IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
BUILDING CASES LIST

Not Restricted

No. 5645 of 2009

HICKORY DEVELOPMENTS PTY LTD (ACN 091 236 912) Plaintiff

v

SCHIAVELLO (VIC) PTY LTD (ACN 006 778 641) First Defendant
and
ADJUDICATE TODAY (ACN 109 605 021) Second Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATES OF HEARING:	15-16 APRIL 2009
DATE OF JUDGMENT:	24 APRIL 2009
CASE MAY BE CITED AS:	HICKORY DEVELOPMENTS PTY LTD v SCHIAVELLO (VIC) PTY LTD AND ANOR
MEDIUM NEUTRAL CITATION:	[2009] VSC 156

BUILDING AND CONSTRUCTION – *Building and Construction Industry Security of Payment Act 2002* (Vic) – object and purpose of the Act - payment claim - whether application lodged within time with the nominating authority in accordance with s.18 of the Act - whether payment claim in accordance with s.14 of the Act - *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 not followed in part, applied in part – whether alleged deficiencies in procedure essential pre-conditions to jurisdiction - whether matters for the adjudicator to decide -whether adjudicator's determination void.

ADMINISTRATIVE LAW– Application of the *Hickman* principle to privative clause - s.85 *Constitution Act 1975* (Vic) - certiorari available under the Act in Victoria.

PRACTICE AND PROCEDURE – Electronic service of documents – operation of email – when documents received.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr JR Dixon SC and Mr JAF Twigg	Giannakopoulos Solicitors

For the Defendants	Mr JJ Gleeson SC and Mr R Andrew	Holding Redlich

HIS HONOUR:

Introduction

1 The issue in this case is whether a determination arising from a purported adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ("the Act") is valid. The answer turns on whether the application for adjudication was made within the time required by the Act and whether the application in substance was in accordance with the Act and, if not, whether the shortcoming renders the adjudication determination void.

2 The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted.[1] Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

3 FKP Lifestyle Pty Ltd as principal, engaged the plaintiff, Hickory Developments Pty Ltd (ACN 091 236 912) ("Hickory"), as the main contractor to design and construct the base building works and fit out to a property located at 60 Brougham Street, Geelong (the "TAC headquarters").

4 Hickory and the first defendant Schiavello (Vic) Pty Ltd (ACN 006 778 641) ("Schiavello"), executed a subcontract dated 17 April 2008 pursuant to which Hickory engaged Schiavello to carry out the design and construction of the base building and the fit out works for the TAC headquarters ("the Subcontract").

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[1] *Building and Construction Industry Security of Payment Act* 1999 (NSW); *Construction Contracts Act* 2004 (WA); *Construction Contracts (Security of Payments) Act* (NT); and *Building and Construction Industry Payments Act* 2004 (Qld).

5 In or about March 2008, Schiavello commenced under the Subcontract. Schiavello says that it achieved practical completion of the works specified in the Subcontract on or about 10 December 2008. Since that date, the only work of significance that Schiavello has done on the TAC Headquarters site is the completion of defects and the cleaning of the premises.

6 The second defendant, Adjudicate Today (ACN 109 605 021) ("the Adjudicator"), is appointed by the Building Commission of Victoria as an authorised nominating authority under s.42 of the Act. It agreed to be bound by the result in the proceeding and did not appear at the trial, provided that no orders for costs were sought against it, which was the position adopted by both Hickory and Schiavello.

7 On 3 February 2009 Hickory received documents in the ordinary post from Schiavello which purported to be a payment claim made under the Act. Hickory denied liability to pay on the payment claim. A process was then initiated, purportedly pursuant to the Act, under which Adjudicate Today nominated Philip Davenport to assess the payment claim. On 10 March 2009 Mr Davenport purportedly made a determination under s.23 of the Act (the "Determination").

8 Hickory claims that the process did not comply with the provisions of the Act and it claims to be entitled to a declaration that the Determination is void. It says that two necessary and essential statutory preconditions to Mr Davenport's jurisdiction were not satisfied, namely that Schiavello did not make an application for adjudication within the time frame provided for in s.18 of the Act, and secondly, Schiavello did not serve a payment claim which was in accordance with s.14 of the Act.

9 In furtherance of the declaration, Hickory seeks a permanent injunction restraining Schiavello from requesting the Adjudicator to provide a certificate under s.28O of the Act. It also seeks a permanent injunction restraining the Adjudicator from providing to Schiavello a certificate under s.28Q of the Act.

10 This matter came before me on 31 March as an application by Hickory for an interlocutory injunction seeking to restrain Schiavello from requesting the Adjudicator to provide a certificate under s.28O the Act.

11 The writ in this proceeding was issued on 27 March 2009. The statement of claim which constituted an indorsement of claim on the writ confined the issues to the question of Schiavello's entitlement to be paid for a progress payment or the progress payments it claimed under the Act as described in its documents delivered to Hickory on 3 February 2009.

12 In my opinion a court should, wherever possible, expeditiously deal with short points of law or construction.[2] This is particularly so in cases in a managed list such as the Building Cases List.[3] The benefit of this approach is enhanced in this case because what is fundamentally at stake is the question of Schiavello's immediate right to payment, or otherwise, of a substantial progress payment or progress payments for building works. The outcome will have a direct affect on the cash flow of both parties. Further, there is no dispute as to the relevant material facts; the case was able to be presented as a trial upon the affidavits filed, without cross-examination. The only question is the legal effect of a payment claim for a progress payment or progress payments served by Schiavello on Hickory purportedly under the Subcontract and the Act. Finally, the purposes of the Act in achieving expedition in the resolution of progress claims will be advanced by adopting this course and diminished if it is not.

13 For this reason on 31 March 2009, upon appropriate undertakings preserving the *status quo* given by counsel on behalf of Schiavello, I ordered that a trial of the proceeding be conducted commencing on 15 April 2009, and gave directions for the completion of pleadings, and the delivery of affidavits and submissions within that time.

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[2] *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 per Finkelstein J at [30].

[3] And will be for its successor in the Supreme Court, which will commence operation on 19 June 2009, the Technology Engineering Construction List (the TEC List).

The Subcontract

14 The Subcontract is a lump sum contract for the amount of $9,413,330.00 (exclusive of GST). It is expressed to made up of two parts as follows:

Base Building Contract	-	$5,675,000.00; and
TAC HQ Fit out Contract	-	$3,738,330.00.

15 A submission was made by Schiavello that the Subcontract comprised two contracts, one contract for the base building works and another for the fit out. I do not accept this submission. The lump sum expressed in the Subcontract was the total of the two sums for the two defined parts of the contract. The Subcontract otherwise reads as a single contract with a single set of obligations and duties, save that there are separate schedules of specification documents appended to the Subcontract, one for the Base Building works and one for the TAC HQ Fit Out. The Subcontract was a single construction contract which included two works components.

16 There was no dispute that the Subcontract is a contract to carry out construction work within the meaning of s.5 of the Act. Accordingly, it is a construction contract to which the Act applies: ss.4 and 7.

17 The work which the subcontractor Schiavello is required to carry out and complete under the Subcontract, including variations, remedial work, the provision of the necessary plant to undertake the works and temporary works are collectively described in the Subcontract as "work under the Subcontract" ("WUS").

18 The Subcontract, by clause 34.6, provided a procedure for the certification of practical completion. The Subcontract Superintendent appointed by Hickory is empowered to issue a certificate of practical completion. A consequence of the issue of a certificate is that, pursuant to clause 5.4, Schiavello's security sum which it was obliged to lodge at the direction of Hickory is reduced, and it is entitled to have fifty per cent of the security sum released to it.

19 The date for practical completion under the Subcontract was 20 November 2008. There have been no extensions granted under the Subcontract to the date for practical completion.

20 It is common ground in this case that, although Schiavello claimed that it had achieved practical completion effectively on 10 December 2008, no certificate of practical completion has been issued by the Subcontract Superintendent.

21 The Subcontract also made provision for a final payment claim and a final certificate to be issued by the Subcontract Superintendent: clause 37.4. Within three weeks after the expiry of the last defects liability period, Schiavello is obliged to give the Subcontract Superintendent a written final payment claim endorsed "Final Payment Claim". This is described in the Subcontract as a "progress claim". The Subcontract Superintendent is then obliged to issue a final certificate evidencing the moneys which are finally due and payable between Hickory and Schiavello in connection with the Subcontract.

22 It is common ground that Schiavello has not yet given to Hickory a written final payment claim endorsed "Final Payment Claim".

23 Importantly for this case, the Subcontract also makes provision for the subcontractor, Schiavello, to make progress claims for payment progressively during the life of the contract in accordance with the time frame specified: subclause 37.1. Item 37 of the Part A Annexure to the Subcontract relevantly provides:

37	Progress Claims (subclause 37.1)	
	Times for progress claims	25th day of each month for WUS done to the 25th day of that month

24 The Subcontract provided for a process of certification in relation to progress claims lodged by Schiavello from time to time: clause 37.2. On receipt of a progress claim, the Subcontract Superintendent was required to issue, inter alia, a progress certificate evidencing his or her opinion of the moneys due to Schiavello pursuant to the progress claim, and the reasons for any difference: clause 37.2(a). If moneys are

certified to be payable on the progress claim Hickory was required to pay the sum certified as due to Schiavello. It was specifically provided that:

> Neither a *progress certificate* nor a payment of moneys shall be evidence that the subject *WUS* has been carried out satisfactorily. Payment other than the *final payment* shall be payment on account only. (clause 37.2)

25 By arrangement with Hickory, and at Hickory's request to assist with its accounting for the project, Schiavello regularly submitted two invoices with each progress claim, one for the base works component of the Subcontract, and one for the fit out works.

