SUPREME COURT OF QUEENSLAND

CITATION:	*Intero Hospitality Projects P/L v Empire Interior (Australia) P/L & Anor* [2008] QCA 83
PARTIES:	**INTERO HOSPITALITY PROJECTS PTY LTD** ABN 67 093 753 970 (applicant/appellant) **v** **EMPIRE INTERIOR (AUSTRALIA) PTY LTD** ACN 110 021 586 (first respondent) **PETER JAMES HANLON** (second respondent)
FILE NO/S:	Appeal No 8158 of 2007 SC No 4845 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave/Judicial Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 April 2008
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2008
JUDGES:	Holmes and Muir JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the second respondent adjudicator made a decision under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the primary judged dismissed the applicant's application for a statutory order of review of the decision – where the underlying object of the *Building and Construction Industry Payments Act* 2004 (Qld) is to provide a mechanism for swift interim adjudications – where the court may dismiss an application for judicial review where it would be "inappropriate" to grant the application under s 48 *Judicial Review Act* 1991 (Qld) – whether the application for leave to appeal under s 13(b) *Judicial Review Act* 1991 (Qld) should be dismissed ADMINISTRATIVE LAW – JUDICIAL REVIEW –

REVIEWABLE DECISIONS AND CONDUCT – EXISTENCE OF OTHER REVIEW OR APPEAL RIGHTS – where the second respondent adjudicator made a decision under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the primary judge dismissed the applicant's application for a statutory order of review of the decision – whether under s 13(b) *Judicial Review Act* 1991 (Qld) provision is made, other than through the *Judicial Review Act* 1991 (Qld), under which the applicant is entitled to seek review of the matter by another Court – whether s 100 *Building and Construction Industry Payments Act* 1994 (Qld) is a provision to which s 13 *Judicial Review Act* 1991 (Qld) applies

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where second respondent adjudicator made a decision under the *Building and Construction Industry Payments Act* 2004 (Qld) – where there was a dispute between the parties as to which document formed the basis of their agreement – where the adjudicator found that the earlier agreement governed the parties, as the later subcontract was signed under duress – whether the adjudicator was capable of maintaining a finding of common law duress

Building and Construction Industry Payments Act 2004 (Qld), s 24, s 26, s 100
Judicial Review Act 1991 (Qld), s 3, s 13(b), s 15(4), s 48

Barrow v Chief Executive, Department of Corrective Services [2004] 1 Qd R 485; [2002] QSC 168, cited
Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor [2007] QSC 333, considered

COUNSEL: J K Bond SC, with M H Hindman, for the appellant
R A Holt SC, with M D Ambrose, for the respondent

SOLICITORS: Clayton Utz for the appellant
DLA Phillips Fox for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA:** This is an application for leave to appeal against orders made by the learned Chief Justice on 20 August 2007 dismissing an application for a statutory order of review of a decision of the second respondent dated 4 May 2007 pursuant to s 26 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"). The decision was based on the Chief Justice's conclusion that s 100 of the Act was a "provision made by a law . . . . under which the applicant is entitled to seek a review of the matter by another court."[1]

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1 See *Judicial Review Act* 1991 (Qld) s 13(b)

[3] An appeal against an order dismissing an application for judicial review lies only by leave of the Court of Appeal.[2]

The application for leave to appeal and grounds of appeal

[4] The grounds upon which the application for leave to appeal is based also constitute the grounds of appeal should the application be successful. Those grounds are:

(a) The primary judge erred in concluding that s 100 of the Act fell within s 13(b) of the *Judicial Review Act* 1991 (Qld);

(b) The primary judge erred in failing to find that the adjudicator erred in law in that his decision was not authorised by the Act or that he acted beyond jurisdiction in:

(i) not applying the subcontract signed by the parties as the subject construction contract;

(ii) setting aside the signed subcontract on the basis of duress.

