

G W Enterprises P/L v Xentex Industries P/L : Con Pappas & John Samios : Philip Davenport : Adjudicate Today P/L

ORDER: Application dismissed

CATCHWORDS: JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – whether the adjudicator failed in his duty to afford natural justice and acted without jurisdiction. JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the adjudicator's decision is void or voidable due to an error of law

Legislation: *Building and Construction Industry Security Payment Act 1999 (NSW)*
Building and Construction Industry Payments Act 2004 (Qld), Part 3, s 7, s 17, s 18, s 21, s 24, s 26, s 28(1)(d), s 30
Queensland Building Services Authority Act 1991
Judicial Review Act 1991, s 17, s 30(1)(a)
Corporations Act 2001 (Cth), s 131

Cases cited *Brodyn Pty Ltd t/as Time and Quality Cost v Davenport* [2003] NSWSC 1019
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2004] NSWCA 394
Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1
Road Transport Authority v John Holland [2006] NSWSC 567

JUDGMENT : Lyons J. Supreme Court of Queensland. Brisbane. 20th December 2006.

[1] This application related to a decision made by the third respondent as an adjudicator under s 26 of the *Building and Construction Industry Payments Act 2004 (BCIPA)*. On 11 August 2006 the third respondent made a decision in respect of a payment claim made under the *BCIPA* by an entity described as Xentex Industries Pty Ltd with an ABN of 35027653684. This decision required the applicant to pay an adjudicated amount of \$34,268 to that entity.

[2] Section 7 of the *BCIPA* sets out the object of the Act:

"7 Object of Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person--

- (a) undertakes to carry out construction work under a construction contract; or*
- (b) undertakes to supply related goods and services under a construction contract."*

[3] Section 8 of the *BCIPA* then states how the object of the Act is to be achieved:

"8 How object is to be achieved

The object is to be achieved by—

- (a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and*
- (b) establishing a procedure that involves—*
 - (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."*

[4] Part 3 of the *BCIPA* sets out the procedure for recovering progress payments and s 17 provides:

"17 Payment claims

(1) A person mentioned in section 12 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 (the respondent).

(2) A payment claim -

- (a) must identify the construction work or related goods and services to which the progress payment relates; and*
- (b) must state the amount of the progress payment that the claimant claims to be payable (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 33(3); 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 the later of -

- (a) the period worked out under 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.*

(5) A claimant can not serve more than 1 payment claim in relation to 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."

[5] The applicant seeks a statutory order of review under the *Judicial Review Act 1991* ("JRA") in relation to the third respondent's decision. The applicant essentially claims that the adjudicator failed in his duty to afford natural

justice and acted without jurisdiction and therefore did not satisfy the requirements of s 17 of the JRA. The applicant also submits that the Adjudication Decision is void or voidable due to an error of law as the first respondent was not incorporated at the time it entered into the agreement with the applicant and once it was incorporated it carried out work using the wrong ABN number.

- [6] In response the first respondent relies on the requirements of the BCIPA which provides that the applicant was required to raise any issues in relation to the disputed claims in the payment schedule pursuant to s 18 of the BCIPA which provides as follows:

"18 Payment schedules

- (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
(2) A payment schedule –
 (a) must identify the payment claim to which it relates; and
 (b) must state 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 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.
(4) Subsection (5) applies if –
 (a) a claimant serves a payment claim on a respondent; and
 (b) the respondent does not serve a payment schedule on the claimant within the earlier of –
 (i) the time required by the relevant construction contract; or
 (ii) 10 business days after the payment claim is served.
(5) 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."

- [7] The first respondent submits therefore that the applicant's failure to comply with the requirements of this section and fully set out the reasons for withholding the payment in the payment schedule means that in accordance with s 24 of the BCIPA these issues cannot subsequently be considered by the adjudicator in determining the dispute.

- [8] The hearing proceeded on the basis that the decision of the adjudicator was an administrative decision to which the JRA applies. The third respondent in accordance with the usual practice took no part in the application and the second and fourth respondents did not appear. The first respondent appeared to resist the application.

The Dispute and Adjudication Decision

- [9] On 15 October 2004 the applicant entered into a Queensland Master Builders Association Housing Subcontract Agreement ("the construction contract") with a party identified simply as Xentex Industries with no reference to an ABN. This contract was for "Painting internal and exterior of new residence" at Lot 50 Elanora and Helensvale and was signed Mr Dimitri Pappas.