26 Work having commenced under the Subcontract in or about March 2008, Schiavello issued its first progress claim to Hickory on 23 May 2008 for base building work only. Hickory made no complaint about that fact that this claim was made on 23 May 2008 rather than on the 25th of the month. On or about 23 June 2008 Schiavello issued progress claim number 2 to Hickory for the base building work. Again, Hickory did not raise any concerns that the claim was issued on 23 June 2008 rather than on the 25th of the month.

27 On or about 21 July 2008, Schiavello despatched the third progress claim for the base building work and the first progress claim for the fit out to Hickory. In accordance with Hickory's request, the progress claim was set out in two separate invoices for the separate components of the work under the Subcontract, even though they were both attached to the same email. This claim was paid by Hickory. Again, it did not raise any concerns that the claim was issued on 21 July 2008 rather than on the 25th of the month. Nor did it raise any concerns about the claim not being set out in the one document.

28 Prior to making the progress claim (or progress claims) which is the subject of the present proceeding, Schiavello issued progress claims to Hickory pursuant to the Subcontract on the following dates:

Date	**Base Building**	**Fit out**
23 May 2008	Progress claim 1	
23 June 2008	Progress claim 2	

Date	Base Building	Fit out
21 July 2008	Progress claim 3	Progress claim 1
21 August 2008	Progress claim 4	Progress claim 2
18 September 2008	Progress claim 5	Progress claim 3
27 October 2008	Progress claim 6	Progress claim 4
25 November 2008	Progress claim 7	Progress claim 5
15 December 2008	Progress claim 8	

The Contentious Progress Claim

29 In accordance with clause 21 of the Subcontract, George Mihos, a Hickory employee, was appointed as the Subcontract Superintendent's representative and had delegated to him all of the powers and functions of Subcontract Superintendent. In addition, Mr Mihos project managed the works on behalf of Hickory and its subcontractors at the TAC Headquarters project site. Mr Mihos was present on the site daily and was responsible for the contract and subcontract administration for the project on behalf of Hickory.

30 On 3 February 2009 Mr Mihos received two invoices in the ordinary post from Schiavello at the offices of Hickory at 101 Cremorne Street, Richmond (the "Tax Invoices"). The Tax Invoices were not accompanied by a letter or note and both were enclosed in the same envelope.

31 The first was Tax Invoice No 75181 dated 31 January 2009 in the sum of $868,247.79 inclusive of GST. It specified a "Works Claim Date" of 31 January 2009 and the "Job Name" was stated to be "TAC Geelong". In the body of the invoice, the following was type written:

> PROGRESS CLAIM NO. 6 FOR FITOUT WORKS AS PER ATTACHED SUMMARY INCLUDING SCHIAVELLO VAR. NO.
> [Variation numbers then appeared some 37 variation numbers].
>
> FITOUT CLAIM FOR 1 NO. BANK GUARANTEE NOT RETURNED AT PRACTICAL COMPLETION.
>
> THIS PAYMENT CLAIM IS MADE UNDER THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002.

Then followed five pages of items listed in summary form with calculations as to the manner in which the progress claim was calculated.

32 The second tax invoice was set out in similar terms. It was described as Tax Invoice No 75200. It was also dated 31 January 2009. It claimed the sum of $1,238,581.19 inclusive of GST. The text of the body of the invoice was the materially the same as the first invoice, except that it said: "PROGRESS CLAIM NO. 9 FOR BASE BUILDING WORKS AS PER ATTACHED SUMMARY ...". Then followed 3 pages of items listed in summary form with calculations as to the manner in which the progress claim was calculated.

33 The total sum claimed in both Tax Invoices was $2,106,828.98.

34 Hickory refused to pay any part of the sums claimed in the Tax Invoices. On 9 February 2009 at 11:39 am, Mr Mihos served on Schiavello Hickory's single payment schedule and payment certificate under the Subcontract. It stated that the amount payable to Schiavello was $Nil in response to both Tax Invoices ("the Payment Schedule"). In preparing this document, it is clear that Mr Mihos treated Schiavello's claim for payment as a single progress claim.

35 I will now turn to an analysis of the relevant provisions of the Act. This is done in order to place the further facts of the case in their proper context.

Outline of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

36 The Act first came into operation in Victoria on 31 January 2003. It has since been amended on two occasions: the first of the amendments came into operation on 26 July 2006 (Act No. 42 of 2006) and the second group of amendments commenced on 30 March 2007 (Act No. 15 of 2002).

37 The Victorian Act was modeled on the provisions and processes set out in the New South Wales *Building and Construction Industry Security of Payment Act 1999* ("the NSW Act"). The Victorian Minister for Planning Ms Delahunty in her second reading

speech[4] in introducing the bill which became the Victorian Act acknowledged the significance of the relationship between the NSW Act and the proposed Victorian Act saying that "this has the benefit of allowing building and construction firms with national operations to be subject to common payment requirements in both jurisdictions".

38 Section 3(1) describes the object of the Act as being

> that any person who carries out construction work ... under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work.

39 The responsible Minister in introducing the bill stated in the second reading speech:[5]

> The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work.
>
> … quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.

40 In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*[6] Beech J described the purpose of the like Western Australian legislation in the following terms:[7]

> In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to "keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes".

41 Campbell J in *Amflo Constructions Pty Ltd v Jefferies*[8] made observations to similar effect about the NSW Act, regarding provisions which are mirrored in the Victorian Act, saying:

> A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation ... nothing ... affects any of the rights that parties to a construction

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[4] Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 2002, 427 (Mary Delahunty).
[5] *Ibid*.
[6] [2009] WASC 19.
[7] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122].
[8] [2003] NSWSC 856 at [25] and [27].

> contract have ... The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the sections of the NSW Act omitted]

42 Campbell J also considered the contents of the second reading speech in introducing amendments to the NSW Act, the *Building and Construction Industry Security of Payment Amendment Bill 2002* (NSW).[9] Given the provenance of the Victorian Act, these observations of the New South Wales Minister provide useful insights into the operation of the Victorian Act.[10] In his speech the New South Wales Minister said:

> The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment. ...
>
> The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid ...
>
> Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act ...
>
> ... there will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.

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[9] New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6541 (Maurice Iemma).

[10] See: *Interpretation of Legislation Act* 1984 (Vic) s. 35(b).

> Presently, when a respondent fails to pay the claimant by the due date for payment under the contract, the claimant's only recourse to enforce payment is to commence proceedings in a court. The Bill will give the claimant another option. The claimant will be able to opt to have an adjudicator determine the amount of the progress payment that is due. This is an *"optional adjudication"*. The claimant will still be able to proceed to adjudication earlier if the respondent provides a payment schedule and the scheduled amount is less than the amount claimed. The benefit to the claimant of proceeding with an optional adjudication rather than commencing proceedings in a court is that the claimant will then be able to use the adjudication certificate to obtain judgment expeditiously and without a court hearing. The claimant will be able to initiate an optional adjudication when the respondent fails to provide a payment schedule within time and fails to pay the amount claimed, or the respondent provides a payment schedule but fails to pay the whole of the scheduled amount.

43 The Victorian Act also preserves a claimant's right to commence proceedings under the relevant construction contract, including proceedings in a court, and any arbitration proceedings or other dispute resolution proceedings: s.48. Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s.48(3).

44 The principle that the respondent to a payment claim for a progress payment "should pay now and argue later" is given full effect under the Act: *Multiplex Constructions Pty Ltd v Luikens and Anor.*[11] This regime promotes the object of the Act, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.

45 From this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights: *Protectavale Pty Ltd v K2K Pty Ltd*[12] and *Jemzone Pty Ltd v Trytan Pty Ltd.*[13]

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[11] [2003] NSWSC 1140 at [96]
[12] *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [7].
[13] (2002) 42 ACSR 42 at 50.

46 The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life.[14] If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.

47 Another important facility in the Act which is also of significance in this context is that a claimant for a progress payment may suspend the carrying out of construction work upon giving 3 business days notice to the respondent: s.29. This may only occur if the respondent does not pay the claimant in response to a payment claim and does not deliver a payment schedule: s.16(2)(b); if the respondent does not pay the claimant the amount specified in any a payment schedule which is given: s.17(2)(b); or, if the respondent does not pay the claimant the sum which is adjudicated to be payable pursuant to the determination of an appointed adjudicator: s.28O (1)(b). The Act further provides that a suspension undertaken in accordance with s.29 does not constitute a breach of contract: s.29(3). The remedy provided by s.29 for the contractor to suspend works in the circumstances described is a powerful tool in the enforcement of the scheme of the Act. However, the decision to exercise the right to suspend is critically dependent on the validity of the payment claim being made for the purposes of ss.16 and 17, and the validity of an adjudicator's determination for the purposes of s.28O. A contractor would be seriously inhibited in the exercise of its statutory right to suspend works if it suspected that its payment claim and the adjudicator's determination made upon it could be vulnerable to attack on technical legal grounds. If the contractor made the wrong call, the consequences of suspending work could be prohibitive. For this reason too, protection of the payment claim and the adjudicator's determination is called for in order to preserve the objects of the Act.

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[14] *John Holland Pty Ltd v Roads and Traffic Authority of NSW* [2007] NSWSCA 140 at [65] per Basten JA.

48 Division 2 of the Act is devoted to the adjudication of disputes. A hallmark of the division is the limited nature of specified procedural requirements. This provides a high degree of flexibility in the management of adjudications conducted under the Act. Procedures may be appropriately shaped to the dispute at hand, consistently with the requirements of the Act and natural justice. The contemporary adage "let the forum fit the fuss"[15] is given ample scope.

