

JUDGMENT : Hodgson JA ; Ipp JA ; Basten JA. New South Wales Court of Appeal. 13th July 2005

- 1 **HODGSON JA:** On 13 April 2005, Bergin J gave judgment in proceedings in which the appellant (Coordinated) sought a declaration that an adjudication determination made by the second respondent (the adjudicator) was void, or alternatively an order quashing this determination; and also sought consequential relief against the first respondent (Climatech) and the fourth respondent (LEADR).
- 2 The primary judge refused the relief sought, and dismissed Coordinated's summons. Coordinated has appealed from that decision.

CIRCUMSTANCES

- 3 On 23 June 2003, Coordinated and Climatech entered into a sub-contract whereby Climatech agreed to carry out construction work to provide air conditioning and mechanical services in connection with the re-development of the former Gazebo Hotel at Elizabeth Bay.
- 4 Between April and December 2004, Climatech submitted to Coordinated what have been referred to as variation claims numbered V16, V23, V24, V25, V28, V29, V31 and V35. The primary judge described the tax invoices in respect of these claims as follows:
 4. ... The tax invoices in respect of each of these claims were in identical form for the months of April, May and June 2004, being respectively V16, V23 and V24. Each of the invoices claimed "site supervision costs" for two named employees and "office overheads" at \$29,959.18. Attached to each of the invoices was what was referred to as an "EOT Invoice Calculation". Those calculations provided a "Formula" in respect of the two employees. The first entry under this heading, relating to the first employee, was "\$75 x 38 x 52/12". The second entry, in relation to the second employee, was "\$45 x 38 x 52/12". The "Formula" in respect of overheads was recorded as: "Total Overheads (Average 01/05/03 to 31/05/04) 12 x 25.87% (Less RL, MK and IB Actual Wages)". There was then a Formula in respect of two different employees, the first recorded as "\$200,000/12 x 25.87%" and the second as "\$125,000/12 x 24.87%".
- 5 The tax invoices for the months July to December 2004 were in identical terms except for the reduction in the amount by \$7,410 for the absence of the second employee from the claims relating to site supervision costs. The total in those invoices was therefore \$7,410 less than the earlier invoices.
- 6 Each tax invoice included the statement: "This invoice is submitted under clause 34.9 of the Contract (Delay Damages)". Payment claims 19 and 20, each of which categorized the EOT claims as "variations", stated that the Payment Claims were made under the Act and that "EOT claims are submitted under clause 34.9 of the contract (Delay Damages) and are also related to EOT awarded on 3 September 2004". That latter reference was to a letter from the Contract Superintendent to the defendant advising that he had assessed "in accordance with contract clause 34 and 34.5" the new dates for practical completion contained in the letter. That letter "instructed" the defendant to complete the Contract in accordance with the new dates for practical completion.
- 5 These claims were not paid, and on 23 December 2004 Climatech served on Coordinated a payment claim under the Building & Construction Industry Security of Payment Act 1999 (the Act) claiming \$697,928.47 excluding GST. Coordinated responded by serving a payment schedule on 13 January 2005, in which it proposed payment of "nil".
- 6 On 28 January 2005, Climatech applied to LEADR for adjudication of the payment claim; and subsequently the adjudicator accepted nomination as adjudicator. Coordinated served its adjudication response on 7 February 2005.
- 7 On 21 February 2005, the adjudicator issued an adjudication determination which determined the amount of the progress payment to be paid by Coordinated to Climatech at \$588,275.15.

CONTRACTUAL PROVISIONS

- 8 The sub-contract incorporated sub-contract conditions AS 4903-2000 as amended by the parties. The parts of the sub-contract relevant to this appeal are as follows (with italics indicating words defined in the sub-contract):

34 Time and progress

34.1 Progress

The Subcontractor shall ensure that WUS reaches practical completion by the date for practical completion.

34.2 Notice of delay

The Subcontractor shall promptly and in any event not later than ten (10) days after the Subcontractor first became aware or ought reasonably to have become aware that anything, including an act or omission of the Main Contractor, the Subcontract Superintendent or the Main Contractor's employees, consultants, agents or other contractors (not being employed by the Subcontractor) may delay the WUS, notify the Subcontract Superintendent in writing of the nature and where possible the extent of the delay. If the Subcontractor fails to give such a notice within the said period of ten (10) days then the Subcontractor shall not be entitled to any EOT arising out of or connected with or in any way brought about by any delay associated with the cause so detailed.

34.3 Claim

The Subcontractor shall be entitled to such extension of time for carrying out WUS (including reaching practical completion) as the Subcontract Superintendent assesses ('EOT'), if:

(a) the Subcontractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and
(b) within ten (10) days after the delay first occurs, the Subcontractor gives the Subcontract Superintendent a written claim for an EOT which must include:

- (i) a detailed statement of the facts on which the claim is based; and
- (ii) a precise identification of the activities affected;

and demonstrating by reference to the activities of the Subcontract Program how the delay involves an activity which is or by virtue of the delay becomes critical to the maintenance of progress in the execution of the Subcontract Works so as to achieve practical completion.

If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Subcontractor shall claim an EOT for such delay by promptly giving the Subcontract Superintendent a written claim evidencing the facts of that delay.

34.4 Assessment

When both non-qualifying and qualifying causes of delay overlap, the Subcontract Superintendent shall apportion the resulting delay to WUS according to the respective causes' contribution.

In assessing each EOT the Subcontract Superintendent shall disregard questions of whether:

- (a) WUS can nevertheless reach practical completion without an EOT; or
- (b) the Subcontractor can accelerate,

but shall have regard to what prevention and mitigation of the delay has not been effected by the Subcontractor.

