Quasar Constructions NSW P/L v Demtech P/L, Damien Michael & Mediate Today P/L [2004] Adj.L.R. 03/04

JUDGMENT : Barrett J : New South Wales Supreme Court. 4th March 2004.

1 By its summons filed on 18 February 2004, the plaintiff claims an order under s.69(1) of the **Supreme Court Act** 1970 in the nature of certiorari quashing an adjudication determination made by the second defendant under the **Building and Construction Industry Security of Payment Act** 1999, a declaration that the determination is null and void and consequential relief, including an order that the first defendant be restrained from taking any steps in relation to or arising from the determination. The second defendant, by whom the determination was made in exercise of the adjudicatory function conferred by the Act, has filed a submitting appearance except as to costs.

2 The plaintiff was, it appears, engaged upon certain construction work in relation to Campbelltown Mall. It retained the first defendant to carry out demolition work. It is accepted, for present purposes, that a contract between them came into force in April 2003. On or about 8 December 2003, the first defendant submitted to the plaintiff a document of that date in the form of a tax invoice expressed to be a payment claim under the Act. The sum claimed was $327,376.55. That sum was made up as follows:

Contract Amount	$ 276,528 . 07
Variations	25,781 . 32
Equipment Stand Down	33,340 . 00
Loss of Re-sale of Scrap	12,000 . 00
Balance of Contract	43,471 . 93
	$ 391,121 . 32
Add GST	39,112 . 13
Less payments to date	102,856 . 90
	$ 327,376 . 55

3 On or about 7 January 2004, the plaintiff submitted to the first defendant a document expressed to be a payment schedule under the Act. It conveyed an opinion or contention that the first defendant had been overpaid by the plaintiff to the extent of $54,508.77 and that there was accordingly nothing payable by the plaintiff to the first defendant. Thereafter, on 19 January 2004, the first defendant made an adjudication application under the Act. This included the first defendant's contentions. The plaintiff's adjudication response, together with contentions, was submitted on 29 January 2004. A written determination was made on 5 February 2004 by the adjudicator duly appointed in accordance with the Act. The adjudicated amount stated in the adjudicator's determination was $250,634.01 (including GST) and, by virtue of the Act (and assuming the determination to be valid), that sum became payable by the plaintiff to the first defendant.

4 In attacking the adjudicator's determination, the plaintiff contends that the determination is susceptible to judicial review and should be quashed for jurisdictional error. The first defendant, while formally reserving its position on the question of jurisdiction, conceded that the power conferred by s.69(1) of the **Supreme Court Act** 1970 had been exercised in so many analogous instances under the **Building and Construction Security of Payment Act** 1999 that there was no real point in its seeking to make submissions on the matter. The cases in question include ***Musico v Davenport*** [2003] NSWSC 977, ***Brodyn Pty Ltd v Davenport*** [2003] NSWSC 1019, ***Abacus Funds Management Ltd v Davenport*** [2003] NSWSC 1027, ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140, ***Transgrid v Walter Construction Group Ltd*** [2004] NSWSC 21, ***Transgrid v Siemens Ltd*** [2004] NSWSC 87 and ***Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd*** [2004] NSWSC 85, the last of which was decided after I had heard the present claims. A useful statement of relevant principles appears in the judgment of Master Macready in ***Transgrid v Siemens Ltd***: *"The parties are not at issue on the question of whether or not the decision of the adjudicator is reviewable for jurisdictional error. It is worth noting the general principles which do apply in this regard because, as has been made plain in the authorities, it is only where there is jurisdictional error rather than an error of law on the face of the record that there might be a right to review.*

*The defendant referred to **Craig v The State of South Australia** (1995) 184 CLR 163 at 178, where the High Court has considered the following passage from Lord Reid's speech in **Anisminic Limited v Foreign Compensation Commission** [1969] 2 AC 147 at 171, to be applicable to tribunals but not inferior courts:*

> *'there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it the power to act so that it failed to deal with something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.'*

*There have been a series of cases in this jurisdiction dealing with the principles as they are applied to an adjudicator under the Act. The matter was first considered in some detail in **Musico & Ors v Davenport & Ors** [2003] NSWSC 977. In that case McDougall J held that a determination of an adjudicator was open to judicial review. In **Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors** [2003] NSWSC 1019, Einstein J also came to the same conclusion. At paragraph 19 he summarised his conclusions in these terms:*

