JUDGMENT :Associate Justice Macready. Equity Division. New South Wales Supreme Court. 3rd July 2006

1 This is the hearing of proceedings in which the plaintiff seeks a declaration that the determination of the third defendant ("the Adjudicator") dated 20 March 2006, purportedly made pursuant to the **Building and Construction Industry Security of Payment Act** 1999 ("the Act"), is void.

2 The plaintiff also seeks consequential relief restraining the first defendant from requesting an adjudication certificate under s 23 of the Act or filing any such certificate as a judgment debt under s 25 but at the moment that is not relevant as the first defendant has undertaken not to request an adjudication certificate or file it as a judgment.

3 The plaintiff's claim in the summons is brought on two grounds, namely, that the Adjudicator failed to consider a submission as to the absence of his jurisdiction made by the plaintiff; and secondly, that the Adjudicator failed to give reasons for deciding he had jurisdiction contrary to that submission.

Background history

4 The plaintiff's submissions helpfully set out the background history and I will incorporate it with some amendment in this judgement.

5 The plaintiff entered into a contract with the first defendant on or about 8 September 2003 for construction work to create an 8 kilometre dual carriageway and associated bridges in an area to the north of Kiama, NSW. The General Conditions of the contract are based on NPWC3 (1981).

6 The project included an area approximately 300 metres long known as "Cut 4". Cut 4 is located in the vicinity of the town of Bombo and accommodates the dual lane carriageway as well as on-loading and off-loading ramps to the Bombo Interchange Bridge.

7 On 2 February 2006 the first defendant made a payment claim, purportedly both under clause 42.1.1 of the contract and section 13 of the Act for $16,577,648.21 in respect of works up to and including 30 January 2006.

8 The plaintiff, in response to the payment claim dated 2 February 2006, served its payment schedule on 15 February 2006 proposing to pay an amount of $738,033.42.

9 Part of the first defendant's payment claim included a claim for an amount of $7,965,509.13 that the first defendant asserts to be due in relation to alleged instructions given by the Superintendent between November 2003 and March 2004 affecting works in Cut 4 because of the presence of a disused detonator dump. The parties have referred to this claim in short form as the detonator dump claim. On 17 March 2005 the Superintendent, pursuant to clause 45.2(a) of the contract, determined that $1,815,458.61 was payable in respect of the "detonator dump" claim. The plaintiff has paid this amount.

10 The first defendant at paragraph 1.11 of its Adjudication Application requested the Adjudicator to determine the amount of the "detonator dump" claim only, that is, $7,965,509.13 and not the total amount claimed in the payment claim.

11 On 20 March 2006 the Adjudicator determined that the plaintiff was to pay the first defendant the amount of $5,583,794 . The amount of the determination comprises $4,845,760.59 for the detonator dump claim and $738,033.42; being the amount the plaintiff proposed paying the first defendant in its payment schedule.

12 It was pursuant to consent orders made by Bergin J on 28 March 2006 that the first defendant undertook, until further order, not to request an adjudication certificate under s 23 of the Act or to file any such certificate as a judgment debt under s 25. The same orders contain a regime for the plaintiff to provide security for the amount of the determination, plus interest, pending the determination of the summons.

The jurisdiction submission

13 The submissions made by the plaintiff to the Adjudicator are contained in the Adjudication Response. In paragraphs 2, 10, 11, and 64-84 of those submissions, the RTA submitted that the Adjudicator had no jurisdiction to determine the Application. The submission was that the Adjudicator did not have jurisdiction because he was being asked to perform a dispute resolution role in relation to an extension of time claim under the contract and not a valuation role in relation to an amount of a progress payment under section 9(a) of the Act. The argument was expressed as follows in paragraph 80 of the plaintiff's Adjudication Response: *"An Adjudicator under the Act cannot be an arbiter of a contested EOT claim, which (in the present case) has not only been determined by the Superintendent but has been referred to discussion with the Principal under clause 45.2(b) of the Contract and is now subject to the Expert determination process under clause 45.3. The adjudication of such claims is beyond the object of the Act. The resolution of an EOT claim does not call for the adjudicator to exercise a valuation function, but rather the Adjudicator is being asked to stand in the shoes of the Superintendent in respect of a determination he made under a dispute resolution clause - ie, clause 45.2(a). This is fundamentally different from the situation where an Adjudicator is asked - and is permitted - to stand in the shoes of the Superintendent when the Superintendent is assessing a Payment Claim under the Act."*

14 At this stage it is not necessary to go into the full details of the argument that was advanced but merely to see whether the adjudicator considered it.

Did the adjudicator consider the jurisdiction submission?

15 A reading of the determination shows that there is no express consideration of the submission. In an early section of the determination dealing with the "procedural history and jurisdiction" the Adjudicator found various facts,

such that the work was construction work, which were necessary to give him jurisdiction. Then immediately after making such findings the Adjudicator in clause 5 states that he has "considered" "the Adjudication Response and the documents contained therein". In ***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** *[2005] NSWSC 548 at [38] – [40]* McDougall J stated:

"A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something … [a] requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made".