The Subcontract Superintendent shall assess any EOT in units of working hours rounded to the nearest half working day (where appropriate).

34.5 Extension of time

Within 35 days after receiving the Subcontractor's claim for an EOT, the Subcontract Superintendent shall give to the Subcontractor and the Main Contractor a written direction evidencing the EOT so assessed. If the Subcontract Superintendent does not do so, there shall be a deemed assessment and direction for an EOT as claimed.

Notwithstanding that the Subcontractor is not entitled to or has not claimed an EOT, the Subcontract Superintendent may, for the benefit of the Main Contractor and not the Subcontractor, at any time and from time to time before issuing the final certificate direct an EOT. For the sake of clarity, the Subcontract Superintendent shall have no obligation to direct an EOT if the Subcontractor is not entitled to or has not claimed an EOT in accordance with the provisions of the Subcontract. ...

34.9 Delay Damages

For every day the subject of an EOT for a compensable cause and for which the Subcontractor gives the Subcontract Superintendent a claim for delay damages pursuant to subclause 41.1, damages certified by the Subcontract Superintendent under subclause 41.4 shall be due and payable to the Subcontractor.

The payment by Main Contractor of such delay damages shall be the sole remedy of the Subcontractor for the events or circumstances giving rise to the delay in respect of which the delay damages are payable and are accepted by the Subcontractor in full and final satisfaction of any claim that the Contractor may have against the Main Contractor or the Subcontract Superintendent, the Principal or any other employee or agent of the Principal for any act or omission of any or all of them and whether in contract, tort, statute, unjust enrichment or any other bases of claim.

36 Variations

36.1 Direction variations

The Subcontractor shall not vary WUS except as directed in writing.

The Subcontract Superintendent, before the date of practical completion, may direct the Subcontractor to vary WUS by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Subcontract (including being within the warranties in subclause 2.2):

- (a) increase, decrease or omit any part;
- (b) change the character or quality;
- (c) change the levels, lines, positions or dimensions;
- (d) carry out additional work;
- (e) demolish or remove material or work no longer required by the Main Contractor.

36.2 Proposed variations

The Subcontract Superintendent may give the Subcontractor written notice of a proposed variation.

The Subcontractor shall as soon as practicable after receiving such notice, notify the Subcontract Superintendent whether the proposed variation can be effected, together with, if it can be effected, the Subcontractor's estimate of the:

- (a) effect on the Subcontractor's program (including the date for practical completion): and
- (b) cost (including all warranties and time-related costs, if any) of the proposed variation.

The Subcontract Superintendent may direct the Subcontractor to give a detailed quotation for the proposed variation supported by measurements or other evidence of cost.

The Subcontractor's costs for each compliance with this subclause shall be certified by the Subcontract Superintendent as moneys due to the Subcontractor.

36.3 Variations for convenience of Subcontractor

If the Subcontractor requests the Subcontract Superintendent to direct a variations for the convenience of the Subcontractor, the Subcontract Superintendent may do so. The direction shall be written and may be conditional. Unless the direction provides otherwise, the Subcontractor shall be entitled to neither extra time nor extra money.

36.4 Pricing

The Subcontract Superintendent shall, as soon as possible, price each variation using the following order of precedence:

- (a) prior agreement;
 - (b) applicable rates or prices in the Subcontract;
 - (c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Subcontract documents, to the extent that it is reasonable to use them; and
 - (d) reasonable rates or prices, which shall include a reasonable amount of profit and overheads,
- and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the subcontract sum.

37 Payment

37.1 Progress claims

The Subcontractor shall claim payment progressively in accordance with Item 37.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and may include details of other monies then due to the Subcontractor pursuant to provisions of the Subcontract. ...

41.1 Notice of Claims

All money claims, whether for damages, compensation, unjust enrichment, restitution or adjustment to the subcontract sum, all matters of interpretation and clarification of this Agreement and all claims whether in contract, tort (including negligence), unjust enrichment or otherwise (hereinafter collectively referred to as a "Claim") shall be dealt with in accordance with this Clause.

This subclause and subclause 41.4 shall not apply to any Claim, including a claim for payment (except for a Claim which would, other than for this subclause, have been included in the final payment claim), the communication of which is required by another provision of the Contract

41.2 Claims to be Specified

Each Claim in respect of which there is a separate legal entitlement shall be in writing and shall specify:

- (a) the perceived legal basis of a claim including where appropriate a reference to the clause of this Subcontract under which the Claim is made.
- (b) The facts relied upon in support of the Claim in sufficient detail to permit verifications; and
- (c) Details of the quantification of the sums claimed then known to the subcontractor and the manner in which such sums have been calculated.

41.3 Time Limit

Subject to any other provision of this subcontract which provides a time limit in which to bring a Claim, in which case the specific time limit in that clause shall prevail, the subcontractor shall not have any right to submit any Claim, initiate any action or proceeding against the Main Contractor and shall have No Claim in respect of any matter, fact or thing whatsoever arising out of or in connection with or under this Subcontract or the Subcontract Works unless the Subcontractor not later than fourteen (14) days after the Subcontractor first became aware or ought reasonably to have first become aware of the commencement of the occurrence of the events or circumstances on which the Claim is based, lodges the claim in writing with the Subcontract Superintendent in accordance with the requirements of Clause 41.2.

41.4

Within 28 days of receipt of Claim referred to in subclause 41.1 above, the Subcontract Superintendent shall assess the Claim and notify the parties in writing of the decision. Unless a party within a further 14 days of such notification

gives a notice of dispute under subclause 42.1 which includes such decision, the Subcontract Superintendent shall certify the amount of that assessment to be monies then due and payable.

