

Pacific General Securities Ltd & Finmore Holdings P/L v Soliman & Sons P/L, Institute of Arbitrators & Mediators & Richard Nixon

JUDGMENT : BRERETON J : Supreme Court of New South Wales : 31st January 2006

- 1 The plaintiffs Pacific General Securities Ltd and Finmore Holdings Ltd as Owners, and the first defendant Soliman & Sons Pty Ltd as Contractor, entered into a building contract dated 7 June 2002, for works at 3-11 Hawkesbury Avenue, Dee Why. Pacific and Finmore claim to have terminated the contract for default by Soliman. Soliman has made a claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"), which the second defendant Institute of Arbitrators and Mediators Australia as nominating authority referred to the third defendant, Richard Nixon, for adjudication. On 3 November, the adjudicator determined that \$440,189.97 – being the full amount claimed – was payable by Pacific and Finmore to Soliman, with interest, within 5 business days after 3 November 2005, and that Pacific and Finmore should bear the costs of adjudication.
- 2 By summons filed on 7 November 2005, Pacific and Finmore claim a declaration that the adjudicator's determination is void, an order restraining Soliman from requesting the nominating authority to provide an adjudication certificate in respect of the determination, an order restraining the nominating authority from issuing an adjudication certificate, and alternatively an order restraining Soliman from filing any adjudication certificate. On 17 November, Soliman undertook not to request the nominating authority to provide an adjudication certificate until the final determination of these proceedings. The nominating authority and the adjudicator have submitted to such orders as the court might make save as to costs.

The building contract

- 3 The contract between Finmore and Pacific as Owners, and Soliman as Contractor, dated 7 June 2002, provided for construction works at 3-11 Hawkesbury Avenue, Dee Why, involving the demolition of four residential dwellings and one commercial building, and the construction of a three storey residential flat building containing 25 two-bedroom and one one-bedroom units, one commercial/retail space and basement car parking for 31 vehicles, for a price of \$4,750,000.00 inclusive of GST. The contract was varied, although not relevantly for present purposes, by an amending agreement dated 19 September 2002.
- 4 Clause 21 of the contract provided that any notice required to be given under the Agreement was deemed to have been given if sent by facsimile transmission to the party's address outlined in the Agreement or the last known address of that party if the address had changed, and was deemed to have been received on the date it was faxed. Schedule 1 shows the Owners as Finmore, of Suite 3, Level 10, 55 Lavender Street, Milsons Point, and Pacific, of Burns Philp House, Level 1, 7 Bridge Street, Sydney. No facsimile number is stated for either.
- 5 From 14 February 2003, Finmore's registered office has been Level 4, 430 King Street Wharf, 5 Lime Street, Sydney. However, in the period immediately prior to September 2005, its principal place of business was an office adjacent to that of Pacific, on Level 1 of Burns Philp House at 7 Bridge Street, Sydney.
- 6 By letter dated 27 January 2005 from the Owners' solicitors Gadens, to Soliman, the Owners purported to terminate the contract with immediate effect. Soliman disputes the Owners' entitlement to terminate and contends that the purported termination was a repudiation, which Soliman claims to have accepted on 3 February 2005.

The first adjudication

- 7 On 4 February 2005, Soliman made a payment claim under the Act for \$440,189.98, of which all but \$55,773.80 had been the subject of an earlier progress claim and related to construction work said to have been performed, and goods supplied and services rendered, up to 26 July 2004. The sum of \$55,773.80 was said to relate to work performed in September, October and November 2004.
- 8 A payment schedule was apparently delivered by the Owners on 18 February 2005.
- 9 On 4 March 2005, Soliman made an adjudication application to the Nominating Authority, which referred it to David Campbell-Williams for adjudication. On 11 March, Mr Campbell-Williams sent notice pursuant to s 19 of acceptance of the reference to the Contractor, but he sent notice to the Owners only on 18 March 2005.
- 10 On 31 March 2005, Mr Campbell-Williams purported to make an adjudication determination in respect of that claim. Following a hearing on 14 April, McDougall J on 20 April 2005 declared that determination to be void, essentially upon grounds that the Owners did not receive the adjudicator's s 19 notice, and were thus deprived of an opportunity to provide an adjudication response.

The second adjudication

- 11 On 21 April 2005, Soliman served written notice on the Nominating Authority withdrawing the original adjudication application, and lodged a further adjudication application, purportedly pursuant to s 26 of the Act, which provides that 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)". Soliman contended that on 20 April, when the original adjudication was declared void, it became entitled to withdraw its original application and make a new application, and that it had 5 business days from 20 April in which to do so.
- 12 On 22 April the Nominating Authority referred the matter to Mr Nixon for adjudication. On 27 April, Mr Nixon served notice of acceptance on the parties. On 28 April the Owners, and on 29 April the Contractor, forwarded to Mr Nixon signed Agreements on Fees in respect of his fees.
- 13 The Owners lodged an adjudication response which contended (by paragraphs 1 to 25) that the purported adjudication application was not validly made, and (by paragraphs 26 to 117) that they were entitled to

withhold payment for various reasons, including that the works were not 100% complete, that some of the work was defective, that \$55,773 worth of work had not been completed during the period to which the claim related, that the works the subject of the claim for retention had not been completed or were defective, and that the Owners were entitled to a set-off for liquidated damages for delay.

- 14 On 5 May 2005, Mr Nixon dismissed the second adjudication application as invalidly made, for not having been submitted in accordance with s 26(3). Section 26 applies, relevantly, if an adjudicator fails to determine an application within 10 business days after acceptance. Mr Nixon took the view that the latest date for determination of the first adjudication application was 5 April; the consequence of McDougall J's decision was that there was no valid adjudication made within time, but that the latest date for withdrawal and resubmission was 5 business days after 5 April, namely 12 April, so that the second adjudication application was not submitted within time.
- 15 On 6 June 2005, the Owners commenced proceedings 50045/05 in this Court, in the Technology and Construction List, which remain pending, in respect of the alleged termination of the construction contract, and breaches of it.

The payment claim

- 16 On 2 September 2005, Soliman purported to serve another payment claim, which is apparently identical in substance to the original payment claim of 4 February 2005, by serving a copy by facsimile on Pacific at its Burns Philp House address. A copy was apparently forwarded by facsimile to Mr Peter Dixon, who was the sole director of Finmore, at a different telephone number, 9299 5562.
- 17 On 6 September, Pacific wrote to Soliman, referring to the claim of 2 September, mentioning that the contract had been terminated and that litigation was underway, and concluding: "We again refute all of your claims and as such do not intend to make the payment claimed".
- 18 On 21 September, Soliman sent a letter by facsimile, addressed separately to each Owner, Pacific at Burns Philp House and Finmore at its registered office at Level 4, Suite 430, 5 Lime Street, King Street Wharf, fax 9299 5562, asserting that no payment schedule had been received and giving notice of Soliman's intention to apply for adjudication under s 17(1)(b) in default of lodgement of a payment schedule.
- 19 On 26 September, a letter on the letterhead of Pacific but signed by Mr Dixon for and on behalf of both Pacific and Finmore was sent by facsimile to Soliman, referring to the payment claim of 2 September and the previous response of 6 September, reiterating that the contract had been terminated and that litigation was underway, and asserting "we again refute all of your claims and as such do not intend to make the payment claimed".

