JUDGMENT : Master Macready : Supreme Court of New South Wales. 25th February 2004

1 **Master**: This is a hearing of an amended summons filed on 20 October 2003 in which the plaintiff seeks final relief being certain declarations and an order in the nature of certiorari quashing the ajudication by the second defendant ("the adjudicator") pursuant to the **Building and Construction Industry Security of Payment Act 1999** ("the act"). A judge of the court has referred the whole of the proceedings to a master for hearing.

The background to the proceedings

2 The defendant contracted with the plaintiff to design and construct a substation at Haymarket in the City of Sydney. The original contract sum was $46,070,842. The adjusted contract sum as at 1 December 2003 including approved variations was $55,870,389. The payment claim, which is subject of these proceedings, is No 22. It was dated 1 August 2003 and claimed an amount of $16,975,394.16. The plaintiff responded by serving a payment schedule on 15 August 2003 in which it proposed a payment to the defendant of $1,495,719.93

3 The first defendant in its adjudication application in respect of this claim sought payment of $16,102,267.29. The adjudicator determined the adjudicated amount of $6,129,941.02 which became payable on 12 September 2003, with interest at 9 percent from that date. This included a sum of $1,303,634.85 which was included in the plaintiff's payment schedule.

4 On 23 October 2003 there was an application for an interlocutory injunction before Gzell J. His honour made orders conditional upon the plaintiff paying the defendant the sum of $3,779,648.28 and upon the defendant providing the plaintiff with an unconditional bank guarantee in the same amount.

The plaintiff claims

5 The plaintiff claims that the determination should be quashed for jurisdictional error in that:

1. The adjudicator was bound by the certification of the superintendent under the contract in respect of the contractual progress payments and he could not go behind such certification,
2. Alternatively that the adjudicator failed to apply s 9(a) in not determining the amount of the progress payment in accordance with the terms of the contract.
3. Alternatively the adjudicator failed to calculate the progress claim in accordance with section 9(b) of the act in respect of the contract which did not provide a contractual mechanism for the calculation of the amount of a progress payment.

6 The plaintiff also contended that there was a breach of natural justice as a result of the adjudicator denying the respondent procedural fairness in that:

(a) He failed to give proper reasons as required general law and by section 22 (3) of the act,
(b) He failed a give notice of the approach he had decided to adopt in respect of valuation of variations, and
(c) He arrived at an approach not supported by either party in paragraph 576.

7 As well as resisting these claims the defendant raised a series of discretionary grounds as to why Certiorari should be refused.

Jurisdictional error

8 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.

9 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."*

10 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:

"19 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;*

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· 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]."

11 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:

"16 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.

17 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.

*18 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).*"

12 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:

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

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

13 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.

14 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."*

Was the adjudicator bound by the certification of the superintendent under the contract in respect of the contractual progress payments?

15 Sections 9 and 10 (1) of the Act are as follows:

"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.

10 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."

16 It was the plaintiff's submission that the contract did make express provision in respect of the calculation of a progress payment and that accordingly ss 9 (a) and 10 (1)(a) applied. The actual contract in the present case, it was submitted, contains appropriate provisions in clause 42.

17 Clause 42.2 and clause 42.3 of the contract are in these terms:

"Clause 42.2 Progress Payment Certificates and Time for Payment

Within 10 business days after receipt of a claim for payment the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor.

If the Contractor fails to make a claim for payment, the Superintendent may nevertheless issue a payment certificate.

The Principal shall pay to the Contractor the amount certified by the Superintendent within 42 days after receipt of the claim for payment.

Payment of moneys shall not be evidence of the value of the work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

Clause 42.3

The amount certified by the Superintendent as due to the Contractor at the time of a claim for payment shall be the value of the work carried out by the Contactor together with any moneys due to the Contractor under any other provision of the Contract or for breach of contract less-
(a) amounts which the Principal is entitled to deduct under clause 42.4 and 42.11;
(b) amounts already paid or certified under the Contract. ..."

18 As is plain from the clauses this is a contract where the parties have adopted a methodology in respect of payment claims, which involves valuation by a third party.

19 It is clear from the decision of the adjudicator that he was referred to the superintendent's determinations and there were submissions as to the obligation of the defendant to provide appropriate documentation to the superintendent for the purposes of him determining the progress claims under the contract. This appears in paragraphs 22-26 of the determination. The adjudicator then went on to deal with the determination of the superintendent and referred to such determinations at paragraphs 27-29 in these terms:

"27 The Respondent submitted that the Superintendent did the best he could with the information at hand when the Claimant's claims were deficient and, therefore, the Superintendent's determinations should not be altered under the adjudication. There are a number of claims in this adjudication which the Superintendent has determined a value of. There are several bases given by Trangrid for the Superintendent's $0.00 determinations, including:
no liability as the work claimed is contract work;
insufficient information to make a determination;
insufficient pricing information;
non compliance with notice provisions;
previous amounts claimed being sufficient; and
no proper claim for any further payment.

28 The above bases are not all of the bases given by Transgrid for the Superintendent's determinations. Few details of the bases for the determinations have been provided. There are a number of claims where I have reached the same conclusions as Transgrid says the Superintendent did, and there are a number where I have reached a different conclusion to the conclusion which Transgrid says the Superintendent reached. By way of example I have concluded that the work is not contract work but is variation work, there is ample information to make a determination other than $0.00, the rejection on the basis of the notice provisions failed, and previous amounts paid were less than the amount which should have been determined. By way of further example, in some instances such as Siemens' VO 229, where the basis for rejection was that previous amounts paid were sufficient, there was no account taken in the Payment Schedule of matters which were expressly excluded from the claim covered by the first determination.

29 Where necessary I have arrived at a different conclusion to that reached by the Superintendent and have set out my reasons for so doing."

20 It is plain, therefore, that the adjudicator has put aside the superintendent's determinations on many occasions. It is this action by the adjudicator which constitutes the plaintiff's first ground of alleged jurisdictional error. In the plaintiff's submission a failure to apply s 9 (a) of the Act by not adopting the superintendent's decision was jurisdictional error. It referred to the comments of McDougall J in ***Musico*** at paragraph 119, which were in these terms:

"119 The more difficult question is whether the impugned determinations, or conclusions, amounted to jurisdictional error. In my opinion, Mr Davenport did fall into jurisdictional error. By ss 9(a) and 10(1)(a) of the Act, the adjudication in this case was to be carried out by reference to the relevant provisions of the contract. As Mr Davenport recognised, the relevant provision was, on the face of things, cl 10.02. That directed his attention to the Architect's certification. But because of the errors in approach that I have identified in paras [72] to [84] above, and because of the

additional errors that I have identified in paras [86] to [100] above, Mr Davenport failed to have regard to the relevant provisions of the contract. He therefore failed to carry out the task that the Act requires to be carried out in the manner that the Act requires it to be carried out. It must follow that Mr Davenport failed to exercise the jurisdiction given to him by the Act."