The first respondent's arguments

[5] The first respondent, who for convenience will be referred to as the respondent, argued that "subsections (2) and (3) of s 100 provide the operational aspect of [the Act] that falls within s 13(b) . . . ." and that ". . . . it is clear that those provisions contemplate that the Court is not to be restricted in any manner from dealing with the parties' rights afresh, notwithstanding the existence of a decision under the [Act]; further, the Court is empowered to make such orders as is appropriate, (including restitution) in deciding the parties' rights with respect to the Contract."

[6] The application for leave to appeal is resisted by the respondent on the following further bases:

(a) The point of law involved in the appeal has no enduring importance because the *Justice and Other Legislation Amendment Act* 2007 amended Part 2 of Sch 1 of the *Judicial Review Act* to include the Act as an enactment to which the *Judicial Review Act* does not apply. The *Amendment Act* was assented to on 29 August 2007 and commenced on 28 September 2007;

(b) Even if the primary judge erred in relation to the application of s 13(b) to s 100 of the Act, the error has not resulted in any substantial injustice. The applicant is entitled to pursue its legal rights in respect of the determination of the adjudicator in a Court. "That approach would provide certainty and finality to the parties, rather than having the same question remitted to another adjudicator, whose decision would again remain the subject of further reconsideration under s 100;"

(c) If there were any errors in the adjudicator's decision there were no relevant errors of law, except in respect of the Act.

[7] It is apparent from the primary judge's reasons that he entertained considerable scepticism about the merits of the case advanced by the respondent to and accepted by the adjudicator. That case can best be explained if the facts before the adjudicator are first addressed.

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2 *Judicial Review Act* 1991 (Qld) s 15(4)

The facts relevant to the parties' contractual relationship and the respondent's claims

[8] The respondent performed work on the Brothers Leagues Club building in Ipswich for the applicant as a subcontractor. Prior to the work being performed, an invitation to tender dated 18 April 2006 was provided by the applicant to the respondent. The respondent provided the applicant with a quotation dated 1 August 2006 in respect of the tender documents. On 8 August 2006 the applicant in a facsimile to the respondent made an offer which included:

> "• Contract Sum $ 463,250 + GST
>
> • Retention is by way of Bank Guarantee which we (sic) held by our company
> . . . . 14 days from end of month payment is to be applied.
>
> • The head contract will be under Empire Interiors (Aus) Pty Ltd . . . ."

[9] The respondent then issued a purchase order dated 9 August 2006 which stated, "Please proceed with all ceiling and partition works for the above project in accordance with your subcontract for the amount of $463,250.00 excl GST . . . . Note: subcontract to follow shortly."

[10] The respondent carried out work for the applicant between 18 August 2006 and 18 September 2006. During that time it submitted progress claims dated 23 August 2006 and 5 September 2006, and a variation claim dated 15 September 2006 for $21,130. The latter claim was paid less a retention amount of $1,006.50 on 15 November 2006.

[11] On 18 September 2006 the applicant provided the respondent with a form of subcontract for its signature. The document included the following:

> ". . . .
> The Subcontractor agrees with the Builder to carry out the Subcontract Works in accordance with the terms and conditions of this agreement ("the Subcontract" which comprises:
> (a) the Schedule;
> (b) the Special Conditions (if any);
> (c) the General Conditions and its annexures;
> (d) the Scope of Work;
> (e) the Drawings (if any).
> The terms used in this Schedule refer to the terms contained in the General Conditions (and its annexures), a copy of which the Subcontractor acknowledges receiving.
> Any ambiguity or discrepancy is to be resolved by applying the above order of precedence.
> . . . .
> Amount of Retention: 10% of Progress Claim up to 5% of Contract value.
> Date for Submission of Progress Claims: 25th of each month.
> Period for Payment of Progress Claims: 30 days to end of month to which the claim relates."

