeed, the proposition for which Musico contend would effectively negate the distinction between jurisdictional and non jurisdictional error of law. I do not think that the court in *Craig* intended to achieve this; that would be inconsistent with what appears to be their approval, in the case of administrative tribunals, of that passage of Lord Reid's speech in ***Anisminic*** that I have set out in para [47] above.

54 I therefore conclude that relief will lie where jurisdictional error, including jurisdictional error of law on the face of the record, is shown. However, I do not think that relief will lie to quash the determination of an adjudicator upon the basis of non-jurisdictional error. That is because, in my view, the legislative scheme set out in s 25(4) of the Act is inconsistent with the availability of this ground of review.

55 By s 25(4)(a)(iii), a respondent seeking to set aside a judgment based on an adjudication certificate cannot challenge the adjudicator's determination. That must mean that in any such proceedings, the judgment cannot be set aside upon the basis that the adjudicator (for example) erred in law in some step of his or her reasoning. It would be quite inconsistent with the legislative intention that is evident in s 25(4) to permit a challenge to be raised, by way of relief in the nature of prerogative relief, upon the ground of error of law. The legislature could hardly be taken to have intended that, having forbidden entry by the front door, it was nonetheless happy for access to be obtained from the rear.

56 Further, in my opinion, where review may in principle be available, the availability of the particular ground must depend, among other things, upon an analysis of the relevant provisions of the Act.

57 For example, in relation to natural justice, the extent of the adjudicator's obligation to afford to a respondent to the adjudication application an opportunity to be heard is limited by s 21(2) of the Act, which provides that an adjudicator is not to consider an adjudication response made outside the time for such response to be lodged. This is reinforced by s 21(5), which provides, relevantly, that the adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission.

58 Musico relied upon the statement of McHugh J in ***Muin v Refugee Review Tribunal*** (2002) 76 ALJR 966, 989 [123] as follows: "*Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power*".

59 That requirement can, I think, be accommodated to the scheme of the Act. Section 21(4) enables an adjudicator to request further submissions from either party and to give the other party an opportunity to comment on those submissions. Where, after considering an adjudication application and an adjudication response, an adjudicator comes to the view that there was some matter, not traversed in them, that might cause him or her to deal with the application in a manner adverse to one or other party, the principle enunciated by McHugh J would ordinarily require that the adjudicator request further written submissions and comments thereon. But whether or not this principle is enlivened in a particular case must, necessarily, depend on an analysis of the "matter", and of its significance to the determination ultimately made by the adjudicator.

60 Further, and more generally, I think that the approach of the Court to an application for review of an adjudicator's determination should be guided by the evident legislative intention that such determinations are to be carried out informally and speedily, and in a manner that will enable erroneous determinations to be adjusted (i.e., in effect, corrected) upon a final hearing of the issues in dispute between the parties.

Third issue: are any grounds of review made out?

61 Musico put their case on the basis that the determination of Mr Davenport was vitiated by what I will call, for convenience, reviewable error, in three ways:

1. His determination was vitiated by patent errors of law;
2. He had failed to accord natural justice to Musico; and
3. He had misunderstood his function and had misconstrued the limitations on his authority. Firstly, it was said that he had acted in excess of jurisdiction, or outside the power granted to him under the Act). Secondly, it was

said that he had failed to exercise his jurisdiction under the "slip rule".

62 I will consider each of those challenges in turn.

Patent error of law

63 Musico contended that Mr Davenport's determination was vitiated by error of law in some nine respects. The alleged errors were, it was said, plain on the face of the determination. The alleged errors were asserted in paras 2(a) to 2(g) of the summons.

64 It is necessary to consider Musico's complaints because some of them are capable of demonstrating and, as will be seen, in my opinion do demonstrate, jurisdictional error of law. Further, in case I am wrong in my conclusion that non jurisdictional error of law is not a ground for review, I would in any event set out Musico's complaints and my conclusions on them.

What constitutes the record?

65 Section 69(4) of the *Supreme Court Act* makes it clear that, whatever may be the position at common law (cf *Craig* at 181), for the purposes of relief in the nature of certiorari, the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination. Beyond that, as the High Court said in *Craig* at 182, *"[t]he determination of the precise documents which constitute 'the record' of the inferior court for the purposes of a particular application for certiorari is ultimately a matter for the court hearing the application."*. Ordinarily, the record would not include the transcript or exhibits (if any) before the inferior court or tribunal *(Craig* at 181), except to the extent that they are incorporated into the ultimate determination, or formal order, that was made.

