

**JUDGMENT : Mason P Giles JA Hodgson JA.** Court of Appeal. New South Wales. 3<sup>rd</sup> April 2004.

1 **MASON P:** I agree with Hodgson JA.

2 **GILES JA:** I agree with Hodgson JA.

3 **HODGSON JA:** On 25 February 2004, Master Macready dismissed with costs a summons brought by the appellant (Transgrid) against the respondents (Siemens and the adjudicator). Transgrid appeals from that decision.

#### **CIRCUMSTANCES**

4 Siemens contracted with Transgrid to design and construct a sub-station at Haymarket in the city of Sydney. The original contract sum was \$46,070,840.00. The adjusted contract sum as at 1 December 2003 including approved contract variations was \$55,870,398.00. On or about 1 August 2003, Siemens served a payment claim bearing that date pursuant to s.13 of the Building & Construction Industry Security of Payment Act 1999 (the Act). This claim was numbered 22, and it claimed \$16,975,394.16. Transgrid responded by serving a payment schedule pursuant to s.14 of the Act indicating as the amount which Transgrid proposed to pay the sum of \$1,495,719.93.

5 On or about 29 August 2003, Siemens applied for adjudication of this payment claim pursuant to s.17 of the Act; and by 2 September 2003 the relevant authorised nominating authority had referred this application to the adjudicator. The adjudicator accepted the adjudication application, and notified Siemens and Transgrid of this by letter dated 3 September 2003.

6 On or about 15 October 2003, the adjudicator issued a written determination bearing that date of the amount of the progress payment (\$6,129,941.02 not including GST), the date on which it became payable (12 September 2003) and the rate of interest payable on it (9%). This determination contained reasons extending over 187 pages.

7 Proceedings were commenced in the Supreme Court by Transgrid against Siemens and the adjudicator on 10 October 2003, and by an Amended Summons dated 20 October 2003 Transgrid sought certain declaratory relief and an order of the nature of certiorari setting aside the determination. The Master decided that Transgrid should not be granted certiorari. In order to understand the issues it is necessary to have regard to certain provisions of the Act and certain terms of the contract.

#### **STATUTORY PROVISIONS**

8 The object of the Act is set out in s.3, which is in the following terms:

##### **3 Object of Act**

(1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*

(2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*

(3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*

(a) *the making of a payment claim by the person claiming payment, and*

(b) *the provision of a payment schedule by the person by whom the payment is payable, and*

(c) *the referral of any disputed claim to an adjudicator for determination, and*

(d) *the payment of the progress payment so determined.*

(4) *It is intended that this Act does not limit:*

(a) *any other entitlement that a claimant may have under a construction contract, or*

(b) *any other remedy that a claimant may have for recovering any such other entitlement.*

9 Section 4 contains the following definitions of "construction contract" and "progress payment":

**construction contract** means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

**progress payment** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) *the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or*

(b) *a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or*

(c) *a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").*

10 It is common ground that the contract in this case is a construction contract.

11 Section 7(1) of the Act is in the following terms:

##### **7 Application of Act**

(1) *Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.*

12 Section 7(2) excludes the application of the Act to certain contracts, including those referred to in s.7(2)(c), as follows:

7(2) This Act does not apply to: ...

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

13 Part 2 of the Act deals with rights to progress payments, and relevantly contains ss.8, 9, 10(1), 11(1) and 12. Those provisions are as follows:

**8 Rights to progress payments**

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or  
(b) who has undertaken to supply related goods and services under the contract,  
is entitled to a progress payment.

(2) In this section, **reference date**, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or  
(b) if the contract makes no express provision with respect to the matter - the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

**9 Amount of progress payment**

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or  
(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

**10 Valuation of construction work and related goods and services**

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or  
(b) if the contract makes no express provision with respect to the matter, having regard to:  
(i) the contract price for the work, and  
(ii) any other rates or prices set out in the contract, and  
(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and  
(iv) if any of the work is defective, the estimated cost of rectifying the defect. ...