9 The definitions in the sub-contract relevant to this matter are as follows:

compensable cause means:

(a) *any act, default or omission of the Subcontract Superintendent, the Main Contractor or its consultants, agents or other contractors (not being employed by the Subcontractor); or ...*

(c) *those listed in Item 35;*

qualifying cause of delay means:

(a) *any act, default or omission of the Subcontract Superintendent, the Main Contractor or its consultants, agents or other contractors (not being employed by the Subcontractor); or ...*

(c) *other than:*

(i) *a breach or omission by the Subcontractor;*

(ii) *industrial conditions or inclement weather whether occurring before or after the date for practical completion; and*

(iii) *stated in Item 32;*

the Subcontract Works means *the whole of the work to be carried out and completed in accordance with the Subcontract, including variations provided for by the Subcontract, which by the Subcontract is to be handed over to the Main Contractor;*

variation has the meaning in clause 36;

work includes the provision of materials;

WUS (from 'work under the Subcontract') means *the work which the Subcontractor is or may be required to carry out and complete under the Subcontract and includes variations, remedial work, construction plant and temporary works,*

THE DETERMINATION

10 The only part of the determination relevant to this appeal is contained in paras.[18]-[37] of the determination. Paragraphs [18] and [19] are as follows:

18. Variation Claims V16, V23, V24, V25, V26, V28, V29, V31 and V35 all advance claims for payment consequent upon what the Claimant contends was an extension of time for completion. The Respondent advances a number of reasons why these claims should be disallowed, and it is convenient to consider each of them in turn.

19. The Respondent says (paragraph 24 of its submissions) that unless the delays are included in the value of a variation, such claims are claims for damages which are not properly claimable under the Act. It relies on *Kembla Coal & Coke -v- Select Civil & Ors* [2004] NSWSC 628 and *Quasar Construction -v- Demtech Pty Ltd* [2004] NSWSC 116, and seeks to distinguish *de Martin & Gasparini -v- Energy Australia & Anor* [2002] NSWCA 330, which is relied upon by the Claimant.

The crux of the matter is whether the amounts claimed are delay damages within the meaning of Clause 34.9 of AS 4903-2000 which provides:

"For every day the subject of an EOT for a compensable cause and for which the Subcontractor gives the Subcontract Superintendent a claim for delay damages pursuant to sub-clause 41.1, damages certified by the Subcontract Superintendent under clause 41.4, damages certified by the Subcontract Superintendent under clause 41.4 shall be due and payable to the Subcontractor. ..."

The original date for practical completion was 30 March 2004 (see Item 11 of Annexure A to the subcontract). On or about 3 September 2004, the Respondent's Subcontract Superintendent notified the Claimant of altered dates for "practical completion". The final completion date specified in the attachment to this letter was 1 February 2005. In its response, apparently sent on 6 September 2004, this last date was stated by the Claimant to be "achievable". Notwithstanding that the cautious language of its letter of 3 September avoided reference to an extension of time, the Respondent's letter is headed "Works Progress & Practical Completion". It contained an instruction to complete "your agreements for the nominated levels as the determined practical completion dates as listed in the attached schedule". Furthermore it referred to revised dates as having been assessed in accordance with Clause 34 and 34.5. It seems to me that thereby the Respondent brought about an extension of time under the subcontract, opening the door for the Claimant to proceed with a claim for delay costs under the contract. Resulting as they do from an extension of time for completion, these claims are variation claims and are properly included in progress claims.

11 As noted by the primary judge, the adjudicator made the following additional findings:

- The Contract Superintendent had directed an extension of time under clause 34.5 of the Contract which was "necessary" to enable the defendant to complete the work and to remain on site beyond the original contract period which contemplated completion by 30 March 2004 (par 22);

- The delay in question was a compensable cause within the meaning of clause 34.9 that entitled the defendant to claim damages (par 23);
- The tax invoices and the relevant progress claims satisfied the requirements of clause 41.2 (par 25);
- When a claim is made under clause 34.9, the circumstances on which the claim for “delay damages” or “delay costs” is based is the default of others which establishes the compensable claim, and the granting by the Contract Superintendent of the EOT, without which “delay damages would not be payable” (par 26);
- The defendant did as required by clause 41.3, giving notice in accordance with the requirements of clause 41.2 quantifying month by month the “monthly delay costs” (par 28);
- The legal basis for each claim is identified as being clause 34.9 of a Contract and the facts relied on clearly enough were the delay in time for completion month by month after 30 March 2004 (par 30); and
- The details provided in the attachments to the invoices are the basis of the claimed variations and on their face they seem to comprise proper components of “delay costs” which should be accepted as being incurred because of the delay occasioned by others so as to make them compensable costs (par 37).

STATUTORY PROVISIONS

12 The provisions of the Act of particular relevance to this case are s.3(1), the definitions of “claimed amount” and “progress payment” in s.4, and ss.6, 8, 9, 10(1), 11(1), 13, 17(1) and 22 of the Act. Those provisions are as follows:

3 Object of Act

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

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.

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”).

6 Definition of “related goods and services”

(1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:

- (a) goods of the following kind:
 - (i) materials and components to form part of any building, structure or work arising from construction work,
 - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
- (b) services of the following kind:
 - (i) the provision of labour to carry out construction work,
 - (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
 - (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
- (c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), **related goods and services** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

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.

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.

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.

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.