The adjudication application

- 20 On 13 October, Soliman made an adjudication application to the Nominating Authority. Its solicitors caused a single copy, addressed to both Owners, to be delivered to the offices of Pacific at Level 1, Burns Philp House. Soliman contends that Finmore was served "care of" Pacific, and says that this was consistent with the course of dealing during the contract. Mr Dixon says that he thinks he saw the adjudication application.
- 21 Meanwhile, on 16 September, a receiver and manager, Mr Reidy of Rogers & Reidy, had been appointed to Finmore. No notice of his appointment was given to Soliman before 21 October 2005. Mr Reidy says, and there is no evidence to the contrary, that he was not served with the payment claim, nor the adjudication application.
- 22 On 17 October, the Nominating Authority referred the matter to Mr Nixon for adjudication. He accepted the reference on 19 October, and that day forwarded Notice of Acceptance to Soliman, to Pacific (at Level 1, Burns Philp House, 7 Bridge Street, Sydney, by facsimile (02) 9241 666 [sic]), and to Finmore (also at Level 1, Burns Philp House, 7 Bridge Street, Sydney, by facsimile (02) 9241 6661). A member of his staff telephoned each recipient to confirm that the document had been received. Mr Dixon spoke on the telephone to the adjudicator's office and acknowledged receipt that morning of the adjudicator's notice. He also informed the adjudicator that the matter was in the Supreme Court, and that Finmore was in receivership. Mr Nixon's "Agreement on Fees" was returned to him executed this time only by Soliman, and not by Pacific or Finmore.
- 23 On 21 October, Ebsworths on behalf of Pacific delivered a submission to Mr Nixon which purported to be an adjudication response, asserting that a payment schedule had been provided to Soliman on 6 September, and that the adjudication application had not been properly served on Finmore. It also purported to repeat, by reference, the other matters raised in the adjudication response to the application of 21 April 2005.
- 24 On 24 October, the adjudicator required the parties to provide further information, which in due course both did. Pacific also provided a further unsolicited submission on 31 October 2005 which referred to action being undertaken in respect of Soliman's builders warranty insurance.

The adjudicator's determination

- 25 On 3 November, Mr Nixon gave his determination - that \$440,189.97, being the full amount of the payment claim, was payable by Pacific and Finmore to Soliman, with interest, within 5 business days after 3 November 2005, and that Pacific and Finmore should pay the costs of the adjudication.
- 26 The adjudicator found that the letter of 6 September was a valid payment schedule, and accordingly that Pacific was entitled to lodge an adjudication response. He determined that the adjudication application had been validly served on Finmore, because (1) a letter to Soliman dated 26 September 2005 in respect of the project which refers to the payment claim of 2 September was signed for and on behalf of Pacific and Finmore by Mr Dixon, a director of Finmore, (2) Mr Dixon's telephone call of 19 October to the adjudicator indicated that Finmore was

aware of the adjudication application, and (3) no-one had advised Soliman of the appointment of a receiver and manager, so it could not be aware of any requirement to serve Finmore at any other address. However, having determined that the submissions in the adjudication response either could not be considered (because they were not matters included in the payment schedule) or did not relate to the contents of the payment schedule, the adjudicator concluded [6.03.06]: "I have determined that, in the absence of any valid submission from the respondent which refutes the claim of Soliman, then Soliman is entitled to payment of the sum of \$440,189.97 (which includes GST)".

Review of adjudications

- 27 The grounds upon which an adjudication determination under the Act can be impugned in judicial review proceedings were considered by the Court of Appeal (Hodgson JA; Mason P and Giles JA agreeing) in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. McDougall J concisely distilled their essence in *Timwin Construction Pty Limited v Façade Innovations Pty Limited* [2005] NSWSC 548, [1], where his Honour said that judicial review was available in the following circumstances:-
- Where an adjudicator fails to comply with the basic and essential requirements prescribed in the Act for there to be a valid determination;
 - Where the adjudication determination does not amount to an attempt in good faith to exercise the relevant power, having regard to the subject matter of the legislation;
 - Where a party has been denied natural justice (for which purpose the narrow statutory scheme limits the extent of natural justice required); and
 - Where the adjudication determination was procured by fraud in which the adjudicator was complicit.
- 28 Where any of those circumstances apply, an adjudicator's determination is not a "determination" within the meaning of the Act at all, and is not merely voidable, but void [Brodyn, [52]].
- 29 For the Owners, Mr Parker submits that:-
- There was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the payment claim was not made within 12 months of performance of the latest of the construction work to which it relates;
 - There was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the payment claim did not sufficiently specify the construction work in respect of which it was made;
 - There was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, and/or there was a denial of natural justice, in that the adjudication application was not validly served on Finmore;
 - There was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the adjudicator did not have regard to certain of the submissions contained in the adjudication response;
 - The adjudication determination was not a valid and effective discharge of the adjudicator's function, because the adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, but having rejected the matters raised by the Owners simply accepted without examination the Contractor's claim; and
 - The Court should as a matter of discretion restrain Soliman from prosecuting its adjudication claim, pending resolution of the proceedings in the Technology and Construction List, in circumstances where the contract has long since been terminated, and Soliman has brought two previous unsuccessful adjudication applications.

Is the determination void for service out of time of the payment claim?

- 30 The Owners submit that there was a non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the payment claim was not made within 12 months of performance of the latest of the construction work to which it relates.

- 31 Section 13 of the Act relevantly provides as follows:-

13 Payment claims

- (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.
- (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.

- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.
- 32 Amongst the basic and essential requirements which are preconditions to a valid adjudicator's determination is "service by the claimant on the respondent of a payment claim (s 13)" [Brodyn, [53]]. Were the matter unaffected by authority, Mr Parker's argument - that that requirement was not satisfied, in the light of s 13(4), by purported service of a claim more than 12 months after the construction work was last carried out - might have warranted closer consideration, but decisions of Campbell J and McDougall J, which I am far from prepared to say are plainly wrong, are to the contrary.
- 33 In **Lifestyle Retirement Projects No.2 Pty Ltd v Parisi Homes Pty Ltd** [2005] NSWSC 705, Campbell J (at [19]) held that precise compliance with s 13(4) was not a basic requirement essential to validity of a determination. His Honour said:-
- 18 *It must immediately be noted that the language of section 13(2) is in one sense mandatory, in stating what a payment claim "must" do. By different verbiage, section 13(4) is likewise, in that same sense, mandatory by saying that the payment claim "may be served only within" a particular period of time.*
- 19 *In my view, consistently with Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 390-391, the question of what was intended to be essential for compliance with the basic requirements of a determination is not decided solely by these textual matters. The fact that the language of section 13(4) is in one sense mandatory shows that it sets out a "requirement", but not that it is a basic and essential requirement. Rather, the question of what is essential needs to be decided, bearing in mind the object and purpose of the legislation. It is concerned with providing a quick and relatively easy way in which an obligation to make a payment on account of what ultimately might be found to be due can be established. Viewed in that light, I do not find that precise compliance with section 13(4) is a basic requirement which is essential to a purported determination actually being a determination under the Act. Rather, section 13(4) is one of the "more detailed requirements", which Hodgson JA held exist in the Act. When there has been a document which purports to be a Payment Claim served, the fact (if it were a fact) that the construction work to which the claim relates was last carried out more than 12 months before the payment claim was served does not mean that the "basic and essential requirement" of "service ... of a payment claim (s.13)" has not been complied with. And even if it turned out that the adjudicator was mistaken in deciding that section 13(4) had been complied with, that would not mean that his determination was void, when he has addressed in a bona fide way the question of whether section 13(4) has been complied with.*
- 34 And in **Energetech Australia Pty Ltd v Sides Engineering Pty Ltd** [2005] NSWSC 801, McDougall J (at [25]) concluded that compliance with s 13(4) was not "basic and essential" in the relevant sense. His Honour explained why:-
- 25 *Secondly, I think (and this may be no more than a variant or consequence of the first reason) the requirement of s 13(4) is not "basic and essential" within the meaning of that phrase as it was explained by Hodgson JA in Brodyn. It may be readily understood (if I may say so with respect) why the matters identified by his Honour in that paragraph have the "basic and essential" quality to which he refers. As to the first, the terms of the Act are not engaged if there is no construction contract. Equally, in terms of the second, third and fourth alternatives, there is no valid adjudication unless they are engaged. Finally, in the case of the fifth requirement, it is simply a reflection of the statutory duty cast upon the adjudicator.*
- 26 *Those matters do not by and large require the investigation and resolution of difficult questions of fact or law. Usually, it will be clear whether or not there is a construction contract (particularly having regard to the wide definition of that expression in s 4 of the Act); and equally it will usually be clear whether (for example) a document of the kind described by s 13(1) has been served.*
- 27 *However, when one looks at the question of s 13(4), a determination of the point raised by that question necessarily involves considerations of questions of fact, in the context of the relevant statutory provisions. The entitlement may well be conditional upon (in this case) service of a payment claim within the period determined or in accordance with the terms of the contract. That, however, I think, is a matter for the adjudicator to determine. If it is a matter for the adjudicator to determine, then, consistent with the approach indicated in Brodyn at 441 [54], it is a matter that, prima facie, does not fall within the "basic and essential requirement".*
- 35 Although Mr Parker argued that Energetech could be distinguished on the basis that there it was s 13(4)(a) and not, as here, s 13(4)(b) which was relevant, it would be an extraordinary and improbable construction of the section that resulted in compliance with the time limit being not essential when it was fixed by the terms of the construction contract, but essential when it was not so fixed.
- 36 Accordingly, the 12-month limit is not a basic and essential requirement non-compliance with which results in invalidity, but a matter within the jurisdiction of the adjudicator to determine, rightly or wrongly.
- 37 Moreover, the requirement of s 13(4)(b) is only that the latest of the construction work the subject of the claim have been carried out in the relevant 12-month period [**Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd** (2004) 61 NSWLR 515, 520 [18]]. Accordingly, to make good a challenge on this ground, were

it otherwise available, the Owners would have to show that none of the construction work the subject of the payment claim had been performed within 12 months before the claim was made.

38 Mr Dixon gave evidence to the effect that it was his “best recollection” that no work had been performed by Soliman after the end of August 2004. Mr Farrelly, an architect engaged on the project, undertook a site inspection on 31 August 2004, when he recorded that there had been no foreman on site since 20 August and that “effectively” no workers had been on site since that date (a labourer being on site on a number of days simply to provide access for the architect) and he listed various defects which he then observed. He inspected the site again on 27 January 2005, when he says that he observed that none of those defects had been rectified, and from his observations he “formed the opinion that there had been no work performed on any part of the site after 31 August 2004”. His evidence was not the subject of cross-examination.

39 Mr Soliman, on the other hand, asserted that in his belief or opinion, work had been performed after 31 August 2004. In this respect, his “opinion” or “belief”, which was often accompanied by a disavowal of actual knowledge, was generally even less compelling than the contrary “best recollection” and “opinion” of Mr Dixon and Mr Farrelly. Surprisingly, no work diaries – which might readily have shown when Soliman did work on the site - were tendered, although Mr Soliman said that they were at his office.

40 However, Mr Soliman identified some external tiling, which he said was claimed under the head of landscaping, performed after that date. Soliman tendered invoices from subcontractors, one from Vogue Tiling Pty Ltd dated 10 October 2004 in respect of work which the invoice describes as having been carried out in October for \$6159.98, and one from Bing Pty Ltd dated 18 October 2004 for painting described in the invoice as having been done in October 2004, for \$2208. There is no reason to doubt these invoices, and the photographic evidence tendered on behalf of the Owners does not demonstrate that the works described in them were complete in July 2004, when the photographs were taken, as it emerged that the photographs did not depict all the external tiled areas. In those circumstances, I prefer the apparently contemporaneous invoices to the “best recollection” of Mr Dixon and the “opinion” of Mr Farrelly, and I find that some painting and tiling was performed in October 2004.

41 Mr Parker argued that even if that be so, nonetheless that work did not form part of the payment claim. Mr Parker correctly pointed out that, according to the previous payment claim of 23 June 2004, there remained to be completed only 1% of the tiling with a value of \$1468, only 1% of the painting with a value of \$90, and only 20% of the landscaping, with a value of \$5460. But Mr Soliman explained that most of the work performed by Vogue in October was external tiling, which was claimed under “landscaping” rather than under “tiling”. While the claim, in respect of works said to have been performed in and after September, does not correspond with the amounts shown as yet to be completed in the June claim, but includes substantially greater amounts than the previous claim had indicated remained outstanding (including a significant sum for completion of a lift which, on any view of the evidence, Soliman did not complete), it does not follow that the subject claim does not include the tiling and painting work which I have found was performed in October. Mr Soliman says that it does, and has explained where it appears – essentially, under “landscaping”. Moreover, I cannot conceive that Soliman omitted from the payment claim work performed on its behalf by Vogue and Bing for which it was entitled to claim, while including a much more dubious claim in respect of the lift. I therefore accept that the work performed by Vogue and Bing in October 2004 is included, at least in part, within the amounts claimed under painting, tiling and landscaping.

42 Accordingly, the payment claim, made on 2 September 2005, was made within 12 months of performance of the latest of the construction work to which it related.

43 It follows that the determination is not void for service out of time of the payment claim, since the 12-month limit for serving a claim is not a basic and essential requirement non-compliance with which results in invalidity, but a matter within the jurisdiction of the adjudicator to determine, rightly or wrongly and, in any event, the payment claim was made within 12 months of performance of the latest of the construction work to which it related.