49 An example of the flexibility in procedure is s.22 which provides for adjudication procedures. Sub-section (4) requires an adjudicator to determine an adjudication application as expeditiously as possible and in any case within a short specified time frame. Sub-sections (5),(5A) and (6) provide a range of powers which the adjudicator may apply in the conduct of an adjudication hearing, as follows:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator-
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> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
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> (b) may set deadlines for further submissions and comments by the parties; and
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> (c) may call a conference of the parties; and
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> (d) may carry out an inspection of any matter to which the claim relates.
>
> (5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.
>
> (6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

[15] See: Rosenberg, M. "*Let the Tribunal Fit the Case*", remarks at a meeting of the American Association of Law Schools (28 December 1977), reprinted in 80 F.R.D. 147, 166 (1977) Maurice Rosenberg, a Columbia law professor coined the phrase "let the forum fit the fuss" to describe the process of identifying the nature of the dispute, the needs and interests of the parties, and the best dispute resolution option in the circumstances., the ultimate goal being to avoid a long, drawn-out process.

Operation of the Act

50 There is no dispute that the Act applies to the Subcontract, and that Schiavello is entitled to rely on its provisions to recover any progress payments which may be due to it under the Subcontract and the Act. Schiavello undertook "construction work" as defined in s.5 of the Act under a "construction contract" as defined in s.4 of the Act. Section 7 provides that the Act applies to any construction contract.

51 Accordingly, pursuant to s.9 of the Act, Schiavello is entitled to be paid a progress payment calculated by reference to the "reference date" under the Subcontract. As provided by s.9(2), a "reference date" in relation to a construction contract is a date determined by or in accordance with the terms of the contract as (i) a date on which a claim for a progress payment may be made, or (ii) a date by reference to which the amount of a progress payment is to be calculated, and in both cases, in relation to a specific item of construction work carried out or to be carried out under the contract. Hickory submitted that the "reference date" under the Subcontract for these purposes was the 25th of each month, as provided for in subclause 37.1 and *Item 37* of the Part A Annexure to the Subcontract.

52 The Act provides a procedure for recovering progress payments. Pursuant to s.14 (1) of the Act, a person referred to in s.9(1) who is or who claims to be entitled to a progress payment, in this case Schiavello, may serve a payment claim ("payment claim") on the person who, under the construction contract, is or may be liable to make the payment. The requirements for a payment claim are set out in s.14(2) as follows:

> (2) A payment claim-
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> (a) must be in the relevant prescribed form (if any); and
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> (b) must contain the prescribed information (if any); and
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> (c) must identify the construction work or related goods and services to which the progress payment relates; and
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> (d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
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> (e) must state that it is made under this Act.

There has not, to date, been any prescription of the form under paragraph (a) or of the information under paragraph (b).

53 The requirements of s.14 of the Act should not be approached in an overly technical manner. Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* said:[16]

> It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: *Multiplex Constructions* [2003] NSWSC 1140 at [76].
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> The manner in which compliance with s 14 is tested is not overly demanding: *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54] citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] ("[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); *Multiplex Constructions* [2003] NSWSC 1140 at [76] ("[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves"); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").

54 The person on whom a payment claim is served may respond by providing a "payment schedule" pursuant to s.15(1) to the claimant. Principally, the payment schedule must identify the payment claim to which it relates and indicate the amount of the payment (if any) which the respondent proposes to make (the "scheduled amount"): s.15(2). If the scheduled amount is less than the claimed amount, the schedule must indicate why it is less and the reasons (if any) for withholding payment: s.15(3). The payment schedule must be served on the claimant within the time required by the construction contract, or within ten business days after the payment claim is served (whichever is earlier), otherwise the respondent becomes

[16] [2008] FCA 1248 at [10] – [11].

liable to pay the claimed amount to the claimant on the due date for the relevant progress payment: s.15(4).

55 Accordingly, there are three possible outcomes of this process under the Act, in its current amended form.[17] First, if the respondent does not provide a payment schedule within due time, whether intentionally (because he disputes the claim) or unintentionally, he becomes liable to pay the claimed amount: s.16, and may, at the option of the claimant, be subject to an adjudication application: s.18(1)(b). Second, if the respondent does provide a payment schedule and the scheduled amount is the same as the claimed amount, he becomes liable under the Act to pay the amount claimed: s.17. The third possible outcome (which is confined to the outcome which arose in this case and does not include two other possible outcomes described in s.18(1)(a)(ii) and s.18(1)(b)) occurs if the respondent provides a payment schedule but the scheduled amount is less than the claimed amount, the claimant may apply within ten business days after the claimant has received the payment schedule to have the dispute adjudicated by an appointed adjudicator (an adjudication application): s.18(1)(a)(i) and s.18(3)(c).

56 As Finkelstein J observed in *Protectavale Pty Ltd v K2K Pty Ltd*,[18] the payment claim and payment schedule define the issues in dispute between the parties which the adjudicator is to resolve, and limit the points which may be the subject of submissions to the adjudicator: *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd*;[19] *Multiplex Constructions Pty Ltd v Luikens*.[20]

57 This is confirmed by s.23(2) of the Act, which states that in reaching a decision the adjudicator is to consider only the provisions of the Act, and to subject the construction contract, the payment claim, the claimant's submissions (including relevant documentation) that have been "duly made by the claimant in support of the

[17] Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [5] listed similar but different outcomes as they would have arisen under the Act in its unamended form.

[18] *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [6].
[19] [2003] NSWSC 365 at [32].
[20] [2003] NSWSC 1140.

claim," the payment schedule, the respondent's submissions (including relevant documentation) that have been "duly made by the respondent in support of the schedule," and what the adjudicator sees on any inspection to the Act.

Adjudication Application Procedure

58 In certain circumstances, a claimant may commence an adjudication application. Subsections 18(1) and (2) provide pre-conditions for the commencement of this process.

59 In this case, it is common ground that s.18(1)(a)(i) has been satisfied, because the scheduled amount indicated in Hickory's payment schedule, which was zero, was less than the amount claimed by Schiavello in its payment claim, which was a total of the amounts in the two tax invoices dated 31 January 2009, being $2,106,828.98 inclusive of GST. Further, it is common ground that the pre-conditions set out in s.18(2) do not here need to be satisfied because this is not an adjudication application to which subsection (1)(b) applies.

60 Nevertheless, the terms of s.18(2) are instructive. In circumstances in which subsection 1(b) applies, s.18(2) provides that an "adjudication application to which subsection (1)(b) applies cannot be made unless" the defined steps are taken within a limited specified time frame. A failure to comply with the steps provided for in s.18(2), in a case where the subsection applied, would provide a statutory bar to the making of an adjudication application.

61 An adjudication application must be in writing and made to an authorised nominating authority chosen by the claimant: s.18(3) (a) and (b). The Building Commission established under the *Building Act 1993* has functions under the Act which include keeping under regular review the administration and effectiveness of the Act; keeping a register of authorised nominating authorities; and keeping and publishing records of adjudication determinations: s.47A. An authorised nominating authority is a person authorised by the Building Commission to nominate

adjudicators for the purposes of the Act: s.42. The functions of the authorised nominating authority are set out in s.43A as follows:

> The functions of an authorised nominating authority are-
>
> (a) to nominate adjudicators for the purposes of this Act; and
>
> (b) to receive and refer adjudication applications to adjudicators; and
>
> (c) to receive adjudication review applications and submissions in response to those applications and to appoint review adjudicators; and
>
> (d) to serve copies of adjudication determinations, adjudication review applications and review determinations on certain persons; and
>
> (e) to provide information to review adjudicators; and
>
> (f) to provide adjudication certificates; and
>
> (g) to provide information to the Building Commission in accordance with this Division; and
>
> (h) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

62 The second defendant, Adjudicate Today, is an authorised nominating authority duly appointed under the Act.

63 Apart from the limited specifications contained in s.18, there is no prescriptive guide to making an application to initiate the adjudication of a payment claim and no prototypical form. Section 18(3)-(5) provides for the form and the making of an adjudication application. The subsections are in the following terms:

> (3) An adjudication application -
>
> (a) must be in writing; and
>
> (b) subject to subsection (4), 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 10 business days after the due date for payment; and

(e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 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 the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

(4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

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

64 In this case, the adjudication application of Schiavello was in writing, in accordance with paragraph (a); it was made to an authorised nominating authority chosen by the claimant, namely Adjudicate Today, in accordance with paragraph (b); and, as there was no application fee required by Adjudicate Today, paragraph (g) did not apply. However, Hickory has taken issue with whether Schiavello complied with the requirements of paragraphs (c),(f) and (h) of s.18.

65 Once an adjudication application has been made to an authorised nominating authority, it is obliged to refer the application to an adjudicator, although no time limit is specified for this step. Subsection 18(7) of the Act provides:

(7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator as soon as practicable.

Challenges to the Determination of an Adjudicator

66 Challenges to the determination of an adjudicator under the NSW Act were considered by the Court of Appeal (NSW)[21] in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor*.[22] The Court of Appeal determined that *Musico v*

[21] Coram Hodgson JA, Mason P and Giles JA.
[22] [2004] NSWCA 394.

Davenport[23] and cases which followed it, such as *Abacus Funds Management v Davenport,*[24] *Multiplex Constructions Pty Ltd v Luikens,*[25] and *Transgrid v Walter Construction Group*[26] were incorrectly decided, insofar as they held that relief in the nature of certiorari is available to quash an adjudicator's determination which is not void and merely voidable.[27] It was held by the Court of Appeal (NSW) in *Brodyn* that there is no occasion where relief in the nature of certiorari would be available and required.

