**JUDGMENT : McDOUGALL J :** Supreme Court : New South Wales, Equity Div. T&C List. 6th May 2008

1 The plaintiff (Trysams) and the first defendant (Club) made a contract (the contract) on 11 July 2005, by which Club undertook to carry out renovations of and additions to a hotel at Gymea. The contract was a construction contract for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 (the Act). On 23 November 2007, Club made a payment claim under the Act. It was in substance although not perhaps in form a final payment claim. The claim included the release of the retention fund. Trysams disputed the claim, including the release of the retention fund. The dispute was referred to the second defendant (the adjudicator) for determination. He determined that Club should receive about 75% of the amount claimed, including the retention fund. Trysams says that the adjudicator's determination is void, essentially because he denied Trysams natural justice.

2 I conclude that there was no relevant denial of natural justice and that Trysams' challenges to the determination fail.

**The issues**

3 The issues for decision are:

(1) Did the adjudicator deny Trysams natural justice when he concluded that certain provisions of the contract, on which Trysams relied in answer to Club's claim for the retention fund, were avoided by the operation of s34 of the Act in circumstances where:

· that issue was not canvassed in the adjudication application or adjudication response (or in the underlying payment claim or payment schedule); and

· the adjudicator had not given the parties any opportunity to put submissions on the issue.

(2) Alternatively, did the adjudicator deny Trysams natural justice by failing to consider on its merits Trysams' case based on those contractual provisions?

(3) Alternatively, did the adjudicator fail to consider in good faith that aspect of Trysams' case?

(4) If the determination were found to be void, should the adjudication application be remitted to the adjudicator for further hearing, or should Club be left to pursue its rights under s26 of the Act?

(5) Subsidiary to the previous issue: should the matter not be remitted to the adjudicator to redetermine, on the ground of apprehended bias?

**The payment claim**

4 The payment claim was served on about 23 November 2007. It asserted that Club had carried out all of its obligations under the contract. The amount claimed, exclusive of GST, was $690,822.22. The claim comprised an amount for variations, an amount for delay costs flowing from extensions of time that were (or, Club said, should have been) granted and the amount of the retention fund. The retention fund was $355,025.00 (5% of the unadjusted contract price of $7,100,500.00).

**The payment schedule**

5 Trysams provided a payment schedule dated 7 December 2007. It stated that the scheduled amount was "*Negative $374,188.55 (incl. GST) – that is, Club Constructions owes Trysams that amount*".

6 The payment schedule allowed an amount for variations (although not the full amount sought by Club). It also allowed an amount for delay costs resulting from extensions of time (again, not the full amount sought; and it is unclear, and in any event irrelevant, whether the amount allowed related to the particular payment claim or to earlier claims). It asserted that Trysams was entitled to credit for unexpended provisional sums totalling about $173,000.00 inclusive of GST. It asserted a set-off for defective or incomplete work valued at about $573,000.00, and for liquidated damages of about $343,000.00 (in each case inclusive of GST).

7 In relation to Club's claim for the retention fund, the payment schedule placed stress on cl 11.10 of the contract. It asserted that by cl 11.10, the retention fund was to be released only on provision of the final certificate. It stated that (as was common ground) no final certificate had been issued, nor had any "special" certificate been issued in respect of any stage of the works. Thus, the payment schedule stated, "the Contract itself mandates against the final release of retention monies until and unless the pre-conditions stipulated under the Contract had been met".

8 The assertion as to the absence of a final or special certificate was, as I have said, uncontested. It was supported by a statutory declaration of a Mr Dale Poland, who appears to have performed the functions of the Superintendent under the contract.

**The adjudication application**

9 The adjudication application was dated 20 December 2007. It included a summary of the parties' competing positions in relation to the disputes arising out of the payment claim and payment schedule. As to the issue raised by the payment schedule in relation to provisional sums (to be credited to Trysams), the summary stated that:

(1) Club's position was "agreed as credits against payments due"; and

(2) there was no difference because "credit against payments due is not in dispute".

10 The adjudication application did not contest Trysams' position, as stated in the payment schedule, that the superintendent had not issued any final certificate or special certificate under the contract. Nor did it suggest that s34 of the Act had anything to say about the relevant provisions of the contract or their operation.

**The adjudication response**

11 The adjudication response was dated 3 January 2008. It commenced with an "*executive summary*". That summary, in relation to the claim for the retention sum, stated twice that "*the contract mandates against the release of the retention*".

12 That submission was amplified later in the document, where reference was made to the decisions of the Court of Appeal in ***Brodyn Pty Limited v Davenport*** (2004) 61 NSWLR 421 and ***Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*** [2005] NSWCA 142. The point made by Trysams was that neither the security nor the retention sum was to be released until a final or special certificate had been issued, and that a final or special certificate could not be issued until Club had achieved practical completion of the works (for the final certificate) or a stage (for a special certificate).

**The determination**

13 The determination was made on 25 January 2008. The adjudicator noted that an extension of time had been agreed (see s21(3)(b) of the Act). The adjudicator determined that the adjudicated amount was $516,243.63 inclusive of GST (or $469,312.39 exclusive of GST).

14 The adjudicator reached the adjudicated amount as follows (all figures are given, as the adjudicator gave them, exclusive of GST):

(1) To the contract sum ($6,455,000.00) he added $835,954.10 for agreed variations and his allowance of a further $49,271.59 for the disputed variations that were the subject of the adjudication application to reach a subtotal of $7,340,225.69.

(2) From this sum he deducted the cost of rectifying defective or incomplete work, which he valued at $163,297.30.

