

JUDGMENT : HHJ McDougall : Supreme Court of New South Wales Equity Division T&C List. 14th August 2006.

- 1 The plaintiff (John Goss) and the first defendant (Leighton) were parties to a design and construct contract dated 31 July 2003 (the contract). The parties accept that the contract was a “construction contract” for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (the Act). The parties accept also that the contract provided for John Goss to carry out construction work for, and perhaps to provide related goods and services to, Leighton in connection with what was called “the Hilton Hotel project”. It makes no difference whether the claim was for construction work, or related goods or services, or both; and for convenience I shall refer hereafter only to “construction work”.
- 2 John Goss served a payment claim on Leighton on 24 May 2006 (the May payment claim). The amount claimed exceeded \$3 million (inclusive of GST). The bulk of that claim, in excess of \$2 million (exclusive of GST), related to a claim for disruption costs said to have been made pursuant to cl 28.8 of the contract.
- 3 Leighton’s payment schedule denied liability entirely. The dispute thereby constituted was referred to adjudication. The second defendant (Mr Davenport) was nominated as adjudicator, and accepted that appointment (the second adjudication). He gave his determination in writing on 3 July 2006. He determined that Leighton owed nothing to John Goss in respect of the payment claim.
- 4 John Goss challenges the determination in this Court. It says that Mr Davenport denied it natural justice, and failed to exercise his powers under the Act in good faith, in the sense explained by Hodgson JA in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 441-442 [55]. It sought relief accordingly; and, quite separately, a declaration that cl 45 of the contract is void, by operation of s 34 of the Act. Clause 45 provides in substance that Leighton is not liable to any claim (over and above the “Contract Amount”) unless John Goss has given it notice of that claim in the time, manner and form set out in cl 45.

The first adjudication

- 5 On 23 March 2006 John Goss made a payment claim (the March payment claim), for an amount in excess of \$3.2 million (inclusive of GST). That claim was made up of four components, three of which (including the cl 28.8 claim for disruption costs) were replicated identically in the May payment claim.
- 6 Leighton answered the March payment claim by a payment schedule in which it admitted liability for \$132,067 (in substance, in respect of the first item in the March payment claim, which was the only item not replicated in the May payment claim). The dispute thereby constituted was referred for adjudication and was determined by Mr Anthony Dutton as adjudicator (the first adjudication).

Mr Dutton’s determination

- 7 Mr Dutton gave his adjudication determination on 16 May 2006. He determined that Leighton was liable to pay John Goss no more than the admitted amount of \$132,067.
- 8 In substance, in relation to the second of the components (which was a claim for additional wages), Mr Dutton reasoned that there was no provision in the contract that entitled John Goss to be reimbursed for those additional wages, which apparently were payable by it to its employees pursuant to an order of the Industrial Relations Commission.
- 9 In relation to the third and fourth components, which were claims for delay costs and disruption costs (in amounts of \$684,707 and \$2,057,420 respectively), Mr Dutton reasoned that John Goss was required to comply, but had not complied, with the requirements of cl 45 of the contract in relation to each claim. He said, in para 145 of his determination, that “the failure by [John Goss] to comply with clause 45” was “a complete bar to [its] entitlement ... to claim delay and disruption costs ... “. Accordingly, he concluded in para 147 that John Goss “is not entitled to payment for its delay and disruption costs as claimed in this adjudication”.

The s 22(4) issue

- 10 Section 22(4) reads as follows:
“(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
(a) the value of any construction work carried out under a construction contract, or
(b) the value of any related goods and services supplied under a construction contract,
the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.”
- 11 As I have said, the May payment claim replicated exactly the second, third and fourth components of the March payment claim. John Goss did not suggest that there were any changed circumstances. In substance, its position was that Mr Dutton had been wrong to reject them on the grounds upon which he had relied.
- 12 Leighton’s primary position was that, there being no suggestion that the value of the construction work comprised in the three repeated components had changed since the time when Mr Dutton made his determination, s 22(4) of the Act applied. Leighton submitted to Mr Davenport that Mr Dutton had determined the value of that construction work or those related goods and services and that, there being no suggestion of change, Mr Davenport was bound by s 22(4) to give them the same value – nil – as Mr Dutton had done.
- 13 Alternatively, Leighton relied on its substantive defences to those claims.

- 14 In those circumstances, each party in its submissions to Mr Davenport addressed my decision in *Rothnere v Quasar* [2004] NSWSC 1151.