67 The Court of Appeal in *Brodyn* held further that it was open to challenge an adjudicator's determination only if:

(a) the basic and essential requirements of the Act for a valid determination are not satisfied;

(b) the purported determination is not a *bona fide* attempt to exercise the power granted under the Act; or

(c) there is a substantial denial of the measure of natural justice required under the Act.

If any of these grounds is made out, then a purported determination will be void and not merely voidable, and would therefore be amenable to relief by way of declaration or injunction.

68 The reasoning of Hodgson JA in *Brodyn* on these matters (with whom Mason P and Giles JA agreed) is set out in the following passages of his judgment:[28]

> I agree with McDougall J [in *Musico v Davenport*] 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

[23] [2003] NSWSC 977.
[24] [2003] NSWSC 1027.
[25] [2003] NSWSC 1140.
[26] [2004] NSWSC 21.
[27] Per Hodgson JA (Mason P and Giles JA agreeing).
[28] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWSCA 394 at [51] – [59].

minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) and s 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.

However, it is plain in my opinion that for a document purporting to be 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 [in] the nature of certiorari.

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:

The existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8).

The service by the claimant on the respondent of a payment claim (s 13).

The making of an adjudication application by the claimant to an authorised nominating authority (s 17).

The reference of the application to an eligible adjudicator, who accepts the application (s 18 and s 19).

The determination by the adjudicator of this application (s 19(2) and s 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 (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

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.

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] HCA 28; (1998) 194 CLR 355 at 390-391. 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] HCA 53; (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.

It was said in the passage in *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147, 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* (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 (s 20(1) and s 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 Ltd v Luikens*.

...

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.
>
> 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 [51]-[56]; [58]-[59].

69 *Brodyn* has continued to be followed in New South Wales. It was followed by the Court of Appeal (NSW) in *Transgrid v Siemens Ltd*[29] and leave to re-argue the case has been refused on a number of occasions.[30] However, Basten JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*[31] was of the view that some aspects of the reasoning in *Brodyn* might require reconsideration.[32] Rather than approaching the matter by asking whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination, Basten JA approached the matter by asking whether the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. On this analysis, if the pre-condition is a matter for the objective determination of the court, a court may declare the determination to be void and order injunctive relief if the pre-condition is not satisfied. On the other hand, if the power to resolve questions said to be pre-conditions to the valid exercise of power by the adjudicator are, on a proper analysis, questions for the adjudicator, a subsequently made determination may still remain a valid determination.

70 As Giles JA (with whom Santow and Tobias JJA agreed) said in *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors:*[33]

> While *Brodyn Pty Ltd v Davenport* might bear elucidation, as has occurred in, for example *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* and *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*, I am not moved ... to regard it as wrong in substance, and I am not persuaded that reconsideration would expand availability of judicial review to the review for error of law or fact ... [contended for in this case]. The Act's oft-recognised

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[29] [2004] NSWCA 395.

[30] *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229; and *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49; (2007) 69 NSWLR 72.

[31] [2005] NSWCA 228.

[32] *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228 at [71] – [77].

[33] [2007] NSWCA 49 at [98] – [99].

> objective of speedy but interim resolution of claims, attendant with the possibility of error and confined curial intervention, in my view weighs heavily against substantive change in the current approach to challenges to determinations under the Act.
>
> The amounts often at stake in the challenges which come before the court make an application for special leave to appeal to the High Court likely, whatever be the approach to the challenges determined in this Court. For the reasons stated above, I consider that the circumstances of this case do not warrant the grant of leave to re-argue *Brodyn v Davenport*; and more widely, I favour maintaining *Brodyn Pty Ltd v Davenport* until the High Court says otherwise.

71 In *John Holland Pty Ltd v Roads and Traffic Authority of NSW* [34] Hodgson JA summarised the effect of *Brodyn Pty Ltd* as being that although there was not, in the New South Wales Act, an explicit exclusion of the jurisdiction of the court by a privative clause, an intention was disclosed by the NSW Act to exclude intervention for errors of law or other errors short of errors causing invalidity. Basten JA, who was in the minority, reiterated his view, and decided the case on the basis that the power to resolve the questions said to be pre-conditions to the valid exercise of power by the adjudicator in that case were, on a proper analysis, questions for the adjudicator and not for the objective determination of the court.[35] He said:

> So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.
>
> As I sought to explain in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [43]-[48], in my view the power to resolve these questions has been conferred on the adjudicator.

72 The statements of law enunciated in *Brodyn*, as applied to the NSW Act, are in substance persuasive. If the NSW Act and its Victorian counterpart are to achieve their objectives in providing for the speedy resolution of progress claims, displacing conventional curial intervention may be seen as a necessary sacrifice. Further, in the context of national building operations being conducted in this country, it is desirable that there be consistency in the regimes for payment under construction contracts in both jurisdictions, particularly where common legislative schemes are in place.

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[34] [2007] NSWCA 19 at [62].

[35] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWSCA 394 at [71] - [72].

73 However, it does not follow from these observations that the principles stated in *Brodyn* to which I have referred can or should be adopted in Victoria, and in significant part, I find myself unable to do so. I am compelled to this course having undertaken a close examination of the Victorian Act and by application of relevant provisions of the *Constitution Act 1975* (Vic). I do so in spite of the position taken by counsel in the case before me that *Brodyn* should be applied.

74 In *Brodyn*, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of certiorari was not available to quash an adjudicator's determination which is not void and merely voidable.

75 In my opinion, this construction is not open under the Victorian Act.

76 In the first place, the Act, which is in similar terms to its NSW counterpart,[36] contains a limited privative clause. Section 28R (5) is in the following terms:

> (5) If a person commences proceedings to have the judgment set aside, that Person -
>
> (a) subject to subsection (6), is not, in those proceedings, entitled -
>
> (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
>
> (ii) to raise any defence in relation to matters arising under the construction contract; or
>
> (iii) to challenge an adjudication determination or a review determination; and
>
> (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

77 Being a privative clause, the principles of statutory construction established by the High Court in *R v Hickman: Ex Parte Fox & Clinton*[37] apply. In *Hickman's* case the

[36] S. 25(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

National Security (Coal Mining Industry Employment) Regulations 1941 (Cth) empowered a Local Reference Board to settle industrial disputes arising in the coal mining industry. The privative clause in question provided that a decision of the Board could not be challenged, appealed against, quashed, or be called into question, or be subject to prohibition, mandamus or injunction in any court on any account. In the face of the privative clause of this breadth, the High Court nevertheless held that prohibition would lie because the decision of the Board had been based on an erroneous finding that the matter before it was within the ambit of the coal mining industry. Dixon J said, in what has become known as the *Hickman* principle, a privative clause is to be construed so as to have the following effect:[38]

> … no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

78 In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*,[39] the High Court confirmed the *Hickman* principle as a rule of statutory construction. It was determined that the rationale for interpreting a privative clause in conformity with the *Hickman* principle is that it is necessary to reconcile the prima facie inconsistency between a statutory provision which appears to limit the powers of a Tribunal, and the privative clause which appears to contemplate that the Tribunal's order will operate free from any restriction imposed by judicial review. This reconciliation is effected by reading the two provisions together and giving effect to each. The High Court held that the privative clause is effective, despite non-compliance with the provisions governing the exercise of the power, but only if the purported exercise of the power is a bona fide attempt to exercise the power; it relates to the subject matter of the legislation; and it is reasonably capable of reference to the power given to the

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[37] (1945) 70 CLR 598.
[38] *R v. Hickman: Ex Parte Fox & Clinton* (1945) 70 CLR 598 at 615.
[39] (1995) 183 CLR 168

body purporting to exercise it. Effectively, the validity of acts done by a repository of power is expanded.[40]

79 In *Plaintiff S157/2002 v Commonwealth of Australia*[41], Gleeson CJ described the process of statutory construction contemplated by *Hickman* as involving two steps:

> The first step is to note that the protection afforded by a [privation clause of the type under consideration] will be inapplicable unless there has been "an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province". The second step is to consider "whether particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action". [This description of the *Hickman* principle provided by Gleeson CJ was given by reference to the quoted explanation of Dixon J provided in *R v Murray; Ex parte Proctor.* [42]]

Gleeson CJ in the same case described the approach to the interpretation of statutes containing privative provisions enunciated by Dixon J in *Hickman*, and developed by him in later cases, has been accepted by the High Court as "authoritative".[43]

80 The majority in *Plaintiff S157/2002*[44] summarised a contemporary approach to *Hickman* in the following terms:[45]

> It follows from *Hickman*, and it is made clear by subsequent cases, that the so-called "*Hickman* principle" is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions. Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with that other provision. [Footnotes omitted]

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[40] Crock, Dr Mary and Robinson, Mark '*Redefining the Role of the Courts: The Implications of Recent Developments in the Judicial Review of Migration Decisions*', Paper delivered at AIC Conference "Administrative Law and Ethics", Canberra 24-26 November 1997.

[41] [2003] 211 CLR 476.
[42] (1949) 77 CLR 387 at 399.
[43] *R v Murray; Ex Parte Proctor* (1949) 77 CLR 387 at 489.
[44] Gaudron, McHugh, Gummow, Kirby and Hayne JJ
[45] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] 211 CLR 476, at 501.