(3) He then added the amount of $187,000.00 for delay costs arising from extensions of time.

(4) He made no allowance for liquidated damages.

(5) He deducted the total amount paid of $6,894,616.00.

(6) To the amount so calculated, $469,312.39, the adjudicator added GST of $46,931.24 to arrive at the adjudicated amount.

15 It does not appear from the adjudicator's calculations that he gave credit for the unexpended provisional sums. Mr Christie of counsel, who appeared for Club, did not accept that the adjudicator had failed to bring the total of those sums to account. I have to say that I find nothing in the adjudication application to suggest that he did.

16 Ms Culkoff of counsel, who appeared for Trysams, submitted that the adjudicator had erred by failing to give credit for those provisional sums. However, she accepted, that error would not entitle the Court to intervene.

17 I should add that Ms Culkoff also submitted that the adjudicator had erred in including in the adjudicated amount GST on the retention sum. The basis for this submission was that the retention sum itself, $355,025.00, was inclusive of GST, and that by including the retention sum in his calculation of the adjudicated amount and by adding GST, the adjudicator had double counted. That submission is incorrect. As I have pointed out, the adjudicator carried out his calculation of the adjudicated amount on an "ex-GST" basis and then added GST. In any event, as Ms Culkoff accepted, the error (if made) would not entitle the Court to intervene.

18 I have to say that I was at the time and remain somewhat confused as to the purpose underlying the submissions as to what I might call "non-*Brodyn*" errors (actual or alleged) in the determination.

19 The adjudicator worked through the disputes in an orthodox way. He dealt first of all with the variations, considered them individually and valued them, and derived a subtotal.

20 The adjudicator then turned to defective or incomplete work. He considered the individual allegations, decided whether or not they were made out, and, where they were, valued the cost of rectification.

21 The adjudicator then turned to the claim relating to extensions of time. This was significant for two reasons. Firstly, it was relevant to Club's claim for delay costs. Secondly, it was relevant to Trysams' claim for liquidated damages. The adjudicator determined that some 142 days of extensions of time should be granted, and valued the delay costs on that basis. It followed from his assessment of the extensions of time that there was no entitlement to liquidated damages, because on that assessment the dates of practical completion of the stages were earlier than the dates for practical completion of those stages.

22 The adjudicator then turned his attention to the claim for the retention fund. He noted, correctly, that Trysams' case was that the retention sum should be withheld for two reasons:

(1) firstly, because Club was liable for defective or incomplete work and to pay liquidated damages; and

(2) secondly, because, there being no final certificate nor any special certificate, "no retention can be released".

23 The adjudicator did not accept those reasons for withholding payment. He said:

(1) the contractual provisions on which Trysams relied sought to limit the operation of the Act and thus fell foul of s34(2)(a);

(2) he as adjudicator was not bound by any contractual regime providing for entitlements to be dependant upon progress certificates (citing Hammerschlag J in ***Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*** [2007] NSWSC 941 at [93]).

(3) he had dealt with the alleged defects, and taken them into account in his quantification of the amount of the claim; and

(4) he had determined that Trysams had no entitlement to liquidated damages.

24 Thus, the adjudicator concluded; *"Based on the information before me, I do not consider that there is any basis for [Trysams] to withhold retention and I determine that the full amount should be released. I will therefore make no deduction for retention in calculating the amount due."*

25 To jump ahead: it is the first step in the adjudicator's view of the operation of s34 was a fundamental step in his reasoning that gives rise to the major dispute. Ms Culkoff submitted that the adjudicator's view of the operation of s34 was a fundamental step in his reasoning, and that in failing to give the parties an opportunity to put submissions on that issue (it being common ground that it had not been raised in the payment claim, payment schedule, adjudication application or adjudication response), the adjudicator had erred. Mr Christie submitted that the s 34 issue it was not an essential step in the adjudicator's reasoning and that it was not in any way material. Mr Christie submitted that the adjudicator's conclusion could be and was adequately supported by the second, third and fourth steps to which I have referred.

**The common law proceedings**

26 Trysams did not pay the adjudicated amount. Club obtained an adjudication certificate (see 24 of the Act) and filed that certificate in the Common Law Division of this Court, thereby obtaining a judgment for the amount certified (see s25 of the Act). The judgment was entered on 12 February 2008.

27 The following day, 13 February 2008, Trysams commenced these proceedings. Ms Culkoff said, and I accept, that at the time Trysams commenced these proceedings it had not become aware of the judgment to which I have referred.

28 On 7 March 2008 the Court ordered Trysams to lodge with the Registrar an unconditional bank guarantee for the adjudicated amount together with some interest, and stayed the judgment in the common law proceedings. The guarantee was lodged. It is held to abide the outcome of these proceedings or the further order of the Court.

