JUDGMENT : McDougall J : New South Wales Supreme Court : 22nd February 2005

1 The plaintiff (Coordinated) and the first defendant (Hargreaves) are parties to a subcontract under which Hargreaves agreed to carry out certain work in connection with the redevelopment of the former Gazebo Hotel at Elizabeth Bay. Hargreaves made a number of what it said were payment claims under the *Building and Construction Industry Security of Payment Act* 1999 (the Act). In at least three cases, those claims were disputed. They proceeded to adjudication. On one occasion, the adjudicator was the second defendant (Mr Parnell). On another occasion, the adjudicator was the third defendant (Mr Sarlos). Co-ordinated says that each determination is void because it did not meet what Coordinated said were *"the basic and essential requirements … for the existence of an adjudicator's determination"* under the Act (the phrases are taken, in reverse order, from the judgment of Hodgson JA (with whom Mason P and Giles JA agreed) in ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394 at para [53]).

The issues

2 The issues between Coordinated and Hargreaves may be stated as follows:

(1) Was each determination void because each adjudicator determined that Hargreaves was entitled to be paid, as a component of a progress payment under the Act, an amount by way of "delay damages" claimed pursuant to an express provision (cl 34.9) of the subcontract?

(2) Was Mr Parnell's determination also void because he determined that Hargreaves was entitled to be paid, as a component of a progress payment under the Act, an amount by way of "interest" claimed pursuant to an express provision (cl 37.5) of the subcontract?

(3) Was Coordinated precluded from relying on the second point because it had not been taken in its payment schedule or adjudication response?

(4) If Mr Parnell's determination was void because he determined that the progress payment due to Hargreaves included an amount for interest under cl 37.5 of the subcontract, should relief be withheld on discretionary grounds because, or moulded to take account of the fact that, the amount involved was "de minimis" – 0.187% of the total amount determined?

(5) Should extension of time (EOT) claims 3 and 4 (also known as claims V 64 and V 80) submitted to Mr Parnell and allowed by him have been rejected pursuant to s 22(4) of the Act upon the basis that they had been dealt with in a prior adjudication conducted by Mr Anthony Makin?

(6) Should EOTs 5 and 6 (also known as V 97 and V105) submitted to Mr Sarlos and allowed by him have been rejected on the same basis?

(7) Should escalation costs claim number 1 (also known as V 65) submitted to Mr Parnell and allowed by him have been rejected on the same basis?

(8) Should escalation costs claim number 2 (also known as V 94) submitted to Mr Sarlos and allowed by him have been rejected on the same basis?

(9) Was the payment claim that was the subject of Mr Parnell's adjudication invalid because it was not made on or from a reference date under the subcontract (see ss 8(1) and 13(4)(a) of the Act)?

3 In different ways, the first eight issues sought to explore what are the basic and essential requirements for there to be a valid determination by an adjudicator under the Act, and what considerations guide the grant of relief if any such requirement has not been satisfied.

4 In relation to the second issue, Coordinated's claim, as set out in the statement of contentions in its second further amended summons and as addressed in its written submissions, referred also to an allowance of interest by Mr Sarlos in his determination. However, it is apparent from Mr Sarlos' determination that he rejected the claim for cl 37.5 interest as a component of the progress payment. The only interest that he allowed was that authorised by s 22(1)(c) of the Act. Accordingly, this challenge to his determination was withdrawn in oral submissions.

5 Coordinated submitted, in the alternative (ie, if its claim that each adjudicator contravened some basic and essential requirement for validity were rejected), that each determination should be set aside upon the basis that it was done in contravention of relevant provisions of the Act, and was therefore unlawful. Thus, Coordinated submitted, it was entitled to a declaration that each adjudicator had acted in breach of the Act, and to an injunction to prevent further action being taken based on their determinations: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 [100] (McHugh, Gummow, Kirby and Hayne JJ).

