JUDGMENT: Palmer J : Supreme Court of New South Wales. 4th December 2003.

Introduction

1 By Summons filed in the Administrative Law List of the Common Law Division on 8 August 2003, the Plaintiff ("Multiplex") seeks:

i) an order in the nature of certiorari to quash, on the ground of error on the face of the record, a Determination dated 24 July 2003 made by the First Defendant ("Mr Luikens") in favour of the Second Defendant ("Lahey") against Multiplex pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act");

ii) an order in the nature of certiorari to quash the Determination on the ground that Mr Luikens had no jurisdiction to make certain decisions which underlie the Determination;

iii) an order that Lahey be restrained from taking any step to enforce the Determination.

2 On 13 August 2003, the Court gave certain directions and accepted an undertaking from Lahey that it would not file the Determination as a judgment in accordance with s.25(2) of the Act without first giving Multiplex's solicitors two clear business days' notice.

3 On 2 September the Summons was transferred to the Technology and Construction List of the Equity Division. On 5 September, Multiplex filed in Court a Notice of Motion seeking an interlocutory injunction in terms of the injunction sought in its Summons. On that day, Bergin J accepted an undertaking from Lahey that it would not seek to file the Determination under s.25(2) until one business day after the determination of Multiplex's Notice of Motion for an interlocutory injunction.

4 On 11 September, Bergin J set the matter down for hearing and accepted a varied undertaking from Lahey, namely, that it would not seek to file the Determination until one business day *"after judgment in these proceedings"*. What was meant was "final judgment" so that the undertaking dispensed with a hearing of Multiplex's Notice of Motion for an interlocutory injunction. Thus, the hearing before me has been conducted as a final hearing.

The facts

5 The dispute arises out of the construction by Multiplex of a large project at Pyrmont. Multiplex entered into a subcontract with Lahey whereby Lahey was to carry out work including heritage window refurbishment and joinery.

6 From time to time Lahey submitted progress claims to Multiplex in accordance with the subcontract. On 24 May 2003, Lahey served on Multiplex a Payment Claim under s.13 of the Act for the sum of $708,823.12.

7 On 4 June 2003, Multiplex responded with a Payment Schedule under s.14 of the Act. On 19 June, Lahey applied for adjudication of the Payment Claim under s.17(1) and Mr Luikens was appointed to adjudicate the dispute.

8 Multiplex served its submissions on or about 26 June and Mr Luikens delivered the Determination under s.22 of the Act on 1 August. He found that Lahey was entitled to payment from Multiplex in the sum of $582,298.04, inclusive of GST.

9 By s.23(2) of the Act, Multiplex was thereupon required to pay the adjudicated amount to Lahey by 8 August. On that date Multiplex commenced these proceedings.

10 Mr Luikens has filed a submitting appearance and does not wish to be heard except as to costs, if necessary.

Whether certiorari lies

11 Multiplex seeks an order in the nature of certiorari under s.69(1) and (3) of the *Supreme Court Act 1970* (NSW). Section 69(1) provides in effect that where the Court formerly had jurisdiction to grant relief by prerogative writ it now has jurisdiction to grant relief by judgment or order under the *Supreme Court Act*. Section 69(3) provides: "*It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.*"

12 The first question which the parties have debated is whether a determination of an adjudicator under s.22 of the Act is amenable to relief in the nature of certiorari. At the time of hearing this question had not yet been decided by a superior court of this State. Elaborate argument was, therefore, presented by Counsel for both sides. After I had reserved my decision, however, McDougall J delivered his reasons for judgment in *Musico v Davenport* [2003] NSWSC 977, in which his Honour held that the determination of an adjudicator made under s.22 of the Act was susceptible to judicial review in the nature of certiorari. I respectfully agree in his Honour's conclusions. However, in deference to the careful submissions which were made to me and because some of those submissions were not, it seems, made to McDougall J in *Musico*, I have thought it appropriate to deal with the question of principle a little more fully than simply by following the decision in *Musico*.

13 Mr F. Corsaro SC, who appears with Mr J. Young for Lahey, submits that certiorari does not lie in respect of such a determination for a number of reasons. First, he says that the Court has power to make an order in the nature of certiorari only if the order is directed to an inferior court or a tribunal exercising governmental powers: *Craig v State of South Australia* (1995) 184 CLR 163, at 174. An adjudicator appointed under s.19 of the Act is neither an inferior court nor a tribunal exercising governmental powers, says Mr Corsaro.

14 I agree that an adjudicator appointed under the Act is not an "*inferior court*". Whether he or she is a "*tribunal*" is debatable but unnecessary to decide because it has long been held that the reach of the prerogative writs extends beyond courts or tribunals, strictly so called, to include any person or body having legal authority to determine

questions affecting common law or statutory rights or obligations of others, as long as the person or body, in making such determination, is required expressly, or by implication from the nature of the duty being performed, to act judicially. In this context, a duty to act judicially means a duty to observe the basic rules of natural justice, namely, to afford a person who might be adversely affected by the decision a reasonable opportunity of presenting an informed case in opposition and, second, to arrive at the relevant decision uninfluenced by bias or self-interest: ***R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co*** *(1920) Ltd* [1924] 1 KB 171, at 205; ***Ridge v Baldwin*** [1964] AC 40, at 74-79; ***O'Reilly v Mackman*** [1983] 2 AC 237, at 279; *Craig* at 175 fn 53; ***Musico*** at paragraphs 28ff.

15 It is clear that an adjudicator appointed under s.19 of the Act has legal authority to make a determination for the purposes of the Act. It is clear also that an adjudicator is required to act judicially in the sense explained above. A respondent must be given the opportunity to present an informed case to the adjudicator which the adjudicator must consider: s.17(5) requires that the adjudication application be served on the respondent; provision is made for the respondent to serve on the claimant and lodge with the adjudicator an adjudication response containing its submissions (s.20(1), (2) and (3)); the adjudicator must give consideration to an adjudication response if it is lodged within the prescribed time (s.21(1)); if one party is given the opportunity to make further submissions, the other must be afforded a right of reply (s.21(4)(a)). Further, the adjudicator must be impartial at least to the extent that he or she is not directly interested in the construction contract as a party: s.18(2).

Whether an adjudication affects common law or statutory rights

16 Mr Corsaro says, however, that an adjudicator's determination under s.22 does not affect anyone's common law or statutory rights or obligations. This is so, he says, because the rights and obligations of parties to a building contract are as provided in that contract or by the general law and nothing in the Act operates to change either the terms of the contract or the general law relating to the contract and the rights of the parties. He relies upon s.32 of the Act, which provides:

> "***Effect of Part on civil proceedings***
>
> *(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:*
>
> *(a) may have under the contract, or*
>
> *(b) may have under Part 2 in respect of the contract, or*
>
> *(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.*
>
> *(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).*
>
> *(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:*
>
> *(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and*
>
> *(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.*"

17 I am unable to accept this submission. A determination in favour of a claimant can produce serious, substantial and coercive legal consequences for a respondent: rights may be given to the claimant which the claimant did not previously have and rights which the respondent previously had may be taken away. For example, s.23(1) provides that if an adjudicator determines that a respondent to a payment claim under the Act is required to pay an adjudicated amount, then the respondent must pay that amount to the claimant on or before the expiration of five business days after the date of service of the determination on the respondent. A statutory right to payment within a prescribed time is thereby created, regardless of what the contract may, on its true construction, provide and a corresponding statutory obligation to pay is, likewise, created.