**Relevant provisions of the contract**

29 Clause 10.20 dealt with security to be provided by Club (referred to as the "Contractor"). Clause 10.23 dealt with retention. Clause 10.24 dealt with release of the security and retention. I set out those clauses:

*10.20 SECURITY TO BE PROVIDED BY CONTRACTOR*

*The Contractor shall provide security for the due performance of his obligations under this Agreement as follows:*

*(a) By way of a bank guarantee for the percentage of the Contract Sum referred to in item S of this appendix to this Agreement; or*

*(b) By way of a retention amount to be retained progressively by the Principal in accordance with the Provisions of paragraph 10.23.01.*

*10.23 RETENTION HELD ON JOINT ACCOUNT*

*The following provisions shall relate to the amount to be retained progressively (called the retention monies) by the Principal as contemplated by Clause 10.20(b):*

*10.23.01 In certifying for progress payments for a particular Stage to the Contractor the Superintendent shall deduct from the amount which would otherwise be payable the percentage as stated in Item T of the Appendix of the contract value of the work executed.*

*10.23.02 The amounts so deducted shall be dealt with in accordance with the provisions of Clauses 10.20, 10.24, 10.25 and 11.10, except that in the event of the Contractor determining his employment under this Agreement pursuant to Clause 12.06 the rights and interests of the Principal in respect of the Retention Monies shall be and are hereby transferred to and for the benefit of the Contractor.*

*10.24 RELEASE OF SECURITY AND RETENTION MONEYS*

*10.24.01 Within ten (10) days of issue of the notice of Practical Completion pursuant to Clause 9.09 or within fifteen (15) days of the date on which each Stage is deemed to have reached Practical Completion pursuant to either of paragraphs 9.09.04 and 9.10.04 the Superintendent shall issue a special progress certificate to the Contractor for one half of the amount of the then current Retention Monies as stated in item T of the Appendix as being applicable to that Stage (or for a lesser amount after taking into account any sum due by the Contractor to the Principal pursuant to any provision of this Agreement); and*

*10.24.02 The Principal shall within a further ten (10) days arrange for the payment to the Contractor of the amount of the special progress certificate.*

*10.24.03 Upon practical completion the bank guarantee provided as security pursuant to 10.20(a) shall be released to the Contractor.*

30 In the Appendix, Item S specified the amount of security (for the purposes of, among others, cl 10.20) as "*$355,025.00 (5% of Contract Sum)*". Item T referred to the retention fund (cl 10.23.01) as "*10% until Practical Completion thereafter at the rate 5% for 26 weeks reducing to 2.5% for the balance of the defect liability period*".

31 As cl10.24 indicates, cl 9.09 dealt with practical completion. That clause was in a relatively straightforward form, and it is not necessary to set it out. In essence, it provided for a series of steps which, if carried through, would lead to the Superintendent's giving a notice of practical completion.

32 Clause 11 of the contract dealt with the final certificate and final payment. It provided for a regime which would lead to the Superintendent's issuing a final certificate certifying the final balance due and payable to Club (cls

11.04, 11.07), for the payment of the amount certified (cl 11.09) and for the release of security (cl 11.10). It is not necessary to set out those provisions.

33 At this point, I note that although the contract appeared to contemplate that the retention fund should be 10% until practical completion, and reducing thereafter, the parties appear to have proceeded on the basis that the retention fund should be limited to 5%. In this, they appear to have conflated the requirements of cl 10.20 (read in conjunction with Item S of the schedule) and cl 10.23 (read in conjunction with Item T). However, as cl 10.20 makes clear, there was to be either a bank guarantee (in the amount set out in Item S) or a retention fund in accordance with cl 10.23 (and therefore complying with Item T).

**Relevant provisions of the Act**

34 Section 8 of the Act gives to every person who undertakes to carry out construction work, or to supply related goods or services, under a construction contract an entitlement to progress payments. (Henceforth, for convenience, I will refer only to construction work.)

35 A "progress payment" is defined in s4 of the Act to mean a payment to which a person is entitled under s8, and (para (a)) to include "the final payment for construction work carried out… under a construction contract".

36 By s9 of the Act, the amount of a progress payment is to be quantified in accordance with the terms of the contract or, if the contract makes no express provision, "on the basis of the value of the construction work carried out or undertaken to be carried out… under the contract".

37 Section 13 of the Act gives to a person who is or claims to be entitled to a progress payment the right to serve a payment claim. By subs(3)(b), the claimed amount "may include any amount… that is held under the construction contract by the respondent and that the claimant claims is due for release".

38 Where a dispute in relation to a payment claim is submitted to adjudication, the adjudicator is required to determine, among other things, "*the amount of the progress payment (if any) to be paid by the respondent to the claimant*" (s22(1)(a)). In reaching that determination, the adjudicator is bound to consider only the matters set out in s22(2):

***22 Adjudicator's determination …***

*(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.*

39 Section 34 of the Act seeks to deal with contractual efforts to exclude or modify the operation of the Act. It provides as follows:

***34 No contracting out***

*(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*

*(2) A provision of any agreement (whether in writing or not):*

*(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*

*(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,*

*is void.*

40 The definition of "progress payment" was amended, and s13(3) was inserted, by the *Building and Construction Industry Security of Payment Amendment Act* 2002 (Act No.133 of 2002). The effect of those amendments, to the extent that they are relevant, is to ensure that the Act applies not only to what might be called progress claims in the ordinary sense of that phrase – claims made during the currency of the contract – but also to a final claim. The amendments were introduced to overcome the effect of the decision of Austin J in ***Jemzone v Trytan*** [2002] NSWSC 395 at [35] to [39]. As a result of those amendments it is clear that:

(1) a progress payment may include a final payment for construction work carried out under a construction contract;

(2) the statutory right to progress payments given by s8 therefore extends to the final payment;

(3) a progress claim may be made under s13 for a final payment;

(4) such a progress claim may include any retention fund that the claimant asserts is due for release; and

(5) if the claimant and respondent cannot agree, and the dispute goes to adjudication, the adjudicator may decide (among other things) whether the retention fund should be released.

**First issue: denial of natural justice**

***The entitlement to natural justice***

41 The Court of Appeal in ***Brodyn*** considered the grounds on which the courts might set an adjudicators determination aside, as being void. One of those grounds was that there was a "*substantial denial of the measure of natural justice that the Act requires to be given*". See Hodgson JA (with whom Mason P and Giles JA agreed) at 441 – 442 [55].