- [10] Painting work was performed at this residence. Painting work was also done for the applicant in the period October-November 2004 at two other properties, referred to in the evidence as St Clair, and Lot 659. There is no evidence of the formation of the contract or contracts which led to the carrying out of painting work at these properties. A series of tax invoices were submitted by Xentex Industries to the applicant which showed an ABN of 35027653684 and gave a contact phone number for Dimitri Pappas and a QBSA Licence Number for John Samios of 063098. The invoices were for the provision of painting services to each of several home projects being constructed by the applicant. Two of the invoices are undated but are numbered 4 and 5 and relate to three houses identified as St Clair, Lot 659 and Lot 50 North Lakes Elanora.

- [11] Three payments were made by the applicant to Xentex Industries on 22 October 2004, 5 November 2004 and 19 November 2004.

- [12] Xentex Industries Pty Ltd was incorporated on 22 November 2004 and Dimitri Pappas is the sole director.

- [13] Further work was carried out and similar invoices were submitted in the name of Xentex Industries (ABN 35027653684). These further invoices are numbered 7, 10, 12 and 15, are dated 13 December 2004 and 31 January 2005 and relate to the same three houses at Lot 50 Elanora, St Clair and Lot 659.

- [14] The dispute primarily relates to amounts outstanding between the parties in circumstances where the first respondent states that the contract was for three coats of paint at \$28 per square metre internal and \$18 per square metre external and the applicant states the amount is for two coats at \$22 per square metre internal and \$12 per square metre external. Whilst the applicant paid an amount of \$42,509.30 to the first respondent the first respondent claims that an amount of \$34,268 remains outstanding.

- [15] By a payment claim dated 12 July 2006 a claimant described as Xentex Industries Pty Ltd (ABN 35027653684) claimed a progress payment from the applicant for the amount of \$34,268 being the total amount outstanding from the seven invoices issued for painting works. The payment claim was served pursuant to the provisions of the BCIPA.

- [16] On 18 July 2006 the applicant responded with its payment schedule which set out the three sites as Lot 9 St Clair, Lot 659 Helensvale and Lot 50 Northlakes Elanora and the amounts that the applicant had paid including amounts paid for the painter to go back on the three sites. The payment schedule stated that "our records clearly show that our account with Xentex is paid in full".

- [17] Subsequently on 2 August 2006 the claimant, again identified as Xentex Industries Pty Ltd (ABN 35027653684), made an adjudication application to the fourth respondent, pursuant to s 21 of the BCIPA for adjudication of a payment claim. The fourth respondent is an authorised nominating authority under the BCIPA. The fourth respondent appointed the third respondent as adjudicator of the matter.
- [18] In its written submissions to the adjudicator the claimant detailed the basis of its entitlement. The focus of the submissions was on the manner in which each claim was made up. On 8 August 2006 the applicant provided its adjudication response to the adjudicator and joined issue with the factual matters.
- [19] On 9 August 2006 the applicant provided, as part of its adjudication response, further submissions which identified that the payment claim was made in excess of 12 months from the date when the last painting works were carried out and that in the circumstances the payment claim contravened s 17(4) of the BCIPA.
- [20] By his decision dated 11 August 2006 the third respondent as adjudicator decided the adjudication application in favour of the claimant and directed that the applicant pay the sum of \$34,268 together with interest to the claimant. In deciding the adjudication application the third respondent provided a written Adjudication Decision setting out the basis for the decision.
- [21] The adjudicator's written reasons can be summarised as follows:
- (a) That it was common ground that there was a construction contract within the meaning of the Act and that under the contract the claimant (the first respondent in this application) had carried out the painting work. That there was a payment claim dated 12 July claiming \$34,268 and that the respondent's (the applicant in this application) reason in the payment schedule for withholding payment was that the amount had been paid in full.
 - (b) That the respondent had then served an adjudication response by way of three faxes and that "*In the adjudication response the respondent raises a number of reasons for withholding payment that were not raised in the payment schedule. The respondent is precluded by s24(4) of the Act from including these additional reasons. They include an allegation that an assumption can be drawn from the dates of invoices included with the payment claim that the works relevant to the claim are more than 12 months old. The respondent refers to section 17(4) of the Act. However, the respondent stops short of saying that the claimant did not carry out any work in the 12 months preceding the making of the claim. In any event this was a reason which had to be raised in the payment schedule (see *Brookhollow v R&R Consultants* [2006] NSWSC 1 per Palmer J at [48]). Natural justice would preclude my considering that submission at this stage when the claimant has no opportunity to address it.*"
 - (c) That the respondent also referred to defective and incomplete work but that this was not detailed in the payment schedule. There was a reference to fraud but as it was not made in the payment schedule he could not have regard to it.
 - (d) That the respondent does not specifically address the claimant's allegation that the rates agreed upon on 15 October 2004 were \$28 and \$18 per square metre and not \$22 and \$12 per square metre but simply stated that the lesser amounts were the industry rates. That this was a reason not raised in the payment schedule and it was not a reason which the respondent was now entitled to raise for withholding payment.
 - (c) The adjudicator was satisfied that the "*claimant carried out the work for which payment is claimed, that the rates claimed are the rates agreed and that the amounts paid are the amounts contended by the claimant. I am satisfied that the claimant is entitled to a progress payment of the whole amount claimed.*"