21 The question of whether or not an adjudicator appointed under the Act is bound by a progress certificate issued under a contract is a matter which has already been determined in this Court. In ***Abacus v Davenport & Ors*** McDougall J had to consider this express matter. At paragraphs 33-40 he said the following:

"33 I do accept the submission that was put for Abacus that the legislature intended that, so far as possible, an adjudicator should determine a builder's entitlement to a progress payment in accordance with any applicable terms of the contract. That follows from ss 9(a) and 10(1)(a) of the Act; cf Musico at para [77].

34 Clause 10 of the contract deals with payment and adjustment of the contract sum. Clause 10.01 provides for the making of progress claims. Clause 10.02 provides for the issue (by the architect) of progress certificates. Clause 10.07 provides that, in effect, the builder's entitlement is to be paid, as a progress payment, "the amount specified by that certificate".

35 It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.

36 Further, as was submitted for Renascent, it is not uncommon for building contracts to provide that it is the proprietor, or someone who is the proprietor's alter ego or agent, to occupy the certifying role that, under the form of contract presently under consideration, is occupied by the architect. In those circumstances, if the submission for Abacus be correct, an adjudicator would be bound by a certificate issued by a proprietor, or by its agent or alter ego, in bad faith, or one that flatly and obviously disregarded the rights of the builder.

37 Such a construction would undermine in a very serious way the evident intention of the legislature that is embodied in the Act. It would enable an unscrupulous proprietor (either by itself, if the contract so permitted, or with the collusion of an unscrupulous certifier) to set at nought the entitlement to progress payments that the Act provides and protects.

38 I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be "the amount calculated in accordance with the terms of the contract" where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued "in accordance with the terms of the contract" where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation "in accordance with the terms of the contract" is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.

39 In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours.

40 I therefore reject the fundamental proposition on which Abacus' case was based. Nonetheless, it is necessary to examine each of the errors of law to see whether jurisdictional error is demonstrated."

22 These views expressed by His Honour have been referred to with approval by Einstein J in ***Leighton Contractors Pty Limited v Campbelltown Catholic Club*** [2003] NSWSC 1103 at paragraph 73. Since the hearing before me there has been published another judgment of McDougall J, namely, ***Transgrid v Walter Construction Group*** [2004] NSWSC 21, in which His Honour was asked to reconsider his decision in **Abacus**. His Honour declined to do so. The decision is of particular significance because the same contractual provisions apply no doubt as a result of the contracts in that case covering construction on the same site as this case. It was the plaintiff's carefully argued submission that I should depart from the construction of the Act adopted by McDougall J. The circumstances in which I might do that need, of course, to be noted.

23 The present proceedings are before me as the whole of the proceedings have been referred by a Judge of the Court for hearing by me, pursuant to Schedule D Part 3. In these circumstances an appeal lies to the Court of Appeal, pursuant to the Rules. An appeal does not lie to a Judge of the Court. See ***Gill v The Residential Tribunal*** (2001) 53 NSWLR 425. It was not submitted that I am bound by the decision of McDougall J in ***Abacus***, but that there are strong reasons normally why I should follow such a decision. In ***Valentine v Eid*** (1992) 27 NSWLR 615, reference was made to the principle that as a matter of comity, a judge at first instance will follow the decision of another judge at first instance unless he or she in convinced that the judgment is wrong. I note that in his article "**The Use and Abuse of Precedent**" (1998) 4 Aust Bar Rev 93 Sir Anthony Mason said: *"Consistency, Continuity and Predictability v Justice, Flexibility and Rationality*

Inconsistent decisions are incontestable indications that a legal system is both unjust and irrational. So inconsistency quickly brings the law into disrepute. Precedent plays an important part in eliminating inconsistency, thereby promoting justice and

rationality. Likewise, precedent enhances continuity and predictability which are also essential qualities in an acceptable system of law. In order that the citizen may order his affairs and make decisions, the courts must apply uniformly rules and principles that are ascertainable in advance. Brandeis J summed up this point of view when he said in a dissenting judgment (Burnet v Coronado Oil & Gas Co 285 (1932) US 393 at 406, 'in most matters it is more important that the applicable rule of law be settled than that it be settled right'. And this approach has much to commend it where, as in commercial law, businessmen require a substratum of settled rules on which to make their contracts."

24 The construction industry is an area where consistency of approach in regard to standard form contracts and the application of the Act are most important. I turn to the arguments as to why I should not follow the reasoning of McDougall J in **Abacus.**

25 I will deal with the arguments under the following headings:
(a) Ordinary construction of the words in s 9 (a).
(b) Freedom of the parties to contract as to how progress payments are to paid under a contract.
(c) A purposive construction having regard to the objects of the Act.
(d) The statutory path in the dual railroad track system.
(e) The reasons for the approach in **Abacus**.

Ordinary construction of the words in s 9 (a)

26 Even when considering the ordinary construction of the words used in the statute it is necessary to be mindful of the purposive construction to which I refer later. The first defendant pointed out that in ***IW v City of Perth*** (1997) 191 CLR 1 at 12, Brennan and McHugh JJ, stated: *"The injunction contained in s 18 of the Interpretation Act [1984 (WA)] is reinforced by the rule of construction that beneficial and remedial legislation . . . is to be given a liberal construction (**West v AGC (Advances) Ltd** (1986) 5 NSWLR 610 at 631). It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical' (**Coburn v Human Rights Commission** [1994] 3 NZLR 323 at 333)."*

27 The equivalent statutory provision in New South Wales is s 33 **Interpretation Act** 1987, which provides:
"Regard to be had to purposes or objects of Acts and statutory rules
In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."

28 When one looks at s 9 it is clear that the trigger for the application of subsection (b) is the fact that the *"contract makes no express provision with respect to the matter"*. The relevant matter is *"the amount of the progress payment"*. In the present case, clearly the contract makes express provision with respect to the amount of a progress payment to which a person is entitled. This then throws one back to the meaning of the words in 9 (a), namely, *"the amount calculated in accordance with the terms of the contract"*.

29 Under clause 42.2 the obligation on the principal to pay is conditioned upon there being the issue of a payment certificate by the superintendent as it is that certificate that determines the amount to which the obligation attaches. Clause 42.3 then sets out how it is that the superintendent is to determine the amount in particular by reference to the value of work carried out. It is true that it is the superintendent who makes the determination referred to in 42.3 but there is nothing on the face of s 9 (a) which removes the role the superintendent has in making that calculation.

