Energy Australia (Australia) P/L v Downer Construction (Australia) P/L' The Institute of Arbitrators and Mediators Australia & William Timothy Sullivan.

JUDGMENT : Barrett J : New South Wales Supreme Court : 14th October 2005

1 The plaintiff, which is a statutory authority responsible for the supply of electricity, seeks in these proceedings declaratory relief to the effect that a purported adjudication application by the defendant under the **Building and Construction Industry Security of Payment Act** 1999 and a purported adjudicator's determination under that Act are void and of no effect. As an interim measure, it seeks orders restraining the defendant from putting into operation the machinery the Act makes available in consequence of the making of an adjudicator's determination – machinery which would culminate in the entry of judgment in favour of the defendant and against the plaintiff for the sum produced by the alleged determination.

2 I heard the application for interlocutory relief over most of Wednesday of this week and indicated that I would give judgment this morning, which I now do.

3 The defendant was retained by the plaintiff under a formal contract to construct a tunnel for electricity cables from a point in the south western part of the City of Sydney near Campbell Street to Surry Hills or thereabouts. The work has been completed and, apart from the subject matter of these proceedings and anything that might arise under defects rectification provisions, the state of the account between the parties has been determined and all payments have been made.

4 The present proceedings relate to a claim by the defendant which has its basis in a provision of the contract dealing with allocation, as between the parties, of the risk of latent ground conditions on the tunnel site. Relevant provisions are as follows:

"[Definition of 'Latent Conditions']

Latent Conditions *are any ground conditions, excluding ground conditions resulting from inclement weather, wherever occurring, which differ materially from those which should have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre-Contract Information and chosen appropriate machinery for use in the execution of the Work under the Deed."*

"[Clause 30.1 – extracts]

(a) Subject to clause 30.1(b), the Contractor bears the risk of all physical conditions and characteristics of the Site and its surroundings (including hydrological, surface and sub-surface conditions and characteristics) encountered during the execution of the Work under the Deed and is not entitled to any additional payment or adjustment to the Contract Price, or any extension of time, arising out of the actual conditions encountered.

(b)(i) If the contractor considers that it has encountered a Latent Condition which will impair or delay the completion of the Work under the Deed, it must immediately give the Principal's Representative written notice.

(ii) The Principal's Representative must, within 21 days of receipt of the written notice, determine whether a Latent Condition has been encountered and whether it will impair or delay the completion of the Work under the Deed and notify the Principal and the Contractor of the Principal's Representative's determination.

(iii) If the Principal's Representative determines that a Latent Condition has been encountered and it will impair or delay the completion of the Work under the Deed, the Contractor will be entitled to:

(A) an extension of time [as described]; and

(B) be paid by the Principal any extra costs (except delay costs dealt with under clause 34.9) reasonably incurred by the contractor [as described]. The Contractor's entitlement under this clause and clause 34.9 will be its only right to make a claim arising out of, or in [sic] way in connection with, the Latent Condition."

5 Relying on those provisions, the defendant made a claim upon the plaintiff in respect of certain ground conditions which it said could not reasonably have been anticipated and did not result from inclement weather. The plaintiff did not accept that, in the particular circumstances, the contract provisions in question supported the claim as made. The matter went to an adjudicator appointed under the Act. The adjudicator made a decision and published it to the parties. The allegations of nullity now pursued by the plaintiff relate to the means by which the matter was placed before the adjudicator and the adjudicator's decision.

6 In order to understand and assess those allegations, it is necessary to review relevant provisions of the Act. In doing so, I note that both parties accept that the sum claimed by the defendant is, of its nature, capable of being characterised as a "progress payment" as defined by the Act, with the result that no issue arises in that respect.

7 Part 3 of the Act sets out the procedure for recovering progress payments. It refers to the builder or contractor seeking to recover such a payment as the "claimant". The proprietor or employing party is referred to as at "respondent". Under s.13, a person claiming to be entitled to a progress payment may serve a "payment claim" on the other party. Such a payment claim must identify the construction work to which the claimed progress payment relates and state the amount of the progress payment, indicating also that the claim is made under the Act. These requirements are laid down by s.13(2).