**11 Due date for payment**

(1) A progress payment under a construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or  
(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment. ...

**12 Effect of "pay when paid" provisions**

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

(2) In this section:

**money owing**, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

**pay when paid provision** of a construction contract means a provision of the contract:

(a) that makes the liability of one party (the **first party**) to pay money owing to another party (the **second party**) contingent on payment to the first party by a further party (the **third party**) of the whole or any part of that money, or  
(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party, or  
(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

14 Part 3 of the Act deals with the procedure for recovering progress payments, and relevantly includes ss.13, 14, 17-22, 24(1), 25, 27, 28(1) and 32. Those provisions are as follows:

**13 Payment claims**

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
  - (b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and
  - (c) must state that it is made under this Act.
- (3) The claimed amount may include any amount:
- (a) that the respondent is liable to pay the claimant under section 27 (2A), or
  - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within:
- (a) the period determined by or in accordance with the terms of the construction contract, or
  - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.
- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

#### 14 Payment schedules

- (1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
- (a) must identify the payment claim to which it relates, and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).
- (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.
- (4) If:
- (a) a claimant serves a payment claim on a respondent, and
  - (b) the respondent does not provide a payment schedule to the claimant:
    - (i) within the time required by the relevant construction contract, or
    - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

#### 17 Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:
- (a) the respondent provides a payment schedule under Division 1 but:
    - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
    - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
  - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless:
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
  - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application:
- (a) must be in writing, and
  - (b) must be made to an authorised nominating authority chosen by the claimant, and
  - (c) in the case of an application under subsection (1)(a)(i) - must be made within 10 business days after the claimant receives the payment schedule, and
  - (d) in the case of an application under subsection (1)(a)(ii) - must be made within 20 business days after the due date for payment, and
  - (e) in the case of an application under subsection (1)(b) - must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
  - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
  - (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
  - (h) may contain such submissions relevant to the application as the claimant chooses to include.
- (4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.
- (5) A copy of an adjudication application must be served on the respondent concerned.

- (6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

#### **18 Eligibility criteria for adjudicators**

- (1) A person is eligible to be an adjudicator in relation to a construction contract:
- (a) if the person is a natural person, and
  - (b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.
- (2) A person is not eligible to be an adjudicator in relation to a particular construction contract:
- (a) if the person is a party to the contract, or
  - (b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

#### **19 Appointment of adjudicator**

- (1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.
- (2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

#### **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.

#### **21 Adjudication procedures**

- (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
- (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
  - (b) within such further time as the claimant and the respondent may agree.
- (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.
- (4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

#### **22 Adjudicator's determination**

- (1) An adjudicator is to determine:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
  - (b) the date on which any such amount became or becomes payable, and
  - (c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
- (a) the provisions of this Act,
  - (b) the provisions of the construction contract from which the application arose,
  - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

- (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must:
- (a) be in writing, and
  - (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
- (a) the value of any construction work carried out under a construction contract, or
  - (b) the value of any related goods and services supplied under a construction contract,
- the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.
- (5) If the adjudicator's determination contains:
- (a) a clerical mistake, or
  - (b) an error arising from an accidental slip or omission, or
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
  - (d) a defect of form,
- the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

#### **24 Consequences of not paying claimant adjudicated amount**

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:
- (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and
  - (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract. ...

#### **25 Filing of adjudication certificate as judgment debt**

- (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
- (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
- (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
- (a) is not, in those proceedings, entitled:
    - (i) to bring any cross-claim against the claimant, or
    - (ii) to raise any defence in relation to matters arising under the construction contract, or
    - (iii) to challenge the adjudicator's determination, and
  - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

#### **27 Claimant may suspend work**

- (1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.
- (2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).
- (2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.
- (3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

#### **28 Nominating authorities**

- (1) Subject to the regulations, the Minister:
- (a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and
  - (b) may withdraw any authority so given. ...