18 If the respondent fails to make payment within the time required by s.23(1) the claimant may obtain an "adjudication certificate" from the adjudicator stating the names of the claimant and the respondent, the adjudicated amount and the date upon which the amount was due for payment: s.24(1)(a), (3). The claimant may then file the adjudication certificate *"as a judgment for a debt in any court of competent jurisdiction"* and may enforce that judgment accordingly: s.25(1). By s.25(4) that judgment is made immune from challenge in certain circumstances. The subsection provides:

> "*(4) If the respondent commences proceedings to have the judgment set aside, the respondent:*
>
> *(a) is not, in those proceedings, entitled:*
>
> *(i) to bring any cross-claim against the claimant, or*
>
> *(ii) to raise any defence in relation to matters arising under the construction contract, or*
>
> *(iii) to challenge the adjudicator's determination, and*
>
> *(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.*"

19 A decision of an adjudicator under the Act may be transformed, simply by the process of filing, into a judgment of a court of law, binding on the parties and yet, seemingly, unimpeachable for error. I cannot see how it can be said that such a decision does not affect rights and obligations of the parties under a construction contract or the rights which the parties would have had under the common law if they were to litigate their contractual dispute in the normal way.

20 For example, the object of an adjudicator's determination under the Act is to give effect to the parties' rights and obligations under the construction contract but, supposedly, only on an interim basis: s.32(2). Nevertheless, the determination, once filed as a judgment, is capable of producing all of the consequences of a final judgment, for good or ill. A respondent may be served with a statutory demand under s.459E *Corporations Act 2001* (Cth) founded on the judgment, yet the respondent will have been deprived by s.25(4)(a)(i) of the Act of its right under the common law to extinguish or reduce the claimed judgment debt by establishing any cross claim which it might have and it will have been deprived by s.25(4)(a)(iii) of its right to appeal from the judgment entered pursuant to s.25(1) on the ground of error of law in the adjudicator's determination, which constitutes the reasons for the judgment. The respondent may be wound up if it does not comply with the statutory demand although it might have been able to demonstrate in litigation conducted in the normal way that, in fact, it was not indebted to the claimant under the construction contract at all.

21 Again, a respondent may choose to pay a statutory demand founded on an adjudicator's judgment and may successfully contest liability for the payment in subsequent litigation only to find that the claimant has since become insolvent and that the money paid under the "interim judgment" is now irrecoverable.

22 Another consequence of a respondent's failure to pay in accordance with an adjudicator's determination is that the claimant may serve on the respondent a notice specifying an intention to suspend construction work under the construction contract: s.24(1)(b). If the respondent fails to pay the adjudicated amount after two business days the claimant may suspend construction work and will then be immune from liability for any loss or damage which may be caused thereby: s.27(1), (3). Clearly, the immunity applies regardless of the provisions of the contract (s.34(1)), even if it be found in later proceedings that the claimant was not entitled to the payment.

23 It is not necessary to found the Court's jurisdiction to grant relief in the nature of a prerogative writ that the impugned decision itself directly creates or affects rights or obligations. As Malcolm CJ put it in ***Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen*** (1999) 21 WAR 158, at 189: *"Unless the remedy is effectively excluded by statute, any statutory authority on which Parliament has conferred statutory powers and duties, which when exercised* ***may lead to the detriment of a person who may have to submit to its jurisdiction,*** *is subject to supervision by the courts by way of the prerogative writs and certiorari, in particular:* R v National Joint Council for Dental Technicians; Ex parte Nate *[1953] 1 QB 704 at 707 per Lord Goddard CJ."* [Emphasis added.]

24 A consideration of the consequences which may flow directly from a determination by an adjudicator under the Act shows clearly, in my opinion, that the decision may affect the rights and obligations of parties to a construction contract or, to put it more broadly, may lead to the detriment of a respondent to a payment claim under the Act. It follows that the determination of the adjudicator is subject to the supervision of the courts in the nature of certiorari unless, as Mr Corsaro next submits, the remedy is effectively excluded by the Act.

Whether certiorari excluded by the Act

25 Mr Corsaro says that the Act in general, and s.25(1) in particular, demonstrates an intention on the part of the legislature that an adjudicator's decision is not to be challenged in any way until the rights of the parties are finally determined by other established mechanisms such as by litigation in the ordinary way, arbitration or negotiation and agreement. Mr Corsaro points to:

- section 3(1) and (2), which state the objects of the Act as being to "*ensure*" that persons undertaking construction work are entitled to receive and able to recover progress payments for that work;
- section 8(1), which provides an unqualified entitlement on the part of a claimant to receive progress payments;
- the remedies provided to a claimant to suspend construction work under s.15(2)(b), s.16(2)(b) and s.27 and to exercise a lien under s.11(3), which remedies, says Mr Corsaro, "*the legislature would not have been likely to contemplate if it was envisaged that the adjudicator's decision were reviewable*";
- section 25(1) which provides for direct enforcement of an adjudicator's decision as a judgment;
- section 24(4), set out above, which, Mr Corsaro says, evidences a clear legislative intent that the adjudicator's determination is not to be open to judicial review.

26 Further, Mr Corsaro relies heavily on the Second Reading Speech introducing the amendments to the Act which were effected in 2002. He places particular emphasis on the following passage: *"Under the new procedure there will no longer be need for a summons and a hearing before a magistrate or judge. Claimants will be able to obtain judgment for the adjudicated amount without the need to engage a solicitor. A claimant will be able to obtain judgment on the day that the claimant files the adjudication certificate with the court. These measures not only will expedite recovery of progress payments but will considerably reduce the cost of doing so. If a respondent applies to the court to have the judgment set aside after an adjudication, the respondent will have to pay into court as security the unpaid portion of the adjudicated amount. This will defeat the practice of using legal proceedings to simply delay payment.*

There will be some instances where a court may set aside the judgment. The respondent may be able to demonstrate to the court that the requirements of the Act have not been complied with; for example, that there has not been a valid adjudication. But in proceedings to set aside the judgment the respondent will not be entitled to bring a cross-claim or to raise any defence in relation to matters arising under the construction contract or to challenge the determination by the adjudicator."