30 The word 'calculate', in its definition in the **Shorter Oxford Dictionary** and the **Macquarie Dictionary,** has primary meanings which comprehend both the making of a mathematical calculation and the making of an estimate. Thus on the plain meaning of the word 'calculated' in s 9 (a) the word includes the making of an estimate which under the contract is to be done by the superintendent. The words "*in accordance with the terms of the contract*" should also be noted. Those words are used elsewhere in the Act in particular in s 8(2)(a) in respect of the concept of reference date. The actual words used there are "*determined by or in accordance with the terms of the contract*". This dual expression indicates that a date determined *"by"* the contract is one fixed self-referentially by its terms in contrast to a date determined "*in accordance with*" the contract which can be ascertained by some external mechanism performed pursuant to the contract. This wider meaning of the latter expression supports the view that a calculation *"in accordance with"* the terms of the contract for the purposes of s 9(a) is not merely a reference as was held by McDougall J in **Abacus** [at 38] to *"the contractual mechanism for determination of that which is to be calculated"*.

Freedom of the parties to contract as to how progress payments are to be paid under a contract

31 In adopting their contract regime parties are, of course, free to adopt any particular mechanism for determination of progress payments. The range and variety of such mechanisms is of course quite substantial. To quote an example referred to in oral argument, the parties would be quite free to make provision for progress payments which make a progress payment equal to a certain proportion of funds expended in the previous month by the builder. The mechanism could vary from the production of invoices and cheques in support of the claim to the production of such documents to an architect for him to check and certify the amount payable. The parties might also in a contract, such as in the present case, provide for a valuation of work done to date and have a third party, namely the superintendent, determine that value.

32 All of these approaches are quite open to parties and are governed by the different principles of law that a court will apply depending upon the particular agreement adopted.

33 The results, in law, which flow from the parties' agreement are many and varied. In dealing with progress payments, a contract may provide detailed, fixed and objective criteria as to how the value of such amounts are to be determined.

This may be as a result of a detailed schedule of rates, bills of quantities or specifications. In such circumstances if the certifier wrongly issues an interim certificate, or issues an incorrect certificate, and there is no arbitrator under the contract who is able to deal with the matter, the Court will set aside the certificate. However, if what has been entrusted to the certifier is a discretionary decision, where no fixed or readily available standard criteria exists, a different result will flow. In such circumstances the courts and indeed an arbitrator, if an arbitrator has power, cannot interfere with the discretionary judgment as the parties have agreed, by contract, to such a result. See generally the discussion in ***WMC Resources Limited v Leighton Contractors Pty Limited*** [1999] WASCA 10, paragraphs 15-26. See also ***Atlantic Civil Pty Limited v Water Administration Ministerial Corporation*** (1992) 39 NSWLR 468.

34 The parties are thus free to choose a form of contract with widely differing legal results. This is a point I will return to later. There is nothing in the simple words of s 9 (a) which differentiates between the many and varied results that might be achieved as a result of the parties' contract. The section simply directs one to the contract result.

A purposive construction having regard to the objects of the Act

35 There have been many references in recent cases on this Act to the purpose of the Act, in particular its objective in seeking to give quick interim decisions on progress payments pending a final determination of the parties' rights. The parties, before me, spent some time on the various reading speeches and it is useful to note some matters from those speeches. In the second reading speech in the Assembly on 8 September 1999 the Minister for Public Works and Services described the main thrust in these terms: *"The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay. Reforms include the power for an unpaid contractor or subcontractor to suspend work and a ban on pay-when-paid and pay-if paid clauses."*

36 After referring to a number of particular types of contracts that were excluded the Minister went on to describe in general terms what the bill covered. At page 104 he said: *"The bill covers civil engineering as well as architectural work, mechanical and electrical work in buildings, maintenance, landscaping and decorating. It affects all parties who contract for that work including owners, contractors, subcontractors and consultants, and applies to both commercial and residential work. The party who will be most affected by the legislation is the party who, for the party's improper financial benefit, delays making legitimate progress payments. This bill gives claimants a quicker and cheaper means of enforcing payment or ensuring that when in dispute, the debtor does not retain use of the disputed money but securely sets it aside until the dispute is resolved."*

37 It is clear from the Minister's comments that the bill will apply to the broad spectrum of building contracts and cover projects which are large and in which the parties are free to adopt complex contractual arrangements.

38 The Minister then went on to give a general overview and said the following: *"The bill is divided into four parts and two schedules. Part 1 deals with the broad objectives of the bill, its commencement and definitions. The legislation will not apply to construction contracts formed before the date of its commencement. Part 2 introduces a statutory right to receive progress payments for construction work. It also provides default provisions dealing with matters such as intervals at which progress claims are made, time for payment following a progress claim and how to value work for progress payments. The default provisions operate if the construction contract is silent on these matters but do not override any such relevant provisions in the contract."*

39 Of interest is the Minister's observation that the default provisions would not override the contractual provisions, inter alia, of valuation of work.

40 When dealing with the detail of the bill, at page 105, the Minister talked of the procedure in terms which also emphasise its interim nature. He said at page 105: *"The claimant can seek payment of that debt by way of proceedings in the Fair Trading Tribunal – for residential building work – the Local Court, the District Court or the Supreme Court, as appropriate.*

The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court. If the claimant obtains judgment for the amount of the payment claim or any part thereof, the respondent must pay the judgment debt. This does not prevent either party from arguing in other legal proceedings or by any dispute resolution process detailed in their contract that the final amount payable is more or less. If the claimant disagrees with the amount proposed for payment in a payment schedule, the claimant does not have to proceed to arbitration or through any other lengthy dispute resolution process specified in the construction contract to resolve such a dispute."

41 In describing the payment schedule application the Minister likened it to a superintendent's progress certificate in these terms: *"The payment schedule is akin to the superintendent's or architect's progress certificate which is typically provided for in construction contracts. In adjudication under the bill, the respondent is unable to raise defences, set-offs or cross-claims which have not been identified in the payment schedule. This means that the respondent must treat payment schedules with the utmost care. The bill prevents parties from contracting out of the effects of either providing or not providing a payment schedule or the adjudication which can follow a dispute over a payment claim."*

42 In his concluding remarks the Minister once again referred to the interim nature of the determination and the nature of an appeal. At page 107 he said: *"Adjudication therefore provides the claimant with important benefits: a prompt interim decision on a disputed payment, and the amount in the decision must be either paid to the claimant, or secured and set aside.*

Failure to comply with either of those matters allows the claimant not only to sue for the adjudicated amount, but also to suspend work.

Therefore, if the dispute is not resolved to the satisfaction of both parties by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved. The bill does not specifically provide for an appeal from the adjudicator's decision. The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal.

Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment."

43 As is apparent the bill was amended following a review of its operation. On the second reading speech in respect of the amendment bill in the Assembly on 12 November 2002 the Minister referred to some of the problems that had arisen: *'The Act was designated to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid. However, some claimants have had difficulty enforcing payment of the debt due under the Act. To enforce payment, the claimant has had to obtain a judgment of a court. At present this involves taking out a summons in the appropriate court. The respondent has 28 days to lodge a defence or cross-claim. Then there is a hearing before a magistrate or a judge, who has to decide whether to enter summary judgment for the statutory debt or set the matter down for full hearing.*

By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and will not be able to raise any defences in relation to matters arising under the construction contract. A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings."