The subcontract

6 The subcontract was made on 12 June 2003 by an "instrument of agreement" which incorporated subcontract conditions AS4903-2000 (appropriate for a design and construct subcontract, as this was), heavily modified. When in these reasons I refer to particular clauses of the subcontract, I am referring, unless otherwise stated, to provisions of AS 4903-2000 as (if at all) modified.

7 By cl 2 of the instrument, the subcontract sum was stated to be $3,578,816 plus GST "or such other sums as shall be determined from time to time in accordance with the provisions of this Agreement". It is not immediately apparent how the subcontract sum might be "determined from time to time in accordance with the provisions of" the subcontract. There were provisions for the payment of other amounts of money, including delay damages (cl 34.9), variations (cl 36.2) and interest (cl 37.5). Adjustment to the subcontract sum was recognised (as a possibility separate to claims "for damages, compensation, unjust enrichment, [or] restitution") in cl 41.1. However, although the effect of each of the provisions to which I have referred was that an amount certified under it was due by

Coordinated to Hargreaves, it does not appear to be the case that the certification of any such amount effected a change to the subcontract sum.

8 Clause 34 dealt with "**time and progress**". It provided, among other things, for EOTs (cl 34.5) and "delay damages" (cl 34.9). Clause 34.9 reads as follows: *"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 sub clause 41.4 shall be due and payable to the **Subcontractor.***

*The payment by the 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 … ".*

Italicised [bold] words or phrases appear thus in the subcontract, and are defined terms.

9 Clause 37 dealt with "payment". By cl 31.7, payment was to be made "progressively in accordance with *Item* 37". The parties agreed that the reference to Item 37 should be read as a reference to an item numbered 2 in Part A of the annexure to the subcontract. (For identification, that is to be found on p 43 of exhibit PX 1.) That item provided that the time for progress claims was the last day of each month for "*WUS*" (works under subcontract) done to the last day of the month.

10 Clauses 37.2 and following dealt with certification and other matters. The effect of the relevant provisions (including cl 37.4) was that Hargreaves was entitled to be paid 7 days after certification (or, in the case of progress claims, 28 days after the Superintendent received the progress claim). Against that background, cl 37.5 provided that interest (at the contractual rate of 8% per annum) was "due and payable after the date of default in payment". The reference to "default in payment" must be a reference to the periods of time specified in cls 37.2 (progress payments) and 37.4 (final claim), the relevant effect of which I have just stated.

11 Clause 41 dealt with the notification and assessment of all monetary claims (excluding, apparently, claims for progress payments or the final payment under cl 37). Except that, as I have already noted, cl 41 does not of itself make any of the monetary claims to which it refers an adjustment to the subcontract sum, it does not require attention.

Hargreaves' claims

12 There were six EOT claims, four interest claims and two escalation cost claims.

EOT 1 (V 36)

13 This claim was made on 26 March 2004. It was "for an extension of time of 11.5 working weeks and associated cost of $201,102.92 … for recovery of overheads, plant, staff and supervision costs … due to architectural design changes which impacted on contract programme … ". The supporting material showed that the delay alleged commenced on 18 June 2003 and finished on 5 September 2003.

EOT 2 (V 37)

14 This claim was also dated 26 March 2004. Although it was said to be "further to" EOT 1, it was in fact a separate claim. It was made "for an extension of time of 9 working weeks and associated costs of $157,384.89 … for the recovery of overheads, plant, staff and supervision costs … due to fire on 07/11/03 where all work … ceased until 12/01/04".

EOTs 3 to 6 (V 64, V 80, V 97 and V 105)

15 These claims were made on, respectively, 31 August 2004, 30 September 2004, 29 October 2004 and 30 November 2004.

16 Each claim was said to result from the effects of, and to relate to a further period of delay following what was said to be the concluding date (22 August 2004) for, EOTs 1 and 2. EOT 3 was for the period 23 to 28 August 2004. EOT 4 was for the period 30 August to 25 September 2004. EOT 5 was for the period 27 September to 29 October 2004. EOT 6 was for the period 1 November to 27 November 2004.

