BEZZINA DEVELOPERS P/L v DEEMAH STONE (QLD) ; MAX TONKIN ; HELEN DURHAM ; ADJUDICATE TODAY P/L

CA before McMurdo P, Keane JA and Fraser JA 1st August 2008

[1] **McMURDO P:** I agree with Fraser JA.

[2] **KEANE JA:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

[3] **FRASER JA:** On 4 April 2007 the second respondent made an adjudication decision under the Building and Construction Industry Payments Act 2004 (Qld) that the amount of a progress payment to be made by the first respondent ("Bezzina") to the appellant ("Deemah") was $655,978.91.

[4] Bezzina applied to the Supreme Court to review that decision under the Judicial Review Act 1991 (Qld). The primary judge acceded to that application, set the decision aside with effect from the date upon which it was made, referred the relevant adjudication application back to the second respondent for consideration according to law, and made consequential orders. Deemah appeals against those orders.

Background

[5] Deemah contracted to supply and install stonework for Bezzina, the builder and developer of a construction project in Surfers Paradise. Deemah's first 11 progress claims were duly paid by Bezzina. Disputes then arose concerning progress claims 12 and 13. It is progress claim no. 13 which is in issue in the appeal.

[6] Deemah invoked the provisions of the Building and Construction Industry Payments Act 2004 (Qld) to recover progress payments under those claims. Section 7 of that Act states that its object is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work, or to supply related goods and services, under a construction contract. That object is to be achieved, so s 8 of the Act provides, by granting a statutory entitlement to progress payments and by establishing a procedure that involves:

"8(b) ...

(i) the making of a payment claim by the person claiming payment; and

(ii) the provision of a payment schedule by the person by whom the payment is payable; and

(iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and

(iv) the payment of the progress payment decided by the adjudicator."

[7] Deemah's progress claim no. 12 was for $712,149.58. In response, Bezzina's payment schedule contended that no money was due. In due course that claim was referred to the third respondent ("the first adjudicator") for decision.

[8] Deemah subsequently served progress claim no. 13 for $971,995.68 on Bezzina on 28 February 2007. That amount included the amount Deemah had claimed in progress claim no. 12. That course is sanctioned by s 17(6) of the Act.

[9] On 14 March 2007 Bezzina served on Deemah a payment schedule that responded to progress claim no. 13. It contended that no money was due. On 28 March 2007 Deemah made an adjudication application for progress claim no. 13. It was referred to the second respondent ("the second adjudicator") for decision.

[10] On 29 March 2007, the parties were advised that the first adjudicator's decision was ready for release upon payment of the adjudication costs. On 13 April 2007 Deemah paid the adjudication costs and the first adjudication decision was released to the parties. The decision was that the amount of the progress payment for progress claim no. 12 was $218,382.14. Neither party advised the second adjudicator of the first adjudication decision. The reasons for that omission are not explained in the evidence.

[11] On 4 April 2007 the second adjudicator made his adjudication decision in respect of progress claim no. 13 that the amount of the progress payment for that claim was $655,978.91. The second adjudicator's valuation of so much of progress claim no. 13 as had been included in progress claim no. 12 was higher than the valuation of it in the first adjudication decision.

[12] On 25 May 2007, following some payments by Bezzina, and allowing for other adjustments for costs and interest, judgment for $528,665.90 was entered in favour of Deemah against Bezzina. Subsequently, pursuant to an order of the Supreme Court, Bezzina paid $528,725.57 into court.

The issues in the appeal

[13] The primary judge rejected Bezzina's challenge to the first adjudication decision concerning progress claim no. 12.[1] That aspect of the decision was not challenged in the appeal.

[14] In relation to the second adjudication decision, concerning progress claim no. 13, the primary judge accepted Bezzina's contention that the decision should be reviewed on the ground that the adjudicator had contravened s 27(2) of the Building and Construction Industry Payments Act 2004 (Qld) by failing to adopt the valuation in the first adjudication decision for so much of the claim as had been included in progress claim no. 12. Deemah challenges that conclusion.

[15] His Honour rejected Bezzina's contention that the adjudicator erred in law by failing to make a bona fide attempt to value the work in progress claim no. 13. Pursuant to a notice of contention, Bezzina seeks to support the

[1] ***Bezzina Developers P/L v Deemah Stone (Qld) P/L*** [2007] QSC 286 at [19]-[26].

judgment in its favour on the ground that the primary judge erred in rejecting its application for judicial review on this basis.

The valuation issue

[16] It is convenient to consider the valuation issue first. In order to appreciate Bezzina's argument on this issue it is necessary to explain in some more detail the procedure for the recovery of progress payments set up by the Building and Construction Industry Payments Act 2004 (Qld).