44 The amendments provided for a different procedure rather than commencing proceedings and allow the filing of an adjudicators certificate. The Minister commented on the procedure in these terms:- *"Under the new procedure there will no longer be need for a summons and a hearing before a magistrate or judge. Claimants will be able to obtain judgment for the adjudicated amount without the need to engage a solicitor. A claimant will be able to obtain judgment on the day that the claimant files the adjudication certificate with the court. These measures not only will expedite recovery of progress payments but will considerably reduce the cost of doing so. If a respondent applies to the court to have the judgment set aside after an adjudication, the respondent will have to pay into court as security the unpaid portion of the adjudicated amount. This will defeat the practice of using legal proceedings to simply delay payment.*

There will be some instances where a court may set aside the judgment. The respondent may be able to demonstrate to the court that the requirements of the Act have not been complied with; for example, that there has not been a valid adjudication. But in proceedings to set aside the judgment the respondent will not be entitled to bring a cross-claim or to raise any defence in relation to matters arising under the construction contract or to challenge the determination by the adjudicator. Adjudication is an expedited procedure. The adjudicator has only 10 business days in which to make a decision. There will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined."

45 This emphasis on the speed and interlocutory nature of adjudications under the Act has, as I have mentioned earlier, been subject to a deal of judicial exposition; in ***Brodyn Pty Limited t/as Time Cost and Quality (CAN 001 998 830) v Phillip Davenport & Ors*** [2003] NSWSC 1019 at [14], for example, it was stated by Einstein J that: *"What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se."*

46 See also: ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** [2003] NSWSC 903 at [35], per Einstein J; ***Luchitti t/as Palluc Enterprises v Tolco Pty Ltd*** [2003] NSWSC 1070 at [40], per Bergin J.

47 Naturally one should not finely construe the terms of the reading speeches but one can see from the speeches that the bill is designed to apply to a wide variety of construction contracts. It is not limited to small subcontractors and obviously has to encompass the large engineering contracts where the parties are in an equal bargaining situation and have the ability and resources available which allows them to choose the contractual arrangements which they wish to govern their relationships. The prompt payment in respect of payment certificates is clearly an important matter which the Act addresses. The evil of non-payment is addressed by the Act in relation to both the contractual path that a party may follow and also the path when there is no contractual entitlement to the progress claim. The strengthened provisions in s 25 particularly subsection (4) equally apply to an entitlement to a progress claim under a contractual regime.

48 In ***Beckhaus v Brewarrina Shire Council*** [2002] NSWSC 960, I considered the general scheme of the Act. Although my decision on contractual entitlements was overturned on appeal, see ***Brewarrina Shire Council v Beckhaus Civil Pty Limited***

[2003] NSWCA 4, no comment was made by the Court on the consideration of the statutory right to progress payments. I concluded my review of that right with this paragraph:

"60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement."

49 These comments seem to have been approved by Nicholas J in ***Walter Construction Group Limited v CPL (Surry Hills) Pty Limited*** [2003] NSWSC 266.

50 Given that there is a parallel system as I have described, it is plain that the parties to a construction contract which has complex procedures for certification, valuation or other mechanisms for determining a progress payment by a superintendent or other certifier will of necessity involve the parties in having to pursue the contractual route. Failure to do so would normally produce default results which would have severe ramifications on the parties' contractual entitlement to payments.

51 In these circumstances where there is a need, because of the contractual entitlement, to engage in a process which involves a determination of the contractual entitlement to a progress payment it seems strange that that whole process could be opened up again under the statutory regime. One has the parties, at not inconsiderable expense, complying with a contractual regime for convincing a third party certifier of their entitlement, but if the construction contended for in **Abacus** were right they would also then be obliged to spend large amounts of time, effort and resources in debating, or seeking to persuade, the adjudicator of the very matters that they had argued before the superintendent or other certifier.

52 Given that the Act has a very wide reference in relation to the nature of the contracts that it covers, it seems to me that there is warrant for considering that it was not intended for the parties to have to, in case of large contracts, go through the exercise twice. Even with such large contracts and on the construction contended for by the plaintiff in this case there is still an appropriate role for the Act to play. Although the adjudicator will not enter into the debate that was before the certifier the issue of his certificate allows for the prompt inexpensive recovery of progress payments, and the right to suspend work, if that is not already given under the contract and these are the main objects of the Act.

53 Another reason why it would be surprising to have the adjudicator step into the shoes of the superintendent is because it has the effect of replacing a decision made by someone who has extensive experience with the contract and works, namely, the superintendent with that of a stranger to the contract, namely, the adjudicator who may only see the matter on one occasion.

54 Given that the adjudicator must hand down his/her determination within ten business days of accepting the application to adjudicate (s 21(3)(a), save insofar as the claimant and the respondent agree otherwise), the potential for error is manifest. As stated by Einstein J in ***Brodyn*** (at [14]): *"What the legislature has effectively achieved is a fast track progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21 (4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision."*

55 Given the time constraints dictated by s 21 and the adjudicator's inevitable unfamiliarity with the project relative to the superintendent, of greater concern is the possibility of the adjudicator making a *"flatly wrong"* decision. ***Transgrid*** at [51] per McDougall J.

The statutory path in the dual railroad track system

56 The parties before me referred to the dual system in these colourful terms as a means for concentrating more upon what the adjudicator was expressly authorised to do under the Act. It is s 22 of the Act which provides for the exercise of power by the adjudicator, the section is in the following terms:

22 Adjudicator's determination

(1) An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

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

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(a) the value of any construction work carried out under a construction contract, or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

(b) an error arising from an accidental slip or omission, or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

57 It is subsection (1) which indicates precisely what it is that the adjudicator is to determine. The words in 22 (1)(a) are deceptively simple and require the adjudicator to determine the amount of the progress payment to be paid. Such determination is to be made by considering, inter alia, the terms of the construction contract.

58 There was reference by the plaintiff to somewhat similar legislation in England, namely, clause 20 of the **Scheme for Construction Contracts (England and Wales) Regulations** 1998 made pursuant to the **Housing Grants Construction and Regeneration Act** 1996, which gave an adjudicator an express power to open up and review a superintendent's determination. I agree with the first defendant's submissions that this not a proper matter to have regard to in the construction of the New South Wales Act. There was no reference to it in the second reading speeches.

59 All that can be said is that the words to which I have referred are quite general. The ordinary, primary meaning of the word "*consider*" is to "*view or contemplate attentively, to survey, examine, inspect, scrutinise*". Such a meaning does not include exercising powers which depend for their efficacy upon the authority given by the contract.