DECISION OF PRIMARY JUDGE

- 13 The primary judge referred to the judgment of Bray CJ in *In Re An Arbitration Between Taylor Woodrow International Ltd. and The Minister of Health* (1978) 19 SASR 1, and continued:
- 27 Clause 36.1 of the Contract effectively defines a variation and does not seem to me to fall foul of Bray CJ's criticism in *Taylor Woodrow*. Although clause 36.2 does combine the concepts of additional work and additional time in that it contemplates the subcontractor giving an estimate of the effect of any proposed variation on the program "including the date for practical completion" (cl 36.2(a)) and any "time-related costs", it is part of the necessary process for the pricing of the proposed variation. The "pricing" of the variation by the superintendent requires the inclusion of a "reasonable amount of profit and overheads" and once that price is assessed it is "added to or deducted from the subcontract sum".
- 28 The letter of 3 September 2004 was in my view correctly described by the second defendant as bringing about an extension of time (par 19). However the "instruction" to complete the Contract by the new dates for practical completion does not seem to me to fall within the definition of variation in clause 36.1 of the Contract. It was not an increase, decrease or omission of any part of the work (cl 36.1(a); it was the same work but to be completed by a later date. Although the letter of 6 September 2004 indicates that there may be some problems in respect of completing the works by the new dates because certain aspects of the work of other trades necessary to be completed prior to the installation of the air-conditioning would not be done, such problems do not change the "quality" or "character" of the defendant's contracted work (cl 36.1(b). The direction did not change the levels, lines, positions or dimensions of the work (cl 36.1(c); nor did it require the defendant to carry out additional work but rather, the same work to be completed by a later date (cl 36.1(d). The direction could not be characterised as demolishing or removing material or work no longer required by the plaintiff (cl 36.1(e)).
- 29 There was no pricing of a variation for the purposes of adding that amount to the subcontract sum. The parties proceeded upon the basis that this was the granting of an extension of time for which the defendant was entitled to delay damages under clause 34.9 as claimed pursuant to clause 41 of the Contract. Such amounts were still able to be claimed as part of the progress payment under clause 37.1 of the Contract as "other monies then due to the subcontractor pursuant to provisions of the subcontract" but were not valued as part of the WUS because they were not variations.
- 30 It seems to me that the second defendant fell into error in his construction of the Contract in concluding that these were variation claims. Such an error is not in my view a failure to comply with the "basic and essential requirements" of the Act as that concept is explained in *Brodyn Pty Ltd v Davenport*. This adjudicator was making a bona fide attempt to comply with his obligations under the Act and all other ancillary matters to give to him the jurisdiction to do so had been complied with. In those circumstances the plaintiff is not entitled to the relief sought in the Summons. I do not need to decide whether such an error and the consequential awarding of the claimed

amounts is conduct that would extend the Brodyn categories because there is, in my view, a further basis upon which the second defendant was entitled to allow the claims, dealt with below in what I have referred to as the broader arguments of the parties.

14 She went on to consider Coordinated's submissions which raised similar issues to those raised in *Coordinated Constructions Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd.* [2005] NSWSC 77, to the effect that the amounts claimed in the variation claims were delay damages, and thus not able to be included in progress payments under the Act because they were not for "construction work" as defined in the Act.

15 The primary judge referred to a contention of Climatch that construction work should not be limited to work actually done, and to the example of the cost of a crane that is on site for the duration of a construction contract, but which may be inoperative for periods of time; and she continued:

37 *The crane example seems to me to be more appropriately utilised in analysing s 8(1)(b) of the Act, pursuant to which a person who has undertaken to supply related goods and services under the contract is entitled to a progress payment, and s 13(2)(a) of the Act, pursuant to which a payment claim must identify the related goods and services to which the progress payment relates. "Goods" include "plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work": (s 6 (1)(a)(ii)). The crane example falls squarely within the provision of "goods" as defined in the Act "for use in connection with the carrying out of construction work". The words in brackets referring to the alternatives of sale or hire, contemplate those costs of provision of that plant being recoverable in the progress payment and in the payment claim. The fact that the crane is not in actual operation for 20% or 50% of the time does not mean that the cost of hiring it for its provision "in connection with the carrying out of construction work" is to be reduced. The provision of this plant is obviously in connection with the carrying out of construction work and the so-called "down-time" is neither here nor there. If the contract is not completed by the anticipated practical completion date and there is a necessity for the crane to stay on the site for a longer period of time, the cost of the additional hiring fees of the crane for the extra time the crane is on site seems to me to be clearly claimable in a payment claim as a related good supplied for use in connection with the carrying out of construction work: s 13(2)(a); s 6(1)(b).*

38 *That example may be used analogously to the provision of "related services", which are defined in the Act to include "the provision of labour to carry out construction work": s 6 (1)(b)(i). Notably, that definition is not expressed as "the provision of labour for construction work carried out". Rather, it seems to me to envisage, consistently with the practical reality of the construction industry, the provision of the labour force for the particular project that will be available "to carry out construction work". It is that "provision" that is able to be the subject of the progress claim and a payment claim under the Act. It also seems to me to encompass not only the cost of the labour but also the cost of what is needed to be in a position to enable its "provision", for instance, a proportion of the overheads of the business. If the labour force is provided on days when there is no "construction work" for it to carry out on the site caused by any qualifying reasons under the relevant contract, then it seems to me that the Act contemplates that, because labour was "provided" on site "to carry out construction work", the contractor is still entitled to be paid for the cost of that provision as a "related service". If the Superintendent awards an EOT, delay damages or costs may be claimed as an amount for that related service. However this must be subject to the terms of the particular contract between the parties.*