81 The privative clause, such as it is expressed in s.28R (5)(a) of the Victorian Act, when construed with the aid of the *Hickman* principle, provides scope for relief in the nature of certiorari in the appropriate case. The subsection would only operate, in the circumstances of this case,[46] if an adjudication determination is under challenge. A determination of an adjudicator which is not a bona fide attempt to exercise the power conferred by the Act; or which does not relate to the subject matter of the adjudication; or is not reasonably referable to the powers conferred on an adjudicator by the Act, could not in truth be described as an "adjudication determination" within the meaning of the Act at all.[47] In this regard, the majority in *Plaintiff S157/2002*[48] said:

> This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot properly be described in the terms used in [the privative clause under consideration] as "a decision ... made under this Act" and is, thus, not a "privative clause decision" as defined in [the relevant parts of the act under consideration]. [Footnotes omitted]

82 Accordingly, to the extent that there is any conflict between the Act in its application to the facts of this case and the privative clause, it may be resolved in the manner I have described.

83 On the construction of the Act, as I have found it to be, certiorari would lie, and the privative clause contained in s.28R (5)(a) of the Act would not thwart its operation.

84 Further, there is some room for the operation of certiorari outside the narrow ambit of s.28R (5)(a), and this is so even without resort to the *Hickman* principle of construction. The provision only comes into operation once a judgment has been entered under the Act. The procedure which precedes this step involves passing through a number of gateways: first, the making of the adjudicator's determination which makes a finding that money is payable under the construction contract in respect of the progress claim:

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[46] S. 28R (5) (a) also operates in the other circumstances defined in this paragraph of the subsection.
[47] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] 211 CLR 476 at 506 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
[48] *Ibid*.

s.23(4) and s.23; second, on any failure on the part of a respondent to pay, within the time limits specified by s.28M and s.28N, the sum determined by the adjudicator, the claimant may request the nominating authority to provide an adjudication certificate: s.28O(1)(a); third, following the issue of an adjudication certificate, an application may be made to a court of competent jurisdiction for the entry of judgment founded on the certificate and founded on evidence that the whole or part of the sum specified in the certificate remains unpaid: s.28R (1-4); then, Judgment may then be entered by the relevant court. It is only at this point that proceedings may be commenced to have the judgment set aside. It is also only at this point that the privative clause s.28R(5)(a) comes into operation. At any time prior to the entry of judgment, s.28R(5)(a) has no application, and cannot for example, work to prevent a challenge to an adjudication determination. Accordingly, during the albeit limited period before the entry of judgment, the provision has no application to proceedings in the nature of certiorari to quash an adjudicator's determination.

85 A further and fundamental issue of construction which arises under the Victorian Act is the application of the *Constitution Act 1975* (Vic), insofar as it makes provision for the powers and jurisdiction of the Supreme Court. Section 85 of the *Constitution Act* relevantly provides by subsections (1), (5) and (6):

> (1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.
>
> …
>
> (5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless12 -
>
> (a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and
>
> (b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and

(c) the statement is so made -

(i) during the member's second reading speech; or

(ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

(6) A provision of a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of subsection (5) are satisfied.

86 The Victorian Act expressly refers to s.85 of the *Constitution Act* in relation to two of its provisions. Section 51 of the Act provides for the constitutional s.85(5)(a) references as follows:

(1) It is the intention of section 46 [relating to immunity afforded to an adjudicator] to alter or vary section 85 of the *Constitution Act 1975*.

(2) It is the intention of section 28R [which includes the privation clause in s.28(5)] to alter or vary section 85 of the *Constitution Act 1975*.

87 Critically, there is no reference in the Act to altering or varying s.85 of the *Constitution Act* in relation to any other matter, including the grant of relief by way of certiorari. It follows, in my opinion, that no implication can arise in construing the Act which has this effect. Indeed it could be said that the implication operates in the opposite direction. Having specifically turned its mind to the matter of which provisions in the Act should operate to limit the jurisdiction of the Supreme Court under the *Constitution Act*, it appears to have been the intention of the Legislature not to limit the Court's jurisdiction by excluding or restricting judicial review by the Court of a determination of an adjudicator under the Act.

88 In my opinion, an adjudication determination is susceptible to the writ of certiorari because it affects rights in the relevant sense. Although an adjudication determination cannot finally resolve all of the rights of the parties under the applicable construction contract, which are left to be determined by later proceedings in the event of dispute,

nevertheless, an adjudication determination does have the effect of finally determining the right of a claimant to immediate payment of its progress claim. This has a discernable or apparent legal effect upon rights, sufficient to found certiorari: *Hot Holdings Pty Ltd v Creasy*.[49] In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*[50] Beech J pointed to a number of features of the equivalent statutory scheme which operates in Western Australia [51], in arriving at a similar conclusion.[52]

89 In Victoria, the Act provides for the following legal effects of an adjudication determination: subject to a limited right of review by an appointed review adjudicator under Part 3, Division 2A, the amount determined by an adjudicator is binding, and the respondent must pay that amount to the claimant: s.28M; if the respondent fails to pay the whole or any part of the adjudicated amount, the consequences provided for in the Act may follow: s.28O; these include a right of the claimant to request the nominating authority to provide an adjudication certificate: s.28O(i)(a); and the right of a claimant to suspend further work: s.28O(1)(b) and s.29; and the claimant may obtain a judgment in a court of competent jurisdiction for the adjudicated amount, based on the adjudication certificate, and the claim can then be enforced as a judgment debt: ss.29A–41.

90 For these reasons, in my opinion, relief in the nature of certiorari is not excluded either expressly or by implication under the Act. The prerogative writ may be invoked in relation to the determination of an adjudicator under the Victorian Act. In this respect, I do not follow *Brodyn*.

91 The plaintiff in the case before me did not seek relief by way of certiorari to quash the decision of the adjudicator on any ground. It is therefore unnecessary for me to consider whether there was any error disclosed on the record by the adjudicator in determining whether the statutory requirements have been satisfied, and if there is

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[49] (1996) 185 CLR 149 at 159 per Brennan CJ, and Gaudron and Gummow JJ.
[50] [2009] WASC 19.
[51] *Construction Contracts Act* 2004 (WA).
[52] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [100].

such an error, whether it is a jurisdictional or non-jurisdictional error, or an error on the face of the record.[53]

92 Nevertheless, another and central principle of *Brodyn* may be accepted and applied in this case. Whether or not certiorari lies, and whether or not it is relied upon for the grant of relief (and it was not relied upon in this case), it remains open to adopt the approach taken in *Brodyn* in deciding whether or not a determination of an adjudicator is void. Under this approach, the determination of an adjudicator is void if the "basic requirements" of the Act were not complied with, being requirements which were intended by the legislature to be essential pre-conditions for the existence of an adjudicator's determination. What amounts to the "basic requirements" of the Act or the "essential pre-conditions for the existence of an adjudicator's determination" may be equated to jurisdictional error in the traditional sense because such requirements would impose an "imperative duty" or an "inviolable limitation or restriction", to use the terminology of the High Court.[54]

93 If the determination of the adjudicator is found to be void in this way, relief by way of a declaration or injunction may be granted, and this may be so, even if certiorari is not able to be granted. The High Court in *Ainsworth v Criminal Justice Commission*[55] said that:

> It does not follow that, because mandamus and certiorari are inapplicable, the appellants must leave this Court without remedy. The law with respect to procedural fairness has developed in spite of the technical aspects of the prerogative writs.
>
> …
>
> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "(i)t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise".

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[53] If the writ of certiorari is available, it may be granted if the decision-maker has committed a "jurisdictional error" or an error of law on the face of the record: *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ (with Gleeson CJ agreeing); Pizer, J (editor) *Victorian Administrative Law* (Sydney Law Book Co, 1985-) Vol 2, pp. 3123 – 3125; *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [101] – [103].

[54] *Plaintiff S57/2002 v Commonwealth* (2003) 211 CLR 476; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009.

[55] [1992] 175 CLR 564 at 581 – 582 per Mason CJ, and Dawson, Toohey and Gaudron JJ.

> *Forster v Jododex Aust. Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421, per Gibbs J at p 437. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

94 As in *Ainsworth*, the present case involves no mere hypothetical question. There is a live controversy as to the legal effect of the adjudicator's determination and the consequences which flow from it.

95 However, if I am wrong in the application of the approach in *Brodyn* as I have described it, I will also consider the approach favoured by Basten JA in New South Wales, and determine whether in each case the pre-condition to the valid exercise of power by the adjudicator under challenge is properly a question for the adjudicator or is a matter for the objective determination of the court.

Provisions Which Are Directory and Those Which Are Mandatory

96 In *R v Murray; Ex parte Proctor*[56] Dixon J referred, by way of analogy, to the distinction between statutory provisions that are directory and those that are mandatory. That distinction is now in disfavour.

97 The High Court considered the matter in *Project Blue Sky Inc v Australian Broadcasting Authority*.[57] The majority of the Court analysed the issue in this way:[58]

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a

[56] (1949) 77 CLR 387 at 399.
[57] (1998) 194 CLR 355.
[58] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 per McHugh, Gummow, Kirby and Hayne JJ.

> purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". [Footnotes omitted]

98 This approach is relevant to the consideration of a number of the provisions in the Act which are expressed in mandatory terms and which call for analysis in the present case.

The Adjudication Application

99 Having received a "NIL" payment response from Hickory, which it set out in its statutory payment schedule, Schiavello decided to refer the dispute over its payment claim to an adjudicator for determination. Accordingly, on or about 23 February 2009 Mr Bradley Dosser, General Legal Counsel employed by Schiavello, accessed the Adjudicate Today website on his computer to download an application form. He had previously used Adjudicate Today and was familiar with the site. He printed off the adjudication application form and handwrote in the relevant details. He also prepared some typed adjudication submissions in consultation with Jason Kotis, the Contract Administrator employed by Schiavello. Mr Dosser then scanned (in portable document format or "pdf") the completed application form and submissions so that he could email it to Adjudicate Today.