60 Any construction of the words of the section to allow the adjudicator to exercise powers granted to a person under the contract would inevitably be an expansion of the ordinary meaning of the expression used by the section. In ***R v PLV*** (2001) 51 NSWLR 736 at 743-4 Chief Justice Spigelman described this impermissible method of construction in these terms:- *"The authorities which have expressed the process of construction in terms of "**introducing**" words to an Act or "**adding**" words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly that the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has "introduced" words or "**deleted**" words from an Act, with the effect of expanding the sphere of operation that could be given to the words actually used...There are many cases in which words have been **read down**. I know of no case in which words have been **read up**."*

61 In my view there is nothing in the words of s 22 to conclude that the adjudicator is to exercise powers given to another by the contract.

The reasons for the approach in Abacus

62 It is apparent from paragraphs 35 and 36 of the judgment in ***Abacus*** that of concern to His Honour was the possibility of certificates being issued in bad faith, as a result of fraudulent collusion, or in a way that obviously disregarded the rights of the builder. His Honour in ***Abacus*** does not seem to have been referred to any cases dealing with fraud or collusion on the part of certifiers and it is plain, on the authorities, that a decision by a certifier that is tainted with fraud can be set aside. As Lord Denning MR said in ***Campbell v Edwards*** [1976] 1 WLR 403, when dealing with a discretionary valuation issue to which I have earlier referred, at 407: "*It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.*"

63 Not only would a court set aside such a certificate but also the certifier is liable to the parties to the contract for damages in respect of the fraudulent issue of the certificate. In ***Transgrid v Walter Construction Group*** His Honour was referred to appropriate authorities and he acknowledged the argument. His Honour relied, however, on the possibility of a flatly wrong decision by the superintendent and the lack of utility of the provisions. The latter proposition I have already addressed and the former is always a possibility but perhaps not as likely as error by the adjudicator for the reasons I have mentioned earlier.

64 Leaving aside fraud, there is a range of possible responsibilities for a certifier under a contract. As is plain from my reference to ***WMC Resources Limited v Leighton Contractors Pty Limited***, the parties have, in the selection of their

procedures, the ability to provide a contractual regime which allows challenges to positions on payment certificates to be made before a court, an arbitrator, or alternatively, if they do not wish any such challenge, they can so provide.

65 Having regard to the fact that the parties have it in their own hands to choose their remedies and, if necessary, appropriate ones it seems to me that the considerations referred to by His Honour are not appropriate.

66 The key to His Honour's construction is in paragraph 38 of the judgment. For the reasons which I have expressed before, I do not think that this is appropriate.

67 His Honour's reference to the adjudicator merely being required to rubber stamp what had been done by the superintendent is colourful. Although the adjudicator would be bound, on the plaintiff's construction, to adopt the superintendent's findings, the Act provides, as I have illustrated above, other protections and benefits in this case where the entitlement is determined under the contract. These are rights for suspension and the ability to recover, inexpensively, in a court of competent jurisdiction, the amount forthwith untrammelled by counter claims and defences.

68 In my view the preferable construction of the Act is that the adjudicator does not step into the shoes of the superintendent. Before deciding whether the contrary construction adopted by McDougall J should not be followed I will consider the remaining aspects of the case.

The plaintiff's alternative submission that the adjudicator failed to apply s 9 (a) in not determining the amount of the progress payment in accordance with the contract

69 This alternative argument of the plaintiff is predicated on the assumption, contrary to what was put in it's principal submission, that the adjudicator can step into the shoes of the superintendent for the purposes of determining the amount payable for progress payments under the contract. The first area of wrongful decision on the adjudicator's part is alleged to be where the adjudicator purported to value variation claims excluded by the second paragraph of 42.1. That clause relevantly provides:

"the Contractor shall not be entitled to claim payment for:

(a) variations which have not been approved in writing by the Superintendent;

(b) any extra costs which have not been valued under clause 40.5 or otherwise agreed to in writing by the Superintendent"

70 The second area where it was alleged that there was an error by the adjudicator in valuing variation claims was under clause 40. The relevant parts of that clause provide:

"40.3 Pricing the Variation to the Work

Unless the Superintendent and the Contractor agree upon a price for the variation, the variations directed or approved by the Superintendent pursuant to Clause 40.1 shall be valued under Clause 40.5 ...

40.5 Valuation

Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contactor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent, as follows-

(a) If the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used.

(b) If Clause 40.5(a) does not apply, the rates or prices in the Schedule of Rates shall be used to the extent that it is reasonable to use them.

(c) To the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used."

71 The plaintiff filed a document described as "***Doyles Schedule 1A Adjudication Challenge***". That document identified the particular ground relied upon with respect to each challenged variation. It indicated separately which part of the relevant clause in the contract it was alleged that the adjudicator did not comply with in making his determination. There are 3 basic grounds that the first defendant argues in relation to this claim. They are:

(a) As to clause 42.1 of the contract. Those provisions do not apply, as it is an attempt to contract out of the Act in breach of s 34.

(b) The error (particularly in relation to clause 40.5) was not jurisdictional error.

(c) In any event the adjudicator, in the circumstances in the way the matter was argued before him, did not breach clause 40 of the contract.

72 I will first deal with the question as to whether there is any jurisdictional error involved.

73 In ***Brodyn*** Einstein J had to deal with a case where there was a challenge to an adjudicator's determination. One of the bases on which it was said that the adjudicator fell into the error was that he valued variations which were not agreed in writing contrary to the terms of the contract. In paragraphs 22 and 23 His Honour held that such an error on the part of the adjudicator was not jurisdictional error. At paragraph 22 he described the matter in this way: *"[F]or the reasons given by McDougall J the rights of the plaintiff under section 32 are not affected in terms of civil proceedings later taken to establish the rights of parties under the construction contract. In particular restitution may be ordered under section 32(3)(b). It is at that stage and in those proceedings that no doubt submissions will be taken from both parties and every parameter of the subject rights will be extremely carefully traversed. The Court will not be trammelled by the stringent time constraints to which adjudicators are subjected by the Act. In truth all that will have occurred will be that the interim regime for payment of progress claims pending final resolution of disputes under construction contracts will have operated according to the terms provided for in the Act; insofar as the alleged failure to give reasons is concerned there is simply no substance in the complaint. Reasons were given. The essence of the complaint is in truth concerned with the soundness of the reasons which were given. But that complaint falls outside of the identified candidates for an order in the nature of certiorari; and relief in the nature of certiorari does not lie to quash the determination upon the basis of the alleged non-jurisdictional errors of law*

on the face of the record which upon proper examination are seen to be no more and no less than an attempt to impugn the adjudication determination. It cannot be suggested that any of the alleged errors of law caused the adjudicator to exceed his authority or powers. The proper occasion for an attempt to have the Court hold that the proper construction of the construction contract properly applied should not have led to that adjudication determination, will be when proceedings to establish those rights are commenced outside of the regime now stipulated for in terms of the interim payment of progress claims."

