NEW SOUTH WALES COURT OF APPEAL

CITATION: Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394

FILE NUMBER(S):
40296/04

HEARING DATE(S): 1, 13 and 14 October 2004

JUDGMENT DATE: 03/11/2004

PARTIES:
Brodyn Pty. Limited t/as Time Cost and Quality - appellant
Philip Davenport - 1st respondent
Dasein Constructions Pty. Limited - 2nd respondent

JUDGMENT OF: Mason P Giles JA Hodgson JA

LOWER COURT JURISDICTION: Supreme Court - Equity Division

LOWER COURT FILE NUMBER(S): SC 5412/03

LOWER COURT JUDICIAL OFFICER: Gzell J

COUNSEL:
Mr. P. Callaghan SC with Ms. R. Rana for appellant
Mr. P.G. Fisher for respondents

SOLICITORS:
Schrader & Associates, Parramatta for appellant
Turnbull Bowles, Sydney for respondents

CATCHWORDS:
BUILDING AND CONSTRUCTION - Progress payments - Building & Construction Industry Security of Payment Act - Adjudicator's determination - Adjudication certificate - Consequent judgment - Grounds for judicial intervention - Whether certiorari available - Grounds on which purported determination void - Natural justice - Error of law - Reference dates - Effect of termination of contract or cessation of work - Home Building Act - Effect of absence of licence - Exercise of discretion - Whether other relief available in respect of judgment, including stay of execution.

LEGISLATION CITED:
Building & Construction Industry Security of Payment Act 1999
Home Building Act 1989 ss.3, 4, 10, 11, 94.
Supreme Court Act 1970 s.69

DECISION:

Appeal dismissed with costs.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40296/04
SC 5412/03

MASON P
GILES JA
HODGSON JA

Wednesday 3 November 2004

BRODYN. LTD. T/a TIME COST AND QUALITY V. DAVENPORT & ANOR.

HEADNOTE

FACTS

Brodyn entered into a construction contract with Dasein to which the Building & Construction Industry Security of Payment Act 1999 (the Act) applied. On 13 June, Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein, and purporting to accept that repudiation.

On 27 June 2003, Dasein served Broydn with a document stated to be a payment claim under the Act. Brodyn responded by serving a payment schedule in accordance with s.14 of the Act.

On 28 August 2003, and again on September 2003, Dasein served Brodyn with further documents stated to be payment claims under the Act. On 29 September, Brodyn served a further payment schedule in accordance with s.14 of the Act. The payment schedule contended inter alia that money should be deducted for incomplete work and for rectifying defects, and that claimant had breached cl.43 by not furnishing a statutory declaration as to payment of workers

On 2 October 2003, Dasein made an adjudication application under the Act in respect of its claim served on 28 September 2003. The adjudicator made his determination on 16 October 2003 giving reasons that did not refer to the contentions referred to above. An adjudicator's certificate under the Act was issued on 17 October 2003. This certificate was filed in the District Court on the same day so as to give it effect of judgment, as provided in s.25 of the Act.

Broydn applied to the Supreme Court for an order in the nature of certiorari quashing the adjudicator's determination, on the grounds that the relevant payment claim was invalid, and that

there had been a denial of natural justice. The primary judge considered that certiorari was available if the payment claim was not valid, but refused relief in the exercise of his discretion because it could not result in the setting aside of the s.25 judgment.

After lodging an appeal from that decision, Brodyn for the first time became aware that Dasein did not have at relevant times a licence under the Home Building Act 1989. Brodyn submitted on appeal that this caused the subcontract to become illegal (s.4) and unenforceable (s.10), and Dasein was not entitled to any progress payments.

HELD

(1) The primary judge erred in the exercise of his discretion. A District Court judgment constituted by the filing of the adjudication certificate can be set aside on appropriate grounds, including the non-existence of an adjudicator's determination.

(2) Musico v. Davenport [2003] NSWSC 977 and the cases which followed it are incorrect, to the extent that they hold that relief in the nature of certiorari is available to quash a determination which is not void. There is no occasion where relief in the nature of certiorari would be available and required. If a determination is void, relief is available by way of declaration and injunction. If the basic requirements of the Act are not complied with, or if a purported determination is not a bona fide attempt to exercise the power granted under the Act, or if there is a substantial denial of the measure of natural justice required under the Act, then a purported determination will be void and not merely voidable.

(3) The payment claim in this case was valid. The decision in Holdmark Developers Pty. Limited v. G.J. Formwork Pty. Limited [2004] NSWSC 905 is incorrect, to the extent that it decides that only one payment claim can be made after termination of a contract and/or cessation of work.

(4) The adjudicator's failure to refer to Brodyn's submission that money should be deducted for incomplete work and for rectifying defects, and that the claimant had breached cl.43 of the subcontract by not furnishing a statutory declaration, did not amount to a denial of natural justice nor render the determination void.

(5) Dasein's failure to have a licence under the HBA is not a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.

ORDERS

1. Appeal dismissed with costs.

****

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40296/04
SC 5412/03

MASON P
GILES JA
HODGSON JA

Wednesday 3 November 2004

BRODYN PTY. LTD. t/a TIME COST AND QUALITY V. DAVENPORT & ANOR.

Judgment

1 **MASON P:** I agree with Hodgson JA.

2 **GILES JA:** I agree with Hodgson JA.

