JUDGMENT McDOUGALL J : Supreme Court New South Wales Equity Division, T&C List. 26 February 2008

1 The first and second defendants (the proprietors) are the owners of land at 18 Day Street, Wagga Wagga (the site). The proprietors have entered into a contract with the plaintiff (the builder) for the construction of a building on the site. It is said that the contract was made in about May 2006. There is no doubt that the contract in question was a construction contract as that expression is defined in the *Building and Construction Industry Security of Payment Act* 1999 (the Act) and that under the contract the builder undertook to carry out construction work and supply related goods and services. (There was an issue raised as to the exclusion from the operation of the Act set out in section 7(2)(b), but that goes nowhere of present relevance.)

2 The builder made a payment claim on 21 September 2007. The amount claimed was a little over $461,000 exclusive of GST. The owners provided a payment schedule on 5 October 2007. The scheduled amount was about $96,500 including GST. The dispute thereby constituted was referred to the first defendant (the Adjudicator) for adjudication.

3 The Adjudicator made a determination dated 5 November 2007, which she appears to have provided to the parties the following day. She concluded that the adjudicated amount was approximately $96,500. The adjudicated amount was identical to the scheduled amount, although it was made up slightly differently.

The builder's claim

4 By its summons filed in these proceedings on 10 December 2007, the builder asserts that the determination is void. The list statement filed with that summons identifies, with numerous particulars, some fourteen matters that are said to constitute the reasons why the determination was void. The list statement is replete with the language of "*jurisdictional error*". That use of language is apparently based on the way that Brereton J expressed himself in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129. The contentions state in the first paragraph that a reference to jurisdictional error is a reference to "the absence of an essential precondition for the existence of an adjudicator's determination as defined in ***Brodyn Pty Ltd v Davenport*** [(2004) 61 NSWLR 421] and/or a denial of natural justice".

5 It is unfortunate that the contentions use the language of jurisdictional error. If the term had been applied strictly and scrupulously in its defined sense, there might be no problem. However, an examination of the contentions shows that the drafter of them appears to have shifted from the defined sense in which it was said the term would be used to the wider sense which the phrase "*jurisdictional error*" connotes in the sphere of administrative law. This unfortunate consequence is compounded when one has regard to what the Court of Appeal said on appeal from Brereton J (***Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd*** [2007] NSWCA 32). Giles JA, with whom Santow and Tobias JJA agreed, said at [29] that the use of the terminology of "*jurisdictional error*" might be seen to indicate departure "*from the basis for invalidity of a determination adopted in*" ***Brodyn.***

The issues

6 It has been extremely difficult to understand the case that the builder seeks to make out. As I have noted, the list statement advances, with particulars, some fourteen alleged instances of "jurisdictional error". The written submissions that were filed in response to the Court's directions ("response" is a somewhat relative term, because they were filed late) did not address all the matters raised in the list statement; and they did not address at all what is now said to be a fundamental point. The oral submissions in court today appeared to have little in common with either the list statement or the written submissions.

7 To begin at the end: the arguments of Dr Doyle, who appeared for the builder, identified what he said were two key submissions. The first related to s 21(4) of the Act. In essence, Dr Doyle submitted thats 21(4) was to be added to the list of "*basic and essential requirements*" for validity of an adjudicator's determination that were addressed in ***Brodyn.***

8 The second key submission related to the question of onus of proof. Dr Doyle submitted forcefully and at length that the Adjudicator had misdirected herself by imposing on the builder, as claimant, an onus of proof that was not to be found in the Act. Indeed, Dr Doyle put, the imposition of such an onus of proof was inconsistent with the scheme of the Act: in particular, s 32.

9 The s 21(4) point was raised in the list statement, in particular in the ninth to twelfth of the alleged jurisdictional errors. It was not, however, addressed in the written submissions.

10 By contrast, the onus point was not identified explicitly in the list statement. It was, however, addressed, although somewhat obliquely, in paragraph 9 of the written submissions.