[12] The applicant, under cover of a letter dated 28 September 2006, forwarded to the respondent two copies of the applicant's general conditions of contract. In the covering letter, the applicant stated:

> ". . . .
> We have implemented a system whereby each new Subcontractor engaged by us is required to provide an executed copy of this document.
>
> Therefore, as a first time Subcontractor with this company, please initial each page and sign where required on page 17. Return one (1) copy of the duly completed document to this office. The other copy should be retained for your reference, as it will apply to the current and any further engagement we might enter into.
>
> Upon return of the signed general conditions contract, we will issue a subcontract specifying the scope of works and confirming your current engagement. Should you undertake further works for us, we will issue a fresh subcontract covering that scope of works, and specifying that the general conditions, while not restated, will apply.
>
> You are reminded that payment of progress claims is dependent upon this process being followed and an executed subcontract being in place for the work for which payment is claimed.
> . . . ."

[13] The respondent signed the subcontract document on 25 September 2006. The applicant signed it on 2 October 2006. The evidence does not trace the parties' actions in relation to the general conditions of contract after they were submitted by the applicant to the respondent. A copy of the general conditions initialled by both parties, however, was provided by the respondent to the adjudicator with the respondent's adjudication response. For convenience the signed subcontract document incorporating the general conditions of contract by reference will be referred to as the "Subcontract".

[14] The respondent made claims including the following:

12.10.06	tax invoice 1083	Progress Claim for $14,245.00
22.11.06	tax invoice 1092	Progress Claim for $50,907.50

[15] In November, December and January the respondent corresponded with the applicant asserting that various progress claims or variation claims were overdue for payment and querying what payment had not been made.

[16] On 22 January 2007 the respondent wrote to the applicant:

> ". . . .
> Prior to commencement of project only a purchased order dated 9th of August 2006 had been issued to Empire Interiors to acknowledge the Intero Porjects (sic) acceptance of Empire Interiors quotation no. 00980.1 revised price $463,250.00 plus GST.
> On the 18th of September 2006 a subcontract agreement had been received which Empire had not been aware that by not compiling (sic) with the agreement payment will not be issued, this occurred

> nearly 1 month being on site, till date empire had not overcome the way that this project had been handle by Intero Projects.
> . . . ."

[17] The letter claimed that sums of $51,460 and $17,626.81 were owing to the respondent.

[18] Those sums were claimed in a facsimile from the respondent to the applicant dated 24 January 2007 which professed itself to be a payment claim under the Act.

[19] The respondent continued to press for payment of accounts which it alleged were overdue. Its correspondence, progress claims and related documents set out its claims and the basis for them. No document originating from the applicant before March 2007 which disputed or queried the respondent's claims was put before the adjudicator.

[20] A payment claim dated 15 February 2007 submitted by the respondent to the applicant was withdrawn by facsimile dated 16 February 2007. The respondent submitted a further payment claim dated 14 March 2007 for $65,202.50. The claim was comprised of the earlier claims for $14,245 and $50,907.50.

The applicant's payment schedule and its submissions to the adjudicator

[21] In its payment schedule provided to the respondent pursuant to s 18 of the Act, the applicant rejected the respondent's payment claims on the following bases:

(a) Under cl 35.1 of the subcontract progress claims were required to be "dated the last date of the month for which the work pertains." And the subcontract schedule provides the "25th of each month" as the "date for submission of progress claims." The subcontract schedule also provides that progress claims are to be for periods of "30 days to [sic] end of month to which the claim relates". The payment claim submitted by the respondent on 15 March 2007 related to "an alleged reference date of 28 February 2007";

(b) The respondent's payment claim did not comply with the requirements of the Act;

(c) The payment claim for $50,957.50 (tax invoice 1092) was not accompanied by "such information as the Builder may reasonably require" as required by cl 35.2 of the General Conditions. Nor was it accompanied by a Statutory Declaration. The applicant is unable to determine whether the work performed was work within the subcontract or the value of the work that was actually performed.

In respect of the respondent's claim for $14,245 (tax invoice 1083), if there is a valid payment claim, which is denied, the value of the works is assessed at $8,745 by reference to signed worksheets 000002 and 000003.

(d) The loss caused the applicant by the respondent's suspension of works under termination of the subcontract exceeds the amount of the respondent's claim.