100 Both the application and the submissions were signed by Mr Dosser on behalf of Schiavello (Vic) Pty Ltd and were dated 23 February 2009. However, the documents referred to in the submissions and marked 'A', 'B', 'C', 'D', 'E', 'F' and 'G' respectively were not included as attachments to this email.

101 At approximately 4:01 pm on 23 February 2009, he sent an email to Adjudicate Today at the address "vic@adjudicate.com.au". This is the email address for Adjudicate Today on its website and also on its letterhead. It is also the email address included at the foot of the Adjudicate Today "Vic Adjudication Application Checklist", which is available on its website and described as "Notes for the guidance of the claimant and

the respondent". At point 9 of the checklist the steps described conclude with the following:

> 9. This adjudication application must be returned to –
>
> Adjudicate Today Pty Ltd [ABN 39 109 605 021]
> Suite 1, First Floor, 191 Balaclava Road
> CAULFIELD NORTH VIC 3161
> Tel: 1300 760 297
> Fax: 1300 760 220
> Email: vic@adjudicate.com.au.

102 The 23 February was the tenth and final day within which Schiavello could make its adjudication application under s.18(3)(c) of the Act.

103 Attached to his 4:01 pm email was the scanned copy of the completed adjudication application and typed submissions. He did not receive a delivery failure notification in response to this email.

104 Mr Dosser believed that it was not necessary to submit all of the supporting documents referred to in his submission when making an application for adjudication. However, later in the day on 23 February 2009 Ms Lorraine Djuricin, the General Manager of Adjudicate Today emailed Mr Dosser. In her email, she suggested that it was necessary to submit all documents with the Schiavello application. As it was the last day for making an adjudication application, and to avoid any argument on the matter, Mr Dosser did just that. He proceeded to scan all of the supporting documents referred to in his submission and send them to Ms Djuricin by email that day. This was a considerable task. The supporting documents are voluminous and measure some 600mm (over 2 inches) in thickness.

105 Mr Dosser wrote to Ms Djuricin in an email letter which accompanied the emailed supporting documents. The letter, omitting formal parts, said:

> Thank you for your e-mail although I must confess I am quite surprised to receive it. I left the office earlier this afternoon sometime after I sent the Application through to Adjudicate Today Pty Ltd to attend a seminar in town not having heard anything from Adjudicate Today in response to my e-mail and luckily popped back in the office this evening to fix up something else and I have now noticed your email.

> I have received a number of Applications for Adjudication via your organisation in just the same way as I sent through Schiavello's Application this afternoon (i.e. Application and Submissions with Attachments to follow by courier or post) and so I understand it to be common practice. I am quite alarmed to receive your comments.
>
> I can provide details if you would like of these particular application[s] but in any event I am sending you the attachments now to ensure they are sent before the end of this day, 23 February 2009, so that they are in time anyway. As you will see they are significant in size as I indicated in my earlier e-mail.
>
> Earlier I indicated I intended to send copies by courier tomorrow. Please confirm if this is still required now that I have also sent them by e-mail today.
>
> In the circumstances, I will also send a copy to the other side this evening and so i trust you will agree that no prejudice will be suffered by them.
>
> I would be very disappointed to think that this would have any impact on Schiavello's Application in the circumstances but cannot see how that would be the case in any event since I have now sent these documents to you and the other side.

106 Mr Dosser sent two further emails to Ms Djuricin, both to her email address, and to the Adjudicate Today email address, vic@adjudicate.com.au. These were sent at 9:50 pm and 9:59 pm respectively and attached the supporting documents referred to in the submissions. He did not receive a delivery failure notification in response to those two further emails.

107 Each time he sent an email to Adjudicate Today attaching material for the adjudication application, he immediately sent an email to George Mihos with the same attachments. He sent George Mihos three emails attaching the adjudication application material: at approximately 4:01 pm, 9:54 pm and 10:00 pm on 23 February 2009. He did not receive a delivery failure notification in response to those three emails.

108 On 24 February 2009 Hickory received by courier, a letter and copy of documents comprising a form headed "Vic Adjudication Application" under the letterhead of Adjudicate Today, together with a document headed "Schiavello – Submissions in Support of Adjudication Application". Also included in the documents couriered to Hickory was a letter dated 24 February 2009 from Schiavello to George Mihos and Michael Argyrou of Hickory. In its letter, Schiavello said that the documents were

sent by way of confirmation of e-mails sent on 23 February 2009 by way of service enclosing "Application, Submissions in Support and Attachments to Submissions".

109 Thereafter, Elias Giannakopoulos and Thomas Tsirogiannis of Giannakopoulos Solicitors communicated with Adjudicate Today on behalf of Hickory.

110 On 26 February 2009 Giannakopoulos Solicitors sent by facsimile to Adjudicate Today a letter seeking confirmation of the date and time it received the materials, including the application to Adjudicate Today. Also on 26 February 2009 Giannakopoulos Solicitors sent a further letter to Adjudicate Today which requested Adjudicate Today to confirm what documents had been received by Adjudicate Today from Schiavello and when.

111 On or about 27 February 2009, Adjudicate Today sent a facsimile to Giannakopoulos Solicitors and the Plaintiff advising inter alia that Phillip Davenport had accepted nomination as adjudicator. Also on 27 February 2009 Giannakopoulos Solicitors received a further facsimile from Adjudicate Today, in response to Giannakopoulos Solicitors' letter dated 26 February 2009 concerning the time and date of the receipt of the application for adjudication. The letter said:

> Please find attached copies of emails received from the claimant with respect to the above mentioned adjudication application.
>
> The hard copy of the adjudication application was received on 24 February 2009.

112 The attached documents comprised: an email recording a time and date of 4:01 pm on 23 February 2009 and emails recording a time and date of 9:50 pm and 9:59 pm on 23 February 2009.

113 Later on 27 February 2009 Giannakopoulos Solicitors sent a letter to the Adjudicator which requested he cease to act in the Adjudication Application and that he refuse to make a determination because the Adjudication Application was void and this in turn would render a determination void. This was submitted to be on the basis that

Schiavello failed to comply with the service provisions contained in Section 50 of the Act when submitting the Adjudication Application to Adjudicate Today.

114 At 9:46 am on 2 March 2009 Brad Dosser of Schiavello sent an email to the Adjudicator and to Giannakopoulos Solicitors, which responded to the letter to the Adjudicator from Giannakopoulos Solicitors dated 27 February 2009 regarding the validity of serving the Adjudication Application by email.

115 On 2 March 2009 Adjudicate Today sent a facsimile to Giannakopoulos Solicitors, which set out a request for information by the Adjudicator regarding the matters raised in the letter from Giannakopoulos Solicitors dated 27 February 2009. Also on 2 March 2009 Adjudicate Today sent a facsimile to Schiavello, which set out the Adjudicator's request for a response from Schiavello regarding the validity of serving the Adjudication Application by email on Hickory and Adjudicate Today. Giannakopoulos Solicitors then sent a letter to the Adjudicator on 2 March 2009 which responded to the matters raised by Mr Dosser in his email dated 2 March 2009 regarding Schiavello's failure to comply with the service provisions contained in Section 50 of the Act when submitting the Adjudication Application to Adjudicate Today. Giannakopoulos Solicitors on that day also sent a letter to the Adjudicator, which responded to the Adjudicator's request for information contained in the facsimile from Adjudicate Today dated 2 March 2009.

116 On 3 March 2009 Hickory served on Adjudicate Today and Schiavello a copy of its Adjudication Response dated 3 March 2009 together with the documents referred to in the response.

117 At 4:46 pm on 4 March 2009 Brad Dosser of Schiavello sent a further email to the Adjudicator and to Giannakopoulos Solicitors, which responded to the facsimile from Adjudicate Today dated 2 March 2009 regarding the validity of serving the Adjudication Application by email.

118 On 5 March 2009 Giannakopoulos Solicitors sent a letter to the Adjudicator which, inter alia, responded to the matters raised by Mr Dosser in his email dated 4 March 2009 regarding the validity of serving the Adjudication Application by email.

119 On 24 March 2009 Hickory received a copy of the Adjudication Determination from Adjudicate Today. The adjudicated amount is $1,812,566.00 inclusive of GST.

120 Hickory claims to be entitled to a substantial sum for liquidated damages arising from alleged delay on the part of Schiavello in the progress of its works under the subcontract. In addition, Hickory alleges that it has spent a considerable sum of money correcting Schiavello's works and completing works that Schiavello failed to perform.

Whether Application Made Within the Prescribed Time

121 Hickory submits that the adjudication application commenced by Schiavello was not commenced within the time prescribed by the Act. It further submits that, for this reason, Schiavello's adjudication application was void because a "basic requirement" of the Act or an "essential pre-condition for the existence of an adjudicator's determination" was not complied with.

122 Section 18(3)(c) of the Act Provides that an adjudication application in the case of an application under subsection (1)(a)(i), which is this case, "must be made within 10 business days after the claimant receives the payment schedule". It was common ground that this provision required Schiavello to make its application on or before 23 February 2009. This was so because the claimant, Schiavello received the payment schedule from Hickory on 9 February, and excluding that day from the calculation pursuant to s.44(1) *Interpretation of Legislation Act 1984*, and further excluding the intervening Saturdays and Sundays from the calculation pursuant to the definition of "business day" as defined in s.4 of the Act, the business day of Monday 23 February 2009 is arrived at.