The current application

- [22] In order to enforce the adjudicator's decision Xentex Industries Pty Ltd is required to seek an Adjudication Certificate from the authorised nominating authority, being the fourth respondent, pursuant to s 30 of the BCIPA. Once the Adjudication Certificate is obtained then the claimant is immediately able to register a judgement in a court of appropriate jurisdiction for that sum. The applicant in the current application applies for the following orders:
1. Pursuant to s 30(1)(a) of the JRA an order quashing or setting aside the decision of the third respondent, as adjudicator, made pursuant to the provisions of the BCIPA and dated 11 August 2006;
 2. Pursuant to s 30(1)(d) of the JRA an order directing:
 - (i) The first and second respondents to refrain from asking the fourth respondent to provide an Adjudication Certificate pursuant to s 30(1)(a) of the BCIPA;
 - (ii) The fourth respondent to refrain from providing an Adjudication Certificate pursuant to s 30 of the BCIPA; and/or alternatively
 3. Pursuant to s 128 of the Supreme Court Act 1995 ("SCA") a declaration of the rights between the parties in relation to the decision that the decision is void and a nullity; and
 4. Pursuant to s 180 of the SCA an injunction to restrain:
 - (a) The first and second respondents from asking the fourth respondent to provide an adjudication certificate pursuant to s 30(1)(a) of the BCIPA;
 - (b) The fourth respondent from providing an adjudication certificate pursuant to s 30 of the BCIPA.

The Applicant's submission

- [23] The applicant has raised two reasons why its application should be successful:
- (a) The payment claim was out of time;
 - (b) There was no contract with the party who made the payment claim and served the adjudication application (the proper claimant point).

Claims out of time

[24] The applicant accepts that the issue of the timing of the payment claim was not raised in its payment schedule as required by s 18 but submits that this omission should not be fatal as the adjudicator was required to consider the timing of the claim to determine if it was a valid payment claim. The applicant states that the adjudication is a nullity because the payment claim was not a valid payment claim as it was out of time and accordingly there was nothing which the adjudicator could validly adjudicate.

[25] The applicant submits that the decision in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*¹ ("*Brookhollow*") held that if an adjudicator's decision was irregular in a material particular then it was a nullity. In particular the applicant relied on the duties of an adjudicator under the *BCIPA*, which were specifically discussed in the *Brookhollow* decision by Palmer J in the following terms:

"[63] In a contested adjudication, the adjudicator need consider only those provisions of the Act and of the contract which are relevant to the issues formulated by the parties in their submissions. In an adjudication in which the respondent does not participate the position of the adjudicator is, in my opinion, analogous to that of the Court when a plaintiff seeks the entry of judgment in default of an appearance by the defendant or where the defendant has failed to file a defence. In such a case, the Court still has a duty to decide the case according to truth and fact and if the plaintiff's case appears on the face of the pleading or on the plaintiff's evidence (or lack of it) to be fatally flawed, then the Court will refuse to enter judgment –

[64] In my opinion, where the respondent has not participated in the adjudication process so that the payment claim is undefended, s 22(2) requires the adjudicator to address in good faith such issues arising from the need to conform with the provisions of the Act and of the contract as manifestly appear on the face of the payment claim, the adjudication application and any supporting material. In most cases, the consideration will be confined to:

- whether there is in existence a construction contract between the parties and whether the payment claim is made pursuant to that contract;*
- whether the payment claim reasonably purports on its face to comply with the requirements of s 13(2);*
- whether there is evidence that the payment claim has been served on the respondent;*
- what the contract provides, if anything, about the particular claim made in the payment claim and the time for payment;*
- whether the claimant says that it has done the work for which the payment has been claimed but has not received payment.*

[65] If a fatal flaw in compliance with the Act or the contract is manifestly apparent from a consideration of these matters, the adjudicator will refuse to make a determination in favour of the claimant. ...