11 An understanding of the builder's position was not assisted by Dr Doyle's failure to identify and address the real issues in dispute as they arise from the "*pleadings*". This put the proprietors at some disadvantage, and Mr Christie of counsel, who appeared for them, referred to this in his submissions. In particular, in support of the onus point, Dr Doyle produced a document (MFI "A") that identified some 30 instances in the determination "*in which the onus question/adjudicator duty appears*". Although some of those paragraphs had been identified in the list statement, it is impossible to discern from the list statement that the identification was for the purpose for which they were used in the course of oral submissions. It is unfortunate, and perhaps ironic, that a party claiming to have been deprived of natural Justice treats the other party in a way that is, quite frankly, not at all distinguishable.

12 Further, an understanding of the builder's case was not assisted by the repetitive, oblique and opaque way in which many of the points were addressed. Although I hope to deal with the principal points that were raised, it is possible that I may have overlooked some in the flurry of verbiage.

13 In those circumstances, I think that the safest course is to go to the contentions in the list statement and deal with them to the extent that it is necessary to do so, and then to go to the separate points made in submissions.

First challenge: denial of natural justice

14 The first challenge advanced in the list statement is that the Adjudicator breached the requirements of procedural fairness because, in some five identified ways, she determined the application on a basis for which neither party had contended, without giving them notice of her intention to do so.

15 The first matter particularised under this rubric was a finding as to s7(2) (b) of the Act. The Adjudicator found in substance that the Act applied to the whole of the contract, or the whole of the works carried out under it, notwithstanding that (as appears to be the case) the proprietors may intend to live in one of the dwelling units that is being constructed. Apparently, the proprietors did not raise that in their payment schedule, but it was a matter raised by the builder in its adjudication application. The builder's case was that the contract applied at least to the balance of the works. The Adjudicator concluded (perhaps on an insufficient appreciation of the proper construction of s7(2)(b)) that the Act applied to the whole of the contract and the contract work. Her determination was more favourable than that sought by the builder. She did not refuse any claim on the ground of the application of the Act. Indeed, in oral submissions in reply, I was informed that the point was not pressed because the builder apparently now agrees with the Adjudicator.

16 The second point under this rubric asserts that the Adjudicator made a finding as to the application of the contract without calling for submissions from the parties. Reference was made in particular to paragraphs 44 to 46 of the determination, in which the Adjudicator considered a claimed extra referred to as "Alucobond". The issue between the parties was whether the builder was entitled to be paid for materials supplied. The proprietors said that the builder was not, because none of the materials had been delivered to the site, nor had they been affixed to, so as to become part of, the building (the point as to non-affixation appears to have been common ground).

17 In those circumstances, the Adjudicator turned her mind to the relevant provisions of the contract: cl 37.3. It was not suggested (nor could it be) that cl 37.3 was irrelevant to this dispute.

18 Section 22(2)(b) of the Act requires an Adjudicator to have regard to *"the provisions of the construction contract from which the application arose"*. The Adjudicator recorded at paragraph 45 her view that the builder's entitlement to be paid had to be assessed in accordance with the contract. With the very greatest of respect, she was entirely correct to reach this conclusion. Section 10(1)(a) makes the point in relation to construction work, and s10(2)(a) makes the point in relation to related goods and services. Thus, the Adjudicator had considered the dispute posed by the parties and taken into consideration the relevant provisions of the contract. She may or may not have had the benefit (if that is the correct word) of submissions from the parties on this point, but why that amounts to jurisdictional error is a matter that was never explained in any of the material to which the Court was taken.

19 The third point under this rubric deals with a similar issue (which I will call for convenience, after the relevant provision of the contract, the clause 37.3 issue). Again, it is suggested, the Adjudicator stepped outside the dispute posed by the parties when she considered the relevant matters. She did not. She dealt with the dispute that was posed for her consideration, and in doing so fulfilled the statutory command to consider the relevant terms of the contract. It might be noted that the general conditions of contract were included as an annexure, DHC5, to the adjudication application; and the annexure to those standard terms which set out particular details was likewise included, as DHC4.