[17] Section 12 of the Act confers a statutory right to progress payments. Under s 13 the amount of a progress payment is to be calculated under the relevant contractual provision or, if there is no such provision, it is to be the value of the work or related goods and services the subject of the progress claim. The criteria for that valuation are specified in s 14.

[18] Subsection 17(2) provides that a payment claim must identify the construction work or related goods and services to which the claimed progress payment relates and must state the amount of the progress payment that the claimant claims to be payable ("the claimed amount"). If the respondent replies to the payment claim by serving a payment schedule on the claimant, s 18(2) requires the payment schedule to state the amount of the payment, if any, that the respondent proposes to make ("the scheduled amount"). Subsection 18(3) provides that if the scheduled amount is less than the claimed amount the schedule "must state 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".

[19] The effect of s 18(5) is that the respondent becomes liable to pay the claimed amount if the claimant serves a payment claim and the respondent does not serve a payment schedule within the earlier of the time required by the relevant contract or 10 business days after service of the payment claim.

[20] Where the scheduled amount is less than the claimed amount, or where the respondent does not pay the scheduled amount or the claimed amount by the due date, s 21(1) entitles a claimant to apply for adjudication of its payment claim. Subsection 21(2) provides that an adjudication application cannot be made unless the claimant gives the respondent a notice of intention to make such application and the notice states that the respondent may serve a payment schedule on the claimant within five business days after receiving that notice.

[21] The details concerning adjudication applications are set out in s 21(3). Relevantly, s 21(3)(f) provides that an adjudication application may contain the submissions relevant to the application the claimant chooses to include.

[22] Similarly, s 24(2)(c) provides that any "adjudication response" may contain the submissions the respondent chooses to include. Subsections 24(3) and (4) provide that the respondent may give an adjudication response only if the respondent has duly served a payment schedule and the adjudication response may only include as reasons for withholding payment reasons already included in the earlier payment schedule.

[23] The adjudication procedures are regulated by s 25. Subsection 25(3) requires an adjudicator to decide an adjudication application within a very short time; s 25(4) empowers an adjudicator to seek further submissions from the parties, hold a conference, or inspect any matter to which the claim relates. I will return to these provisions.

[24] Subsections 26(1) and (2) provide:

> *"(1) An adjudicator is to decide*
>
> *(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 amount became or becomes payable; and*
>
> *(c) the rate of interest payable on any amount.*
>
> *(2) In deciding an adjudication application, the adjudicator is to consider the following matters only*
>
> *(a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
>
> *(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 properly 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 properly 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.*

[25] Subsection 26(3) requires the adjudicator's decision to be in writing and to include reasons for the decision, unless both parties asked the adjudicator not to include reasons.

[26] Bezzina's argument is that the second adjudicator contravened the obligation in s 26(1)(a) "*to decide ... the amount of the progress payment ...*" by simply accepting the sum claimed by Deemah rather than embarking upon a valuation of the work. The primary judge rejected the same argument,[2] correctly in my respectful opinion, for the reason that the valuation of the relevant work was not in issue.

[2] ***Bezzina Developers P/L v Deemah Stone (Qld) P/L*** [2007] QSC 286 at [9], [10], [14], [27], [28], [30] and [31].

[27] Bezzina's payment schedule referred to Deemah's progress claim no. 13, stated that it was a payment schedule under the Act and then continued:

"We hereby advise you that the:

Revised schedule amount due will be = nil

The reasons why the revised scheduled amount = nil are as follows:- "

[28] There followed a detailed analysis of various matters claimed by Bezzina to require deductions from the value Deemah had ascribed to the work in progress claim no. 13.

[29] In the second adjudication decision, the adjudicator referred to relevant background matters, the part of the payment schedule I have quoted, Bezzina's failure to lodge an adjudication response, the adjudicator's understanding of several paragraphs that followed the part of the schedule I have quoted (these paragraphs are not in issue here), and continued:

> *"8 The payment schedule consists of a 17 page submission setting out 'the reasons why the revised schedule amount equals nil'. ..."*

[30] After pointing out that Bezzina had failed to lodge an adjudication response after receiving Deemah's adjudication application, the adjudicator returned to the effect of Bezzina's payment schedule:

> *"15. As I indicated earlier, the payment schedule sets out the Respondent's reasons for the scheduled amount being $nil. In most cases, the Respondent indicated an amount that the Respondent said should be deducted from the claimed amount. In respect of some of the reasons, it was unclear how much exactly the Respondent believed should be deducted.*
>
> *16. In the adjudication application, the Claimant attempted to reconcile the deductions against the payment claim, but it too, found the payment schedule to be unclear and it was unable to always decipher the amount that the Respondent proposed to deduct in relation to each reason. Nevertheless, it seems to be clear that the Respondent's scheduled amount is $nil, because the sum of the amounts that the Respondent proposed should be deducted from each of the reasons, results in deductions that exceed the claimed amount.*
>
> *17. In the adjudication application, the Claimant responded to each of the Respondent's reasons in turn. It is appropriate that I follow this pattern and deal with each reason by outlining the Respondent's submissions in the payment schedule, the Claimant's reply to each reason and my decision in respect of each reason."*

[31] The adjudicator then assessed the validity of the reasons assigned by Bezzina for the particular deductions. No complaint is made about that part of the adjudication.

[32] It is apparent that the adjudicator construed Bezzina's payment schedule as implicitly admitting Deemah's valuation of the work, subject only to the particular "reasons why the revised schedule amount = nil" which are then set out in the schedule.

[33] That view finds significant support in the fact that, because Bezzina's payment schedule stated as an amount of the payment it proposed to make an amount which was less than the claimed amount, s 18(3) of the Act obliged Bezzina to "*state why the scheduled amount is less ...*"

[34] Whilst a particular adjudication might involve a valuation, the express obligation imposed by s 26 is "*to decide*", not "*to inquire*". Paragraphs (c) and (d) of subsection 26(2) required the second adjudicator, in deciding the adjudication application, to consider the payment claim and submissions as well as any payment schedule and any submissions in support of it. The valuation ascribed by Deemah in its payment claim being implicitly admitted by Bezzina in its payment schedule, the adjudicator was entitled to adopt Deemah's valuation.

[35] Bezzina's counsel referred to ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** .[3] In that case, Hodgson JA expressed the "*tentative view*" that an adjudicator was not entitled automatically to determine a progress claim at the amount claimed by the claimant if a respondent to a payment claim did not raise any relevant ground for denying or reducing it.[4] His Honour was not there concerned with a case such as this, where a respondent does raise relevant grounds for denying a claim and confines the dispute to those particular grounds. Other decisions relied upon by Bezzina are similarly distinguishable. [5]

[36] I would reject Bezzina's contention that the adjudicator erred in law in failing to value the work in the manner required by the Act. The claimed contravention of s 27

[37] Section 27 provides:

> *27 Valuation of work etc. in later adjudication application*
>
> *(1) Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14, 17 decided*
>
> *(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.*
>
> *(2) The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the*

[3] ***Coordinated Construction Co Pty Ltd v JMHargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385; [2005] NSWCA 228.

[4] **Coordinated Construction Co Pty Ltd v JMHargreaves (NSW) Pty Ltd** (2005) 63 NSWLR 385 at [51]; [2007] NSWCA 228; followed by Brereton J in **Pacific General Securities Ltd v Soliman & Sons Pty Ltd & Ors** (2006) 196 FLR 388; [2006] NSWSC 13 at [82].

[5] See, eg. **Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd** [2007] NSWCA 32 at [25] - [27].

same value as that previously decided 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 decision."

[38] The primary judge found that the second adjudicator had erred in law in failing to take into account the effect of s 27 upon his obligation to value the work the subject of the payment claim by giving it the same value as attributed to it in the first adjudication decision. His Honour held that this failure to comply with a statutory procedure involved an error of law sufficient to justify exercise of the jurisdiction under s 20(2)(f) of the Judicial Review Act 1991 (Qld).[6] His Honour also held that the second adjudicator's failure to take into account his statutory obligation under s 27 constituted a jurisdictional error that enlivened the power to grant declaratory and injunctive relief and to set aside the judgment already obtained.[7] Deemah challenges these findings.

The meaning of "decided" and "decision" in s 27

[39] Deemah contended that for the purposes of s 27(2), the first adjudicator's decision was not "*decided*" or a "*previous decision*" by the time of the second adjudication decision. It was submitted that the value of the construction work was not "*decided*" by the first adjudicator until her decision had been released to the parties on 13 April 2007, which was after the date of the second adjudication decision. On that view of the Act, s 27(2) did not in this case oblige the second adjudicator to adopt the value used by the first adjudicator in the first adjudication decision.

