JAR Developments P/L v Castleplex P/L [2007] Adj.L.R. 07/10

JUDGMENT : His Honour Rein AJ. Supreme Court New South Wales, Equity Division T&C List. 10th July 2007

1 The Court is here concerned with the validity of an adjudication determination under Division 2 of the **Building and Construction Industry Security of Payment Act 1999 (NSW)** ("the Act").

2 The principal facts were agreed in a Statement of Agreed Facts (Exhibit "B") in the following terms (with incorrect year references corrected in brackets):

"*1. On or about 30 August 2004, the plaintiff ('**JAR**') and the first defendant ('**Castleplex**') entered into a construction contract ('**Contract**').*

*2. The Contract is a contract to which the Building and Construction Industry Security of Payment Act 1999 (NSW) ('**Act**') applies.*

3. Castleplex made a payment claim on 24 November 2006.

4. The JAR delivered a payment schedule by hand upon the registered office of Castleplex on 7 December [2006].

5. JAR further hand delivered a copy of the payment schedule, and sent a copy of the same by fax, to Castleplex's ordinary place of business on 8 December [2006].

6. The last of ten (10) business days as and from 7 December [2006] was 21 December 2006.

*7. Castleplex lodged a document identified as being an adjudication application with the Institute of Arbitrators and Mediators Australia (the '**Institute**') on 22 December 2006.*

*8. On or about 22 December 2006, the Institute issued a notice to the parties that the application had been referred to the second defendant (the '**Nominated Adjudicator**').*

9. On or about 4 January 2007, the Nominated Adjudicator issued a notice to the parties advising that he had accepted the adjudication application.

10. On or about 9 January 2007, the Nominated Adjudicator requested that the parties make submissions in relation to certain matters including:

a. the date that the Castleplex received the payment schedule for the purposes of section 17(3)(c) of the Act;

b. the date that JAR received the adjudication application for the purposes of section 20(1) of the Act.

11. The solicitors for each of the parties provided those submissions to the adjudicator on or about 10 and 11 January, 2007.

12. On or about 12 January 2007, JAR provided a response to the Nominated Adjudicator in respect of the purported adjudication application of Castleplex.

13. At all times, JAR asserted that the adjudication application was not made in accordance with the requirements of the Act and reserved its position.

14. On or about 2 April 2007, the Nominated Adjudicator issued a document which purported to be a determination under the Act and was dated 19 January 2007."

3 The Nominated Adjudicator, Mr Max Tonkin, is the second respondent to the motion but he has filed a submitting appearance.

4 JAR read the affidavits of Mr Thomas Roberts of 20 April 2007, and of 21 June 2007. JAR tendered volume 1 of the material exhibited to Mr Thirgood's affidavit in which the payment schedule is contained (behind Tab 3). The payment schedule had on its face the following: *"made pursuant to the **Building and Construction Industry Security of Payment Act 1999**. To be delivered by hand and sent by post and facsimile."*

5 Castleplex read an affidavit of Mr Wong, the contents of which were objected to on the grounds of relevance. In my view, the understanding and reaction of Mr Wong can offer no assistance on the question of the construction of the Act. No estoppel argument was mounted by Castleplex. It follows in my view that the contents of the affidavit are not relevant.

6 I received detailed written submissions from Mr F Hicks, counsel who appeared for JAR, and Mr N A Nicholls, counsel who appeared for Castleplex, and I heard detailed oral submissions too.

7 It will be observed that paras 4 and 5 of the Agreed Statement of Facts speak of "delivery" of a payment schedule on 7 December 2006 and a "further delivery" on 8 December 2006. The wording was agreed upon by Mr Hicks and Mr Nicholls to avoid pre-empting one of the two issues in the case, namely how what occurred on 8 December 2006 is to be characterised.

8 JAR says that it served the payment schedule on 7 December 2006 and that the failure of Castleplex to seek an adjudication prior to 22 December 2006 meant that the requirement in s 17(3)(c) of the Act was not met, with the consequence that the adjudication process held before Mr Tonkin and his certificate have no legal effect.