16 The statement in clause 5 could not, in my view, amount to a consideration of the submission as to jurisdiction, especially in the context of a statutory obligation to give reasons in s 22(3)(b) and coming as it did immediately after the Adjudicator turned his mind to making relevant factual decisions on jurisdiction.

17 In the section of the report that dealt with "Reasons for the determination" and a subheading of "Explanations and Overview" he made the following comments:

"*6.2 Both parties have provided submissions that are additional to the entitlements provided under the various sections of the Act and were not requested pursuant to section 21(4) (a) of the Act. These additional submissions have not been considered in determining the adjudication application.*"

18 It is plain that what the Adjudicator was referring to were a series of letters written after the plaintiff had filed its adjudication response. The first defendant had written to the adjudicator pointing out that the submission as to jurisdiction had not been included in the payment schedule and therefore should not be taken into account by the Adjudicator. This short series of correspondence finished with a note from the Adjudicator saying somewhat elliptically that he would only be considering material that was permissible under the Act in the determination.

19 The Adjudicator dealt with the parties' submissions in a detailed and careful manner. On a number of occasions he picked up the point that a matter in the adjudication response had not been dealt with in the payment schedule and accordingly he refused to consider it. However nowhere in his determination does he say this about the jurisdiction submission which was contained in the adjudication response.

20 In my view the Adjudicator has failed to consider the plaintiff's jurisdiction submission. The reason why he did not do so is not apparent from his determination and it is only in this sense that there is an absence of reasons.

21 The first defendant raised the following matters in answer to the plaintiff's claim:
1. The Adjudicator was not obliged to consider the submission because it was not included in the payment schedule.
2. Even if the Adjudicator was obliged to consider the submission the determination is not void.
3. The submission was bad in any event and relief should be refused on discretionary grounds.
4. Failure to give reasons does not render a determination void.

22 I will now consider these matters.

Was the Adjudicator obliged to consider the submission which was not included in the payment schedule?

23 The first defendant relied on the provisions of the following sections of the Act in support of its submission that the Adjudicator was not obliged to consider the jurisdiction submission because it had not been duly made.

24 Section 14 provides for payment schedules and s 14(3) provides:

"*(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.*"

25 Section 20 deals with adjudication responses and is in the following terms:

"*20 Adjudication responses*

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response****) at any time within:*
(a) 5 business days after receiving a copy of the application, or
(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,
whichever time expires later.

(2) The adjudication response:
(a) must be in writing, and
(b) must identify the adjudication application to which it relates, and
(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2) (b).

(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.

(3) A copy of the adjudication response must be served on the claimant."

26 The foundation of the first defendant's case was of course subsection (2B) as the payment schedule did not contain any reference to the jurisdiction submission.

27 One should also note the obligations upon the Adjudicator in s 22 which contain, inter alia:

"*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)."

28 In the context of the Adjudicator's obligation to give consideration to submissions that have been "duly made" it should be noted that the adjudicator does have power to order further submissions under s 21, the relevant parts of which are as follows:

"*(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:*

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates."

29 The first defendant referred to a number of cases which dealt with the obligation to disclose in the payment schedule matters, relied upon in the adjudication response. A number of these cases were concerned with the raising of a new matter of defence but do not seem to be concerned with a situation which goes to the jurisdiction of the arbitrator.

30 In ***Multiplex Constructions Pty Ltd v Luikens*** *[2003] NSWSC 1140* Palmer J said the following:

"*65 Mr Rudge submits that the words in s.14(3), **"if it is less because the respondent is withholding payment for any reason"**, are to be construed as meaning "if it is less because the respondent is holding back a payment, otherwise properly due under the contract, by reason of a cross claim or set-off": see e.g. T22.51ff, T5.1-.17. Where a cross claim or set-off is the reason for not paying the amount claimed in the Payment Claim, says Mr Rudge, that reason must be disclosed in the Payment Schedule. But where the respondent refuses to pay the amount claimed on the ground that it is not due and payable according to the terms of the contract, that is not "withholding payment" within the meaning of that phrase in s.14(3) and the reason for not paying the amount claimed is not required to be shown in the Payment Schedule.*

66 In the present case, Mr Rudge says, one reason for not paying the amount claimed for Item 8 was that the claim was excessive when valued according to the terms of the contract. That reason was not required to be disclosed in the Payment Schedule and, consequently, the adjudicator was not entitled to exclude it from his consideration by reason of s.20(2B). That reason, together with the evidence in support of it, was, therefore, properly part of Multiplex's Adjudication Response and the adjudicator had a duty under s.22(2)(d) to consider it. His error of law in refusing to consider it was a jurisdictional error requiring that the determination be quashed.

*67 I am unable to accept this submission. The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "**ambush**" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*

*68 Section 14(3) requires that if the respondent to a payment claim has " **any reason**" for "**withholding payment,** it must indicate that reason in the payment schedule. To construe the phrase "**withholding payment**" as meaning "**withholding payment only by reason of a set-off or cross claim**" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "**withholding payment of all or any part of the claimed amount in the payment claim".** If the respondent has any reason*

whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

69 A subsidiary argument which Mr Rudge appeared to advance in his oral submissions was that Multiplex had given a sufficient reason in its Payment Schedule for withholding payment of the claim in respect of Item 8 simply by stating that the claim was "rejected"; Multiplex had thereby complied with the requirements of s.14(3) and was permitted to amplify that reason in its Adjudication Response by giving particulars of valuations and calculations on the basis of which the claim had been rejected.