[79] The issue is whether omission of reference to s 13(4) and (5) in Mr Davenport's reasons for determination demonstrates that he failed to address in good faith the provisions of the Act and of the contract to the extent which was required, bearing in mind that no defence to the payment claim founded on non-compliance with s 13(4) and (5) was raised in a payment schedule."

[26] The *Brookhollow* decision involved the question as to whether the adjudicator's decision was void in circumstances where a payment claim was served, without a payment schedule and the matter proceeded to adjudication where one of the allegations was that the claim was not a valid payment claim because it was not served within 12 months of the construction work being carried out. In that case it was held that the payment claim did on the face of it comply with the relevant provisions of the *Building and Construction Industry Security Payment Act 1999* (NSW) ("*BCIPA* (NSW)").

[27] The applicant submits however that in the current case it was apparent from the face of the record that the payment claim was served more than 12 months after the construction work was last carried out. Accordingly the applicant submits that the adjudicator's decision was in law a nullity because the payment claim was not a valid payment claim and accordingly there was nothing that the adjudicator could validly adjudicate.

[28] As Palmer J held in *Brookhollow*, in a contested adjudication the issues to be determined by the adjudicator are those formulated by the parties. In the present case, one issue raised by the applicant and determined adversely to it was whether the claim was made more than twelve months after the construction work to which it relates was last carried out. There is no right of appeal to this Court against that determination. I note that there was material before the adjudicator showing evidence of work being done on the sites as late as August 2005.

[29] I am not satisfied that on the face of the payment claim it would have appeared that the claim did not comply with the requirements of s 17 of the *BCIPA*. The *BCIPA* provides that a payment claim may be served in a period of 12 months after the construction work was last carried. The payment claim sets out that the claim related to "*Painting Services, Various Sites within the State of Queensland*" and the last invoice date was 31 January 2005.

¹ [2006] NSWSC 1

On this basis the contract and the invoices are just the starting point as the crucial date is the date the work was last carried out. Given that the payment claim was dated 12 July 2006 it would not have been apparent from the face of the payment claim that all construction work had necessarily been completed by July 2005. There was always the possibility that work was done after the last invoice date, and there was, as I have noted, material before the adjudicator showing evidence of work being done on the sites as late as August 2005.

[30] In discussing the s 17 of the BCIPA (NSW) Palmer J held in *Brookhollow* that:

"[33] Consistently with the reasoning of Basten JA in *Climatech*, Hodgson JA in *Nepean* concluded that a payment claim cannot be treated as a nullity for failure to comply with s 13(2)(a) of the Act "unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made": *Nepean* at para 36. The corollary of this proposition is that a payment claim can be treated as a nullity if it does not on its face reasonably purport to comply with s 13(2)(a). ...

[41] The law as to compliance with s 13(2) of the Act as it emerges from *Brodyn* and *Nepean*, may be summarised thus:

(i) a payment claim which is never served on the respondent under s 13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;

ii) there are some non-compliances with the requirements of s 13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;

iii) a payment claim which does not, on its face, purport in a reasonable way to:

- identify the construction work to which the claim relates; or
- indicate the amount claimed; or
- state that it is made under the Act

fails to comply with an essential and mandatory requirement of s 13(2) so that it is a nullity for the purposes of the Act;

iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s 13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act;

v) in the case of a payment claim which purports reasonably on its face to comply with s 13(2):

- if the respondent wishes to object that it does not in fact comply so that it is a nullity for the purposes of the Act, the respondent must serve a payment schedule under s 14(4) and an adjudication response under s 20, in which that objection is taken;
- if the respondent does not serve a payment schedule within the time limited under the Act and the claimant ultimately seeks the entry of judgment under s 15(4), the respondent may not resist summary judgment on the ground that the payment claim was not a valid payment claim by reason of non-compliance with the requirements of s.13: the respondent has only one chance to take that objection, namely, in a timeously served payment schedule;

vi) in the case of a payment claim which was never served on the respondent or which does not purport reasonably on its face to comply with the requirements of s 13(2):

- the payment claim is a nullity for the purposes of the Act;
- an adjudication founded upon that payment claim is a nullity, regardless of whether the objection to the validity of the payment claim was taken in a timeously served payment schedule;
- an application under s 15(4) for judgment for the statutory debt created by s 14(4) may be defeated on the ground that there was no payment claim in existence for the purposes of s 15(l)(b)."