**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.

15 Section 34 is in the following terms:

**34 No contracting out**

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

**CONTRACTUAL TERMS**

16 The contract provided for a Superintendent, named in the contract, or subsequently appointed by the Principal (that is, Transgrid), whose role is dealt with in cl.23, which is in the following terms:

**23. SUPERINTENDENT**

*The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent shall exercise in a reasonable manner the powers conferred on him by the Contract.*

*If, pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction.*

*In Clause 23 'direction' includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.*

*Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing. If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.*

*The Principal or Contractor shall give effect to the directions of the Superintendent provided that if either party is dissatisfied with any direction of the Superintendent that party may notify the other party of such dissatisfaction and then or subsequently, proceed in accordance with the provisions of Clause 46, provided that unless the party so notifies the other party within 28 days after the date on which such direction was given, that party shall not be entitled to have the said matter referred to arbitration.*

17 The Contractor is of course Siemens. Various provisions of the contract authorise the Superintendent to give directions, including cls.30.2 and 30.3 concerning defective materials or work.

18 Clause 40 deals with variations. Sub-clauses 40.1 and 40.5 are in the following terms:

**40. VARIATIONS**

**40.1 Variations to the Work**

*The Superintendent may direct the Contractor to do any one or more of the following:*

- (a) increase, decrease or omit any part of the work under the Contract;
- (b) change the character or quality of any material or work or of anything described in the Contract;
- (c) change the levels, lines, positions or dimensions of a design or of anything described in the Contract, the Design Documents or any part of the work under the Contract;
- (d) execute additional work;
- (e) demolish or remove material or work no longer required by the Principal;
- (f) vary the Contractor's design obligations under the Contract.

*The Contractor shall not vary the work under the Contract or claim payment except as directed in writing by the Superintendent or approved in writing by the Superintendent, pursuant to Clause 40.*

*The Contractor is bound only to execute a variation which is within the general scope of the Contract.*

*Unless otherwise agreed with the Contractor, the Superintendent shall not direct a variation after Practical Completion unless the variation is in respect of rectification work referred to in Clause 37 or is for minor works. ...*

**40.5 Valuation**

*Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent, as follows -*

- (a) If the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used.
- (b) If Clause 40.5(a) does not apply, the rates or prices in the Schedule of Rates shall be used to the extent that it is reasonable to use them.
- (c) To the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used.
- (d) In determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads.
- (e) If the valuation is of an increase or decrease in a fee under Clause 14.3, the value shall be the actual increase or decrease without regard to overheads or profit.
- (f) If the valuation relates to additional costs incurred by the Contractor for delay or disruption the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit.
- (g) If Clause 11 (b) applies, the percentage referred to in Clause 11 (b) shall be used for valuing the Contractor's profit and attendance.
- (h) Daywork shall be valued in accordance with Clause 41.

Unless otherwise provided in the Contract, the Contractor shall make a General Request for Valuation to the Superintendent on form 40.5.1 contained in Annexure A within 28 days of the commencement of the events or circumstances entitling the Contractor to a valuation and the Principal shall only be required to pay or allow the Contractor such amounts as arise out of a General Request for Valuation made in accordance with this Clause.

19 Clause 42 deals with certificates and payments. Sub-clauses 42.1, 42.2 and 42.3 are in the following terms:

#### **42. CERTIFICATES AND PAYMENTS**

##### **42.1 Payment Claims**

On the first day of each month and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall be entitled to deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include all amounts then due to the Contractor under the Contract or for breach thereof.

The Contractor shall not be entitled to claim payment for:

- (a) variations which have not been approved in writing by the Superintendent;
- (b) any extra costs which have not been valued under Clause 40.5 or otherwise agreed to in writing by the Superintendent;
- (c) any materials (including imported items) not delivered to Site;
- (d) work performed off Site (including design and factory fabrication) unless specifically provided for in the Contract.

##### **42.2 Progress Payment Certificates and Time for Payment**

Within 10 business days after receipt of a claim for payment the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor.

If the Contractor fails to make a claim for payment, the Superintendent may nevertheless issue a payment certificate.