70 I am unable to accept this submission. For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication."

31 His Honour returned to the matter in ***Brookhollow Pty Ltd v R & R Consultants Pty Ltd*** *[2006] NSWSC 1*. That was a case where a payment schedule was not served, an undefended adjudication obtained and the certificate was filed on the District Court as a judgment. Application was then made to restrain the defendant from taking action to enforce the determination. The case put before His Honour was summarised by him as follows:

"*21 Brookhollow submits that Claim No 9 was not a valid payment claim under the Act; accordingly, there was nothing upon which Mr Davenport could validly adjudicate so that his Determination is a nullity.*

22 Mr Harper SC, who appears for Brookhollow, says that Claim No 9 is not a payment claim within s.13 of the Act because:

- *it was not served within the period determined by or in accordance with the Contract: s.13(4)(a);*
- *it was not served within twelve months after the construction work to which the claim relates was last carried out: s.13(4)(b);*
- *it is a second payment claim in respect of the same reference date under the Contract, the first payment claim in respect of that reference date being Claim No 8, so that Claim No 9 is prohibited by s.13(5).*

23 Mr Harper submits that service of a payment claim which meets the requirements of s.13 is a necessary precondition to an adjudicator's jurisdiction to enter upon the adjudication. He says that whether a payment claim is valid under s.13 is ultimately a question of law so that it does not matter whether the validity of the payment claim was raised before the adjudicator: a party can always come to this Court or any other competent Court to take the point that the adjudication was a nullity because the payment claim adjudicated upon was not a valid payment claim under s.13 of the Act."

32 That was a case where the jurisdiction of the Adjudicator was in issue. Plainly in that case there was no raising of the defences referred to above in the payment schedule, as there was no schedule. His Honour dealt with the law as to the validity of a payment claim and whether it complies with s 13(2). He then went on to discuss whether it was necessary for it to negative on its face the possibility of a prohibition under s 13(4) or (5).

33 In this respect he said:

"*44 A payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defences to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.*

45 In my opinion, a payment claim under the Act works the same way. If it purports reasonably on its face to state what s.13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.

46 An assertion that service of a payment claim is prohibited under s.13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s.13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.

47 However, if the respondent does elect to raise a defence in bar founded on s.13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That

examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.

48 In my opinion, the scheme of the Act in general and of s.13 and s.14 in particular requires that a defence in bar to a payment claim founded on s.13 (4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s.15 (4) of the Act.

49 In my opinion, these conclusions are consistent with, and are inherent in, the reasoning in Brodyn and they are not contrary to the majority decision in Nepean. They are also in conformity with the general approach to the determination of invalidity of a payment claim under s.13(4) and (5) taken by McDougall J in ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** *[2005] NSWSC 801, at para 25, by Campbell J in* ***Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd*** *[2005] NSWSC 705, at para 19, and by Campbell J in* ***Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*** *[2005] NSWSC 1143 at paras 87-90."*

34 As is apparent from that case Justice Palmer was considering a submission which ultimately went to the jurisdiction of the Adjudicator. His Honour's conclusion was in these terms:

"51 For the reasons which I have given, I conclude that because Claim No 9 complied with the requirements of s.13(2), it was not a nullity under the Act, i.e. it was effective to engage the provisions of Pt 3. If Brookhollow wished to assert that the payment claim was barred by reason of the prohibition in s.13(4) or (5), it had to do so in a timeously served payment schedule. Having failed to serve a payment schedule within time, Brookhollow was not entitled to assert nullity of the payment claim in order to resist the entry of judgment under s.15(4). Likewise, it cannot now rely upon the defence in bar to found an injunction restraining enforcement of the adjudication determination or of the judgment resulting from it."

35 The first reason that the plaintiff says that s 20(2B) did not apply is that a submission as to jurisdiction was not a "*reason for withholding payment*" within the meaning of s 20(2B). It is said to be in substance an assertion that an adjudicator does not have the power to determine whether the payment should be withheld. Accordingly, it was submitted that on its face the section did not apply.

36 The first defendant submitted that one obvious "reason for withholding payment" in an appropriate case would be that the claim for payment does not come within the scope of the Act. In the present case it was submitted that both in form and in substance, one of the reasons for "*withholding payment*" relied upon by the plaintiff in its adjudication response was the claim that it was not open to the first defendant to recover what the plaintiff describes as delay costs in circumstances where the Superintendent has not granted an extension of time.

37 The first defendant argued that if the plaintiff's construction of s 14(3) were correct, it would have absurd consequences for the operation of the Act and they illustrated the result by the following examples. A respondent merely states in its payment schedule:

"I do not propose to pay anything because the claim is not for or in relation to construction work or for related goods and services".

Or

"I propose to pay nothing because the construction work was carried on outside New South Wales".