123 The question then becomes, did the sending of the emails, or any one of them, on 23 February 2008 constitute the making of an adjudication application by Schiavello on the business day of 23 February 2009 in accordance with s.18(3)(c) of the Act?

Use of Email to Make the Application

124 The operation of electronic mail, which is often abbreviated as "e-mail" or "email", is now so widespread that it falls within common general knowledge. Although no expert evidence was presented on the subject, and there may be a number of, or indeed many, possible variations in the operation of the email system, the Court is in a position to take notice of and act upon the following basic technical understanding of the sequence of events which is in common use, as applied to the uncontroverted facts of this case.

125 When the three emails were transmitted by Schiavello's General Legal Counsel, Mr Bradley Dosser on 23 February 2009 to the email address of Adjudicate Today at "vic@adjudicate.com.au" an electronic message in each case, representing the contents of the emails was received by a server on a computer terminal located at Suite 2, MVB, 90 Mona Vale Road, Mona Vale, New South Wales ("Mona Vale"). This is different to the location of the premises from which Adjudicate Today conducts its business, which is Suite 1, First Floor, 191 Balaclava Road, Caulfield North, Victoria.

126 Although there is no direct evidence of this, from general experience I accept that shortly after each email was received by the server computer, it sent an electronic notification to a computer operated by Adjudicate Today, indicating that the emails had been received. The managing director of Adjudicate Today, Lorraine Djuricin, having access the company's email mailbox on the computer she used, was then in a position to discover the notification which had been sent by the server in each case, open the relevant email, and thereby gain access to and read what was stored in electronic form on the server, including the text of the email and any attached documents which had been sent with the email. Until at least these steps had been taken by Ms Djuricin, it could not be said that the email in each case and its

attachments had been "received" at the place of business of Adjudicate Today and, in my opinion, the emailed documents in each case remained merely accessible to the intended recipient.[59] The printing of the emailed documents into hard copy form was also a facility which was likely to have been available to Adjudicate Today, once the relevant email had been opened. However, in my view, the taking of this further step was not necessary in order to establish that the emailed documents had been "received".

127 The evidence of Mr Dosser was that, having sent each of the three emails on 23 February 2009 to the email address of Adjudicate Today, he did not subsequently receive any delivery failure notification on his computer in response to the sending of any of the emails. In the absence of any evidence to the contrary, I accept that each of the emails was transmitted to the Adjudicate Today server situated at Mona Vale and were available for access by Adjudicate Today shortly after each email had been sent.

128 Further, in my view it is likely, on the balance of probabilities, that the attachments included with each email, namely the scanned copy of the completed application form and the typed submissions which accompanied the 4:01 pm email, and the scanned copies of the supporting documents which accompanied the 9:50 pm email and the 9:59 pm email, were indeed attached to their respective emails, and having regard to the evidence given by Mr Dosser who sent the emails, the terms of the emails, and the fact that their was no evidence given to the contrary, I accept that the attachments in each case were similarly transmitted to the Adjudicate Today server situated at Mona Vale and were available for access by Adjudicate Today shortly after each email had been sent.

129 Senior counsel for Hickory submitted that the Court could not assume, in the absence of evidence that the attachments were opened and read, that the attachments to the emails were capable of being opened, or if opened, that they were not corrupted and

[59] *Austar Finance v Campbell* [2007] NSWSC 1493 per Austin J at [60].

capable of being read, either in full or at all. However, it seems to me more likely than not that the attachments were capable of being opened and read and there was no evidence to the contrary.

130 An adjudication application is required to be *made* under s.18(3)(c) of the Act within the time prescribed. The Act, however, is silent on the question as to what constitutes the *making* of an application. The paragraph is not expressed in terms of *service* of the application on the authorised nominating authority,[60] nor is it expressed in terms of *notifying* the authority,[61] or *giving* the application to the authority,[62] or that the documents which comprise the application have been physically *received* by the authority within the time specified.

131 Court procedures now commonly provide for the commencement of a proceeding by electronic filing. In the Supreme Court of Victoria, an originating process which is filed electronically, is taken to have been filed in Court "on the date and at the time the authorised provider [the server] made it available for retrieval by the Prothonotary".[63] A facility is provided to reject a document which is sought to be filed electronically if it does not comply with the requirements of the Rules.[64] In the County Court of Victoria, the civil procedure rules provide for the filing of an originating process electronically. In this event the filing of the process is taken to have occurred when it is received by the Court's information system.[65] It is significant that in both examples, the date and time of filing of an originating process filed electronically is governed by the date and time when the email transmission arrives at the court server where it may be accessed by the court administration.

132 Accordingly, there appears to be no reason in principle why an adjudication application cannot be commenced by the filing of the appropriate documents electronically with the authorised nominating authority. In such a case the date and

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[60] Cf. *Austar Finance v Campbell* [2007] NSWSC 1493.
[61] Cf. *Xiao v Perpetual Trustee Company Ltd and Anor* [2008] VSC 412 at [58] – [65].
[62] *Xiao v Perpetual Trustee Company Ltd and Anor* [2008] VSC 412 at [62].
[63] *Supreme Court (General Civil Procedure) Rules* 2005, R. 5.11(1A) (b) and R. 28.10(3).
[64] *Supreme Court (General Civil Procedure) Rules* 2005, R. 28.11.
[65] *County Court Civil Procedure Rules* 2008, R. 5.11(1)(b)(ii).

time of filing of the application may be determined by the date and time when the email transmission arrives at the authority's server where it may be accessed by its administrators.

Conclusion as to Whether Application Made Within the Prescribed Time

133 In my opinion, under the Act it was open to Adjudicate Today to have the adjudication application lodged by email, and to treat the adjudication application as having been made at the time when it arrived at its server. The previous conduct of Adjudicate Today in accepting such applications as reflected in Mr Dosser's email letter to Ms Djuricin, the general manager of Adjudicate Today, on 23 February 2009; combined with the statements contained in paragraph 9 of its "Vic Adjudication Application Checklist"; and its conduct in accepting Schiavello's adjudication application and treating it as having been lodged by it on 23 February 2009, and within time; and the text of Mr Dosser's emailed letter dated 23 February 2009, which unequivocally demonstrated an intention that his email and attachments would constitute the making of Schiavello's adjudication application; all point to electronic lodging as being the procedure which Adjudicate Today and Schiavello adopted and applied in this case, as they were both entitled to do under the Act.

134 Furthermore, there was no disadvantage caused to either party by Adjudicate Today and Schiavello following this course.

135 In my opinion, Schiavello's adjudication application was made to Adjudicate Today within the time prescribed by s.18(3)(c) of the Act and its application was accordingly made within time, for the reasons which I summarise below

136 First, although the mandatory word "must" appears in s.18(3)(c), this does not in itself render an act done in breach of the provision should be invalid. I do not find that this was a purpose of the legislation.

137 Second, Hickory assumed the evidentiary burden of proof in this case. It was not for Schiavello to prove that its making of the adjudication application was in strict

compliance with the Act. It was for Hickory to prove the contrary if it wished to rely upon the fact. I am not satisfied that its case that Schiavello's adjudication application was not made in accordance with s.18(3)(c).

138 Third, I do not accept that the service provision of the Act, s.50, operates to preclude the making of an adjudication application by email. Although electronic service is not mentioned in s.50, it is well accepted that provisions such as this are facultative, and do not usually provide for a prescriptive code or exclude the possibility that service may validly be effected in some other way. Certainly, this is not the position in this case. I do not construe s.50 to exclude the making of an adjudication application under s.18(3)(c) electronically by email.

139 Fourth, in any event I am satisfied that Schiavello's 4:01 pm email of 23 February 2009 sent to Adjudicate Today enclosing its application and supporting submissions (but not its supporting documents) was in fact opened by Ms Djuricin, and that she did so on the business day of 23 February 2009. Ms Djuricin's email to Mr Dosser sent at 5:28 pm on 23 February 2009, in which she acknowledged receipt of his 4:01 pm email and attachments, is consistent with this having occurred, and I find that on the balance of probabilities, it did in fact occur.

140 Fifth, the documents referred to in the submission sent by Schiavello to Adjudicate Today by email at 4:01 on 23 February 2009, although sent at 9:54 pm and 10:00 pm on 23 February 2009, were still sent within the "business day" of 23 February. Although it is doubtful, given the time, that these documents were accessed or opened by Adjudicate Today on that day, in my opinion there was no necessity for them to be sent with the adjudication application. Indeed, there was no mandatory requirement for them to be delivered with the application at all. Section 18(3)(h) of the Act is a permissive not a mandatory provision.

141 There is ample facility in the Act for the appointed adjudicator to receive such documents in the course of his or her deliberations upon adequate notice to the respondent to the application. Neither s.18(3) nor s.43A of the Act preclude the filing

of further material by an applicant for the consideration of an adjudicator after the filing of the application. Although it would be usually convenient to do so, and may aid in the expedition of the process, and the ultimate success of the applicant, there is no requirement that the application must contain everything upon which the applicant intends to rely in support of its claim at the time of it making its application. Still less would a failure to provide everything with the application give rise to an invalidity in the application. If it did, a level of inflexibility would be introduced into the process, contrary to the intended operation of the Act. Further, it would be contrary to the permissive terms of s.18(3)(h) of the Act. Provided the minimum is provided under s.18(3), that is compliance with paragraphs (a), (b), (c), (f) and (g) (if applicable), there will be a valid application under the Act.

