JUDGMENT : McDougall J. Equity Div. T&C List. New South Wales Supreme Court. 1st December 2006.

1 The plaintiff (Inten) as head contractor and the first defendant (Refine) as subcontractor made a written subcontract on 13 September 2005 (the contract) whereby Refine undertook to perform electrical work at a project at Neutral Bay. There is no doubt that the work to be performed by Refine was construction work, and that the contract was a construction contract, for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 (the Act).

2 On 19 September 2006, some months after work under the contract had been completed, Refine served a payment claim on Inten "for Electrical Works at Woolworths Neutral Bay". It will be necessary to return to the detail of that payment claim. It is sufficient at present to note that it was broken up into components. One of those components, comprising about 94% of the total claimed, was described as "Commerical [sic] Costs", and was said to be made up of "Prolonganation [sic] Costs", "Loss of Productivity" and "Interest on Late Payments". For convenience, I shall refer to that component collectively as "commercial costs".

3 Inten provided a payment schedule dated 28 September 2006. It denied liability for all but a small amount – less than $14,000 – of the amount claimed.

4 The dispute thereby constituted was referred to adjudication. The second defendant (the adjudicator) was the adjudicator. By his determination delivered on 1 November 2006, the adjudicator determined that Refine was entitled to (again in round figures) $181,000 inclusive of GST. The amount determined included about $147,000 in respect of the commercial costs.

5 In these proceedings, Refine claims that the adjudicator's determination is void. It contends that:

(1) The adjudicator denied it natural justice, by deciding Refine's entitlement to the disputed amounts on a basis for which neither party had contended; and

(2) The adjudicator failed to exercise his powers in good faith and referable to the purposes for which they were given, in the sense explained by Hodgson J in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 441-442 [55]. (For convenience, I will refer to this concept as "*Brodyn* good faith".)

The issues: denial of natural justice

6 Mr G A Sirtes of counsel, who appeared for Inten, stated that his client's case on denial of natural justice encompassed the following:

> "*1. Did the Adjudicator deny the Plaintiff natural justice in failing to give the Plaintiff an opportunity of responding to arguments that:*
> *1.1 the First Defendant was not claiming for "cost, expense or loss" within the meaning of clause 1.7 but a variation under clause 4;*
> *1.2 the First Defendant's claim, being a variation claim, was not exempted by clause 1.7 of the Contract;*
> *1.3 the First Defendant's claim for "Commercial Cost" is claimable as part of a progress claim and is not subject to clause 16 because of the different wording of clause 16.1 as compared to clause 2.1(b).*"

7 Mr F P Hicks of counsel, who appeared for Refine, accepted that those were the issues by which the claim of denial of natural justice was to be considered and decided.

The issues: lack of *Brodyn* good faith

8 Mr Sirtes did not articulate precisely the issues in respect of this aspect of his client's case. He accepted that, in many cases, denial of natural justice and lack of *Brodyn* good faith are two sides of the one coin, so that a decision on the former will necessarily decide the latter: see what I said in ***John Goss Projects v Leighton Contractors*** [2006] NSWSC 798 at para [57]. However, he submitted, this was not such a case.

9 As articulated in written submissions (dated 15 November 2006), Mr Sirtes submitted that the lack of ***Brodyn*** good faith was demonstrated by the way in which the adjudicator dealt with the issues before him. He submitted that the adjudicator:
(1) Had failed to demonstrated impartiality in his reasons;
(2) Had acted not as an "umpire" but as a participant, exerting himself in the service of Refine;
(3) Had taken an unbalanced approach to the arguments put before him; and
(4) Had raised and developed arguments not put by Refine, to the detriment of Inten.

10 In oral address, Mr Sirtes focussed on five aspects of the determination, one of which, he accepted also, was relevant also to the case of denial of natural justice. I will return to the detail of those submissions.

Notice to the adjudicator

11 In ***John Goss*** at para [57], I drew attention to the possibility that the concept of *Brodyn* good faith might overlap with the concept of "good faith" used in s 30(1) of the Act. That section protects adjudicators for anything done or omitted to be done in good faith in the exercise of their functions under the Act, or in the reasonable belief that the act or omission occurred in the exercise of those functions.