38 It was submitted that on the plaintiff's reasoning there is no valid payment schedule in these examples because no "reason for withholding payment" is disclosed and it would thus follow that the claimant could obtain summary judgment pursuant to s 15 of the Act. The real reason for withholding payment is, it was submitted, because the Act does not allow the claimant to recover such amounts and a respondent would be entitled to state so in the payment schedule.

39 The submission is important more for suggesting ways in which the real complaint by the plaintiff could have been expressed in the payment schedule. One could now characterise the real complaint as being the fact that the Act does not respond to the claims made by the first defendant and that those claims should be dealt with under the contractual regime between the parties.

40 The plaintiff also pointed to the fact that submissions as to jurisdiction could not be required to be included in the payment schedule because such submissions cannot be made until jurisdiction is invoked. It might be that jurisdiction is never invoked and in any event an absence of jurisdiction is a matter that has to be dealt with by the person who proposes to exercise jurisdiction. At the time of service of the payment schedule there is no such person who has been identified and the parties are merely dealing with claims made between inter parties.

41 However stating in the payment schedule that the Act does not respond to the claim has utility as it gives the claimant the opportunity to decide whether to proceed to the next step of making an adjudication application with all its attendant expense.

42 The plaintiff also submitted that s 14(3) requires that a distinction be made between a "reason for withholding payment" and an explanation as to "why the scheduled amount is less" than the claimed amount. Section 20(2B) only deals with the former. A reason for withholding payment is akin to an acceptance that there is an entitlement to payment in the amount claimed accompanied by an assertion that payment will nonetheless not be made for some other reason (such as set-off). Accordingly it was submitted that a reason for withholding payment is a

different matter from, for example, an assertion that the work was never done or that the work was done but had a value less than the amount claimed which disputes the quantum of the claim.

43 The plaintiff recognised that this argument was put in ***Multiplex Constructions v Luikens*** and rejected by Palmer J. One of the concerns for His Honour was of course that a matter raised in an adjudication response and in respect of which there has been no opportunity to respond should not surprise a party. Furthermore, a matter going to the jurisdiction of the arbitrator, for instance, whether there was construction work, is unlikely to be raised by the applicant for adjudication and the question of whether or not there is jurisdiction is more likely to be raised by the respondent to an application in the adjudication response.

44 If a new submission is legitimately made in an adjudication response then the measure of natural justice that the Act requires to be observed would most likely include notice of that submission to the applicant for adjudication with an opportunity to respond. Although the Act does not contain a mechanism to give the applicant an opportunity to provide responsive submissions by way of right, the Adjudicator has within his control a mechanism which would ensure that natural justice is given to the applicant in respect of such a submission. The mechanism is the power of the Adjudicator under s 21 to call for further written submissions from either party and give a party an opportunity to comment on those submissions.

45 Something similar happened in this case when the first defendant on its own initiative made submissions responding to the adjudication response. However the Adjudicator decided to ignore them. The case has not been argued by the plaintiff on the basis of a denial of natural justice in this respect no doubt due to the fact the plaintiff suggested to the Adjudicator that he should not have regard to the first defendant's further submission. These facts illustrate that the Act gives no right to respond to a reason for withholding payment made for the first time in the adjudication response. The Adjudicator may not see the need to give an opportunity to respond and thus not call for the additional submissions.

46 Could such matters as the plaintiff now seeks to raise in the adjudication response have been asserted in the payment schedule? Although at the time of the adjudication response the plaintiff is asserting to the Adjudicator that he has no jurisdiction to make the determination, the basis for the absence of jurisdiction is that the Act does not respond to the nature of the claim that was made by the first defendant.

47 There is no doubt that plaintiff withheld payment in respect of the disputed amount in the plaintiff's payment schedule. The reason why it did so was specified in the payment schedule by reference to contractual entitlements and other matters but not in respect of an inability to claim such amounts under the Act. If it had done so it would be quite possible for it in its response to suggest that this meant that there was no valid payment claim to be considered and hence no jurisdiction.

48 The decision in ***Brookhollow*** is very much on point and I should follow it unless I think it is plainly wrong. However, there is a problem with the decision as His Honour was not referred to an ongoing disagreement in the Court of Appeal. That contention begins with ***The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd & Ors*** *[2005] NSWCA 142* which concerned a failure to raise matters in a payment claim. The case was decided on the ground that the error - if it existed - did not render the determination void. Hodgson JA in obiter dicta, dealt with an argument that the first respondent was not entitled to raise new issues not included in its payment claim. He said:

"*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**."*

49 Bryson JA and Brownie AJA agreed.

50 The matter was next raised in ***Coordinated Construction Co Pty Ltd v JM Hargreaves** (NSW) Pty Ltd [2005] 63 NSWLR 385*. In remarks, which were plainly, obiter His Honour in paragraph 50 commented on what he believed might have been an important error in the judgment of the primary Judge, not bearing on the outcome of the case. He continued: *"In the second half of para.[51] of his judgment, the primary judge said this: 'An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.'*

51 That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.

52 The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see ***The Minister for Commerce v. Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.

53 Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void."