39 *The Contract in this case required the defendant to provide this related service, and permitted payment for the provision of labour even whilst there was no construction work to actually carry out. This is seen in the regime for extensions of time under clause 34, the capacity to claim delay damages under clauses 41 and 34.9 and the entitlement to include such amount in progress claims under clause 37.1. Thus there is a proper basis for the allowance of the extension of time claims per se as a "related service" under the Act and irrespective of whether they were variations.*

16 Accordingly, the primary judge refused the relief sought by Coordinated.

GROUNDS OF APPEAL

17 Coordinated relies on the following grounds of appeal:

1. Her Honour erred in holding that the adjudication determination of the Second Respondent dated 21 February 2005 ("the Adjudication Determination") was a valid Adjudication Determination for the purposes of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act").
2. Her Honour ought to have held that by allowing an amount for delay damages pursuant to clause 34.9 of the contract, the Second Respondent allowed an amount which was not "for construction work" and that the Second Respondent thereby failed to comply with an essential requirement under the Act and the respective Adjudication Determination was void.
3. Her Honour erred in holding that the delay damages payable by reason of the Adjudication Determination was for "related goods and services" as defined in section 6(1)(b)(i) of the Act.
4. Her Honour erred in not holding that the Adjudication Determination was relevantly unlawful for the purposes of the principle stated in *Project Blue Sky v The Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100].
5. Her Honour ought to have held that the Adjudication Determination included an amount that was not "for construction work", and that it was not open to the Second Respondent to include such an amount in the adjudicated amount of the Adjudication Determination.

6. Her Honour ought to have:
 - (a) held that the Adjudication Determination was unlawful; and
 - (b) made an order restraining any party from taking further steps on the basis of the Adjudication Determination.
 7. Her Honour ought to have held that the amount of delay damages pursuant to clause 34.9 of the contract, allowed by the Second Respondent was not "for construction work", and that it was not open to the Second Respondent to include in his Adjudication Determination such amount.
 8. Her Honour ought to have held that certiorari was available pursuant to section 69 of the Supreme Court Act 1970 (NSW).
 9. Her Honour ought to have held that:
 - (a) the Second Respondent made a jurisdictional error; or
 - (b) there was an error of law on the face of the record, because the Adjudication Determination allowed an amount for delay damages pursuant to clause 34.9 of the contract.
 10. Her Honour to have made an order in the nature of certiorari, pursuant to section 69 of the Supreme Court Act 1970 (NSW), quashing the Adjudication Determination.
- 18 I will consider in turn the following issues:
1. Were amounts included in the adjudication determination not for construction work or related goods and services, and thus not able to be included in progress payments under the Act (Grounds 2, 3, 5, and 7)?
 2. If so, was this a vitiating error within *Brodyn Pty. Ltd. v. Davenport* [2004] NSWCA 394 (Ground 1), or was the adjudicator's determination unlawful as discussed in *Project Blue Sky v The Australian Broadcasting Authority* (1998) 194 CLR 355 (Grounds 4 and 6)?
 3. Should leave be granted to re-argue *Brodyn* (Grounds 8, 9 and 10)?

SHOULD THE AMOUNTS HAVE BEEN EXCLUDED FROM THE DETERMINATION BECAUSE NOT "FOR" CONSTRUCTION WORK OR RELATED GOODS AND SERVICES?

Submissions

- 19 Mr. Rudge SC made the same submissions for Coordinated as in the case of *Coordinated Constructions Co. Ltd v. J.M. Hargreaves (NSW) Pty. Ltd.* [2005] NSWCA 228, summarised as follows in the judgment in that case:
- 35 Mr. Rudge SC for Coordinated submitted that a claim for delay damages was not a claim for construction work: *Quasar Constructions Pty. Ltd. v. Demtech Pty. Ltd.* [2004] NSWSC 116, 20 BCL 276; and that to the extent that the decision of McDougall J in *Kembla Coal & Coke Pty. Ltd. v. Select Civil Pty. Ltd.* [2004] NSWSC 628 diverged from that of Barrett J in *Quasar*, the decision of Barrett J was to be preferred. It was not material that there may be an express contractual right to such damages: cf, a claim for liquidated damages as considered in *Baese Pty. Ltd. v. G.A. Bracken Building Pty. Ltd.* (1990) 6 BCL 137.
- 36 Mr. Rudge submitted that the expression "for construction work" in the definition of "claimed amount" was not equivalent to "in respect of construction work" or "relating to construction work", because the statutory context differed from that considered in *State Government Insurance Office (Qld) v. Crittenden* (1996) 117 CLR 412 at 416; and it was not consistent with the legislative intent in the Act (*CIC Insurance Ltd. v. Bankstown Football Club Ltd.* (1997) 187 CLR 384 at 408, *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 CLR 104 at 196, *Solution 6 Holdings Ltd. v. Industrial Relations Commission of NSW* [2004] NSWCA 200, 60 NSWLR 558 at [81]-[84]) that the mere existence of a connection with construction work (cf. *Project Blue Sky* at [87]) would be sufficient to justify inclusion in a progress payment.
- 37 Mr. Rudge submitted that in this contract, delay damages were made a monetary remedy to compensate a sub-contractor for the head contractor's wrong: cf. *Lawson v. Wallasey Local Board* (1883) 11 QBD 229. Off-site costs, such as office overheads, were plainly not for construction work. On-site overheads were perhaps less clearly so, but still were claims for damages by reason of the sub-contractor being unable to carry out construction work, rather than being for construction work.
- 20 He also submitted that the primary judge erred in characterising the claim as being for related goods and services supplied:
1. The claim was on its face for damages not for the supply of good and services.
 2. The claim was not for goods and services "supplied", but rather for delay caused by the head contractor in relation to the supply of goods and services.
 3. There was no finding by the adjudicator that related goods and services had been supplied, so it was not open for the primary judge to substitute her findings for those of the adjudicator.
- 21 Mr. Rudge submitted that, had Climatech made a claim for the supply of related goods and services, Coordinated could have advanced grounds for resisting such a claim. Since no such claim was made, Coordinated was denied the opportunity for doing this. Accordingly, Climatech should not have succeeded before the primary judge on a basis not advanced in its progress claim or before the arbitrator, and should not succeed on that basis before this Court: *John Holland Pty. Ltd. v. Cardno MBK (NSW) Pty. Ltd.* [2004] NSWSC 258.