3 **HODGSON JA:** On 2 April 2004, Gzell J gave judgment in proceedings in which the appellant (Brodyn) sought an order in the nature of certiorari quashing the adjudicator's determination of the first respondent (the adjudicator) dated 16 October 2003, and associated relief affecting the second respondent (Dasein). The primary judge refused to grant the relief sought, and dismissed Brodyn's summons and ordered it to pay the respondents' costs.

4 Brodyn appealed from that decision.

CIRCUMSTANCES

5 In November 2002, Brodyn entered into a contract with Dasein for Dasein to undertake concreting work for twelve townhouses at 37 River Road, Wollstonecraft. The contract included the standard form of AS4303-1995 General Conditions of Subcontract for design and construction.

6 Between December 2002 and May 2003, Dasein submitted ten progress claims, and Brodyn paid a total of $277,522.43 in response to them.

7 On 13 June 2003, Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein, and purporting to accept that repudiation.

8 On 27 June 2003, Dasein served on Brodyn a 4-page document claiming payment of $115,340.39 stated to be "final claim for 37 River Road, Wollstonecraft, NSW", stating that it was a payment claim made under the Building & Construction Industry Security of Payment Act 1999 NSW (the Act), and setting out the items in respect of which the claim was made.

9 Brodyn responded with a 139-page document entitled Final Certificate, identifying the claim to which it related and certifying that the payment to be made by Dasein to Brodyn was $125,695.29. It set out ten reasons, including reference to rejected or unapproved variations, and defects in the work done; and also, as point (9), "the claimant has not furnished a statutory declaration in breach of Clause 43 of the subcontract numbered 9/1-03 executed on 26th November 2002". One other substantial matter referred to

in this document was to the effect that Dasein was indebted to Brodyn for $86,184.00, being liquidated damages for 56 days' delay at $1,539.00 per day.

10 On 4 August 2003, Dasein recovered certain items that had been left on the site. However, it claimed that not all items were returned, and on 28 August 2003, Dasein served on Brodyn a document claiming payment of $191,800.78, stated again to be "final claim for 37 River Road, Wollstonecraft, NSW", stating that it was a payment claimed under the Act, and setting out items in respect of which the claim was made. A substantial part of the increase from the previous claim was due to a claim for items left on the site and not recovered.

11 Brodyn responded with a document dated 29 August 2003, asserting that Dasein's purported claim was invalid and that no payment was due. Dasein made an adjudication application under the Act on 15 September 2003, but withdrew it shortly afterwards.

12 On 28 September 2003, Dasein served on Brodyn a document claiming payment of $214,744.90, made up of the $191,800.78 previously claimed, and $3,421.86 interest. This document also stated that it was a claim made under the Act, and set out items in respect of which the claim was made.

13 Brodyn responded to this with a document dated 29 September 2003, described as a payment schedule, which concluded as follows:

> The reasons for the difference are as follows:
>
> 1) No contract binds the parties after TCQ's acceptance of Daseins (sic) wrongful repudiation and hence Dasein Constructions Pty Limited have no further rights to progress claims.
> 2) TCQ submitted a detailed payment schedule on 10 July 2003 in response to the final claim dated 28 June 2003 and rely upon the information contained within.
> 3) The purported progress claim is outside the jurisdiction of the Act, for the reason that a final claim has previously been submitted. Section 13(5) of the Act states the claimant is only entitled to serve one payment claim in respect of each reference date.

TCQ is another label for Brodyn.

14 On 2 October 2003, Dasein made an adjudication application under the Act in respect of its claim served on 28 September 2003. The adjudicator accepted the application by Notice of Acceptance served on 11 October 2003. Brodyn provided a 153-page adjudication response on 15 October 2003.

15 The adjudicator made his determination on 16 October 2003. This determined the amount of the progress payment to be made by Brodyn to Dasein as $180,059.00, the due date for payment as 14 October 2003 and the rate of interest as 9% per annum compounded at six-monthly intervals. Reasons were given, extending over six pages.

16 An adjudication certificate under the Act was issued on 17 October 2003; and it was filed in the District Court on the same day so as to give it the effect of a judgment, as provided in s.25 of the Act.

17 These proceedings were commenced on 23 October 2003 and an ex parte injunction was obtained on that day against Dasein requesting or filing an adjudication certificate, before Brodyn was aware that judgment had already been obtained. On 30 October 2003, Brodyn issued a Statement of Liquidated Claim in the District Court, claiming damages of $385,441.93 against Dasein.

18 On 31 October 2003, Dasein was placed in voluntary administration. On the same day, Judge Walmsley in the District Court granted a stay on the District Court judgment; but he vacated this on 21 November 2003, because the stay had been granted in ignorance of the voluntary administration, and contrary to s.440D of the Corporations Act.

19 On 25 November 2003, Brodyn commenced further proceedings in the Supreme Court against Dasein, seeking leave under s.440D of the Corporations Act in relation to the three proceedings it had commenced, and a stay of execution of the District Court judgment or an injunction against Dasein enforcing that judgment.

20 On 4 December 2003, a Deed of Company Arrangement in relation to Dasein was signed. Subsequently, Brodyn lodged a proof of debt, which on 22 April 2004 was rejected in full by the deed administrator.

21 The summons in these proceedings was heard by Gzell J on 23 March 2004, and as noted above, he gave his decision on 3 April 2004.