42 The content or extent of the requirement to afford natural justice is to be assessed by reference to the relevant statutory provisions, including:
(1) the requirement that a respondent state in its payment schedule its reasons why its scheduled amount is less than the claimed amount (s14(3));
(2) the limited time within which a respondent to an adjudication application may lodge an adjudication response (s20(1)); and
(3) the prohibition against a respondent's including in its adjudication response any reason for withholding payment that has not been stated in its payment schedule (s20(2B)).

43 Ms Culkoff submitted that the test for denial for natural justice was that described by me in ***John Goss Projects v Leighton Contractors*** (2006) 66 NSWLR 707. Referring to what I had said earlier in *Musico v Davenport* [2003] NSWSC 977 at [107], I said (in ***John Goss*** at [31]) "*that where an adjudicator was minded to decide a dispute on a basis for which neither party had contended, then natural justice required the adjudicator to notify the parties of that intention, so that they could put submissions on it*." I adhere to that view. However, as I pointed out in *John Goss* at [42], "*the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case*". By that I meant, as I said, that the principles of natural justice could not… "*require an adjudicator to give the parties an opportunity to put submissions on matter that were not germane to his or her decision*".

44 ***John Goss*** was a case where it was easy to see that the particular point on which the adjudicator decided it was "*germane*". Indeed, it was fundamental to the adjudicator's decision. Had the adjudicator notified the parties of the way in which he was proposing to dispose of the case, there were substantial submissions that could have been put to dissuade him from doing so. Thus, it was easy to conclude that, by denying the plaintiff in that case any opportunity to put submissions, the adjudicator had denied the plaintiff natural justice.

45 It does not follow from what I said in *John Goss* (or, for that matter, in ***Musico***) that any failure by an adjudicator to ask for submissions on a matter not raised by the parties will amount to denial of natural justice sufficient to justify the Court's declaring the adjudication to be void, on *Brodyn* grounds. At the very least, the point must be (as I said) "germane to [the] decision". In addition, perhaps, it must be at least arguable that meaningful submissions could have been put if an opportunity to put them had been afforded: i.e, that there was something to be put that might well persuade the adjudicator to change his or her mind.

***Trysams' submissions***

46 It is by no means clear that Ms Culkoff accepted the importance of materiality. Her submission was that the adjudicator had denied Trysams natural justice because of his view about the operation of s34. She did not submit in terms that the failure to offer Trysams an opportunity to put submissions was material because the s34 point was an essential element in the adjudicator's reasoning, or an essential step along the way to his conclusion. Her submission (as I understood it) was that the failure was material because there were submissions that could have been put. In my view, this approach is likely to lead (as I think to some extent in this case it did lead) to confusion.

47 Ms Culkoff submitted that if the adjudicator had notified Trysams that he was minded to conclude that the contractual provisions on which it relied were avoided by s34, Trysams could have made the following submissions (I paraphrase, in briefer terms than the original, paragraph 45 of Ms Culkoff's written outline dated 31 March 2008):
(1) section 34 could not have the effect that the adjudicator ascribed to it "for the reasons articulated by the Court of Appeal in ***John Holland Pty Limited v Roads and Traffic Authority of New South Wales*** [2007] NSWCA 140;"
(2) the issue of a final certificate or a special certificate was a condition precedent to the release of the retention fund (relying on the decision of the Court of Appeal in ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** (2003) 56 NSWLR 576); and
(3) if the adjudicator "applied s34 to void the provisions under the Contract, contrary to the principles enunciated in *John Holland v RTA*, such a decision could operate to deny Trysams the right to issue a Final Payment Claim which could "*undo" the… determination – with the retention moneys still available to Trysams to meet the rectification costs*".

48 Ms Culkoff submitted further that if the relevant clauses of the contract were void (through the operation of s34) then they were void for all purposes. Thus, she submitted (in amplification of the third point noted above), the adjudicator's decision that the relevant clauses were void had denied Trysams the opportunity, said to be one recognized in *John Holland* and preserved in s32, to require Club to pay money "*for defects, or liquidated damages, or whatever,*" and to thereby use the retention monies for such a purpose.

***Club's submissions***

49 Mr Christie submitted that before any failure to afford an opportunity to be heard could amount to a denial of natural justice, the subject matter must be shown to be material in the sense that I explained in *John Goss*. He submitted, based on what Hodgson JA had said in ***Brodyn*** at 441–442 [55], that there must be "*a substantial denial… of natural justice*". Mr Christie referred to *re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, where Gleeson CJ said at 13-14 [37] that fairness is not abstract but practical and that "*[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice*".

50 Mr Christie submitted further that it was not appropriate to take a narrow and pedantic approach to the adjudicator's reasons, "*combing through the words of the decision-maker with a fine appellate tooth-comb [sic], against the possibility that a verbal slip will be found warranting*" the intervention of the Court (he quoted from Kirby J in ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (1996) 185 CLR 259 at 291).

51 Mr Christie submitted that on a fair reading, the s34 point was not essential to the adjudicator's conclusion. In particular, Mr Christie submitted (as I have indicated at [25] above) that the ultimate decision could be upheld without reference to the reasoning based on s34.