51 Justice Ipp did not comment on these matters as they were not essential to the decision. Basten JA spend some time on the issue making the following comments:

"64 At [50]-[53] Hodgson JA takes issue with a passage in the judgment of McDougall J below, part of which is set out at [50]. In substance the issue in dispute, as I understand it, is this: if, on a proper construction of the Act and the contract, the adjudicator comes to the view that a particular item in the payment claim is not justified, he or she will nevertheless be required to allow the item if an appropriate objection was not taken by the respondent in its payment schedule. In the passage from the judgment below, set out at [50] above, reliance for this conclusion would appear to be rooted squarely in s 22(2) of the Act. However, when read in context, the primary judge expressly placed weight upon a number of other provisions of the Act, to which attention should be given. Before turning to those, it is convenient to note the scope and operation of s 22(2). The provision is set out in full at [29] above.

*65 According to the well-known principles governing judicial review under the general law, a decision-maker will fail to exercise a statutory power if he or she fails to take into account a mandatory consideration. Similarly, there will be a failure properly to exercise the statutory jurisdiction where the decision-maker takes into account an impermissible consideration. The same principles are found in the Administrative Decisions (Judicial Review) Act 1977 (Cth), discussed by Mason J in **Minister for Aboriginal Affairs v Peko Wallsend Ltd** (1986) 162 CLR 24 at 39-40. As his Honour noted (at p.40), many statutory discretions are in their terms unconfined and the considerations will therefore be unconfined **"except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard …"**. Section 22(2) of the Act is an exception to this rule: indeed, it has a dual function. On the one hand, it prescribes matters to which the adjudicator is required to have regard; on the other hand, it identifies those matters as the **"only"** matters to which the adjudicator is to have regard. At least on its face, the list is exhaustive.*

66 If that were the whole of the story, the conclusion suggested by Hodgson JA, namely that the adjudicator would be entitled to disallow an item on the basis of the contract and the nature of the claim made, would be made good. The fact that the payment schedule prepared by the respondent did not identify the reason for disallowance would not mean that the adjudicator had failed to take account of a mandatory consideration, or had had regard to an impermissible consideration. However, McDougall J based his reasoning to a contrary conclusion in part on other statutory provisions, in addition to s 22(2), including ss 14(3) and 20(2B). Sub-section 14(3) requires that where

a payment schedule indicates an amount of a payment which is less than that the amount of the claim, the schedule must indicate why the amount is less and, if a respondent is withholding payment, the reason for that action. Where the payment schedule indicates an amount which is less than the amount claimed, the claimant may apply for adjudication of its payment claim: s 17(1)(a). Where such an application is made, the respondent may lodge a response to the claimant's adjudication application. That response may contain relevant submissions (s 20(2)(c)), but, subs (2B) provides:

> *"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."*

In the light of this express restriction on the response which can be provided to the adjudicator, there is merit in the conclusion that the adjudicator is not entitled to go beyond the terms of the response, in rejecting part or all of the claim. That was the conclusion reached by McDougall J.

67 It is not necessary to resolve this difference of opinion in the present case, nor would I wish to do so. There are factors, not referred to at [50] above and not expressly identified by McDougall J, which militate against the conclusion just identified. For example, the claimant may make an adjudication application in circumstances where the respondent has failed to provide a payment schedule at all: see ss 15(1)(a) and (2)(a)(ii) and 17(1)(b). Whether, in the light of s 20(2B) the respondent can give any reasons for withholding payment at all in such a case, is unclear. It is also unclear whether it is intended, in that event, that the adjudicator must allow the claim in full. These issues require consideration. They are dealt with further in a different context in ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** *[2005] NSWCA 229 at [40]-[42].*

68 The judgment of this Court in ***The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** *[2005] NSWCA 142 was handed down after the decision of McDougall J in the present case. Accordingly the reasoning relied on by Hodgson JA in that case at [33]-[36] and relied on at [50] above, was not considered by the primary judge. However, it follows from what I have said that I am not persuaded that the reasoning in those paragraphs of* ***Contrax*** *is correct, but a similar conclusion may be attainable by a different course. "*

52 Unfortunately His Honour did not expand upon what might be that different course.

53 In the hearing before me the plaintiff relied upon the comments made by Hodgson JA in ***The Minister for Commerce v Contrax Plumbing*** and submitted that the Adjudicator was obliged to consider the substance of the submission in any event as it touched upon the Act, the contract and the payment claim. The first defendant relied on its arguments which I have recited earlier and pointed out that Hodgson JA's comments were obiter. It also pointed out the inconsistency in the plaintiff's position in suggesting that the Adjudicator should have had regard to its submissions and their conduct in the correspondence which occurred after the adjudication response which concluded with the plaintiff suggesting to the Adjudicator that he should disregard the defendants further submissions following upon the adjudication response.