Is the determination void for insufficient specificity in the payment claim?

44 The Owners submit that there was non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the payment claim did not sufficiently specify the construction work in respect of which it was made. Their complaint is that the sum of \$55,773.80 is merely identified as the “value of works completed in this period” with no identification of the period or what work was in fact done.

45 Although precision and particularity is required to a degree sufficient to apprise the parties of the real issues in dispute, regard may be had to the familiarity which the parties will have with construction industry practices and the formality and particularity of a pleading is not expected [*Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [76]]. A payment claim is not a nullity for non-compliance with s 13(2)(a), at least unless the non-compliance is patent on the face of the claim [*Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409, [34] – [39] (Hodgson JA), [46] – [48] (Santow JA)]. Moreover, compliance with s 13(2) is not a basic requirement fundamental to the validity of an adjudication, but one of the “more detailed requirements”, exact compliance with which is not essential to a valid determination [*Brodyn*, [54] – [55]].

46 In fact, it is plain that the “period” referred to in the payment claim is the period since the last progress claim (of June 2004), and the claim is apportioned across several heads showing the percentage complete under each. Mr Dixon conceded in cross-examination that he understood precisely what was being claimed.

47 It follows that the determination is not void for insufficient specificity in the payment claim, since it sufficiently specified the construction work in respect of which it was made, and even if it did not, the sufficiency of a payment claim is not a basic and essential requirement non-compliance with which results in invalidity, but a matter within the jurisdiction of the adjudicator to determine, rightly or wrongly.

Is the determination void for want of service of the adjudication application?

48 The Owners submit that there was non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, and/or a denial of natural justice, in that the adjudication application was not validly served on Finmore, in that Mr Reidy, the receiver of Finmore, was not served with the adjudication application.

49 Although the making of an adjudication application to a nominating authority and its reference to and acceptance by an eligible adjudicator are identified in *Brodyn* as “**basic and essential requirements**”, service of the adjudication application on the respondent is not [*Brodyn*, [53]]. However, a denial of natural justice, to the extent that natural justice is to be afforded as contemplated by the procedure set up by the Act, including failure to give notice to a respondent, invalidates an adjudication [*Brodyn*, [57]]:- *The circumstance that the legislation requires notice to a respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and, in my opinion, such is the importance generally of natural justice that one can infer a legislative intent that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.*

50 The ambit of the measure of natural justice required by the Act extends beyond the “basic and essential requirements” which are preconditions to validity, to the particular process during the adjudication of receipt and consideration of the submissions referred to in the Act [*Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 326, Macready AsJ]. Thus a denial of natural justice (or procedural fairness) will invalidate an adjudication, but only if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act. Failure to serve notice of an adjudication application to the extent that the Act requires service would ordinarily be a denial of that measure of natural justice to which a respondent is entitled under the scheme of the Act.

51 Relevantly, the Act provides:-

31 Service of notices

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

- (a) by delivering it to the person personally, or
- (b) by lodging it during normal office hours at the person’s ordinary place of business, or
- (c) by sending it by post or facsimile addressed to the person’s ordinary place of business, or
- (d) in such other manner as may be prescribed by the regulations for the purposes of this section, or
- (e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person’s ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

52 The construction contract provides as follows:-

21. Notices

21.1 Any notice required to be given under this agreement is deemed to have been given should any of the following events have occurred:

21.1.1 If the notice is delivered by hand to the other party;

21.1.2 If the notice is posted by ordinary pre-paid mail;

21.1.3 If the notice is sent by facsimile transmission to the party’s address outlined in this Agreement OR the last known address of that party if the address has changed.

21.2 Any notice is deemed to have been received on the date it was delivered by hand OR the same day as it was faxed OR the day following the day it was posted.

53 Although at first sight the structure of clause 21.1 taken alone might suggest otherwise, in my opinion on its proper construction the words “to the party’s address ... has changed” in 21.1.3 govern not only clause 21.1.3, but 21.1.1 and 21.1.2 also. The references to “address” in 21.1.3 indicate that it was intended to cover at least service by post (under 21.1.2) as well as service by facsimile (under 21.1.3). Such a construction is necessary to give sensible effect and operation to 21.1.2, in particular. Once that it recognised, the better view is that, though engrossed as part of 21.1.3, those words should be read as if they followed a semi-colon after “transmission” and formed a further clause governing all of 21.1.1, 21.1.2 and 21.1.3.

54 Accordingly, it would be valid service on Finmore under the contract (and therefore under s 31(1)(e)) if the notice was delivered by hand to Finmore at its address outlined in the contract or, if it had changed, the last address of Finmore known to Soliman.

55 The evidence establishes the following:-

The construction contract showed Finmore's address as Suite 3, Level 10, 55 Lavender Street, Milsons Point, and that of Pacific to be Level 1, Burns Philp House.

However, immediately prior to 16 September 2004, Finmore's ordinary place of business was an office adjacent to Pacific's, at Level 1, Burns Philp House at 7 Bridge Street, Sydney, which Soliman knew as Finmore's address.

On 16 September, a receiver and manager, Mr Reidy of Rogers & Reidy, was appointed to Finmore. No notice of his appointment was given to Soliman before 21 October 2005.

Although Mr Dixon said that with the appointment of a receiver and manager, Mr Reidy was "in charge" of Finmore's affairs and operated from other premises, Mr Dixon was, at least as late as 26 September 2005, acting on behalf of Finmore in respect of the payment claim of 2 September, since a letter to Soliman dated that day was signed for and on behalf of Pacific and Finmore by Mr Dixon, on Pacific's letterhead and using the Burns Philp House address.

Finmore had no employees other than Mr Dixon, who was also its sole director, and directing mind.

On 13 October, Soliman's solicitors served a single copy of the adjudication application, addressed to both Pacific, and to Finmore "care of" Pacific, at Level 1, Burns Philp House.

The adjudication application came to the notice of Mr Dixon, the sole director of Finmore, on or about 13 October. This finding is supported by Mr Dixon's concession that he thinks he saw the application, and the evidence that he received and acknowledged the adjudicator's subsequent notification of acceptance of the reference.

The adjudicator's acceptance of the reference came to the notice of Mr Dixon on or about 19 October.

The receiver was not served with the adjudication application. However, he was notified of its pendency by facsimile letter from the adjudicator on 24 October.

56 I am not satisfied that the appointment of the receiver had, by 13 October 2005, effected any change to Finmore's ordinary place of business, which I find remained adjacent to that of Pacific at Level 1, Burns Philp House. The adjudication application was therefore lodged at Finmore's ordinary place of business, and accordingly, it was served on Finmore in compliance with s 31(1)(b).

57 Further, the adjudication application was delivered by hand to Pacific and Finmore at the Burns Philp House address, which was then Finmore's last address known to Soliman, its address having changed from the Milsons Point address specified in the contract. Accordingly, it was served on Finmore in compliance with s 31(1)(e) and cl 21.1.1.