9 When the matter came before the adjudicator, Castleplex argued that service under s 31 of the Act did not occur until the time when the recipient became aware of the document. The adjudicator accepted that argument and accepted the evidence of Mr Wong that he did not become aware of the payment schedule's service until 8 December 2006, and accordingly he held that the adjudication notice was validly served. Mr Nicholls accepts that the adjudicator's decision was contrary to the decision of the Court of Appeal in ***Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*** [2006] NSWCA 259 and hence wrong. Neither side had referred the adjudicator to that decision.

10 Mr Hicks says that because the time of service of the payment schedule was critical to the validity of the adjudicator's appointment, the adjudicator cannot, by his erroneous interpretation, confer on himself jurisdiction.

11 Castleplex accepts that service was effected on 7 December 2006 and accepts that no adjudication application was filed within the time set in s 17(3)(c) in relation to that service, but it says:

(a) The payment schedule was also served on 8 December 2006 and the notice of adjudication application was initiated within the ten day period specified so far as that service is concerned.

(b) Even if the notice was not served within the ten day period, the adjudicator made a determination that 8 December 2006 was the relevant date and the failure to meet the ten day requirement was not a matter that precluded jurisdiction, and hence was not a matter which rendered the determination (and the certificate and judgment based upon it) a nullity.

Was the adjudication application made within time?

12 JAR accepts that if the payment schedule should be treated as having been served on 8 December 2006 then the adjudication application was served in time. It is agreed by both parties that JAR's payment schedule even if served on 8 December was served within time (as that was the last day).

13 Before considering the arguments, attention needs to be drawn to the evidence concerning service. On 7 December 2006, Mr Roberts, Castleplex's solicitor, delivered a copy of the payment schedule to a Ms Kelly Coomber, a person employed by the accountants whose office was the registered office of JAR. He sought her acknowledgment of a document headed "Acknowledgment of Service" and obtained the acknowledgment. It was agreed that the payment schedule was never served by post – but it was served by fax: see para 30 of Mr Robert's affidavit. On the following day, 8 December, Mr Roberts attended at the office of JAR, and there is no dispute that he served the payment schedule at the office of Castleplex on a Ms Tran. Once again he sought an acknowledgment of service and once again he obtained it. That acknowledgment bears the date 7 December 2006 but as Mr Roberts pointed out in his affidavit the date is an error and the document was served and the acknowledgment in fact obtained on 8 December 2006. In his affidavit he said that he served a second copy of the payment schedule and sent it by fax "out of an abundance of caution". He did not mention to Ms Tran that he had served a copy of the payment schedule the day before.

14 Mr Hicks did not agree to a characterisation of what occurred on 8 December as "service" and submitted if it was service it did not have any incidents additional to the service on 7 December. Service on 7 December, he submitted, "broke the seal" and whatever occurred on 8 December did not undo what had occurred. Thus, it was submitted, what occurred on 8 December was not really service at all, and Mr Roberts' characterisation of it as such in his affidavit and in the acknowledgment could not turn it into something it was not.

15 Section 17 of the Act is in the following terms:

"**17 Adjudication applications**

(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

*(3) **An adjudication application**:*

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and

*(c) **in the case of an application under subsection (1)(a)(i)—must be made within 10 business days after the claimant receives the payment schedule, and***

(d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment, and

(e) in the case of an application under subsection (1)(b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2)(b), and

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable."

16 The service on 7 December was valid service since it complied with s 109X of the **Corporations Act 2001 (Cth)**, and s 31(3) of the Act permits other forms of service than the modes set out in s 31(1), and see ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** [2003] NSWSC 903 at [57].

17 Service on 8 December (subject to the issue of prior service) was itself valid service in accordance with s 31 because it was lodged (by being hand delivered) at JAR's "ordinary place of business" during normal office hours.

18 Castleplex submits that there was in fact service of the payment schedule on two different dates in accordance with two different regimes of service, and since that is so, it was entitled to lodge its response within 10 days of the second service.

