SUPREME COURT OF QUEENSLAND

CITATION:	*Hitachi Ltd v O'Donnell Griffin P/L & Ors; O'Donnell Griffin P/L v Hitachi Ltd & Ors* [2008] QSC 135
PARTIES:	**HITACHI LIMITED T/AS HITACHI AUSTRALIA PROJECT OFFICE ABN 35 002 539 693** (applicant) **v** **O'DONNELL GRIFFIN PTY LTD ABN 003 905 093** (first respondent) **PHILIP DAVENPORT** (second respondent) **ADJUDICATE TODAY PTY LTD ABN 39 109 605 021** (third respondent) **O'DONNELL GRIFFIN PTY LTD ACN 003 905 093** (applicant) **v** **HITACHI LIMITED T/AS HITACHI AUSTRALIA PROJECT OFFICE ABN 35 002 539 693** (first respondent) **SEAN O'SULLIVAN** (second respondent) **ADJUDICATE TODAY PTY LTD ABN 39 109 605 021** (third respondent)
FILE NOS:	BS11431 of 2007 BS3138 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 June 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 May 2008
JUDGE:	Skoien AJ
ORDER:	**1. In application BS11431 of 2007; application dismissed** **2. In application BS3138 of 2008; application allowed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS – adjudication of progress payments under the *Building and Construction Industry Payments Act* 2004 (*Payments Act*) – where adjudication considered selected larger variation claims but not numerous small claims – where applicant/respondent sought an order that adjudication decision was void – whether having regard

to legislative intent, s 26 *Payments Act* requires an adjudicator to examine each and every variation in a large claim – whether the adjudicator acted bona fides – whether the adjudicator observed procedural fairness

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – adjudication of progress payments under the *Payments Act* – where payment claim included some variation claims submitted in previous adjudication – where previous adjudicator had considered those claims without assessing a specific value – whether the value of those claims had been "previously decided" for the purposes of s 27 *Payments Act* – whether subsequent adjudicator's treatment of those claims constituted jurisdictional error

PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – approbation and reprobation – where party adopted inconsistent approaches in two adjudications – whether conduct amounted to an abuse of process – whether conduct amounted to a denial of natural justice – whether the second adjudication should be set aside as void

Building and Construction Industry Payments Act 2004, s 17, s 18, s 21, s 23, s 24, s 26, s 27
Constitution of Queensland 2001, s 58

Abel Point Marina (Whitsundays) P/L v Uher & Anor [2006] QSC 295, applied
Amflo Construction P/L v Anthony Jefferies [2003] NSWSC 856, cited
Bitannia P/L v Parkline Constructions P/L (2006) 67 NSWLR 9, cited
Brodyn P/L v Davenport [2003] NSWSC 1019, considered
Brookhollow P/L v R & R Consultants P/L & Anor [2006] NSWSC 1, considered
Coordinated Construction Co P/L v Climatech (Canberra) P/L & Ors [2005] NSWCA 229, considered
Fifty Property Investments Pty Limited v Barry J O'Mara & Anor [2006] NSWSC 428, applied
Firedam Civil Engineering v KJP Construction P/L [2007] NSWSC 1162, cited
Halkat Electrical Contactors P/L v Holmwood Holdings P/L [2007] NSWCA 32, distinguished
Holmwood Holdings P/L v Halkat Electrical Contractors P/L & Anor [2005] NSWSC 1129, distinguished
Hunter v Chief Constable of the West Midlands Police [1982] AC 529, cited
Intero Hospitality Projects P/L v Empire Interior (Australia) P/L [2007] QSC 220, cited

John Fairfax & Sons P/L v McRae (1955) 93 CLR 351, cited
John Holland P/L v Roads & Traffic Authority of New South Wales & Ors [2007] NSWCA 19, considered
Lucas Stuart P/L v Council of the City of Sydney [2005] NSWSC 840, cited
Multiplex Constructions Pty Limited v Luikens & Anor [2003] NSWSC 1140, cited
Nicholas v Bantick (1993) 3 Tas R 47, cited
Roadtek, Department of Main Roads v Davenport & Ors [2006] QSC 47, cited
Shell Refining (Australia) P/L v AJ Mayr Engineering P/L [2006] NSWSC 94, cited
Timwin Construction P/L v Façade Innovations P/L [2005] NSWSC 548, distinguished
Transgrid v Siemens Ltd (2004) 61 NSWLR 521, cited
Walton v Gardiner (1993) 177 CLR 378, cited
Williams v Spautz (1992) 174 CLR 509, applied
VACC Insurance Co Ltd v BP Australia Ltd (1999) 47 NSWLR 716, cited

COUNSEL: Mr RN Wensley QC for the applicant in BS11431 of 2007; for the respondent in BS3138 of 2008
Mr DD Feller SC with him Mr A Kostopoulos for the respondent in BS11431 of 2007; for the applicant in BS3138 of 2008

SOLICITORS: HWL Ebsworth, Lawyers for the applicant in B811431 of 2007; for the respondent in BS3138 of 2008
Kreisson Legal for the respondent in BS11431 of 2007; for the applicant in 3138 of 2008

INDEX

The Application

[1] **ACTING JUSTICE SKOIEN:** These two applications each seek orders relating to adjudications made under the provisions of the *Building and Construction Industry Payments Act* 2004 ("the *Payments Act*"). They arise out of an engineering subcontract between Hitachi Limited ("Hitachi") as head contractor and O'Donnell Griffin Pty Ltd ("ODG") as sub-contractor in a large engineering project at Brigalow, Queensland. Pursuant to an order of the Court the two applications were heard together. Where necessary, I will refer to them as "the Hitachi application" and "the ODG application".