20 The fourth matter referred to under this rubric relates to a Liquidated Damages Certificate. The Adjudicator is said to have found that it constituted part of the payment schedule although no party identified it as having that characteristic. There are two answers to this. The first is that on any view the proprietors made it clear through their "*proposed payment schedule*" that they proposed to set off liquidated damages, which had been assessed by the Superintendent at $77,500. (In this context, I think that the word "proposed" refers to the payment intended to be made and is not a word intended to qualify, or indicate some provisional or diminished status of, the document as a payment schedule.) The second answer is that in any event there was material before the Adjudicator that would have entitled her to conclude that the certificate in question was not merely referred to in, but physically sent with, the payment schedule. It is apparent that the "*proposed payment schedule*" is one of ten pages that had been faxed to the builder on 5 October 2007. The other nine pages can be identified by the fax transmission notes. They include the certificate as to liquidated damages.

21 The fifth matter referred to under this rubric, likewise, challenges the Adjudicator's finding as to the contents, or constitution, of the payment schedule. For the reasons that I have just given, there was material on which the Adjudicator was entitled to reach the conclusion that the Liquidated Damages Certificate did form part of the material supplied with, or in amplification of, the payment schedule.

22 As to each of the fourth and fifth matters, I have proceeded, without deciding, on the basis on the basis that if the Adjudicator's decision, that the Liquidated Damages Certificate did form part of the payment schedule, were wrong, then there might be a *"jurisdictional*" or ***Brodyn*** error. I should not be taken as assenting to that view.

Second challenge: s7(2)(b)

23 *The second head of challenge raised in the list statement relates to "jurisdictional error in claiming jurisdiction over residential building work".* For the reasons that I have given (at [15]), in relation to the first challenge under the preceding rubric, that challenge cannot be accepted. It might be noted in any event that it is far from clear that an erroneous view formed by an adjudicator as to the construction or application of the Act could ever give rise to a ***Brodyn*** error. I think that this is a clear indication of the danger that is inherent in the use of inappropriate terminology.

Third challenge: s22(2)(b)

24 The third challenge is that the Adjudicator *"committed jurisdictional error in failing to determine the provisions of the governing contract".* A number of particulars are given. They assert variously that the Adjudicator failed to have regard to, or did not consider, or misinterpreted, aspects of the contract. However, it is to be noted that in *Brodyn* at 442 [56], Hodgson JA stated:

"I do not think that compliance with the requirements of s 22(2) are made such pre-conditions... . The matters in s 22(2), especially in paragraphs (b), (c) and (d), could involve extremely doubtful questions of fact or law... . 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."

25 When one goes to the paragraphs of the determination that are referred to in the particulars, it is clear that the Adjudicator did indeed have regard to, or consider, relevant terms of the contract. She may have been mistaken in her understanding of those terms, or in her view of their application. But no such error could invalidate her determination.

26 In this context, Dr Doyle laid particular stress on the Adjudicator's finding, or assumption, that there was a date for practical completion that had been extended to 21 August 2007 (see paragraphs 144 to 149 of the determination). Item 7 of the annexure to the contract, which is where the date for practical completion should have appeared, was blank. However, it is clear from the terms of the adjudication application itself that the builder was of the view that there was a date for practical completion. For example, in paragraph 54 of that document, it was stated that:

"The applicant builder is not liable for liquidated damages because of the delay of four to five months according [sic] to the date for Practical Completion given in the contract."

27 That is hardly consistent with the submission now put for the builder.

28 In addition, the material put before the Adjudicator as part of the adjudication application included a certificate by the Superintendent under the contract dated 5 October 2007. That certificate appears to have formed part of, or to have been sent with, the payment schedule (I have dealt with this above) although in the way that the builder put the documents before the Adjudicator, it was stripped out of that context. That certificate stated that "[t]he Contractor has failed to reach practical completion by the due date for Practical Completion, being August 21, 2007 (as duly extended)".