19 Mr Nicholls argued that effect of service of a process or notice has the effect of invoking the jurisdiction of the Court and ensures that the person so served is appraised of the proceedings and given an opportunity to be heard, citing ***John Russell & Co Ltd v Cayzer, Irvine & Co Ltd*** [1916] 2 AC 298 at 302; ***City Finance Co Ltd v Matthew Harvey & Co Ltd*** (1915) 21 CLR 55 at 60; [1915] HCA 75; **Craig v Kanssen** [1943] 1 KB 256 at 262 and ***Willowgreen Ltd v Smithers*** [1994] 2 All ER 533 at 537. Mr Hicks agreed with this, but said that the process and rights started when the payment schedule was served on 7 December.

20 Uninstructed by authority it would seem to me that since s 17(3)(c) requires the application for adjudication to be made within 10 business days "after the claimant receives the payment schedule", then provided the payment schedule received on Day 1 is the same as that received on Day 2, then the 10 days within which the claimant has to lodge his application commences to run from Day 1 irrespective of whether another copy of the document is served one or two or even more days later.

21 There is, as I have noted, no dispute in this case that service on the registered office was valid but it was possible that validity may not have been accepted by Castleplex. Mr Roberts did say he had effected service on 8 December out of abundant caution and I do not think it can be said that he waived or elected not to rely on service on 7 December (no such argument was mounted) but nor do I think it can be said that the service on 8 December brought about a different process to that initiated on 7 December, the payment schedule served on 8 December being identical in form and contents to that served on 7 December.

22 No cases were cited dealing with multiple service in any other field, and counsel indicated that they were not aware of any.

23 In ***Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*** [2006] NSWCA 259, Hodgson JA did make reference to the possibility of service on two occasions (see at [56] and see also at [65]-[69] per Hunt AJA, with whom Handley JA agreed at [1]), but **Falgat** was not concerned with the present problem.

24 ***Falgat*** is authority for the proposition that "provides" and "receives" in the Act are to be understood to be references to service: see **Falgat** at [61].

25 The question then is whether the decision in ***Falgat*** means that service on 8 December started a fresh period of 10 days. If the words *"has been served with"* is substituted for *"receives"* in s 17(3)(c) so that it reads: *"in the case of an application under subs (1)(a)(i) – must be made within 10 business days after the claimant [has been served with] the payment schedule"* the answer to the question when does time start to run, is *"from when the claimant was served with the payment schedule"*. Castleplex was served with the payment schedule on 7 December and again I do not think that service of another copy on 8 December (accepting that it was service) means that time starts running again.

26 In a sense, the rights of the claimant to an adjudication have commenced to run once the other party to the building contract has provided its response by means of the payment schedule. In the absence of an argument based on estoppel arising out of some confusing conduct on the part of the builder, I do not think that the process initiated by the service of the payment schedule on 7 December has come to an end because a second copy was served the following day. If it is said that service of the same payment schedule on the second occasion commenced its own chain, then there were two sets of process deriving from the one payment claim – a most unsatisfactory state of affairs in respect of a statutory regime designed *"to provide a speedy and effective means of ensuring that progress payments are made during the course of administration a construction contract without undue formality or resort to the law"*: see ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** (2005) 21 BCL 364; [2005] NSWCA 229 at [49] per Basten JA. I do not think the Act could have intended that second valid service of documents within time would activate a second regime for payment.

27 The need for certainty of timing seems to me to be best accommodated by taking the first date of valid service of a payment schedule as the date from which time commences to run.

Is the adjudication a nullity?

28 The decisions of the Court of Appeal in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421; [2004] NSWCA 394 and ***Transgrid v Siemens Ltd*** (2004) 61 NSWLR 521; [2004] NSWCA 395 provide authority for the bases upon which a Court can intervene in the determination of an adjudicator. In ***Multipower Corp Pty Ltd v S & H Electrics Pty***

Ltd [2006] NSWSC 757 per McDougall J, these were summarised at [33] (the paragraph numbers below are a reference to ***Brodyn***) as:

"*(1) The first ground of review arises where an adjudicator does not satisfy the conditions laid down by the Act essential for there to be a valid determination ([52]).*

(2) The second ground of review arises if the adjudicator does not try in good faith to exercise the relevant power relating to the subject matter of the legislation in a way that is reasonably capable of reference to the power ([55]).