66 In general terms, it seems to me that the record, in cases such as the present, would include the adjudication application, any adjudication response, perhaps any further written submissions and comment thereon requested or permitted pursuant to s 21(4)(a) and the determination itself. The adjudication application and adjudication response would form part of the record because, in substance, and in the absence of pleadings, they are the documents that define the dispute that the adjudicator is to determine. The incorporation into the record of any s 21(4)(a) written submissions or comment might depend on whether they served further to define the dispute. The determination (including reasons) would form part of the record because of s 69(4) of the *Supreme Court Act*.

67 Further, where the adjudicator was asked to exercise his or her power pursuant to the "slip rule" in s 22(5), it is likely that the record would include any application to the adjudicator from a party to exercise that power, any response thereto and the decision of the adjudicator thereon. Equally, where the power under the slip rule was exercised on the adjudicator's own initiative, the record would ordinarily include whatever it was that the adjudicator said or did in the exercise of that power.

68 In his determination, Mr Davenport referred to a number of the provisions of the contract, and expressed views as to their meaning and application. In my opinion, in determining whether there is error of law on the face of the record, it is open to me to have regard at least to those provisions of the contract to which Mr Davenport referred. Applying by analogy what was said in *Craig* at 181-2, I think that at least those clauses of the contract that are specifically referred to and analysed by Mr Davenport should be taken to be incorporated into his determination; and, as I have noted, his determination itself forms part of the record. In substance, it seems to me that the way Mr Davenport dealt with those particular contractual provisions makes them an integral part of his determination, as opposed to "a merely introductory or incidental reference".

69 Again, I have gone into this matter at what may appear to be excessive length because it is by no means clear from the submissions, in particular those for Grosvenor, what was agreed to constitute the record.

70 It should be noted that, whatever may be the precise constitution of the "record" in the present case, Musico tendered a folder of documents (exhibit PX 15) that included not only the adjudication application, the adjudication response, the determination and the documents relating to the application to Mr Davenport to exercise his power under the slip rule, but also the building works contract between Musico and Grosvenor, and documentation relevant thereto, including the subject payment claim by Grosvenor and Musico's payment schedule in response. Grosvenor did not oppose the tender of these documents and did not submit that I should not have regard to them in determining whether there had been error of law on the face of the record, although it was submitted for Grosvenor, in respect of every error that was alleged, that it was not "patent on the face of the record of the Adjudicator's determination".

First asserted error of law (paragraph 2(a) of the summons)

71 Mr Davenport's determination shows that:

1. The payment claim was made on about 12 June 2003;
2. On 23 June 2003, the Architect issued a progress certificate, apparently under cl 10.02 of the contract (to which Mr Davenport specifically referred in his determination); and
3. That progress certificate was included in Musico's payment schedule (I interpolate that the payment schedule was in evidence before me; the Architect's certificate was annexed to it; and the payment schedule made it clear that Musico's attitude – that nothing was payable – was based on the Architect's certificate).

72 Mr Davenport stated that Musico "claim[ed] to have terminated the contract under cl 12.03 on 27 September 2003". This however appears to be incorrect. (Of course, if it were correct, then the whole of Mr Davenport's reasoning on this point would be incorrect because, by hypothesis, the payment claim having been made at a time when the contract was on foot, Grosvenor's rights must be assessed under the contract, and in particular cl 10: see

section 9(a) of the Act.) Mr Davenport had "reservations about the validity of the purported termination" but made no finding thereon; Musico had submitted that he was not empowered to do so.

73 It appears to be common ground that the termination in fact occurred on 27 November 2002, rather than 27 September 2003. I say "appears to be" because:

1. This is the date of termination identified in Musico's chronology;
2. Grosvenor did not dispute the proposition that the document purporting to be a notice of termination was given to it on 27 November 2002;
3. Musico, in para 49 of their written submissions, referred "the termination date of the contract on 27 November 2002", and Grosvenor in para 121 of its written submissions appears to accept the proposition that termination purportedly occurred on that date; and
4. Neither party, in either its chronology or its written submissions, sought to support the date of 27 September 2003 to which Mr Davenport referred.

74 Mr Davenport found that cl 10 provided a mechanism for the making and valuing of monthly progress claims. However, he concluded, "the contract does not envisage that progress claims will continue to be made after termination ... under clause 12". In that event he said "[p]ayment is then governed by clause 12.05.04". That clause provides for an assessment on completion of the works. No such assessment had been made.