12 When Mr Sirtes outlined Inten's case on the question of ***Brodyn*** good faith to Bergin J, her Honour directed that its written submissions be served on the adjudicator. That was done. I then listed the matter for directions, and requested the adjudicator (notwithstanding his submitting appearance) to appear at the directions hearing. He declined to do so. My reason for listing the matter, and for inviting him to appear, was to ascertain whether,

notwithstanding his submitting appearance, he would wish to be represented, or to be heard on the question of ***Brodyn*** good faith.

13 In the circumstances, I concluded that it was appropriate to hear the matter, notwithstanding that the submissions advanced on the question of *Brodyn* good faith could be seen to raise also the question of good faith in the s 30(1) sense.

The payment claim

14 The payment claim comprised the following narration:
"Payment Claim for Electrical Works at Woolworths Neutral Bay.
As per attached pages detail A."

15 The amount claimed was $261,575.02, together with GST of $26,157.50: a total of $287,732.52.

16 There were two pages attached as "Detail A". They comprised a number of components. The first was described as "Contract Works". The value of those works was assigned, and they were said to be "100% Complete". A subtotal was then stated for the value of those works.

17 The next component comprised "Variations". Some sixty two variations were listed, together with the values attributed to them by Refine, and in each case the assertion that they were 100% complete. (The variations numbers ranged from 1 to 68, but some six of those numbers were not used.) There was then a stated subtotal for variations.

18 The next component was the "Commerical [sic] Costs", to which I have referred already, and the components of which I have stated. That was followed by another subtotal.

19 The three components (treating variations and commercial costs each as one component) were then totalled; retention at 2.5% and the amounts said to have been paid by Inten were deducted; and a total said to be owing was thereby derived.

20 At the foot of the second page there appeared the following:
"Notes
Loss of Productivity 3231.17 Hours @ $75.73
Prolonganation [sic] Costs – Office overheads (All records held by Company Accountant) @ 50% turnover @ $3,406.67 x 6 Weeks".

The payment schedule

21 The payment schedule stated that the scheduled amount was $13,710.14 and that the disputed amount was $274,022.38 (each inclusive of GST). It then stated the reasons for withholding payment, by reference to three categories: Variations, Prolongation Costs and Loss of Productivity.

22 Liability for prolongation costs was denied on the following grounds:
"[Inten] assumes that the claim by Refine … for "prolongation costs" is a delay claim.
A claim for delay based loss is rejected by [Inten] for two [sic] reasons:
(a) such a claim is barred under the contract;
(b) Refine was granted only one extension of time under the contract; and
(c) the prolongation claim is not made under any provision of the contract. …".

23 The third reason was expanded upon, by the assertion that the claim *"is a claim for damages pursuant to some unarticulated breach allegedly [sic] by [Refine]".* Inten referred to the decision of Hodgson JA in ***Coordinated Construction Co Pty Limited v J M Hargreaves (NSW) Pty Limited*** (2005) 63 NSWLR 385 at 397 [41] and to the decision of Barrett J in ***Quasar Constructions v Demtech Pty Limited*** [2004] NSWSC 116 at para [34].

24 The payment schedule asserted further that the claim was one for delay costs, and was thereby barred by clause 1.7 of the contract; and it referred also to the barring provisions of clause 16.1 of the contract.

25 In relation to the loss of productivity claim, Inten stated that it: *"[d]oes not recognise any claim by Refine for "loss of productivity". Inten cannot determine whether this is a delay based claimed [sic] identified by another name or a distinct claim altogether. No such claim is sanctioned by the Contract nor is such a claim recognised as a measure of loss in contract law. For the purposes of this Payment Schedule, however, Inten proposes to treat the claim as one for damages for some unarticulated breach of contract allegedly committed by Inten …*

The "loss of productivity" claim is rejected on the same grounds as the "prolongation claim" … ".

26 Inten did not reproduce the second of the grounds upon which it relied in opposition to the claim for prolongation costs (the ground relating to extensions of time). Clearly, however, it intended to rely on the first and third of those grounds, although it did not reproduce them literally. It said however that "… its submissions on these issues … apply with equal force to the claim for loss of productivity …".

The adjudication application

27 In the usual and regrettable way of such things, the adjudication application annexed what appears to have been every piece of paper that passed between the parties in relation to the subject matter of the claim. It also included Refine's submissions which were said to "elaborate" its position. Those submissions are rather difficult to follow, because in part they cut and paste passages from Inten's payment schedule and then comment on them. In the version that is in evidence, it is impossible except by textual analysis to distinguish between quotation and

response. (I was told that, in the original, the response was made clear by use of differently coloured type.) In any event, the following matters appear from the submissions:

(1) The claim was for construction work carried out pursuant to the contract (paras 1.1, 1.2).