The interest claims

17 Claims V 51, V 54, V 72 and V 81 sought interest under cl 37.5. The fire to which I have referred delayed not only the progress of the works, but also payment. I was informed from the Bar table, without objection, that subcontractors including Hargreaves were not paid until the fire damage insurance claim had been settled.

18 V 51 was for an amount (excluding GST) of $859.58. V 54, V 72 and V 81 were each for an amount (again excluding GST) of $174.07.

V 65 and V 94

19 Escalation claim V 65 was submitted on 18 August 2004. It alleged that, because of the delays that were the subject of EOTs 1 and 2, the cost of completing the work - ie, the cost of completing work not carried out before the end of those delays – had increased.

20 Escalation claim V 94 was submitted on 29 October 2004. It related to what were said to be the further increased cost of carrying out the remaining work (over and above that claimed in V 65) by reason of the further delays alleged to have occurred since 18 August 2004.

The extension of time granted

21 On 3 September 2004, the Superintendent sent Hargreaves a letter. It is, I think, a reasonable inference that the letter was at least prompted by the EOT claims that by then had been made (EOTs 1, 2 and 3). It referred to "the lack of urgency as observed of a great proportion of the on-site workforce" and stated that certain "practical completion dates", set out in an attachment, were assessed to be "reasonable". The letter directed Hargreaves "in accordance with all sub clauses of contract clause 34 to complete your agreements for the nominated levels as the determined practical completion dates as listed in the attached schedule."

22 I have no doubt that the letter amounted to the grant of an EOT; and indeed, Coordinated did not submit otherwise. There was some question as to whether it was granted pursuant to Hargreaves' claims, or pursuant to the Superintendent's discretion to do so of his own volition under the second paragraph of cl 34.5. (That authorised the Superintendent to "direct an *EOT*", for the benefit of Coordinated and not Hargreaves, even where Hargreaves was not entitled to or had not claimed an EOT.) If it were necessary to consider whether the "delay damages" claimed by Hargreaves under cl 34.9 were for a "compensable cause", as defined in the subcontract, that question would be relevant. But that issue does not fall for determination in these proceedings.

23 The EOT claims made by Hargreaves were either rejected, or allowed to the extent that the Superintendent's letter of 3 September 2004 is to be construed as doing so and otherwise rejected.

Mr Makin's determination

24 The payment claim that was the subject of the adjudication application determined by Mr Makin included EOTs 1 and 2. Mr Makin valued each at "$ Nil" (see paras 49 and 51 of his determination dated 12 May 2004).

Mr Parnell's determination

25 The payment claim that was the subject of the adjudication application determined by Mr Parnell included EOTs 1, 2, 3 and 4, the interest claims V 51, V 54, V 72 and V 81, and escalation claim V 65.

26 Mr Parnell noted that EOTs 1 and 2 had been dealt with and rejected by Mr Makin. On that basis he, too, rejected them. However, he allowed EOTs 3 and 4, and escalation claim V 65. It would seem that he did so on the basis that they related to later periods of time than EOTs 1 and 2, notwithstanding that they had the same foundation. Thus, he was satisfied that s 22(4) of the Act did not apply. (In contrast, in relation to EOTs 1 and 2, he stated that *"[t]here is no occasion under Sec. 22(4) to otherwise re-agitate the matter."*)

27 Mr Parnell's determination shows that Coordinated submitted that he could not allow EOTs 3 and 4, or the interest claims, because they were "beyond my jurisdiction and outside the scope of the Act". That was because (see p 10 of his determination):

(1) "unless it can be positively established the delay cost component claimed is included in the value of the variation (as defined in the sub-contract) works it is in the nature of damages and not properly "claimable" … "; and

(2) "delay costs claimed … do not clearly arise as part of the valuation of variation works as defined in the sub-contract" and (Coordinated said) must be rejected.