> *'This then provides the essential reason as to why upon the proper construction of the Act the following conclusions may be drawn:*

- *that apart from any privative effect the Act might have, relief under section 69 of the Supreme Court Act would in principle lie against an adjudicator appointed under section 19 of the Act;*
- *that the determination of an adjudicator made pursuant to section 22 of the Act is in principle susceptible to judicial review;*
- *that judicial review of adjudication determinations made under the Act may be undertaken on jurisdictional grounds (at least in the sense that involves refusing to exercise, or acting in excess of, jurisdiction);*
- *that judicial review of adjudication determinations made under the Act may be undertaken for denial of natural justice or for fraud; and*
- *that relief in the nature of certiorari will not lie to quash the determination of an adjudicator on the basis of non-jurisdictional error of law on the face of the record [because the legislative scheme set out in section 25 (4) is inconsistent with the availability of this ground of review].'*

*In **Abacus v Davenport & Ors** [2003] NSWSC 1027, McDougall J again had to consider the question. His Honour referred to his earlier judgment in **Musico** and made the following comments:*

*'I dealt with these issues in my judgment in **Musico** at paras [21] to [60]. I concluded that:*

1. *Relief in the nature of prerogative relief would in principle lie against the determination of an adjudicator under the Act;*
2. *Relief would lie for jurisdictional error (including refusal to exercise jurisdiction, acting in excess of jurisdiction and what I described as jurisdictional error of law on the face of the record) and denial of natural justice (on the basis that the requirements of natural justice had to take into account, not only the circumstances of the particular case, but also the legislative scheme); and*
3. *Relief would not lie in the case of non jurisdictional error of law on the face of the record.*

I should make it quite clear that, in Musico, I was not intending to express in a comprehensive way all the grounds on which review might be available. What I said was, of course, said in the context of, and in the course of, deciding the particular issues propounded for decision in that case. There may be circumstances beyond those that I described that might ground an application for relief in the nature of prerogative relief. However, consideration of that question should wait until it is raised on the facts of a particular case.

*I adhere to the views that I expressed in **Musico**. I note that the approach that I took in that case has been followed by Einstein J in **Brodyn Pty Ltd v Davenport & Ors** [2003] NSW SC 1019. Accordingly, the remaining issue for decision in this case is whether Abacus has demonstrated jurisdictional error, including jurisdictional error of law on the face of the record (there being no claim of denial of natural justice).'*

*The matter was again dealt with by Palmer J in **Multiplex Constructions Pty Limited v Luikens & Ors** [2003] NSWSC 1140, His Honour came to the same conclusion and he summarised the type of jurisdictional error which would lead to the setting aside of a decision at paragraph 34 in these terms:*

'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.'

*His Honour also carefully considered the question of whether or not non jurisdictional error on the face of the record could lead to the setting aside of a determination. He concluded, in agreement with McDougall J and Einstein J, that an adjudicator's determination under s 22 of the Act may not be reviewed under s 69 (1)(a) of the **Supreme Court Act** for non jurisdictional error of law on the face of the record.*

*The defendant emphasised in submissions that the onus of establishing jurisdictional error clearly lies upon the prosecutor. Reference was made to **Hill v King** (1993) 31 NSWLR 654 at 661, where the Court of Appeal held:*

*'On an application for prerogative relief the prosecutor bears the burden of establishing clearly the facts which show an absence or excess of jurisdiction: see **R v Alley; Ex parte New South Wales Plumbers and Gas Fitters Employees' Union** (1981) 153 CLR 376 at 382, 392-393, 397.'"*

5 In proceeding to consider the alleged jurisdictional error by the adjudicator on which the plaintiff seeks to rely, I must note the nature of the contract, as found by the adjudicator. He accepted that the contract was formed by the plaintiff's acceptance, by conduct, of a written offer by the first defendant dated 28 April 2003. That offer described, in brief terms, the demolition work to be done and the manner of doing it and provided for a "lump sum price for demolition ex GST" of $320,000. There was no provision for part or periodic payments, although it is clear from the determination that the adjudicator accepted that some payments had in fact been made by the plaintiff on account before delivery of the first defendant's payment claim (or tax invoice) dated 8 December 2003.