[40] The authorities cited by Deemah's counsel in this respect are not on point: they concerned differently worded statutes where the question whether there was a *"decision"* before communication to the persons affected arose in different contexts .[8] The submission requires a meaning to be given to the term "*decision*" in s 27(2) that differs from its meaning in other provisions, which draw a distinction between the adjudicator's decision and the communication of it to the parties. For example, s 35(5) provides that s 35(4) does not apply only because an adjudicator "*refuses to communicate the adjudicator's decision*" until the adjudicator's fees and expenses are paid, and s 29(2) refers to the date "*on which the adjudicator's decision is served on the respondent*". The obligation in s 25 (3) that an adjudicator must "*decide*" an adjudication application as quickly as possible similarly should not be construed as demanding release of the decision, because that would frustrate the adjudicator's right under s 35(5) to withhold release of the decision until the adjudicator was paid. The appellant's submission thus runs up against the presumption that the same words in the same statute bear the same meaning. [9]

[41] There are therefore substantial difficulties in the way of accepting Deemah's submission that the proper construction of the words "*decided*" and "*decision*" in s 27(2) requires the conclusion that it had no application in this case.

[42] I would, however, accept Deemah's alternative contention that the same conclusion is required for a different reason, namely that s 27(2) applies only where the adjudicator is informed of the earlier adjudication decision.

The second adjudicator's knowledge concerning the first adjudication decision

[43] The primary judge acknowledged that it is difficult to criticise the second adjudicator for his omission to give the work examined by him the same value that had been given to it by the first adjudicator when the parties had not brought the result of the first adjudication to the attention of the second adjudicator.[10]

[44] His Honour observed though that, although the adjudicator was not aware of the result of the first adjudication, he had been informed of the making of the first adjudication application. Bezzina's counsel contended for a stronger finding, that the second adjudicator, as a specialist with knowledge of the Act, should have appreciated that there was probably an earlier adjudication decision on progress claim no. 12 before he made the second adjudication decision. It is therefore necessary to consider what the evidence reveals about the state of the second adjudicator's knowledge concerning the first adjudication.

[45] Bezzina's payment schedule in response to Deemah's progress claim no. 13 pointed out that progress claim no. 13 incorporated progress claim no. 12 and that progress claim no. 12 was the subject of an adjudication application to which Bezzina had filed its response on 12 March 2007. Deemah's submissions in support of its adjudication application acknowledged that its progress claim no. 12 was the subject of a current adjudication application "which adjudication application has not been decided." Deemah then referred to s 27 and summarised the circumstances described in s 27(2) in which an adjudicator is not bound by a previous adjudication decision. In conformity with s 21(5) of the Act, a copy of Deemah's adjudication application, which included its submissions, was served on Bezzina. Bezzina did not serve any adjudication response to that application.

[46] The material before the second adjudicator therefore demonstrated that Bezzina and Deemah were aware of the potential significance of s 27 if an adjudication decision on progress claim no. 12 was delivered during the second adjudication process.

[47] Subsection 25(3) of the Act provides:

(3) Subject to subsections (1) and (2), an adjudicator must decide an adjudication application as quickly as possible and, in any case

[6] ***Bezzina Developers P/L v Deemah Stone (Qld) P/L*** [2007] QSC 286 at [37]
[7] ***Bezzina Developers P/L v Deemah Stone (Qld) P/L*** [2007] QSC 286 at [38].
[8] ***Semunigus v The Minister for Immigration and Multicultural Affairs*** [1999] FCA 422 at [12], [18][21]; [63]-[78], [103]-[105]; **Pongrass Group Operations Pty Ltd v Minister for Planning** (2007) 157 LGERA 250; [2007] NSWLEC 638 at 24-25.
[9] **D Aguilar Gold Ltd v Gympie Eldorado Mining P/L** [2008] 1 Qd R 56 at [26]; [2007] QCA 158.
[10] ***Bezzina Developers P/L v Deemah Stone (Qld) P/L*** [2007] QSC 286 at [32].

(a) within 10 business days after the earlier of

(i) the date on which the adjudicator receives the adjudication response; or

(ii) the date on which the adjudicator should have received the adjudication response; or

(b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days."

[48] That provision has a dual significance here. First, because the second adjudicator was not told whether or not Bezzina and Deemah had agreed to extend the time within which the first adjudicator was obliged to decide the first adjudication application, it cannot be inferred that the second adjudicator knew the due date for the first adjudication decision. Secondly, there being no agreement between Deemah and Bezzina to extend the time for the second adjudication decision, the second adjudicator was allowed only a very short period of time to give an adjudication decision upon progress claim no. 13. Compliance with that time limit is important: amongst other things, failure to comply with it deprives the adjudicator of any remuneration.[11]

[49] In these circumstances, and particularly because neither party at any time corrected Deemah's submission that the earlier adjudication application had not been decided, I conclude that, whilst the second adjudicator knew of the first adjudication application, the second adjudicator did not know that there had been or that there probably had been an adjudication decision about progress claim no. 12.