The Principal shall pay to the Contractor the amount certified by the Superintendent within **42 days** after receipt of the claim for payment.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

##### **42.3 The Calculation of Payment**

The amount certified by the Superintendent as due to the Contractor at the time of a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract or for breach of Contract less -

- (a) amounts which the Principal is entitled to deduct under Clause 42.4 and 42.11;
- (b) amounts already paid or certified under the Contract.

Where work is defective or omitted, the estimated cost of rectifying the defect or omission may be deducted from moneys otherwise due to the Contractor or otherwise taken into account.

If the Contract provides that the Contractor must complete a specified task, submit a specified document or fulfil some other requirement before it is entitled to make a claim for payment then notwithstanding this Clause 42, the Contractor shall not be entitled to make a claim for payment and the Principal shall not be obliged to make payment until the Contractor has complied with that provision of the Contract.

#### **MASTER'S DECISION**

- 20 The Master noted that the parties agreed that the adjudicator's determination was reviewable for jurisdictional error; and he discussed a number of cases in which this had been accepted: *Musico v. Davenport* [2003] NSWSC 977, *Brodyn Pty. Ltd. v. Davenport* [2003] NSWSC 1019, *Abacus v. Davenport* [2003] NSWSC 1027, *Leighton Contractors Pty. Ltd. v. Campbelltown Catholic Club* [2003] NSWSC 1103, *Multiplex Constructions Pty. Ltd. v. Luikens* [2003] NSWSC 1140, and *Transgrid v. Walter Construction Group* [2004] NSWSC 21.
- 21 The Master considered a submission by Transgrid that there was 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, the Master said he preferred a construction of the Act such that "*the adjudicator does not step into the shoes of the Superintendent*".

- 22 The Master then considered other submissions advanced by Transgrid, including a submission that the adjudicator also failed to apply s.9(a) in that he included in the progress payment amounts not calculated in accordance with the contract, namely amounts in respect of alleged variations not approved in writing or valued as required by cl.42.1. The Master held that any such error was not a jurisdictional error.
- 23 Having rejected those further submissions, the Master held that, even if he decided that, because of his preferred view of the Act, there was jurisdictional error by reason of the first submission, he would not grant relief on discretionary grounds, in particular the ground that practical completion of the contract would be achieved on 25 March 2004, so that final entitlements of the parties could then be worked out. On that basis, he dismissed the summons without forming a final view as to whether he should follow Abacus.