74 It seems to me, without dealing with the first argument of the first defendant as to the contracting out of the Act, that even if an adjudicator, contrary to the contract, includes the amount of a variation that was not agreed in writing, this was not jurisdictional error. There could be many factual matters going to whether or not a particular variation was agreed to in writing and a decision one way or the other does not lead the adjudicator to exercise a jurisdiction which he does not have. He was purporting to apply the contract and having embarked on that process was as much entitled to decide the relevant question wrongly as he was to decide it correctly. McDougall J came to the same conclusion in ***Transgrid v Walter Constructions*** which I have referred to above. When dealing with the submissions I also suffered from the same difficulties which are referred to by His Honour in paragraphs 36 – 44 of his judgment.

75 Breaches of clause 40.5. This is in a similar category to that which I have just dealt with. In my view dealing with it as a matter of principle it is also not jurisdictional error. In these circumstances it is not necessary to deal with the other arguments.

The plaintiff's alternative claim that the adjudicator failed to calculate the progress claim in accordance with s 9(b) of the Act in respect of the contract which did not provide a contractual mechanism for the calculation of the amount of the progress payment

76 This claim is based upon the fact that there is no superintendent's certification. It was put in these terms in the plaintiff's submissions: *"An alternative view is that because the relevant clauses depend on the Superintendent's certification, the clauses might not, for that reason or other, allow the adjudicator to calculate the amount of the progress payment in accordance with the terms of the Contract as required by 9(a), because, to adopt the words of McDougall J in* ***Musico****, the contract by its terms does not expressly provide a "contractual mechanism" for the calculation of an amount of a progress payment."*

77 The other reason suggested as to why this might be so is that the superintendent's certificate, or opinion, is void under s 34 of the Act and thus does not provide the appropriate provision referred to in s 9(b) of the Act.

78 In both these circumstances it is suggested that s 9(b) and s 10(1)(b) are required to be applied by the arbitrator. The plaintiff's submissions then go on to suggest that under the terms of s 10 (1)(b)(iii) the calculations would exclude any disputed variations not agreed to by the parties. In the plaintiff's submission this significant restriction would mean that he had wrongly included in his determination many of the variations claimed by the claimant.

79 Section 10(1)(b) of the Act provides:

"(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."

80 The defendant's answer to this was as follows: *"Further, the Plaintiff has misconstrued section 10(1)(b)(iii). Section 10(1)(b)(iii) provides guidance on the valuation of construction work. It provides that in the case of a contentious variation, the value of an agreed variation is relevant. It does not provide that disputed variations are not capable of being valued. A variation which was not agreed might well be capable of valuation having regard to the matters in s. 10(1)(b)(i) or (ii). Nor are the sub-paras 10(b)(i) – (iv) exclusive. Section 10 does not define the scope of construction work which comes within the scope of the Act. The definition of "construction work" in section 4 serves that role. As a matter of construction, therefore, the Plaintiff's interpretation has no basis. Further it would conflict with a fundamental purpose of the Act, which is to provide for the adjudication of all contentious claims for payment for construction work."*

81 In my view the defendant is correct and even if the premise of the plaintiff's argument were correct the proper construction of the section is an answer to this claim.

Procedural fairness

Failure to give reasons

82 The first matter is the claim in the summons that there was a failure to give proper reasons. In submissions nothing was put as to the failure to give reasons. This may well be because this would not lead to an order in the nature of certiorari. See ***Re Minister for Immigration and Multicultural and Indigenous Affairs, Ex Parte Palme*** (2003) 77 ALJR 1829 at paragraphs 40, 41 and 48.

Failure of the referee to give notice of the approach he had decided to adopt in respect of valuation of variations

83 The plaintiff's submission was expressed in the following terms:

"63. The plaintiff contends that the adjudicator failed to give notice of the approach he had decided to adopt to value the variations, namely, to accept the claimant's valuation in the absence of an alternative from the respondent without actually valuing the variation under section 9(a) (and the relevant provisions of the contract as discussed above) or 9(b) of the Act.

64. In those circumstances where the adjudicator had decided to value the individual variation claims not by reference to section 9 of the Act or the contract but by adopting a quick and speedy "absence of alternative" approach, the adjudicator should properly have notified the plaintiff that it intended to adopt such an approach. Having failed to do so the adjudicator denied the plaintiff procedural fairness."

84 In support of its claim the plaintiff relied upon what was said in paragraph 107 of ***Musico*** by McDougall J. There His Honour concluded: *"If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it."*

85 His Honour then went on to refer to the Act and why that was so.

86 This alleged failure is disputed by the first defendant on factual grounds and it points to the actual course of the submissions before the adjudicator. Quite often, in respect of claims by the first defendant, the plaintiff did not put forward an alternative valuation and sometimes suggested that the superintendent's determination of nil value was appropriate. On occasions the plaintiff did put a different value forward in respect of a particular valuation. In an earlier part of its submissions the first defendant referred to the somewhat limited function of the adjudicator, particularly the matters that had to be considered under s 22 (2). At paragraph 57 and 58 it was submitted as follows:

"57. It is self-evident that the adjudicator's function is to adjudicate upon a dispute. The adjudicator's role is not inquisitorial. In making his or her determination, the adjudicator is confined to considering the matters set out in section 22(2). The payment claim, the payment schedule, and the parties' submissions confine the scope of the dispute and the subject matter of the adjudication. Thus, a payment claim may include a claim for a variation. The respondent might merely submit in its payment schedule and submissions — as was the case in some instances in the present case — that the adjudicator should reject the variation claim because:

- the superintendent's certification was binding; or

· the work and materials the subject of the claimed variation were within the original scope of works.

58. If the respondent does not, in the alternative, provide the adjudicator with an alternative valuation, and if the adjudicator rejects the respondent's primary submissions, the adjudicator is entitled to accept the valuation submitted by the claimant.

Put another way, section 22 does not require the adjudicator to embark upon an independent enquiry upon unchallenged valuations submitted to him or her."