The second adjudication

- 15 John Goss submitted to Mr Davenport that Mr Dutton had not determined the value of the relevant construction work. It submitted that Mr Dutton had determined that the effect of cl 45, in the events that he had found had occurred, was that Leighton had no contractual liability to John Goss for those claims and, correspondingly, that John Goss had no contractual entitlement to be paid anything for them.
- 16 John Goss relied on the distinction that I drew in *Rothnere* at paras [43] and [44] between an entitlement to be paid for construction work and the valuation of that construction work (and, accordingly, of that entitlement). Thus, John Goss relied on what I had said in *Rothnere* in support of its submission that Mr Dutton had not (to use the words of s 22(4)) “determined the value of” the construction work comprised in its delay and disruption claims.
- 17 Leighton did not submit to Mr Davenport that what I had said on this point in *Rothnere* was incorrect; that is to say, it did not submit that there was no distinction between entitlement and valuation of the kind that I indicated in paras [43] and [44]. It said, however, that the facts in *Rothnere* were clearly distinguishable from the facts in the adjudication before Mr Davenport, so that what I had said should not govern the outcome of Mr Davenport’s deliberations.
- 18 Thus, the issues posed for Mr Davenport were:
- (1) Had Mr Dutton determined the value of the construction work comprised in John Goss’ delay and disruption claims (which, as I have said, were replicated in the May payment claim and in the adjudication before Mr Davenport)?
 - (2) Alternatively, had Mr Dutton, without determining the value of that construction work, determined that Leighton had no liability to pay, and John Goss no entitlement to be paid, for whatever the value of that construction work was?
 - (3) If the latter, was it therefore open to Mr Davenport to determine afresh the question of entitlement, and, if he determined that in favour of John Goss, to determine for himself the value of the construction work?

Mr Davenport’s determination

- 19 Mr Davenport stated that the issue for his determination was “whether Mr Dutton, in accordance with section 10, determined the value of construction work and whether I am now called upon to value that same construction work.” It will be apparent from what I have said that he thereby correctly directed himself to the fundamental issue.
- 20 In essence, Mr Davenport reasoned that Mr Dutton had determined the value of the construction work that was comprised in the delay and disruption claims. His reasoning was that John Goss had “claimed only the alleged unpaid value, i.e. the alleged amount of unpaid consideration payable for the construction work carried out under the construction contract.” He then said “that Mr Dutton determined the residual amount of consideration payable under the contract for the construction work carried out under the contract” and had thereby “valued the consideration payable for the construction work carried out.” It followed, said Mr Davenport, that Mr Dutton “has valued the construction work carried out.”
- 21 Thus, there being no suggestion that the value had changed, Mr Davenport concluded that he was bound by s 22(4) of the Act to give to that construction work the same value – nil – as Mr Dutton had assigned to it.
- 22 If matters had gone no further then, subject to questions of good faith and natural justice, Mr Davenport’s determination would not be reviewable. I held in *Rothnere* (at [18]-[26]) that s 22(4) was not one of the “basic and essential requirements” of validity referred to by Hodgson JA in *Brodyn* at 441 [52]. If Mr Davenport’s reasoning displayed mistake, that mistake would not make his determination amenable to review in this Court. It would be a mistake within the ambit of the jurisdiction entrusted to him by the Act; a mistake that he was entitled to make.
- 23 It is therefore necessary to consider the challenges advanced on the grounds of denial of natural justice and absence of good faith.

Denial of natural justice

- 24 As I have said, the parties’ submissions to Mr Davenport referred to my decision in *Rothnere*. To understand both the parties’ submissions and Mr Davenport’s reasoning in relation to them, I refer briefly to the decision in *Rothnere*.
- 25 *Rothnere* was a case where, it was said, construction work had been included in two payments claims, and had been valued by an adjudicator in an adjudication founded upon the earlier payment claim. The second payment claim likewise gave rise to an adjudication, and the adjudicator in that second adjudication took the view that the relevant work had not been valued by the adjudicator in the first determination. I concluded that s 22(4) of the Act was not one of the “*basic and essential*” requirements identified by Hodgson JA in *Brodyn*. Accordingly, I concluded that even if the challenge were made out on the facts, it did not give rise to what might loosely be called “*reviewable error*”. However, against the possibility that what I had said might be incorrect, I considered whether the challenge would succeed on the facts. I concluded that it would not. In that context, I dealt with the operation of s 22(4) in this way at paras [41] to [44]:

- [41] There is one other point that needs to be mentioned. Mr Christie submitted that, where s 22(4) referred to the valuation of construction work, it meant, in substance, the value that the respondent to a payment claim was liable to pay. That was a step in his argument which was that s 22(4) was introduced by the Building and Construction Industry Security of Payment (Amendment) Act 2002, to discourage what the Minister, in the Second Reaching Speech, had referred to as "adjudicator shopping", and that it should be construed (if ambiguous) so as to facilitate the achievement of that end.
- [42] I do not think that it is possible to read s 22(4) in this way. Section 8 gives an entitlement to a progress payment for construction work. Section 10 sets out how construction work is to be valued. The phrase "construction work" itself is a defined phrase: see section 5.
- [43] A determination under the Act may involve both questions of quantification - the section 10 issue - and questions of entitlement; or it may involve one or the other.
- [44] In my judgment, s 22(4) itself makes it clear that an adjudication determination need not necessarily include the valuation of construction work: the use of the introductory word "If" makes this clear. Subsection (4) therefore only applies where a component of a determination - that is to say, in terms of s 22(1)(a), of the determination of the amount of the progress payment (if any) to be paid - includes a determination of the value of construction work. Where it does, then subs (4) applies. Where it does not (either because the work has not at all been valued before or because the value of the work has changed) then s 10(1) applies. But there is nothing in these considerations that indicates that the phrase "construction work" when used in s 22(4) should be construed in any way other than the way that it is used throughout the Act."
- 26 It will be seen that the submission attributed to Mr Christie (who appeared for the plaintiff in **Rothnere**) in para [41] was in substance the submission of Leighton in the second adjudication. Thus, and not surprisingly, John Goss relied in the second adjudication on what I had said of that submission in paras [42] to [44].
- 27 Mr Davenport said, of the distinction that I had drawn in para [43] between quantification and entitlement: "I don't understand the distinction which McDougall J makes. Sections 10 and 22(4) of the Act don't use the term "quantification" or "entitlement". They refer to the "value" of construction work. The value can only mean the consideration payable for construction work. If there is no consideration payable then the construction work has no value. It may have no value because it is worthless or because there is no entitlement to be paid for it. I agree with the submission of Mr Christie, counsel for the respondent in **Rothnere** at [41] of McDougall J's decision, that "valuation of construction work" in s22(4) means the value that the respondent to a payment claim is liable to pay."
- 28 Mr Davenport then referred to what I had said in **Rothnere** at paras [36] and [37] and continued:
"With respect, I think McDougall J has made the mistake of considering the adjudication application as a determination of individual items rather than as the determination of the consideration payable under the contract for the construction work carried out under the contract. What the previous adjudicator decided was the consideration payable under the contract. That is the value of the construction work. When he considered that no amount was payable in respect of certain work because it was not a variation, he was determining the value of the construction work under the contract. I don't believe that a determination that a respondent is not liable to pay for a variation or other work means that, so far as concerns that item, the adjudicator has not determined the value of construction work carried out under the contract and another adjudicator can, in effect, reverse the decision of the previous adjudicator. That approach is likely to lead to a proliferation of claims such as that before me which is, in effect, a claim to reverse the decision of a previous adjudicator on the consideration payable under the construction contract for construction work carried out under the contract.
If McDougall J is correct then the claimant can make yet another adjudication application and another and another until either the time limited by s 13(4) of the Act expires or an adjudicator determines that the claimant is entitled to a progress payment for each of the three items the subject of the adjudication application before me. Moreover, if McDougall J is correct, then if eventually an adjudicator does decide that the claimant is not entitled to a progress payment, the Supreme Court will not declare the determination void even though it does offend against s 22(4). McDougall J's interpretation does encourage and sanction adjudicator shopping. It offends against the basic principle of issue estoppel. It cannot be correct.
I accept that in this adjudication application the claimant has adopted McDougall J's approach in **Rothnere**. However, McDougall J's findings on this issue are obiter. He found at [24] that s 22(4) is not to be regarded as a provision non compliance with which would have the effect of undoing a purported exercise of power by an adjudicator. Therefore, as he acknowledges at [40], it was unnecessary for him to decide whether the second adjudicator had in fact complied with s 22(4)."
- 29 In the final paragraph of his determination (dealing with the question of responsibility for the costs of the adjudication), Mr Davenport said: "It appears to me that the claimant or the claimant's legal advisers have relied upon the obiter dictum of McDougall J in **Rothnere**. The respondent has not contended that McDougall J's obiter dictum is incorrect. I have decided that it is incorrect. Therefore, I have decided not to make any determination on the apportionment of adjudication fees."
- 30 As Mr Davenport recognised, the approach that he took to the relevant paragraphs of my decision in **Rothnere** was not one for which either John Goss or Leighton had contended. John Goss had submitted to him that what I had said was correct, and applicable. Leighton did not submit that it was incorrect, but that it was distinguishable.

Thus (at least, strictly speaking), Mr Davenport decided the issue on a basis for which neither party had contended. It was common ground that he had not notified the parties of his intention to do so, or invited them to put submissions on the point.