27 Mr Corsaro's submission amounts to this: the intention of the legislature, to be deduced from a consideration of the Act as a whole, is to deprive the citizen of a right firmly established by the common law for his or her protection, namely,

the right to call upon the superior courts to supervise, by granting relief in the nature of prerogative writ, decisions of bodies or persons exercising a statutorily conferred power to affect the citizen's rights and interests.

28 I am unable to accept Mr Corsaro's submission. I must, of course, construe and apply the Act itself, not the Second Reading Speech. I approach construction of the Act bearing in mind the admonition of Gleeson CJ in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 77 ALJR 454, a case in which the Court considered the extent and effectiveness of a privative clause in the Commonwealth *Migration Act 1958*. The Chief Justice said at 462: "... *courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment:* Coco v R *(1994) 179 CLR 427. As Lord Hoffmann recently pointed out in the United Kingdom (*R v Home Secretary; Ex parte Simms *[2000] 2 AC 115), for parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual":* **Annetts v McCann** *(1990) 170 CLR 596. …….*

... privative clauses are construed 'by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied': Public Service Association (SA) v Federated Clerks' Union *(1991) 173 CLR 132.*"

See also ***Darling Casino Ltd v New South Wales Casino Control Authority*** (1997) 191 CLR 602, at 633.

29 I do not find anywhere in the Act unmistakeable and unambiguous language depriving a party to a construction contract of the right to apply to the Court for review by way of certiorari of an adjudicator's determination.

30 On the contrary, it appears clear enough that it was not the intention of Parliament to prohibit, by s.25(4)(a), review by way of certiorari of a judgment entered by the filing of an adjudication certificate under s.25(1). Such a judgment cannot be "set aside" by appeal because challenge to the adjudicator's determination is proscribed by s.25(4)(a)(iii). On what ground, then, could such a judgment be "set aside" – as the subsection expressly contemplates it may be – if not upon grounds which would found relief in the nature of certiorari, such as that the adjudication giving rise to the judgment had been conducted contrary to the provisions of the Act and, therefore, without jurisdiction. This is the very example referred to in the Second Reading Speech as a basis for setting aside a judgment entered pursuant to s.25(1): *"There will be some instances where a court may set aside the judgment. The respondent may be able to demonstrate to the court that the requirements of the Act have not been complied with; for example, that there has not been a valid adjudication."*

31 If Parliament did not intend that a judgment entered pursuant to an adjudication determination should be immune from review by way of certiorari, it would be strange indeed to impute to it an intention that the determination itself, which founds the judgment, should nevertheless have the protection of that immunity.

32 I conclude that there is nothing in the Act which prohibits review by way of certiorari of an adjudicator's determination under s.22. I am fortified in this conclusion by the decisions to the same effect of Gzell J in ***Abacus Funds Management Ltd v Davenport*** ([2003] NSWSC 935), at paragraphs 21 and 22, of McDougall J in *Musico* at paragraphs 34-39, and of Einstein J in ***Brodyn Pty Ltd v Davenport*** [2003] NSWSC 1019, at paragraph 19. I respectfully agree in the views which their Honours there express.

Whether certiorari lies for error of law

33 While, in general principle, relief in the nature of certiorari in respect of a determination under s.22 is not precluded by the Act, further questions arise as to the grounds upon which such relief can be given and the circumstances in which relief may be granted or withheld in the Court's discretion.

34 It seems clear enough that relief will be granted where the adjudicator's determination is the result of jurisdictional error: see *Musico* at paragraphs 42ff. Jurisdictional error will arise where, for example, the adjudicator's decision:
– was given in bad faith or was procured by fraud;
– was one which the adjudicator had no power under the Act to make;
– was made without complying with the limited requirements of natural justice provided by s.17(5), s.20(1), (2) and (3), s.21(1), s.21(4)(a) and s.18(4) of the Act; and see paragraph 15 above;
– did not deal with the question remitted for adjudication;
– determined a question not remitted for adjudication;
– did not take into account something which the Act required to be taken into account; or
– was based upon something which the Act prohibited from being taken into account.

See generally ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147, at 171.

35 The fact that it is an error of law on the part of the administrator which gives rise to any one of the above errors in no way alters the character of that error as one going to jurisdiction: see *Craig* at 179. The difficult question is whether relief in the nature of certiorari is available if the adjudicator's determination is the result of error of law which does not give rise to jurisdictional error. The question arises because of the provisions of s.69(3) and (5) of the *Supreme Court Act* and their effect upon the construction of the Act.

36 Section 69 provides, in so far as is relevant:

> *"(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.*
>
> ...
>
> *(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision."*

37 It seems to me that s.69(3) *Supreme Court Act*, in conjunction with subsection (1), vests the Court with jurisdiction to grant relief in the nature of certiorari for error of law on the face of the record in relation to every decision which would, according to the principles of the common law, be susceptible to certiorari and that, under subsection (5), that jurisdiction it taken away only if, and to the extent that, *"any legislative provision"* takes it away. Is there, then, *"any legislative provision"* in the Act which takes away the jurisdiction, conferred by s.69(3) of the *Supreme Court Act*, to quash an adjudicator's determination for error of law not giving rise to jurisdictional error?

38 In ***Musico***, McDougall J expressed the opinion that the legislative scheme set out in s.25(4) of the Act was inconsistent with the availability of non-jurisdictional error of law as a ground for quashing an adjudicator's determination. At paragraph 55 his Honour said: *"By s 25(4)(a)(iii), a respondent seeking to set aside a judgment based on an adjudication certificate cannot challenge the adjudicator's determination. That must mean that in any such proceedings, the judgment cannot be set aside upon the basis that the adjudicator (for example) erred in law in some step of his or her reasoning. It would be quite inconsistent with the legislative intention that is evident in s 25(4) to permit a challenge to be raised, by way of relief in the nature of prerogative relief, upon the ground of error of law. The legislature could hardly be taken to have intended that, having forbidden entry by the front door, it was nonetheless happy for access to be obtained from the rear."*

39 His Honour's reasoning depends upon an implied, rather than an express, provision of the Act: s.25(4)(a)(iii) concerns the setting aside of a judgment entered in accordance with s.25(1), not the quashing of a determination made in accordance with s.22. There is no other provision of the Act which (to borrow the words of s.69(5) *Supreme Court Act*) expressly *"prevents the Court from exercising its power to quash or otherwise review"* the adjudicator's determination on the ground of non-jurisdictional error of law.

40 I bear in mind the extreme reluctance of the Courts to impute to the legislature an intention to curtail fundamental rights – especially a right to review such as is conferred by s.69(1) and (3) *Supreme Court Act* -– in the absence of *"clear and unmistakable language"*: see per Gleeson CJ in *Plaintiff S157/2002*, quoted at paragraph 28 above. Nevertheless, the Courts recognise that a legislative intention to abrogate such rights does not always have to be explicit: such an intention may be found in legislation *"by necessary implication"*: see ***Annetts v McCann*** (1990) 170 CLR 596, at 599; ***Public Service Association (SA) v Federated Clerks Union of Australia*** (1991) 173 CLR 132, at 160 per Dawson and Gaudron JJ; *Darling Casino* at 633 per Gaudron and Gummow JJ.