29 It is correct to say that the builder denied that 21 August 2007 was the proper extended date for practical completion and that it had failed to complete the contract works by the proper or correct extended date for practical completion. Nonetheless, in circumstances where the material to which I have referred was put before the Adjudicator, her failure (if such it be) to regard the blank item in the annexure to the contract as decisive can hardly amount to "*jurisdictional error",* let alone to error of the kind sufficient to lead to the overturning of the determination on the principles expounded in ***Brodyn*** and in many cases since.

The fourth challenge: s22(2)(b) again

30 The fourth head of challenge asserts that the Adjudicator "*committed jurisdictional error in failing to comply with the mandatory requirements of s 22 of the Act".* There are various particulars given. For the reasons that I have already indicated, s 22(2) might be mandatory, but a failure to comply with it is not a precondition to validity in the *Brodyn* sense.

31 Further, when one goes to the particulars, they relate either to the Alucobond variation, to certain PC items, or to alleged defective painting work. For the reasons that I have given, the Adjudicator did consider the clause 37.3 issue in relation to the Alucobond variation. The same issue was raised in respect of the PC items: had they been delivered to the site, and had they been affixed to, so as to become part of, the building? The Adjudicator dealt with that on its merits by referring back to an earlier part of her determination, where she had dealt with cl 37.3 in an equivalent context.

32 The case in relation to the defective painting work was extremely difficult to follow and, so far as I could tell, (and I confess that my understanding in this respect may be deficient) was not something pressed in oral submissions.

Fifth and sixth challenge: s14(2)(b),(3)

33 The fifth head of error alleged is that the Adjudicator "*committed jurisdictional error in failing to apply s4(2)(b) and s14(3) of the Act. This apparently relates to the Adjudicator's consideration of s14(2)(a), at paragraph 38 of her determination. She asserted that the formalities for a payment schedule "are set out at s14(2)(a) of the Act".* The point appears to be that she should have referred, but did not refer, to s 14(2)(b) and s 14(3). Since there was no issue whatsoever as to those latter provisions, I have no understanding as to how a failure to refer to them could amount to jurisdictional, *Brodyn* or for that matter other, error.

34 The sixth challenge asserts that the Adjudicator "c*ommitted jurisdictional error in failing to comply with mandatory requirements of section 22(2)(b) of the Act.*"

35 This relates to her finding that the liquidated damages certificate formed part of the payment schedule. The answer to this should by now be plain. Firstly, by application of the reasoning of Hodgson JA in *Brodyn* 441 [56], there is no error that gives rise to nullity. The second is that there was material before the Adjudicator that enabled her to come to that conclusion.

Seventh challenge: s20(2B)

36 The seventh challenge asserts that the Adjudicator "c*ommitted jurisdictional error*" in basing the determination on material not available to the first defendant in breach of section 20(2B) of the Act."

37 There are a number of particulars given. The first of those relates to delay costs. That appears to involve at the very least a misunderstanding of the Adjudicator's reasoning. She recorded the proprietors' submission that delay costs were not recoverable as an amount payable "*for*" construction work or related goods and services. She stated plainly that the proprietors could not rely on this submission because it was not a reason for non-payment raised in the payment schedule. She then dealt with the claim delay costs on its "*merits*" at paragraphs cls 137 to 143 of the determination. She did so by reference to the relevant contractual provisions - cl34.9 and 37.1. She had not been favoured with submissions from the parties as to either of these provisions. However, the dispute had been raised and in my view it was not only open to but incumbent upon the Adjudicator to resolve it by directing herself in accordance with the relevant contractual conditions. This she did.

38 The second alleged error relates to "e*xpanded reasons*" dated 26 October 2007 that appear to have formed part of the adjudication response. Those expanded reasons related to a number of items that on any view had been included, at least by implication as reasons for non-payment, in the payment schedule. The document that was attached to the payment schedule was described as a "*Schedule of Explanation to Progress Claim Number 16*". It appears to have been proffered as a shorthand statement of the superintendent's, and therefore the proprietors', reasons for arriving at the scheduled amount.

39 One of the matters referred to in the Schedule of Explanation and in the expanded reasons referred to a variation claim know as V67. Dr Doyle conceded in the course of argument that, apart from the reference to V67, the expanded reasons did no more than put submissions based on, and "expanding", reasons for non-payment set out in the Schedule of Explanation that had formed part of the payment schedule.