- 31 In *Musico v Davenport* [2003] NSWSC 977, I said at para [107] that where an adjudicator was minded to decide a dispute on a basis for which neither party had contended, then natural justice required the adjudicator to notify the parties of that intention, so that they could put submissions on it. I said:

“[107] If that be Grosvenor’s position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder’s entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).”

- 32 I affirmed this in para [108]:

“[108] It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have “a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it”. (See Lord Diplock in *O’Reilly* at 279.)”

- 33 In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, Einstein J referred to this aspect of *Musico* at para [10] as “authority for the proposition that an adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party.”

- 34 Each party addressed the allegation of denial of natural justice by seeking to define what it was that Mr Davenport was required to, and did, decide. John Goss submitted that the issue for him was whether, as I had said in *Rothnere*, Mr Dutton had “valued” the relevant construction work or whether, without proceeding to value it, he had decided that John Goss was not entitled to be paid for that work. Leighton submitted that the issue for Mr Davenport was whether he was required, by the terms of s 22(4) of the Act, to determine that the amount of the progress payment (if any) to be paid by Leighton to John Goss should include any amount for the three components of the March payment claim that were repeated in the May payment claim and that were common to both adjudications. Further, Leighton submitted, in considering this issue Mr Davenport was required to consider whether my reasoning in *Rothnere* required him to answer it in the way that John Goss submitted he should.

- 35 Where a party to an adjudication invokes s 22(4) of the Act, the question that is raised for consideration is whether in a prior adjudication “an adjudicator has, in accordance with section 10, determined ... the value of any construction work carried out under a construction contract”.

- 36 The statutory context in which s 22(4) appears makes plain what it is an adjudicator is to do (s 22(1)) and how it is the adjudicator is to do that (s 22(2)). Under sub s (1), the adjudicator must determine the amount of the progress payment (if any) to be paid by the respondent to the claimant, the date on which it was or is payable and the rate of interest that it bears. In reaching that determination, the adjudicator must consider only the matters set out in sub s (2):

“22 Adjudicator’s determination

...

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

- (a) the provisions of this Act,
- (b) the provisions of the construction contract from which the application arose,
- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
- (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”

- 37 The provisions of the relevant construction contract (s 22(2)(b)) will be relevant for a number of reasons. They may specify the reference dates on and from which a claimant has an entitlement to a progress payment (s 8). They may specify how the amount of the progress payment is to be calculated (s 9). They may specify how the construction work is to be valued (s 10). They may specify the due date for payment (s 11).

- 38 Although all those matters (and many others that may be taken into consideration under s 22(2)) go to the determination of the amount of the progress payment that is payable, they do not all deal with the valuation of the construction work that is the subject of the payment claim for that progress payment. The adjudicator’s task may (and usually will) comprehend more than merely the valuation of the relevant construction work. Attention to the requirements of the contract may indicate that there are to be deducted from, or offset against, that value

some particular amounts (for example, retention payments or conceded back charges for defective or incomplete work). Thus, construction work may be valued at a particular sum, but the adjudicated amount of the progress payment may be less than that sum because of some such deduction or offset.