75 Mr Davenport considered that cl 12.05.04 "could not prevent a claimant from making a payment claim under the Act" because it appeared to be "an attempt to contract out of the provisions of the Act". (This was because the clause purported, on termination, to suspend the right to progress payments.) I am not certain whether this passage was integral to Mr Davenport's reasoning, but, if it were, it does not in my view disclose any error of law. On the contrary, a provision such as cl 12.05.04 must give way to the statutory right to progress payments created by s 8 of the Act (see s 34(1) in relation to contracting out).

76 But Mr Davenport's apparent conclusion, that the position as to payment was governed by cl 12.05.04, could only be correct if the contract had been terminated by Musico under cl 12.03. As Mr Davenport expressly refrained from deciding whether or not that had occurred, he could not have come to the conclusion that *"[p]ayment is ... governed by clause 12.05.04"*.

77 If the contract were on foot then, under s 9(a) of the Act, Grosvenor's entitlement was to *"the amount calculated in accordance with the terms of the contract"*. See also s 10(1)(a) whereby the construction work, that was the subject of the payment claim, was to be valued *"in accordance with the terms of the contract"*. Under both ss 9 and 10, the relevant enquiry can only go outside the terms of the contract *"if the contract makes no express provision with respect to the matter"* (see ss 9(b) and 10(1)(b)).

78 Thus, because Mr Davenport had not concluded that the contract had been terminated, cl 10.02 must have been the source of Grosvenor's entitlement to the progress payment that was the subject of its payment claim. In my opinion, Mr Davenport erred in law in deciding that cl 10.02 did not apply. His error is expressed in the following conclusion: "*It appears to me that the contract has no express provision for valuing the amount of the progress payment to be made in respect of the present payment claim*."

79 There are other errors apparent in this section of Mr Davenport's reasoning. Firstly, cl 10 in general, and cl 10.02 in particular, seem to me to be matters relating to procedure, rather than substantive obligations of performance. I think that cl 10.02 is an example of the kind of procedural obligation that would survive termination: *Heyman v Darwins Ltd* [1942] AC 356; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon Pty Ltd* (1980) 144 CLR 301; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

80 Secondly, as Mr Davenport noted in his determination *"[t]he payment claim ... is a claim for a progress payment under the contract"*. It is clear, both from Grosvenor's submissions before me, and from Mr Davenport's determination, that Grosvenor did not accept that the contract had been validly terminated. It must follow that its claim, which was expressed in the payment claim to be *"based on the provisions of the contract"*, was a progress claim made pursuant to cl 10.01. The claim in fact was signed by Grosvenor's solicitor, so it cannot be supposed that the stipulation that it was a claim *"based on the provisions of the contract"* was accidental, or a slip.

81 The inevitable consequence seems to me to be that Grosvenor invited Musico to have the claim assessed by the Architect in accordance with the provisions of cl 10.02 of the contract. As I have noted, that is precisely what Musico did.

82 Grosvenor's adjudication application was in evidence. I have already noted that, in my view, it forms part of the record. It includes a document described as "Claimant's Submission". That submission specified, among other things, that for the purposes of s 8 of the Act, "the relevant" "reference date on and from which the Claimant's right to the subject progress payment is 30 May 2003 in accordance with clause 10.01 and appendix A item K.1 of the Contract" (para 3.2).

83 Further, it was stated that "[t]he Claimant submits that cl 10.03 of the Contract applies to the Payment Schedule ..." (para 5.5). That was a reference to the obligation of the Architect, under cl 10.03, to give particulars of any difference between a progress certificate issued by him pursuant to cl 10.02, and the amount claimed by Grosvenor under cl 10.01. (I interpose to observe that if it is legitimate to have regard to the payment schedule, which was in evidence before me, the progress certificate did in fact give particulars of the difference between the amount claimed and the amount certified.)

84 The only view of events is that Musico was insisting on its right under the contract – in particular, cl 10.01 – and was propounding that contractual right as the basis of its payment claim and adjudication application.

85 Mr Davenport sought to buttress his conclusion by stating that he was not "satisfied that the so called progress certificate of 23.06.2003 is valid ...". His reasons for doing so are challenged in paras 2(b) to (f) of the summons. It is to those challenges that I now turn.

Paragraph 2(b) of the summons

86 Although both Mr Davenport and the parties referred from time to time to "the Architect" (adopting the contractual usage), the body or person that, it was common ground, occupied the contractual position of the architect, was a firm of quantity surveyors known as JPQS Pty Ltd ("JPQS"). For convenience, however, I will adopt the common usage and refer to "the Architect".