Construction of s 27(2)

[50] The issue then is whether the second adjudicator erred in law in failing to adopt the valuation made in the first adjudication decision in circumstances in which the second adjudicator did not know that there had been or that there probably had been an earlier decision.

[51] The New South Wales decisions to which the Court's attention was drawn [12] do not concern the proper construction of s 27. There are, however, general statements in them that suggest that an adjudicator making a decision under the statutory equivalent in New South Wales of s 26 is not obliged to take into account facts that (like the earlier adjudication decision here) are not disclosed by either party to the adjudicator.

[52] For example, in ***John Holland Pty Ltd v Road Traffic Authority of New South Wales***,[13] Hodgson JA, referring to his reasons in ***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd***, said (I have added the emphasis):

"[48] However, it is to be noted that I said that the adjudicator was required by pars.(a) and (b) of s.22(2) to consider matters "if he or she thinks [they are] relevant to the construction of the Act, the construction of the contract, and the validity of the terms of the contract having regard to the provisions of the Act". To put this another way, I was saying that the adjudicator should not ignore something which he or she is aware of and also believes is of real relevance to issues arising under pars.(a) and (b), simply because the matter was not raised in submissions duly made by a respondent. Of course, if the matter has not been so raised, there may be questions of natural justice to the claimant that need to be addressed, perhaps by calling for further submissions or by arranging a conference; but that is another issue. However, the requirement for natural justice to the claimant is a further reason why the adjudicator would not be required to consider such matters under pars.(a) or (b) unless he or she thought they were really material to issues arising under those paragraphs.

[49] Thus, in my opinion, any requirement to consider such matters which were not raised in submissions duly made arises only after a threshold is crossed, involving both awareness of the matters in question and a belief that they are of real relevance. .."

[53] The Court's attention was also drawn to decisions concerning a variety of different statutes that suggest that a decision-maker might err in law by making a decision without making enquiries about material not provided by the parties in particular cases. In one decision, for example, it was said that there would be such an error where "*it is obvious that material is readily available which is centrally relevant to the decisions to be made.*" [14]

[54] It is not necessary to refer to the numerous other decisions on that topic to which the Court was referred. The differences between s 27 and the statutory provisions considered in those decisions render them of no real assistance in resolving the issue here. It turns upon the proper construction of s 27.

[55] As to that, it seems most unlikely that the legislature intended that, in circumstances in which neither party has informed the adjudicator of the earlier decision, the adjudicator would be obliged to make enquires to discover if there is an earlier decision, obtain a copy of it, and then prepare a decision that takes the earlier decision into account. Such a result seems even more startling when it is recalled that the adjudicator has no power to compel answers to enquires he or she might make, the adjudicator has no power to compel production of any earlier decision, and the adjudicator would lose the right to remuneration for undertaking the adjudication if the taking of those additional steps led to the adjudicator failing to make an adjudication decision within the very short period of time allowed by the Act.

[11] Subsection 35(4) provides that an adjudicator is not entitled to be paid any fees or expenses if the adjudicator fails to make a decision on the application within the time allowed by s 25(3), unless that happens because the application is withdrawn or the dispute is resolved.

[12] ***Coordinated Construction Co Pty Ltd v JMHargreaves (NSW) Pty Ltd*** (2005) 63 NSWLR 385 at [51] - [52]; [2005] NSWCA 228; ***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142 at [34] - [37]; ***John Holland Pty Ltd v Road Traffic Authority of New South Wales*** (2007) 23 BCL 205; [2007] NSWCA 19 at [48] - [49].

[13] **John Holland Pty Ltd v Road Traffic Authority of New South Wales** (2007) 23 BCL 205; [2007] NSWCA 19 at [48] - [49].

[14] ***Prasad v Minister for Immigration and Ethnic Affairs*** (1985) 6 FCR 155 at 170 per Wilcox J; See also ***Luu v Renevier*** (1989) 91 ALR 39 at 49 per Davies, Wilcox and Pincus JJ.

[56] The better view of s 27(2) is that it operates on the premise that one of the parties will have informed the adjudicator of any relevant, previous adjudication decision. That is suggested both by the proviso within s 27(2), which contemplates that the claimant or respondent might satisfy the adjudicator that there has been a change in the value of the work since the previous decision, and by the context in which s 27 appears in the Act.

[57] Where s 27(2) applies, it informs the manner in which the adjudicator is to perform the function imposed by s 26(1) of deciding the amount of a progress payment. In performing that function, s 26(2) requires the adjudicator to take into account only the matters described in paragraphs (a)-(e) of that subsection. The only paragraphs of that subsection that qualify as potential sources of knowledge in the adjudicator of a previous adjudication decision are paragraphs (c) and (d). Those paragraphs contemplate that the parties will supply the necessary information for the task.