28 The issues thus decided were, in substance, dealt with by me in ***Kembla Coal & Coke v Select Civil*** [2004] NSWSC 628. It appears from the determination that reference was also made to the decision of the Court of Appeal in *De Martin & Gasparini v Energy Australia* [2002] NSWCA 330.

29 Mr Parnell directed himself by reference to the principles stated by me in *Kembla Coal,* referring in particular to paras [117] and [122].

30 Similarly, Mr Parnell reasoned that V 65 was for "the additional cost to the Claimant through delays attributable to the Respondent which had extended the completion date ie *"the works took longer to complete"*.". He reasoned, by reference to both the decision of Barrett J in ***Quasar Constructions v Demtech Pty Ltd*** [2004] NSWSC 116 and my decision in ***Kembla Coal,*** that the claim was for construction work "*within the scope of that envisaged in the quoted references from*" ***Quasar.***

31 As to the interest claims, Mr Parnell appears to have reasoned that each claim was sufficiently related to construction work because it related to interest on overdue amounts for subcontract works, where payment had been delayed by reason of the fire.

32 Thus, Mr Parnell determined the adjudicated amount at $737,221.51, of which a total of $1,381.79 (in each case exclusive of GST) related to the interest claims.

Mr Sarlos' determination

33 The payment claim that was the subject of the adjudication application determined by Mr Sarlos included EOTs 5 and 6 and escalation claim V 94. He allowed those claims on the basis that they were in fact "delay and disruption related claims". He said that "[d]elay and disruption related costs are costs generated by related goods and services as defined by s 6 of the Act". He found that the relevant delay and disruptions had in fact occurred (see para 43 of his determination).

34 Coordinated submitted to Mr Sarlos, as it had submitted to Mr Parnell, that the relevant claims were not "for" construction work. However, as noted, he decided that they were allowable as claims for related goods and services.

35 Coordinated also submitted to Mr Sarlos that the payment claim did not satisfy the requirements of s 13 of the Act (in what respect, does not appear from his determination). Coordinated referred to the decision of the Court

of Appeal in ***Brodyn.*** However, Mr Sarlos concluded that the claim did comply with the provisions of s 13 (see para 25 of his determination).

First and second issues: "delay damages", interest

36 Each of these issues involves two questions:

(1) Was it open to the adjudicators, Messrs Parnell and Sarlos, to include in their determination of the amount of the progress payment to be paid by Coordinated to Hargreaves an amount of delay damages pursuant to cl 34.9 and an amount of interest pursuant to cl 37.5?

(2) If it was not open to them to do so then, because in each case they did, is their determination thereby void?

37 Before I deal with these questions, I should record that Coordinated submitted formally that the decisions of the Court of Appeal in ***Brodyn*** and in ***TransGrid v Siemens Ltd*** [2004] NSWCA 395 were wrong in holding that certiorari was not available where there was jurisdictional error of law; and that the circumstances relating to the first and second issues disclosed that the determinations of Messrs Parnell and Sarlos were vitiated by jurisdictional error of law. Since it is not open to me to consider the merits of this submission, I do not need to consider whether the matters relied upon in relation to the first two issues, if made good, would demonstrate jurisdictional error of law.

38 In support of the first issue, Coordinated relied upon the decision of Barrett J in ***Quasar.*** It submitted that, to the extent that there was some difference between the analysis of Barrett J in that case and my analysis in ***Kembla Coal,*** the analysis of Barrett J was to be preferred. However, in relation to interest, Coordinated relied on my analysis in ***Kembla Coal***.

39 Although ***Quasar*** and ***Kembla Coal*** were both decided before the Court of Appeal gave its decision in ***Brodyn,*** the particular points that they dealt with were not the subject of consideration by the Court of Appeal. (Each case proceeded on the basis that an adjudicator's determination might be susceptible to orders in the nature of certiorari if jurisdictional error of law were shown – a proposition denied by the decision in ***Brodyn*** – but this is not of present relevance.)