87 The first reason that Mr Davenport gave for regarding the progress certificate as invalid was that it was not signed by the Architect. The contractual obligations of the Architect under cl 10.02 were to assess and determine amounts owing by either party to the other, and to "issue" a progress certificate showing the amount assessed, other adjustments and matters, and (cl 10.02.03.06) "the amount certified as then being due for payment to the Builder by the Proprietor".

88 The progress certificate in question was issued on the letterhead of JPQS – each of its many pages was so headed. It has not been suggested that JPQS had not prepared the progress certificate. There is no requirement in the contract for the progress certificate to be "signed", as opposed to "issued". It is in my opinion clear that, in preparing and making available to the parties a document styled "Progress Certificate" that met the contractual requirements for such a document, JPQS did what the contract required and issued a progress certificate in response to the progress claim.

89 I therefore conclude that Mr Davenport erred in law in concluding that the progress certificate was vitiated because it was not signed.

Paragraph 2(c) of the summons

90 Mr Davenport stated, as a further ground of invalidity, that "[t]he Architect failed to issue progress certificates in respect of the preceding two progress claims. The Architect had abrogated the role envisaged by clause 10.02."

91 The failure to certify earlier claims may have been relevant had Grosvenor elected to pursue its rights in respect of those claims. It did not do so. Instead, it sought to pursue its rights in respect of the subject claim. Even if – which I do not think is the case – the Architect had abrogated its role by failing to certify the two prior claims, Grosvenor, by invoking the contractual process laid down in cl 10.02, was clearly calling upon the Architect to perform its part in that process. The Architect did so.

92 In the same context, Mr Davenport referred to the circumstance that the Architect had, on 29 November 2002, assessed the "final contract sum". This, it was said, gave the Architect a conflict of interest in relation to subsequent progress claims.

93 That reasoning is fundamentally flawed. The Architect was obliged to certify a final contract sum after (and assuming the validity of) the purported termination. It is impossible to understand how that could have furnished a "c*onflict of interests*" when, as happened, Grosvenor called on the Architect to perform its duty under cl 10.02.

Paragraph 2(d) of the summons

94 Mr Davenport identified as a "serious flaw in the certificate", the fact that the Architect had calculated liquidated damages at 27 November 2002, being, it was said, "*Termination Date of contract*". Mr Davenport referred to other dates propounded by Musico and concluded *"that the Architect's assessment of liquidated damages is not to be relied upon"*.

95 Even if the Architect erred in this calculation, that would not render the progress certificate void. It would be a matter for Mr Davenport as adjudicator to determine what (if any) was the appropriate amount to be allowed for liquidated damages and to take that into account in his determination.

Paragraph 2(e) of the summons

96 In any event, Mr Davenport concluded that the liquidated damages clause was a penalty. The liquidated damages amount was $2,500 per day. There is no basis shown in the determination for concluding that this amount, in the context of a contract for $3,870,000 (exclusive of GST) for additions and alterations to a shopping centre, is *"out of all proportion"* or *"extravagant, exorbitant or unconscionable": **Amev-UDC Finance Ltd v Austin*** (1986) 162 CLR 170; ***Esanda Finance Corporation Ltd v Plessnig*** (1989) 166 CLR 131. Mr Davenport appears to have thought that the amount fixed was a penalty because *"the contract makes no provision for reduction upon handing over of possession of parts of the works"*. As Wilson and Toohey JJ recognised in ***Esanda Finance*** at 142, there is a need "to allow for the latitude that necessarily attends the conception of a genuine pre estimate of damages". Mr Davenport seems not to have recognised this principle; but in any event, his reasoning gives no indication of why, having regard to the test established by the authorities to which I have referred, the specified sum was penal.

Paragraph 2(f) of the summons

97 Mr Davenport concluded *"that time is at large (because the Architect has failed to administer the time extension provisions as required by the contract)*." His reasoning was that *"[t]he Architect has not granted a single days [sic] extension of time notwithstanding that the Architect has acknowledged that the scope of work was increased by*

$187,000 and in addition, the Architect approved variations to the value of $357,017 ... . I cannot imagine that that additional amount of work would not have justified so much as one day of extension of time".