41 In my opinion, it is necessarily implicit in s.25(4)(a)(iii) of the Act that because a judgment entered pursuant to s.25(1) is immune from review by way certiorari on the ground of non-jurisdictional error of law, so also is the adjudicator's determination which founds that judgment. I respectfully agree with McDougall J that it would be absurd to suppose that the legislature intended that an adjudication determination could not be reviewed for error of law once a judgment founded upon it had been entered but was wide open for review and quashing if a party were quick enough to commence proceedings prior to the entry of the judgment. If such a construction of the Act were embraced, very few judgments would be entered under s.25(1) before the respondent had concluded a full appeal against the determination under the guise of seeking a review in the nature of certiorari for error of law. Clearly, that is not what the legislature intended by the scheme of the Act, as has been cogently demonstrated by Einstein J in *Brodyn* at paragraph 14.

42 For these reasons, I respectfully concur in the views expressed by McDougall J in ***Musico*** and by Einstein J in ***Brodyn*** that an adjudicator's determination under s.22 of the Act may not be reviewed under s.69(1) and (3) *Supreme Court Act* for non-jurisdictional error of law on the face of the record.

What constitutes *"the record"*

43 Mr Corsaro submits that *"the record"* for the purpose of this application is confined *"only to those parts of the determination that contain findings relevant to the value of the progress payments, rather than any reasons therefore"*: Outline, paragraph 20. In support of this submission he relies upon the following passage from the joint judgment in *Craig* at 181: *"... in the absence of some statutory provision to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision."*

44 I am unable to accept Mr Corsaro's submission that *"the record"* does not include the adjudicator's reasons for his determination. The law, as stated in the above passage from *Craig*, has been modified in New South Wales by statute. In ***Kriticos v State of New South Wales*** (1996) 40 NSWLR 297, Kirby P, at 299ff, criticised the *"narrow view"* of what constituted *"the record"* which had been adopted by the High Court in *Craig*, and his Honour called for legislative review. That call did not go unheeded.

45 In 1996 s.69 of the *Supreme Court Act* was amended by the insertion of new subsections (3), (4) and (5) which made it clear that the Court had jurisdiction to quash a determination on the ground of error of law on the face of the record and that the face of the record included the reasons expressed by a tribunal for its ultimate determination: see *New Redhead Estate & Coal Co Ltd v New South Wales Coal Compensation Board* [1999] NSWCA 464, at

paragraph 24. There was no legislative amendment, however, to the general rule stated in the passage from *Craig* cited above that *"the record"* does not ordinarily include evidence upon which the impugned decision is said to be founded.

46 In ***Musico,*** at paras 65-70, McDougall J concluded that in proceedings to quash an adjudicator's determination for error of law on the face of the record, the record would include the reasons for the determination (by virtue of s.69(4) *Supreme Court Act*) and, in addition, the adjudication application and any adjudication response since, in the absence of pleadings, those documents served to define the issues for determination. If additional written submissions of the parties provided pursuant to s.24(4)(a) of the Act narrowed or clarified the issues, then such submissions would also form part of the record. If the determination referred to provisions of the contract and expressed views as their meaning and application, then those provisions would, likewise, form part of the record.

47 In the present case, as will doubtless occur in most cases, Lahey's adjudication application attached and incorporated its Payment Claim dated 23 May 2003 and Multiplex's Payment Schedule dated 4 June 2003. Those documents also form part of the record because the issues which the adjudicator had to determine cannot be understood without reference to them.

48 It is clear from the observations of McDougall J in *Musico* that the payment claim, the payment schedule, the adjudication application, the adjudication response and any further submissions may form part of the record for the purpose of defining the issues submitted for adjudication, but that does not mean that the whole of the contents of those documents thereby becomes part of the record as well. The adjudication application, the adjudication response and further submissions may append or refer to a considerable volume of evidence both oral and in the form of documents. Evidence is not normally part of the record, as the High Court observed in the passage quoted from *Craig* at paragraph 43 above. While the New South Wales legislature has altered the law as stated by the High Court in *Craig* so as to include reasons for the decision as part of the record for the purposes of review under s.69 of the *Supreme Court Act*, it has gone no further: it has not included as part of the record all of the material before the Tribunal or decision-maker, as it might have done in accordance with a suggestion of Kirby P in ***Commissioner of Police v District Court of New South Wales*** (1993) 31 NSWLR 606, at 618E.

49 It would be especially unfortunate if adjudication under the Act, intended to be a quick and cheap interim dispute resolution mechanism, could be subjected to review under s.69 *Supreme Court Act* by a proceeding which becomes *"a discretionary general appeal for error of law on the face of the record"* – to borrow the words of the High Court in *Craig* at 181 – simply because the record is allowed to include evidence and submissions generally, rather than being strictly confined to the adjudicator's reasons and to such part of the documents before the adjudicator as defined the issues for adjudication.

Alleged jurisdictional errors of law

50 By paragraph 2 of its Summons, Multiplex seeks orders quashing the Determination for error of law on the face of the record in respect of eleven specified alleged errors. By paragraph 3 of the Summons Multiplex seeks, additionally or alternatively, orders quashing the Determination for jurisdictional error on the ground of three specified errors.

51 The Determination adjudicated upon sixteen Items of claim. Multiplex originally asserted in paragraph 2 of its Summons that error of law had occurred in respect of most of the sixteen Items of claim; however, at the hearing it abandoned several of its complaints. As paragraph 3 of the Summons relies upon certain errors of law alleged in paragraph 2 as giving rise to jurisdictional error as well, it is necessary to set out all alleged errors upon which Multiplex now relies.

52 Omitting those allegations now abandoned by Multiplex, paragraph 2 of the Summons is as follows: *"Orders in the nature of certiorari to quash the Determination for error of law on the face of the record in that:*

(a) In respect of items numbered 1, ... 8, 9, 10, 11, 12, 13 and 14 in the Determination the First Defendant erroneously failed to assess the value of the work performed.

*(b) In respect of items numbered 1, ... in the Determination the First Defendant erroneously purported to determine the value of work performed under the construction contract between the Plaintiff and the Second Defendant dated 28 May 2002 (**Contract**) at 100% of the sum agreed for performance of the work in circumstances where the First Defendant determined that the work was not completed.*

(c) In respect of items numbered 1, ... 8, 9, 10, 11, 12, 13 and 14 in the Determination the First Defendant erroneously purported to place the onus of providing evidence as to the value of work performed on the Plaintiff.

(d) The First Defendant erroneously purported to determine the value of work performed under the Contract without having carried out any inspection of the work or the premises.

(e) The First Defendant erroneously determined that the Plaintiff's waiver in February 2003 of the bars on making a claim under clause 3 of the Contract was retrospective.