#### ISSUES ON APPEAL

24 Transgrid relies on the following grounds:

1. *Having determined, or as he should have determined, that Section 9(a) of the Act required the adjudicator to determine the amount of the progress payment as the Superintendent had determined under the Contract, the learned Master erred in that he failed to hold that the Building and Construction Security of Payment Act 1999 required under section 9(a) that the adjudicator calculate the amount of the progress payment strictly in accordance with the certificates issued under the contract by the Superintendent.*
2. *The learned Master erred in that he failed to find that the adjudicator in determining the amount of the progress payment, by having regard to variations, which did not fall within the provisions of clause 42.1 of the Contract, committed jurisdictional error.*
3. *The learned Master should have found that the adjudicator fell into jurisdictional error by determining the amount of the progress payment other than in accordance with the Superintendent's determination of the amount of the progress payment.*
4. *The learned Master erred in exercising a discretion at (sic) to whether he should grant an order by way of certiorari when the Appellant was entitled to that order as of right where, as the Learned Master found or should have found, there was patent jurisdictional error of law on the face of the record.*
5. *Alternatively, having found, or as he should have found, that Section 9(a) of the Act required the adjudicator to follow the valuation of the Superintendent under the Contract, the learned Master's discretion to refuse the relief claimed miscarried:*
  - 5.1. *in that the learned Master acted upon a wrong principle that the discretion to refuse certiorari for jurisdictional error entitled the learned Master to refuse relief if there was an alternative remedy otherwise available.*
  - 5.2. *in that the learned Master should have exercised his discretion by finding jurisdictional error on the part of the adjudicator and that it was not open to refuse certiorari even if "other effective and convenient" remedies were available.*
  - 5.3. *in that the learned Master should have found that the discretionary aspects of the grant of certiorari are limited so as to only permit the refusal of relief claimed by the Appellant to circumstances where there were appropriate appeal procedures and that there were no appropriate appeal procedures in this case.*
  - 5.4. *in that the learned Master incorrectly found the existence of an alternative remedy which disentitled the granting of relief as a matter of discretion when there was no true alternative remedy available to the Appellant.*
  - 5.5. *in that the Learned Master incorrectly rejected the approach by McDougall J in connection with the exercise of discretion as a matter of principle in Musico v Davenport and should have approached the exercise of discretion by considering that there was no alternative effective and convenient remedy available to the Appellant and which was also in the public interest, which disentitled the Appellant to the relief claimed.*
  - 5.6. *in that the learned Master gave excessive and unjustified weight and regard to:*
    - 5.6.1. *the availability of a dispute resolution mechanism in the Contract which would result in a final adjudication of the parties rights,*
    - 5.6.2. *the irrelevant consideration of, or alternatively had excessive and unjustified regard to, the public interest in avoiding multiple suits between the parties in these circumstances.*
  - 5.7. *in that the exercise of his discretion was guided by an incorrect finding that a review process commencing in March 2004 under the Contract provided an adequate "effective" or alternatively an alternate remedy when that was not the case and that no true effective or convenient alternative remedy existed having regard to the adjudicator's jurisdictional errors.*
  - 5.8. *in that he failed to consider or to give sufficient weight to the public interest in ensuring that the uncertainty about the limits of an adjudicator's jurisdiction arising from the recent judgments- of the Court was resolved for the better administration of the Act and for the certainty thereby provided to other claimants and respondents under the Act.*
  - 5.9. *in that he failed to consider or to give sufficient weight to the very substantial amount of money awarded by the adjudicator and the fact that the jurisdictional error would create rights outside the Contract that would affect the Appellants rights and were not subject to the dispute resolution mechanism or an alternative effective and convenient remedy.*

- 5.10. *in that the learned Master incorrectly took into account the possibility of the commencement of civil proceedings which might be taken to finally determine rights between the parties as though the proceedings before the Master appealed from were considered a collateral process to those civil proceedings thereby wrongly following a principle which would deprive all aggrieved parties to an adjudication of an order in the nature of certiorari.*
- 25 Siemens relies on the following ground in its Notice of Contention:  
1. *The Second Respondent did not commit a jurisdictional error by not concluding that he was not bound by the certification of the superintendent under the contract in respect of contractual progress payments.*
- 26 In my opinion, it is appropriate to consider first the Notice of Contention: if this is correct, the Court would otherwise be considering the question of discretion on a false basis.
- 27 I will address in turn the following issues. First, what kinds of errors vitiate the determination of an adjudicator under the Act? Second, were any such errors shown here? Third, should relief have been refused on discretionary grounds?

#### WHAT ERRORS VITATE AN ADJUDICATOR'S DETERMINATION?

- 28 As stated above, the parties agreed before the Master that the adjudicator's determination was reviewable for jurisdictional error, and they maintained that position on appeal.
- 29 However, for reasons I have given in **Brodyn Pty. Limited v. Davenport** [2004] NSWCA 394, and as submitted by Mr. Walker SC for Siemens in this case, in my opinion this review is available only where the determination is not a determination within the meaning of the Act, because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination. If an adjudicator has erroneously decided that such an essential pre-condition has been satisfied when in truth it has not, then that can be considered a jurisdictional error making the determination "reviewable". However, for reasons given in **Brodyn**, such an error would in fact make the determination void; and in my opinion, relief in the nature of certiorari is not available to quash a determination under the Act that is not void. Where a determination is void, relief is available by way of declaration and injunction; so in my opinion there is no occasion where relief in the nature of certiorari would be available and required.
- 30 I adopt the following paragraphs from my judgment in **Brodyn** concerning the essential pre-conditions for the existence of an adjudicator's determination:
53. *What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:*
1. *The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
  2. *The service by the claimant on the respondent of a payment claim (s.13).*
  3. *The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*
  4. *The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
  5. *The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*
54. *The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.*
55. *In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. **Project Blue Sky Inc. v. Australian Broadcasting Authority** (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. **R v. Hickman; Ex Parte Fox and Clinton** (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*
56. *It was said in the passage in **Anisimic** 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** [2003] NSWSC 1140.