6 The adjudicator also found that the contract "ceased operation" on 12 August 2003, at which point some part of the work contracted for had not been done. It is apparently accepted that that remaining part of the work will not be undertaken by the plaintiff.

7 The jurisdictional error initially alleged by the plaintiff is that the adjudicator:
(a) allowed in his determination an amount not referable to construction work found by him to have been performed;
(b) allowed the entire lump sum contract price (for the entire work to be performed) notwithstanding that the adjudicator determined that the first defendant had not completed the construction work the subject of the lump sum; and
(c) failed to undertake the task prescribed by s.9 of the Act, that is, the task of calculating the amount of the progress payment in either the way specified in s.9(a) or the way specified in 9(b).

8 In the course of the hearing, the plaintiff added another component of error. The plaintiff says that if the adjudicator did, in reality, purport to proceed in accordance with s.9(a), there was no basis for doing so since, at the relevant time, the contract was not on foot.

9 It is necessary now to note the way in which the sum of $250,634.01 (including GST) stated in the determination was calculated. The calculation, as set out in the determination, is as follows:

"65. For the reason above, taking into consideration s.9 and s.10 of the Act, I value the payment claim as follows:

These figures do not include GST

(a) Amount claimed $391,121.32
(b) Less Demtech Variation $ 25,781.32
(c) Less Demtech Equipment s/o $ 33,340.00
(d) Less Demtech Loss of Re-Sale $ 12,000.00
(e) Less Agreed Water Damage Backcharge $ 3,290.00
(f) Less Agreed Damages Ramp Backcharge $ 2,700.00
(g) Less Paid $ 93,506.28
Sub-Total $220,503.72

66. The progress payment due to the Claimant is as follows:
(a) Carry over $220,503.72
(b) Plus Agreed Variation by Quasar $ 7,345.38
Sub-Total $227,849.10
Plus 10% GST $ 22,784.91
Progress Payment Due $250,634.01"

10 It is clear that the starting point in the adjudicator's calculation was the gross sum of $391,121.32 referred to in the first defendant's payment claim (tax invoice) as set out at paragraph [2] above. The adjudicator adjusted that gross sum by deducting the items of $25,781.32, $33,340.00 and $12,000 included in the payment claim. Also deducted were $3,290 said to have been agreed to by the first defendant for water damage and $2,700 likewise agreed by the first defendant on account of damage to a ramp. There was also a deduction of $93,506.28 for amounts paid (the corresponding item in the payment claim being the GST inclusive equivalent, $102,856.90). There was then one addition, being $7,345.48 for something that the plaintiff apparently agreed should be included. Left intact was the item of $43,471.93 shown in the payment claim as "Balance of Contract", in the way noted at paragraph [2] above.

11 The sum determined by the adjudicator thus represented so much as remained unpaid (after allowing for prior payments of $93,506.28 ex GST or $102,856.90 including GST) of the aggregate of three items, being, first, the "contract amount" ($276,528.07) claimed by the first defendant in the payment claim, second, the "balance of contract" ($43,471.93) so claimed and, third, the additional amount agreed by the plaintiff ($7,345.48) – less the two items ($3,290 and $2,700) that the first defendant agreed should be deducted. The overall result in ex-GST terms was accordingly the contracted lump sum of $320,000 (ie, $276,528.07 plus $43,471.93) adjusted by only the minor agreed items of $7,345.48, $3,290 and $2,700, from which were deducted the prior payments of $93,506.29. In substance, therefore, the result of the adjudication was to award to the first defendant, by way of progress payment under the Act, the whole of the unpaid balance of the contracted lump sum of $320,000, adjusted only by the agreed minor items mentioned. Moreover, this approach was taken by the adjudicator and embodied in the adjudication even though, as is made clear on the face of the determination, the contract had "ceased operation" on 12 August 2003 at a time when only part of the contracted work had been done.