40 I have come to the conclusion that the answer to the second question that I have posed means that the first and second issues must be resolved in favour of Hargreaves. Accordingly, I do not propose to deal with the arguments on the first question. I will assume, for the purposes only of dealing with the second question, that the first question should be answered "no", on the basis that neither delay damages claimed pursuant to cl 34.9 nor interest claimed pursuant to cl 37.5 have a sufficient connection with construction work to form part of a payment claim that may be enforced by the mechanism for which the Act provides. To put it slightly differently, using the phraseology of Barrett J in ***Quasar*** at [34] (which was adopted by Coordinated in this case), I am prepared to assume that neither delay damages claimed pursuant to cl 34.9 nor interest claimed pursuant to cl 37.5 are amounts payable "for" construction work done or undertaken to be done, or related goods or services provided or undertaken to be provided, pursuant to a construction contract.

The second question: the* Brodyn *argument

41 The second question requires close attention to the reasoning of the Court of Appeal in *Brodyn.*

42 **In *Rothnere v Quasar*** [2004] NSWSC 1151, I summarised the effect of the decision in ***Brodyn*** at paras [9] to [17]. I repeat what I said in those paragraphs: *"The basis upon which the Court can intervene in the determinations of adjudicators made under the Act has been considered by the Court of Appeal in two recent cases: specifically, I refer to* ***Brodyn Pty Ltd v Davenport*** *[2004] NSWCA 394. Reference may also be made to* ***TransGrid v Siemens*** *[2004] NSWCA 395.*

Hodgson JA gave the leading judgment in both appeals. Mason P and Giles JA agreed with his Honour in both. His Honour said that the determination of an adjudicator could be made the subject of judicial intervention in a number of circumstances. They include:

(1) That the adjudicator has failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination.

(2) That the adjudicator has denied natural justice to a party (the content and operation of this depending, of course, upon the relatively limited scheme put forward by the Act for the provision of natural justice).

(3) That the adjudication determination is procured by fraud in which the adjudicator is complicit.

Hodgson JA listed in ***Brodyn*** *at [53] some (apparently not necessarily all) of what his Honour called "the basic and essential requirements":*

"1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).

2. The service by the claimant on the respondent of a payment claim (s.13).

3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).

4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).

5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a))."

It is apparent, both from the way his Honour phrased para [53] and again from para [55], that the list *"may not be exhaustive"*. It will be seen that the list does not include s 22(4). ***Rothnere*** contends that it should.

The reasoning of the Court of Appeal needs to be understood against the background to the challenges that the appellant in ***Brodyn*** raised. Hitherto, it had been thought that the determinations of adjudicators could be challenged on the grounds of denial of natural justice, jurisdictional error of law on the face of the record, and fraud; and that challenges could be brought, pursuant to s 69 of the *Supreme Court Act* 1970, by applications for relief in the nature of certiorari. See, for example, ***Musico v Davenport*** [2003] NSWSC 977; ***Abacus Funds Management v Davenport*** [2003] NSWSC 1027; and ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140.

The effect of the Court of Appeal's decision in ***Brodyn*** is that relief in the nature of certiorari is not available and that judicial intervention is not justified simply on the basis of jurisdictional error of law on the face of the record. What Hodgson JA said was that relief could be granted by way of declaration or injunction; but that, if it were to be granted, it should be granted upon the basis of the criteria that I have earlier set out.

I mention that history because it is necessary to an understanding of his Honour's reasons in ***Brodyn***, particularly in paras [55] and [56].