54 In ***Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors*** [2006] NSWSC 13 Brereton J referred to this difference of opinion. He concluded at [79] that he should treat what was said in paragraphs 33 to 36 of ***The Minister for Commerce v Contrax Plumbing*** as the decision of unanimous Court of Appeal which he should follow. His Honour was there considering whether in the absence of valid submissions duly made by the respondent an Adjudicator was bound to allow the payment claiming in full. He had earlier dealt with the appropriateness of whether the Adjudicator should have, as he did, disregard the submissions in the adjudication response because they were not raised in the payment schedule. He does not seem to have had a submission that the Adjudicator should otherwise have considered the submissions under s 22 (2) (a) or (b).

55 I think I should also regard what was said in paragraphs 33 to 36 in a unanimous decision of the Court of Appeal in ***The Minister for Commerce v Contrax Plumbing*** as a decision I should follow. I do so with some concern because it seems to sidestep what was sought to be achieved by the amendment inserting s 20(2B) in the Act. There will be practical difficulties for Adjudicators as they will have to turn their minds to not only whether they should reject a submission made contrary to s 22(2)(d) but whether they should also consider it under s 22(2)(a) or (b) and whether the applicant should be given an opportunity.

56 It is to be noted that in his comments in paragraph 35 Hodgson JA expressly limited the submissions of the respondent that the Adjudicator may have regard to by excluding submissions based on facts and circumstances of the particular case not otherwise before him or her. In the present case the facts and circumstances surrounding the claim and explaining its nature were before the Adjudicator. The argument advanced by the plaintiff in substance was, as I have pointed out, that the Act does not respond to an extension of time claim. Determination of the substance of that claim clearly requires a consideration of the provisions of the Act and the provisions of the construction contract. All necessary documentation to determine that issue was before the Adjudicator.

57 Bearing in mind the mandate to the adjudicator to make a determination based, inter alia, on the matters in 22(2)(a) and (b) it would have been appropriate for him to consider the submissions he had before him on that point. Furthermore, it would have been appropriate and indeed incumbent upon him to give the other party an opportunity to reply to those submissions.

58 I have already determined he did not consider them and he expressly rejected the other party's submissions in response. In my view the Adjudicator should have considered the submissions in the adjudication response and the defendant applicant's reply to that submission.

59 As I have determined that the Adjudicator was obliged to consider the submission the following matters are now relevant.

Even if the Adjudicator was obliged to consider the submission the determination is not void

60 The Court of Appeal in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at [55], held that an adjudicator's determination purportedly made under the Act may be declared void if it:

(a) Fails to comply with the basic and essential requirements for the existence of an adjudication determination set out in the Act;

(b) Does not exhibit a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject of the legislation and reasonably capable of reference to that power;

(c) Involves a substantial denial of the measure of natural justice that the Act requires to be given.

61 The plaintiff submitted that in the present case all three of these circumstances applied. I will address each in turn.

Failure to comply with the basic and essential requirements for the existence of an adjudication determination set out in the Act

62 As indicated above, the relevant failure is not considering the submission as required by s 22(2)(d). Section 22(2)(d) of the Act requires the Adjudicator to consider, in determining the adjudication application: *"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"*.

63 In **Brodyn,** after identifying the basic and essential requirements of s 22, Hodgson JA said the following:

*"56 It was said in the passage in **Anisminic** quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in **Craig v South Australia** (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in **Multiplex Constructions Pty Limited v Luikens** NSWSC 1140."*

64 There has been some debate as to the precise scope of His Honour's comments. The matter has not been dealt with in an authoritative way by the Court of Appeal but was considered at first instance by Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 and in ***Pacific General Securities Pty Ltd v Soliman & Sons Pty Ltd*** [2006] NSWSC 13.

65 In ***Holmwood*** His Honour carried out a detailed and careful analysis of ***Brodyn*** and subsequent cases which had referred to ***Brodyn***. His conclusion was as follows:

*"46 The statement in **Brodyn** that compliance with the requirements of s 22(2) is not a precondition to the existence of authority to make a decision, and that non-compliance does not result in invalidity if an adjudicator either considers (only) the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered [**Brodyn** , [56]] appears to proceed on the assumption that s 22(2) requires (though not as a condition of validity), not merely consideration of the matters (and only the matters) identified in that section, but also reaching a legally correct conclusion on those matters [**Hargreaves,** [74] (Basten JA)]. [As Basten JA has observed, the section does not require that: statutory directions to decision-makers to take into account (only) certain specified parameters, including legal parameters to be found in statutes and/or contracts, may not mean that the decision-maker must, as a condition of validity, correctly apply those parameters; so long as he or she takes them into account, an incorrect understanding of their principles does not amount to a failure to have regard to them, though it may amount to non-jurisdictional error of law]. But my understanding of what Hodgson JA was saying in **Brodyn** is to the effect that mere error of law by an adjudicator in the consideration and application of the specified considerations does not invalidate a determination. As Basten JA has suggested, **Brodyn** may be correctly understood as saying that the structure of the Act demonstrates that, contrary to the general rule with respect to administrative tribunals, an adjudicator is authorised to determine a payment claim so long as he or she takes into account the legal parameters prescribed by the Act and the contract - whether or not the decision actually reflects a correct understanding and application of them [**Hargreaves,** [78]].*

47 That this was in fact what was intended by Hodgson JA is suggested by the illustrations which his Honour offered – of "extremely doubtful questions of fact or law; for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is 'duly made' by a claimant, if not contained in the adjudication application" – which suggest that what his Honour was intending to convey was not that an adjudication would be valid, even if a relevant consideration was entirely disregarded, unless there was a want of good faith, but rather that the requirement to take into account the provisions of the construction contract did not mean that there was jurisdictional error if the adjudicator, having considered the

question, wrongly concluded that a particular provision was or was not a provision of the contract, and therefore did or did not apply it.