(2) The amount claimed "is the contract value, or is calculated in accordance with the express terms of the sub contract, or is a reasonable value for the additional costs incurred to undertake the work. [s 13(2)(b)]" (para 1.5).

(3) The payment claim related to work under the agreement "supplemented with additional Variations" (para 1.6).

28 The submissions stated that the claim was one for *"[l]oss of productivity … which is the consequence of the significant disruption caused to [Refine] by [Inten]"* (adjudication submissions, page 49; exhibit PX 1 page 77). It asserted that *"… this relatively small subcontract was subject to more than 85 variations to the scope of work and a large number of acts of prevention"* and that this caused *"distruption [sic] and therefore loss of productivity to [Refine's] labour"* (pages 50, 78). It stated that Refine was forced to provide additional labour *"[i]n order to complete the entire scope of work – contract and variations"* and that the *"cost of the additional labour is directly related to undertaking the work under subcontract."* (ibid).

29 Refine denied the proposition that the claim was barred by clause 20.1 of the contract, relying on ss 13(4)(b) and 34 of the Act.

30 There were other features of the adjudication application to which either Mr Sirtes or Mr Hicks drew attention:

(1) In commenting on Inten's submission that the claim for delay was barred under the contract, Refine said that it "contends that the contract has no application and that [Inten] is not entitled to rely on its terms" (pages 43, 71).

(2) The relevant conduct of Inten was unconscionable, within s 51AC of the *Trade Practices Act* 1974, so that Inten was unable to rely on the claims barring provisions of the contract (pages 44, 72).

(3) In answer to the proposition that the prolongation claim was not brought pursuant to any provision of the contract but was a claim for breach, Refine stated that it "does not accept the application of the terms of the Sub Contract" (pages 45, 73).

(4) Refine referred to the proposition enunciated by Hodgson JA in *Hargreaves* at 397 [40] and [41]: reinforcing the contention that it saw its claim as being one for the value of construction work undertaken by it pursuant to the contract (pages 46, 74).

(5) In answer to Inten's reliance on clause 16, Refine stated that it "denies the application of the terms of the subcontract." (pages 48, 76).

The adjudication response

31 In its adjudication response, Inten made the following points:

"(1) 1.1 [t]he predominant part of the Payment Claim is for "*Prolongation Costs*" and "*Loss of Productivity*" … which are not claims that fall within either s.9(a) 9(b) of the Act;

1.2 The claims are not merely outside the parameters of ss. 9(a) or 9(b), but constitute claims which are effectively barred by the Contract.

(2) 8. As to the broad brush claim for prolongation and delay Costs, these claims also fall beyond the ambit of the Act. …:

(a) a damages claim may be claimable as part of a Payment Claim if and only [if] the contract entitles such a claim to be made;

(b) if a contract entitles such a claim to be made, an assessment must be made as to whether the amount claimed is due for construction work under the contract rather than being, in there [sic] nature, damages for contractual breach. Only the former is claimable;

(c) there is no entitlement whatsoever to claim for any costs which are expressly barred under the contract, as is so in the instant case.

(3)10 … [o]n the one hand, the Applicant appears to base its claim on the contract but then eschews the contract as regards the contractual bars contained therein which deny its claim."

Relevant provisions of the contract

32 I set out those provisions of the contract on which Inten relied, or to which the adjudicator referred in his determination:

"**1.0 Commencement and Completion** …

1.7 INTEN will not be liable in contract, negligence or otherwise for any cost, expense of loss incurred by the Subcontractor which arises out of or is connected with delay or disruption to the progress or completion of the Works howsoever caused whether or not INTEN has granted an extension of time. …

2.0 Payment and Security

2.1 On the day of the month states [sic] in the Appendix the Subcontractor must submit [to] INTEN a progress claim in a form provided by Inten Constructions Pty Ltd showing: …

(b) Subject to clauses 16.0, 20.0 and 21.0, other amounts to which the Subcontractor is entitled under the Subcontract; and …

3.0 Execution of the Works

3.1 The Subcontractor must comply with all directions of INTEN in relations [sic] to the execution of the Works. …

4.0 Variations

4.1 INTEN may by written notice instruct the Subcontractor to carry out variations. The Subcontractor must comply with INTEN instruction within the time stated by INTEN or, if no time stated, within a reasonable time.