[22] In its submissions to the adjudicator the applicant submitted in respect of part of the tax invoice 1083 claim that:

> ". . . .
> (i) in the absence of any documentation by the Claimant which supports it's contention that this item of work has, in fact, been carried out and has been carried out in accordance with the Subcontract,
>
> (ii) where there is clear disagreement (as evidenced from the face of the Dayworks Sheet 000002) between the site foreman and the Claimant as to whether the work has, in fact, been carried out or whether that work has been carried out in accordance with the Subcontract,
>
> the Respondent is entitled to withhold payment of the amount claimed in accordance with clause 35.3 of the Subcontract.
> . . . ."

[23] The submissions asserted also that the respondent:

> ". . . .
> (b) relies on paragraph 1.2 of the Payment Schedule insofar as it refers to clause 35.3 of the Subcontract which provides that the amount of each progress payment paid to the Claimant is the Respondent's assessment of the value of the work performed by the Claimant;
> . . . ."

[24] Similar submissions were made in relation to other aspects of the tax invoice 1083 claims. In respect of three of these, the reference was to dayworks sheet 000003.

[25] Dayworks sheet 000002 is signed on behalf of the applicant and it would seem that the person who signed the document placed his initials against some but not all of the entries on the sheet. Dayworks sheet 000003 has been signed on behalf of the applicant but there is no initialling of individual entries. There is no evidence which explains precisely what is to be gleaned from the way in which the two sheets have been signed and initialled. The adjudicator made an observation along these lines in his reasons.

[26] Clause 35.3 of the General Conditions of Contract provides:

> ". . . .
> The amount of each progress payment paid by the Builder will be paid within the period specified in the Schedule, being the Builder's assessment of the total gross value of the work under the Subcontract to which the claim relates, less:
>
> (a) any retention moneys;

(b) the progress payments already made in respect of the work under the Subcontract;

(c) any amount owing by the Subcontractor to the Builder whether liquidated or not and whether under this Subcontract or not; and

(d) any other amount properly withheld.

. . . ."

[27] The applicant also claimed a set-off in the sum of $164,000 arising from loss allegedly suffered through the respondent's cessation of work, the resulting termination of the subcontract by the applicant and the loss resulting from having the balance of the work performed by another subcontractor engaged by the applicant at a higher price.

[28] In its submissions to the adjudicator in respect of tax invoice 1092, the respondent relied on its contentions in the payment schedule.

The adjudicator's findings

[29] The adjudicator found as follows. The Subcontract did not apply to the work performed by the respondent or to claims for payment in respect of that work. Furthermore, the Subcontract "was signed under duress, as the Respondent had stipulated that signing was a precondition of continuation of progress payments."

[30] The adjudicator observed in his reasons that ". . . . where both parties agree to executes [sic] a contract it would be reasonable for either party to expect that the basic manner in which the existing arrangement was being undertaken would continue and if any changes were necessary that both parties would have an input to resolve any issues between the parties. This has not occurred in this case." The adjudicator held that "the subcontract was signed under duress, as the Respondent had stipulated that signing was a precondition of continuation of progress payments."

[31] The applicant's claim for set-off was disallowed on the basis that it was made under the Subcontract.

The merits of the adjudicator's findings

[32] The primary judge was plainly of the view that the adjudicator's findings concerning the governing contract and duress were unlikely to be sustained should the issues between the parties fall for determination by a court. On the hearing of the appeal counsel for the respondent did not attempt to justify these findings, choosing to argue that the exercise of the primary judge's discretion, for the reasons advanced by the primary judge, was sound.

[33] In view of the approach taken by the respondent's counsel in argument, this court is entitled to determine the application for leave to appeal on the basis that the findings of the adjudicator as to the governing contract and the question of duress are wrong in law.