22 Following the bringing of this appeal, on 10 May 2004 Dasein undertook to take no steps to enforce the District Court judgment, on condition that Brodyn lodge with the Registrar "a Bank Guarantee to pay to [Dasein] the sum of $265,000.00 in accordance with an order of this Court or in the event that the subject appeal is unsuccessful or abandoned".

23 In July 2004, Brodyn for the first time became aware that Dasein did not have at relevant times a licence under the Home Building Act 1989. Subsequently, Brodyn made application to amend its Notice of Appeal to include a ground relying on this absence of a licence; and that application was granted on 1 October 2004.

24 Meanwhile, on 23 August 2004, Brodyn made an application in the other Supreme Court proceedings to restrain Dasein from enforcing the District Court judgment. That application was stood over by Windeyer J until the determination of this appeal.

25 This appeal was heard on 13 and 14 October 2004.

STATUTORY PROVISIONS

26 In order to understand the issues, it is necessary to have regard to certain provisions of the Act.

27 The object of the Act is set out in s.3, which is in the following terms:

> **3 Object of Act**
>
> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
>
> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
>
> (a) the making of a payment claim by the person claiming payment, and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable, and
>
> (c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

28 Section 4 contains the following definitions of "construction contract" and "progress payment":

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

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

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

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

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

It is common ground that the contract in this case is a construction contract, to which the Act applies (s.7).

29 Part 2 of the Act deals with rights to progress payments, and relevantly contains ss.8, 9, 10(1) and 11(1). Those provisions are as follows:

8 Rights to progress payments

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

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

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

is entitled to a progress payment.

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

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

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

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.

…

11 Due date for payment

(1) A progress payment under a construction contract becomes due and payable:
(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

…

30 Part 3 of the Act deals with the procedure of recovering progress payments, and relevantly includes ss.13, 14, 17-22, 24(1), 25, 27, 28(1) and 32. Those provisions are as follows:

13 Payment claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
(2) A payment claim:
(a) must identify the construction work (or related goods and services) to which the progress payment relates, and
(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and
(c) must state that it is made under this Act.
(3) The claimed amount may include any amount:
(a) that the respondent is liable to pay the claimant under section 27 (2A), or
(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
(4) A payment claim may be served only within:
(a) the period determined by or in accordance with the terms of the construction contract, or
(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
whichever is the later.
(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
(2) A payment schedule:

(a) must identify the payment claim to which it relates, and
(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:
(a) a claimant serves a payment claim on a respondent, and
(b) the respondent does not provide a payment schedule to the claimant:
(i) within the time required by the relevant construction contract, or
(ii) within 10 business days after the payment claim is served,
whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:
(a) the respondent provides a payment schedule under Division 1 but:
(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application:
(a) must be in writing, and
(b) must be made to an authorised nominating authority chosen by the claimant, and
(c) in the case of an application under subsection (1) (a) (i) - must be made within 10 business days after the claimant receives the payment schedule, and
(d) in the case of an application under subsection (1) (a) (ii) - must be made within 20 business days after the due date for payment, and
(e) in the case of an application under subsection (1) (b) - must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
(f) must identify the payment claim and the payment schedule (if any) to which it relates, and
(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
(h) may contain such submissions relevant to the application as the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

18 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract:

(a) if the person is a natural person, and

(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract:

(a) if the person is a party to the contract, or

(b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

20 Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).

(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

(3) A copy of the adjudication response must be served on the claimant.

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:

(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or

(b) within such further time as the claimant and the respondent may agree.

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
(b) may set deadlines for further submissions and comments by the parties, and
(c) may call a conference of the parties, and
(d) may carry out an inspection of any matter to which the claim relates.
(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.
(5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

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.

24 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

…

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).

(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

28 Nominating authorities

(1) Subject to the regulations, the Minister:

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and

(b) may withdraw any authority so given.

…

> **32 Effect of Part on civil proceedings**
> (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
> (a) may have under the contract, or
> (b) may have under Part 2 in respect of the contract, or
> (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
> (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
> (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
> (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
> (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

31 Section 34 is in the following terms:

> **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.

DECISION OF PRIMARY JUDGE

32 Before the primary judge, Brodyn contended that the payment claim dated 28 September 2003, in respect of which the adjudication application had been made, was not a valid payment claim under the Act; and the primary judge noted that, if this was correct, the adjudicator mistakenly asserted the existence of a power he did not have, and certiorari was available to quash the determination.

33 However, the primary judge noted that the Act provided an interim regime only, and continued (in par.[21]):

> Integral to the protection of the interim regime was s 25 of the Act. If the plaintiff sought to set aside the District Court judgment constituted by the filing of the adjudication certificate, it could not challenge the adjudicator's determination. The only utility of an order in the nature of certiorari is to ground an application to set aside the judgment but in such proceedings the plaintiff is debarred from challenging the adjudicator's determination.