(f) The First Defendant erroneously applied the terms of clause 3(e) of the Contract to matters extraneous to the Contract, by determining that the Plaintiff was required to notify the Second Defendant of its disagreement with the terms of the Second Defendant's letter of 17 February 2003 within the time laid down in clause 3(e) for notification of disputes arising under the Contract.

(g) The First Defendant erroneously determined that the Plaintiff's failure to respond within a short period to the Second Defendant's letter of 17 February 2003, constituted an acceptance of the assertions contained in that letter.

(h) In respect of items numbered 10, 11, 12, 13 and 14 in the Determination the First Defendant erroneously determined that the Plaintiff was required to indicate in the payment schedule "reasons for withholding payment" when the

scheduled amount was less than the claimed amount because the work claimed had been deleted from the Contract by variation and had therefore not been performed.

(i) The First Defendant erroneously determined that the description of the deduction for cleaning charges at item BC14 of the payment schedule was not, or not sufficient, "reasons" for withholding payment for the purpose of sub-section 14(3) of the Act (item numbered 15 in the Determination).

(j) The First Defendant erroneously determined that in respect of item numbered 9 in the determination, the Plaintiff did not provide 'reasons' in its payment schedule for withholding moneys.

(k) The First Defendant erroneously failed to determine the amount of the progress payment to be paid by the Plaintiff to the Second Defendant in accordance with the provisions of the Act."

Paragraph 3 of the Summons is as follows:

"Further, or in the alternative, orders in the nature of certiorari to quash the Determination for jurisdictional error in that:

(a) The First Defendant had no jurisdiction to determine that the Plaintiff had on 13 February 2003 waived reliance upon clause 3 of the Contract retrospectively or at all.

(b) The First Defendant had no jurisdiction to determine that the Second Defendant was entitled to payment for variations other than in accordance with the terms of the Contract.

(c) The First Defendant had no jurisdiction to determine the amount of a progress payment other than by reference to the Contract or by assessing the value of work performed."

The extent of an adjudicator's jurisdiction

53 The jurisdictional error asserted in paragraph 3(a) of the Summons is founded upon the error of law alleged in paragraph 2(e) of the Summons and relates to Item 8 in the Determination. That Item is a claim by Lahey for $195,648 in respect of variations described in its progress claim as Item 33 and particularised in a fifteen page addendum to the Payment Claim. Multiplex responded to this claim in its Payment Schedule as follows: *"V(ariation) 33 previously rejected as per correspondence sent 27 May 2003"*. In a letter of 27 May 2003 to Lahey, Multiplex had denied liability for the claim on the ground that clause 3(a) of the contract required notification by Lahey of a variation claim within a certain time, the claim had not been notified within time and, in consequence, the claim was *"absolutely and conclusively barred"*. This was the only ground relied upon by Multiplex in its Payment Schedule to deny liability for Item 8.

54 In its Adjudication Submission, Lahey asserted an oral agreement made between the parties on 13 February 2003 and confirmed by Lahey in a letter dated 17 February 2003. Lahey submitted that by this agreement Multiplex had waived its right to rely on clause 3(a) of the contract in respect of the variation claimed in Item 8.

55 In paragraph 5.12 of its Adjudication Response, Multiplex conceded that an agreement had been made in February 2003 between the parties whereby Multiplex waived compliance with clause 3(a) in respect of variations, but it asserted that the waiver had been prospective, not retrospective, so that it did not apply to the variations claimed in Item 8.

56 Mr Luikens proceeded to determine the issue thus raised between the parties. He found that, by the agreement made in February 2003, Multiplex had waived the notification requirements of clause 3(a) in respect in respect of the variations claimed in Item 8 and he allowed that claim accordingly. Multiplex now submits that the adjudicator fell into jurisdictional error of law in determining the question at all. It says that an adjudicator has no jurisdiction under the Act to decide whether or not a term of a construction contract has been waived.

57 Multiplex's argument proceeds thus:

– an adjudicator's jurisdiction is limited by ss.8, 9 and 10 of the Act, which specify the matters in respect of which the adjudicator may make a determination;

– by s.9(a) the amount of a progress payment to which a person is entitled in respect of a construction contract is the amount calculated in accordance with the terms of the contract;

– clause 3(a) was an express term of the contract and Mr Luikens had no power under the Act to calculate the amount of Lahey's progress claim except by giving effect to that clause;

– the adjudicator exceeded his jurisdiction in purporting to determine the amount of the progress claim on the basis of a finding that Multiplex had waived clause 3(a).

I note that this submission was never made by Multiplex to Mr Luikens.

58 I am unable to accept this submission. When s.9(a) and s.10(1)(a) and (2)(a) speak of calculating a progress payment or valuing construction work and related goods and services *"in accordance with the terms of the contract"* they must mean *"in accordance with the relevant or applicable terms of the contract"*. What are the relevant or applicable contractual terms which affect the calculation or valuation which the adjudicator must make might depend on the construction of the express terms of the contract, or upon whether a term is to be implied in order to give the contract business efficacy, or it might depend on whether a term has been waived or cannot be relied upon because of an estoppel. If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.

59 Accordingly, I hold that Mr Luikens did not exceed his jurisdiction in determining the question which both parties raised for his decision, namely, whether or not Multiplex had waived compliance with clause 3(a) of the contract in respect of the work comprised in Item 8. If he fell into error of law in reaching his conclusion that the clause had been

waived retrospectively, that is a non-jurisdictional error which is not susceptible to review under s.69(1) and (3) *Supreme Court Act*, for the reasons I have given earlier.

Construction of s.14(3) and s.20(2B)

60 The second ground upon which Multiplex asserts that Mr Luikens fell into jurisdictional error of law is, I think, not very clearly articulated either in paragraph 3(b) of the Summons or in Multiplex's written submissions, although it received a little more elaboration in Mr Rudge's oral submissions. Mr Rudge says that the adjudicator excluded from his consideration matters to which he was required to give consideration by reason of his misconstruction of the Act. This error of law, he says, infects the adjudicator's findings in relation to a number of Items in the Determination. If Mr Rudge is correct in this assertion, the adjudicator's error would be a jurisdictional error of law rendering the Determination susceptible to review and quashing under s.69(1) and (3) *Supreme Court Act*.

61 The circumstances in which the adjudicator arrived at his conclusion in respect of Item 8 in the Determination illustrate how this issue arises.

62 Multiplex's Payment Schedule gave only one reason for rejecting the amount claimed in respect of variation work referred to in Item 8, namely, that the claim was barred by clause 3(a) of the contract. Accordingly, the Payment Schedule allowed nothing for the claim in Item 8. Multiplex's Adjudication Response, however, contained a detailed assessment of Lahey's claim for variation work in Item 8 asserting, for example, that the claim incorporated a provision for overhead of 17.5% rather than 10%, as provided by clause 3(e)(vii) and clause 6.04 of the Special Conditions. Multiplex's assessment of the claim in Item 8 was less than a third of what Lahey had claimed.