98 Even if Mr Davenport's scepticism were well founded, it does not follow that, as he concluded "the Architect failed to administer the extension of time provisions in accordance with the terms of the contract", or that time was thereby rendered at large. If the appropriate material had been put before him, it might have been open to Mr Davenport to reach some assessment for himself of the amount (if any) that should be allowed for liquidated damages, having regard to the extensions (if any) that the Architect should have granted. It was not open to him to avoid this task and, instead, simply to conclude that time was at large.

Paragraph 2(g) of the summons

99 For the reasons that have been referred to, Mr Davenport's conclusion was that he was "not satisfied that the amount of the progress payment can be determined in accordance with the terms of the construction contract". In my view, that conclusion was wrong in law, because each of the elements that leads to it is wrong in law.

100 But, the approach that Mr Davenport thereupon took is wrong in law for another reason. He purported to "determine the amount of the progress payment in accordance with s 9(b) of the Act". However, as I have noted, that section only applies where "the contract makes no express provision". In the present case, the contract did make express provision. It followed that, even on his conclusions, Mr Davenport was obliged to assess the progress claim in accordance with the contract, and not under s 9(b).

Second issue: denial of natural justice

101 Under this heading, Musico relied on the circumstance that, so they said, Mr Davenport reached a number of conclusions that had not been advanced by Grosvenor and of which Musico had not had notice.

102 Musico relied on six of the matters that have been referred to above, in relation to the question of error of law on the face of the record. They are the matters referred to in paras 2(a), (b), (c), (d), (e) and (g) of the summons, which are substantially repeated, in relation to denial of natural justice, in paras 3(a) to (f) of the summons.

103 The complaint as to denial of natural justice in relation to the proposition that the liquidated damages figure was penal (para 3(e) of the summons) has been withdrawn.

104 Three additional matters are raised: relating to the cost of rectification of defect; the amounts approved for variations and additional scope of works; and the amounts claimed in respect of liquidated damages and retention monies. As to the first and third of these, there was some concession by Grosvenor but, notwithstanding that concession, Mr Davenport did not take the matters into account. As to the second of those matters: it was said that the variations of $357,017 in fact included, and were not additional to, the amount of $187,000 for additional scope of works.

105 Not only is it difficult to understand Grosvenor's position as to whether, in principle, Mr Davenport was obliged to afford the parties natural justice (see para [44] above), it is also difficult to understand its position in relation to the specific breaches alleged by Musico. So far as it can be gleaned from the written submissions for Grosvenor, Grosvenor's position, in relation to the complaints advanced by paras 3(a), (b), (c) and (d), appears to concede that the specific reasons of Mr Davenport that are impugned in those paragraphs were not specifically raised, either by Musico in its adjudication application, or by Mr Davenport pursuant to s 21(4)(a) of the Act.

106 As to two of those matters – namely, those referred to in paras 3(a) and 3(d), Grosvenor's position appears to be that, although the matters were not explicitly raised, nonetheless, because, in effect, Mr Davenport was required to consider the provisions of the contract, the provisions of the payment schedule and the provisions of the Act, it was open to him to reach the view that he did, notwithstanding that Grosvenor had not advanced or contended for those views in its adjudication application.

107 If that be Grosvenor's position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).

108 It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it". (See Lord Diplock in ***O'Reilly*** at 279.)

109 In my opinion, therefore, the complaints of denial of natural justice asserted in paras 3(a), (b), (c) and (d) of the summons are made out.

110 It is apparent – and the submissions for Grosvenor appear to concede this – that the complaint advanced by para 3(f) stands or falls with the complaint advanced by para 3(a). Having regard to the view that I have just expressed, it stands.

111 The remaining complaints (bearing in mind that para 3(e) has been abandoned) seem to me to fall into a somewhat different category. The matters there complained of were the subject of articulation and debate (not, of course, in the process of any hearing but through the adjudication application and adjudication response). Mr Davenport may have erred in the conclusions to which he came in respect of these matters, but I do not think, in coming to them, he contravened the principles of natural justice as they are to be accommodated to the scheme of the Act.

Third issue: acting in excess of jurisdiction/failure to exercise jurisdiction

112 As I understand Musico's complaints in this regard, they are that:

1. Insofar as Mr Davenport made the determinations referred to in para 4 of the summons, he had "no jurisdiction" to do so; and
2. To the extent that Mr Davenport failed to correct what were said to be arithmetical errors or obvious mistakes in his determination, he erred in his apparent exercise of discretion not to do so because he failed to exercise the jurisdiction given to him by s 22(5) of the Act.

113 The first group of complaints was based on two propositions: that an adjudicator under the Act has no power to decide questions of law; and that at least some of the errors were jurisdictional in nature.