34 He concluded that no useful result could ensue from granting prerogative relief, and accordingly refused it.

GROUNDS OF APPEAL

35 Brodyn relies on the following grounds in its Amended Notice of Appeal:

> 1. His Honour erred in that he:
> (a) Failed to determine the issue of whether the claim the subject of the Adjudication was a claim within the provisions of the Building and Construction Security of Payment Act 1999 ("the Act");

(b) Failed to determine whether the Adjudicator had jurisdiction to determine the claim;
(c) Misinterpreted section 25 of the Act in holding that the section debarred the appellant from making the application for a writ of certiorari;
(d) Failed to take into account or deal with submissions made by the appellant that jurisdictional error arose because of a denial of natural justice in that he:
(i) Failed to deal with the Adjudicator's treatment of the Appellant's payment schedule dated 9 July 2003;
(ii) Failed to consider the matters referred to in the payment schedule; and
(iii) Failed to deal with the onus of proof of the quantum of the claim before the Adjudicator;
(e) Misdirected himself as to the exercise of a discretion where there is found to be jurisdictional error; and
(f) Misdirected himself as to the utility of granting relief in the nature of a writ of certiorari.

2. At all relevant times, the Second Respondent was not licensed under the Home Building Act 1989.

36 Dasein relies on the following grounds in its Notice of Contention:

1. His Honour should have held that the Building and Construction Industry Security of Payment Act 1999 ('the Act') confers powers on an Adjudicator appointed under the Act but he is not a "statutory decision-maker" for the purposes of any consideration of judicial review;
2. His Honour should have held that upon the proper construction of the Act, the Adjudication process under the Act in (sic) not judicial;
3. His Honour should have found that upon the true construction of the Act, the Adjudication process is a sui generis system of provisional dispute resolution;
4. His Honour should have held that an adjudicator appointed in accordance with s19 of the Building and Construction Industry Security of Payment Act 1999 is not a tribunal or inferior court subject to s69 of the Supreme Court Act 1970;
5. His Honour should have held that if a determination of an adjudicator under the Building and Construction Industry Security of Payment Act 1999 is open to judicial review, the proper construction of the Act excludes judicial review in the nature of prerogative relief;
6. His Honour should have held that an adjudication determination made pursuant to s22 of the Act is not an "ultimate determination" within the meaning of s69(3) of the Supreme Court Act 1970;
7. His Honour should have held that the privative effect of s25(4) of the Act prevents judicial review in the nature of prerogative relief in the form of a writ of certiorari pursuant to s69 of the Supreme Court Act 1970 once judgment is entered;
8. His Honour should have found that the Appellant was entitled to seek to set aside the Judgment entered in the District Court pursuant to section 25(4) of the Act on the basis that there had not been a valid adjudication.
9. His Honour should have found, on a proper construction of the Act, that s25(4) of the Act does not allow the respondent to challenge the adjudicator's determination for any errors made intra vires;
10. His Honour should have held that the Appellant actions amounted to an abuse of process and/or that the Appellant acted in bad faith in seeking to delay payment of the adjudication amount without recourse to s25(4) of the Act whilst seeking to have contractual issues finally determined.

37 I will consider in turn the following issues. First, did the primary judge err in the exercise of his discretion? Second, what are the grounds for judicial intervention concerning adjudicator's determinations under the Act? Third, was the payment claim in this case a valid payment claim, and if not, was a remedy available? Fourth, was there a denial of natural justice justifying intervention by this Court? Fifth, did the lack of a licence under the Home Building Act justify intervention by this Court?

EXERCISE OF DISCRETION

38 In my opinion, there was error by the primary judge in the last sentence of par.[21] of his judgment, quoted above. If the determination was quashed by the Supreme Court, or declared by the Supreme Court not to be an adjudicator's determination within the meaning of the Act, this could have substantial utility.

39 Under s.24 of the Act, a claimant may request the nominating authority to provide an adjudication certificate, if the respondent fails to pay any part of the adjudicated amount in accordance with s.23, that is, within a time that is at least five business days after service of the determination. In this case, the adjudication certificate was issued the day after the determination was made, and thus was irregularly issued; and this in turn meant that the ex parte injunction obtained on 23 October 2003 was ineffective because the adjudication certificate had already been filed as a judgment.

40 In my opinion, this irregularity could be a ground for setting aside the judgment: plainly, such a judgment can be set aside on appropriate grounds, whether this be considered as being authorised by rules of court allowing for the setting aside of judgments obtained in the absence of the other party, or implied by s.25(4) itself. If the judgment were set aside, the fact that the determination had been quashed or declared void would preclude the obtaining of another judgment by subsequent compliance with the requirements of ss.24 and 25. Accordingly, such an order would have utility.

41 Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s.25(4): this wording assumes that there is a determination which is challenged.

42 Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator's determination was a forgery, that would not be challenging the adjudicator's determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act, that would not be challenging an adjudicator's determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge.

43 Since there was an error in exercise of discretion, this Court itself needs to consider whether to grant or refuse relief, or to send the matter back for a further hearing.

GROUNDS FOR JUDICIAL REVIEW

44 It was decided in Musico v. Davenport [2003] NSWSC 977 that relief in the nature of certiorari is available against an adjudicator's determination, albeit not on the ground of non-jurisdictional error of law on the face of the record. This has been followed in a number of other first instance decisions, including Abacus Funds Management v. Davenport [2003] NSWSC 1027, Brodyn Pty. Limited v. Davenport [2003]

NSWSC 1019, Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140 and Transgrid v. Walter Construction Group [2004] NSWSC 21.