8 Section 14(1) allows the respondent to *"reply to the claim by providing a payment schedule to the claimant"*. A payment schedule must identify the payment claim to which it relates and indicate the amount of the payment, if any, that the respondent proposes to make: s.14(2). Where it is indicated that the full amount claimed will not be paid, the payment schedule must state *"the respondent's reasons for withholding payment"*: s.14(3). If the respondent provides a payment schedule conveying the message that the respondent does not propose to pay

the full claimed amount, the claimant may, under s.17(1), *"apply for adjudication of"* the payment claim. A claimant who does this makes what s.17(1) calls an *"adjudication application"*. Section 17(3) sets out requirements with respect to an adjudication application. Among those requirements is a requirement that the adjudication application *"identify the payment claim and the payment schedule (if any) to which it relates"*: s.17(3)(f). It is also provided that an adjudication application *"may contain such submissions relevant to the application as the claimant chooses to include"*: s.17(3)(h).

9 Section 20(1) allows the respondent to give the adjudicator an *"adjudication response"*, that is, *"a response to the claimant's adjudication application"*. Such a response may, under s.20(2)(c), contain *"such submissions relevant to the response as the respondent chooses to include"*. This, however, is subject to s.20(2B) which says that there cannot be included in the adjudication response *"any reasons for withholding payment unless those reasons have already been included in the payment schedule provided by the claimant"*.

10 Section 21 is concerned with the adjudication process. It proceeds on the footing that the adjudicator's task is to "determine" the "adjudication application".

11 There is, in the statutory scheme, a clear and necessary link between the payment claim and the adjudication application. Under s.17(1), the claimant applies for "adjudication of a payment claim". By doing this, the claimant makes an "adjudication application" and it is that "adjudication application" that the adjudicator is required to determine. But because the adjudication application is, of its nature, an application for adjudication of the payment claim, determination of the adjudication application is adjudication of the payment claim.

12 The plaintiff's principal case on the interlocutory application before me is, in essence, that the defendant's supposed adjudication application was not, in truth, an adjudication application at all, because the claim that the defendant submitted for adjudication by means of the application was not the defendant's payment claim but a different claim; and, for the same reason, the determination purportedly made was not an adjudication of the defendant's payment claim.

13 Two questions arise: first, whether there was in reality any material divergence between the defendant's payment claim and the matter submitted to the adjudicator for decision; and; second, whether any such divergence justifies the conclusion that there was no determination by the adjudicator of the kind with which the Act is concerned. In the present context, I am called upon to decide no more than whether there is a serious question to be tried on these matters.

14 The payment claim begins by describing the claim in summary terms, "Latent condition claims WI 1.1, 1.2 and WI 2.1 (in relation to water ingress)". There is then reference to the costs to which the claim relates, being delay costs, direct and disruption costs and the costs of collection and control of seepage. These are quantified. The asserted latent condition which led to water ingress is described as follows: *"Downer encountered extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source during excavation of the Tunnel."*

15 There follows this statement: *"The ground conditions encountered, as described below, were materially different to the ground conditions which should reasonably have been anticipated by a prudent, competent and experienced contractor. They did not result from inclement weather (refer page 20 of the Douglas Partners report on Latent Conditions Claim dated 12 July 2005)."*

16 The following was included in the description of the basis of claim:

"5. During the construction of the tunnel Downer encountered bedding plane shears at the following locations:

- *design chainages 575 and 501,*
- *design chainages 572 to 467, and*
- *design chainages 421 to 404.*

6. It became apparent that the water was entering the tunnel through which those features and that those features:

(a) were shears;
(b) were permeable;
(c) were laterally extensive;
(d) occurred in a sub-horizontal orientation; and
(e) were linked hydraulically with a rechargeable water source.

7. At those features, Downer encountered significant water entry at the tunnel excavation face and, as tunnelling was proceeding down grade, that water collected at (rather than draining away from) the excavation face.

8. The result of Downer encountering the Latent Condition was that:

(a) significant water inflow occurred and continued to occur in a sustained fashion over a long length of the tunnel;
(b) a high proportion of the water inflow occurred at or near the face of the tunnel during construction;
(c) the water inflow disrupted and reduced productivity during the construction of the tunnel;
(d) the water inflow could not be addressed effectively by grouting;
(e) Downer incurred additional costs and Completion was delayed; and
(f) in combination with the unforeseen water quality, a fundamental change to the tunnel drainage system including the Water Treatment Plant was required."