(3) The third ground of review arises where an adjudicator denies a party such measure of natural justice as the legislative scheme requires to be afforded ([57]).

(4) The fourth ground of review arises if there is fraud in which the adjudicator is complicit ([60])."

29 This application concerns only (1).

30 In ***Brodyn,*** Hodgson JA (with whom Mason P and Ipp JA agreed) limited the basic and essential elements of the Act as being those requirements that enliven the adjudicator's power to perform the functions under the Act: see at [55].

31 Hodgson JA listed those provisions that appeared to be the basic and essential requirements:

"*[53] … 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 (s 7 and s 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 (s 18 and s 19).

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

*[54] 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 nonjurisdictional 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**.*

*[55] 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 390–391.*

*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.*

*[56] It was said in the passage in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147, 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** (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 (s 20(1) and s 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 Ltd v Luikens****."* [emphasis added]

32 In ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** (2005) 21 BCL 364; [2005] NSWCA 229, Basten JA indicated that even where the Court was of the view that a claim did not satisfy mandatory requirements or where the determination went beyond the parameters of the claim, that would not of itself justify intervention, saying at [44]: *"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."*

33 In ***Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd*** [2007] NSWSC 554, the builder served a claim on the proprietor (Guardian). Guardian did not serve a payment schedule within the specified time, but did serve one out of time. An adjudication application was made and an adjudicator appointed, but on hearing from both parties that there had been no payment schedule served within time and no compliance by Kell & Rigby with s 17(2) (whereby the builder had to either give 20 business days notice of its intention to apply for adjudication of the payment claim or give the other party an opportunity to provide a payment schedule within five business days), the adjudicator decided not to proceed with the adjudication. In the absence of a response to the payment claim the builder had the choice to recover the claimed amount as a debt due or make an adjudication application under s 17. Guardian argued that by issuing the adjudication application, Kell & Rigby had made an election under s 15 and were precluded from proceeding from the first option provided by s 15. Bergin J held that the adjudication application was a nullity because s 17 had not been complied with, and the making of the application was "incapable of creating legal consequence including the legal consequence of the making of an election under s 15(2) of the Act".

34 Section 17(2) is couched in terms of a prohibition: "An adjudication application to which subsection (1)(b) applies **cannot be made unless…**", whereas s 17(3)(c) is phrased as a "must be made within 10 business days", but I do not see this distinction as important in the present context.

35 In ***Kell & Rigby***, Bergin J made reference to ***GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 and the words of McHugh JA: *"One of the basic doctrines of common law jurisprudence is that the failure to perform a mandatory condition imposed by statute invalidates the doing of any act dependent on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine."*

36 In ***Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd*** [2005] NSWSC 439, a subcontractor (Brick) made a payment claim on Taylor. On 5 January 2005 Brick faxed a payment claim to Taylor, in response to which on 20 January 2005 Taylor served a payment schedule disputing that any amount was owing. On 20 January Brick noted that it had served a payment claim on 5 January and not received the amount due – it gave Taylor five business days within which to serve a payment schedule or pay the claim. Taylor replied that the payment claim had not been served until 6 January and therefore that the payment schedule was not due until 20 January and was therefore served within time. It also asserted through its solicitors that even if the payment schedule was not served within time it would meet the requirement to respond to the five day notice. Brick lodged an adjudication application and Taylor responded, but the adjudicator, having found that no payment schedule had been served within time or in response to the five day notice, held that Taylor was precluded from lodging an adjudication response.