45 The relevant part of McDougall J's judgment in Musico is pars.[28]-[32], which are as follows:

> 28 In *Craig v The State of South Australia* (1995) 184 CLR 163, the court at 174-5 considered the jurisdiction of a superior court to grant relief in the nature of prerogative relief. Their Honours said that relief in the nature of certiorari "went only to an inferior court or to certain tribunals exercising governmental powers" (citations omitted). Their Honours referred to *R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205, *Ridge v Baldwin* [1964] AC 40, 74-9 and *O'Reilly v Mackman* [1983] 2 AC 237, 279, as indicating "the tribunals other than courts which are amenable to the writ".
>
> 29 In the first of those cases, Atkin LJ, at the reference given, said:
>
> > "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings' Bench Division exercised in these writs."
>
> 30 In the second of those cases, at the reference given, Lord Reid considered a number of the earlier cases, including the judgment of Atkin LJ just referred to. His Lordship said, at 75, that the duty to act judicially could arise simply from the tribunal's duty to determine what the rights of an individual should be: it was not necessary that there should be something more to impose on it such a duty.
>
> 31 In the third of those cases, at the reference given, Lord Diplock referred to and, as he put it, "broadened" what Atkin LJ had said by omitting, as a separate requirement (in terms of Atkin LJ's formulation) the reference to "having the duty to act judicially". Having referred to what Lord Reid had said in Ridge, Lord Diplock said:
>
> > "Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described [i.e., by reference to an earlier passage, determinations of questions affecting the common law or statutory rights or obligations of other persons as individuals] it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of any personal bias against him on the part of the person by whom the decision falls to be made."
>
> 32 I therefore conclude, in answer to the question posed in para 22 above, that, apart from any privative effect the Act might have, relief under s 69 of the Supreme Court Act would, in principle, lie against an adjudicator appointed under s 19 of the Act.

46 However, it is to be noted that each of the three cases referred to in the passage from Craig were cases concerning tribunals exercising governmental powers; and Craig itself indicated that the remedy was

limited to inferior courts and such tribunals. There is a real question whether an adjudicator is properly considered a tribunal exercising governmental powers.

47 In considering on what grounds such judicial review may be available, McDougall J said this at pars.[47]-[52]:

> 47 In *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 Lord Reid said:
>
> > "[T]here 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 power to act so that it failed to deal with the question remitted to it and decided some other question which was not remitted to it. It may have refused to take into account 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".** (emphasis supplied)
>
> 48 His Lordship's statement was cited with apparent approval, in relation to administrative tribunals, in *Craig* at 178.
>
> 49 The decision in *Craig* at 179 established that, in the absence of a contrary intention in the statute or other constituting instrument, an administrative tribunal lacks power either authoritatively to determine questions of law or to make an order or decision otherwise than in accordance with the law.
>
> 50 Accordingly, there will be cases where a decision otherwise than in accordance with the applicable law involves jurisdictional error. As the court said in *Craig*, after stating the principles referred to in the preceding paragraph:
>
> > "If such an administrative tribunal [i.e., one lacking judicial power] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, **at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion,** and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it". (emphasis supplied)
>
> 51 The position of an adjudicator under the Act is not completely analogous to that of an administrative tribunal of the kind referred to by the court in *Craig*. Nor, of course, is it closely analogous to that of an inferior court (which, as the court pointed out in *Craig* at 179-180, has "authority to decide questions of law, as well as questions of fact", so that an error of law in the determination of issues before it will not ordinarily lead to jurisdictional error). The position is, in my view,

> closely analogous to that of an expert by whose determination the parties have agreed to be bound (see, for example, *A Hudson Pty Ltd v Legal & General Life of Aust Ltd* (1985) 1 NSWLR 701). This approach was confirmed by the English Court of Appeal in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 (although, for the reasons given in para [41] above, care needs to be taken in seeking to apply decisions on a different legislative scheme).
>
> 52. I therefore conclude that, where the determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues. It would be otherwise, as the High Court pointed out in *Craig* (echoing, I think, what Lord Reid said in *Anisminic)*, if the error of law causes the adjudicator to make one or other (or more) of the jurisdictional errors that the court identified: in such a case, relief would lie, subject to any relevant discretionary considerations.

48 He went on to conclude at par.[54] that relief will not lie for non-jurisdictional error of law on the face of the record, giving as the reason that "the legislative scheme set out in s.25(4) of the Act is inconsistent with the availability of this ground of review".

49 In my opinion, there is some tension between this approach and s.69 of the Supreme Court Act 1970 which provides as follows:

> **69 Proceedings in lieu of writs**
>
> (1) Where formerly:
>
> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
>
> (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,
>
> then, after the commencement of this Act:
>
> (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
>
> (d) shall not issue any such writ, and
>
> (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
>
> (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
>
> (2) Subject to the rules, this section does not apply to:
>
> (a) the writ of habeas corpus ad subjiciendum,
>
> (b) any writ of execution for the enforcement of a judgment or order of the Court, or
>
> (c) any writ in aid of any such writ of execution.
>
> (3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.
>
> (4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.
>
> (5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law

principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

50 This would seem to suggest, at least prima facie, that if relief in the nature of certiorari is available at all, it will include jurisdiction to quash on the basis of error of law on the face of the record.

51 I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss.3(3), 25(4). The remedy provided by s.27 can only work if a claimant can be confident of the protection given by s.27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s.27 would be prohibitive, and s.27 could operate as a trap.