In para [55], his Honour said that the legislature did not intend that exact compliance with all the detailed requirements that it laid out was essential to the existence of a (valid) determination. His Honour said that what the legislature required "*was compliance with the basic requirements ..., a bona fide attempt by the adjudicator to exercise the relevant power ..., and no substantial denial of the measure of natural justice that the Act requires to be given*". (I have referred above to fraud; that is picked up later in his Honour's reasons, at para [60].)

At para [56], his Honour dealt with the proposition that a decision (in that case, the determination of an adjudicator) might be a nullity if the adjudicator refused to take into account something that he or she was required to take into account, or based his or her decision on something that he or she had no right to take into account. His Honour referred to the decision of the High Court in ***Craig v South Australia*** (1995) 184 CLR 163 at 173 for the proposition *"that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision"*. However, his Honour said, the statutory scheme did not give rise to a right to relief *"for mere error of law on the face of the record"*. By reference to the matters set out in s 22(2), his Honour said that they "could involve extremely doubtful questions of fact or law", giving examples. He therefore said: "*In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in section 22(2), or bona fide addresses the requirements of section 22(2) as to what is to be considered.*""

43 In ***TransGrid v Siemens Ltd*** [2004] NSWCA 395, the Court of Appeal summarised at para [29] the basis upon which, consistent with *Brodyn,* the determination of an adjudicator could be reviewed. Hodgson JA (with whom, as in *Brodyn,* Mason P and Giles JA concurred) said that: " … *review is available only where the determination is not a determination within the meaning of the Act, because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination. If an adjudicator has erroneously decided that such an essential pre-condition has been satisfied when in truth it has not, then that can be considered a jurisdictional error making the determination "reviewable". However, for reasons given in* ***Brodyn****, such an error would in fact make the determination void; and in my opinion, relief in the nature of certiorari is not available to quash a determination under the Act that is not void. Where a determination is void, relief is available by way of declaration and injunction; so in my opinion there is no occasion where relief in the nature of certiorari would be available and required.*"

44 The considerations that guide the search for reviewable error may therefore be stated in various ways but to the same effect:

(1) Have the conditions laid down by the Act as essential for there to be a determination been satisfied (***Brodyn*** at [52])?

(2) Have the basic and essential requirements for the existence of a valid determination been met (***Brodyn*** at [53])?

(3) Have all preconditions which the Act makes essential for the existence of a determination within the meaning of the Act been satisfied (***TransGri***d at [29])?

45 These formulations of the test suggest strongly that, even if the list of essential requirements is not to be regarded as closed (*Brodyn* at para [55]), nonetheless the class of matters that, if not satisfied, will make a decision reviewable may be regarded as preconditions to the existence of a valid determination, rather than errors in the determination itself. Of course, as Hodgson JA noted in *TransGrid* at para [29], the error may be manifested in the determination – by the adjudicator erroneously deciding that an essential precondition has been satisfied when in fact it has not. But the language in both *Brodyn* and *TransGrid* suggests strongly that the factors to be considered are anterior rather than interior: matters that must exist before there can be an adjudication at all.

46 Further, I think, it is necessary to bear in mind that in ***Brodyn*** at para [54] Hodgson JA said that stating the enquiry in terms of jurisdictional or non jurisdictional error "tended to cast the net too widely". It follows, I think, that the basic and essential requirements, or essential preconditions, are more limited in scope than those matters which, under the pre-***Brodyn*** approach, were considered to be jurisdictional in nature.

47 I do not think that an error of the kind presently assumed – awarding, as part of the adjudicated amount of a progress payment, an amount for delay damages under cl 34.9 or interest under cl 37.5 – can be said to be a breach of a basic and essential requirement for, or an essential precondition of, a valid determination.

48 There must be, among other things, a construction contract between the claimant and the respondent, and a payment claim served by the claimant on the respondent. The entitlement to serve a payment claim is by s 13(1) of the Act given to "[a] person referred to in section 8(1) who is **or who claims to be** entitled to a progress payment" (emphasis supplied). The person referred to in s 8(1) is one who has undertaken to carry out construction work, or supply related goods and services, under a construction contract.