4.2 The Subcontract Sum will be adjusted by a reasonable amount in respect of variations which are instructed in writing by INTEN. In determining a reasonable amount regard will be had to any rates or prices specified in or agreed to under the Subcontract or any other Agreement or similar work.

4.3 The Subcontract Sum will not be adjusted and the Subcontractor will not be entitled to payment for a variation unless it is instructed in writing by INTEN and the instruction states that it is an instruction for a variation under this clause 4.0. …

16.0 Barring of Claims

16.1 INTEN will not be liable upon any claim by the Subcontractor in respect of any matter arising out of or connected with the Subcontract, including but not limited to a breach of the Subcontract or negligence, unless within 5 working days after the first day upon which the Subcontractor could reasonably have been aware of the first of any breach, act, omission, direction, approval, circumstance or other fact or facts on which the claim is based the Subcontractor has given written notice to INTEN of the claim, or its intention to make a claim, stating in either case that it is a notice under this clause 16. …

20.0 Final Statement

20.1 Within 5 working days after the Subcontractor received INTEN notice of Substantial Completion of the Works in relation to each Site the Subcontractor must submit to INTEN a statement **("Final Statement")** in the form of the proforma Final Statement annexed hereto. …

21.0 Definitions and Interpretation

21.1 In this Subcontract: …

j) **"Variation"** means any of the following:

i) An increase or decrease in or omissions from the Works;

ii) A change in the character or quality of material or Work;

iii) A change in the levels, lines, positions or dimensions of a part of the Works;

iv) Execution of additional work; and

v) A change to the scope of the Works which result from a direction or instruction issued to INTEN under the Head Contract. … "

The determination

33 The adjudicator dealt first of all with the claim for the "Variations" component of the payment claim. No complaint is made of this aspect of his determination.

34 He then turned his attention to the claim for prolongation costs. He recorded the paucity of information contained in the payment claim, but concluded that he was satisfied that "*due to the suspension of work directed by [Inten] … and due to other directions of [Inten] the work was prolonged and [Refine] incurred additional office overheads.*" To jump ahead: Inten attacks this part of the determination, asserting that the basis upon which the adjudicator was satisfied of the matters to which he referred was not made plain, and that his satisfaction appeared to be based on nothing more than mere assertion. However, as was common ground, the material before the adjudicator included some three folders of material, mostly business records and the like, upon which Inten relied. It also included a report from Tracey, Brunstrom and Hammond Pty Ltd (TBH), a report on which Inten relied – presumably, as evidence – in its adjudication response. (In a submission that was at the time, and remains, entirely obscure, Mr Sirtes submitted that the adjudicator had displayed his want of ***Brodyn*** good faith by taking into account, in finding for Refine, the TBH report.)

35 Mr Sirtes did not refer me to the detail of the three volumes of material that were before the adjudicator, or to much of the detail of the TBH report, in support of his submission that the adjudicator had acted with a lack of ***Brodyn*** good faith in achieving the state of satisfaction to which I referred in the previous paragraph. As I made plain to both counsel, I did not intend myself to trawl through the numerous and repetitive documents that had been tendered, but relied on them to take me to any aspect that they considered to be relevant. Mr Sirtes did not explain, except by way of assertion, how it was that the adjudicator was not entitled to be satisfied, on the basis of all the material before him, that the work was prolonged, and Refine incurred additional office overheads, because of a suspension of work and other directions of Inten.

36 I return to the determination.

37 The adjudicator relied on the TBH report to quantify the claim for prolongation costs, assessing it at $6,813.34 (the amount assessed by TBH, on the assumption – with which it did not agree – that the claim was allowable) rather than the amount of $20,440.02 claimed by Refine.

38 The adjudicator then turned to the claim for loss of productivity. He adverted once more to the paucity of information provided in the payment claim. He concluded, however, that he was "*satisfied … that [Refine] incurred considerable extra man hours as a consequence of complying with directions from [Inten] … and many other matters for which [Inten] is responsible.*" However, he concluded, he was not satisfied of the number of hours claimed by Refine, and preferred instead one of the alternative assessments performed by TBH. Again to jump ahead: Inten

complained that the adjudicator had acted capriciously in preferring one assessment given by TBH (for 1,876 hours) over an alternative assessment (of 140 hours). However, and contrary to the submission put at T 5.30, the adjudicator did not "ignore" the alternative calculation: he referred to it expressly, and said that he did not accept that it was "*an appropriate conclusion*".

