JUDGMENT : Barrett J : New South Wales Supreme Court : 14th November 2005

1 The plaintiff seeks a declaration that an adjudication made under the **Building and Construction Industry Security of Payment Act** 1999 is void. The defendant is a quantity surveyor. It is not disputed that services of the kind it provides in the ordinary course of its business are within the definition of "construction work" in s.5 of the Act.

2 The adjudicator's determination is dated 24 October 2005. It does not, in terms, identify the payment claim (s.13), payment schedule (s.14) and adjudication application (s.17) that the adjudicator considered to represent the foundation for his decision. However, an adjudication application made by the defendant and dated 28 September 2005 is the only such application in evidence. It referred to a payment claim served on 24 September 2005 (being a payment claim in the sum of $14,025) and a payment schedule served on 27 September 2005 (indicating an intention to make no payment). It must follow that it was by reference to the claim to which those three documents related that the adjudicator made his decision. This is borne out by several other pieces of documentary evidence, including the single nomination by the nominating authority dated 5 October 2005 nominating Mr Whelan as adjudicator and the identification by the plaintiff's solicitor in a letter of 11 October 2005 to Mr Whelan of 28 September 2005 as the date of the defendant's adjudication application.

3 The plaintiff's contention that the adjudication is void is made on the basis that the adjudicator failed to consider important submissions made by the defendant. Before referring to the submissions in question, I should identify the basis on which the alleged failure to consider them is said by the plaintiff to vitiate the adjudication.

4 The plaintiff accepts that, particularly in light of the decision in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421, the avenues of attack upon an adjudication under the Act are limited. The Court of Appeal (Hodgson JA, Mason P and Giles JA concurring) there identified, at [55], three such avenues. First, there may have been a failure to comply with the "***basic and essential requirements***" for the existence of a valid determination. Those requirements (or, at least, some of them) were identified at [53]. Second, a determination will be void if there has been no "bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power". The third of the postulated vitiating factors is a "substantial denial of the measure of natural justice that the Act requires to be given". It is upon the second and third of these grounds that the plaintiff bases its present case.

5 The first of the submissions (or sets of submissions) the adjudicator is said to have failed to consider was to the general effect that no dispute capable of being adjudicated under the Act arose from the payment claim of 24 September 2005 and the payment schedule of 27 September 2005. The defendant had served a payment claim in the sum of $11,220 dated 1 November 2004 and another in the sum of $2,805 dated 2 December 2004. These were served on Citadel Property Group Pty Ltd. A total of three payment claims was afterwards served by the defendant on the plaintiff: one for $11,220 dated 27 July 2005, a second for $2,805 dated the same day and a third for $14,025 (the aggregate of $11,220 and $2,805) dated 24 September 2005. A payment schedule was served in response to each of the three payment claims served on the plaintiff.

6 In submissions dated 11 October 2005 forwarded to the adjudicator, the defendant pointed out that the payment claim of 24 September 2005 was "a recomposition" of the earlier two addressed to the defendant and that they, in turn, were or included "a recomposition" of payment claims previously served on Citadel. The plaintiff went on to submit to the adjudicator that, having regard to s.13(5), the later and composite claim addressed to the defendant was unauthorised by the Act. This is because there was merely "reissuing of payment claims from the same reference date".

7 It is appropriate to set out at this point s.13 of the Act:

"**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."

8 The plaintiff submitted to the adjudicator that, having issued the two payment claims to the plaintiff in July 2005 and having been served with payment schedules in reply, the defendant could use these as a basis for an adjudication application only if it did so within the time allowed by s.17, which time had well and truly expired by the time an adjudication was eventually made in September 2005. As a result, the submissions continued, there was no jurisdiction to deal with the adjudication application. The supposed payment claim of 24 September 2005 was regarded as inoperative because of s.13(5).

9 I shall refer to the submissions made by the plaintiff to the adjudicator and summarised in paragraphs [5] to [8] above as the "no-dispute submissions".