40 It is clear that a party to an adjudication application is entitled to include, in its adjudication application or response, submissions that bear on the issues that have been raised. The effect of section 20(2B) is that a respondent cannot include in its adjudication response any reason for withholding payment that has not been identified in the payment schedule. It is equally clear, at least by implication, from section 22(2)(d) that the adjudication response may put submissions in relation to reasons for non-payment advanced in the payment schedule. Indeed, it is clear that the submissions may go a little further, because they can include "relevant documentation".

41 Thus, except for the treatment of V67, there was nothing in the expanded reasons that was proscribed by section 20(2B). As to V67, it is difficult to understand whether Dr Doyle's complaint related to the substance of what was said or to the language in which it was couched. There is no doubt that the superintendent expressed himself in strong language when he dealt with V67 in the expanded reasons. It is far less clear that the expanded reasons, did anything more than put submissions, certainly in strong language, dealing with the reason for refusal of the V67 claim that had been identified in the Schedule of Explanation. That reason was: "This variation request has no approval. There have been no requests for time extensions apart from wet weather."

42 The expanded reasons emphasised "that there has never been any claim for extension of time for variations nor has there been any allegation that the contractor has been delayed on the project." It then provided further material in support of that, including material that referred to relevant obligations under the contract and to what had happened in site meetings and the like.

43 I do not think that the disputed part of the expanded reasons necessarily goes beyond what is permissible by way of submissions. The essential point is the same, namely that no relevant variation request had been made, and that the only requests for extensions of time that had been made were made on account of wet weather.

44 If the expanded reasons do go further - and as I have said I do not think that they do - they certainly do not go beyond canvassing the issues raised in the relevant part (paragraphs 52 to 58) of the adjudication application.

45 What is also clear is that the expanded reasons appear to have had no influence on the adjudicator's reasons. As I have said before, she set out the relevant provisions of the contract, set out the builder's case and set out the proprietors' response. The response is clearly within the ambit of the dispute as it may be understood from the Schedule of Explanation. The Adjudicator then dealt with the relevant clauses of the contract, noted that no-one had submitted to her that they should be dispensed with (let alone made any submission as to how they could be dispensed with), said that they operated to bar the claim for extension of time, and said that they therefore operated to negate the builder's defence to the claimed set-off for liquidated damages. That reasoning seems to me to be sound, and in any event to display no error of the kind that would entitle this Court to intervene. Further, it seems to me to deal with the dispute proposed by the parties for resolution, and to do so by considering matters to which it was not only open but mandatory for the Adjudicator to have reference under section 22(2).

46 Other submissions put under this rubic relate to variations, unfixed materials, painting and the like. They were either not addressed or not separately addressed (in relation to painting) or have been dealt with elsewhere in these reasons (for example, the clause 37.7 issue).

47 The last dispute related to carpentry. I do not think that this was addressed at all in oral submissions and I have to say that I do not understand from the contentions advanced in the list statement how it could demonstrate error of a kind that would entitle this Court to intervene.

Eighth challenge: alleged failures to decide

48 The eighth challenge asserts that the Adjudicator *"failed to exercise the statutory power confirmed by section 22 of the Act by failing to make a determination about certain items at all*". Some 19 items are particularised. There is a short answer to this. It is that the Adjudicator did make a determination in each case. The determination that she made was not the determination sought by the builder but it was nonetheless a determination.

49 The challenge was put in numerous different ways. In essence, however, the complaint appears to be that the Adjudicator asserted that she was not satisfied that the amount claimed was anything other than the amount allowed by the proprietors (supported, as they were, by documentation from the Superintendent). Whether she was right or wrong in those conclusions is not a matter with which I am concerned.

50 It may be that this head of challenge was intended to encompass the onus issue. If it was, it fails to signal it.

Ninth to twelfth challenges: s21(4)

51 The ninth to twelfth challenges between them seek to address the s21(4) *"key submission.*" They assert either that the Adjudicator "c*ommitted jurisdictional error by failing to make a good faith determination of the dispute,"* in failing to exercise the s21(4) powers, or that she ignored one of the basic and essential requirements for validity because, in the circumstances of this case, she did not exercise one or more of the s21(4)powers.