39 The adjudicator then turned his attention to the legal arguments. He rejected Refine's claim that s 51AC prevented Inten from relying on its contractual defences. He then turned to the substance of those defences, referring to Inten's submission that the claim for prolongation costs was not "*sanctioned by the Contract*". He said: " … *what is being claimed is recompense for construction work carried out under a construction contract. What is being claimed is reimbursement of costs allegedly incurred in carrying out construction work*."

40 He referred to the authorities on which Inten relied (***Hargreaves*** and ***Quasar***) – I shall return to his treatment of them – and considered the operation of clause 1.7. He stated that clause 1.7 "must be read in context": a proposition that could hardly be denied, being supported by a number of authorities including (to name but one) the decision of Gibbs J in ***Australian Broadcasting Commission v Australasian Performing Right Association Limited*** (1973) 129 CLR 99, 109.

41 The adjudicator noted that the context included the power to direct variations (clause 4.1) and the entitlement to be paid for variations (clause 4.2). He said that, where a variation causes delay or disruption, its reasonable cost would include an amount to compensate Refine for that delay or disruption.

42 The adjudicator turned his attention to the definition of "variation" in clause 21.1(j). He then referred to the provisions of clause 3.1, whereby Refine was obliged to comply with Inten's directions in relation to the execution of the works. He said:

"*It appears to me that directions of [Inten] and acts or omissions of [Inten] that disrupt or delay [Refine] can be said to be Variations that entitled [Refine] to claim an adjustment to the Contract Sum.*

It appears to me that [Refine's] claims for Loss of Productivity and Prolongation Costs are essentially variation claims and claims for adjustment of the Contract Sum rather than claims for damages for breach of contract. Therefore, I am not satisfied that clause 1.7 exempts [Inten] from liability."

43 Inten did not submit that this aspect of the adjudicator's reasoning displayed error of a kind that would entitle this Court to intervene on the principles laid down in ***Brodyn.*** It submitted, however, that in so reasoning, the adjudicator had dealt with the claim and its defence on a basis for which neither party had contended, so that he was obliged to give the parties (specifically, Inten) an opportunity to make submissions: relying on, among other cases, my decision in ***Musico v Davenport*** [2003] NSWSC 977 at paras [107] and [108] and the decision of Einstein J in ***Procorp Civil Pty Limited v Napoli Excavations and Contracting Pty Limited*** [2006] NSWSC 205 at para [10(xii)].

44 The adjudicator then turned his attention to clause 16.1. He said in substance that it could not operate to bar a progress claim (ie, a claim for payment construction work pursuant to clause 2.1) where the progress claim was made within the time specified by the Act: relying on s 34. Again, Inten did not submit that this aspect of his reasoning displayed error of the kind that it would entitle this Court to intervene.

45 The adjudicator then turned to clause 20. Again, he said, this clause could not bar a progress claim if it were brought in accordance with the Act: referring again to s 34. Again, Inten did not submit that this aspect of his reasoning displayed error of the kind that would entitle this Court to intervene. Although it had initially raised this aspect of the determination as also involving a denial of natural justice, the challenge was not pressed in the issues as they were ultimately formulated (see para [6] above).

Analysis: denial of natural justice

46 I do not think that it is necessary to consider separately the three issues formulated by Mr Sirtes. The proposition that is common to them all, and on which they all depend, is that the terms of the dispute that the parties had submitted to the adjudicator did not permit him to reason as he did without giving them (specifically, Inten) the opportunity to be heard.

47 The first point to be observed is that the progress claim did not identify specifically the claimed "*basis of contractual entitlement*" (***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 at [25] (Hodgson JA, with whom Ipp JA agreed)). However, Inten did not rely upon this, either before the adjudicator or before me, as a ground of invalidity (either of the payment claim or of the adjudicator's determination in respect of it).

48 On a fair reading, the payment claim is one that is made for construction work claimed to have been performed pursuant to the contract, and is comprised of the three components that I have identified. Thus, it is a fair inference that the third component – the claim for commercial costs – is a claim said to be for construction work.

49 It is not apparent, at least on the face of the payment claim, that the claim for prolongation and loss of productivity costs is related to the claim for variations. However, the adjudication application identifies that this is so at pages 49 and 50 (77 and 78 of exhibit PX 1). Thus, by the time the dispute had come to the attention of the adjudicator, it was reasonably plain that the claim for prolongation and loss of productivity costs was said to be related to the variations for which claim was also made (or for which claims had been made in the past).