*48 This conclusion is also supported by **Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd** [2005] NSWCA 142, in which Hodgson JA said, of s 22 [at [49]], that while it requires the adjudicator to consider the provisions of the Act and the provisions of the contract, so long as the adjudicator did so, or at least bona fide addressed the requirements of s 22 as to what was to be considered, an error on those matters did not render the determination invalid, and that an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what were valid and operative terms of the contract, did not prevent a determination from being an "adjudicator's determination" within the meaning of the Act.*

*49 So understood, **Brodyn** accords with the well-established place in this area of the law of failures to take into account relevant considerations. Indeed, it would be a surprising result that, in the absence of a privative clause, a prescribed relevant consideration could be disregarded without affecting the validity of the decision. Accordingly, it is a condition of validity of a determination that an adjudicator consider the matters specified in s 22(2), although error in considering those matters, so long as they are in fact considered, will not result in invalidity.*"

66 I respectfully agree with His Honour's conclusions. The result for the present case is that, as the Adjudicator failed to consider the submission as he was obliged to do, the determination is void.

Was there a bona fide attempt by the Adjudicator to exercise the relevant power relating to the subject of the legislation and reasonably capable of reference to that power?

67 In **Timwin Construction Pty Limited v Façade Innovations Pty Limited** [2005] NSWSC 548 McDougall J first considered this ground and said:

*"[38] There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in **Brodyn**. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in **Roberts v Hopwood** [1925] AC 578 , 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

*[39] That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see **Zhang v Canterbury City Council** (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

*[40] As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in **R v Hunt; ex parte Sean Investments Pty Ltd** (1979) 180 CLR 322 (Mason J) and in **Evans v Marmont** (1997) 42 NSWLR 70, 79–80 (Gleeson CJ and McLelland CJ in Eq)."*

68 In **Holmwood** Brereton J elaborated: *"good faith as a condition of validity of the exercise of an adjudicator's power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.*"

69 Accordingly, on this ground a total failure by the Adjudicator to consider the application must lead to the determination being void.

Is there a substantial denial of the measure of natural justice that the Act requires to be given?

70 This requirement was amplified in ***Brodyn*** by Hodgson JA who stated at 57: *"The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity; so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.*"

71 Plainly a complete failure by the Adjudicator to consider the submission in this case must lead to the determination being void.

The submission was bad in any event and relief should be refused on discretionary grounds

72 I have had detailed submissions from the defendant on whether or not the jurisdiction submission should be determined in favour of the plaintiff or the defendant. There is now overwhelming support for the proposition that delay costs pursuant to the contract are recoverable under the Act: see ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 and ***Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385. It is worth setting out Hodgson JA's reasons in ***Hargreaves*** in some detail:

"38 The object of the Act is stated in s.3(1) as being "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". The definition of "progress payment" refers to s.8, which does not limit

the payment to payment for construction work and/or related goods and services; and the amount of the progress payment is dealt with in s.9, which also does not impose such a limit.

39 It is true that s.13 requires a payment claim to indicate the claimed amount, and that this expression is defined to be an amount claimed to be due for construction work carried out or for related goods and services supplied; and, pursuant to s.17, what is adjudicated is the payment claim. That gives some support to the argument that the adjudicator can only include in progress payments amounts claimed to be due for construction work carried out and/or for related goods and services supplied; but the terms of s.13 itself, in particular s.13(3), tell against it. …….

40 Further, in the case of a construction contract that provides that progress payments include certain amounts, s.9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s.13 and the definition of "claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.

41 In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

42 Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl.34.9) and which are then to be included in progress payments (cl.37.1). They are therefore prima facie within s.9(a) of the Act.

43 If in substance they represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out. ……..

45 It follows from this discussion that delay damages and interest under this contract could be claimed to be due for construction work carried out or for related goods and services supplied; and in my opinion, even if s.13 is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s.9(a) and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision."

73 In this case it is apparent from the materials that the particular variation 147 comprises additional work-related amounts, additional time associated amounts and other costs. These latter two claims are ones which are based on the contract provisions for extensions of time. They therefore are of a similar nature to those claims to which His Honour was referring in the case he was considering. In my view it would seem clear that they are for construction work under the contract and the amount payable in respect of such construction work will clearly require a determination of the extent of delay and whether any appropriate extension of the contract should be given. Indeed the submission put by the plaintiff to the Adjudicator in its adjudication response, conceded that time-related costs consequent upon an extension of time claim were claimable under the Act based upon the cases to which I have referred.

74 The submissions went on to raise a distinction, which it was submitted, was not dealt with by Hodgson JA in the **JM Hargreaves** case. The substance of that submission I have set out earlier in paragraph 13 of this judgement. It can be seen from the submission that question is raised as to whether the adjudicator can stand in the shoes of the superintendent under the contract.