58 Moreover, provisions such as s 31, which authorise convenient methods of serving a company without having to consider rules of court [*Players Pty Ltd v Interior Projects* (1996) 20 ACSR 189, 195; 14 ACLC 918, 922-3], are facultative and not exclusive or mandatory [*Howship Holdings Pty Ltd v Leslie (No 2)* (1996) 41 NSWLR 542; 133 FLR 307; 21 ACSR 440], and do not exclude any means of service proved to have brought a document to the actual attention of the company [*Ketrim Pty Ltd v AS & L Pty Ltd* (2004) 214 ALR 206; [2004] NSWSC 1046, [16]-[19]]. In this respect, delivery of a document to one director who is the directing mind and will of the company can bring the document to the attention of the company, as where the document is delivered to the only director of a sole-director company [*Emhill Pty Ltd v Bonsoc Pty Ltd* (2004) 50 ACSR 305; [2004] VSC 322]. The evidence shows that the adjudication application actually came to the notice of Mr Dixon, Finmore's sole director and directing mind, and accordingly, there was effective service on Finmore on this basis also.

59 However, Mr Parker argues that it was a consequence of the appointment of a receiver and manager that service on the receiver was required if there were to be valid service. He was unable to refer to any authority for that proposition.

60 The Corporations Act 2001 (Cth) relevantly provides as follows:-
109X(1) [Service of document on company] For the purposes of any law, a document may be served on a company by:

- (a) leaving it at, or posting it to, the company's registered office; or
- (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
- (c) if a liquidator of the company has been appointed — leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
- (d) if an administrator of the company has been appointed — leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.

61 Sub-section (1)(c) and (d) have the effect that if a liquidator or administrator has been appointed to a company, a document may be served on the company by leaving it at, or posting it to, the last address of the office of the liquidator or administrator. But it makes no similar provision in respect of a receiver. This is unsurprising, since although the appointment by a creditor under a charge of a receiver and manager may well dominate exclusively a company's affairs and dealings and relations with the outside world, it does not permeate the company's internal domestic structure, which continues to exist notwithstanding that the directors no longer have authority to exercise their ordinary business management functions [*Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSW 782, 790; (1969) 92 WN(NSW) 199 (Street JJ)] and does not completely

displace the directors, but effectively suspends their powers to the extent necessary to enable the discharge of the receiver's functions [*Re Emmadart Ltd* [1979] Ch 540, 544; *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301; *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814; cf *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53].

- 62 Thus the appointment of a private receiver (unlike that of a liquidator or administrator) does not have any special consequence so far as service is concerned, and does not mean that service in a manner which would otherwise have been valid is no longer sufficient. Nor was any right or interest of the receiver or secured creditor liable to be affected by the adjudication application, since a determination could not create a right to Finmore's assets and undertaking of higher priority than that of the chargee and its receiver.
- 63 Accordingly, there was effective service of the adjudication application on Finmore, and there was no denial of natural justice.
- 64 It follows that the determination is not void for want of service of the adjudication application, since the adjudication application was sufficiently served on Finmore, Finmore had sufficient notice of the application that there was no denial of natural justice, and there was no requirement to serve notice on Finmore's receiver.

Is the determination void for failure to have regard to relevant submissions?

- 65 The Owners submit that there was non-compliance with a basic and essential requirement prescribed in the Act for there to be a valid determination, in that the adjudicator did not have regard to certain of the submissions contained in the adjudication response.
- 66 The adjudicator's obligation, imposed by s 22(2)(d), is to consider the payment schedule "together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule". A failure to consider, at all, a relevant submission contained in an adjudication application or response, which the adjudicator is required by the Act to consider, is jurisdictional error, or a failure of a basic and essential requirement, resulting in invalidity of an adjudication [*Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, [45]-[51], [123]].
- 67 In the words of s 22(2)(d), the obligation is limited to such submissions as have been *duly* made. A respondent cannot include in an adjudication response any reasons for withholding payment which have not already been included in the payment schedule [s 20(2B); *Multiplex Constructions v Luikens*, [66]-[68]]. In this context, the Act uses "reasons" in the sense of "grounds". The payment schedule must specify the grounds for withholding payment. Just as an adjudication application may contain such submissions relevant to the application as the claimant chooses to include [s 17(3)(h)], so the adjudication response may contain such submissions relevant to the response as the respondent chooses to include [s 20(2)(c)], which may support and explain the grounds advanced in the payment schedule, but may not add new grounds. Thus evidentiary and argumentative material which was not included in the payment schedule can be included in the adjudication response, if the additional material is within the scope or ambit of the grounds for withholding payments identified in the payment claim [*Holmwood v Halkat*, [129]].
- 68 The submissions which the adjudicator disregarded were:-
- those contained in paragraphs 26 to 117 of the initial adjudication response to the application of 21 April 2005, which were purportedly incorporated by reference and enclosure in the ultimate adjudication response, and included a dispute that the works were 100% complete, complaints of defective work, a dispute that \$55,773 worth of work had been completed during the period to which the claim related, an assertion that the works the subject of the claim for retention had not been completed or were defective, and a set-off for liquidated damages for delay; and
 - those contained in an additional submission made on behalf of Pacific on 31 October 2005 with reference to action being undertaken in respect of Soliman's builders warranty insurance.
- 69 The adjudicator determined, in effect, that each of these submissions advanced reasons for withholding payment which had not been raised in the relevant payment schedule. The only basis on which the contrary was suggested by Mr Parker was that the payment schedule incorporated reasons which had previously been advanced for withholding payment, including in the original adjudication response.
- 70 The relevant payment schedule, being Pacific's letter of 6 September, was as follows:- *We write regarding your progress claim dated the 2nd September 2005.*
- As you are aware, the contract in respect of 3-11 Hawkesbury Avenue, Dee Why, has been legally terminated, and litigation is underway between our respective companies.*
- We again refute all of your claims and as such do not intend to make the payment claimed.*
- 71 Thus the payment schedule simply asserted that the contract had been terminated and that litigation was underway, and concluded with a repeated refutation of all claims and a refusal to make the payment claimed. Accordingly, it identified two *reasons* or *grounds* for withholding payment: (1) that the contract had been terminated, and (2) that litigation was underway. The statement "*we again refute all your claims*" is not a reason or ground for withholding payment, but simply a statement of Pacific's position. I am inclined to accept, without deciding, that a payment schedule may sufficiently "indicate" reasons for withholding payment by reference to reasons previously advanced in an earlier payment schedule, if appropriately worded – for example, if the sentence just quoted had been prefaced by the words "*For the reasons advanced in our payment schedule of 18 February, ...*". But

in my opinion the mere use of the word "again" in the letter of 6 September does not incorporate reasons previously advanced; it simply restates a consistent position of refusal to pay, without indicating reasons for that refusal. I have not overlooked that a payment claim and a payment schedule, in the context in which they are required to be prepared, need not be as precise and as particularised as a pleading [*Multiplex Constructions v Luikens*, [76]], and that in some circumstances the briefest reference to an issue previously agitated may suffice to indicate a reason for withholding payment [*Multiplex Constructions v Luikens*, [77]-[78]], but here (save as to the two reasons expressly stated) the payment schedule does not even briefly refer to the essence of any reason for withholding payment. The statement that the claim is again refuted does not involve a statement of any reason for withholding payment [cf *Multiplex Constructions v Luikens*, [69]-[70]]. Nor is it sufficient to incorporate reasons previously advanced in previous payment schedules, adjudication responses or otherwise: the claimant could not know from it whether all or any and if so which of the grounds previously advanced were now relied upon, and the payment schedule was insufficient to convey what if any grounds (other than the two reasons expressly stated) were relied upon as justifying withholding payment.