50 Mr Hicks submitted that the relationship between the claim for prolongation and loss of productivity costs and variations was made plain (or plainer) in the three folders of documentation furnished to the adjudicator. He referred to some of that material, where indeed the relationship between these items is addressed. That seems to be the case: or at least, it was a conclusion that the adjudicator, acting reasonably, could draw from the material to which Mr Hicks referred.

51 If, as I think it is open to infer from the material to which I was referred, Refine was basing its claim for prolongation and loss of productivity costs on the various variations that had been directed, then it follows necessarily that the claim had a contractual foundation in clause 4.

52 Mr Sirtes, however, submitted that Refine had eschewed reliance on the contract as the source of its rights. He referred to the various statements that I have quoted in para [30] above, whereby Refine from time to time contended "that the contract has no application" or did not accept, or denied, "*the application of the terms of the [contract]*".

53 It is not a fair reading of those passages of the adjudication application, either in context or, indeed, in isolation, that Refine was intending to deny that the contract had any relevance to its claim, or that its claim was based on the contract. It is reasonably clear that Refine was intending to deny that the terms of the contract upon which Inten relied by way of defence (clauses 1.7, 16.1 and 20.1) had any "application" to its claim. This could be read as either or both of the following propositions: that it was unjust (because of the alleged unconscionable conduct of Inten) to permit Inten to rely upon, and in that sense "apply", those provisions; or that on a proper reading of the contract those provisions had no "application" to the basis on which the claim was made.

54 Mr Hicks placed great weight on the way that Refine had formulated its claim, both expressly (in relating it to variations) in the submissions, and through the documents. He placed great weight also on the propositions advanced by Inten (both in its payment schedule and in its adjudication response) in opposition to the claim: that the claim was not one made under any provision of the contract, and was not one "sanctioned" by the contract. In substance, he submitted, by advancing those negative propositions, Inten had created a situation where the adjudicator was either permitted or, indeed, required (see s 22(2)(b), (d) of the Act) to have regard to all the terms of the contract before deciding whether or not to accept the submission.

55 Mr Sirtes submitted that this was not how the payment schedule or adjudication response should be read. He submitted that his client was intending to do no more than make the (rather obvious) point that claims for prolongation and loss of productivity costs were not expressly recognised by the contract.

56 It is not appropriate to subject payment claims and payment schedules (or adjudication applications and adjudication responses) to the degree of close textual analysis usually reserved for Acts of Parliament. That is particularly so in the case of the latter category: adjudication applications and responses. They are prepared to identify and frame the dispute that an adjudicator is to resolve. The adjudicator has a short period of time within which to resolve them. The disputes are often of considerable complexity, involving a great deal of documentation. Adjudicators do not have the time that lawyers do after the event to subject those documents to detailed analysis, with a view to finding fault in their expression.

57 In a practical sense the real question is what could an adjudicator, acting reasonably, take to be the scope of the dispute propounded by the adjudication application and response? In the present case, an adjudicator, acting reasonably, could have taken the view that the dispute propounded for consideration involved the following elements:

- · a claim for payment for construction work
- · articulated as a claim for prolongation and loss of productivity costs
- · arising from variations ordered or other directions given by Inten to Refine
- · in respect of which Inten asserted that there was no contractual entitlement to payment.

58 Clearly, in this case, that is how the adjudicator in substance regarded the dispute propounded for his determination.

59 The assertion that a claim is not "made under any provision of", or is not "sanctioned" by a contract could be read, by an adjudicator acting reasonably, as an assertion that no term of the contract provides a foundation for, or gives an entitlement to, the amount claimed. That is different in substance to an assertion that a claimed entitlement is barred by a provision of the contract. In the latter case, it is necessary to look at the alleged barring provision, to understand whether it has the effect for which its proponent contends. But in the former case, it is necessary to consider the provisions of the contract as a whole, to see whether the assertion is made good. In substance, that is what the adjudicator did in the present case.

60 If the dispute propounded for the adjudicator's consideration included, by way of defence, the proposition that certain aspects of the claim lacked contractual foundation, it was open to him to consider the contract as a whole to see if he agreed. Indeed, I would go further and say that, the contention having been properly advanced through the payment schedule and within the framework of the adjudication (and neither party suggested that it was not properly advanced), s 22(2)(b), read in conjunction with para (d), made it incumbent upon the adjudicator to do so.