12 It is the contention of the plaintiff that, in proceeding as he did, the adjudication fell into jurisdictional error of law because he did not deal with the question remitted for adjudication. Under s.22, the function of an adjudicator is to determine "the amount of the progress payment (if any) to be paid by the respondent to the claimant". An adjudication application must, in accordance with s.17(3)(f), identify the payment claim (being the claim made under s.13 by the person retained to perform work) and any payment schedule (being a response under s.14 by the person for whom the work was to be done) to which the application relates. The core message conveyed by a payment claim is an assertion of entitlement to a "progress payment". A payment schedule indicates the amount, if any, that the recipient proposes to pay being, by implication, an amount accepted by that recipient as payable in respect of or on account of the claimed "progress payment".

13 Central to these provisions and the mechanisms they create is the concept of "progress payment". The plaintiff says, and I agree, that an adjudicator has jurisdiction only to determine an amount that is, on the basis of the particular payment claim and payment schedule, a "progress payment" within the meaning of the Act; and that, in exercising that jurisdiction, the adjudicator may proceed only in accordance with the method the Act prescribes for determining the amount of a "progress payment" in the context of the particular payment claim and payment schedule. Jurisdictional error arises if an adjudicator is seen to have embarked on some course that is foreign or irrelevant to this statutory task. Jurisdictional error does not arise if, having embarked on the right course, an adjudicator comes to a wrong conclusion.

14 The plaintiff places heavy emphasis on the term "progress payment" and the prescribed method of determining the amount of a "progress payment". There is, in s.4 a definition of "progress payment" as follows:

"***progress payment*** *means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):*

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment')."

The definition took this form as a result of the **Building and Construction Industry Security of Payment Amendment Act** 2002. Before that, it was as follows:

"***progress payment*** *means a payment to which a person is entitled under section 8.*"

By virtue of s.6 of the **Interpretation Act** 1987, the s.4 definition applies except in so far as the context or subject matter otherwise indicates or requires.

15 In both its present form and its original form, the definition of "progress payment" directs attention immediately to s.8:

"**Rights to progress payments**

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, reference date, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month."

16 This section creates an entitlement to a progress payment by reference to a specified date but does not attempt to quantify the amount of the payment. That task is left to s.9:

"***Amount of progress payment***

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the 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."

17 Section 10(1) is also relevant:

"***Valuation of construction work and related goods and services***

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the work is defective, the estimated cost of rectifying the defect."

18 The first step in applying s.8 is to identify the "reference date". Section 8(2) envisages two alternative and, it appears, mutually exclusive possibilities, namely, that the parties' contract contains terms in accordance with which there is to be determined "the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out ... under the contract" (s.8(2)(a)); or that "the contract makes no express provision with respect to that matter" (s.8(2)(b)). Given the word "express" in s.8(2)(b), it must be the case that the terms envisaged by s.8(2)(a) are confined to express terms.

19 The question posed by s.8(2)(a) is accordingly whether the express terms of the contract provide for the determination of the date on which there may be made a claim for a "progress payment", such claim for a "progress

payment" being "in relation to work carried out or undertaken to be carried out ... under the contract". If the s.4 definition of "progress payment" is applied, the question becomes whether the express contractual terms make provision for the determination of the date on which a claim may be made for "a payment to which a person is entitled under section 8", including a payment of the particular kind covered by paragraph (a), (b) or (c) of the definition to which an entitlement arises under s.8. As a matter of strict construction, an express contractual term could be regarded as making provision for the determination of the date on which a claim might be made for a payment the entitlement to which arises under s.8 of the **Building and Construction Industry Security of Payment Act** only if the contractual term referred to that Act, that section and the entitlement created by the section. If, in the ordinary way, the contract provided for periodic assessment of the quantity or value of work done and, without in any way referring to the Act or s.8, created in the party who had done the work a contractual entitlement to claim on some specified date a payment related to that work, the situation would not be one in which, in terms of s.8(2), the express terms of the contract provided for determining a date on which a claim for what the Act calls a "progress payment" might be made. The absence of any reference to the Act and s.8 would mean that the periodic payments provided for in the contract were not "progress payments" as defined by s.4. The entitlement to those payments would be sourced in the contract, not in s.8 of the Act.