63 Mr Luikens concluded that because Multiplex's Payment Schedule gave as Multiplex's only reason for rejection of the claim its reliance upon clause 3(a) of the contract, he was precluded by s.20(2B) of the Act from having regard to the manner in which Multiplex now assessed the value of the variation work in Item 8 in its Adjudication Response. Having rejected Multiplex's submissions and its evidence as to assessment of the variation work on this ground, and having accepted Lahey's submission that Multiplex had waived reliance on clause 3(a) of the contract in respect of the work in Item 8, the adjudicator allowed the whole of Lahey's claim for that Item.

64 The relevant provisions of the Act are as follows. Section 13 relevantly provides:

"*(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release."

Section 14 relevantly provides:

"*(1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.*

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment."

Section 17 relevantly provides:

"*(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 ..."

Section 20 relevantly provides:

"*(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within:*

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).

(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant."

Section 22 relevantly provides:

"(1) ...

(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."

65 Mr Rudge submits that the words in s.14(3), *"if it is less because the respondent is withholding payment for any reason"*, are to be construed as meaning "if it is less because the respondent is holding back a payment, otherwise properly due under the contract, by reason of a cross claim or set-off": see e.g. T22.51ff, T5.1-.17. Where a cross claim or set-off is the reason for not paying the amount claimed in the Payment Claim, says Mr Rudge, that reason must be disclosed in the Payment Schedule. But where the respondent refuses to pay the amount claimed on the ground that it is not due and payable according to the terms of the contract, that is not *"withholding payment"* within the meaning of that phrase in s.14(3) and the reason for not paying the amount claimed is not required to be shown in the Payment Schedule.

66 In the present case, Mr Rudge says, one reason for not paying the amount claimed for Item 8 was that the claim was excessive when valued according to the terms of the contract. That reason was not required to be disclosed in the Payment Schedule and, consequently, the adjudicator was not entitled to exclude it from his consideration by reason of s.20(2B). That reason, together with the evidence in support of it, was, therefore, properly part of Multiplex's Adjudication Response and the adjudicator had a duty under s.22(2)(d) to consider it. His error of law in refusing to consider it was a jurisdictional error requiring that the determination be quashed.

67 I am unable to accept this submission. The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.

68 Section 14(3) requires that if the respondent to a payment claim has *"any reason"* for *"withholding payment"*, it must indicate that reason in the payment schedule. To construe the phrase *"withholding payment"* as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been *"duly made"* by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

69 A subsidiary argument which Mr Rudge appeared to advance in his oral submissions was that Multiplex had given a sufficient reason in its Payment Schedule for withholding payment of the claim in respect of Item 8 simply by stating that the claim was "rejected"; Multiplex had thereby complied with the requirements of s.14(3) and was permitted to amplify that reason in its Adjudication Response by giving particulars of valuations and calculations on the basis of which the claim had been rejected.

70 I am unable to accept this submission. For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

71 For these reasons, I am of the view that Mr Luikens did not fall into error in his construction of s.14(3) and s.20(2B) of the Act and that he rightly rejected the submissions and evidence of Multiplex in its Adjudication Response in support

of reasons for withholding payment of Item 8 which were not indicated in the Payment Schedule. It follows that Mr Luikens did not commit jurisdictional error of law in his determination of Item 8.

What a Payment Schedule should show

72 Multiplex asserted in its Adjudication Response that it was not liable to pay the claims in Items 9, 10, 11, 12, 13 and 14 because the work claimed in those Items had been deleted from the contract. Mr Luikens rejected that reasons for non-payment on the ground that it had not been indicated by Multiplex in its Payment Schedule, as required by s.14(3) and s.20(2B) of the Act. It is to be noted that Lahey did not concede that the work in those Items had been deleted from the contract and had not been performed. Multiplex now submits that Mr Luikens fell into jurisdictional error of law in failing to take into account its reasons for non-payment of these Items.

73 Item 9 relates to a claim by Lahey which depends on the value of work said to have been deleted by Multiplex from Lahey's contract. Lahey said that the value of the work deleted was $334,401. In its Payment Schedule, Multiplex dealt with the claim in the following way. In a summary on the front page of the Schedule Multiplex said merely: *"Back charges/contra charges/scope deletions (BC1-BC16)"*. Attached to the summary was a document entitled *"Assessment of progress claim number 14"*. Under a heading *"Back charges/contra charges/ scope deletions"* appears relevantly *"BC1 Deletion of southern tenancies wall panels (by others)"*; then the deduction claimed by Multiplex is shown at $434,010 and the deduction claimed by Lahey is shown at $334,401. No further explanation is given.

74 In its Adjudication Response at Tab B, Multiplex asserted in relation to Item 9 that there had been an agreement between itself and Lahey in November 2002, confirmed by letter dated 2 December 2002, that Multiplex would award the panelling in respect of the southern tenancies to another sub-contractor in order to alleviate delay and that the cost of engaging such other contractor would be about $90,000 and would be charged to Lahey's account. Multiplex asserted that it had ultimately awarded the sub-contract to Batoma Commercial Interiors Pty Ltd and that under clause 5 of the contract with Lahey, Multiplex was entitled to set off against the claim now made by Lahey the amount which Multiplex had paid to Batoma.

75 Mr Luikens was of the view that the Payment Schedule had not sufficiently indicated Multiplex's reasons for withholding payment of the full amount claimed which Multiplex sought to advance in its Adjudication Response. In my opinion, the adjudicator erred in so holding.

76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

78 Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

79 In the present case, Multiplex wished to resist payment of the claim in Item 9 on the ground that the work had been taken away from Lahey and awarded to another sub-contractor, and that the cost charged by the other sub-contractor was for Lahey's account. Cryptic though the statements in the Payment Schedule were in respect of BC1, I think that they were sufficient to indicate to Lahey the reason for non-payment of that claim for the purposes of s.14(3). The project in which Multiplex and Lahey were engaged was a large one and Lahey's sub-contract was for very extensive work. It must be assumed that Lahey was highly experienced in the building industry and was generally aware of the history of its own involvement in that project by the time it received the Payment Schedule. BC1 was referred to in the summary page in the Payment Schedule under the heading "back charges/contra charges", indicating to a person in the position of Lahey that non-payment was said to be due to an offsetting charge that Multiplex was entitled to make against Lahey or for its account. The attached assessment indicated the scope of the work: *"Deletion of southern tenancies' wall panels"*. It is a fair assumption that Lahey must have known what particular work in its sub-contract was meant by that reference. The statement *"(by others)"* must reasonably have indicated to a person in Lahey's position that work on the *"southern tenancies' wall panels"* had been done by

other sub-contractors. The fact that the Item was included as a "Back Charge" or "Contra Charge" must reasonably have indicated that Multiplex claimed to be entitled to charge to Lahey's account the cost of the work which had been done by the other sub-contractors. The difference between the amount allowed for this work by Lahey in its Payment Claim and the amount allowed by Multiplex for this Item, as shown in the assessment, must reasonably have indicated to Lahey the cost of the work done by other sub-contractors which Multiplex claimed it was entitled to charge back to Lahey. By reference to the work for this Item as specified in its own sub-contract, Lahey must reasonably have been able to form a view whether the cost charged by the other sub-contractors for the work was fair and reasonable.