- 39 Further, there may be a question as to whether the claimant is entitled to be paid at all for construction work: for example, for an unauthorised variation where the contract specifies that the written authority of the respondent is required as a precondition of entitlement. (I leave aside, for present purposes, the possible impact of s 34 on such a provision.)
- 40 The precise issue that s 22(4) posed for Mr Davenport was not the amount determined by Mr Dutton as the progress payment payable in respect of the March payment claim. It was whether, in determining the amount of that progress payment, Mr Dutton had valued construction work that was required to be valued in the second adjudication pursuant to the May payment claim. Sections 9 and 10 make it clear that there is a distinction between the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work. That is the distinction that I sought to point out (on reflection, in a way that was perhaps unduly brief and somewhat delphic) in para [43] of my decision in **Rothnere**.
- 41 It was, therefore, fundamental to the task to be undertaken by Mr Davenport that he apply himself to the parties' submissions based on what I had said in **Rothnere**. (Those submissions were made both in the payment claim and payment response and in support of the adjudication application and adjudication response. It is not suggested that either party sought impermissibly to extend the ambit of its submissions.)
- 42 In my view, the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case. Whatever the principles of natural justice may require in a particular case, they could not, in my opinion, require an adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision. For the reasons that I have given, I think that the relevant aspect of my decision in **Rothnere** was germane to Mr Davenport's decision.
- 43 Mr Davenport was correct in stating that the relevant part of my decision in **Rothnere** was obiter. I did not decide the case on the basis of the distinction between entitlement and valuation. If his reasoning had gone no further (ie, if he had reasoned that the relevant part of my decision was obiter, and therefore not strictly speaking binding upon him, but had decided nonetheless to act in accordance with what I had said), then no question of denial of natural justice could arise. That is because, in the hypothetical circumstances, the point would not be material. But Mr Davenport went further. He decided not only (and correctly) that what I had said was obiter, but also that it was wrong, and that he would not follow it. The question, therefore, is whether this was material; and, if so, whether he was obliged to give the parties an opportunity to address it.
- 44 If Mr Davenport had notified the parties of the issue, John Goss could have put submissions directed to at least two points. Firstly, it could have sought to develop or explain my reasoning in **Rothnere**. Secondly, it could have submitted that, regardless of the precise status of that reasoning (as obiter or as part of the reasons for decision) and regardless of whether it might be incorrect, Mr Davenport should nonetheless follow it. The latter submission would invoke considerations of certainty, and analogous to those considered (although in a different context) by the High Court of Australia in *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485, 492.
- 45 Such submissions might have had one of three results. They might have persuaded Mr Davenport that the distinction between entitlement and valuation was one required by the Act to have been made. Or they might have persuaded him that, regardless of his own views, he should defer to a reasoned expression of opinion in this Court reached after full argument on the point. Or they may have failed to dissuade him from his view that what I had said on this point in **Rothnere** was wrong, and should not be followed. Because Mr Davenport did not tell the parties that he was proposing to decide the application on a basis for which neither had contended, he deprived John Goss of the opportunity to put submissions that could well have persuaded him to take either the first or the second of those courses.
- 46 Clearly, the issue of the correctness of my reasoning, on s 22(4) in **Rothnere**, was material to the issue for Mr Davenport's decision. Each party had approached the matter on the basis that what I had said was correct. The question was whether, being correct, it governed the outcome. It might be thought to follow (subject to the fifth of Leighton's submissions to which I refer in the next paragraph) that Mr Davenport, in denying John Goss an opportunity to address his thinking, denied it in a real and material sense an opportunity to be heard.
- 47 Leighton however submitted that it did not follow that there was a denial of natural justice. Firstly, it submitted, the question of the meaning and application of s 22(4) was clearly within the defined area of dispute. Secondly, it submitted, the real question was whether Mr Davenport was constrained by the relevant part of my decision in **Rothnere** to decide the issue in favour of John Goss. Thirdly, it submitted, the parties had had an opportunity to put submissions on **Rothnere**. Fourthly, it submitted, Mr Davenport's views on the correctness of what I had said in **Rothnere** did not form part of his reasoning. Fifthly, it submitted, I could conclude that even if John Goss had had an opportunity to address the issue, Mr Davenport would have come to the same conclusion.
- 48 As to the first submission: it is correct to say that the issue that Mr Davenport was required to decide included a question as to the meaning of s 22(4) (in particular the words "determined ... the value of any construction work") and its application to the facts before him. But the debate was conducted on the basis that the meaning of the subsection had been addressed in the relevant part of my reasons in **Rothnere**. The debate was not conducted on

the basis that the relevant part of those reasons was wrong (or, for that matter, that it was obiter). As I have indicated, the submission for Leighton was that the facts in *Rothnere* were clearly distinguishable from the facts before Mr Davenport, so that he was not required to apply, by analogy or otherwise, my reasoning on this point. To put it another way: the debate before Mr Davenport concerned not the validity of the distinction that I drew in *Rothnere* at para [43], but the relevance (or applicability) of that distinction to the facts before him.