20 A similar analysis applies to s.9. If the contract makes no express provision with respect to "the matter" (being, clearly enough, the matter of "the amount of a progress payment to which a person is entitled in respect of a construction contract"), the amount to which the s.8 entitlement extends is to be calculated under s.9(b). If, on the other hand, there is such an express provision in the contract, the amount to which the s.8 entitlement relates is "the amount calculated in accordance with the terms of the contract" as specified in s.9(a). Again, application of the s.4 definition of "progress payment" would mean that s.9(a) applied only if the contract made express provision for the calculation of the amount to which an entitlement under s.8 of the **Building and Construction Industry Security of Payment Act** related and would not apply where the contract merely created a progress payment regime in the way commonly encountered in the construction industry.

21 Parliament cannot have intended that ss.8 and 9 should operate in such a way that, if contractual provisions of the ordinary kind creating a progress payment regime do not refer to entitlements under s.8 of the **Building and Construction Industry Security of Payment Act**, the statutory entitlements under ss.8 and 9 are to be geared to the monthly timing schedule in s.8(2)(b) and the method of quantification in s.9(b). Having regard to the objects of the Act stated in s.3, it must be accepted that there was an intention that the statutory mechanisms should underwrite the contractual system of progress payments where the parties had adopted one. Such parties were not meant to be denied their agreed system and forced on to the timing and quantification in ss.8(2)(b) and 9(b) just because the express terms of their contract did not adopt the statutory definition of "progress payment". It must follow that ss.8 and 9 (and, as to actual calculation, s.10) are to be approached on the footing that where there is an express contractual regime for the claiming and making of progress payments in the ordinary sense, divorced from the defined meaning arising from s.4, the matters of timing and quantification with which ss.8 and 9 are concerned are to be determined in accordance with the express contractual provisions on the subject. This is the approach that commended itself to McDougall J in **Musico v Davenport** (above). It involves the conclusion that, to the extent that the expression "progress payment" plays a part in deciding whether ss.8(2)(a) and 9(a) apply, the context is, as contemplated by s.6 of the **Interpretation Act**, one indicating a meaning other than that derived from the s.4 definition.

22 Before leaving this examination of the statutory provisions, I should refer to the aspects of the s.4 definition of "progress payment" covered by paragraphs (a), (b) and (c). As I have said, the part of the definition that begins "and includes" and contains paragraphs (a), (b) and (c) was added by the amending Act of 2002. Although the concept of entitlement under s.8 is not expressly mentioned in the part of the definition beginning with the words "and includes", I am of the opinion that, by clear implication, an item within paragraph (a), (b) or (c) is intended to be a "progress payment" for the purposes of the Act only if it is something to which an entitlement arises under s.8. This reading ensures that a payment of the particular kind has the characteristic that gives any other payment the quality of "progress payment" for the purposes of the Act. The reading is also consistent with the legislative intent reflected in both the Explanatory Notes to the Bill that became the **Building and Construction Industry Security of Payment Amendment Act** 2002 and the Second Reading speech of the Minister for Public Works and Services. The Explanatory Notes include the following:
*"**Schedule 1[7]** amends the definition of **progress payment** to make it clear that the Act creates an entitlement not only to payments that are in the nature of instalments, but also to final payments and to single one-off payments."*

23 The Second Reading speech (Legislative Assembly, 12 November 2002) contains the following passage: *"Minor changes have been made to remove possible ambiguities, for example, to ensure that progress payments include milestone payments, that progress claims under the Act can be made under construction contracts that have no provision for progress payments, and that progress claims can include the final amount claimed and retention moneys."*

24 One purpose of the amendments was, clearly enough, to overcome the decision in ***Jemzone Pty Ltd v Trytan Pty Ltd*** (2002) 42 ACSR 42 that, for the purposes of the Act, a distinction is to be drawn between part payment while work is in progress and final payment upon or after its completion.

25 Against this background, I return to the circumstances of this case. The contract, as found by the adjudicator, was a lump sum contract which briefly described the work to be done and provided for an overall and undissected price of $320,000. There were no contractual provisions with respect to progress payments according to the ordinary

understanding of the concept. The parties, by their conduct, may be taken to have superimposed some progress payment regime in a practical sense since it is clear that some payments were made and accepted during the course of such of the work as was actually done. The contractor (first defendant) left the site before the specified work was completed and the contract came to an end in a way on which the adjudicator made no firm findings. The rights and wrongs of that do not matter. The significant point is that the totality of the work for which the contract provided had not been performed when the contract came to an end.