52 Section 21 of the Act deals with adjudication procedures. Subsection (4) reads as follows:

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates.

53 It will be seen that s21(4) is cast in terms of a discretion. An Adjudicator "may" do one or other, or more, of the four things set out. However, as appears from subs(5), "the Adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the Adjudicator's call for a conference..."

54 I have great difficulty in understanding how a discretion - and in truth that is what s21(4) gives the Adjudicator - can become a mandatory requirement. But that was the thrust of Dr Doyle's submission. When asked how it was that it might happen, Dr Doyle conceded that the question was a "vexed point" and that it was difficult to elaborate its limits.

55 In essence, as I understood the submissions, the proposition being advanced was that where an Adjudicator reaches a state where he or she cannot make up his or her mind on the evidence (or other material properly before him or her) then it is incumbent upon him or her to take one or more of the steps set out in s21(4). This subjective and ambulatory conversion of a discretion into a mandatory requirement is said to be required by the policy of the Act both as expressed in s3 and as it might appear from the Second Reading Speech. It is also said to reflect the absence of any onus in the Act - a point to which it will be necessary to return.

56 Dr Doyle submitted that the category of basic and essential requirements laid down in *Brodyn* was not closed. That, no doubt, is correct. However, when one examines those categories, they all have to do with sections of the Act that have nothing of discretion in them. They are sections of the Act that set out either the basic framework within which the adjudication procedure is to take place or the basic mechanism by which it is to be constructed. At ***Brodyn*** 442[54], Hodgson JA said that "*more detailed requirements*" in the sections to which his Honour had referred in the preceding paragraph do not necessarily give rise to basic and essential requirements. Nor, his Honour said, do matters that might "*involve extremely doubtful questions of fact or law".*

57 Dr Doyle submitted that the proposition for which he contends was not inconsistent with ***Brodyn.*** He submitted that s21(4) lay at the core of the Act. He submitted that once an Adjudicator had found that he or she could not determine an issue then he or she must go to, and exercise, the powers set out in s21(4).

58 I have to say that I see nothing in the structure of the Act, and nothing in the reasoning in ***Brodyn*** or in cases that have explained and applied it, that supports the submission in the various ways in which it was put. Subsection (4) appears in a section that deals with "Adjudication Procedures". To the extent that the heading is something that can be taken into account, it is not suggestive of something basic, fundamental or essential. It is suggestive of something that is procedural.

59 The wording of the subsection indicates that the powers are given *"for the purposes of any proceedings conducted to determine an adjudication application"*. Subsection (5) makes it plain that the application may be determined even though the procedures, or powers, set out in subs(4) are invoked but not worked through. It would be strange

in the extreme if an adjudicator were required, as a basic and essential question of validity, to invoke subs(4), but not required to allow it to be worked out before giving his or her determination. That would occur for example, where a request had been made for submissions, or for a conference, but where the deadline imposed by subs(4) was reached and was not extended.

60 Nothing in the scheme of the Act, or in the evident purpose of s21 (particularly subs(4)) suggests that the subsection has the character that Dr Doyle ascribes to it.

61 That leaves the argument that the Adjudicator failed to make a good faith determination because she did not exercise one or more of those powers. The underlying proposition appears to be that the use of the subs(4) powers must be considered whenever an adjudicator cannot decide a question. If that is so, then the submission must fail. In this case, the Adjudicator did not find herself unable to decide any question. She decided them, although as I have said, in most if not in all cases in ways inconsistent with the case propounded by the builder.

62 In any event, it seems to me to be a very long bow to draw, to suggest that an adjudicator who might have exercised, but did not exercise, the s21(4) powers thereby fails to act in good faith. Again, the discretionary language in which the subsection is cast seems to me to work against the submission.