10 Further and separate submissions were made by the plaintiff to the adjudicator to the effect that there was no contract (and no "arrangement") between the plaintiff and the defendant capable of falling within the definition of "construction contract" with the plaintiff. The adjudicator had requested further submissions on that matter in accordance with s.21(4)(a). The request was addressed to the defendant in the first instance, with an opportunity for the plaintiff to comment on anything submitted by the defendant. Both parties replied to the request and made submissions. I shall refer to the plaintiffs' submissions (or "comments") on that matter as the "no-contract submissions".

11 It is the contention of the plaintiff that the adjudicator did not consider at all the no-dispute submissions related to ss.13 and 17 and the general issue of multiple payment claims; and that the adjudicator also failed to give consideration to the no-contract submissions – or, as I think the case was ultimately put, that he failed to give adequate consideration to the latter submissions. As a result, the plaintiff contends, the determination is void on either or both of the second and third bases identified in **Brodyn**, that is, lack of good faith attempt by the adjudicator to exercise the statutory power or substantial denial of the measure of natural justice required by the Act.

12 I consider first the matter of natural justice (the third issue just mentioned). There is reference in **Brodyn** (at [55]) to "the measure of natural justice that the Act requires to be given". That reference pays attention to the procedural requirements that the Act itself imposes. Among them is the requirement in s.22(2) which defines and delineates the matters that an adjudicator is to consider. Also, by force of the word "only", s.22(2) limits the matters that an adjudicator is to consider: ***Co-ordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 per Basten JA at [65]. Section 22(2) is as follows: *"In determining an adjudication application, the adjudicator is to consider the following matters only:*
(a) the provisions of this Act,
(b) the provisions of the construction contract from which the application arose,
(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

13 Among the matters to be considered are "all submissions (including relevant documentation)" made by the claimant in support of the payment claim and the respondent in support of the payment schedule. If, as happened in this case (with respect to the matter that became the subject of the no-contract submissions), the adjudicator acts under s.21(4)(a) to request further written submissions from a party, it must follow that any such further submissions and any comments thereon by the other party (as allowed by s.21(4)(a)) are among the matters to be considered in conformity with s.22(2). These statutory provisions delineate the "measure of natural justice that the Act requires to be given. I quote again from the judgment in ***Brodyn*** (at [57]): *"The circumstance that the legislation requires notice to the 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 intention 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.*"

(While submissions by the respondent and provisions relevant to them are, because of the particular context, mentioned in this extract, submissions by the claimant are, of course, equally relevant; and, as I have said, submissions and comments generated pursuant to s.21(4)(a) must also be regarded as relevant).

14 For present purposes, emphasis needs to be placed on the last part of the passage just quoted, commencing "so that". Those words seem to me to make it clear that, so far as natural justice is concerned, the relevant question is whether there has been a failure to receive and consider submissions in a way that entails inconsistency with the statutory provisions.

15 Another important indicator of the extent of *"the measure of natural justice that the Act requires to be given"* comes from s.21(3). That section requires an adjudicator to determine an adjudication application "as expeditiously as possible" and, in any event, within 10 business days after his or her notification of acceptance of the application (or any longer period the parties agree). There is thus a statutory intention that an adjudicator should work quickly. That may militate against the standards of thoroughness and detail that are to be expected where no externally imposed time pressure applies. It cannot be intended that an adjudicator working to the tight statutory timetable will be as painstaking as a judge who has reserved judgment in a case involving the same claims under the same construction contract.

16 Against that background, I turn to the matter of the no-contract submissions, and the question whether there was a failure on the part of the adjudicator to receive and consider those submissions. That is the first step in deciding whether any such failure involved a denial of the measure of natural justice envisaged by the statutory provisions.