61 In substance, I think, the reality is that:

(1) Refine, although with less than complete clarity, made it plain in its adjudication application that its claim was one for what might be called the on costs or consequences of variations and other directions – in which case, it was, or at least could be, a claim for construction work having a foundation in the terms of the contract; and

(2) Inten by its adjudication response denied that there was any contractual entitlement to the relevant components of the claim.

62 The dispute thus constituted, including Inten's denial of any basis of contractual entitlement, required the adjudicator to take into consideration the relevant provisions of the contract. This he attempted to do.

63 No doubt, as Mr Sirtes in substance submitted, the adjudicator reasoned in a way that found no source or basis in Refine's adjudication application. Its submissions were pitched at a level of generality. But it was necessary for the adjudicator to deal with the dispute in some detail; indeed, if he did not do so, he might have been accused of neglecting his obligation under s 22(3)(b) to state reasons.

64 In ***Brodyn,*** Hodgson JA referred to the concept of natural justice, in its application to adjudication applications, at 441-442 [55] and 442 [57]. In the former paragraph, he referred to "*the measure of natural justice that the Act requires to be given*". In the latter, he referred to ss 17(1) and (2), 20, 21(1) and 22(2)(d) and stated "that natural justice is to be afforded to the extent contemplated by those provisions." That was because the sections to which his Honour referred required "notice to the respondent and an opportunity to the respondent to make submissions". The significant point, for present purposes, is that the entitlement to natural justice is not at large: it is to an extent circumscribed, or its content defined, by the statutory scheme. In particular, the scheme includes the making of an application that notifies the respondent of the grounds, with the opportunity to the respondent to reply (ss 17 and 20), the determination of the dispute thereby provided (s 22(1)) and consideration, in reaching that determination, of the payment schedule (s 22(2)(d)).

65 I conclude, for the reasons that I have given, that the adjudicator sought to deal with the issue that was propounded by the payment schedule and, to an extent, restated or refined, in the adjudication response.

66 The adjudicator's task included a determination of Inten's contention that no provision of the contract supported, or sanctioned, the claim for prolongation and loss of productivity costs. That submission was advanced forcefully, in its payment schedule and adjudication response. In those circumstances, the measure of natural justice for which the scheme of the Act by implication provides did not require the adjudicator to give Inten an opportunity to be heard further in support of that contention, once he had reached the view, contrary to the position for which Inten contended, that the claim could be supported by reference to relevant provisions of the contract.

67 Thus, Inten's claim that it was denied natural justice, in any of the three respects identified in para [6] above, must fail.

Lack of *Brodyn* good faith

68 Mr Sirtes did acknowledge that the adjudicator had rejected certain of Refine's claims, and had in some instances preferred Inten's evidence. (I refer to the adjudicator's ruling on the s 51AC claim, and to his preference for Inten's quantification of the delay and loss of productivity claims, through the TBH report, compared to the amounts claimed.) That is not a promising start for a submission that, nonetheless, the adjudicator lacked the requisite degree of impartiality (which is how Mr Sirtes at one stage put it).

69 Mr Sirtes referred to five specific aspects of the determination. I shall deal with those individually.

The quantification of prolongation costs

70 Mr Sirtes submitted that the only material relevant to this was that contained in the TBH report. As I have said, the adjudicator relied on that. Mr Sirtes submitted that, thereby, the adjudicator had displayed partiality towards Refine: in using the TBH report in substitution for the lack of proof in Refine's material.

71 The submission appears to be based on the proposition that if an adjudicator, having considered a claimant's material, decides that the claim is not good, he or she must thereupon dismiss the adjudication without considering the respondent's material. That proposition finds no support in the Act. On the contrary, an adjudicator is bound to consider all relevant material in accordance with the provisions of s 22(2) of the Act. That relevant material includes the payment schedule; and in this case, the payment schedule (as well as the adjudication response) included the TBH report. I simply do not understand how the adjudicator erred, let alone displayed want of *Brodyn* good faith, in considering the TBH report in this context. Presumably, Inten put it before him because it thought it was relevant. Presumably, it intended that he should act upon it to the extent that he found it relevant. How then can it complain because he did so, but in a way that was not to its liking?