114 It may be accepted that an adjudicator has no power to decide questions of law in an authoritative or binding way. That follows, if from nothing else, from the common law position as explained in *Craig* (see para [49] above), and from the provisions of s 32. Section 32 means that the principle, established by cases such as ***Administration of the Territory of Papua and New Guinea v Daera Guba*** (1973) 130 CLR 353, that the doctrine of estoppel extends to the decisions of a tribunal that has jurisdiction to decide finally a question arising between parties, has no application in this case. But it does not mean that an adjudicator, in the course of reaching what on the scheme of the Act is an interim and ultimately non-binding determination, has no power to come to a conclusion on questions of law.

115 In ***Parist Holdings Pty Ltd v WT Partnership Australia Ltd*** [2003] NSW SC 365, Nicholas J, having examined s 22(2) of the Act, concluded, in paras [43] and [44], that it was open to an adjudicator to consider, and to come to a view about, matters such as the existence of a contract and its terms, and the existence and effect of contractual provisions. Although his Honour was considering the Act prior to its amendments, s 22 was not amended in a way that is presently material. In my opinion, his Honour's reasoning is both correct and applicable to s 22 as amended.

116 On its proper construction, the command in s 22(2) operates in two ways:

1. Firstly, it specifies matters that an adjudicator "is to consider";
2. Secondly, and by exception, it stipulates the matters that an adjudicator is not to consider.

117 An obligation to consider something requires "*an active intellectual process directed at that*" thing: ***Tickner v Chapman*** (1995) 57 FCR 451, 462 (Black CJ); or the application of one's own mind to it by obtaining an understanding of the relevant facts, circumstances and contentions, ibid at 476 (Burchett J); see also at 495 (Kiefel J). In any case where a determination of the issues before an adjudicator depended on the terms of the contract and their effect – i.e., to what obligations, properly construed, did the contract give rise – an adjudicator must necessarily form a view of these issues in the process of deciding the question of entitlement. In any such case, it would be impossible for an adjudicator to come to a view as to the quantification of a party's contractual entitlement without understanding that entitlement.

118 The protection for the parties – in particular, the party against whom the determination is made – is that the determination is not binding and that it can in effect be corrected on a final hearing of the issues in dispute.

119 The more difficult question is whether the impugned determinations, or conclusions, amounted to jurisdictional error. In my opinion, Mr Davenport did fall into jurisdictional error. By ss 9(a) and 10(1)(a) of the Act, the adjudication in this case was to be carried out by reference to the relevant provisions of the contract. As Mr Davenport recognised, the relevant provision was, on the face of things, cl 10.02. That directed his attention to the Architect's certification. But because of the errors in approach that I have identified in paras [72] to [84] above, and because of the additional errors that I have identified in paras [86] to [100] above, Mr Davenport failed to have regard to the relevant provisions of the contract. He therefore failed to carry out the task that the Act requires to be carried out in the manner that the Act requires it to be carried out. It must follow that Mr Davenport failed to exercise the jurisdiction given to him by the Act.

120 As to the second complaint in relation to jurisdiction, it should be recorded that the parties did not agree that Mr Davenport made arithmetical errors or obvious mistakes in his determination. I was taken to material to suggest that this was indeed the case. I was, and remain, in some doubt that it is appropriate to look at material that goes beyond the record for the purpose of determining whether there has been jurisdictional error. However, it is not necessary to decide this point because I think that the complaint fails for another reason.

121 It is, I think, clear that a mistake of the kind referred to in s 22(5) would not vitiate a determination made by an adjudicator. It is equally clear that the power given by s 22(5) is permissive rather than mandatory. That is no

doubt because the legislature recognised that any mistakes could be corrected upon a final hearing: see s 32(3).

122 It might be thought that, in the ordinary case, a proper exercise of the discretion conferred by s 22(5) would favour the correction of mistakes of the kind referred to therein. However, it is a matter for the adjudicator whether or not any such correction is to be made. If an adjudicator declines to make any correction – for example, because he or she thinks there is no mistake – then the error (if any) will be an error within jurisdiction. This is really another way of saying that, under s 22(5) a party to an adjudication has the right to request the adjudicator to consider the exercise of power under s 22(5), not the right to have the power exercised in a particular way. As Griffith CJ said in ***R v Arndel, ex parte Freeman*** (1906) 3 CLR 557, 566-567, and repeated in ***Randall v Council of the Town of Northcote*** (1910) 11 CLR 100, 105: "*If the act sought to be compelled to be done is a discretionary act, mandamus does not go further than to command the exercise of the discretion, and can never go to command its exercise in a particular manner.*"