142 Further, in accordance with the rules of natural justice, an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance. In the appropriate case, this would involve permitting a party at its instigation to provide material directly to the adjudicator in order to more fully present its case, provided this is done on proper notice to the opposing party. Such a step may involve delivering documents or submissions to the adjudicator for the first time in the process, or supplementing any submissions which have already been delivered with the application, pursuant to s.18(3)(f) of the Act. Either way, this would be in addition to the powers of an adjudicator expressly provided for in s.22(5) of the Act, which is not an exclusive repository of the procedures which may be employed in an adjudication conducted under the Act to ensure that the principles of natural justice are applied.

143 Hickory further submitted that the tight time frames provided for in the Act, pointed to actual physical receipt of the documents by Adjudicate Today as being critical to its operation. It followed, so it was put, that actual physical receipt within the time prescribed by s.18(3)(c) was a "basic requirement" of the Act or an "essential pre-

condition for the existence of an adjudicator's determination", and as there was no proof of actual physical receipt of all of the documents comprising the adjudication application on the business day of 23 February 2009, there was a fatal non-compliance with the Act, such that the adjudicator's determination was void.

144 For the reasons which follow, I do not accept this submission.

145 First, the purposes of the Act were able to achieved, and its provisions were able to work perfectly well with the making of the application electronically on the business day of 23 February 2009, as occurred in this case. Accordingly, it was not a "basic requirement" of the Act that the adjudication application documents be physically received by the authorised nominating authority on that day.

146 Second, in my opinion, the Act does not manifest any legislative intention that an application which was not made strictly within time provided for in s.18(3)(c), should render the ultimate adjudicator's determination, void. The provisions of s.18(3) may be contrasted with other provisions in the Act which may have this effect, for example: s.18(2) which provides that an adjudication application "cannot be made" unless the specified pre-conditions are met; and s.23(2B) which provides that an "adjudicator's determination is void" if it is made in contravention of the specified requirements.

147 Third, extensive submissions were made to the adjudicator as to the time frame for the making of the adjudication application to the effect that the application was made out of time. The adjudicator rejected these submissions and proceeded to make his determination. In my opinion, this was a matter which was properly for the adjudicator to determine and is not a matter for the Court to objectively determine.

The Payment Claim

148 Hickory made a number of submissions that the payment claim purportedly made pursuant to s.14 of the Act in this case was void.

149 I accept that an adjudication founded on a payment claim that is a nullity, is itself a nullity: *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor,* [66] per Palmer J.[67] With this in mind, I turn to the submissions in detail.

Two Progress Claims

150 Hickory submitted that the two Tax Invoices which were delivered to it in the ordinary post by Schiavello on 3 February 2009, did not constitute a payment claim made under the Act. Although they were posted in the same envelope, unaccompanied by a letter or separate note, it was said that s.14(8) which provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract, precluded the delivery of what constituted not one, but two payment claims. This conduct was said to render the ultimate determination of the adjudicator void because it was founded on an invalid payment claim. A declaration to this effect was claimed.

151 I do not accept this submission for the following reasons.

152 First, as I have found, there was one Subcontract which was comprised of two parts, one part related to the fit out works and the other part related to the base building works. Schiavello was accustomed to invoice Hickory for the separate components of the works by the delivery of separate Tax Invoices. This was done at the request of Hickory for its internal accounting purposes. This course of conduct was accepted and acted upon by Hickory throughout the project. I infer that all Tax Invoices delivered during the project by Schiavello were described on their face in the form of the two invoices which are the subject of the controversy, namely as payment claims under the Act. Further, it is clear that Hickory accepted the two Tax Invoices as a single and combined payment claim. It responded to the payment claim with a single and combined payment schedule which it provided under s.15 of the Act. A declaration is a discretionary remedy and accordingly may be refused where the

[66] [2006] NSWSC 1.
[67] *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1 at [41].

conduct of the applicant justifies this course. In this case, the conduct of Hickory which I have described would, in my opinion, justify the refusal of declaratory relief on the basis claimed.

153 Second, I find that in fact, Schiavello delivered to Hickory, one payment claim on 3 February 2009, which comprised two parts. From a practical point of view, the delivery of the Two Tax invoices at the same time and in the same envelope could properly be described as one payment claim.

154 Third, even if there was a technical defect in the making of the payment claim, the defect falls far short of that which could possibly be described as a "basic requirement" of the Act or an "essential pre-condition for the existence of an adjudicator's determination" such that non-compliance would render the ultimate determination of the adjudicator void.

155 Fourth, the adjudicator accepted the two Tax Invoices as constituting a valid progress claim upon which the adjudication determination could be founded. He was entitled to do so. There is no basis for the Court to intervene.

Payment Claim the Subject of a Previous Claim

156 It was submitted by Hickory that the payment claim which is the subject of this proceeding was a payment claim which had been made previously by Schiavello. There were only two items of a minor nature added to claims which had been made previously, together with a claim on the security which had been lodged.

157 In support, s.14(8) was relied upon. This provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

158 However, s.14(9) in my opinion, resolves the issue against Hickory. It provides that subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

159 In this case, I accept that a previous payment claim had in fact been made by Schiavello which covered the items referred to in the two Tax Invoices. However, in spite of not being paid on those claims, Schiavello did not make an adjudication application in respect of them. It sought instead to essentially reactivate those claims by the delivery of the two Tax Invoices, the subject of this proceeding.

160 I accept that Schiavello has not been paid on the previous claims. It follows that s.14(9) permits the payment claim comprised in the two Tax Invoices to be validly made.

161 In any event, if it had been made out, this too would not have rendered the ultimate determination of the adjudicator void. Furthermore, it was a matter for the adjudicator to determine, and not the Court.

Excessively Technical Objections Not Countenanced Under the Act

162 The submissions made by Hickory to which I have referred, smack of excessive technicality. The legislature did not intend, in my view, that precise compliance with all of the more detailed requirements of the Act is essential to the existence of a valid determination. To approach the matter in the manner suggested by Hickory would not accord with the legislative intention disclosed in the Act that adjudication determinations should be made and given effect to with minimum delay and therefore should be approached with minimal technicality and court involvement.

163 True it is that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights. However, it is artificial to elevate this consideration to the point where it operates to insist on strict compliance with every procedural requirement with the attendant risk of the process being declared a nullity in the event of non-compliance, as the price for the privilege. In my view, it is not of sufficient weight to displace the legislative intention which I have described.

164 Further, the approach taken in a number of cases determined in New South Wales is to treat issues of compliance or otherwise with the technical requirements of the

equivalent of s.14 of the Victorian Act (which is s.13 of the NSW Act), as matters for the adjudicator to determine. Ipp JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*[68] stated that whether a claim complies with s.13(2) of the Act is "a matter for determination under s.17". In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*[69] Basten JA referred to the cases concerning compliance with s.13 and said that the existence of essential preconditions to a valid claim "are matters for the adjudicator, not for objective determination by a Court". In *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors*[70] Giles JA said that a determination of the parameters of the payment claim is similarly a matter for the adjudicator. In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor*,[71] Palmer J took a similar approach to the requirements of s.13. His Honour said:[72]

> The law as to compliance with s.13(2) of the Act as it emerges from *Brodyn* and *Nepean*, may be summarised thus:
>
> (i) a payment claim which is never served on the respondent under s.13(1) cannot set in motion the machinery of Pt 3 so that any purported adjudication of that payment claim and any other enforcement procedures in Pt 3 founded upon that payment claim must be a nullity;
>
> (ii) there are some non-compliances with the requirements of s.13(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result;
>
> (iii) a payment claim which does not, on its face, purport in a reasonable way to:
>
> – identify the construction work to which the claim relates; or
>
> – indicate the amount claimed; or
>
> – state that it is made under the Act fails to comply with an essential and mandatory requirement of s.13(2) so that it is a nullity for the purposes of the Act;
>
> (iv) a payment claim which, on its face, purports reasonably to comply with the requirements of s.13(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Pt 3 of the Act …

[68] [2005] NSWCA 409 at [76].
[69] [2006] NSWCA 238 at [71].
[70] [2007] NSWCA 49.
[71] [2006] NSWSC 1.
[72] *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1 at [41].

165 I see no reason why the matters under challenge by Hickory in this case should be in any different a position. In my opinion, applying the criteria in *Brookhollow* referred to, there was no breach of s.14 of the Act, and if there was any breach in the manner alleged by Hickory, it did not result in the payment claim being a nullity.

The Submission There Was No "WUS" to Support the Progress Claim

166 It was submitted that a critical error was made by the adjudicator in treating the application in front of him as a valid application, when the application did not comply with the Act. It was submitted that it did not comply because there had been no WUS (work under the Subcontract) to support the progress claim, the subject of the application. It was said that this was an essential requirement under both the Act and the Subcontract.

167 The issue as to whether there was a valid payment claim before the adjudicator by reason that there was no WUS to support it, is a matter which goes to the question as to whether a payment claim is due and payable. As such, this is classically a matter for the adjudicator to determine, and in the process he or she may come to the wrong conclusion. However, if the essential requirements of the adjudication process have been complied with, as they have in this case in my opinion, the determination of the adjudicator is not void.

168 In my opinion, if the adjudicator was wrong in the manner claimed, it did not constitute a jurisdictional error, but rather, if there was such an error, it was an error within jurisdiction. Such an error would not render the determination void in the sense explained in *Brodyn*.

Conclusion

169 In my opinion, Hickory has not made out its case.

170 Accordingly, I will dismiss Hickory's claim with costs. I will hear the parties on what further orders should be made.