49 It must follow that there can be a payment claim for the purposes of the Act (so that, by its service on the respondent, the second basic and essential requirement identified by Hodgson JA in ***Brodyn*** at para [53] is satisfied) even if the payment claim is comprised entirely of, or includes, an amount that is not "for" construction work. A person may be found not to be entitled to a claimed progress payment, or part, for any number of reasons. The work may not have been done (and there may be no contractual entitlement to payment in advance); the work may have been done defectively and there may be a valid set-off for the cost of rectification; the work may be overvalued; there may be a valid set-off for liquidated or other damages; the claim may not be "for" construction work (or the supply of related goods and services) at all; or there may be other disqualifying features. However, the payment claim will be effective, for the purposes of the Act, by reason of the claimed entitlement. The process that the Act contemplates is that the respondent will submit a payment schedule answering the claim. If the claimant and the respondent cannot agree, then the claimant may submit the payment claim to adjudication. I cannot see how a claim that is invalid because the amount claimed is not "for" construction work is different in principle to a claim that is invalid because it is grossly overvalued. In each case (and in the case of all the other possible defences to which I have referred) the adjudicator may determine the validity of the claim. That is simply a consequence of the exercise by the adjudicator in the particular case of the powers and duties entrusted to her or him by the Act.

50 To put it another way, I think that the jurisdiction entrusted by the Act to adjudicators includes the power to determine whether (assuming it to be a relevant consideration) a particular amount claimed is "for" construction work. That is because, in essence, the adjudicator's function is to determine, in respect of the payment claim that is the subject of the adjudication application, the issues raised in it and in the payment schedule. Those issues may include those referred to in para [45] above, and no doubt more. All those matters are "within jurisdiction". They form part of, not preconditions to, the jurisdiction.

51 This conclusion is supported by the structure of the Act. Section 13(2) of the Act (not a basic and essential requirement or essential precondition – see *Brodyn* at [54]) requires, among other things, that a payment claim identify the construction work (etc) to which the progress payment claimed relates. Section 14(3) requires, where the amount proposed to be paid by the respondent is less than the claimed amount, that the payment schedule indicate why. Section 17(3)(h) provides that an adjudication application may contain such relevant submissions as the claimant chooses. Section 20(2)(c) provides that an adjudication response may contain such relevant submissions as the respondent chooses. However, the respondent cannot in its adjudication response rely on any reason for withholding payment unless that reason has been included in the payment schedule: s 20(2B). An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.

52 In those circumstances, the adjudicator would have carried out in full, and in a relevantly unchallengeable way, her or his functions under the Act. Yet if the submissions for Coordinated were correct, the determination would still be void if the determined amount, or part, were not "for" construction work. It strikes me as unlikely in the extreme that the legislature intended that the procedure could be followed through faithfully and (be it assumed) accurately as to every issue raised by the parties, yet still be a nullity because of an issue that was not raised. But that, I think, is the necessary consequence of Coordinated's submission in the particular circumstances postulated.

53 I therefore conclude that if (assuming but not deciding) it was not open to Mr Parnell or Mr Sarlos to include, in the adjudicated amount of the respective progress payments, an amount for delay damages under cl 34.9 or interest under cl 37.5, the fact that they included such amounts in the adjudicated amount does not render their determinations void.

***Alternative argument based on* Project Blue Sky**

54 Coordinated submitted, basing itself on what was said in *Project Blue Sky* by McHugh, Gummow, Kirby and Hayne JJ at 393 [100], that even if its submissions based on *Brodyn* were not accepted (as I have held that they should not be accepted), nonetheless, the determinations of Messrs Parnell and Sarlos were each made in contravention of the Act, because in each case they allowed as part of the determined amount of the progress payment an amount that was not "for" construction work. Accordingly, Coordinated submitted, the determinations were relevantly "unlawful" and it was entitled to injunctive relief restraining the taking of any further action based on those unlawful determinations.