26 The adjudicator, as has been seen, purported to treat as a progress payment under the Act the whole of the unpaid balance of the lump sum contract price, adjusted for agreed minor items. The first defendant submits that, in approaching the matter in that way, the adjudicator proceeded consistently with the Act, the unpaid balance of the lump sum price, as adjusted, being "the final payment for construction work carried out ... under a construction contract" and thus within paragraph (a) of the definition of "progress payment". The plaintiff submits that that characterisation is incorrect and that the adjudicator did not, as required by s.22, determine the amount of any "progress payment" at all and hence did not embark upon or perform the task set for him by the Act.

27 In my judgment, the submission made on behalf of the plaintiff is correct. Paragraph (a) of the definition of "progress payment" not only refers to a "final payment", it also refers to that payment being "for construction work carried out ... under a construction contract". The focus is thus upon work actually done. Once that work is identified, it is necessary to see that the payment in question is a payment "for" that work. The payment must accordingly be found to have the character of remuneration or reward referable to the doing of the work. If, as in the present case, particular work is specified as the totality of the contracted work and a particular sum is provided for as the remuneration or reward referable to the totality of the contracted work, but only part of the contracted work is done, the whole of that sum (or so much of it as has not already become payable) simply cannot represent a sum payable "for" the part of the work actually done.

28 I might add, by way of aside, that I do not consider that the whole payment for the totality of work under a lump sum and entire contract could sensibly be regarded as within paragraph (a) of the definition of *"progress payment"*. A *"final payment"*, being *"final"*, comes after some earlier payment or, at least, after a liability to make some earlier payment has arisen.

29 The conclusion that the s.4 definition did not catch the whole of the contracted sum (or so much of it as has not already become payable) in the case of a lump sum contract where only part of the work had been done would, in my opinion, be reached if the first defendant sought to rely upon the *"means"* part of the s.4 definition of *"progress payment"* instead of paragraph (a) of the *"and includes"* part. In the absence of that paragraph, a final payment of the present kind may well not be within the *"progress payment"* definition but, even if that obstacle did not exist, I am satisfied that, in the context of the Act as a whole, *"progress payment"* imports a notion of part payment (including final payment) referable to or on account of actual work. Relevant indications are found in s.3(1), the definition of *"claimed amount"* in s.4 and s.13(2), as well as ss.8, 9 and 10 themselves.

30 Section 3(1) is as follows:
"The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services."

A progress payment is thus something to be recovered *"in relation to the carrying out of ... work"*.

31 The claim that *"a person who has undertaken to carry out construction work under the contract"* (to adopt the s.8(1)(a) description) is, under s.13, a claim for what becomes a *"claimed amount"*, that is, according to the s.4 definition of that term, *"an amount of a progress payment claimed to be due for construction work carried out ..."*. Such a claim must, in accordance with s.13(2), identify not only the amount of the progress payment claimed to be due but also *"the construction work ... to which the progress payment relates"*. The words "*for construction work*" describe the necessary link between work and payment.

32 There has been some discussion in earlier cases of the question whether inclusion in a payment claim of an element for extension of time, delay or disruption invalidates the payment claim because the subject matter of such items does not bear the relationship to construction work envisaged by the word "for" in s.13(2). The decision has been that, because of the nature of a payment claim as a statement of the claimant's demands and contentions, it would not be correct to regard it as invalid because of the inclusion of matter arguably beyond its permitted scope: see, in particular, ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266 and ***Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd*** [2003] NSWSC 869.

33 As Bergin J pointed out in the last-mentioned case, however, it is quite another thing to say that an element on account of extension of time, delay, disruption or any other perceived wrong can properly be taken into account in an adjudication, as distinct from a payment claim. Referring specifically to the matter of damages for repudiation, her Honour said: *"I am not satisfied that Nicholas J's judgment [in **Walter v CPL**] is authority for the proposition for which the defendant also contends that the claim for damages for wrongful repudiation of the contract is a matter that the adjudicator can determine. His Honour was considering a claim in respect of services provided under a construction contract that specifically dealt with an entitlement in the subcontractor to an amount for such costs. That is a very different matter to a claim for damages for wrongful repudiation of a contract. The adjudicator will decide what amount, if any, the plaintiff is to pay the defendant having regard to the matters he is obliged to consider pursuant to s. 22 of the Act."*

34 The clear message throughout the Act is, in my opinion, that any "progress payment", including one within paragraph (a), (b) or (c) of the definition of "progress payment", can only have that character if it is "for" work done or, where some element of advance payment has been agreed, "for" work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the "progress payment" concept is founded.