80 In these circumstances, in my view, Lahey was given a sufficient indication of Multiplex's reasons for withholding payment of Item 9/BC1 it to determine whether it should persist in its claim for this Item and to understand the nature of the case it would have to meet in an adjudication.

81 In my opinion, Mr Luikens erred in concluding that he was required to exclude from his considerations the submissions and evidence advanced by Multiplex in opposition to the claim in Item 9. Accordingly, he failed to take into account matters which s.22(2)(d) required him to take into account and he thereby fell into jurisdictional error. I will return to the consequences shortly.

Items 10 to 15

82 Mr Rudge says that Multiplex's complaints as to Items 10, 11, 12, 13, 14 and 15 of the Determination fall into the same category as the complaint as to Item 9: T23.35, T25.44. Those items relate to the alleged deletion of work from the contract or to *"back charges"* and Multiplex's Payment Schedule treats each of the claims in the same way as the claim for Item 9.

83 Whereas Mr Luikens rejected Multiplex's submissions as to Item 9 on one ground, namely, non-compliance with s.14(3), he rejected Multiplex's submissions as to Items 10, 11, 12, 13, 14 and 15 on two grounds: first, the documentation provided by Multiplex in its Adjudication Response did not support its reasons for rejecting the claims and second, Multiplex had not given a sufficient indication of its reasons for rejecting the claims in its Payment Schedule in accordance with s.14(3) of the Act.

84 In my view, it does not matter in the result whether Mr Luikens was correct to reject Multiplex's submissions on the second ground. He took into account in his consideration Multiplex's reasons for non-payment of those Items by reference to the submissions and the material included in the Adjudication Response and he was not convinced of their sufficiency. If he erred in his evaluation of that material, the error was clearly non-jurisdictional so that I would not have quashed the Determination in respect of those Items even if Mr Luikens had committed jurisdictional error in his second reason for rejecting Multiplex's submissions.

Whether adjudicator must assess value by inspection

85 It is not clear from Multiplex's submissions whether it asserts that the error in respect of Item 1 of the Determination was jurisdictional error. Mr Rudge seemed to suggest (Summons para.3(c) and T25.10ff) that Mr Luikens had made no real attempt to assess the value of the work claimed in this Item, with the result that he had not discharged his duty under the Act and had therefore fallen into jurisdictional error. I cannot agree. Mr Luikens noted that Multiplex had not stated the basis for its assessment and, with some misgivings, he determined that the Tender Breakdown which formed part of the contract was the best evidence available of the value of the work comprised in the subject claim. If his Determination on this basis was erroneous, the error did not go to jurisdiction and is therefore not reviewable, for the reasons which I have given.

86 Mr Rudge seemed to suggest (Outline, para.52) that Mr Luikens, in failing to inspect the works in dispute so that he could value them for himself, failed to determine the value of Lahey's progress claim by reference to the value of the work performed, as required by s.9(b) of the Act. By reason of that failure, Mr Rudge submits, I gather, that Mr Luikens asked himself a wrong question and ignored relevant material, thereby falling into jurisdictional error.

87 This submission seems to found on the proposition that because s.21(4)(d) provides that an adjudicator "*may carry out an inspection of any matter to which the claim relates*", it follows that the adjudicator must carry out such an inspection so that if an inspection is not carried out, matter has not been taken into account which the Act requires to be taken into account.

88 In my view, this proposition cannot be supported: s.21(4) makes it clear that it is within the discretion of the adjudicator whether or not to take any of the steps set out in paragraphs (a) to (d). Exercise of that discretion one way or another will depend upon the adjudicator's judgment as to whether or not he or she will be assisted in reaching a decision within the constraints, particularly the time constraints, imposed by the Act. If the adjudicator commits an error of judgment in making that discretionary decision, it is an error within jurisdiction and is not reviewable by way of certiorari.

89 The errors of law assigned in paragraph 2 of the Summons which are not said to produce jurisdictional error are not reviewable for the reasons which I have given and I therefore do not need to discuss them further.

Whether the Determination should be quashed

90 For the above reasons, I am not satisfied that Multiplex has made out any ground for the quashing of the Determination under s.69(1) of the *Supreme Court Act* save in respect of Item 9. As I have found in paragraphs 79-81, the error into which Mr Luikens fell led him to exclude from his consideration Multiplex's evidence and submissions in respect of Item 9, which was matter which he was required to take into account by s.22(2)(d) of the Act. The

difference between the parties as to what Multiplex owes in respect of Item 9 is $99,609. That is not a trivial sum in the context of a total of $529,034.59 (excluding GST) which Mr Luikens determined was the adjudicated amount for the purpose of s.22(1)(a) of the Act. It seems to me, therefore, that the Determination is flawed by reason of a jurisdictional error. Remedies by way of judicial review are discretionary. The question now arises whether, in the exercise of the Court's discretion, the Determination should be quashed.

91 The first point to note is that although the jurisdictional error in this case has affected only one disputed claim amongst the sixteen which Mr Luikens considered in his adjudication, the Court cannot quash just the decision which affects Item 9, leaving the rest of the Determination intact. That is because the adjudication process is required by s.22(1) of the Act to produce only three findings: the adjudicated amount (if any), the date upon which that amount becomes payable and the rate of interest payable. Only these findings are reflected in the adjudication certificate which is issued under s.24(3) of the Act and filed as a judgment under s.25(1). The adjudicator has no power to correct the adjudication amount where it is shown to have been produced by error of law, whether or not jurisdictional. There is power to correct a determination under s.22(5) only in accordance with what might loosely be called the "slip rule". None of the circumstances provided in s.22(5) is applicable in the present case.

92 It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s.13(1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced. This is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands.

93 I turn now to the discretionary considerations as to whether relief under s.69(1) *Supreme Court Act* should be granted.

94 It is well established that relief in the nature of the prerogative writs may be withheld in the Court's discretion if there is another "equally effective and convenient remedy": see e.g. ***R v Hillingdon London Borough Council; Ex parte Royco Homes Ltd*** [1974] QB 720, at 728 per Lord Widgery CJ; ***Ex parte Waldron*** [1986] QB 824, at 852 per Glidewell LJ; ***Boral Gas (NSW) Pty Ltd v. Magill*** (1993) 32 NSWLR 501, at 508ff per Kirby P. In the case of an adjudication under the Act, it might be said that the legislature has provided within the Act itself the means whereby errors of law, jurisdictional or non-jurisdictional, may be corrected. The effect of s.32 is to render a determination and a judgment founded upon it merely of temporary duration until all matters in dispute may be determined finally by litigation or other dispute resolution procedures. It might be said, therefore, that errors made in the adjudication process should await correction and restitution by the process envisaged by s.32 and not by invocation of the judicial review process under s.69 *Supreme Court Act*.