52 However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. Project Blue Sky Inc. v. Australian Broadcasting Authority (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. R v. Hickman; Ex Parte Fox and Clinton (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

56 It was said in the passage in Anisminic quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in Craig v. South Australia (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140.

57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example Ridge v. Baldwin [1964] AC 40, Durayappah v. Fernando [1967] 2 AC 337, Banks v. Transport Regulation Board (Vic) (1968) 119 CLR 222 at 233, Calvin v. Carr [1980] AC 574 at 589-90, Minister for Immigration v. Bhardwaj (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.

58 The question then is whether there is available a remedy in the nature of certiorari, in circumstances where the determination is not void by reason of defects of the kind I have been discussing. In my opinion it is not, because the availability of certiorari in such circumstances would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies.

59 For these reasons, I disagree with the view expressed in Musico and the cases which followed it, to the extent that they hold that relief in the nature of certiorari is available to quash a determination which is not void.

60 If there is fraud of the claimant in which the adjudicator is also involved, the determination will be void because the adjudicator has not bona fide attempted to exercise the power. If the determination is induced by fraud of the claimant in which the adjudicator is not involved, then I am inclined to think that the determination is not void but voidable; and it is liable to be set aside by proceedings of the kind appropriate to judgments obtained by fraud.

61 Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above in pars.[41] and [42], it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination.

INVALIDITY OF PAYMENT CLAIM?

62 Brodyn's submission was that the payment claim served on 28 September 2003 was not a valid payment claim under the Act, because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made. This submission was supported by the decision of McDougall J in Holdmark Developers Pty. Limited v. G.J. Formwork Pty. Limited [2004] NSWSC 905.

63 However, s.8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s.8(2)(a) if the contract so provides but not otherwise; while s.8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s.13(4): reference dates cannot support the serving of any payment claims outside these limits.

64 In my opinion, as submitted by Mr. Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.

65 There is a possible point of distinction between the present case and Holdmark, in that in Holdmark it was common ground that the contract was at an end, whereas in the present case Dasein did not concede this. However, in circumstances where the document provided by Dasein on 27 June 2003 referred to its "final claim", it seems strongly arguable that, if Brodyn was not entitled to terminate, Dasein did by this document accept the repudiation that the purported termination would in these circumstances constitute. In any event, in my opinion Holdmark was wrongly decided, and it is not necessary to distinguish it.

66 There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this.

DENIAL OF NATURAL JUSTICE?

67 Mr. Callaghan SC for Brodyn submitted that natural justice was denied, because the adjudicator failed to consider Brodyn's submission that there should be deducted the estimated costs of rectifying the defect (cf. s.10(1)(b)(iv) of the Act) and that the claimant had not furnished a statutory declaration in breach of cl.43 of the subcontract.

68 Clause 43 is in the following terms:

> **43 PAYMENT OF WORKERS AND SECONDARY SUBCONTRACTORS**
>
> **43.1 Payment of Workers**
>
> The Subcontract Superintendent may, not less than 5 days before each payment certificate is due, in writing direct the Subcontractor to-
>
> (a) give the Subcontract Superintendent a statutory declaration by the Subcontractor or, where the Subcontractor is a corporation, by a representative of the Subcontractor who is in a position to know the facts declared, that all workers who have at any time been employed by the Subcontractor on work under the Subcontract have at the date of the direction been paid all moneys due and payable to them in respect of their employment on the work under the Subcontract; and
>
> (b) provide documentary evidence to the Subcontract Superintendent that at the date of the direction all workers who have been employed by a secondary subcontractor have been paid all moneys due and payable to them in respect of their employment on the work under the Subcontract.
>
> **43.2 Payment of Secondary Subcontractors**
>
> Not earlier than 14 days after the Subcontractor has made each claim for payment under Clause 42.1, and before the Main Contractor makes that payment to the Subcontractor, the Subcontractor shall give to the Subcontract Superintendent a statutory declaration by the Subcontractor or, where the Subcontractor is a corporation, by a representative of the Subcontractor who is in a position to know the facts declared, that all secondary subcontractors have been paid all moneys due and payable to them in respect of work under the Subcontract.
>
> **43.3 Withholding of Payment**
>
> If the Subcontractor fails-
>
> (a) to provide, within 5 days of the direction by the Subcontract Superintendent pursuant to Clause 43.1, the statutory declaration or the documentary evidence, as the case may be; or
>
> (b) to comply with Clause 43.2,
>
> then notwithstanding Clause 42.1, the Main Contractor may withhold payment of moneys due to the Subcontractor until the statutory declaration or documentary evidence, as the case may be, is received by the Subcontract Superintendent.
>
> If the Subcontractor provides to the Subcontract Superintendent satisfactory proof of the maximum amount due and payable to workers and secondary subcontractors by the Subcontractor, the Main Contractor shall not be entitled to withhold any amount in excess of the maximum amount.
>
> **43.4 Direct Payment**
>
> Where the Main Contractor is entitled to or is required to make payment to any worker or secondary subcontractor of a sum owing to the worker or secondary subcontractor, the Main Contractor may, on behalf of the Subcontractor, make the payment directly to the worker or secondary subcontractor and the amount so paid shall be a debt due from the Subcontractor to the Main Contractor.
>
> At the written request of the Subcontractor, and out of moneys payable to the Subcontractor, the Main Contractor may on behalf of the Subcontractor make

payments directly to any worker or secondary subcontractor of the Subcontractor.