- 49 As to the second submission: essentially the same reasoning applies. If one accepts that the relevant questions were as formulated by Leighton, it does not follow that a determination of that question, on a basis not propounded by either party and not communicated to them before the determination was made, involves no denial of natural justice. There is a significant conceptual difference between saying that a decision (whether or not obiter) is correct but distinguishable, and saying that it is incorrect. A debate conducted along the former lines will not involve considerations relevant to the latter.
- 50 As to the third submission: it is correct to say that the parties had had the opportunity to put submissions on *Rothnere*. But as I have said, and as Mr Davenport recognised in the last paragraph of his determination, those submissions did not challenge the conclusions that I expressed in the relevant part of my decision.
- 51 As to the fourth submission: Leighton submitted that Mr Davenport determined the application not on the view that he took of my reasoning in *Rothnere*, but because he concluded that s 22(4) required him to adopt what Leighton called “*Mr Dutton’s valuation*” (written submissions dated 19 July 2006, para 16). There are a number of difficulties with this submission. Firstly, it begs the question, whether there was any “*valuation*” performed by Mr Dutton. Secondly, it begs the question of the proper construction to be given to s 22(4). Both of those were matters with which the relevant aspects of my reasoning in *Rothnere* dealt.
- 52 Thus, I think that the distinction that Leighton sought to draw between what I had said in *Rothnere* and what Mr Davenport considered, and decided, was illusory. As I have said, a consideration of the applicability of s 22(4) necessarily requires a consideration, among other things, of the meaning of the words “*determined ... the value of any construction work*”. The question is whether that is, or is a part or component of, the determination of the amount of the progress payment referred to in s 22(1)(a). That is the precise point discussed, although obiter, in the relevant part of my reasons in *Rothnere*. Had Mr Davenport accepted (either because he thought it was correct or because he thought, notwithstanding his doubts, he should not depart from it) and applied my reasoning in para [43] of *Rothnere*, he should have come to the conclusion that, in determining the amount of the progress payment payable in respect of the March payment claim, Mr Dutton had not determined the value of the construction work (or alleged construction work) comprised in the second, third and fourth components of that progress claim.
- 53 The fifth submission was based on the forthright way in which Mr Davenport expressed his views. But it does not follow that he would not have paid due attention to submissions put to him before those views became, as it were, finalised in his determination. In particular, it is apparent that he either was unaware of, or if aware of did not consider, the second alternative referred to in para [45] above.
- 54 I therefore conclude that Mr Davenport, in deciding the way he did, denied John Goss natural justice.
- 55 The result, according to *Brodyn*, is that John Goss is entitled to appropriate declaratory relief. I should record that John Goss made a formal submission that it was entitled not merely to a declaration but to an order in the nature of *certiorari*, quashing Mr Davenport’s determination, and that in this respect *Brodyn* was wrongly decided. For obvious reasons, I cannot accept that submission.

Want of good faith

- 56 The conclusion to which I have come renders it unnecessary for me to consider this aspect of the submissions for John Goss. In circumstances where the expression “good faith” (or its Latin ancestor, “*bona fides*”, or some cognate form) is used not only as a circumstance of invalidation on the *Brodyn* test, but also as a qualification to the statutory right of immunity given to adjudicators by s 30(1) of the Act, I do not think that it is appropriate for me to consider the point. What I have said should not be read as implying that, were it necessary to do so, I might have accepted the submissions for John Goss on this point.
- 57 The content of the concept of good faith (in the *Brodyn* sense, if I may call it that) is unsettled – see the judgment of Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at paras [63] and following. There is possibility for that concept to overlap with the reference to “good faith” in s 30(1). In those circumstances, I think that courts should be slow to decide applications on the basis of a lack of “*Brodyn*” good faith unless it is necessary to do so. In many cases, it will be possible to decide an application on the basis of denial of natural justice; and if this is so, then that should be sufficient.
- 58 The legislature has emphasised, both in debate and in the wording of the Act, the significance that it attaches to the purposes for which the Act was enacted. The work that adjudicators do is fundamental to the successful operation of the Act. It is essential that qualified and experienced people, capable of working under the very tight deadlines imposed by the Act, are available to accept appointment as adjudicators. It is not unreasonable to think that many of them are comforted, in seeking to do their best, by the immunity given to them by s 30(1) should they make a mistake. I think that there would be legitimate concern if decisions of this Court were seen to have the possibility to encroach on that immunity, by pronouncing on questions which, although they raise issues perhaps quite different to those that might be raised under s 30(1), nonetheless use, in common with it, the language of “good faith”. In this context, it is necessary to remember that adjudicators customarily, and very

properly, file submitting appearances when their determinations are challenged by proceedings in this Court. Thus, they are bound by the findings (including, if made, as to want of good faith) in circumstances where they have not taken an active part in the hearing.

- 59 These concerns are not diminished if the tentative view of Basten JA, expressed in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385, at 404 [72], [75], questioning the applicability of the concept of “good faith” to the determinations of adjudicators under the Act, is borne in mind.