123 In the present case, the evidence suggests that Mr Davenport considered the application. If mandamus is to lie, it must be shown that the ostensible performance of the obligation to consider under s 22(5) was not a real performance of that obligation. There is no evidence to suggest that this is the case. Further, to the extent that Musico relied on the apparent arithmetical and other discrepancies that ground this complaint, they "*ought not to be permitted under colour of doing so to enter upon an examination of the correctness of the [adjudicator's] decision*": ***R v War Pensions Entitlement Appeal Tribunal; ex parte Bott*** (1933) 50 CLR 228, 243.

124 I therefore conclude that Musico has demonstrated jurisdictional error of law, but no other jurisdictional error.

Discretionary defences

125 Grosvenor submitted that the grant of relief in the nature of prerogative relief is discretionary. Musico did not appear to challenge this proposition at the level of principle. In my opinion the proposition is, again at the level of principle, correct: see, for example, ***Hill v King*** (1993) 31 NSWLR 654, although there may be still some controversy as to the extent of the discretion.

126 It has been held on a number of occasions that the grant of certiorari is discretionary, and that it will ordinarily be refused where there is an effective alternative remedy. Specifically, relief will ordinarily be refused to a party who had a right of appeal against the order which it is sought to quash: ***Re McBain: ex parte Australian Catholic Bishops Conference*** (2002) 209 CLR 372, 472 [283] (Hayne J); see also ***Re Preston*** [1985] AC 835, 852 (Lord Scarman), 862 (Lord Templeman). However, as was emphasised in ***Meagher v Stephenson*** (1993) 30 NSWLR 736, 738, the question is what is the most effective and convenient remedy, not just for the applicant, but also in the public interest.

127 Grosvenor relied on some five discretionary considerations:
1. the asserted existence of an alternative and more convenient remedy;
2. whether the relief would be futile;
3. whether the application lacked real merit;
4. whether the plaintiff had suffered any real injustice; and
5. whether the decision would have been the same even if the alleged error had not occurred.

128 I consider those matters in turn.

Alternative remedy

129 Grosvenor relied on s 32 of the Act. As I have already noted, the effect of sub s (3) is to enable the Court (or other appropriate tribunal – e.g., an arbitrator) on a final hearing to take account of money paid under the determinations of adjudicators and, where necessary, to order restitution. Alternatively, Grosvenor submitted that Musico could seek to have set aside the judgment that followed from the filing of the adjudication certificate.

130 In my opinion, the question of refusing relief on these discretionary grounds would only arise where the suggested alternative remedy would, if sought and obtained, have the same effect as relief in the nature of prerogative relief. In the context of the Act, that could only be so where an application to set aside the judgment arising from the filing of the adjudication certificate could be conducted on grounds including denial of natural justice or jurisdictional error. If I am right in thinking that s 25(4)(a)(iii) would preclude those arguments, then it could not be said that such an appeal is a true alternative to relief in the nature of prerogative relief.

131 Grosvenor also submitted that it would be open to the judgment debtor to seek a stay of the judgment. Section 32 preserves such rights as the parties to a construction contract have apart from (and of course not inconsistent with) the Act. I do not think that there is anything in the Act that would preclude a court from exercising its statutory or inherent jurisdiction to stay a judgment that, by force of s 25(1), it must be taken to have given. However, unless such a stay can be granted because of denial of natural justice or jurisdictional error, it cannot be regarded as an alternative remedy. Even if it could, it would not be a true alternative. The effect of a stay is to prevent execution, during the continuance of the stay, of the judgment. The effect of certiorari is to quash the decision and, therefore, the judgment consequent upon it. Neither is finally determinative of the rights of the parties under the construction contract.

132 t is not to the point that the balance of accounts between Musico and Grosvenor will (or may) in due course be ascertained, and that appropriate adjustments will (or may) be ordered. The question for present consideration is whether Grosvenor should be forced to pay an amount that is due only because of an adjudicator's determination that, I have found, was flawed by denial of natural justice and jurisdictional error. In this context, it should be

remembered that, whilst the judgment remains in force, it can be enforced. It could also be used to found a notice under s 459E of the *Corporations Act* 2001.

Relief would be futile

133 Grosvenor submits that relief would be futile "since the adjudicator is now "functus officio", and the determination has been registered as a judgment of this Court". Whether or not those propositions are correct, certiorari to quash the determination will be effective – either automatically or by way of consequential relief.