Decision

- 22 I repeat the following views expressed by me in *Hargreaves*:
- 38 The object of the Act is stated in s.3(1) as being "to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the

- supplying of those goods and services". The definition of "progress payment" refers to s.8, which does not limit the payment to payment for construction work and/or related goods and services; and the amount of the progress payment is dealt with in s.9, which also does not impose such a limit.
- 39 It is true that s.13 requires a payment claim to indicate the claimed amount, and that this expression is defined to be an amount claimed to be due for construction work carried out or for related goods and services supplied; and, pursuant to s.17, what is adjudicated is the payment claim. That gives some support to the argument that the adjudicator can only include in progress payments amounts claimed to be due for construction work carried out and/or for related goods and services supplied; but the terms of s.13 itself, in particular s.13(3), tell against it. Further, as submitted by Mr. Feller SC for Hargreaves, it is by no means clear that the words "carried out" and "supplied" should be given a strict temporal connotation.
- 40 Further, in the case of a construction contract that provides that progress payments include certain amounts, s.9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s.13 and the definition of "claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.
- 41 In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.
- 42 Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl.34.9) and which are then to be included in progress payments (cl.37.1). They are therefore prima facie within s.9(a) of the Act.
- 43 If in substance they represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out.
- 44 If they represent off-site costs (such as office overheads) or other on-site costs, it may be a question of fact and degree whether they are for construction work carried out or for related goods and services supplied. They would in my opinion properly be regarded at least as part of the price for the totality of the construction work when completed. And it would seem artificial to say that they are excluded from the Act if they are not referable to work that has already been carried out, particularly when s.9(b) refers to the value of construction work undertaken to be carried out and related goods and services undertaken to be supplied. However, it is not necessary in this case altogether to exclude the possibility that some delay damages claimed under this contract might possibly not be for construction work carried out or related goods and services supplied within the definition of "claimed amount" in s.4; but it is certainly not obvious that this is so in relation to any of the claims in this case.
- 45 It follows from this discussion that delay damages and interest under this contract could be claimed to be due for construction work carried out or for related goods and services supplied; and in my opinion, even if s.13 is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s.9(a) and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision.
- 23 As regards **John Holland**, in my opinion some parts of what was said in that case may require qualification on the basis of views I have expressed in **Minister of Commerce v. Contrax Plumbing (NSW) Pty. Ltd.** [2005] NSWCA 142 at [33]-[36] and in **Hargreaves** at [50]-[53].
- 24 However, I accept that what is referred to an adjudicator for determination is a claimant's payment claim, and what an adjudicator is to determine is the amount of the progress payment to be paid on the basis of that claim and on the basis of other considerations in s.22(2) of the Act. Accordingly, the task of the adjudicator is to make a determination within the parameters of the payment claim, although that is not to say that, if an adjudicator were to make an error which can later be seen as taking the determination outside those parameters, it necessarily invalidates the determination.
- 25 I note also that s.13(2)(a) requires that a payment claim "identify" the construction work or related goods or services to which the payment relates. This requirement must be interpreted, in my opinion, having regard to the requirement in s.14(3) that the payment schedule indicate the respondents' reasons for withholding payment, the limitation on the adjudication response in s.20(2B) to those reasons, and the corresponding limitation in s.22(2)(c),

as well as the circumstance that, for the reasons given above, payment claims may include amounts that are not (in a narrow sense) for construction work that has actually been carried out for related goods and services that have actually been supplied. In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of “delay damages” of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

- 26 In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s.20(2B) and s.22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant’s entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s.22(1).
- 27 So far as this case is concerned, there is no suggestion that the contractual basis for the amounts claimed was not adequately indicated in the payment claim. The complaint is that the payment claim did not indicate that the claim was for related goods or services supplied. However, in my opinion, if a claim is in substance a claim for related goods or services supplied, it is not essential that it be explicitly identified as such in the payment claim: generally it is enough that the claim and its basis (in the contract and/or as a matter of valuation) be set out with sufficient clarity.
- 28 Accordingly, it is not to the point that the payment claim in this case on its face indicated its contractual basis as being for delay damages rather than the supply of goods and services. Any contention by Coordinated that the adjudication was invalidated, because the claim was not one which could validly be made under the Act, was for Coordinated to establish before the primary judge or before this Court; and in my opinion, Coordinated has not established that. It is not to the point that the adjudicator made no finding that the claim was for related goods and services supplied.

IF SO, WAS THERE A VITIATING ERROR OR UNLAWFUL ACT?

- 29 It follows there was no error of the kind that, according to *Brodyn*, could invalidate a decision; and also that there was no unlawful act by an adjudicator which, according to *Blue Sky*, could justify the grant of an injunction. I would add that in my opinion, if a determination is valid because the basic and essential requirements of the Act are complied with, an error of law by the adjudicator, even in interpreting the Act itself, would not make the determination unlawful and thus liable to restraint by injunction.