87 I accept these submissions, and it seems to me, that what has happened here with regard to many particular complaints is that the referee has rightly accepted a submission as to value where the other party has not responded to that submission by the provision of an alternative value. I agree with the observations made by McDougall J in ***Transgrid v Walter Construction*** when His Honour dealt with a similar submission in his case in these terms:

"65 It was open to TransGrid to take whatever approach it wished to the adjudication application propounded by Walter. It chose to take the course of criticising the material relied upon by Walter and, in some cases, the approach taken by Walter. It chose to put forward no evidence of its own as to valuation of the claims. It is not suggested that Mr Sullivan denied it the opportunity to do so. The submission is simply that Mr Sullivan, having rejected the criticisms that TransGrid made of Walter's claims, was then obliged to give it "a second bite of the cherry". I do not agree. Mr Sullivan was entitled to think that TransGrid had taken a considered approach to the adjudication application, and that it had put forward whatever material it wished to rely upon in answer to that application. There is no suggestion that, for example, TransGrid put its position on the express basis that, if Mr Sullivan rejected its primary criticisms, it would then seek to put forward further material in reply; or that Mr Sullivan induced it to take the approach that it did. Indeed, having regard to the time limits imposed by the Act for filing an adjudication response, and thereafter for determining the application, it is difficult to see how (without the consent of Walter) Mr Sullivan could have extended a further opportunity to TransGrid to put submissions. There is no doubt that, under s 21(4) of the Act, Mr Sullivan could have called for further material from TransGrid. (This would have given him the obligation to afford Walter an opportunity to comment on that material.) However, unless there were an agreed extension of time, that request (and the provision of material in response to it, and any further comment on that material) must all take place within the 10 business days' time frame within which, subject to any agreement of the parties, the application is to be determined. ...

*67 It seems to me to be clear that TransGrid took a considered approach to the conduct of the adjudication. It should not now be allowed, under the guise of protest at an alleged denial of natural justice, to seek to take another approach: cf **Coulton v Holcombe** (1986) 162 CLR 1, 8-9; **University of Wollongong v Metwally (No 2)** (1985) 59 ALJR 481, 483. The applicability of those principles to adjudications under the Act (admittedly, but irrelevantly, before the substantial amendments effected in 2002) was confirmed by Nicholas J in **Parist Holdings Pty Ltd v WT Partnership** [2003] NSW SC 365."*

88 In my view there is no denial of procedural fairness.

89 It was also suggested that there was a failure to afford procedural fairness to the plaintiff in relation to the finding of paragraph 576 of the adjudicator's determination. What was actually said by the adjudicator in that paragraph was as follows: *"It is reasonable to imply (and the tests for implying such a term would in my view be met) that the due date for payment of the amount certified in the payment certificate which has been issued as a result of the events set out in clause 42.13 is the 28 days as provided in clause 42.2 or otherwise within a reasonable time. In either case, my conclusion is that payment should have been made within 28 days from 1 February 2003 which is 1 March 2003."*

90 This finding, the subject of the plaintiff's complaint in these proceedings, was one which led to the amount claimed by the defendant being reduced. The defendant's claim, which was denied in whole by the plaintiff, was accepted in part. The defendant's claim was one substantially for compound interest at 9 per cent for four months in respect of equipment which was ready to be delivered to the site in accordance with the construction programme but which could not be delivered because the site was not ready. It is apparent from the adjudicator's reasons that the plaintiff at all times had notice of the nature of the claim made and advanced many reasons as to why the claim should be refused. I am not satisfied on the material available to me that the plaintiff has been denied procedural fairness. It has had adequate notice of the time based claim and appropriate opportunity to respond. The adjudicator's approach is just one of many different approaches available on the submissions put to him. In my view there is no procedural unfairness involved.

Certiorari, if available, should be refused on discretionary grounds

91 There is no dispute that the grant of certiorari is discretionary and the substantial debate before me was whether in the present circumstances it was appropriate that the Court refuse to grant the remedy. As it is necessary to appreciate the reasons I will make some short reference to authority. The High Court has consistently referred to the discretionary aspects of the grant of certiorari. See **Re *Minister for Immigration and Multicultural Affairs, Ex Parte Lam*** (2003) 77 ALJR 699 at 703, and in ***Re McBain, Ex Parte Australian Catholic Bishops Conference*** (2002) 209 CLR 372 at 383. This approach has been extended even in cases of alleged jurisdictional errors. See ***Glennan v The Commissioner of Taxation*** (2003) 77 ALJR 1195 at 1198, and ***Re Heerey, Ex Parte Heinrich*** (2001) 185 ALR 106.

92 The principles are of broad scope and a useful discussion of them appears in ***Meagher v Stevenson*** (1993) 30 NSWLR 736 at 738: *"In **R v Huntingdon District Council; Ex parte Cowan** [1984] 1 WLR 501 at 507; [1984] 1 All ER 58 at 63, Glidewell J said: ... the court should always ask itself whether the remedy that is sought in the court, or the alternative remedy ... by way of appeal, is the most effective and **convenient**, in other words, which of them will prove to be the most effective and convenient in all the circumstances, not merely for the applicant, but in **the public interest**.' (Emphasis supplied.)*

*Then **in Re Preston** [1985] AC 835 at 852, Lord Scarman said: '... a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures ... it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attach an appealable decision.'*

In the same case Lord Templeman said (at 862): 'Judicial review should not be granted where an alternative remedy is available ... Judicial review process should not be allowed to supplant the normal statutory appeal procedure.'"

93 The Court of Appeal held in **Meagher v Stephenson** at 738 - 739: *"Where, as in this case, the same court has both appellate and supervisory jurisdiction, the claim for certiorari for non-jurisdictional error on the face of the record cannot provide any relief which is not also available in the appeal."*

94 The Court of Appeal returned to the relevance of the public interest (at 739: *"There is much to be said for the view that certiorari for non-jurisdictional error on the face of the record is not an '**appropriate**' remedy in such cases and the remedy by appeal is the '**most ... convenient in the public interest**': see also **R v Elliott; Ex parte Elliott** (1974) 8 SASR 329."*

95 Some of the recent authorities, in this Court, on the Act also refer to this discretionary aspect. In particular in ***Brodyn Pty Limited v Davenport***, Einstein J said at paragraph 18: *"And in determining the limited extent to which the procedures under the Act are open to judicial review, it is necessary to take into account the central mischief sought to be remedied as exposed by the second reading speech. Justice McDougall has relevantly set out that reading speech in **Musico (**see [2003] NSWSC 977 at [20]). It makes it very plain that the legislation was aimed at permitting contractors and subcontractors to obtain a prompt interim progress payment on account, pending final determination of all disputes. Were the Court to now hold that disappointed respondents may, following an adjudication determination, invoke general review by the courts of those determinations by way of orders in the nature of prerogative writs, the way would be open for a wholesale undermining of the mischief sought to be dealt with by the Act."*

96 In ***Musico v Davenport*** at paragraphs 125 - 126 McDougall J held that the grant of certiorari is discretionary as a matter of principle. His Honour said in this regard (at [126]): *"[A]s was emphasised in **Meagher v Stephenson** (1993) 30 NSWLR 736, 738, the question is what is the most effective and convenient remedy, not just for the applicant, **but also in the public interest**."* [Emphasis added]

97 However, McDougall J held (at [130]): *"In my opinion, the question of refusing relief on these discretionary grounds would only arise where the suggested alternative remedy would, if sought and obtained, have the same effect as relief in the nature of prerogative relief. In the context of the Act, that could only be so where an application to set aside the judgment arising from the filing of the adjudication certificate could be conducted on grounds including denial of natural justice or jurisdictional error. If I am right in thinking that s 25(4)(a)(iii) would preclude those arguments, then it could not be said that such an appeal is a true alternative to relief in the nature of prerogative relief."*