***Decision***

52 I remain of the view that the concept of materiality is inextricably interlinked with the concept of natural justice, insofar as the latter concept is relevant to the determinations of adjudicators under the Act. On my view, that flows not only from Hodgson JA's use of the adjective "*substantial*" in ***Brodyn,*** but also from the point made by Gleeson CJ in ***Lam:*** that the law is concerned with the practical effect of the alleged denial of an opportunity to be heard. Thus, the concept of materiality requires some analysis of at least:

(1) the importance or otherwise of the relevant subject matter (as to which, it is said, there was a denial of an opportunity to put submissions): in particular, its significance to the actual determination; and

(2) whether or not there were submissions that could properly have been put that, as a matter of reality and not mere speculation, might have affected the determination.

53 In some cases, those two matters may overlap; but in others, they may be quite separate. To the extent that Ms Culkoff submitted that the concept of materiality was to be judged only and always by having regard to the nature of the submissions that could have been put, I do not agree.

54 In my view, each of the ways in which Ms Culkoff sought to support her submission should be rejected. Firstly, I do not think that, on a fair reading of the relevant part of the determination, the adjudicator's views on the operation of s34 were essential to his conclusion. If the relevant dot point were excised from his reasons, the conclusion – that there should be no deduction for retention – could be sustained. That is because the adjudicator understood correctly that:

(1) the retention sum stood as security for the performance of Club's obligations, including as to defect rectification and as to the payment of liquidated damages; and

(2) on his valuation of all the elements required to be considered in arriving at the adjudicated amount (including both positive elements – claims asserted by Club – and negative elements – offsetting amounts claimed by Trysams) there was a balance owing to Club.

55 To this the adjudicator added his view that, to the extent that the contractual regime for certification might stand in the way of his determination, he was not bound by that regime. He reached that view not because of the operation of s34 but because of the analogy drawn by him with the reasoning of Hammerschlag J in the earlier case involving these parties: ***Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*** [2007] NSWSC 941 at [93].

56 Whether the referee was right or wrong in his application of the reasoning of Hammerschlag J is not to the point. Ms Culkoff did not submit that this aspect of the adjudicator's reasoning displayed any error, let alone "***Brodyn*"** error; and a submission that a mere misunderstanding, or misapplication, of the relevant legal principle, without more, could have entitled the Court to intervene could not be accepted.

57 Thus, whilst I accept that the referee obtained support for his conclusion from his view as to the operation of s34, I do not think that his failure to give the parties an opportunity to be heard on the point has the consequence that his determination must be declared to be void.

58 It follows that there was no substantial denial of natural justice, because the point was not material to the adjudicator's decision. In any event, I think, the second and third strands of Ms Culkoff's submissions should not be accepted. I turn to them.

59 As to the second strand: I do not think that the decision of the Court of Appeal in the ***John Holland*** case on which Ms Culkoff relied ([2007] NSWCA 140) has the effect for which she contended.

60 That was a case where practical completion had been achieved, and the defects liability period was in force. The contract provided that the respondent might in its discretion release up to 50% of the security provided by the appellant. It declined to release any, claiming that it was entitled to hold the security against claims that it had foreshadowed for alleged defective works and the like.

61 It was against that background – fundamentally different to the facts in this case – that the Court of Appeal considered the question, whether the security provisions of the contract were void by the operation of s34.

62 The Court dismissed the proposition that the security provisions were some "*clog*" on the adjudication process, or that they had the effect of "*undoing*" the determination. Giles JA said at [62] that the contractor's (appellant's) statutory right to receive an adjudicated amount, and the principal's (respondent's) contractual right to be paid any amount shown as owing on a final certificate, were separate and distinct. His Honour said at [63] that the use of the security to recoup any amount finally certified to be owing by the contractor to the principal would not have any effect contrary to the operation of the Act:

*[62] It is not correct that retention of security "undoes" an adjudicator's determination, or that a superintendent who in performing his contractual function comes to a determination negates a statutory right to retain an adjudicated amount. The adjudicator's determination remains, and brings payment of the adjudicated amount, but that is interim and subject to a different position being established in relation to payment for the relevant work or related goods and services, contractually or in proceedings. If in civil proceedings it is decided that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, that does not undo the adjudicator's determination. It has done its work in ensuring "prompt interim progress payment on account,*

*pending final determination of all disputes" (per Ipp JA in **Brewarrina Shire Council v Beckhaus Civil Pty Ltd** at [219], above). So also if, in the manner earlier described, the contractual mechanisms result in a contractual obligation on the principal to pay the contractor or the contractor to pay the principal. The contractor's right under the Act is to receive the adjudicated amount, but subject to final determination, and if the final determination involves the superintendent determining that the contractor was entitled to $10 or $30, rather than the $20 determined by the adjudicator, the superintendent is not negating the contractor's statutory right.*

*[63] Section 34 of the Act requires that the contractual provision exclude, modify or restrict, or have the effect of excluding, modifying or restricting, "the operation of this Act". The Act operated to require that the RTA pay the adjudicated amounts to John Holland, and it did so. (In relation to the Detonator Dump monies, it may be taken that it has done so or will do so if the challenge to the adjudicator's determination has failed or fails). There is no effect contrary to that operation of the Act if, in the final determination of the position between the parties, one party has to pay money to the other because the final arbiter takes a different view from that of the adjudicator. Section 32 of the Act preserves the final determination, by the contractual mechanism or by proceedings. Nor is there an effect contrary to that operation of the Act if security provided under the contract is retained, the contract on its proper construction and operation so permitting, to satisfy John Holland's obligation to pay money to the RTA if that is the outcome of the final determination.*

63 What his Honour said must be understood in the light of the particular facts, including that at the relevant time there had been no final determination (either pursuant to the contract or otherwise) of the amount (if any) owing by the appellant to the respondent. Indeed, at the relevant time, the defects liability period had not expired, so that no such final determination could be made.