[58] It is a fundamental rule of statutory construction that the provision to be construed must be understood in its context:

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ***"by reference to the language of the instrument viewed as a whole."*** *In* ***Commissioner for Railways (NSW) v Agalianos*** *Dixon CJ pointed out that* ***"the context, the general purpose and policy of a provision and its consistency in the fairness of surer guides to its meaning than the logic with which it is constructed."*** *Thus, the process of construction must always begin by examining the context of the provision that is being construed."* [15]

[59] The context of s 27 to which I have referred confirms that its purpose is to impose an obligation upon an adjudicator to take into account an earlier adjudication decision only where the adjudicator is informed of that earlier adjudication decision.

[60] The result of the contrary construction of s 27, that it obliges an adjudicator to take into a fact of which the adjudicator remains unaware because the parties, who both know the fact, have failed to tell the adjudicator of it, is appropriately characterised as absurd. As Gibbs CJ pointed out in Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation, [16] the canons of construction are not so rigid as to prevent a realistic solution in such a case. If it is right to say that the construction I prefer may be adopted only by reading into s 27(2) words (such as *"... the same value as that previously decided in a decision made known to the adjudicator unless the claimant or respondent . . . "*) then such words may be read into the provision to give effect to the legislative purpose. [17]

The adjudicator's power to seek further submissions

[61] One of the primary judge's reasons for reaching the conclusion that s 27(2) applied in this case was that s 26(2)(a) obliged the adjudicator to take into account the provisions of the Act (including s 27) and in that context had the power to ask for further written submissions from either party under s 25(4)(a) of the Act.[18]

[62] Paragraph (a) of s 26(2) (which I set out earlier in these reasons) undoubtedly obliges an adjudicator to take s 27 into account but, in my respectful opinion, where an adjudicator does not know that there has been or has probably been an earlier adjudication the adjudicator is entitled to regard s 27 as having no potential application.

[63] Subsection 25(4) provides:

"(4) For a proceeding conducted to decide an adjudication application, an adjudicator

(a) may ask for further written submissions from either party and must give the other party an opportunity to comment on the 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."

[64] There would be obvious difficulties in any contention that the second adjudicator made a reviewable error of law in failing to seek further submissions under that provision, which confers a discretion upon the adjudicator. [19] The primary judge did not fmd that the adjudicator was obliged to exercise his discretion under s 25(4)(a) to call for further written submissions and Bezzina does not contend for such a finding in this appeal. Where, as in this case, the adjudicator does not know that there is, or that there probably is, a prior adjudication decision, no occasion arises for the exercise of the power to call for further submissions concerning any prior adjudication decision.

[65] In my respectful opinion, an obligation to seek further submissions from the parties on that topic should not be implied in s 27 when an express power to seek further submissions exists in s 25(4)(a). Implying such an obligation would also create practical difficulties in view of the very limited time available to adjudicators to make decisions and the absence of compulsive powers to obtain any prior adjudication. If the parties fail to inform the

[15] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 381 [69]-[71]; [1998] HCA 28 (citations omitted).

[16] ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*** (1981) 147 CLR 297 at 304; see also per Mason and Wilson JJ at 320-321; [1981] HCA 26.

[17] ***Newcastle City Council v GIO General Ltd*** (1997) 191 CLR 85 at 113 per McHugh J; [1997] HCA 53, a passage cited by the primary judge; see also per Muir JA in ***Nominal Defendant v Ravenscroft*** [2007] QCA 435 at [33]-[48].

[18] **Bezzina Developers P/L v Deemah Stone (Qld) P/L** [2007] QSC 286 at [34]-[36].

[19] cf ***Transgrid v Walter Construction Group Ltd*** [2004] NSWSC 21; **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140; ***Abel Point Marina (Whitsundays) P/L & Anor v Uher*** [2006] QSC 295 per Wilson J at [20].

adjudicator of an earlier adjudication decision, it seems too much to ask of the adjudicator that he or she should delay a decision for the purpose merely of making enquiries and at the risk of losing any right to remuneration.

