JUDGMENT : **McDougall J** : New South Wales Supreme Court : 5th August 2005

1 The plaintiff (Energetech) and the first defendant (Sides) are parties to a construction contract made on 7 June 2004 whereby Sides undertook to carry out construction work for Energetech. Under the contract, Sides was entitled to be paid upon the achievement of "Milestones", the second of which was defined as "Practical Completion". Sides claimed to have reached that milestone and submitted a payment claim. Energetech provided a payment response whereby it asserted that nothing was payable because the milestone had not been reached. Sides thereupon made an adjudication application which was accepted by the second defendant (the adjudicator). The adjudicator decided that the relevant milestone had been reached and accordingly determined that an amount of $559,457.20 was payable. Energetech complains that the adjudicator's determination is vitiated in such a way that it is reviewable by this Court on the principles laid down in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 and explained in subsequent cases.

2 Energetech came before me on referral from the Duty Judge yesterday afternoon. It was apparent that there was a question of principle involved. The parties sensibly agreed to the course that the judgment obtained by Sides as a result of filing the adjudication certificate should not be enforced in the short term, and so that the parties could address the point of law. It was agreed that I should deal with that point of law pursuant to Pt 31 r 2.

3 Sides' position is that the adjudicator was correct to determine (as he did in his determination at paragraphs 27 and 31) that practical completion had been achieved. However, it submitted, even if the adjudicator were incorrect in so determining, his determination of the amount payable was not thereby vitiated. That, in essence, is the point that was argued.

4 Under s 8 of the *Building and Construction Industry Security of Payment Act 1999* (the Act), a person who has undertaken to carry out construction work under a construction contract is entitled to a progress payment. Section 8(1) makes it clear that *"the entitlement to a progress payment accrues on and from each reference date". By sub s (2), and relevantly for the purposes of this case, the reference date is "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 ... under the contract".*

5 The procedure for recovering progress payments (the right to which is given by s 8) is dealt with in ss 13 and following of the Act. By s 13(1), a person referred to in s 8(1) who is or who claims to be entitled a progress payment may serve a payment claim on the person who is or may be liable to make the payment. Section 13(2) sets out the elements of a payment claim. Section 13(4) prescribes when a payment claim may be made. It states:

> *"(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."*

6 In the present case, the combined effect of cl 24 of the general conditions of contract and cl B2.3 of appendix B to the contract is that Sides is *"entitled to make claims for payment only upon achievement (such achievements to be agreed to by [Energetech]) of defined Milestones"*. Schedule B(4) sets out the two milestones in question of which the second, as I have said, is "practical completion".

7 It is therefore apparent from the terms of the contract that the milestone dates set out in schedule B4 are the reference dates for the purposes, relevantly, of s 8(1) of the Act. The entitlement to the progress payment in suit, therefore, arises on and from the achievement of practical completion. If practical completion is not achieved, there is no entitlement.

8 The dispute between the parties which was submitted to and decided by the adjudicator was whether practical completion had been achieved. As I have said, the adjudicator decided that dispute in favour of Sides. The question for decision is whether, assuming but not deciding that he was wrong to conclude that practical completion had been reached, he has erred in such a way as to entitle this Court to grant declaratory and injunctive relief.

9 The basis on which the Court may intervene is set out in ***Brodyn*** at 441 [53]. In that paragraph Hodgson JA (with whom Mason P and Giles JA agreed) set out five "***basic and essential requirements***" for the existence of a valid determination. His Honour said that they were:

> *"(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 (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).*"

10 It is apparent both from what his Honour said subsequently that the list of basic and essential requirements might not be complete.

11 At 441 [54], Hodgson JA considered some of the *"more detailed requirements"* of the Act, including ss 13(2); 17; 21; and 22. His Honour said: *"A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination."*

12 At 442 [56], Hodgson JA explained, by reference to ss 17, 20 and 22, why this was so. He said that some of the questions raised by those sections *"could involve extremely doubtful expressions of fact and law"*. It followed, he said, that *"… it is sufficient to avoid invalidity if an adjudicator either does consider only"* those matters or *bona fide* addresses them.