17 The plaintiff's no-contract submissions were, in technical terms, "comments" of the kind envisaged by s.21(4). On 19 October 2005, the adjudicator wrote to the parties. The letter made it clear that it had its genesis in s.21(4)(a). It provided each party with an "opportunity" – an "opportunity" for the defendant to "provide a further submission on what constitutes their contract with Shellbridge Pty Ltd"; and an "opportunity" for the plaintiff to "respond to the claimant's further submission". This, clearly enough, was a request pursuant to s.21(4)(a). Each party in due course sent written material to the adjudicator in response to the letter of 19 October 2005. The adjudicator's determination refers at paragraph 23 to the request of 19 October 2005. At paragraph 24 the adjudicator sets out a summary of the parties' responses. The summary of the plaintiff's submissions is brief. Being a summary, it does not refer to each and everything said in the submissions. But it is obviously not essential to the requirements of natural justice that a decision maker refer to every fact, every piece of evidence, every submission and every argument.

18 It is quite possible for a review of matters known to have been before a decision maker to lead to a conclusion that, although a particular matter is not mentioned, the decision maker could not have failed to consider the matter. I refer, in that respect, to the observations of Cole JA in ***Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd*** (1996) 91 LGERA 31 at p.91 approving the approach taken by Stein J in the following passage: "*A review of the material before the Minister when he determined to grant consent indicates that he could not have failed to consider the matters in the impugned conditions or the mine's visual intrusion into the landscape.*"

19 To similar effect, as regards a tribunal of fact, is an observation of Brennan J in ***Bromley v The Queen*** (1986) 161 CLR 315 at p.326: "*But his Honour gave the jury a warning, directing their attention precisely to the danger of acting on Carter's evidence where it was unsupported by other evidence. No more was needed. The credibility of Carter was the chief issue in the case and the jury could not have failed to consider whether it was safe to act on his evidence nor, once it was pointed out to them, could they have failed to appreciate the danger of placing too much reliance on the appearance of Carter in the witness box.*"

20 I quote these passages in order to make the point that the whole of the content and tenor of an adjudication may be called in aid in deciding whether particular submissions were considered in the way the Act requires. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions.

21 In the present context, the adjudicator cannot have failed to consider the whole of the content of the submissions forwarded by the plaintiff in written form in response to the invitation of 19 October 2005. It is clear that he received them. That is expressly confirmed in the determination. He summarised what he no doubt considered to be the most pertinent aspects. And crucially, he included in his determination passages which, in my opinion, demonstrate that he gave active consideration not only to the contract formation question to which the no-contract submissions were directed but also to the possibilities the submissions raised. In particular:

(a) the adjudicator said, at paragraph 24: "*The respondent makes further submissions on **the law of contract**, estoppel and assignment, which I have considered*" [emphasis added];

(b) paragraph 27 dealt explicitly with the contract formation events concerning Citadel and Tony and Rosa Maiolo (who play roles in relation to both Citadel and the plaintiff); and

(c) paragraph 34 reads: "***Having considered the additional submissions made by the parties** I support the view of the claimant that it is entitled to be paid on the basis that there was an agreement as envisaged by the Act and the supporting case law*" [emphasis added].

22 Whether the adjudicator was right or wrong in the conclusion he reached on the question to which the no-contract submissions were directed is beside the point for present purposes. The plaintiff accepts that neither error of fact nor error of law is capable of vitiating an adjudicator's decision. The only relevant question, in the context of the present discussion, is whether, in the words used in ***Brodyn*** at [57], "*there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions*", that is, the provisions concerning material to which an adjudicator is to have regard. As regards the plaintiff's no-contract submissions, being submissions forwarded in response to the invitation of 19 October 2005, the clear answer, on the face of the report and having regard to the analysis and findings in it, is that there was no such failure.