134 In any event, I am not certain that the concept of "functus officio" has any relevance. If the decision is quashed then the effect will be that there has been no valid determination of Grosvenor's adjudication application. I see no reason why Adjudicate Today could not nominate another adjudicator to undertake the task that, on my reasoning, Mr Davenport failed to carry out according to law. Musico in their written submission in reply, appeared to accept that this would be the case.

Lack of real merit/no real injustice/whether decision challenged would have been the same even without error

135 As the parties covered these three matters together, so will I.

136 Those submissions appeared to be based upon Grosvenor's detailed submissions on the errors alleged by Musico. To the extent that I have found that there was merit in Musico's claim, those submissions fail.

137 I do not think that the granting or withholding of relief depends on some attempt to divine what would have happened had the plaintiff been afforded natural justice. On the contrary, the reason for granting relief in those circumstances is precisely because the plaintiff has been denied the opportunity to put its case. In the present case, Musico were denied the opportunity to meet what turned out to be crucial, although unheralded, steps in Mr Davenport's reasoning. To the extent that the matters complained of were also asserted to constitute errors of law, I have indicated that in many cases I agree. It cannot be supposed that Musico, had they been given notice, would have been unable to persuade Mr Davenport of this.

138 For essentially similar reasons, I do not think that the granting or withholding of relief should depend on an analysis of what might have happened had Mr Davenport exercised the jurisdiction given to him according to law.

Abuse of process

139 Grosvenor's challenge appears to be "that the Plaintiffs' grounds for judicial review are generally lack of [sic] merit and there is no real case for the relief or remedy sought." To the extent that I have found that Musico's challenges are made good, the complaint of abuse of process is groundless. To the extent that I have found that the challenges are not made good, the complaint of abuse of process adds nothing.

Election

140 Grosvenor relied on three matters:

1. Firstly, Musico had submitted to adjudication;
2. Secondly, Musico had sought correction of alleged errors in the determination pursuant to s 22(5); and
3. Thirdly, Musico had sought mandamus to compel Mr Davenport to correct those alleged errors.

141 The first of these propositions is untenable. A party upon whom an adjudication application is served has two choices: to submit (and pay) or to contest. It cannot be said that, by seeking to contest the application, that party somehow acquiesces in any breach of the obligations of natural justice, or jurisdictional error, that might follow.

142 The second and third matters can be considered together. The correction that Musico sought did not relate to any of the conclusions of Mr Davenport that, in these proceedings, Musico sought to challenge. I do not think that Musico, in seeking to have corrected what it contends are arithmetical errors, must thereby be taken to accept the whole of the determination against it regardless of what Musico says (and, in some instances, I have found) are matters that vitiated the determination as a whole.

Consequences of Grosvenor's being in administration

143 This argument appeared to be directed to the proposition that Musico were seeking a stay because Grosvenor was in administration. It is certainly the case that, by notice of motion filed in Court on 7 August 2003, Musico sought a stay of execution under the judgment that Grosvenor had recovered by filing the adjudication certificate in this Court. However, that stay was sought (and granted on conditions) to preserve the position whilst these proceedings were heard and determined. I did not understand Musico to submit that, quite independently of their challenges to Mr Davenport's determination, there should be a permanent stay, or at least a stay up until the underlying issues in dispute between them and Grosvenor under the contract were resolved, on the ground that Grosvenor was insolvent.

144 If Grosvenor intended to go further, and submit that, because it is in administration, then relief (if otherwise available) should be refused on discretionary grounds, I would not accept that submission. There does not seem to me to be any basis of principle upon which I could hold that the fact of Grosvenor's administration means that Grosvenor should have, or retain, the benefit of a determination in its favour that was, as I have found, fundamentally flawed.

Conclusion and orders

145 In my opinion, Musico are entitled to the relief that they seek. I therefore make the following order:

I order that the determination of the first defendant made on 18 July 2003 on adjudication application No. 2003 ADJT082, pursuant to the *Building and Construction Industry Security of Payment Act* 1999, be quashed.

146 I will hear the parties on the question of consequential or other relief (if required) and costs

M G Rudge SC/D A C Robertson (Plaintiffs) instructed by White Barnes
Submitting appearance (Defendant 1) instructed by Philip Davenport (Defendant 1)
D A Doyle, Sol/J Cheung, Sol (Defendant 2) instructed by The Builders' Lawyer (Defendant 2)