[66] Had Bezzina been so minded it could have informed the second adjudicator that the first adjudication decision had been made. It is true that s 24(4) prevents a respondent from including in an adjudication response a reason for withholding payment which was not included in the respondent's payment schedule, but Bezzina had drawn the adjudicator's attention to the fact that progress claim no. 13 included the amount claimed in progress claim no. 12. Deemah's submission, to which I earlier referred, plainly enough construed that as an invocation of s 27 in the event that the first adjudication decision was made before the second adjudication decision. In these circumstances s 24(4), read in the light of s 27, would not have prevented Bezzina from drawing the second adjudicator's attention to the first adjudication decision. Further, Bezzina might have paid the first adjudicator's fees and expenses, obtained a copy of the decision, and provided it to the second adjudicator. It was not obliged to do that, but its failure to do so tends to undermine its complaint that the second adjudicator erred by failing to take the first adjudication decision into account.

"Forum shopping"

[67] The primary judge also considered that the apparent purpose of s 27(2) was to discourage "forum shopping" among adjudicators, and that this suggested that the parliamentary intention might have been that a later adjudicator would take steps to inform himself or herself whether there had been an earlier, relevant adjudication decision. [20]

[68] There are references to discouraging "*adjudicator shopping*" in some decisions,[21] but in my respectful opinion that desirable aim does not justify the construction of s 27(2) advocated by the respondent. Other provisions of the Act appear to be designed for that purpose. Adjudicators are not selected by particular applicants but by the "*authorised nominating authority*" to whom the applicant gives the adjudication application.[22] The elaborate scheme for the registration and control of authorised nominating authorities in Part 4 of the Act appears to be designed to achieve, amongst other aims, the exercise of their functions independently of the wishes of individual claimants.

Errors in the adjudication decision

[69] The construction of s 27 advocated by Bezzina is also not justified by the submission on its behalf that the effect of the second adjudicator having failed to take into account the valuation in the first adjudication decision was an increase over that valuation for the same work of $320,000. That figure is contentious, but it is clear that the two valuations differ significantly. Both cannot be correct, but it is not possible on the material available to the Court to say which is correct.

[70] Occasional discrepancies of this kind are an inevitable consequence of the very short time frames allowed for claims, responses, and adjudication decisions and the necessary limits on the information available to adjudicators. The precision aimed for in litigation is not practically achievable under the Act. In **Intero Hospitality Projects P/L v Empire Interior (Australia) P/L**,[23] Muir JA (with whose reasons Holmes JA and Chesterman J agreed), after referring to the second reading speech for the Bill for the Act and summarising the regime under the Act, said:

> "*[51] It is apparent from the foregoing that the Act is intended to provide a mechanism by which claims for payment under construction contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process. It is apparent also that in making determinations under the Act adjudicators will often lack the evidence upon which and the time within which to make fully informed considered determinations. That does not matter in the scheme of things, as adjudicators' determinations do not finally determine parties' contractual rights. That is left to the courts or to alternative dispute resolution processes agreed upon by the parties.*"

[71] For these reasons, and for the reasons I earlier gave, the potential difference between the two valuations is not, in my view, a sufficient basis for construing s 27 as obliging an adjudicator to delay an adjudication for the purposes of seeking to ascertain whether or not there has been an earlier adjudication that the parties have not brought to the adjudicator's attention.

Other construction issues

[72] The omission of any provision in the Act expressly dealing with a case of this kind creates difficulties, whatever construction is adopted. For example, where an earlier adjudication decision is brought to the second adjudicator's attention only after the second adjudication application has been served, compliance by the second adjudicator with the rigorous time limit for making a decision might be put at risk if the second adjudicator were required to take the first decision into account, particularly if the parties wished to be heard about the effect of the earlier decision. Another difficulty is that a third adjudicator is not given any clear guidance whether he or she is obliged to adopt the first or the second adjudication where they provide different valuations of the same work.

[73] Problems of that kind, however they be resolved, do not justify construing s 27 as obliging the second adjudicator to take the first decision into account in circumstances in which the parties have not brought it to the second

[20] **Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd** [2007] QSC 286 at [34]-[36].

[21] ***Rothnere Pty Ltd v Quasar Constructions Pty Ltd*** [2004] NSWSC 1151 at [41]; ***John Goss Projects v Leighton Contractors & Anor*** [2006] NSWSC 798 at [62]

[22] Section 21(3)(b)

[23] ***Intero Hospitality Projects P/L v Empire Interior (Australia) P/L*** [2008] QCA 83

adjudicator's attention. Such a construction would increase the risk of breaches of the time limits for adjudications, contrary to the central object of the Act of securing prompt progress payments. It would also increase the risk that matters outside adjudicators' control might unfairly lead to the loss of their remuneration, thereby deterring qualified persons from becoming adjudicators.

Conclusion

[74] For these reasons I would uphold the appellant's contention that the primary judge erred by concluding that the second respondent erred in law in failing to take into account the first adjudication decision. It follows that, in my view, there was neither an error of law sufficient to justify review under s 20(2)(f) of the Judicial Review Act 1991 (Qld) nor any jurisdictional error of the character found by the primary judge.