[34] But in any event, the implicit concessions by the respondent's counsel were appropriately made. There was no material before the adjudicator capable of sustaining a finding of duress by application of the principles propounded in

authorities such as *Crescendo Management Pty Ltd v Westpac Banking Corporation*[3] and *Maritime Union of Australia v Geraldton Port Authority* [4]. It also seems obvious enough that whatever documents may have constituted the parties' agreement initially, by executing the Subcontract and initialling the general conditions of contract against the background of the applicant's stipulations in its letter of 28 September, the parties manifested an intention to enter into a legally binding agreement in terms of the Subcontract.

[35] There is no reason in principle why the Subcontract could not have retrospective effect. It may be seen from the expressed date of commencement for stages 1 and 2 stated in the schedule to the Subcontract that it was intended to apply to work prior to the date on which it was executed. Another argument advanced on behalf of the applicant was that the adjudicator was not entitled to make any determination based on duress having regard to the terms of s 26 of the Act. It is unnecessary to consider that question.

[36] It does not follow, however, from the conclusion that the adjudicator erred in law that if the matter were to be remitted for determination by another adjudicator, the applicant would necessarily be successful. As was pointed out in the primary judge's reasons, the issues between the parties can be resolved finally only by judicial determination.

Was s 100 of the Act a provision of the type described in s 13 of the *Judicial Review Act*?

[37] Before considering the argument that the exercise of the primary judge's discretion miscarried as a result of an erroneous construction of sections 100 of the Act and s 13 of the *Judicial Review Act* 1991 (Qld), it is appropriate to note that, even if the primary judge's discretion ought not have been exercised under s 13, it was open to the primary judge to consider whether the application before him should have been dismissed under s 48 of the *Judicial Review Act* 1991 (Qld). I will consider the application of that provision shortly.

[38] Section 13 of the *Judicial Review Act* 1991 (Qld) relevantly provides:

> " . . . . if -
>
> (a) an application under section 20 to 22 or 43 is made to the court in relation to a reviewable matter; and
>
> (b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person;
>
> the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so."

[39] Section 100 of the Act provides:

> "**100 Effect of pt 3 on civil proceedings**
>
> (1) Subject to section 99, nothing in part 329 affects any right that a party to a construction contract—
>
> (a) may have under the contract; or

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3 (1988) 19 NSWLR 40

4 [1999] FCA 899

(b) may have under part 230 in relation to the contract; or

(c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

(2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and

(b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings."

[40] Section 13 applies to a "provision" . . . . made by a law . . . . under which the "applicant" is given an entitlement "to seek a review" of the matter, the subject of the application for judicial review, provided such matter is "a reviewable matter". Consequently, before the section can apply to a statutory provision, that provision must give an entitlement to the applicant for judicial review to seek a review of the matter the subject of the judicial review application.

[41] "Review" is defined in s 3 of the *Judicial Review Act* 1991 (Qld) as:

"***review***, in part 1, division 3, **includes a review** by way of—
(a) reconsideration, rehearing or appeal; or

(b) the grant of an injunction or of a prerogative or statutory writ or order; or

(c) the making of a declaratory or other order." (emphasis added)

[42] The meanings given to "review" provided by the *Shorter Oxford English Dictionary* include, "the act of looking over something (again), with a view to correction or improvement . . . ."[5] The ordinary everyday meaning of the word denotes a reconsideration with a view to affirming, varying, or setting aside a decision.

[43] Paragraphs (a), (b) and (c) of the definition are all prefaced by the words "includes a review by way of". Those words indicated that the matters listed in paragraphs (b) and (c), to fall within the definition, must involve or be by way of a reconsideration of a previous decision.

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5 See also *Colpitts v Australian Telecommunications Commission & Ors* (1986) 9 FCR 52 at 63

[44] Section 100 of the Act, in effect, declares that nothing in Part 3 of the Act affects the parties contractual rights and obligations or civil proceedings "arising under a construction contract" except to the extent required by s 99. The section, however, does not confer any entitlement on any person to seek "a review" of an adjudicator's decision. Section 100 makes it plain that contractual rights and remedies are preserved but in no sense does it make provision for remedies. At relevant times an adjudicator's decision was subject to judicial review only by operation of the provisions of the *Judicial Review Act* 1991 (Qld).