35 In this case, it is necessary to decide whether the applicable regime is the regime under ss.8(2)(a), 9(a) and 10(1)(a) or that under ss.8(2)(b), 9(b) and 10(1)(b). Because the parties' contract did not make provision for any system of progress payments in the ordinary sense and having regard to the conclusions as to the meaning of "progress payment" for the purposes of ss.8(2)(a) and 9(a) expressed at paragraph [21] above, the case must be governed by the latter set of provisions rather than the former. The task the adjudicator was required by s.22(1) to undertake therefore involved calculation of the value of the construction work carried out or undertaken to be carried out by the first defendant under the contract, being a calculation made in accordance with s.10(1)(b) and involving a value arrived at having regard to the matters specified in subparagraphs (i) to (iv) of s.10(1)(b). The adjudicator did not embark upon any such determination. Instead, he calculated (subject only to agreed adjustments) what would have been payable to the first defendant had the contract in its entirety been performed by completion (or, perhaps, substantial completion) of all specified work. It follows, in my opinion, that the adjudicator undertook a task and performed a function foreign and irrelevant to those required of him by the Act. Jurisdictional error of the kind grounding relief in the nature of certiorari has therefore been shown.

36 I therefore turn to discretionary considerations relevant to the question whether relief under s.69(1) of the **Supreme Court Act** should be granted. In doing so, I quote a passage in the judgment of Palmer J in ***Multiplex Constructions Pty Ltd v Luikens*** (above) which refers to the relevant considerations: *"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.*

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.'*

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."

37 In the present case, the parties have reached a point where the contract is no longer on foot, the first defendant has left the site and no further work will be done. They are obviously in dispute as to the amount, if any, that the plaintiff is legally obliged to pay to the first defendant, whether for work done, by way of damages for breach of contract by repudiation or on some other account. There may well be claims in both directions. If the parties' disputes cannot be resolved by discussion and negotiation, they will no doubt be litigated or submitted to some alternative resolution process.

38 In my judgment, the existing determination of the adjudicator should be set aside and the parties' disputes as to the final resolution of their contractual relationship and the state of account between them should be dealt with by them as I have outlined. A consequence of the quashing of the existing determination will be that the first defendant is

deprived of the ability to make any immediate recovery under the Act by reference to that determination. But, as Palmer J observed at paragraphs [99] to [103] of his judgment in ***Multiplex v Luikens***, that does not necessarily mean that the first defendant cannot put in train steps to obtain another adjudication on the basis of its original payment claim and the plaintiff's original payment schedule. The statutory mechanism for obtaining a quick determination of an amount referable to contracted work and recoverable accordingly under the Act as a "progress payment" will therefore not be put beyond the first defendant's reach.

39 The plaintiff has made out a case for relief generally in accordance with the summons. Discretionary considerations do not stand in the way of a grant of such relief. I make the following orders and declarations:

1. Order pursuant to s.69 **Supreme Court Act** 1970 that the adjudication determination of the second defendant made on 5 February 2004 on Adjudication Application No. 2004 ADJT 177 pursuant to the **Building and Construction Industry Security of Payment Act** 1999 be quashed.
2. Declare that the said adjudication determination is null and void.
3. Order that the first defendant be restrained from taking any steps in relation to or arising from the said adjudication determination, including making any request under s.24 of the said Act for an adjudication certificate, filing any such adjudication certificate as a judgment for a debt in a court pursuant to s.25 of the said Act and any enforcement or execution action to recover any such judgment debt.
4. Order that the third defendant, as an authorised nominating authority under the said Act, be restrained from providing an adjudication certificate under s.24 of the said Act in relation to the said adjudication determination.
5. Order that the first defendant pay the plaintiff's costs of the proceedings.

Mr M Christie – Plaintiff instructed by James R Knowles Lawyers Pty Limited
Mr D A C Robertson - First Defendant instructed by Dutton Lawyers