Thirteenth challenge: s20(2B) again

63 The thirteenth challenge relates again to s20(2B). The particulars give no indication of the matters to which, it is said, the Adjudicator had regard when she should not have done so; nor is it clear why this aspect of the builder's case goes beyond the matters referred to earlier in the context of s20(2B). No enlightenment is derived from the submissions on this point.

Fourteenth challenge: alleged failure to consider certain claims

64 The fourteenth challenge asserts that the Adjudicator committed jurisdictional error in failing duly to consider the plaintiff's delay claim and "*EOT claim*". There are two immediate problems with this assertion. The first is that the Adjudicator did consider the issue of delay. She did so in the context of the proprietors' claimed entitlement to set off liquidated damages. It is clear from the determination she did so by reference to the parties' submissions and the relevant contractual provisions. The second problem is that the Adjudicator was never asked to consider, or decide upon, the builder's claim for an extension of time. I raised this point with Dr Doyle in the course of submissions. His first response was that it was done "*only by implication*". He then referred to a page at the end of the adjudication application, which, referring to V67, made it clear that the builder was not in possession of sufficient information to advance a claim for an extension of time.

65 For the reasons that I have already given in dealing with the issue of liquidated damages, the Adjudicator committed no relevant error (if indeed any error occurred, a topic on which I express no view) in the way she treated liquidated damages and the contractual provisions deal with them.

The onus point

66 As I have said, the written submissions did not deal with all of the matters raised in the list statement. One matter that they did deal with is the so called onus point.

67 On a number of occasions, the Adjudicator referred to various heads of claim and said words to the effect that she was not satisfied, or the claimant had not satisfied her, that the claim should be valued at anything more than the amount allowed by the proprietors. Dr Doyle submitted that in doing this the Adjudicator had imposed an evidentiary onus which was not justified by, or consistent with, the terms of the Act. He submitted that "[i]t must be idle to attempt to beach evidentiary whales on deserts of 10 day documentary procedures" (written submissions, paragraph 9).

68 It is of course correct to say, as Brereton J pointed out in ***Holmwood*** at [129], that adjudicators do not have available to them the full range of material that a court or arbitrator might in dealing with the same dispute. However, as his Honour had earlier said at [118], the assertions of each party *"can be evaluated against such evidence as is submitted in the adjudication application and adjudication response"*. The thrust of his Honour's decision is to the effect that in undertaking this task of an evaluation the adjudicator should not have regard to capricious or irrelevant considerations (and this aspect of his Honour's decision was upheld, although in briefer terms, on appeal - see the reasons of Giles JA at [26], [27]).

69 The duty of an adjudicator, as laid down in s22(1), is to determine the amount of the progress payment (if any) to be paid, the date of payment and the rate of interest. In undertaking that task, the Adjudicator is to consider only so many of the matters referred to in subs(2) as may be applicable. It is clear from the scheme of the Act that what is called for is some process of balancing or evaluating the competing materials supplied by the parties. It is not a matter of calling evidence. Nor is it a matter of conducting some mini trial. But at the same time, if the Adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that he or she be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward).

70 Thus, one might think, it is incumbent on a claimant to put before the adjudicator material that is rationally capable of persuading the adjudicator that the amount claimed was in fact payable.

71 Dr Doyle submitted that this was not necessarily so. He submitted that there was a statutory presumption, or as he put it "*predisposition,*" in favour of acceptance of a claimant's material. I have to say that I see no such presumption or predisposition in the wording of the statute. It is clear that the object of the Act is to enable those

who carry construction work or related goods and services to receive, and recover, progress payments. It is clear that the Act seeks to do so in a peremptory, not to say rough and ready, way. It is far less clear that the Act reflects any further presumption in favour of claimants other than such presumptions (as to certainty and the like) as might be thought to flow from the abbreviated procedures laid down in the Act.