[45] In my respectful opinion, s 100 of the Act is not a provision to which s 13 of the *Judicial Review Act* 1991 (Qld) applies. Consequently the exercise of discretion by the primary judge by reference to s 13 miscarried. However, as indicated earlier, such a discretion may have been exercised under s 48 of the *Judicial Review Act* 1991 (Qld). Before discussing the application of that provision it is appropriate to consider further the relevant provisions of the Act.

The purpose of the Act and the role of Adjudicators

[46] The underlying object of the Act was described in the second reading speech to the *Building and Construction Industry Payments Bill* 2004 (Qld)[6] as being ". . . . to provide for a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis without extinguishing a party's ordinary contractual rights to obtain a final determination of a payment dispute by a Court or tribunal of competent jurisdiction."

[47] The Act sets up a regime under which a person claiming monies under a construction contract ("the claimant") may serve a claim for payment on the person alleged to be liable to make payment under the contract ("the respondent"). The respondent may respond to the claim by serving on the claimant a payment schedule stating the amount of payment the respondent proposes to make. Where that payment is less than the claimed amount, the schedule must explain the reason for the deficiency. The Act provides for the consequences of non-payment where a payment schedule is not provided and where there is non-payment of any amount admitted to be payable under a payment schedule.

[48] Where the claim is rejected in whole or in part in a payment schedule, the claimant may apply for adjudication of the claim. The adjudication must be carried out by an adjudicator registered under the Act. Within the time period provided for by the Act,[7] the respondent must file a response to the application. After the filing of that response the adjudicator is required to decide the application as quickly as possible and in any event within 10 business days after the earlier of the date on which the adjudicator receives the adjudication response or the date on which the adjudicator should have received the adjudication response. The parties have the right to extend time for the determination.

[49] In deciding the application, the adjudicator may consider only the matters listed in s 26(2) of the Act and the parties are not entitled to legal representation on any conference called by the adjudicator. The subsection does not contemplate the giving of oral or other evidence, apart from the provision of "relevant documentation".

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6 On 18 March 2004

7 *Building and Construction Industry Payments Act* 2004 (Qld) s 24

[50] The respondent is required to pay the amount, if any, found by the adjudicator to be payable. In the event of default in payment there is provision for the obtaining of an adjudication certificate which may be "filed as a judgment for a debt . . . . in a Court of competent jurisdiction."

[51] It is apparent from the foregoing that the Act is intended to provide a mechanism by which claims for payment under construction contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process. It is apparent also that in making determinations under the Act adjudicators will often lack the evidence upon which and the time within which to make fully informed considered determinations. That does not matter in the scheme of things, as adjudicators' determinations do not finally determine parties' contractual rights. That is left to the courts or to alternative dispute resolution processes agreed upon by the parties.

Consideration of the exercise of a discretion under section 48 of the *Judicial Review Act* 1991 (Qld)

[52] In his reasons, the primary judge referred with approval to decisions in which similar observations had been made.[8] Other judicial observations on the nature of the Act and its counterpart in New South Wales are collected in *Altys Multi-Services Pty Ltd v Grandview Modular Building Services Pty Ltd* [9] and *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor*.[10] As Chesterman J remarked in the latter decision, the Act emphasises speed and informality.[11]

[53] His Honour went on to observe that "the salutary protection afforded to subcontractors by the Act will be sadly reduced if applications are routinely reviewed on any of the grounds appearing in s 20 of the *JR Act*."[12] His Honour then referred with approval to paragraph 10 of the primary judge's reasons in this case. The primary judge there said:

> "[10] One very substantial limitation upon my usefully dealing with them now, is that I could not do so definitively – for want of proper evidence tested through the curial process. If I were to conclude that because of the way he went about the determination, the adjudicator erred in law, the most I could do would be to remit the matter for determination before another adjudicator. The parties' interests would much better be served were those issues left for definitive determination in properly instituted court proceedings of a comprehensive character later in the piece."