[31] In the circumstances of the current case I am not satisfied that the payment claim was a nullity on the ground that it should have been apparent from the face of it that it was out of time.

[32] The applicant has also submitted that an adjudication decision is void if an adjudicator fails to address in good faith the matters it is required to address in accordance with s 26(2) of the BCIPA. In particular further reliance was placed on the *Brookhollow* decision and the submission was made that the decision in that case meant that once the adjudicator was aware of the issue of the timing of the payment schedule he could not disregard the matter and should have actually turned his mind to a determination of the issue. The applicant submits that as the adjudicator did not address the issue once raised then he acted in breach of natural justice in relation to making the decision. It was further submitted that in circumstances where the claimant sought what was in effect a default judgement because the claim was undefended due to the issue not having been raised in the payment schedule there was a particular burden imposed on the adjudicator to consider the issue.

[33] I am not satisfied that the adjudicator has failed to address the issue. The material which was submitted to the adjudicator pursuant to s 26 of the BCIPA included the construction contract which clearly set out the date for commencement as 15 October 2004. This material also included the submission by the applicant to the adjudication annexing material showing evidence of work being done on the sites as late as 8 August 2005. In

addition the payment schedule submitted from the respondent (to the adjudication) shows an item listed as "Amount paid for painter to go back"² (with respect to three invoices). The respondent's written submission also specifically included a reference to a "6 month maintenance period".³ Furthermore the adjudicator's decision clearly stated that "the respondent stops short of saying that the claimant did not carry out any work in the 12 months preceding the making of the claim". I am not satisfied therefore that the adjudicator has failed to address the issue and I am not satisfied that the adjudication decision is a nullity on this basis.

[34] Furthermore s 26(2) of the *BCIPA* states that an adjudicator is to consider only certain matters in coming to a determination. These matters are listed as provisions of the *BCIPA*, certain provisions of the *Queensland Building Services Authority Act 1991*, the payment claim, the payment schedule and any inspection carried out. If the adjudicator had taken into account matters which he was not entitled to then this would have been contrary to the *BCIPA*.

[35] Section 18(3) of the *BCIPA* provides that a respondent served with a payment claim must state reasons in a payment schedule if the scheduled amount is less than the claimed amount and do so within ten business days after the payment claim has been served. Section s 24(4) of the *BCIPA*, upon which the respondents rely, provides that:

"24 Adjudication responses

(4) *the respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant."*

[36] I am satisfied that the adjudicator took the correct approach in determining the application and that he could not take into account any matters raised by the current applicant which they had not raised in the payment schedule. This approach to the interpretation of a similar provision in the *BCIPA* (NSW) was endorsed by Macready (Associate Justice) in *Road Transport Authority v John Holland Pty Ltd*⁴ which followed the approach taken by Palmer J in *Brookhollow* where his Honour indicated:

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

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

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

[47] However, if the respondent does elect to raise a defence in bar founded on s.13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.

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

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

² Attachment 10 to Payment Claim

³ Submission by Respondent to the Adjudication p 2

⁴ [2006] NSWSC 567

- [37] Accordingly it is imperative that any reasons for withholding payment must be raised in the payment schedule or they cannot be raised at all. I am not satisfied therefore that the applicant should succeed on the ground that the adjudicator had failed to consider the matters he was required to consider in good faith.
- [38] I turn then to the second aspect of the applicant's submission which relates to the submission that the correct entity has not made the payment claim.