If a payment is made in respect of moneys referred to in Clause 43.1 or 43.2 by the Main Contractor to or in respect of a worker or secondary subcontractor in compliance with a Legislative Requirement, the amount paid shall be a debt due from the Subcontractor to the Main Contractor.

If any worker or secondary subcontractor obtains a court order in respect of moneys referred to in Clause 43.1 or 43.2 and produces to the Main Contractor the court order and a statutory declaration that it remains unpaid, the Main Contractor may pay the amount of the order, and costs included in the order, to the worker or secondary subcontractor and the amount paid shall be a debt due from the Subcontractor to the Main Contractor.

After becoming aware of the occurrence of a relation-back day (as defined in the Corporations Law) in respect of the Subcontractor, the Main Contractor shall not make any payment (other than a payment made pursuant to a Legislative Requirement) to a worker or secondary subcontractor without the concurrence of the official receiver or trustee in bankruptcy of the estate of the bankrupt or the liquidator, as the case may be.

69 Part B of the subcontract contained certain deletions, amendments and additions, including the following alterations to cl.42.1:

2.42 Clause 42.1-

2.42.1 delete "Subcontract Superintendent" wherever appearing and substitute "Main Contractor".

2.42.2 Fourth paragraph - second line delete "to the Main Contractor and".

2.42.3 Add at the end the following additional paragraph: "The Subcontractor shall deliver with each claim for payment a statutory declaration warranting:

2.42.3.1 that the Subcontract Works have been constructed in compliance with the Legislative Requirements and Clause 3.3.1 of Part B of AS 4303;

2.42.3.2 that the value of any approved or directed variation is as stated in the claim for payment; and

2.42.3.3 as to the matters required by subparagraph (a) and (b) of Clause 43.1 of this Subcontract.

70 However, there was no reference to this alteration in submissions made by Brodyn to the adjudicator, and no further elaboration of the submission concerning breach of cl.43.

71 Brodyn's document dated 9 July 2003 was treated by the adjudicator as being incorporated by reference in the payment schedule dated 29 September 2003. This document asserted that, by reason of specified defects and deficiencies, the completed works were properly valued not at the figure then claimed by Dasein (about $332,000.00 ex GST) but at $282,994.16. It also alleged further defects and deficiencies amounting to about $37,000.00 in Variation Schedules attached to the document.

72 The document also included a claim for over $116,000.00 for damages for delay, and put the value of agreed variations (subject to the deduction of $37,000.00) at $22,167.11.

73 The adjudicator adopted the figure of $22,167.11 for the agreed variations; but decided that otherwise the respondent's entitlement, if any, was to damages; and he noted to the effect that s.10(1)(b) did not provide for any allowance on the ground of such a cross-claim.

74 In my opinion, the adjudicator was correct in so far as he held that, under s.10(1)(b), regard is not to be had to a cross-claim for damages for delay; but in so far as a cross-claim for damages may rely on defective or incomplete work, plainly this is to be taken into account under s.10(1)(b). Only the work completed is to be valued, and regard is to be had to the estimated cost of rectifying defects. It appears that the adjudicator did not have any regard to Brodyn's claim that there were deficiencies and defects requiring something in the order of about $90,000.00 in all to rectify.

75 However, this omission in the adjudicator's reasons appears to flow, not from his not having regard to Brodyn's submissions, but from either misinterpreting them or misapplying the law. I do not think this amounts to a denial of natural justice; and certainly not to one which would render the determination void.

76 As regards the lack of provision of a statutory declaration, Brodyn did not refer the adjudicator to the alteration to cl.42.1 referred to above, and did not suggest that the direction in writing referred to in cl.43.1 had been given. It made no reference to the provisions of s.127(5) of the Industrial Relations Act 1996, which authorise a principal contractor to withhold payment to a subcontract until the subcontractor gives a written statement that employees have been paid for work done in the relevant period.

77 Accordingly, even if ss.9 and 10 of the Act permit this matter to be taken into account, which is questionable, the failure of the adjudicator to mention the bald reference made by Brodyn to breach of cl.43 could not in these circumstances amount to a denial of natural justice.

LACK OF HOME BUILDING ACT LICENCE

78 The Home Building Act 1989 (HBA) contains the following definitions of "residential building work" and "specialist work" in s.3(1):

> ***residential building work*** means any work involved in, or involved in co-ordinating or supervising any work involved in:
>
> (a) the construction of a dwelling, or
>
> (b) the making of alterations or additions to a dwelling, or
>
> (c) the repairing, renovation, decoration or protective treatment of a dwelling.
>
> It includes work declared by the regulations to be roof plumbing work or specialist work done in connection with a dwelling and work concerned in installing a prescribed fixture or apparatus in a dwelling (or in adding to, altering or repairing any such installation). It does not include work that is declared by the regulations to be excluded from this definition.
>
> ***specialist work*** means:
>
> (a) plumbing work (other than work declared by the regulations to be roof plumbing work), or
>
> (b) gasfitting work, or
>
> (c) electrical wiring work, or
>
> (d) any work declared by the regulations to be refrigeration work or air-conditioning work.