Loss of productivity

72 I have referred to this already (see para [38] above). The complaint was put in terms that the adjudicator took one approach – favourable to Refine – and "ignored" the other. But he did not. He referred to, and rejected, that other approach. He did not state expressly his reasons for rejecting it; but I think that it is a fair reading of the relevant passage of the determination that he gave reasons in support of the approach that he preferred. His rejection of the other approach should be read in that context.

Willingness to accept Refine's "assertions"

73 Again, I have referred to this already (see para [34] above). The difficulty with the proposition is that the adjudicator was given not just the submissions but also three volumes of material in support of them; and the

submissions put to me on this point did not show, or attempt to show, that the "assertion" could not have been supported by the material that was provided to the adjudicator.

The adjudicator's treatment of the decision in *Hargreaves*

74 In both its payment schedule and its adjudication response, Inten referred to the decision in ***Hargreaves.*** It said that "a claim for damages pursuant to some unarticulated breach … is not recognised as validly made as part of a Payment Claim", and referred to ***Hargreaves*** in support of that proposition.

75 It cannot be said that the submission stated with precision the effect of the relevant reasoning on this topic of Hodgson JA in ***Hargreaves.*** It might have been appropriate, for example, to refer to what his Honour said on this topic at 397 [38] to 398 [45]. As his Honour's analysis shows, whilst there is in effect a spectrum, ranging from claims that are clearly "for" construction work at one end to claims that are clearly not "for" construction work at the other, there is no sharp line of demarcation between them. Thus, as his Honour said at 398 [45], under the contract in question *"delay damages and interest … could be claimed to be due for construction work carried out … and … it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined*".

76 The adjudicator in this case referred, with some dissatisfaction, to Inten's failure to refer him to the particular parts of the judgments cited by it on which it relied, and to its failure to state whether the decisions had been followed, not followed, considered or distinguished. He said that it was not the job of an adjudicator to carry out research "to see whether or not the judgments referred to are truly authority for the argument raised."

77 If one compares the brevity, and potentially misleading character, of the submission with the detail of the reasoning in *Hargreaves,* that complaint has some justification. It may be that the adjudicator could have expressed himself with somewhat less asperity; but his understandable annoyance at being given a bald proposition, and left to work out for himself where it was sourced, does not mean that he was partial.

78 In any event, I think, this aspect of the complaint goes nowhere, once it is recognised that the adjudicator (being, as I have found, entitled or required to consider the matter) had concluded that the claim was one brought under the contract. Once he came to this conclusion, and by implication that the claim was not "merely" one for damages, the point for which the decision in *Hargreaves* was cited falls away.

The adjudicator shifted the goalposts

79 This is a reformulation, in the context of want of ***Brodyn*** good faith, of the complaint that the adjudicator determined a dispute that had not been propounded for his consideration and decision. For the reasons I have given, that complaint fails. Having failed for the purposes of denial of natural justice, it fails also for the purposes of want of ***Brodyn*** good faith.

The cumulative effect of the propositions

80 So far, I have dealt with each proposition separately. However, Mr Sirtes submitted, it was necessary to consider them cumulatively. Whilst I accept that this is so in principle, I have found that none of them, individually, is made out. The accumulation of zero upon zero, no matter how many times it is essayed, produces nought but zero.

81 Alternatively, if one were to weigh the complaints made by Mr Sirtes (giving them such merit as they might be thought to possess) against those aspects of the dispute where the adjudicator accepted Inten's evidence or submissions, the same result is achieved.

Conclusion on want of Brodyn good faith

82 This ground has not been made out.

Conclusion and orders

83 Each challenge to the determination fails. I make the following orders:

(1) I order that the summons be dismissed.

(2) Subject to order (3), I order the plaintiff to pay the first defendant's costs and otherwise make no order as to costs.

(3) I give either party leave to apply to discharge or vary order (2); any such application to be made by notice to the party affected and to my associate within 7 days of today's date.

(4) I order that the exhibits remain with the papers for 28 days, and that they be dealt with thereafter in accordance with the Rules.

(5) I order that any security provided or money paid into Court by the plaintiff pursuant to the Court's orders made on 24 November 2006 be applied for the benefit of or paid out to the first defendant.

(6) I reserve liberty to apply either in respect of order (5) or generally on 48 hours' notice

(7) I direct that these orders be entered forthwith.

G A Sirtes (Plaintiff) instructed by Jason Li Lawyers
F P Hicks (First Defendant) Submitting appearance (Second Defendant)