The Proper Claimant Point

- [39] The applicant submits that there was no construction contract between the first respondent and the applicant because the contract was between the applicant and Xentex Industries and not Xentex Industries Pty Ltd. The applicant therefore submits that the payment claim was not a proper payment claim under the BCJPA and is therefore void. The applicant relies on the decision in *Brodyn Ply Ltd t/as Time Cost and Quality v Davenport*⁵ ("Brodyn") where Hodgson JA (with whom Mason P and Giles JA agreed) considered the BCIPA (NSW) and determined that:

"[52] ... it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

[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...*
- 2. The service by the claimant on the respondent of a payment claim ...*
- 3. The making of an adjudication application by the claimant to an authorised nominating authority ...*
- 4. The reference of the application to an eligible adjudicator, who accepts the application ...*
- 5. The determination by the adjudicator of this application..., by determining the amount of the progress payments, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing ..."*

- [40] The applicant submits that the "basic and essential requirements" include the requirement for a construction contract to exist between a claimant and a respondent and relies on *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)*⁶ As there was no construction contract the applicant submits the payment claim was a nullity and the decision of the third respondent must also be a nullity and accordingly the applicant's rights of review under s 20(2)(c) of the JRA have been enlivened.
- [41] I am not satisfied however that the payment claim was a nullity on this basis. There was a construction contract in existence but there has been a misdescription of the party making the payment claim. I am not satisfied that one of the essential elements has in fact failed. It is clear that there was an agreement between the applicant and Xentex Industries for painting work to be done.
- [42] The first contract was with Xentex Industries. There is no direct evidence of the contractual arrangements pursuant to which other work was done. Invoices issued in the name of Xentex Industries, further identified by ABN 35027653684. These were paid by the applicant. This occurred before Xentex Industries Pty. Ltd. was incorporated. After the incorporation, further invoices issued, in which the party claiming payment was similarly identified.
- [43] On the payment claim the name Xentex Industries Pty Ltd plus the ABN were used. Against a background of the prior transactions the payment claim could only be understood as a reference to the entity using the name Xentex Industries and the ABN. The reasons for this are that the written contract identified the party contracting to do work as Xentex Industries. The invoices for all the work was issued by Xentex Industries plus the ABN. There was no evidence of any assignment of the benefit of the contracts to the company Xentex Industries Pty Ltd or of a novation of the contracts so that Xentex Industries Pty Ltd replaced Xentex Industries as the contracting party.
- [44] It is clear that the applicant understood the payment claim in truth was made by the entity with which it had entered into the contracts. The applicant did not in its payment schedule assert that the entity that served the payment claim was not a party to the contract and accordingly had no right to make the claims. Rather it dealt with the merits of the claims.
- [45] In my view the payment claim was made by the entity described as Xentex Industries plus the ABN. It had been a party to the contract. It was entitled to make the payment claim.
- [46] Furthermore I do not consider that a misdescription of a party should defeat the whole adjudication particularly when the issue is not raised at the time of the adjudication. I would adopt the comments of Wilson DCJ in *Phoenix Project Development Pty Ltd v On Hing Ply Ltd* that:⁷ *"There is authority, involving similar legislation in New South Wales, to suggest that the legislature intended these matters to be finally determined by adjudication, and to limit the opportunity for parties to attempt, later and elsewhere, to raise separate, or new triable issues"*.

⁵ [2004] NSWCA 394

⁶ [2005] NSWCA 409

⁷ [2006] QDC 75 at [10]

- [47] It is clear that the *BCIPA* was intended to provide a fast track adjudication system in relation to disputes under construction contracts. I note that the adjudication decision specifically stated that "*it is common ground that there was a construction contract within the meaning of the Act*" and that the issue of the wrong party making the claim was not raised at any time in the proceedings. It was clearly reasonable for the adjudicator to assume that the parties had in existence a valid construction contract throughout the adjudication process. This is particularly so where the respondent, who has been active throughout the adjudication process, has failed to bring to the adjudicator's attention any doubt as to the existence of a construction contract with the party making the adjudication application, before the adjudicator has made a final decision.
- [48] I am satisfied that the applicant's failure to include any such objections in relation to the issue of the validity of a construction contract in its payment schedule pursuant to s 24(4) of the *BCIPA* means that this issue cannot be raised.
- [49] Accordingly I am not satisfied that the failure to commence the proceedings in the correct name was fatal to the adjudication decision as it was not a failure to establish one of the essential terms. Accordingly I cannot be satisfied that the adjudicator did not have the jurisdiction to determine the matter. In determining the matter the adjudicator has determined the matter on the facts before him. As no issue was raised as to the correct names of the parties, the matter proceeded to a determination.
- [50] I would therefore dismiss the application.
- [51] I will hear Counsel for the parties' submissions in relation to costs.

MJF Burnett for the applicant instructed by Ebsworth and Ebsworth for the applicant
S Boote for the respondent instructed by Keith Mole and Associates for the respondent