- 72 Accordingly, the submissions which the adjudicator disregarded did not address the two reasons which were advanced in the relevant payment schedule, but raised quite different grounds which had not been raised in the payment schedule. The disregarded submissions would have expanded the scope or ambit of the matters relied upon by the Owners beyond the reasons or grounds contained in the payment schedule, and the adjudicator was right to disregard them: they were not *duly* made.
- 73 It follows that the determination is not void for failure to have regard to relevant submissions, as the adjudicator rightly did not have regard to certain of the submissions contained in the adjudication response, because they were outside the ambit of the relevant payment schedule.

Is the determination void for failure to discharge the adjudicator's function?

- 74 The Owners submit that the determination was not a valid and effective discharge of the adjudicator's function, because the adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, but having rejected the matters raised by the Owners simply accepted, without examination, the Contractor's claim.

- 75 In *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228, Hodgson JA expressed the view, albeit tentatively, that if an adjudicator determined a progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, that could be such a failure to address the task (of determining the amount of the progress payment to be paid, which requires determination on the material available and to the best of the adjudicator's ability of the amount properly payable), as to render the determination void. His Honour said:-

50 *Before concluding, I wish to note what I believe may be an important error in the judgment of the primary judge, not bearing on the outcome of the case. In the second half of para.[51] of his judgment, the primary judge said this:*

An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.

- 51 *That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.*

- 52 *The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see **The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Ltd.** [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.*

- 53 *Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.*

- 76 That is what the Owners complain has happened here. However Basten JA, without deciding, expressed a different view. His Honour said:-
- 64 At [50]-[53] Hodgson JA takes issue with a passage in the judgment of McDougall J below, part of which is set out at [50]. In substance the issue in dispute, as I understand it, is this: if, on a proper construction of the Act and the contract, the adjudicator comes to the view that a particular item in the payment claim is not justified, he or she will nevertheless be required to allow the item if an appropriate objection was not taken by the respondent in its payment schedule. In the passage from the judgment below, set out at [50] above, reliance for this conclusion would appear to be rooted squarely in s 22(2) of the Act. However, when read in context, the primary judge expressly placed weight upon a number of other provisions of the Act, to which attention should be given. Before turning to those, it is convenient to note the scope and operation of s 22(2). The provision is set out in full at [29] above.
- 65 According to the well-known principles governing judicial review under the general law, a decision-maker will fail to exercise a statutory power if he or she fails to take into account a mandatory consideration. Similarly, there will be a failure properly to exercise the statutory jurisdiction where the decision-maker takes into account an impermissible consideration. The same principles are found in the Administrative Decisions (Judicial Review) Act 1977 (Cth), discussed by Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40. As his Honour noted (at p.40), many statutory discretions are in their terms unconfined and the considerations will therefore be unconfined **“except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ...”**. Section 22(2) of the Act is an exception to this rule: indeed, it has a dual function. On the one hand, it prescribes matters to which the adjudicator is required to have regard; on the other hand, it identifies those matters as the “only” matters to which the adjudicator is to have regard. At least on its face, the list is exhaustive.
- 66 If that were the whole of the story, the conclusion suggested by Hodgson JA, namely that the adjudicator would be entitled to disallow an item on the basis of the contract and the nature of the claim made, would be made good. The fact that the payment schedule prepared by the respondent did not identify the reason for disallowance would not mean that the adjudicator had failed to take account of a mandatory consideration, or had had regard to an impermissible consideration. However, McDougall J based his reasoning to a contrary conclusion in part on other statutory provisions, in addition to s 22(2), including ss 14(3) and 20(2B). Sub-section 14(3) requires that where a payment schedule indicates an amount of a payment which is less than that the amount of the claim, the schedule must indicate why the amount is less and, if a respondent is withholding payment, the reason for that action. Where the payment schedule indicates an amount which is less than the amount claimed, the claimant may apply for adjudication of its payment claim: s 17(1)(a). Where such an application is made, the respondent may lodge a response to the claimant’s adjudication application. That response may contain relevant submissions (s 20(2)(c)), but, subs (2B) provides: **“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.”**
- In the light of this express restriction on the response which can be provided to the adjudicator, there is merit in the conclusion that the adjudicator is not entitled to go beyond the terms of the response, in rejecting part or all of the claim. That was the conclusion reached by McDougall J.
- 67 It is not necessary to resolve this difference of opinion in the present case, nor would I wish to do so. There are factors, not referred to at [50] above and not expressly identified McDougall J, which militate against the conclusion just identified. For example, the claimant may make an adjudication application in circumstances where the respondent has failed to provide a payment schedule at all: see ss 15(1)(a) and (2)(a)(ii) and 17(1)(b). Whether, in the light of s 20(2B) the respondent can give any reasons for withholding payment at all in such a case, is unclear. It is also unclear whether it is intended, in that event, that the adjudicator must allow the claim in full. These issues require consideration. They are dealt with further in a different context in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [40]-[42].
- 68 The judgment of this Court in *The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 was handed down after the decision of McDougall J in the present case. Accordingly the reasoning relied on by Hodgson JA in that case at [33]-[36] and relied on at [50] above, was not considered by the primary judge. However, it follows from what I have said that I am not persuaded that the reasoning in those paragraphs of *Contrax* is correct, but a similar conclusion may be attainable by a different course.
- 77 Ipp JA refrained from expressing a view on this issue, as it was not necessary for the disposal of the appeal. But in the present case, Hodgson JA’s view, if correct, would determine the issue in favour of the Owners, so I must resolve this disagreement. There are two questions: the first is whether, in the absence of valid submissions duly made by a respondent, an adjudicator is bound to allow the payment claim in full; and the second is whether allowing a claim in full without examination of its merits in the absence of valid submissions duly made by a respondent is such a failure to perform the task of adjudication as to result in invalidity.
- 78 As to whether, in the absence of valid submissions duly made by a respondent, an adjudicator is bound to allow the payment claim in full, it is apparent from Hodgson JA’s judgment cited above, that McDougall J at first instance had suggested that in the absence of valid issues raised by the respondent, the adjudicator would be bound to allow the payment claim in full. However, in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142, Hodgson JA, with whom Bryson JA and Brownie AJA agreed on this issue, said:-