64 In the present case, the claim was in effect Club's final payment claim. There is no doubt that the adjudicator was empowered to deal with it (both because of the definition of "*progress payment*" in s4 and because, by the operation of s13(3), it was open to Club to include in its payment claim a claim for the retention fund).

65 I do not think that the adjudicator's conclusion, that the contractual provisions on which Trysams relied were void by operation of s34, is necessarily (or at all) inconsistent with the reasoning of the Court of Appeal in ***John Holland***. On the contrary: if the contractual provisions had the effect of denying Club's entitlement to the retention fund, simply because no final certificate or special certificate had been issued, it might well be correct to say that those provisions restricted, or had the effect of restricting, the operation of the Act in relation to a final payment claim that included a claim for the retention sum. Clearly, the legislature intended that adjudicators should have power to determine such claims. Equally clearly, adjudicators deciding such claims are not to be bound by the decision (or absence of decision) of a superintendent to issue (or not to issue) a final or special certificate. In this respect, I refer not only to the decision of Hammerschlag J in ***Trysams*** but also to my decision in ***Abacus v Davenport*** [2003] NSWSC 1027 at [34] to [40]. (I note that Hammerschlag J in ***Trysams*** at [93] referred to and relied upon my decision.)

66 The legislature gave adjudicators power to deal with claims to retention funds. It must be taken to have understood the function that retention funds play, and the very common contractual situation in which the release of those funds is dependant upon a process of certification. The legislature could not have intended that adjudicators, in deciding claims for retention funds, would be bound by such certification provisions.

67 For these reasons, I do not think the decision in ***John Holland*** has a great deal to say about the operation of s34 in the circumstances of this case; i.e., on Club's case (accepted by the referee), at a point in time when, subject to questions of defective or incomplete work, Club had substantially performed its obligations under the contract. (As to the significance of defective or incomplete work: the amount allowed by the referee was approximately 2.2% of the adjusted contract sum. This suggests that, in the referee's view Club had indeed substantially performed its obligations under the contract.)

68 I have not overlooked that the second strand of Ms Culkoff's submissions relied also on the decision of the Court of Appeal in ***Brewarrina Shire Council***. However, that case was not concerned with a payment claim or adjudication under the Act. Further, the amendments introduced to the Act by Act No.133 of 2002 (see [40] above) commenced on 3 March 2003. They were not inforce at the time of the events with which that case was concerned.

69 In my view, if the adjudicator in this case had afforded Trysams an opportunity to make submissions on the s34 point, and Trysams had made the submissions foreshadowed by Ms Culkoff, those submissions should not have persuaded the adjudicator to change his mind. Indeed, I think, if he did rely upon them and change his mind, he would have fallen into error: although not error of a reviewable kind.

70 Since the submissions that Trysams says it would have made are not submissions that should have been accepted, I find it difficult to see how Trysams lost anything by being denied the opportunity to put them.

71 The third strand of Ms Culkoff's submissions (set out at [47] above) appears to overstate the effect of the adjudicator's determination. In essence, Ms Culkoff submitted that, because the adjudicator had decided that the relevant contractual provisions were void, it was no longer open to Trysams to rely upon them. That cannot be correct. The adjudicator's determination does not fix, in any final and authoritative way, rights under the contract. It is still open to Trysams to take proceedings (curial or arbitral) to establish what it says are its entitlements against Club. As s32 of the Act recognises, nothing in the adjudicator's determination affects any right that might be agitated in any such proceedings. Nor does the adjudicator's determination mean that Trysams cannot in any such proceedings rely on the relevant contractual provisions to assert that Club had no entitlement to be paid, and should on some restitutionary or other basis repay, the retention fund.

72 The adjudicator's decision that the relevant contractual decisions are rendered void by the operation of s34 cannot bind a court or arbitral tribunal. Whilst it is correct to say that "void" in s34 means "void for all purposes" (see Hammerschlag J in ***Trysams*** at [16] and the cases there cited; and see also my article, "*Prohibition on Contracting Out of the Building and Construction Industry Security of Payment Act* (NSW)" (2006) 22 BCL 246 at 255 to 256), an adjudicator's decision, unlike a final decision of a court or arbitral tribunal, does not finally decide the question as between the parties. No estoppel can arise from the determination which would preclude Trysams from rearguing the point before a court or arbitrator.

73 It is correct to say that the effect of the adjudicator's decision is to deprive Trysams of the practical protection afforded by the retention fund. That, however, is a necessary consequence of s13(3) of the Act, and the power given to adjudicators to decide disputes as to payment claims, including a dispute as to a retention fund.

74 It follows that in my view the attack based on denial of natural justice, because there was not given any opportunity to put submissions on the operation of s34, must fail.

**Second and third issues**

***Alleged failure to consider the relevant contractual provisions.***

75 In essence, the second and third submissions are alternative ways of asserting that the determination is void because the adjudicator failed to consider Trysams' case based on the relevant contractual provisions. It is said that thereby he either:

(1) denied Trysams' natural justice, by failing to consider an integral part of its case; or

(2) failed to exercise in good faith the powers given to him by the Act; specifically, the power (or duty) to consider the provisions of the Act, the provisions of the contract, the payment schedule and Trysams' submissions duly made in support of it.

76 There is a very simple resolution to these issues. The adjudicator did consider this aspect of Trysams' payment schedule. As I have said, he recognised that Trysams sought to answer the claim for the payment of the retention fund in two ways, including specifically its submission that "the Contract mandates against release of retention" and the reference to cl 11.10. The adjudicator dealt with those submissions. I accept that he did not deal with them to Trysams' satisfaction. But that is hardly to the point.