[54] Judicial review of adjudicators' decisions sits uncomfortably with the Act's purpose of providing an expeditious, interim determination. Were the application for leave to appeal and the appeal to succeed, the matter could be remitted to another adjudicator for a determination. In that event, instead of one determination

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8 *Roadtek, Department of Main Roads v Philip Davenport & Ors* [2006] QSC 47 and *Brodyn Pty Ltd t/as Time Coast and Quality v Davenport* [2003] NSWSC 1019

9 [2008] QSC 26

10 [2007] QSC 333

11 [2007] QSC 333 at [20]

12 *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor* [2007] QSC 333 at [50]

contemplated by the Act there would be two determinations with an appeal interposed. There would be also the likelihood of litigation to finally determine the parties' contractual rights.

[55] The applicant has a claim against the respondent which is substantially in excess of the respondent's claim. Remission to another adjudicator will not advance the resolution of this aspect of the parties' dispute and it is surely desirable that all the issues between them be resolved as expeditiously as possible in the one proceeding.

[56] Another possible course would be to merely set aside the adjudicator's determination. The above discussion shows that course to be undesirable.

[57] Under s 48 of the *Judicial Review Act* 1991 (Qld) a court may dismiss an application for judicial review where it would be "inappropriate" to grant the application. The power conferred by the section is a broad one[13] and may be exercised by the Court on its own motion[14]. For the above reasons, I am of the view that it would be inappropriate to grant the application and that it ought be dismissed.

[58] Accordingly, I would dismiss the application for leave to appeal with costs.

[59] **CHESTERMAN J:** I agree that the application for leave to appeal should be dismissed with costs, for the reasons given by Muir JA. I wish to add one comment.

[60] The application for judicial review was brought pursuant to Part 3 of the *Judicial Review Act* 1991 (Qld) ('*JR Act*'): see *The State of Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324 at paras 16-35; *ACN 060 559 971 v O'Brien & Anor* [2007] QSC 91; *JJ McDonald & Sons Engineering Pty Ltd v Rics Dispute Resolution Service Qld & Anor* [2005] QSC 305; *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor* [2007] QSC 333 paras 39-43. With the enactment of the *Justice and Other Legislation Amendment Act* 2007 judicial review of adjudications made pursuant to the *Building and Construction Industry Payments Act* 2004 ('the Act') will no longer be reviewable pursuant to Part 3 of the *JR Act*.

[61] Adjudications will, however, continue to be reviewable pursuant to Part 5 of the *JR Act* which regulates the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. The grounds on which review might be sought are those established by the well known principles of administrative law. They are of course more circumscribed than the grounds for review given by s 20, s 23 and s 24 of the *JR Act*.

[62] Mr Bond SC who appeared with Mr Hindman for the applicant held out the prospect that builders dissatisfied with adjudications will continue to seek judicial review of them, utilising the provisions of Part 5 and seeking guidance, no doubt, from the New South Wales jurisprudence in which there have been numerous attempts to review adjudications pursuant to the general principles of an administrative law *dehors* a *Judicial Review Act*.

[63] Section 48 of the *JR Act* (unlike s 13) applies to applications for judicial review brought under both Part 3 and Part 5. The observations of Muir JA that:

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13 *Barrow v Chief Executive, Department of Corrective Services* [2004] 1 Qd R 485 at 487

14 *Judicial Review Act 1991* s 48(3)

> 'Judicial review of adjudicators' decisions sits uncomfortably with the Act's purpose of providing an expeditious, interim determination'

and the remarks I made in *Minimax* that:

> 'The salutary protection afforded to subcontractors by the Act will be sadly reduced if applications are routinely reviewed on any of the grounds appearing in s 20 of the *JR Act*'.

are as apposite to applications brought under Part 5 as to those formerly brought under Part 3.

[64] Section 48 will continue to offer an appropriate means of protecting the efficacy of the *Building and Construction Industry Payments Act* 2004 (Qld) by discouraging applications for review, subject, of course, to the individual merits of particular cases.