- 33 The only challenge to the primary judge's decision on the second and third issues identified above was to the effect that the primary judge erred in holding that Contrax was entitled to rely on s.34, when that matter had not been raised in its payment claim. This contention relied on John Holland, and also on a suggested anomaly arising from the prohibition in s.20(2B) on a respondent relying on reasons not included in its payment schedule.
- 34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.
- 35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d).
- 36 Similarly, in my opinion, an adjudicator could take into account a contention of an applicant that a term of the contract is void by reason of s.34, when considering matters under paragraphs (a) and (b), even if that contention could not be taken into account under paragraph (c).
- 79 Despite the reservations expressed by Basten JA in *Hargreaves*, I should treat what was said in the passage cited from *Contrax Plumbing* as the decision of a unanimous Court of Appeal, which I should follow. It supports the view expressed by Hodgson JA in *Hargreaves*, with which, for the additional reasons below, I respectfully agree.
- 80 What is referred to an adjudicator for determination is a claimant's payment claim [s 17(1)], and what an adjudicator has to determine is the amount of the progress payment [s 22(1)(a)], on the basis of that claim and considering the other matters referred to in s 22(2) of the Act [*Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, [24] (Hodgson JA)]. Where a construction contract does not make express provision with respect to progress payments, the entitlement of a contractor to a progress payment is to "an amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract" [s 9(b)] as at the relevant reference date [s 8(2)(b)]. Although the phrase "or undertaken to be carried out" in s 9(b) creates some confusion, it seems that, as one would expect from the ordinary usage in the construction industry of the term "progress payment", a progress claim can be made only in respect of construction work which has actually been carried out (or related goods and services which have actually been supplied) [s 13(2); s 4, definition of "claimed amount"], at least where the contract does not make express provision with respect to the matter, since a reference date can in those circumstances occur only after construction work has been carried out [s 8(2)(b); cf s 8(2)(a)]. The basis of valuation prescribed by s 10 has the result that, in the absence of express contractual provision, the amount of a progress payment will (prima facie, and subject to the impact of variations under s 10(1)(b)(iii) and defective work under s 10(1)(b)(iv)), be that proportion of the contract price as corresponds with the proportion of the contracted construction work that has actually been performed as at the relevant reference date (less any payment already made). A consequence of this is that, to found an entitlement to a progress payment, in the absence of express contractual provision, construction work must have been carried out (or related goods and services supplied), and to quantify the amount of the payment that work must be valued in accordance with the terms of the contract and, to the extent that the contract does not provide, relative to the contract price. Accordingly, adjudication of a payment claim involves, at least, a determination of what construction work has been carried out (or what related goods and services have been supplied), and the valuation in accordance with s 10 of that work.
- 81 Failure to serve a payment schedule which puts in issue the whole or any part of a payment claim gives rise to alternative remedies: the claimant can sue for so much of the amount claimed as was not put in issue by a payment schedule and remains unpaid in a court of competent jurisdiction [s 15(2)(a)(i); s 16(2)(a)(i)] ("default proceedings for judgment"), or the claimant can make an adjudication application [s 17(1)(b); s 17(1)(a)(ii)], in respect of which a respondent who has not lodged a payment schedule at all is not entitled to lodge an adjudication response ("default adjudication proceedings"). In default proceedings for judgment, the only issues are whether there has been a failure to provide a payment schedule within time and/or a failure to pay the claimed or scheduled amount; there is no scope for scrutiny of the merits of the payment claim, or any cross-claim or set-off [s 15(4); s 16(4)]. It is noteworthy that in an adjudication under s 17(1)(a)(ii) – although an alternative to a proceeding for judgment on the undisputed part of a payment claim – there will have been a payment schedule, so that an adjudication response can be lodged and the adjudicator would be bound to have regard to the submissions contained in it. It is also noteworthy that despite s 14(4), which provides that upon failure to provide a payment schedule within time, the respondent becomes liable to pay the claimed amount on the due date, nonetheless if the claimant takes default adjudication proceedings under s 17(1)(b) rather than default proceedings for judgment, the respondent must be afforded a further opportunity to lodge a payment schedule

[s 17(2)] – which if availed of would result in ordinary adjudication proceedings in respect of any dispute. This indicates that s 14(4) does not conclude liability for the purposes of any adjudication, but only for the purpose of default proceedings for judgment. These provisions, taken together, indicate that even where no payment schedule has been lodged, if the matter proceeds to adjudication, the adjudicator is still required to proceed in accordance with ss 21 and 22, and in particular to have regard to the matters specified in s 22(2) – save that in an adjudication under s 17(1)(b) there will not be an adjudication response – and is not bound to allow the claim in full. If that be so in the absence of any payment schedule at all, then the same must pertain where a payment schedule has been lodged, even if it does not state sound or sufficient reasons for withholding payment.

- 82 I therefore respectfully agree with the view tentatively expressed by Hodgson JA in *Hargreaves*: the adjudicator’s duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.
- 83 As to whether allowing a claim in full without examination of its merits in the absence of valid submissions duly made by a respondent is such a failure to perform the task of adjudication as to result in invalidity, as Hodgson JA also tentatively thought, the question is whether that amounts to a failure in a basic and fundamental requirement of validity of a determination, or whether it means that there has not been a good faith attempt at performance of the function, in the sense referred to in *Brodyn*.
- 84 In *Holmwood v Halkat*, I expressed the view that *Brodyn* was correctly to be understood as saying that mere error of fact or law, including in the interpretation of the Act or the construction contract, did not invalidate an adjudicator’s determination, and endeavoured to explain that although Hodgson JA eschewed the terminology of jurisdictional error in the context of when non-compliance with the “more detailed requirements” would result in invalidity, the concept of jurisdictional error remains a useful one in identifying which requirements were intended to be essential pre-conditions to a valid determination, since traditionally jurisdictional error results in the decision being void, and, although the Act contains no privative clause, *Brodyn* limits the availability of judicial review to decisions which are void [*Holmwood v Halkat*, [45]-[51]].
- 85 At least in the context of tribunals other than inferior courts, one well recognised species of jurisdictional error is “asking the wrong question”, in the sense that a tribunal which misconceives what it is required to determine falls into jurisdictional error, resulting in invalidity of its decision [*Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid); *Craig v South Australia* (1995) 184 CLR 163, 178-179].
- 86 One of the “basic and essential requirements of validity” with which *Brodyn* requires compliance is “the determination by the adjudicator of [the adjudication application]” [*Brodyn*, [53]]. Hodgson JA allowed, in *Brodyn* (at [55]) and later in *Contrax Plumbing* (at [46]), that the list of basic and essential requirements identified in *Brodyn* may not be exhaustive. I have endeavoured to explain above the minimum content of an adjudication: the absence of relevant material from a respondent does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value. Adoption of the other approach by an adjudicator – by allowing a claim in full just because a respondent’s submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity. In the terminology of *Brodyn*, it would best be accommodated under the rubric, not of want of good faith – because it falls short of capriciousness [cf *Holmwood v Halkat*, [117]] – but of failure of a basic and essential element, namely adjudication of a payment claim (which requires as a minimum determination of whether the construction work the subject of the claim has been performed, and of its value). In short, there would not have been an adjudication, within the meaning of the Act, of the payment claim, but only a rejection of the respondent’s contentions. Accordingly, I respectfully agree with Hodgson JA’s tentative view that for an adjudicator to determine a progress payment at the amount claimed simply because he or she rejects the relevance of the respondent’s material is such a failure to address the task set by the Act as to render the determination void.
- 87 In this case, after summarising the Payment Claim, the Payment Schedule, and the Adjudication Response, the adjudicator’s reasons continued:-
- 6.03.05 I have reviewed the submissions of the respondent but I have determined that there is nothing submitted that would prevent me from proceeding with this application.
- 6.03.06 I have determined that the submissions in the Adjudication Response either:
- (a) cannot be considered; or
- (b) do not relate to the contents of the Payment Schedule.
- My reasons for this determination are included in paragraphs 6.03.01 to 6.03.05 above.
- 6.03.07 I have determined that, in the absence of any valid submission from the Respondent which refutes the claim of Soliman, then Soliman is entitled to payment of the sum of \$440,189.97 (which includes GST).