Abuse of process

- 60 Leighton asserted that the conduct of John Goss in making the May payment claim and instituting the second adjudication was an abuse of process. It relied upon this, in a way that I must confess I find difficult to follow, as a defence to the whole of the claim by John Goss in this Court.
- 61 The abuse of process was said to arise from the circumstance that all three elements of the May payment claim and the second adjudication had been included in the March payment claim and had been determined by Mr Dutton in the first adjudication. It was an essential element of Leighton’s argument on this issue that Mr Dutton had determined the value of the delay and disruption claims, and that John Goss did not in the second payment claim assert that those items had any value other than that which it said had been determined by Mr Dutton.
- 62 There seem to me to be three answers to this submission. The first is that the Act by s 13(6) permits (or, more accurately, “does not prevent”) the inclusion in a payment claim of an amount that has been the subject of a previous payment claim. Any question of “**abuse of process**”, or “**adjudicator shopping**”, is dealt with by s 22(4).
- 63 The second answer is that Mr Dutton did not determine the value of the relevant construction work. In my view, it is quite plain on reading his determination that his conclusion was based not on any valuation of the work but on his view that, by the operation of cl 45 in the events that had occurred, Leighton was not liable to John Goss for the relevant claims. It was accordingly unnecessary for him to seek to value, and he did not value, the work that was the subject of those claims.
- 64 The third answer is related to the second. The argument based on abuse of process only arises for consideration if s 22(4) is to be construed as apparently Mr Davenport construed it. If that were so then it is difficult to see how John Goss could obtain relief in this Court, given that (by hypothesis) Mr Davenport’s reasoning would have been seen to be correct. In that hypothetical circumstance, abuse of process leads nowhere. Alternatively, if s 22(4) is to be construed as I have said it should be, abuse of process does not arise.
- 65 Finally, I note that although Leighton addressed the concept of abuse of process at some length in its supplementary written submissions (dated 25 July 2006) and relied upon those written submissions in its oral submissions, it did not indicate how the alleged abuse of process might be relevant to the issues arising on the claim by John Goss.

Clause 45

- 66 Clause 45 is lengthy. It is only necessary to set out cl 45.1:
- “45.1 Notwithstanding any other provision of the Works Contract to the contrary, Leighton will not be liable upon any claim by the Contractor in respect of any matter arising out of the Works Contract or otherwise including but not limited to variations to the work under the Works Contract and claims for damages unless:*
- (a) the claim together with full particulars thereof is lodged in writing with Leighton not later than ten (10) Business Days after the date the Contractor became aware or should have reasonably become aware of the occurrence of the events or circumstances on which the claim is based; or*
- (b) written notice of intention to make the claim specifying the nature of the claim is lodged with Leighton within that time and the claim, together with all particulars thereof, is lodged in writing with Leighton before the Date of Substantial Completion.”*
- 67 The form of “prescribed notice” must be so titled, and must set out particulars of the breach etc on which the claim is or will be based, the relevant provisions of the contract or other contractual basis, and the amount or likely amount of the claim.
- 68 Section 34 of the Act provides as follows:
- “34 No contracting out*
- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.*
- (2) A provision of any agreement (whether in writing or not):*
- (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
- (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.”*

Threshold point

- 69 Leighton’s primary position was that I should not consider the application for declaratory relief, because there was no existing issue relating to the operation of cl 45, and any declaration made would have no utility. It relied on the judgment of the majority in the High Court of Australia in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, where Mason CJ, Dawson, Toohey and Gaudron JJ emphasised the need for there to be a “real interest” in the subject matter of the declaration, and stressed that the jurisdiction to grant declarations of right should not be used to answer “abstract or hypothetical questions”.

- 70 John Goss submitted that there would be utility in considering the question. It stated that if it were successful on either denial of natural justice (and I have held that it should succeed on this point) or want of good faith, it would make a further payment claim replicating the claim advanced through the May payment claim and in the likely (I would have said inevitable) event of rejection, submit the dispute thereby constituted to adjudication. Thus, it said, there was utility in a determination of the point, because it would be relevant to that likely adjudication.
- 71 Further, it submitted, a determination would be of utility in any court proceedings (or arbitration) claiming final relief under the contract.
- 72 With some hesitation, but on the basis that there is almost certain to be another adjudication, I think it appropriate to consider the question. I think that there is a real issue between the parties, as to whether cl 45 bars claims of the kind that John Goss has said it will bring consequent upon its success on the natural justice point. I therefore think that there is utility in considering and ruling upon the question. In other words, I think that the issue as to the operation of cl 45 has gone beyond the merely hypothetical.

The competing submissions

- 73 John Goss submitted that "Clause 45 has the effect of providing a time limitation for the making of claims under the Act" (written submissions dated 12 July 2006, para 26). Thus, it submitted, the clause was inconsistent with s 13(4) of the Act. That subsection reads:
- "13 Payment claims
- (4) A payment claim may be served only within:
- (a) the period determined by or in accordance with the terms of the construction contract, or
- (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
- whichever is the later."
- 74 Leighton submitted that cl 45 did not prevent John Goss from serving a payment claim within the period of 12 months after construction work was last carried out under the contract (or, for that matter, at any other time). It submitted that cl 45 imposed a notice precondition on the bringing of a claim (except for the Contract Amount); but said nothing as to the time at which a payment claim could be advanced for a claim duly notified under cl 45.