The *Payments Act*

[2] It is useful to set out a brief summary of the provisions of the *Payments Act* which give rise to these disputes. To state it briefly and broadly the relevant provisions which relate to progress payments under a contract such as this recognise that proper progress payments provide the cash flow which is necessary to keep sub-contractors in business. See *Amflo Construction Pty Ltd v Anthony Jefferies* [2003] NSWSC 856 at paragraph [27], per Campbell J. So the scheme of this part of the *Payments Act* is to expedite claims for progress payments which are not final but *pro tem* and which may, if necessary be the subject of further and final litigation in due course. It is a "pay now, argue later" situation (*Multiplex Constructions Pty Limited v Luikens & Anor* [2003] NSWSC 1140).

[3] In the Second Reading Speech of the *Building and Construction Payments Bill* on 18 March 2004; it was said:

> "The underlying object of the [*Payments Act*] is to provide for a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contact 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."

[4] The right to a progress payment arises on each "reference date" which, if not spelt out in the construction contract, is specified by the *Payments Act* itself in the definition within schedule 2 of the Act. A "payment claim" is then served by the contractor on the other party (s 17) for the progress claim which, if it is not accepted by the other party may be challenged by serving on the claimant a "payment schedule" (s 18). In cases of dispute a party may make an adjudication application, in the nature of a statement of claim (s 21), which, after acceptance by an adjudicator (s 23) calls for an adjudication response by the other party, in the nature of a defence (s 24).

[5] The *Payments Act* lays down very strict guidelines and a very tight schedule for adjudication. Each necessary step must be taken within a mere matter of days of the previous step. For example, in the Hitachi application only 19 days elapsed from the acceptance by the adjudicator of the adjudication application and the making of the adjudication.

[6] No doubt in many instances adjudication under the *Payments Act* provides not only a speedy decision on a dispute but one which the parties accept. This would no doubt be more likely the more straightforward the subject of the dispute should be. The less complicated adjudication might well be resolved merely in conference or

by inspection. However the courts of Queensland and New South Wales (which has very similar legislation) have on a number of occasions recognised the difficulties faced by the adjudicator in more complicated cases. Thus:

(a) "the process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection", *Roadtek, Department of Main Roads v Davenport & Ors* [2006] QSC 47 at [16] per McKenzie J;

(b) "it is a somewhat pressure cooker environment in which adjudicators provide their determinations", *Shell Refining (Australia) P/L v AJ Mayr Engineering P/L* [2006] NSWSC 94 at [27] per Bergin J;

(c) "the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract access to a 'fast track' adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures", *Lucas Stuart P/L v Council of the City of Sydney* [2005] NSWSC 840 at [13] per Einstein J;

(d) "What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. The vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing. It is also because of the constraints imposed upon the adjudicator … and in particular by … denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of larger construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedure. That claw back route expressly includes the making of restitution orders", *Brodyn P/L v Davenport* [2003] NSWSC 1019 at [14] per Einstein J, cited with agreement by de Jersey CJ in *Intero Hospitality Projects P/L v Empire Interior (Australia) P/L* [2007] QSC 220.

Hitachi application; Mr Davenport's adjudication of payment claim 17

[7] On 22 October 2007, ODG served payment claim No 17 on Hitachi. There may be some minor dispute about the exact figures but it is accurate enough to say that the payment claim was for a sum of $15,990,284.99, made up of:

Direct field costs	$481,207.57
Overheads/profits	$63,268.83
Variations (after some deductions)	$13,992,146.00

[8] The payment claim was set out in five lever arch folders of documents and included submissions and supporting documentation in respect of 113 variation claims made by ODG under the subcontract. The values of the individual claims claimed ranged from $179.75 to $3,383,013.12.

[9] On 5 November 2007, Hitachi delivered a payment schedule in response to the payment claim giving reasons why Hitachi owed nothing to ODG and alleging that in fact $2,198,311.08 was payable by ODG to Hitachi. The payment schedule comprised two lever arch folders of details submissions and dealt separately with each of the variation claims that formed part of the payment claim.

[10] On 19 November 2007, ODG made an adjudication application under s 21. That section allows a claimant to apply for adjudication of a payment claim if a respondent serves a payment schedule in which the scheduled amount stated is less than the claimed amount, as was the case here. That application comprised 22 lever arch folders of submissions, documents and experts' reports.

[11] On 22 November 2007, the adjudication application was accepted, the nominating authority having referred the application to Mr Davenport and he having accepted the appointment as adjudicator.