95 I do not think that there can be a hard and fast rule upon which the Court acts in exercising the discretion whether to grant relief by way of certiorari in respect of an adjudication under the Act which is shown to be flawed by jurisdictional error. The authorities show that the Courts take a pragmatic approach to the question whether there is another equally effective and convenient remedy besides the grant of prerogative relief, and that the discretion is very much grounded upon the particular facts of the case. In ***Ex parte Waldron***, Glidewell LJ said at 852: "*Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available in the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.*"

96 When an adjudication under the Act is shown to have resulted from jurisdictional error, a weighty circumstance in the exercise of the discretion whether to grant relief under s.69(1) *Supreme Court Act* is the fact that the scheme of the Act requires that a respondent "*pay now, argue later*": s.25. In some cases adherence to this scheme by refusal of prerogative relief on discretionary grounds may produce no great hardship to the respondent; in other cases, it may. For example, where the amount in dispute is fairly small and the whole dispute may be speedily and cheaply resolved in the Local Court, a respondent in an adjudication may be shown to have a more effective and convenient remedy for redress of an erroneous determination in proceedings conducted in the Local Court rather than by debating esoteric questions of administrative law at great expense in the Supreme Court in an application for review under s.69(1) *Supreme Court Act*. Indeed, in such a case the Supreme Court may be able to come to the conclusion at an early stage of an application for relief under s.69 that the proceedings are doomed to failure because relief, even if otherwise available, would be withheld on discretionary grounds so that it could simply dismiss the application, or stay it on terms, under Pt 13 r5(1). In the circumstances postulated, such a result would be in accordance with the general policy of the Act. In different circumstances, the interests of justice may require the policy of the Act to give way.

97 In the present case, the amount involved in Item 9 is nearly $100,000. There is no evidence that the whole of the dispute between Multiplex and Lahey is in the process of litigation or resolution by arbitration or mediation. There is no evidence as to how long it would take before the jurisdictional error which produced rejection of Multiplex's evidence and submissions as to Item 9 could be remedied and relief, if appropriate, given in litigation conducted on a final basis.

98 Prima facie, it seems to me that jurisdictional error in the adjudication process which produces an obligation on the part of Multiplex to make a substantial payment should be corrected by the grant of relief under s.69 unless an equally effective and convenient remedy is shown. On the evidence before the Court, no such remedy has been shown to be available so that the Determination should be quashed.

Consequences of quashing a determination

99 The consequences of the Court's order in this case will doubtless be inconvenient and expensive for the parties. That is, principally, the result of the way in which the Act is structured and because it makes no express provision for what is to happen if a determination under s.22 or a judgment entered pursuant to s.25(1) is set aside for jurisdictional error of law.

100 If a payment claim which originates an adjudication comprises the whole of the claims made by that claimant under the contract, the consequence of quashing a determination may be relatively straightforward: the whole of the dispute, instead of being determined on an interim basis by the adjudicator under the Act, may simply await final determination by litigation or other dispute resolution procedures. If, on the other hand, a payment claim is in respect of many progress claims made under a contract and considerable construction work remains to be carried out under the contract, the matter will probably not be so straightforward. The claimant will no doubt want the payment claim determined before completing construction work. Can the claimant re-submit the dispute constituted by the payment claim and the payment schedule to the same adjudicator to be determined according to the reasons given by the Court in quashing the original determination? Or is the adjudicator, having made a determination under s.22(1), functus officio?

101 In my opinion, the solution lies in s.26 of the Act, which is as follows:

> *"(1) This section applies if:*
>
> *(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or*
>
> *(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).*
>
> *(2) In either of those circumstances, the claimant:*
>
> *(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and*
>
> *(b) may make a new adjudication application under section 17.*
>
> *(3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).*
>
> *(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17."*

102 An adjudicator may fail to determine an adjudication application for the purposes of s.26(1)(b) for a number of reasons. The adjudicator may become incapable of making the determination within the time required or may for some reason refuse to do so or become disqualified from doing so. But, in my opinion, an adjudicator may also fail to determine an adjudication within time for the purposes of the subsection if the determination is purportedly delivered within time but is not given according to law. For example, where the adjudicator has given a determination within time but it has been procured by fraud, it could hardly be said that the adjudicator has performed the task which the Act requires of him or her within the time stipulated in s.21(3). The same may be said of a case in which the adjudicator delivers a determination within the time stipulated but the determination has been given without jurisdiction. In such cases, it may be said that the determination is of no effect: it is as if the adjudicator had made no decision at all.

103 When an adjudication under the Act is quashed pursuant to judicial review, in my opinion the claimant becomes entitled to withdraw its adjudication application under s.26(2) upon and from the date upon which the quashing order is made because on that date it has been ascertained that the adjudicator did not determine the adjudication according to law within the time allowed by the Act, for the purposes of s.26(1)(b). The claimant may then, within five business days of the quashing order, make a new adjudication application under s.26(3). That subsection, in conjunction with s.17(3)(c), (d) and (e), makes it clear that the adjudication process does not start all over again from the beginning. Rather, there is an adjudication pursuant to a fresh adjudication application, of the dispute as defined by the original payment claim and the original payment schedule. The respondent may not, therefore, make any submissions to the new adjudicator in reliance upon reasons for withholding payment of the original payment claim which were not indicated in its original payment schedule, as provided in s.14(3) and s.20(2B). The new adjudicator appointed by the nominating authority under s.19 may, or may not, be the adjudicator who conducted the original adjudication, as considerations of convenience, saving of expense and perceptions of pre-judgment may require. In conducting the new adjudication, the adjudicator would, doubtless, have regard to the reasons of the Supreme Court for quashing the original determination. By this procedure, the saving in time and expense envisaged by the adjudication machinery of the Act may not be totally lost.

Orders

104 For the reasons I have given, I propose to order that the Determination of the First Defendant dated 24 July 2003 be quashed.

105 I will stand the proceedings over for a short time to enable the parties to bring in Short Minutes of Order reflecting these reasons. I will then hear argument as to costs.

106 If the Second Defendant declines to continue the undertaking which it has given until the making of final orders, I will immediately entertain an application for an injunction in terms of paragraph 1 of the Summons.

M.G. Rudge SC and D.A.C. Robertson – Plaintiff instructed by Minter Ellison
Sparke Helmore - First Defendant
F.C. Corsaro SC and J.J. Young - Second Defendant instructed by Colin Biggers & Paisley