55 I do not think that this submission should be accepted. I do not think that it was relevantly unlawful for Messrs Parnell and Sarlos to decide this question as they did. In saying this, I continue to make the assumption that each

determination included an amount that was not "for" construction work, and that, as Coordinated submitted, it was not open to Messrs Parnell and Sarlos to include such amounts in the adjudicated amount of the respective progress payments.

Third and fourth issues: interest – point not taken or "de minimis"

56 The conclusion to which I have come on the first and second issues means that it is not necessary to consider the third and fourth issues.

Fifth and sixth issues: EOTs 3 to 6

57 Messrs Parnell and Sarlos acknowledged that these claims arose out of EOTs 1 and 2, which had been the subject of consideration by Mr Makin. However, in each case, they noted that the particular claims pressed before them were for damage said to have been sustained at a time after the expiry of the period of time covered by EOTs 1 and 2. Thus, they concluded that s 22(4) did not apply.

58 In my judgment, they were either correct so to conclude or, alternatively, it was open to them on the facts so to conclude. But in any event, even if they were wrong, there was no contravention of a basic and essential requirement for the existence of a valid determination. Hodgson JA referred to s 22 in *Brodyn* at para [54] as one of the "more detailed requirements" of the Act. In para [55], his Honour said that "the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid determination." I read what his Honour said in para [55] as applying to, among other things, the more detailed requirements listed in para [54]. This is sufficient to answer Coordinated's submission. But even if it were open to me to consider the matter afresh, I would conclude, basically for the reasons already given in respect of the first and second issues, that s 22 is not a precondition to the existence of a valid determination. It is a matter interior, rather than anterior, to the determination.

Seventh and eighth issues: escalation costs claims 1 and 2 – s 22(4)

59 Again, Messrs Parnell and Sarlos held that these claims, although arising out of the circumstances that gave rise to EOTs 1 and 2, were manifestations of separate or additional loss. Thus, they concluded, s 22(4) did not apply.

60 Again, I think, they were either correct so to conclude or, alternatively, it was open to them on the facts so to conclude. But again, if they were wrong, I would hold, for the reasons just given in relation to the fifth and sixth issues, that they did not thereby contravene any basic and essential requirement to the existence of a valid determination.

Ninth issue – reference date

61 It was common ground that the reference dates under the contract were the last day of each month. The payment claim that was the subject of Mr Parnell's adjudication was dated, and apparently prepared on, 29 September 2004. On that date, it was faxed to Hargreaves' consultant, apparently for submission to Coordinated. The evidence makes it clear that it was not given to Coordinated until on or after 30 September 2004. The consultant added some further documents to the claim before submitting it to Coordinated.

62 I therefore find, as a matter of fact, that the payment claim in question was submitted on or shortly after a reference date – namely, 30 September 2004. It follows that this issue must be decided against Coordinated as a matter of fact. It is therefore unnecessary to consider, among other things, Hargreaves' defence based on estoppel. Nor is it necessary to consider whether the payment claim could be regarded as one made on or from the previous reference date, 31 August 2004. (This relates to the circumstance that the previous "*application for progress payment*" given by Hargreaves to Coordinated did not contain in full the statement required by s 13(2)(c) of the Act).

Conclusion and order

63 It follows that each of the challenges to the determinations by Messrs Parnell and Sarlos fails. I therefore order that the summons be dismissed. Unless the parties wish to argue otherwise, costs should follow the event; but if any party wishes to argue for a different order, I will hear argument on a date to be arranged with my associate. Any application for a different costs order is to be made within 7 days of the publication of these reasons.

M G Rudge SC/M Christie (Plaintiff) instructed by Colin Biggers & Paisley
D D Feller SC/D Loewenstein (First Defendant) instructed by James R Knowles Lawyers Pty Limited