LEAVE TO RE-ARGUE BRODYN

- 30 As noted earlier, there appear to be two possible aspects to any application to re-argue *Brodyn*, namely (1) the question of whether challenges to determinations are limited to cases where determinations are invalid or whether they may extend to cases where determinations are not invalid but may be quashed, for example for error of law on the face of the record; and (2) the question of whether *Brodyn* set the requirements for validity too low, particularly in relation to the application of s.22 of the Act.
- 31 Coordinated’s application appears to focus on the availability of certiorari, and thus essentially on the first of those two questions; and it challenged the view expressed in *Brodyn* that there was a legislative intent that certiorari not be available, and that it was by no means clear that an adjudicator was a tribunal exercising governmental powers.
- 32 For my part, I am not persuaded that there are grounds to give leave to re-argue the first question identified above; but in any event, for reasons already given, even if certiorari could issue for error of law on the face of the record, it would not issue in this case. I would not give leave in this case to re-argue *Brodyn*.

ORDER

- 33 For those reasons, in my opinion the appeal should be dismissed with costs.
- 34 **IPP JA:** I agree with Hodgson JA, for the reasons set out in [38] to [45] of his reasons in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd & Ors* [2005] NSWCA 228 that “delay damages” can amount to payments “for construction work”.
- 35 This is sufficient, in my view, to dispose of the appeal. I agree with the orders proposed by Hodgson JA.
- 36 I would not comment on the other issues raised. These are not essential to the decision.
- 37 **BASTEN JA:** The Appellant (the plaintiff in the proceedings below) sought relief in the nature of prohibition and certiorari in relation to a determination made by an adjudicator under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”). The basis on which such relief was sought was that there had been a failure to comply with the basic and essential requirements of the Act: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWSC 312 at [13]. The requirements said not to be satisfied were those provided for in s 13(2)(a) and (b) of the Act. The primary focus of the argument was the proposition that a claim for damages where there was delay, for a compensable cause, under clause 34.9 of the contract, did not

constitute a claim for payment “for” construction work. It was conceded by the Appellant that the preconditions to a valid determination identified in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 at [53] did not include a failure to comply with s 13(2). Nevertheless, it was argued before her Honour that, the list set out in *Brodyn* not being exhaustive, this failure nevertheless rendered the determination invalid.

- 38 The error in fact made by the adjudicator, identified by her Honour at [30], set out at [13] above, was the treating of the extensions of time as “variation claims”. That, her Honour held, did not constitute a jurisdictional error, but rather an error within jurisdiction. Her Honour correctly held that such an error would not render the determination invalid, in the sense explained in *Brodyn*.
- 39 Her Honour did not reach a final conclusion in relation to the argument that claims for payment on account of delays were not payment claims “for construction work”, because, she held, they were in substance claims for payment in relation to a related service, namely “the provision of labour to carry out construction work”: see s 6(1)(b)(i) and [38], set out at [15] above. As noted at [20], the Appellant challenged this approach on the basis that it had not been the subject of a finding by the adjudicator.
- 40 At [21] above, Hodgson JA refers to the decision of Einstein J in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258. His Honour expresses the view that “some parts of what was said in that case may require qualification, in part because of the views expressed in *Hargreaves* at [52] in relation to the material which the adjudicator was entitled to take into account. I have expressed my views in relation to that matter in *Coordinated Construction Co Pty Ltd v J M Hargreaves* [2005] NSWCA 228 at [64]-[68]. However, the reference to *John Holland v Cardno MBK* in this context requires further explanation.
- 41 That case was concerned with a problem for which the Act appeared not to provide, namely where a contractor makes a claim on one basis, or even without specifying a basis, and then seeks to raise a new or additional justification before the adjudicator. Einstein J was of the view that the contractor was entitled to take that step, because s 13(2) does not require a payment claim to identify the contractual basis on which the claim is made, nor to provide supporting documents as part of the claim. Accordingly, a valid claim could be made without taking those steps. The principal must then respond by way of a payment schedule, which is likely to deal with the basis for claim relied upon, rather than that which is not identified or relied upon. It is then supposed that the claimant, by “submissions” made under s 17(3)(h), on an application for adjudication, can supply the missing detail, by reference to contractual terms, or supporting documentation. The principal can respond by making submissions, pursuant to s 20(2)(c), but cannot include in those submissions “any reasons” for withholding payment which were not included in the payment schedule: s 20(2B). Nevertheless, Einstein J noted that the claimant’s submissions must be supportive of a payment claim already made, and cannot “constitute” a payment claim by adding a fresh basis of claim: *ibid* at [25]. However, his Honour took a different view in relation to an absence of supporting documentation. If the principal complained in the payment schedule that it could not verify the amounts because of absence of supporting documentation, which documentation was forthcoming on the adjudication application, it could not then provide reasons based on that documentation for withholding payment: *ibid* at [30]. However, his Honour held that, at least in the particular circumstances of the challenges before him, the contractor could not succeed on the basis of the new material, either because it made out a claim which was not established by the “payment claim” or because the result was to deny the principal procedural fairness.