23 The plaintiff's alternative case, in relation to the no-contract submissions, is that the adjudicator gave inadequate consideration to them. I would say two things about that proposition. First, the natural justice formulation at [57] in ***Brodyn*** does not refer to any quantity or degree of consideration as being necessary. Nor, of course, does the Act. Second, there is no material before me enabling me to judge the quantity or degree of consideration given by the adjudicator to the no-contract submissions. For all anyone knows, he may have wrestled with them for hours, undertaken extensive analysis, satisfied himself eventually that the defendant's position was to be preferred and then recorded that conclusion in his report without elaboration. Such a course would, in my view, satisfy any requirement that "adequate consideration" be given to submissions but, as I say, no such requirement emerges from the discussion in ***Brodyn*** and I do not think that a failure to make extensive reference to submissions and to reasons for accepting or rejecting them should be seen as playing a part in this particular statutory scheme.

24 I consider next the plaintiff's contention that the adjudicator failed, in a way inconsistent with the natural justice requirement referred to at [57] of ***Brodyn,*** to receive and consider the no-dispute submissions.

25 The plaintiff said in its original submissions made to the adjudicator that the purported claim by the defendant did not comply with the requirements of the Act. That submission, complete with the supporting reasons advanced by the plaintiff, was set out in unelaborated form in paragraph 18 of the adjudicator's determination. One of the reasons given by the plaintiff and quoted by the adjudicator was that the claim *"is not made on a reference date for the purposes of section 8(2) of the Act."*

26 The plaintiff's submission was that there can be only one payment claim in respect of a particular reference date. The contention that the payment claim of 24 September 2005 was *"not made on a reference date for the purposes of section 8(2) of the Act"* was advanced because, in the plaintiff's view, the payment claims of 27 July 2005 had already been based on the relevant reference date and it was not permissible for the later payment claim of 24 September 2005 to have the same basis.

27 I digress at this point to consider the role of a "reference date" in the statutory scheme. The term is defined, in relation to a "construction contract", by s.8(2). The definition applies for the purposes of s.8 which, in sub-s.(1), creates a statutory entitlement to a progress payment "[o]n and from each reference date under a construction contract". In a case such as the present, it is provided that the last day of the first named month in which work was carried out under the construction contract is a "reference date" in relation to the contract and that the last day of each following month is also such a "reference date".

28 The expression "reference date" plays a direct role in the system of claim notification provided for in s.13. Section 13(5) says that a claimant cannot serve more than one payment claim (that is, the kind of claim provided for in s.13) "in respect of each reference date under the construction contract". Although s.8(2) defines "reference date" only for the purposes of s.8 itself, the use of the expression in s.13(5) with respect to "construction contract" indicates, to my mind, that the s.8(2) definition is intended to apply also for the purposes of s.13(5). It is not as if any other date would obviously suggest itself as the "reference date under" a contract, "reference date" not being something that in ordinary parlance is associated with construction or any other types of contracts. Section 13(5) is to be read in the light of s.13(6) which, as is seen above, says that s.13(5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

29 It is thus clear that s.13(5) precludes the service of more than one payment claim in respect of any one reference date but does not seek to preclude cumulation of amounts in successive payment claims. As a result, if, in a case within s.8(2)(b), the claim in respect of the first reference date is for $10,000 which is not promptly paid and there is then a claim for $25,000 (inclusive of the first $10,000) in respect of the second reference date, there is no overstepping of the limit allowed by s.13(5).

30 Section 13(5) and its operation played a predominant role in the plaintiff's no-dispute submissions. It was said that because of the "recomposition" in the payment claim of 24 September 2005 for $14,025 of the two payment claims of 27 July 2005 (one for $11,220 and the other for $2,805), the claim of 24 September 2005 was unauthorised by the Act, so that there was no matter validly before the adjudicator for decision.

31 In seeking to identify the reference date, the adjudicator was, by necessary implication, addressing the submission based on s.13(5). He referred explicitly to the plaintiff's submission that the claim was not made on a reference date. He noted the defendant's submissions on the point and appears, clearly enough, to have concluded (rightly or wrongly) that the reference date was 24 November 2004. He then said explicitly that "this claim" was made within the time allowed by the Act.