**Conclusion on Trysams' case**

77 It follows that Trysams' attacks on the determination fail. The summons must be dismissed with costs.

**Club's cross-claim**

78 It follows that Club's cross-claim does not arise. I will however indicate, both because it is of some practical significance and because it may be relevant to the question of costs, what I would have done in the event that I had concluded that the determination was void.

79 The effect of a hypothetical decision that the determination was void would be that it never existed: that there had been no determination on the adjudication application. Thus, s26 of the Act would be engaged. That section reads as follows:

***26 Claimant may make new application in certain circumstances***

*(1) This section applies if:*

*(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or*

*(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).*

*(2) In either of those circumstances, the claimant:*

*(a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and*

*(b) may make a new adjudication application under section 17.*

*(3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).*

*(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.*

80 In the hypothetical circumstances under consideration, it would be open to Club to withdraw the application and make a new adjudication application, as contemplated by subs (2). However, it would not have been incumbent on Club to do so. It could have called upon the adjudicator to complete (or undertake) the process. Had it been necessary to do so, I would have expressed the view that the adjudicator should do so. I would not however have made an order that he do so (particularly, an order that he do so within a specified time) without giving him an opportunity to be heard.

81 I appreciate that the adjudicator and the third defendant (the authorised nominating authority to whom the application was made) have submitted save as to costs. However, I would be loathe to impose an obligation on the adjudicator, involving at least in theory the usual consequences of non-compliance, without having some understanding of his readiness and, perhaps, willingness to undertake that obligation.

82 I have no doubt that an order of the kind sought (in effect, an order under s69 of the *Supreme Court Act* 1970 in the nature of mandamus) could be made. I dealt with this question in ***Musico*** at [22] to [32]. I concluded that adjudicators

appointed (more accurately, "*taken to be appointed*" – see s19(2) of the Act ) had legal authority to determine questions affecting the rights of claimants and respondents, and were therefore amenable to orders under s69.

83 Palmer J considered the question in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140. His Honour concluded at [15] that an adjudicator under the Act had legal authority to make a determination affecting the rights of the parties to the adjudication, and was required to act judicially in that he or she was required to observe the basic rules of natural justice. Thus, his Honour concluded, the Court had power to grant relief in the nature of certiorari against the determinations of adjudicators.

84 My reasoning on this point in ***Musico*** was considered by the Court of Appeal in *Brodyn.* Hodgson JA dealt with it at 437 [44] and following. His Honour concluded that the Court's power to grant relief against the determinations of adjudicators was more limited than I had said.

85 His Honour concluded that the legislature intended that the validity of an adjudicator's determination should depend on satisfaction of those basic and essential requirements for the existence of a determination laid down in the Act (***Brodyn*** at 441 [52] and [53]). His Honour said that approaching the question on the basis of jurisdictional or non-jurisdictional error of law "*has tended to cast the net too widely*" (at 441 [54]).

86 I concluded in ***Musico*** at [32] "*that, apart from any privative effect the Act might have, relief under s69 of the Supreme Court Act 1970 would, in principle, lie against an adjudicator appointed under s19 of the Act*". I do not think that the reasoning of Hodgson JA in ***Brodyn*** casts doubt on that "*in principle*" conclusion. In substance, his Honour said, the Act on its proper construction did manifest a "*privative effect*", in that it at least by implication excluded judicial review on the basis of jurisdictional error of law.

87 I accept that it follows from the decision in ***Brodyn*** (which has been affirmed on a number of occasions) that the Court does not have power to grant relief in the nature of certiorari against the determinations of adjudicators. It does not follow either from that proposition or from the reasoning leading to it that the Court does not have power to grant relief in the nature of mandamus. That is because the denial of the availability of certiorari was not based on the proposition that an adjudicator is not a "tribunal" in principle susceptible to judicial review. It was based on an analysis of the scheme of the Act and a conclusion that, at least by implication, the legislative purpose is inconsistent with review in the nature of certiorari, and consistent only with review on a narrower basis.

88 Basten JA touched on the issue in ***Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 at [79]. One of the arguments advanced in that case, which did not require resolution, was that prerogative relief under s69 of the *Supreme Court Act* 1970 would not be available in relation to an adjudicator's determination. His Honour referred to my consideration of the point in ***Musico*** and to Palmer J's consideration of it in ***Multiplex.*** Basten JA did not express a view on the point, saying only that ***Brodyn*** identified no reasons for doubting the correctness of what Palmer J and I had said, and that the question did not need to be addressed.

89 For these reasons, were it necessary to do so, I would conclude that the Court has the power to order an adjudicator to reconsider an application and make a determination according to law.

90 Undoubtedly, there may arise cases where it would be inappropriate to make such an order, and more appropriate to leave the dissatisfied claimant to its rights under s26(2). It is both unnecessary and undesirable to explore that question further.

**Costs**

91 Ms Culkoff submitted that if I came to the views that I have articulated – in summary, that the summons should be dismissed and therefore that the cross-claim also should be dismissed – costs should follow the event in each case. Thus, she accepted, Trysams must bear Club's costs of the summons. However, she submitted, Club should bear Trysams' of the cross-claim.

92 Mr Christie embraced the former proposition. He submitted, however, that the cross-claim was in substance defensive and that, it having failed only because Trysams' claim against Club had failed, Club should have its costs of the cross-claim.