Essential preconditions

- 42 In *John Holland v Cardno MBK*, Einstein J expressed the view that, in order to satisfy the statutory scheme, a payment claim did not need to be “comprehensible by the respondent in terms of its supporting materials”: *ibid* at [21]. However, as Hodgson JA notes at [25] above, the claim must “identify” the work, goods or services to which the payment sought relates. The term “identify” should be given a purposive construction: what must be done must be sufficient to draw the attention of the principal to the fact that an entitlement to a payment is asserted, arising under the contract to which both the contractor and the principal are parties. In that sense, the claim, to be valid, must be reasonably comprehensible to the other party. If the entitlement does not arise absent the supply of supporting documentation, then the claim must be accompanied by that documentation, unless it has already been provided. On the other hand, it may be that the distinction between a “claim” and a “reply” by way of a payment schedule (see s 14(1)), on the one hand, and “submissions” on the other, suggest that the precise contractual basis for the entitlement may not need to be identified in the claim, nor addressed in the response. Rather, the claim should assert, in full, the factual basis upon which it is made, including the provision of documents where necessary, whereas the reliance on a relevant contractual provision may be dealt with by way of submissions, if the matter comes before an adjudicator. It would then follow that the requirement in s 20(2B) that the “reasons” for withholding payment must be limited to those identified in the payment schedule, would not preclude the principal from undertaking the same exercise in its submissions, namely the identification of the absence of justification in terms of specific contractual provisions.
- 43 The next question is whether the existence of a valid payment claim, which complies with s 13(2) is an essential precondition to a valid determination. A related question is whether, even if there is a valid claim, a determination which appears to go beyond the parameters of the claim is itself a valid determination: see [24] and [26] above.
- 44 For reasons explained in *Hargreaves* at [72]-[77], it is not possible to construe s.13(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims. However, it does not follow that the Court should set aside a determination in circumstances where, in its view, the claim does not satisfy those

requirements, or the determination goes beyond the parameters of the claim, properly understood. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 72 (Spigelman CJ).

- 45 In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.
- 46 In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in *Brodyn*, should be understood as giving effect to these principles.
- 47 It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], was to the following effect: "If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide."

Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that it must be undertaken in good faith, but that is not a sufficient condition of validity.

- 48 The approach set out above does not import into the operation of the provisions discussed some overriding principle of procedural fairness, as may, on one view, be inferred from the approach adopted in *John Holland v Cardno MBK*. Such an approach would be attended with difficulties for two reasons. The first is that it is at risk of introducing into the adjudication process some ill-defined notion of "fairness", the counterpart of which is impermissible unfairness. The danger is that the Court may be led into reassessing the merits of the decision in a manner which fails to draw a firm distinction between procedural and substantive unfairness: see generally, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [28] (Gleeson CJ), [80] (McHugh and Gummow JJ) and [148] (Callinan J). The second reason is that the relevant content of procedural fairness must be ascertained by reference to the specific statutory scheme. Where that scheme is inconsistent with some element which might otherwise have been implied under the general law, it is the general law which must give way.

Claim for related services

- 49 It is now convenient to return to the basis upon which the primary judge refused relief in reference to the challenge that the payment claim was not for construction work. Her Honour's reasoning relied upon the proposition that the claim could properly have been supported as a claim for payment for services, namely the provision of labour to carry out construction work. As noted at [21] above, the Appellant challenged that approach on the basis that it was not litigated before the adjudicator, who made no findings in that regard.
- 50 At [27]-[28] above, Hodgson JA dismisses this argument on two bases: first, the Appellant did not demonstrate that the payment claim was not "in substance a claim for related goods or services supplied", and, secondly, that it was "not to the point that the adjudicator made no finding that the claim was for related goods and services supplied". However, there is, in my opinion, a difficulty with each of these propositions.
- 51 First, for the reasons set out above, it was for the adjudicator to determine the scope and nature of the payment claim. Furthermore, if the adjudicator had been inclined to determine the claim on the basis of a contractual entitlement other than that asserted by the claimant, he would have been required to make the relevant findings of fact and law to support his conclusion. If, in accordance with *Brodyn* and as suggested above, those matters are entrusted to the adjudicator by the Act, it is not open to the Court to form a view on those matters and act upon the view so formed, even to demonstrate that the adjudicated amount may be upheld on a different basis. The circumstances in which a court exercising a power of judicial review can reach a conclusion different from that reached by the repository of the power will be extremely rare: see *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 at 579. If the decision-maker has found all the necessary factual elements to justify a particular conclusion but has wrongly added a further element, which was not satisfied, a court may conclude that the proper result has constructively been reached: see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41]-[43]. However, in the present case, her Honour was not entitled

to uphold the decision of the adjudicator, on the assumption that he had committed jurisdictional error, on a different basis, unless affirmatively satisfied that all the relevant facts had been found and the error was an immaterial misconception of law.

- 52 Her Honour did not state her conclusions in that way and the Appellant challenges the legitimacy of her Honour's approach. However, it is not necessary to rule on that challenge because the underlying assumption, namely that the adjudicator's determination was otherwise infected by jurisdictional error, has not been made out. That assumption was based upon the argument that "delay damages" could not amount to payments "for construction work", a conclusion which I would reject for the reasons given in *Hargreaves* at [59]-[63].

Application of Project Blue Sky

- 53 I agree with the reasons of Hodgson JA at [29] in relation to the reliance placed on the comments in the joint judgment in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [100]. The effect of a failure to comply with a statutory requirement, in circumstances where the resulting decision or determination remains valid, will no doubt depend upon the particular statutory context. In the present case, the valid determination of "an adjudicated amount" imposes a legal obligation on the respondent to pay that amount: s 23(2). If not paid, the claimant may request "an adjudication certificate" (s 24(1)) which may be filed in a court of competent jurisdiction and which will be enforceable as a judgment for a debt. Section 25(4) envisages the possibility of a respondent seeking to have the judgment set aside, but the respondent is limited in the kinds of issues it can raise. This scheme depends upon the existence of an adjudicated amount, validly determined, but is inconsistent with the proposition that injunctive relief is available to prevent further steps being taken if the adjudicated amount is not paid, based on some legal error not going to validity, in the adjudication process.

Conclusion

- 54 For the reasons set out above, I agree that the appeal must be dismissed with costs.

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