17 In items 6 and 7, the references to "those features" appear to be references to the "bedding plane shears" described at item 5. I interpolate that bedding plane shears are, in lay terms, fractures or fissures.

18 In its payment schedule responding to the defendant's payment claim, the plaintiff indicated that it did not propose to pay any of the sum claimed. It appears to have accepted that there was a typographical error in item 5, in that "575 and 501" should have been "575 to 501" (the descriptions being of lengths of the tunnel in a reverse direction). Apart from that minor matter, the plaintiff denied that the ground conditions described in the payment claim constituted a latent defect for the purposes of the contract. A basis for that denial was stated.

19 The plaintiff's payment schedule was accompanied by a report of an expert, Dr Pells. That report described the defendant's claim as based on bedding plane shears at chainages 401 to 421, 467 to 572 and 501 to 575. This, apart from the correction of the typographical error, corresponded with the payment claim. The report then went on to state, giving reasons, why it was incorrect to say that water was entering through geological features of the relevant kind in the stated stretches of the tunnel. In some cases, there were no recorded bedding plane shears in the relevant locations and in others the recognised shears were shown not to have produced sustained water flows.

20 The defendant subsequently lodged its adjudication application. In doing so, it identified longer stretches of tunnel as the location of the shears constituting the latent condition. The differences, by way of additional length, were significant. The reference to design chainages were different, with the result that the adjudication application was concerned with the condition of the ground at locations not all together corresponding with those identified in the payment claim, although it must be said that there was some degree of correspondence.

21 In responding to the adjudication application, the plaintiff pointed out these discrepancies. It made the point that the adjudication application really advanced a claim different from that advanced through the payment claim, adding that new material was advanced in support of the new claim. A specific example of this was given. The plaintiff contended that the application was not an application for adjudication of the payment claim and that it would be denied natural justice if the new claim was adjudicated. The plaintiff's submissions were backed up by another report from its expert.

22 The adjudicator nevertheless proceeded to make a determination. He dealt with the plaintiff's contention by saying, in effect, that the claim had always been a claim about excess water ingress and that the large volume of material put before him by the parties made it clear what the dispute was about, namely, "the amount of water ingress". An adjudicated amount was stated at the end of the determination. A supplementary determination correcting an error subsequently stated that amount as $6,040,579.05.

23 The plaintiff criticises the adjudicator's determination not only for failing to recognise that there had been no proper adjudication application, but also because, as its sees matters, the adjudicator, having recognised the correct question as related to the condition of the ground as regards latent matters, went on to make a decision as to whether levels of water penetration were greater than should have been anticipated. That, it is said, addressed a different question and amounted to a failure to deal with the real issue.

24 The grounds on which the plaintiff seeks interlocutory relief directed towards ensuring that the determination is not treated as valid are three-fold. First and principally, there is the ground I have already mentioned, namely, that there was no valid adjudication application and therefore no valid adjudication. Second, the plaintiff says that the adjudicator did not, in truth, determine the dispute arising from the payment claim and is therefore seen to have acted irrationally or arbitrarily. Third, the plaintiff contends that it was denied natural justice by having no opportunity to address the basis on which the determination was ultimately made. On these bases, the plaintiff says it is entitled to the declaratory relief sought and there is, on the evidence adduced before me, a serious question to be tried as to that entitlement.

25 At this point I must return to the Act and refer to some of the case law. Section 23(2) of the Act says that if an adjudicator determines that a respondent is required to pay an adjudicated amount (that is an amount by way of progress payment), the respondent must pay that amount to the claimant on or before a date the Act proceeds to identify. If the respondent fails so to pay, the claimant may obtain an adjudication certificate which, under s 25, may be filed as a judgment for debt in a court of competent jurisdiction and is enforceable accordingly. It is appropriate to set out s.25 in full:

"**Filing of adjudication certificate as judgment debt**

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings."

26 As can be seen, s.25(4) makes provision about any application the respondent makes to have such a judgment set aside.

27 It is clear and, I might say, has consistently been recognised by the court, that there is very limited scope to challenge an adjudicator's decision, the underlying philosophy being that contractors should enjoy a summary means of obtaining payments on account on a basis aptly described by Palmer J in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 as "*pay now, argue later*".