32 In coming to these conclusions, in the context of an adjudication application based on the payment claim of 24 September 2005, the adjudicator cannot but have considered the point that there had been two earlier payment claims in July 2005. He refers to them at paragraph 14 of the determination. It may be that, in light of s.8(2)(b), he was wrong in the conclusion he reached as to the reference date. At paragraphs [62] and following in ***Brodyn***, there is a discussion on the manner of fixing the reference date in a case governed by s.8(2)(b) where the relevant work has been completed. There was disapproval of the approach in ***Holdmark Developers Pty Ltd v G J Formwork Pty Ltd*** [2004] NSWSC 905 to the effect that a reference date occurs at the end of the month in which the work is completed and that there are no further reference days thereafter. Having regard to the recognition in s.13(6) that a later payment claim might include a sum already included in an earlier claim, it was held that the end of each successive month after completion of the work marked a new reference date.

33 But even if the adjudicator was wrong in determining the reference date, the fact remains that the content of the determination with respect to the reference date and the permitted time for making a payment claim (a matter governed by s.13 to which express reference was made) means that he could not have failed to take into account the no-dispute submissions based on the existence of the earlier claims of 27 July 2005. I would add that, in light of the discussion at [62] and following of **Brodyn**, the adjudicator was probably correct in proceeding on the basis that the existence of those earlier claims did nothing to undermine the payment claim of 24 September 2005 and that the original claims on Citadel were irrelevant.

34 In relation to both the no-contract submissions and the no-dispute submissions, therefore, I am of the opinion that the basic complaint of the plaintiff is not made out. I am satisfied that the adjudicator gave consideration to both the no-contract submissions and the no-dispute submissions in the way the act envisages and requires. That is

sufficient to dispose of the claim based on the natural justice considerations applicable to determinations by adjudications under the Act as elucidated in the ***Brodyn*** case.

35 The plaintiff contends that there was a failure by the adjudicator to make a bona fide attempt to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power, being the second basis of invalidity identified at paragraph [55] of ***Brodyn***. The content of that requirement was discussed by McDougall J in ***Timwin Construction Pty Ltd v Façade Innovations Pty Ltd*** [2005] NSWSC 548. Extensive and valuable analysis of it appears in the recent judgment of Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 (8 November 2005). But in view of my findings that the adjudicator did not fail to consider the no-contract submissions or the no-dispute submissions in the way the Act requires, there is no need for me to consider the question whether such a failure would involve a breach of the "bona fide attempt" requirement. For reasons stated by Brereton J at [118] and following, however, the general answer to that question is likely to be an affirmative answer.

36 For the reasons I have stated, the plaintiff has not made out a case for the making of a declaration that the adjudicator's determination is void. But in view of the lengths to which the plaintiff has gone in this court in an attempt to obtain declaratory relief in a matter involving $14,025, I desire to say a few words generally about the statutory context.

37 Matters of the present kind seem often to be approached on the footing that the s.25 result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s.25(4) upon attempts to have such a judgment set aside are referred to in that connection. But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s.32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s.25 has had the effect of creating. The s.25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.

38 It was pointed out in ***Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*** (2005) 62 NSWLR 385 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s.25 is, by reason of s.32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added (at [21]): *"A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid."*

As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed.

39 These points should be borne in mind by principals or proprietors who consider themselves to have good claims in contract or on other grounds outside the Act and, at a first stage, suffer an adverse determination by an adjudicator involving a modest sum. The consequences the Act produces go, in commercial terms, to matters of cash flow and credit risk without definitive and final creation of legal rights. Where the amount involved in a determination is small, the availability to a disappointed principal or proprietor of the avenues referred to by Handley JA and a perception that they are more appropriate avenues might be factors that influence the discretion that this court exercises upon an application for declaratory relief of the present kind.

40 The summons is dismissed with costs.

Mr P.M. Barham – Plaintiff instructed by John Ajaka
Mr B. DeBuse – Defendant instructed by Home Wilkinson Lowry