13 His Honour said at 444 [66]:

"66 There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this."

14 It is apparent from the last sentence of that paragraph that what his Honour said was, in effect, provisional. He did not need to express a final view. However, I think, it provides a significant indicator of the approach that this Court should take.

15 In ***The Minister for Commerce v Contrax Plumbing (NSW) Pty Limited*** [2005] NSWCA 142, Hodgson JA dealt with the consequences of errors of law (and fact) at para [49]. He said that an error of law in the interpretation of the Act or the contract, or as to the validity and operative terms of the contract, would not prevent a determination from being valid for the purposes of the Act:

"49 In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s.22(2) as to what is to be considered, an error on these matters does not render the determination invalid."

16 Similar views were expressed by his Honour in ***Coordinated Constructions Pty Ltd v J M Hargreaves*** [2005] NSWCA 228 at paragraphs [45] and [46].

17 In ***Coordinated Constructions Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors*** [2005] NSWCA 229, Hodgson JA said at para [24] that the task of the adjudicator was in substance to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. He said:

"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."

18 In the present case Mr Corsaro SC, who appeared for Energetech, based his submission on the second of the basic and essential requirements identified by Hodgson JA in ***Brodyn*** at para [53]: the service by the claimant on the respondent of a payment claim. He submitted that the question of service of a payment claim (which is referred to in s 13(1)) called up the requirements of s 13(4). Thus, he submitted, if the payment claim were not served within (relevantly for present purposes) the period determined by or in accordance with the terms of the construction contract, it was not a valid payment claim and there was no service within s 13(1). That, he submitted, was consistent with the clear scheme of s 8(1), whereby the entitlement to a progress payment is one that accrues on and from each reference date under the contract.

19 As I have said, the parties were at issue as to whether the payment claim was valid. The essential issue as to the validity turned on whether or not the milestone, practical completion, had been achieved. That was, in substance, the issue that was referred to the adjudicator for determination. The determination of that issue requires in substance a determination of facts. The relevant facts were, as is apparent from the adjudicator's careful treatment of the question, complex. It is *prima facie* strange to think that an error in a determination of the question of fact could result in the invalidity of the determination on the basis laid down in ***Brodyn***. However, Mr Corsaro submitted that the ultimate question involved one of interpretation of the contract and the accrual of the right under cl 24 of the General Conditions and clause B2.3 of the Schedule, read in the light of B4. Thus, he submitted, the ultimate question of entitlement was one of law notwithstanding that it required the resolution of issues of fact.

20 In the present case, I think, there can be no doubt that the document that was served purported to be a payment claim under the Act. It complied with s 13(1) whereby, as I have said, the entitlement to make a claim is given not just to someone so entitled to a progress payment but to someone who claims to be so entitled. That entitlement is asserted in the first instance by service of a payment claim. The payment claim must comply with the detailed requirements of s 13(2): requirements identified as not being basic or essential.

21 Clearly, the assertion of an entitlement to a progress payment includes an assertion that the relevant reference date, on or from which the entitlement accrues, has past. In the present case, that assertion necessarily involves an assertion that practical completion - the date of which forms the relevant reference date - has occurred. In that context, I think, the requirement to serve the payment claim within the period determined by or in accordance with the terms of the contract must mean that the payment claim is to be served after the claimant claims that the relevant time has accrued. That is consistent with the scheme of s 13, from which it is evident not only that there maybe a dispute, ultimately capable of resolution by adjudication, as to the amount of progress payment but also a dispute as to the actual entitlement.

22 In truth, I think the position for which Energetech contends in these proceedings would read down the words "or who claims to be" in s 13(1) to a point where they have very little work to do. Particularly where those words were inserted by amendment, to overcome the effect of the decision of the Court of Appeal in *Brewarrina Shire Council v Beckhaus Civil Pty Limited* (2003) 56 NSWLR 576, I do not think that a construction that reads down the otherwise clear words should be adopted unless there is no alternative.