28 The Court of Appeal has held in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 that an adjudicator's determination is not susceptible to review by way of proceeding in the nature of prerogative writ. But as the court also made clear in that case, a contractor's right to obtain and enforce payment under the Act is dependent upon the stipulated statutory conditions being satisfied. I refer in that respect to paragraphs 52 to 57 in the judgment of Hodgson JA, in which Mason P and Giles JA concurred: *"However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.*

What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

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

The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. 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.

In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. ***Project Blue Sky Inc. v. Australian Broadcasting Authority*** *(1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf.* ***R v. Hickman; Ex Parte Fox and Clinton*** *(1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*

It was said in the passage in ***Anisminic*** *quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in* ***Craig v. South Australia*** *(1995) 184 CLR 163 at 177 the High Court said 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. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to*

*what is to be considered. To that extent, I disagree with the views expressed by Palmer J in **Multiplex Constructions Pty. Limited v. Luikens** [2003] NSWSC 1140.*

*The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in **Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited** [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example **Ridge v. Baldwin** [1964] AC 40, **Durayappah v. Fernando** [1967] 2 AC 337, **Banks v. Transport Regulation Board (Vic)** (1968) 119 CLR 222 at 233, **Calvin v. Carr** [1980] AC 574 at 589-90, **Minister for Immigration v. Bhardwaj** (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."*

29 It is also pertinent to quote from the judgment of Hodgson JA in ***Coordinated Construction Company Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229: *"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."*

30 In the latter case Basten JA said: *"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.*

*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)."*

31 Basten JA also said: *"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.*

*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 is must be undertaken in good faith, but that is not a sufficient condition of validity."*

32 It is the plaintiff's case that there is a serious question to be tried as to the existence, in this case, of what Hodgson JA in ***Brodyn*** called *"the conditions laid down for the existence of an adjudicator's determination"*. The divergence, in terms of locations, between the payment claim and supposed determination are identified as the first factor giving rise to such a serious question. The other factor is what is seen as the adjudicator's posing of the right question but answering the wrong question. This is relied upon both in its own right, as it were, and as a basis for saying that lack of opportunity for the plaintiff to address the basis on which the adjudicator determined the matter represents a substantial denial of natural justice, that being recognised by Hodgson J in ***Brodyn***, particularly at paragraph 55, as a basis for concluding that one of the essentials to the existence of an adjudication determination is lacking.

33 The defendant says that there is no serious question to be tried. According to the defendant, the statute shows an intention that while it is the payment claim that falls to be adjudicated, that claim is to be addressed in the context in which it eventually comes before the adjudicator, that is, in light of the payment schedule and the respective

submissions advanced within the limits allowed by the Act. If, in the course of that process, refinements, explanations or even changes emerge so that the matter going before the adjudicator is an explained or refined or varied version of what was originally in the payment claim, that does not mean that the statutory conditions are not met, according to the defendant's submissions.

34 On the matter of correspondence between the subject matter of the payment claim and the subject matter of the adjudication application, I accept the plaintiff's submissions as to the existence of a serious question to be tried. I am satisfied that the intervention of the varied descriptions of the affected parts of the tunnel has the capacity to justify a finding of non-correspondence indicative of a failure to follow and implement the statutory scheme so that the statutory conditions for the existence of a valid adjudicator's determination may be seen as not to exist.

35 I doubt that the same holds good in relation to the suggestion that the adjudicator answered the wrong question, at least when that matter is viewed in its own right. That, if shown, would be an error of law which might not go to the satisfaction of the statutory conditions. However, as expressly recognised by Hodgson JA in ***Brodyn***, the absence of opportunity for the plaintiff to put a case on the question eventually answered would potentially go to the matter of satisfaction of the statutory conditions and in that respect also there is, in my view, a serious question to be tried.

36 I turn therefore to the balance of convenience. In doing so, I must recognise that if there is no interlocutory injunction the defendant will be free to move at once to obtain and file an adjudication certificate, so that the plaintiff becomes subject to a judgment for more than $6 million. I proceed on the assumption that the defendant will move in that direction.