79 Sections 4, 10 and 11 of the HBA are in the following terms:

> **4 Unlicensed contracting**
>
> A person must not contract to do:
>
> (a) any residential building work, or
>
> (b) any specialist work,
>
> except as or on behalf of an individual, partnership or corporation that is the holder of a contractor licence authorising its holder to contract to do that work.
>
> **10 Enforceability of contracts and other rights**
>
> (1) A person who contracts to do any residential building work, or any specialist work, and who so contracts:

(a) in contravention of section 4 (Unlicensed contracting), or

(b) under a contract to which the requirements of section 7 apply that is not in writing or that does not have sufficient description of the work to which it relates (not being a contract entered into in the circumstances described in section 6 (2)), or

(c) in contravention of any other provision of this Act or the regulations that is prescribed for the purposes of this paragraph,

is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, and the contract is unenforceable by the person who contracted to do the work. However, the person is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.

(2), (3) (Repealed)

(4) This section does not affect the liability of the person for an offence against a provision of or made under this or any other Act.

11 Other rights not affected

This Division does not affect any right or remedy that a person (other than the person who contracts to do the work) may have apart from this Act.

80 Section 94 of the HBA is in the following terms:

94 Effect of failure to insure residential building work

(1) If a contract of insurance required by section 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contract (the ***uninsured work***), the contractor who did the work:

(a) is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, in relation to that work, and

(b) is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit).

(1A) Despite section 92 (2) and subsection (1), if a court or tribunal considers it just and equitable, the contractor, despite the absence of the required contract of insurance, is entitled to recover money in respect of that work on a quantum meruit basis.

(1B) A contractor who applies to a court or tribunal for a remedy under this section, or who is awarded money under this section, is not guilty of an offence under section 92 (2) by virtue only of that fact.

(1C) Without limiting the factors that a court or tribunal may consider in deciding what is just and equitable under subsection (1A):

(a) in relation to any contract - the court or tribunal may have regard to the impact on the resale price of the property if no contract of insurance is provided, and

(b) in relation only to a contract entered into before 30 July 1999 - the court or tribunal is not to be limited by the fact that the required contract of insurance was not obtained until after the date of the contract.

(2) However, the contractor remains liable for damages and subject to any other remedy in respect of any breach of the contract committed by the contractor.

(3) Residential building work that is uninsured work at the time the work is done ceases to be uninsured work for the purposes of this section if the required contract of insurance for the work is subsequently obtained.

(4) If a person commenced residential building work before 30 July 1999 and entered into a contract of insurance that complies with this Act in relation to that work after the contract for the residential building work was entered into, that contract of insurance is, for the purposes of this section or any previous version of this section, taken to have been in force in relation to the residential

> building work done under the contract for the residential building work whether that work was done before or after the contract of insurance was entered into.
> **Note.** If a contract of insurance is in force in relation to part of the residential building work, this section applies only in relation to the part of the work that is not insured.

81 It was submitted for Brodyn that, because Dasein did not have a licence under the HBA, the subcontract was illegal (s.4) and unenforceable (s.10). Accordingly, Dasein was not entitled to any progress payment.

82 In my opinion, the civil consequences for an unlicensed contractor for its breach of s.4 are those set out in s.10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s.94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s.10 of the HBA.

83 Accordingly, in my opinion Dasein's failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.

CONCLUSION

84 It follows that the appeal should be dismissed with costs. However, this will not necessarily mean that Brodyn is without any remedy.

85 A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had a greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s.25 of the Act could not be stayed on that kind of basis, although the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief.

86 In the present case, there could be discretionary factors in favour of a stay of execution in favour of Brodyn. Windeyer J, in his judgment of 23 August 2004, said that the execution of a deed of company arrangement had the effect of bringing into being a statutory set off of the claims between Brodyn and Dasein. We had no submissions about this, but conceivably that could be one basis for a stay of the District Court judgment. The circumstances that the adjudicator has, by force of the Act, disregarded a claim for damages for delay of over $116,000.00, and (apparently in error) has disregarded a claim of deficiencies and defects amounting to about $90,000.00, and also that money paid over may well be irrecoverable, could be further grounds for granting a stay. There is the further point that the adjudicator could not take into account Brodyn's objections to Dasein's claim for over $50,000.00 for items left on the site, because these objections were not raised in the payment schedule: s.20(2B) of the Act. In my opinion, the circumstance that significant objections of a respondent have not been taken into account because they were not raised in the payment schedule could not itself be a ground for resisting reliance on an adjudicator's determination or enforcement of a resulting judgment; but just possibly it could in this case add to the discretionary considerations in favour of Brodyn.

87 However, as noted above, the intention of the legislature that progress payments be made with a minimum of delay and court involvement, and the possibility that Dasein's financial difficulties have been caused by failure to make this progress payment, could militate strongly against the granting of such a stay.

88 It would of course be desirable if issues concerning possible staying of a s.25 judgment could be dealt with as part of case management of proceedings brought (as permitted by s.32 of the Act) to obtain a final resolution of the rights of the parties. This should be possible if the judgment is in the same court as those proceedings. If it is not, because for example the s.25 judgment is in the District Court and the s.32 proceedings are in the Supreme Court, then it may be that the Supreme Court could remove the judgment into the Supreme Court pursuant to s.145 of the District Court Act, or possibly grant a conditional "common injunction" against the judgment creditor restraining enforcement of the judgment.

89 The order I propose is appeal dismissed with costs.

****

LAST UPDATED: 03/11/2004