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. On this basis, I agree with the result reached in **Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited** [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example **Ridge v. Baldwin** [1964] AC 40, **Durayappah v. Fernando** [1967] 2 AC 337, **Banks v. Transport Regulation Board (Vic)** (1968) 119 CLR 222 at 233, **Calvin v. Carr** [1980] AC 574 at 589-90, **Minister for Immigration v. Bhardwaj** (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.

#### WERE SUCH ERRORS SHOWN IN THIS CASE?

- 31 In this case, there is no doubt that the purported determination answered the statutory words, at least unless vitiated by one of the other matters to which I have referred. Plainly, there was a construction contract between Siemens and Transgrid to which the Act applied (ss.7 and 8). Siemens served the payment claim on Transgrid identifying the construction work to which the progress payment related and indicating the amount claimed (s.13). Transgrid provided a payment schedule identifying the payment claim and indicating the amount of the payment it was prepared to make. Siemens made an adjudication application in writing to an authorised nominating authority, identifying the payment claimed (s.17). The authorised nominating authority referred the adjudication application to an adjudicator, who accepted the adjudication application (s.19). The adjudicator determined the amount of the progress payment, the date on which it became due, and the rate of interest payable, and did so in writing and with reasons (s.22).
- 32 There was no suggestion of denial of natural justice or fraud.
- 33 What was alleged was "jurisdictional error". The jurisdiction of the adjudicator is to determine the adjudication application referred to him or her (see ss.17(6), 19(2), 21(5) and 22) by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s.22(1)). Section 22(2) requires the adjudicator to consider specified matters only. However, for reasons given earlier, in my opinion an adjudicator's determination will not be rendered invalid by this provision so long as the adjudicator either does consider only the matters specified, or else bona fide addresses the requirements of s.22(2) as to what is to be considered.
- 34 In this case, there is no suggestion that the adjudicator did not consider the provisions of the Act and the provisions of the contract. However, the Master found that he made a jurisdictional error, because he did not determine the amount calculated in accordance with the terms of the contract, as required by s.9(a). In my opinion, even if "amount calculated in accordance with the terms of the contract" were, on the true construction of s.9(a) and of the contract, the amount certified by the Superintendent, a decision to the contrary by the adjudicator would be a mere error of law, and not such as to render the determination invalid. To that extent, I disagree with the views expressed by McDougall J in **Musico v. Davenport** [2003] NSWSC 977. Similarly, if it be the case that, on the true construction of the contract, there could be no entitlement to a progress payment in respect of a variation not approved in writing by the Superintendent, the inclusion of such a progress payment would likewise be an error of law, and not a matter which would render the determination invalid.
- 35 Accordingly, it is 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). 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** [2003] NSWSC 1027 to that tentatively expressed by the Master in the present case.

#### SHOULD RELIEF HAVE BEEN REFUSED ON DISCRETIONARY GROUNDS?

- 36 Having regard to my decision on the other questions, it is not necessary for me to decide this question.
- 37 However, I would comment that the legislature has treated the question of whether progress payments should be made as an important question, and this suggests that the fact that the payments are provisional only and the rights

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of the parties will be determined otherwise would not normally be a ground for withholding relief. Particularly this is so on the approach I have taken, where relief is available only if the determination is found to be void.

**CONCLUSION**

38 For those reasons, in my opinion the appeal should be dismissed with costs.

Mr. F. Corsaro SC for appellant instructed by Doyles, Sydney

Mr. B. Walker SC with Mr. M. Christie for 1st respondent instructed by Baker & McKenzie, Sydney for 1st appellant :

Colin Biggers & Paisley, Sydney for 2nd respondent