98 The defendants submitted that proceedings of the type contemplated by s 32 do provide an alternative remedy which satisfies the above mentioned legal principles. The reasons why they said that this was so are as follows:

*"(i) Proceedings of the type contemplated by s 32 have all the hallmarks of an appeal whereby the order to pay the adjudicated amount can be reversed. This construction of s 32 is consistent with the Parliament's intentions: see para. 4 above, where the passage of the Second Reading speech is set out, and where the Minister describes section 32 proceedings as "**the appeal**".*

*(ii) Section 32 proceedings can be brought at the same time and in the same proceedings as proceedings for certiorari: see **Abacus Funds Management v Davenport** [2003] NSWSC 1027 at [12].*

*(iii) McDougall J's comments (in the passage quoted in paragraph 81 above) that the alternative remedy must have **"the same effect as relief in the nature of prerogative relief"** should not be followed. The approach of Palmer J in **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140 at [90]-[98] should be preferred. The foregoing authorities speak of an **"alternative remedy"**, but do not go so far as to say that such remedy must have the same effect. The true question is whether **"a more convenient and satisfactory remedy exists": R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust.) Ltd** (1949) 78 CLR 389 at 401.*

99 In **Multiplex Constructions v Luikens** Palmer J considered whether the appeal process constituted by the s 32 proceedings might be an equally effective and convenient remedy. At paragraph s 94 –98 His Honour said the following:

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

*95 I do not think that there can be a hard and fast rule upon which the Court acts in exercising the discretion whether to grant relief by way of certiorari in respect of an adjudication under the Act which is shown to be flawed by jurisdictional error. The authorities show that the Courts take a pragmatic approach to the question whether there is another equally effective and convenient remedy besides the grant of prerogative relief, and that the discretion is very much grounded upon the particular facts of the case. In **Ex parte Waldron** , Glidewell LJ said at 852:*

"Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available in the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available."

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

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

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

100 I think His Honour's approach is sensible and has regard to the approach of the High Court in ***R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozane Theatres (Australia) Ltd*** (1949) 78 CLR 389 at 400. I turn to the various matters to be considered.

101 I have earlier indicated that this is a substantial contract. It is nearing its completion and the evidence before me indicates that practical completion will be achieved on 25 March 2004. There have been a number of notices of disputes served pursuant to clause 46 of the contract during the contract period and the parties are currently looking at a third party dispute resolution process to resolve those disputes. If that process is not agreed it is the plaintiff's intention to commence either litigation or arbitration under clause 46 of the contract as early as possible so that all claims may be disposed of in the one procedure. Mr McArdle, the contracts manager of the plaintiff, in his affidavit of 5 December 2003 indicated that that would be in a few months from the date of his affidavit. One thing that might also be noted on this aspect is that there seems to be an ongoing process for agreement in respect of disputed areas between the parties.

102 Although the amount of this progress claim is large it must be seen in the context of the size of the contract. Importantly the contract has now run its course and it is quite clear that the final appeal process which will contest the appropriateness or otherwise of the progress claims will be commenced in a very short time. The present situation can be contrasted with that which may have occurred if the first one or two of the twenty plus progress claims were the subject of a dispute at the commencement of this contract. One could then see quite a different time span before the resolution of the final appeal which is the alternative to judicial review.

103 The public interest is also an important consideration. The plaintiff referred to the following matters under this head.
First, *there is the public interest reflected in a fundamental policy of the Act to provide an inexpensive means for determining* ***interim*** *payments.*

Secondly, *the parties to the contract have agreed to a contractual regime which provides for interim progress payments based on contractual progress certificates. The interim payments are* ***"on account only"*** *(cl. 42.2). The parties' expectations are that any error in the contractual progress certificate cannot be the subject of an appeal, and that any disagreement about under-payment or over-payment can resolved in the final certificate. (See clause 42.7 and 42.8), or in subsequent arbitration or litigation.*

Thirdly, *the adjudication determination required an enormous effort by the adjudicator. It involved submissions and documents filling over 20 lever arched folders. The adjudicator required two extensions of time. (The first was to 13 October and the second was to 20 October.) The adjudicator's fees, reflecting the huge task undertaken by him and reflected in a lengthy and comprehensive determination, were $113,030.72 (McArdle para 14). The Plaintiff contends that he committed a jurisdictional error by not embarking on the Herculean task of independently valuing each contentious item, irrespective of the parties' submissions. In these circumstances, the Court should be reluctant to make an order in the nature of certiorari, where the alternative enquiry which the adjudicator should have embarked upon (according to the Plaintiff) was an impossibility, or one which required even more money (i.e. fees) and time. An even lengthier and more costly enquiry would have been at odds with the basic aim of the Act — to provide cheap and quick adjudication of interim payments.*

Fourthly, *the present case concerns a large engineering project, and a contract which will upon completion have involved about 30 progress claims. The public interest is not served by expensive litigation involving, potentially, multiple proceedings. There is a public policy against a multiplicity of proceedings:* ***Dow Jones and Co Inv v Gutnich*** *(2002) 77 ALJR at 262 [36]. This is reflected in the Act. See also* ***R v Monopolies Commission; ex parte Argyll Plc*** *[1986] 1 WLR 763 at 774-775 per Sir John Donaldson MR, where the Court of Appeal exercised its discretion by refraining from making an order in the nature of certiorari, notwithstanding that the preconditions for such order had been satisfied. In the context of financial regulation (with which the latter case was concerned), Bingham LJ has stated (extrajudicially) that* ***"it would seem to me wise for the Courts to venture into this unchartered minefield with considerable circumspection lest the cure be more damaging than the disease": "Should Public Law Remedies be Discretionary?",*** *[1991] Public Law 64 at 75. These comments carry force when the Court considers whether to exercise its discretion to refrain from making an order in the nature of certiorari in relation to an adjudication determination."*

104 Bearing in mind that the final review process will commence in March 2004, it seems to me that it is inappropriate for there to be an order by way of certiorari. This matter seems to be in that class of case where the public interest has a role to play in not encouraging multiple suits between the same parties.

105 If I were to form a view that the construction I prefer, that of the adjudicator not stepping into the shoes of the superintendent, should be followed, for the reasons expressed above, I would not grant relief.

106 Rather than form a final view on whether the view expressed by McDougall J in ***Abacus*** is wrong and should not be followed, I think it is better that I base my decision upon the discretionary ground to refuse relief. Accordingly I dismiss the summons with costs.

Mr F Corsaro SC for plaintiff instructed by Doyles Construction Lawyers
Mr RW White SC & Mr M Christie for first defendant instructed by Baker & McKenzie