93 Mr Christie submitted in addition that if it were necessary to do so I should consider the merits of the cross-claim.

94 In my view, the cross-claim was defensive in the relevant sense. It was postulated upon success of Trysams' claim against Club. The cross-claim failed not because of its intrinsic merits (or lack of them) but because the event on which it was predicated did not occur. In my view, that is enough to justify the conclusion that the "event" on which the costs of the cross-claim should follow is not the failure of the cross-claim but the failure of the summons.

95 There are two other considerations leading to the same conclusion. Firstly, Trysams opposed the cross-claim on the basis that Club should be left to its rights under s26(2). I do not think that this outcome would have been appropriate. If the matter were remitted to the adjudicator for further consideration in accordance with the Court's reasons, it is likely that the further fees (if any) would be considerably lower than the fees involved having the whole matter considered afresh by another adjudicator. Further, if the matter were reconsidered by the adjudicator, the adjudicator would be able to consider whether he did in fact make an error by omitting to give credit for the unexpended provisional sums. If the adjudicator came to that conclusion, there would be a significant benefit to Trysams.

96 Further, Trysams opposed the remitter of the matter to the adjudicator on the ground of apprehended bias. That apprehended bias was said to arise merely from the fact that the adjudicator had considered the matter and come to certain views. In circumstances where the great majority of those views are immune from review, and where the only palpable error (assuming, against Mr Christie's reservation, that the error exists), could be corrected on a reconsideration of the "*matter*" I see no reason for any apprehension of bias.

97 Ms Culkoff relied on the decision of Macready AsJ in ***Reiby Street Apartments v Winterton Constructions*** (2006) 22 BCL 426. That was an entirely different case. There was a dispute between the adjudicator and the plaintiff in respect of the adjudicator's fees for an earlier determination under the contract. It is easy to understand that how in those circumstances an observer might have apprehended on reasonable grounds that the adjudicator might not bring an unbiased mind to a further determination. There is no such factor present in this case.

98 As I have indicated, the appropriate order for the costs of the cross-claim is that they follow the event of the summons. In other words, the appropriate costs order overall is that Trysams should pay Club's costs of the proceedings including of Club's cross-claim.

**Superfluous documents**

99 Before finishing these reasons, I wish to record what in my view is an undesirable practice. As has happened in other cases under the Act, Trysams sought to tender the entirety of the material before the adjudicator, as well as his reasons. This material (including the reasons) occupied some nine folders and comprised in excess of 2700 pages. When I questioned the need for such a voluminous tender, some three folders were excised. One of the six folders tendered comprised the determination. It in turn comprises about 30 pages. Of the remaining five volumes (comprising in excess of 1400 pages) I was referred to about 15 pages.

100 I can accept that the tender should not have been narrowed down merely to those 15 pages together with the determination. I can accept that it would have been desirable, if not necessary, to give those 15 pages some context. I cannot accept that it was necessary to give them over 2700 pages of context. That is so particularly in the case of the folders comprising the payment claims and payment schedule (651 pages between them), and in the case of the payment schedule including a CD ROM to which no reference whatsoever was made), the adjudication application (250 pages) and the contract (465 pages).

101 An application to declare void an adjudication determination is not a proceeding in the nature of appeal, or in the nature of merits review. Except in rare cases (of which this was not one) there can be no point in seeking to put before the Court all of the material that was before the adjudicator. That point is reinforced in the present case bearing in mind the admirable way in which Club made admissions in its list response so as to facilitate the identification of the real issues in dispute. Much of the material tendered was relied upon to prove matters that had been admitted.

102 Having regard to my conclusions, it is not necessary to consider whether some special costs order should be made to take account of what in my view is the pointless and wasteful duplication of material. However, I wish to make it clear that parties are required to exercise some degree of intellectual judgment in choosing the material that they put before the Court. There is no reason why the opposing party should be burdened with the cost of considering a vast amount of irrelevant material. There is no reason why the Court's record should be cluttered with a vast amount of irrelevant material. There is no reason why, in an appropriate case, the service and tender of a vast amount of irrelevant material should not be recognised by moulding appropriate orders as to costs.

103 Litigation is to be conducted in such a way as to facilitate the just, quick and cheap resolutions of the real issues in dispute. See s56(1) of the *Civil Procedure Act* 2005. Parties to civil proceedings have a duty to assist the court to further the achievement of that process. See s56(3). Their lawyers are bound to assist them. See s56(4). To my mind, the application of those principles requires, among other things, that parties and their legal representatives give proper consideration to the issues in the case and to what they need to prove. I do not regard the indiscriminate wholesale tender of documents, to which quite clearly no sufficient intellectual analysis has been applied to consider their relevance and significance, as an appropriate way to approach the discharge of the duties set out in s56.

**Orders**

104 In proceedings 55012 of 2008 I make the following orders:

(1) Order that the summons and cross-claim be dismissed.
(2) Order the plaintiff to pay the first defendant's costs of the proceedings, including of the cross-claim.
(3) Otherwise make no order as to costs.
(4) Grant the first defendant leave to call on the bank guarantee in the sum of $549,333.53.
(5) Alternatively direct the Registrar to call upon the said guarantee and to pay the proceeds thereof to the first defendant.
(6) Order that the exhibits remain with the file for 28 days and that thereafter that they be held or disposed of in accordance with the rules.

105 In proceedings 10630 of 2008 I order that the stay granted on 7 March 2008 be dissolved.

V Culkoff (Plaintiff) : M Christie (First Defendant) JPR Legal Pty Ltd instructed by Doyles Construction Lawyers (First Defendant) ; Philip Davenport (Second and Third Defendants)