23 It seems to me that there are two answers to the submissions for Energetech. The first is that, as it was put by Hodgson JA in ***Brodyn*** at 444 [66], the question *"as to whether the document complies in all respects with the requirements of the Act is for the adjudicator to decide",* particularly where that question involves *"doubtful questions of fact and law"*. Thus, where the adjudicator addresses that question in good faith, an error in the conclusion would not render the determination invalid. See ***Minister for Commerce v Contrax*** at para [49].

24 Alternatively, putting the matter in terms of what Hodgson JA said in ***Coordinated Constructions v Climatech*** at para [24], the task of the adjudicator in this case was *"to make a determination within the parameters of the payment claim"*. That is what the adjudicator did; noting that parameters of the dispute were defined not just by the payment claim but also by the payment response; and that, as I have said, the question so defined was whether the relevant milestone had been achieved.

25 Secondly, I think (and this may be no more than a variant or consequence of the first reason) the requirement of s 13(4) is not *"basic and essential"* within the meaning of that phrase as it was explained by Hodgson JA in ***Brodyn***. It may be readily understood (if I may say so with respect) why the matters identified by his Honour in that paragraph have the *"basic and essential"* quality to which he refers. As to the first, the terms of the Act are not engaged if there is no construction contract. Equally, in terms of the second, third and fourth alternatives, there is no valid adjudication unless they are engaged. Finally, in the case of the fifth requirement, it is simply a reflection of the statutory duty cast upon the adjudicator.

26 Those matters do not by and large require the investigation and resolution of difficult questions of fact or law. Usually, it will be clear whether or not there is a construction contract (particularly having regard to the wide definition of that expression in s 4 of the Act); and equally it will usually be clear whether (for example) a document of the kind described by s 13(1) has been served.

27 However, when one looks at the question of s 13(4), a determination of the point raised by that question necessarily involves considerations of questions of fact, in the context of the relevant statutory provisions. The entitlement may well be conditional upon (in this case) service of a payment claim within the period determined or in accordance with the terms of the contract. That, however, I think, is a matter for the adjudicator to determine. If it is a matter for the adjudicator to determine, then, consistent with the approach indicated in ***Brodyn*** at 441 [54], it is a matter that, *prima facie*, does not fall within the "basic and essential requirement".

28 I therefore conclude that even if, assuming but not deciding, the adjudicator erred in determining that practical completion (ie, the relevant milestone) had been achieved, that error is not such as to vitiate his determination so as to entitle Energetech to declaratory and injunctive relief. It follows that the preliminary point under Pt 31 r 2 should be decided accordingly. That, I think, leads to the conclusion that the summons should be dismissed.

29 Mr Corsaro submitted that it might be appropriate to leave the summons on foot so as to enable his client to use it as a vehicle to make an application for a stay on other grounds. Somewhat surprisingly, Mr J P Doyle, solicitor, for Sides agreed with that proposition. However, I do not think it is appropriate to do so. The conclusion to which I have come means that the claim advanced by the summons has failed. In those circumstances, I think it is appropriate that the summons should be dismissed. However, I wish to make it perfectly clear that I am dismissing the summons because of the conclusion to which I have come on the preliminary point that was identified and that I have dealt with in these reasons. No application has been made to me for a stay based on any other ground. The dismissal of the summons cannot be taken as expressing any view, positive, negative or neutral, on any application for a stay that may be made on any ground other than that with which I have dealt.

30 Mr Doyle expressed the view that his client was entitled to know, and know promptly, what Energetech proposed to do. I agree with that. The answer to some extent is in his client's hands. I have little doubt that if actions are taken to enforce the judgment, then Energetech's hand in relation to applying for a stay will be forced. However,

I do not propose to give either party judicial advice on the commercial steps that it should take to enforce or resist enforcement of the judgment.

31 Mr Corsaro very properly conceded that if the summons were to be dismissed it should be dismissed with costs. I therefore order that the summons be dismissed with costs. I order that the exhibits be retained for 28 days and thereafter held or disposed of in accordance with the Rules. I order that the first defendant be relieved of the undertaking to the Court given to it by its solicitor Mr Doyle yesterday.

F C Corsaro SC (Plaintiff) instructed by Clark McNamara
J P Doyle, Solicitor (Defendants 1-3) instructed by Doyles Construction Lawyers (Defendants 1-3)