75 This is a matter on which there was some difference of opinion at first instance. ***Abacus Funds Management v Davenport*** [2003] NSWSC 1027, was a case where an Adjudicator purported to determine the value of work which had been the subject of an assessment by the architect (at [21]), and who also had also assessed delay (at [23]). McDougall J stated (at [35]-[36]).

"It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.

Further, as was submitted for Renascent, it is not uncommon for building contracts to provide that it is the proprietor, or someone who is the proprietor's alter ego or agent, to occupy the certifying role that, under the form of contract presently under consideration, is occupied by the architect. In those circumstances, if the submission for Abacus be correct, an adjudicator would be bound by a certificate issued by a proprietor, or by its agent or alter ego, in bad faith, or one that flatly and obviously disregarded the rights of the builder."

McDougall J further said (at [38]-[39]):

"*I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be "the amount calculated in accordance with the terms of the contract" where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued "in accordance with the terms of the contract" where the contract makes provision for that matter (s10(1)(a)). However, a reference to calculation or valuation "in accordance with the terms of the contract" is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.*

In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours."

76 The other first instance decision is one of mine, which went on appeal. In ***Transgrid v Siemens Limited*** (2004) 61 NSWLR 521, the Court of Appeal referred to my finding at first instance (at 536-537 [21]) in these terms:

"*The Master considered a submission by Transgrid that there was a jurisdictional error in this case, on the basis that the adjudicator did not determine the progress payment by considering what was the amount calculated in accordance with the contract, as required by s 9(a), because that amount was what was certified by the Superintendent pursuant to cl 42.2 of the contract. Despite contrary views expressed in Abacus and Leighton Constructions, the Master said he preferred a construction of the Act such that 'the adjudicator does not step into the shoes of the Superintendent'.*"

77 Because of the other issues involved the Court of Appeal held it was not necessary to decide whether, on the true construction of s 9(a) and the contract, the amount "calculated in accordance with the terms of the contract" is the amount certified (cl 42.2 of the contract) or the value of the work less deductions (cl 42.3 of the contract). Hodgson JA said:

"*However I would express the view that the latter follows from what I think is a preferable interpretation of s 9(a) and the contract, consistent with the use of the word 'calculation' and consistent with the provisions against contracting out (s 34); that is, on this matter I prefer the view of McDougall J in Abacus v Davenport to that tentatively expressed by the Master*".

78 His Honour's view, that the Adjudicator can step into the shoes of the Superintendent is thus obiter and not binding. If I were to decide the matter naturally I would give His Honour's views the most careful consideration when reconsidering my earlier tentative view. The question is, should I decide the matter?

79 It was submitted by the plaintiff that the question of whether the submission was right or wrong is really irrelevant because if the Adjudicator made an erroneous determination on the point this would not normally lead to invalidity. The Adjudicator was free to decide the matter correctly or incorrectly. This point has been made in many of the cases. In these circumstances it was submitted that this was not a relevant matter for consideration.

80 This submission ignores the law to the effect that if there were no possibility that the Adjudicator's determination would be any different if he had considered the matters in the submission contained in the response then relief would not be granted. In ***Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd*** [2006] NSWSC 375, White J said (at [63]):

"*If it were clear that there was no possibility that the adjudicator's determination would have been different if the reasons indicated in the payment schedule and the submissions duly made had been considered, then the failure to consider the submission would not affect the validity of the determination (**Stead v State Government Insurance Commission** (1986) 161 CLR 141 at 145; **Re Refugee Tribunal; ex parte Aala** (2000) 204 CLR 82 at 88, [4]; 122, [104]; 130 [130]; 153, [211]; and compare the reasons of Gaudron and Gummow JJ at 91 [17] and 109, [58]-[60]).*"

81 If the Adjudicator addressed the question no doubt he would have found it a somewhat complex matter and may in due course have been directed to the conflict in the authorities to which I have referred. The plaintiff's submissions have emphasised the fact that the dispute resolution process in respect of the extension of time had not yet run its full contractual course. They also point out that this claim is fundamentally different from the situation in ***Abacus*** and ***Transgrid*** where an Adjudicator is asked - and is permitted - to stand in the shoes of the Superintendent when the Superintendent is assessing a Payment Claim under the Act. The complexity of the matter makes it impossible to determine that there is no possibility that the Adjudicator would have changed his determination. It is only this possibility that is the one to consider and I should not necessarily assume that the Adjudicator's decision in these circumstances would have been correct in law as I might now determine it.

82 Therefore I would not refuse relief on this ground.

Failure by the Adjudicator to give reasons does not render a determination void

83 Having regard to my conclusions above it is not necessary to address the alleged failure by the Adjudicator to give reasons which appear to be based upon an inference that he did decide the matter.

84 I make orders 1, 2, 3 and 5 in the Summons.

Mr S Finch SC and R Scruby for plaintiff instructed by Clayton Utz
Mr M Christie and Ms V Culkoff for defendant instructed by Andrew McKeracher for 1st defendant