Decision

- 75 I considered the operation of s 34 in my judgment in *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at paras [31] and following. I concluded at para [43] that the relevant contractual provisions did fall foul of s 34 of the Act, because they deferred inordinately the statutory entitlement given by s 8(1) to be paid from a reference date for construction work carried out prior to that reference date.
- 76 An appeal from my decision was dismissed: *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142. I acknowledge that what I had said as to the operation of s 34 did not receive unqualified approval, although having regard to the view that the Court of Appeal took of the principal issue in that case, it was unnecessary for a final view to be expressed on the s 34 point.
- 77 Hodgson JA said at para [51] that it was "**strongly arguable**" that s 34 operated as I had said it did. He gave reasons for this in the following paragraphs. Bryson JA did not share in those observations. He said at para [58] that my "demonstration of the manner in which provisions of the contract excluded modified or restricted the operation of the Act, or otherwise fell within s 34(2), was not appropriately specific." Brownie AJA referred at para [61] to the differing, although tentative, views of Hodgson and Bryson JJA, and said that since the point was not necessary to resolve the question to decide the appeal, he would express no opinion.
- 78 Bryson JA observed at para [58] that "[t]he avoidance provisions should be applied according to their terms and no more widely." The Act seeks to strike some balance between competing considerations. On the one hand, there is the protection of the entitlement of those who perform construction work, or supply related goods or services, to receive progress payments. On the other, there is the freedom of parties to contract as they wish. I respectfully agree with what Bryson JA said, although I would add that, in interpreting the "avoidance provisions", it is necessary to pay due regard to the objects of and policy underlying the Act. But, that having been said, I do not think that anything in the Act generally, or in s 34 in particular, requires the Court to strain to find that a provision of a contract offends the Act.
- 79 Clause 45 in broad substance applies to claims for payment over and above what is called the "Contract Amount" – ie, the basic stipulated contractual remuneration "excluding any additions or deductions which may be required to be made" (see definition in cl 1). It is to be contrasted with the "Contract Sum", which is the contract amount increased or decreased by "any additions or deductions ... which may be required to be made" (ibid).
- 80 Where John Goss wishes to claim an amount over and above the Contract Amount (for example, for a variation, or for delay or disruption costs), it is required, as a precondition of such a claim, to give notice under, and complying with the terms of, cl 45. It is obvious why a head contractor in Leighton's position might stipulate for such notice. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable Leighton to monitor its overall exposure to the subcontractor. Thirdly, it will enable Leighton to assess its own position vis a vis its principal. No doubt, there are other good reasons for stipulations of the kind found in cl 45.

- 81 It is correct to say that cl 45 operates to bar claims if the notice provisions in it are not followed. But it does not follow that cl 45 is thereby inconsistent with the rights given under the Act, so as to attract the operation of one or other of the alternatives set out in s 34(2).
- 82 As I have said, the ground of invalidity alleged by John Goss was that the requirement to notify a claim within 10 business days of the occurrence of the events giving rise to it was inconsistent with the right given by s 13(4) to bring a payment claim within 12 months after cessation of work under the contract. I do not accept that submission. Clause 45 says nothing about the time when a payment claim may be made. Its concern is to limit entitlement to work that might be comprised in a payment claim, whenever the payment claim is made. Provided notice is given in accordance with cl 45, the work that is the subject of the notice may be included in a payment claim made at any time, subject of course to the general provisions of the Act relating to progress claims and their contents.
- 83 It follows that the application for declaratory relief in respect of cl 45 must fail. I add only, and perhaps unnecessarily, that John Goss did not submit that the time limit set out in cl 45 was one with which it could not possibly or reasonably comply in any given case.

Conclusions and orders

- 84 John Goss has succeeded on its claim that it was denied natural justice. I therefore do not think it appropriate to deal with its alternative claim that Mr Davenport did not consider the adjudication application in good faith.
- 85 John Goss fails in its application for declaratory relief as to the invalidity of cl 45, not upon discretionary considerations but because I have concluded that the clause does not conflict with s 13(4) of the Act so as to attract the operation of s 34.
- 86 I make the following orders:
- (1) Declare that the second defendant's determination on 3 July 2006 of the plaintiff's adjudication application dated 22 June 2006 is void.
 - (2) Order that the summons otherwise be dismissed.
 - (3) Reserve for further consideration the question of costs.
 - (4) Direct that any application for an order for costs be notified to my associate and the party against whom the order is sought within 7 days of today's date; any such notification to specify both the costs order sought and in brief the reasons why it is sought.

M Christie/M A Izzo (Plaintiff) instructed by Harris Freidman Hyde Page
M G Rudge SC/R J Cheney (First Defendant) instructed by Rivlin & Associates
Submitting Appearance (Second Defendant)