37 The plaintiff makes several points about the hardship that will accrue to it if interlocutory relief is not granted. It says that it will suffer the stigma of having judgment entered against it. It says it will have to satisfy the judgment debt in circumstances where, if its contentions ultimately prevail, there is a risk that the defendant will not be able to refund the substantial sum involved. Principally, however, it says that there is doubt that, even if its contentions ultimately prevail, it will be open to it to seek to have the judgment set aside.

38 The first two matters seem to me to deserve little weight. For large commercial concerns, including statutory authorities, litigation is an ordinary incident of operations and no particular stigma should be seen to arise from a judgment, particularly where the judgment does not result from a judicial decision and it is said that the judgment is liable to be set aside.

39 As to the credit risk, the plaintiff adduced evidence by way of a Dunn and Bradstreet report, but I do not think that that enables me to make the finding that the plaintiff seeks, particularly where there is nothing to suggest that the defendant will dissipate any judgment proceeds it receives.

40 But, of course, the plaintiff, if it suffers judgment, will no doubt make an application to have the judgment set aside, that being the course recognised by s.25(4). By doing so, it will avoid having to satisfy the judgment debt, at least while its application is undetermined, but will be required by s.25(4)(b) to pay the relevant amount into court. That, of itself, should not be regarded as entailing relevant hardship for the plaintiff, particularly as it recognised the possibility of having to pay money into court, or otherwise to secure payment, as part of the price to be paid for an interlocutory injunction upon the present application.

41 That really leaves for consideration the question whether s.25(4) will operate in such a way as to cut off the plaintiff's ability to obtain proper redress in respect of the matters on which I have found there is a serious question to be tried.

42 I return to the substantive relief claimed by the plaintiff in these proceedings. The basic proposition for which it contends is that the purported adjudication determination is not an adjudication determination at all; and that it is void so that it is, in the eyes of the law, non-existent. This brings to the fore paragraph 61 of the judgment of Hodgson JA in ***Brodyn***: *"Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above in pars.[41] and [42], it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination."*

43 His Honour refers there to paragraphs 41 and 42 of the judgment which I also set out: *"Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s.25(4): this wording assumes that there is a determination which is challenged.*

Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator's determination was a forgery, that would not be challenging the adjudicator's determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act, that would not be challenging an adjudicator's determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that

remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge."

44 In these proceedings, the relief sought is of the very kind referred to in the second sentence of Hodgson JA's paragraph 41. It is there made clear that s.25(4)(a)(iii) would not operate to the plaintiff's detriment. If there is, in truth, no existing adjudicator's determination, the assertion to that effect by the plaintiff does not involve challenging any such determination. This is because the determination is non-existent. The situation can thus be seen to be one in which, although having to pay money into court, the plaintiff is able to have fully and properly argued and determined the matters about which it is aggrieved, without being pre-empted by the statutory scheme.

45 I should say that in several cases the court has recognised the summary nature of that statutory scheme and has seen it as inappropriate to seek to temper it in ways that the statute does not contemplate. I too approach the matter in that way.

46 In the result, I am not satisfied that the plaintiff has shown that refusal of the interlocutory relief will entail relevant hardship for it. In my opinion, the plaintiff will not be, in any material sense, worse off if the proceedings move towards trial in the absence of the interlocutory relief sought, than it would be if the relief were granted. In this particular case where the plaintiff maintains that there is no adjudicator's determination, the status quo does not, as I see it, stand in need of safeguarding by the interlocutory order the plaintiff seeks. This view is based squarely on s.25(4)(c)(iii).

47 The application for relief by way of interlocutory injunction is therefore dismissed.

[Counsel addressed]

48 I direct that the matter be placed in the Technology and Construction List directions list today, if the judge taking that list is able to accommodate it.

49 The plaintiff will pay the defendant's costs of the interlocutory application.

50 I should add, by way of footnote, that all my references to "the defendant" are technically references to the first defendant, the other two defendants being the adjudicator and the nominating authority both of whom filed submitting appearances and played no part in the hearing.

Mr C.R.C. Newlinds SC/Mr S.A. Kerr – Plaintiff instructed by Mallesons Stephen Jaques
Mr G. Inatey SC/Mr W.V. McManus - First Defendant instructed by Corrs Chambers Westgarth (D1) Colin Biggers & Paisley (D2 & D3