- 88 Because the adjudicator is obliged to include in the determination the reasons for it, and the reasons reveal no examination of whether the construction work the subject of the payment claim had been carried out, nor of what was its value, there is a compelling case that the adjudicator simply allowed the claim in full in default of any valid submission against it. As I have endeavoured to explain, that is not an adjudication, within the meaning of the Act, of the payment claim.
- 89 It follows that one of the basic and essential requirements of validity has not been satisfied, since there has not been an adjudication, within the meaning of the Act, of the payment claim, and accordingly the adjudicator's determination is void.

Should the adjudication application be stayed on discretionary grounds?

- 90 The Owners finally submit that the Court should as a matter of discretion restrain Soliman from prosecuting its adjudication claim, pending resolution of the proceedings in the Technology and Construction List, in circumstances where the contract has long since been terminated, and the claimant has brought two previous unsuccessful adjudication applications.
- 91 The Owners invoke *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2005] NSWCA 49, in which the Court of Appeal set aside the grant by the District Court of an injunction restraining a builder who had instituted proceedings in the court from prosecuting an adjudication application. In so doing, the Court of Appeal left open (at [24]) the possibility that it might well be appropriate to grant an "anti-suit" injunction to restrain adjudication proceedings in order to protect the integrity of related proceedings in the court, if the adjudication proceedings were commenced shortly before a trial was due to commence with the result that they would interfere with the orderly preparation and presentation of the parties' cases in the court. But generally, the Court held that the rights of parties under the Act were adjudicated only on an interim basis and supplemented those under the general law, that consecutive and concurrent proceedings under the Act and the general law are envisaged and permissible, and that the builder was entitled to pursue concurrently its statutory and common law rights.
- 92 The proceedings in the Technology and Construction List are at a relatively early stage and remain in the directions list. They have not been set down for hearing. There is not the slightest evidence that the adjudication proceedings would interfere with their conduct. All the more so is that the case where the adjudication proceedings have been completed, and all that remains is obtaining and registering an adjudication certificate.
- 93 There is no basis for restraining further prosecution of the adjudication application on discretionary grounds.

Conclusion and orders

- 94 The determination is not void for service out of time of the payment claim, since the 12-month limit for serving a claim is not a basic and essential requirement non-compliance with which results in invalidity, but a matter within the jurisdiction of the adjudicator to determine, rightly or wrongly, and, in any event, the payment claim was made within 12 months of performance of the latest of the construction work to which it related.
- 95 Nor is the determination void for insufficient specificity in the payment claim, which sufficiently specified the construction work in respect of which it was made, and even if it did not, the sufficiency of a payment claim is not a basic and essential requirement non-compliance with which results in invalidity, but a matter within the jurisdiction of the adjudicator to determine, rightly or wrongly.
- 96 Nor is it void for want of service of the adjudication application, since the adjudication application was sufficiently served on Finmore, Finmore had sufficient notice of the application that there was no denial of natural justice, and there was no requirement to serve notice on Finmore's receiver.
- 97 And it is not void for failure to have regard to relevant submissions, as the adjudicator rightly did not have regard to certain of the submissions contained in the adjudication response, because they were outside the ambit of the relevant payment schedule.
- 98 However, adjudication of a payment claim (which requires as a minimum determination of whether the construction work the subject of the claim has been performed, and of its value) is one of the basic and essential requirements of validity of a determination. For an adjudicator to determine a progress payment at the amount claimed simply because he or she rejects the relevance of the respondent's material bespeaks misconception of the adjudicator's function such as to constitute jurisdictional error or failure of a basic and essential requirement of validity, such as to render the determination void. The adjudicator did not apply his mind to a consideration of the claim within the parameters of the Act, but having rejected the matters raised by the Owners simply accepted without examination the Contractor's claim. There was not an adjudication, within the meaning of the Act, of the payment claim, but only a rejection of the respondent's contentions. Accordingly, the adjudicator's determination is void.
- 99 There is no basis on which further prosecution of the adjudication application should be restrained on discretionary grounds.
- 100 Although the plaintiff has succeeded, it failed on all but one of the grounds it advanced. Had it relied only on the ground on which it succeeded, the scope of the case and the evidence would have been very much reduced. While costs ordinarily follow the event, and I am conscious that it is exceptional for the Court to apportion costs having regard to the partial success of a party, it may do so where an issue is severable and distinct. In this case, the plaintiff succeeded on an issue which occupied little of the argument and would have required only the

adjudication to be put into evidence. It failed on all others. Although I shall reserve leave to the parties to apply for a different costs order, prima facie the parties should be left to bear their own costs.

101 My orders are:-

1. Declare that the determination of the Third Defendant dated 2 November 2005 reference number ADJ 10151 ("the Determination") purportedly made pursuant to s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"), is void.
2. Order that the First Defendant be permanently restrained from requesting the Second Defendant, as the authorised nominating authority within the meaning of s 24 of the Act, to provide an adjudication certificate under s 24 of the Act in respect of the Determination.
3. Order that the Second Defendant be permanently restrained from providing an adjudication certificate under s 24 of the Act in respect of the Determination.
4. No order as to costs, to the intent that each party bear its own costs.
5. Reserve leave to each party to apply, by written submission lodged with my associate and served on the other parties within seven days, for a costs order notwithstanding paragraph 4 above. In the event of any such application, any respondent to it may within a further seven days lodge with my associate and serve on the other parties a responsive submission, and the applicant may within a further seven days lodge with my associate and serve on the other parties a reply.

G Parker (P1 & P2) instructed by Ebsworth & Ebsworth (P)

S Goldstein (D1) instructed by Colin Biggers & Paisley (D1)

D Campbell-Williams (sol) (D2 & D3) instructed by Cowley Hearne Lawyers P/L (D2), Dibbs Abbott Stillman (D3)