37 Einstein J held that the payment claim was served on 5 January 2005 and hence the payment schedule had to be provided by 19 January 2005: at [24]. His Honour held that service of the payment schedule did not meet the requirements of s 14(4) because it occurred after the 10 day period, and did not meet the requirements of s 17(2)(b) because it was not served "after" the time required. He rejected the contention in the letter from Taylor's solicitor that the payment schedule had been "constructively" resubmitted. The letter did not comply with the basic requirements of a payment schedule, and did not purport to be given under s 17(2)(b), and it was not provided by Taylor (but by its solicitors).

38 Einstein J said at [40]:

"[40] The holding is that s 17(2)(b) merely provides a respondent with an (additional) opportunity to provide a payment schedule when it has failed to do so in accordance with s 14 and to do so after the claimant has given notice of its intention to apply for adjudication. The respondent may ignore the opportunity [in which case it loses the opportunity to lodge an adjudication response – s 20(2A)] or it can provide a payment schedule. If it chooses to provide a payment schedule then it might choose to provide one identical to that which it has previously provided or it might choose to provide a different payment schedule. However the Act is not to be construed to require the claimant or the adjudicator to guess whether a respondent relies on a payment schedule for the purpose of s 17(2)(b) when it has not been provided in accordance with that section."

39 Einstein J also considered obiter the question of whether had the adjudicator fallen into error on various topics, Taylor could attack the decision – one of those topics was whether the adjudicator had fallen into error in determining the time within which application had to be made and whether s 17(3)(e) was the appropriate requirement as opposed to s 17(3)(c). Einstein J said that had he been required to decide the point, his finding would have been that any error in the adjudicator's decision would not be a failure to satisfy one of the basic requirements (there being no contention of a lack of bona fides): at [57] and [58].

40 This approach treats timing under s 17 as one of the more detailed requirements under s 17, and inferentially as a matter which if considered bona fide by the adjudicator and in accordance with the requirements of natural justice will not lead to the determination being a nullity even if wrongly decided.

41 Although ***Taylor*** was not concerned with time for filing of an adjudication application, and is strictly distinguishable I think the principles can be no different in relation to this point and s 17(3)(c).

42 In ***Multipower Corp Pty Ltd v S & H Electrics Pty Ltd*** [2006] NSWSC 757 the subcontractor ("S&H") made a payment claim on Multipower (the head contractor) for work done. Multipower responded with a payment schedule conceding only part of the amount claimed as payable. S&H then made an adjudication application seeking adjudication of the dispute – an adjudicator was appointed and she made a determination that S&H was entitled to the whole amount claimed. Multipower claimed that the adjudication application was out of time and hence that the determination was void. Whether the application was void depended on the question of whether the due date for payment by Multipower was 14 February 2006 or 24 February 2006. S&H had in its adjudication application asserted that the due date was 14 February 2006 but the adjudicator determined that it was in fact 24 February 2006 based on s 11(1)(b) of the Act.

43 McDougall J noted, at [36] of ***Multipower***, that basic and essential preconditions of validity were identified by Hodgson JA at [53] of ***Brodyn*** and that they were compared to "*more detailed requirements*" at [54] of **Brodyn** which included "*s 17 as to the time when an adjudication application can be made*". After referring to [54] and [55] of ***Brodyn***, McDougall J said at [37]:

> "*[37] In my view, it is clear from His Honour's analysis that even what might have been called jurisdictional error of law in days gone by would not result in the avoidance of a determination unless the subject matter of that error were a 'basic and essential requirement'.*"

44 McDougall J rejected submissions that anything said by Einstein J in ***Schokman v Xception Construction Pty Ltd*** [2005] NSWSC 297 or Campbell J in ***Amflo Constructions Pty Ltd v Jefferies*** (2004) 20 BCL 452; [2003] NSWSC 856 were inconsistent with ***Brodyn.*** I do not accept JAR's submission that McDougall J can be viewed as having reached his conclusion that the determination was not a nullity because a factual dispute was involved. That approach is perhaps one which could have been taken in ***Brodyn*** in dealing with issues such as this, but it was not. In ***Multipower*** the issue was when was the payment due, which was a matter of statutory construction and construction of the contract.