72 Indeed, I think, if there were a presumption in favour of payment then there might be very little indeed for an adjudicator to do where there was no payment schedule or adjudication response. In those circumstances, it might be thought, an adjudicator is required to do no more than tick the boxes, the boxes in this case being the issues (if any) that were tendered for his or her decision. However, it seems to be reasonably clear from the views of Hodgson JA in ***Coordinated Construction Co Pty Limited v J.M. Hargreaves (NSW) Pty Limited*** [2005] NSWCA 228 at [50] to [53] that even in the circumstances postulated the adjudicator's obligations would be somewhat more extensive. It is true to say that in the same decision Basten JA at [64] to [68] was disposed to leave the question open; and it is equally true to say that the point was not necessary for the resolution of the particular appeal. However, the point was considered by Brereton J in ***Pacific General Securities Limited & Anor v Soliman and Sons Pty Limited*** [2006] NSWSC 13 and in turn by Palmer J **in *Brookhollow Pty Limited v R & R Consultants & Anor Pty Limited*** [2006] NSWSC 1. (Indeed, Brereton J had considered the same point at first instance in *Holmwood* at [50].) The point was necessary for the decision of Palmer J in ***Brookhollow***. His Honour concluded that notwithstanding that a claim was undefended, nonetheless the adjudicator was required to address in good faith those issues arising under section 20(2B) that "*manifestly appear on the face of the payment claim, the adjudication application and any supporting material*". If there were some statutory presumption in favour of a claimant, one might wonder why that would be so; one might wonder indeed why a claimant even has to go to adjudication.

73 If there is a presumption at all, it is a presumption that can perhaps be enforced by default where there is no payment schedule, by suing for and recovering judgment (section 15(2)(a), and note the limitation in subsection (4)).

74 In my view, there is no basis in the statute for speaking of any wider presumption or predisposition in favour of claimants. What is necessary is that the competing material be evaluated and that a decision be reached in good faith on that material. In my view that is precisely what the Adjudicator did in this case.

Conclusion

75 I think I have now dealt with the principal issues, if not all the issues, that have been raised. To the extent that I have not, there is certainly nothing in the "omitted " issues that could have any different bearing on the result of these proceedings. That result is that all the challenges advanced, however they have been formulated, fail and that the summons should be dismissed.

DISCUSSION AS TO COSTS

76 It follows from the conclusion that I have expressed that the order should be that the plaintiffs pay the proprietors' costs of the proceedings. Dr Doyle did not put submissions against the making of a costs order. Mr Christie, for the proprietors, sought an order that costs be payable on the indemnity basis. He submitted that his client had been put to unreasonable expense, because a multiplicity of issues had been raised in the list statement but not all of those issues had been addressed in written or oral submissions.

77 Although the written submissions did not canvas every matter referred to in the List Statement, they made it clear in paragraph 1 that the contentions set out in the List Statement contained "the details of the plaintiff's submissions". It does not appear from that document that the builder intended to abandon any of the points raised in the list statement.

78 Again, although the oral submissions focussed on what Dr Doyle more than once referred to "*as his key submissions*", I do not think that, with the exception of a couple of points to which I have referred to in my reasons dealing with the merits, he intended to abandon all the other points.

79 In addition, although the 14 matters alleged in the List Statement contain between them a great number of particulars (according to Mr Christie in excess of 50) it is nonetheless the fact that a number of those are repeated, and it is equally the fact that there are common threads which enables them to be dealt with, as I have sought to do, to some extent in what might be called a global way.

80 Whilst I do think that greater care should have been exercised in framing the challenges to the determination, I do not think that the way that the case reference was articulated or run is such as to display, in the words of Gaudron and Gummow JJ in ***Oshlack v Richmond River Council*** (1998) 193 CLR 72 at 89, any relevant delinquency.

81 Accordingly, I do not think that this is an appropriate case for indemnity costs.

Orders

82 I make the following orders:

(1) Order that the summons be dismissed.

(2) Order the plaintiff to pay the second and third defendant's costs.

(3) Order that the exhibits remain with the papers for 28 days and that thereafter they be held or disposed of in accordance with the rules.

Dr David Doyle (Solicitor) (Plaintiff) instructed by The Builders' Lawyer
M Christie (Second and Third Defendants) instructed by Philip Davenport (First Defendant) ; Massey Bailey Solicitors (Second and Third Defendants)