[75] In view of my conclusion that there was no error justifying judicial review, the question whether the adjudication decisions here in issue were reviewable at all under the Judicial Review Act 1991 (Qld) does not arise in this appeal, in which Deemah did not put in issue the primary judge's conclusion that, as had been held in decisions in the Trial Division,[24] an adjudication decision is amendable to review under Part 3 of the Judicial Review Act 1991 (Qld). I note also that the appeal falls to be decided with reference to the law in force before the commencement of the Justice and Other Legislation Amendment Act 2007 (Qld). From the commencement of that Act, adjudication decisions are not reviewable under the Judicial Review Act 1991 (Qld).[25]

Discretionary dismissal of the application

[76] Had I concluded that judicial review was available, the question would have arisen whether this was an appropriate case for the exercise of the Court's power to dismiss the application for judicial review pursuant to s 48 of the Judicial Review Act 1991 (Qld). Under that section, the Court is empowered, of its own motion, to dismiss an application on the grounds that it would be inappropriate to grant the application.

[77] Bezzina failed to inform the adjudicator that Deemah's valuation of the progress claim was in dispute. It also failed to inform the second adjudicator of the first adjudication decision even though, when its adjudication response was due on 4 April 2007, it had known for a week that the first adjudication decision had been made and was available for release upon payment of the adjudication costs.

[78] It follows that Bezzina's conduct contributed to what it contends were the errors of law by the second adjudicator that justified judicial review of the decision on progress claim no. 13. That being so, and having regard to the policy of the Act referred to in Intero Hospitality Projects P/L v Empire Interior (Australia) P/L,[26] there is much to be said for the view that the application for judicial review should have been dismissed even had Bezzina made out one of the errors of law for which it contended.

Costs

[79] Costs should follow the event, save in one respect. The appeal record occupied 1,660 pages, of which only a very small fraction were referred to the Court or otherwise relevant. There was no justification for a record comprising more than a very slim folder of material. The costs of the record must also have been increased by the mistakes which necessitated the late production of a supplementary volume of some 80 pages. At the hearing of the appeal the appellant, through its counsel, appropriately acknowledged that the responsibility for the state of the record lay with it. For these reasons I would deny the appellant the costs of the record.

Disposition

[80] I would allow the appeal and set aside the orders made on 7 November 2007. In lieu of those orders I would order that the application for an order of review and other relief filed by the first respondent (matter no. BS6000 of 2007) be dismissed with costs to be assessed on the standard basis. I would order that the first respondent pay the appellant's costs of and incidental to the appeal, save for the costs of the appeal record, which should be borne by the appellant.

ORDERS:

1. Allow the appeal and set aside the orders made on 7 November 2007
2. In lieu thereof order that the application for an order of review and other relief filed by the first respondent (matter no. BS 6000 of 2007) be dismissed with costs to be assessed on the standard basis
3. First respondent pay the appellant's costs of and incidental to the appeal, save for the costs of the appeal record, which should be borne by the appellant

P G Bickford, with A B Wallace, for the appellant instructed by Moray & Agnew
G D Beacham for the respondents instructed by Holding Redlich

[24] ***JJMcDonald & Sons Engineering Pty Ltd v Gall*** [2005] QSC 305; ***Roadtek v Philip Davenport*** [2006] QSC 47; ***State of Queensland v Epoca Constructions Pty Ltd*** [2006] QSC 324 at [16]-[35]; A***bel Point Marina (Whitsundays) Pty Ltd v Uher*** [2006] QSC 295 at [2]; ***ACN 060 559 971 Pty Ltd v O'Brien*** [2007] QSC 91 at [16].

[25] The Justice and Other Legislation Amendment Act 2007 (Qld), s 91, inserted *"8 Building and Construction Industry Payments Act 2004 (Qld), part 3, division 2"'* into schedule 1 part 2 of the Judicial Review Act 1991 (Qld). After the commencement of that amendment on 28 September 2007 (2007 SL No. 241), the Judicial Review Act 1991 (Qld) has no application to adjudication decisions: see Judicial Review Act 1991 (Qld), s 18. In my respectful opinion, adjudications are no longer reviewable under any part of the Judicial Review Act 1991 (Qld): cf ***Intero Hospitality Projects P/L v Empire Interior (Australia) P/L*** [2008] QCA 83 at [61]

[26] ***Intero Hospitality Projects P/L v Empire Interior (Australia) P***/L [2008] QCA 83 at [51] - [57].