45 ***Amflo*** was not relied on in this case but ***Schokman*** was. Although Einstein J in ***Schokman*** did hold that the determination was void, it would appear to be a view arrived at because of the absence of natural justice rather than a failure to comply with the time requirements of s 17. Viewed that way, which, having re-read the decision and Bergin J's comment about ***Schokman*** at [21]-[22], I think is the correct way, there is no inconsistency between ***Schokman*** and ***Taylor*** (a subsequent decision by the same judge as had decided ***Schokman***), to which I have already referred. I accept that the view of the basis for the decision in **Schokman** I have expressed here is contrary to that which I expressed in ***Springs Golf Club Pty Ltd v Profile Golf Pty Ltd*** [2006] NSWSC 344 at [20], although the conclusion in that case that the adjudication was not void by reason of the error alleged, is unaffected by that difference.

46 In **Fifty Property Investments Pty Ltd v O'Mara** (2007) 23 BCL 35; [2006] NSWSC 428, the builder ("Impero Stone") served a payment claim on the developer ("FPI"), and as no payment schedule was served the matter proceeded to an adjudication. FPI claimed that the adjudication determination was void because the adjudicator had determined that there was a construction contract between FPI and Impero Stone and that decision was erroneous. The second matter related to a breach of natural justice. Brereton J pointed out that the existence of a construction contract was one of the basic and essential requirements of the Act identified in ***Brodyn,*** and that the Court was entitled to consider whether or not the decision maker had made a wrong decision on the collateral question as to the existence of such facts (at [18]), and if a wrong decision had been made, the jurisdictional basis for the determination could be found to be absent. I do not see ***Fifty Property*** as questioning the categorisation in ***Brodyn*** and the case is not inconsistent with the conclusions of McDougall J in ***Multipower*** or Einstein J in ***Taylor***.

47 Although ***Kell & Rigby*** is authority for the proposition that failure to adhere to time constraints set out in the Act will render an adjudication application void, **Kell & Rigby** was a case in which the adjudicator had refused to proceed (for that very reason) and the Court therefore did not have to consider what would be the effect of an adjudication in which an error as to compliance with the time limit was made. It is therefore not inconsistent with ***Schokman*** and ***Taylor***.

48 ***Kell & Rigby*** deals with the consequences where failure to meet time limits imposed by the Act is established at the adjudication. It is implicit that the adjudicator has no power to excuse or waive a failure to meet a time limit imposed by the Act: see also **Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd** [2003] NSWSC 903 at [35], [38] and [39]. ***Brodyn*** at [53]-[55] is however dealing with the question of the effect of an erroneous determination by an adjudicator that time limits or other detailed requirements (as opposed to basic and fundamental requirements) have been met. JAR placed emphasis on the decision of Basten JA in ***Coordinated Construction Co***, and his Honour's reference to determination of an objective fact, although his comment related to situations where mandatory requirements were not met or where the determination went beyond the parameters of the claim and were not, it appears, directed to the detailed requirements. It was not argued before me even on a formal basis that ***Brodyn*** was wrongly decided, and I do not think it is necessary or appropriate to consider whether or not what was said by Basten JA *in* ***Coordinated Construction Co*** or what had been said by McHugh HA

in ***GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 involves, or might logically lead to, a qualification to the unanimous view of the Court in ***Brodyn***.

49 Given that both McDougall J and Einstein J (although obiter in ***Taylor***) have concluded that the reasoning in ***Brodyn*** leads to the conclusion that an adjudication in which the adjudicator erroneously but bona fide and in accordance with the rules of natural justice determines, that a requisite time limit has been met, will not thereby be rendered void, and since, with respect, I am not persuaded that they are wrong to so conclude, it is appropriate that I follow ***Multipower***.

50 It follows in my view that the adjudication determination, the certificate and the judgment based upon it are not liable to be set aside and JAR's Notice of Motion should be dismissed with costs to be paid by JAR.

F Hicks (Plaintiff) instructed by McCullough Robertson
N A Nicholls (First Defendant) instructed by Mills Oakley Lawyers
Submitting appearance (Second Defendant)