[12] On 26 November 2007, Hitachi made its adjudication response which was voluminous, comprising six lever arch folders of documents, containing submissions in response to the adjudication application submissions; a statement; a statutory declaration; a superintendent's certificate; documents and evidence substantiating Hitachi's reasons for non-payment and its counter-claim; and supporting documentation in respect of those reasons.

[13] On 11 December 2007, in accordance with s 26, the third respondent released Mr Davenport's decision dated 10 December 2007. It was a document of 24 pages, containing 133 numbered paragraphs. His decision was that Hitachi should pay ODG $4,400,000, including GST, with a due date for payment of 5 November 2007, plus interest at the Supreme Court rate. The adjudicator directed that Hitachi should pay the adjudication fees in the sum of $59,675.00 on or before 18 December 2007.

[14] Since then Hitachi has paid amounts totalling $4,506,798 to ODG, comprising the adjudicated sum, interest, adjudicator's fees and GST.

The Hitachi application

[15] On 17 December 2007 Hitachi filed the originating application in BS11431 of 2007 seeking an order that Mr Davenport's adjudication decision on Claim 17 was void and unenforceable. An application was made the next day for interim injunctive relief and for directions in the proceeding. The object of the interim relief was to restrain ODG, until trial, from applying for a certificate under s 30 of the *Payments Act* and filing it as a judgment for a debt under s 31. Hitachi gave the usual undertaking as to damages and offered to pay the adjudicated amount into court.

[16] The application was heard by the Honourable Justice Lyons on 18 December 2007. For reasons given *ex tempore* by her Honour, the application for interim relief was dismissed and her Honour made orders for directions.

[17] The matter then came before me. The formal grounds given by Hitachi in support of its application were that:

(a) Mr Davenport failed to consider the payment schedule and submissions properly made in the adjudication response as required of the second respondent by the *Payments Act* s 26(2)(d);

(b) Mr Davenport failed to include reasons for the adjudication decision as required by the *Payments Act*, s 26(3)(b);

(c) Mr Davenport failed to provide the measure of natural justice required to be dispensed by adjudicators acting under the *Payments Act*; and

(d) Mr Davenport failed to act reasonably and bona fides in making the adjudication decision.

[18] Section 26 of the *Payments Act*, relevantly, is:

> "**26 Adjudicator's decision**
>
> …
>
> (2) In deciding an adjudication application, the adjudicator is to consider the following matters only–
>
> (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
>
> (b) the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
>
> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
>
> (3) The adjudicator's decision must–
>
> (a) be in writing; and
>
> (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision."

Mr Davenport's reasons

[19] I now set out (with my emphasis) the paragraphs of Mr Davenport's reasons which, in my view, expose the approach he took to his task; his "methodology" as the parties tended to call it:

> "[12] For the purpose of assessing a progress payment on account, *I don't think it is necessary to examine each of the hundreds of individual Bill of Quantity items which go to make up the total claimed amount and assess the amount, if any, which may be due for each item. I don't think it is necessary to examine each and every variation claim* [113 in this instance] *and decide the contractual entitlement if any, of the claimant in respect of each individual*

variation. This seems to be what the claimant anticipates that the respondent and the adjudicator do.

[13] It seems to me that *in respect of a voluminous claim such as this,* it *is possible* for the Superintendent, the respondent or the *adjudicator*, as the case may require, *to make an assessment of a lump sum amount that, in the opinion of the assessor, represents a reasonable assessment of the value of work executed. I don't think that that assessment has to be justified by reference to the assessor's estimate of the value of each and every variation claim.*

…

[16] If a payment claim is as voluminous as is the present payment claim, the Superintendent and the respondent *only have to make such determination of the amount of the progress payment as can reasonably be made in the time allowed. Any overpayment or underpayment can be adjusted in the next progress certificate. Similarly, an adjudicator only has to make such determination of the amount of the progress payment as can reasonably be made in the time allowed.* While the Act allows the adjudicator to seek an extension of time for making a decision, it contemplates that the adjudicator is only required to make such an assessment as can be made in 10 business days.

…

[20] The approach which I have taken is *to examine in detail a selection of the variation claims to find what I can be comfortably satisfied is a reasonable lump sum assessment of a progress payment on account. I have taken into account all of the variation claims but I have not found it necessary to separately assess an amount for each and every variation.* I have taken a conservative approach. I arrive at an amount of $4m before adding GST. In my opinion, the onus was on the claimant to satisfy me that any greater amount is due. The claimant has failed to do so.

[21] For reasons covered below, it appears to me that both parties have failed to adopt the correct approach to valuing variations. It seems to me that variations should be re-assessed by both parties. For that reason, *I don't think I should or could value all the individual variations*. There is simply insufficient evidence from both parties. *But there is sufficient evidence to enable me to make a lump sum assessment*.

…

[126] I am satisfied that with respect to a number of other variation claims the claimant has an entitlement. However I am not satisfied that the claimants variation claims (including the 3 above) [as to which, see my paragraph [23], post] make sufficient allowance for the claimant's own inefficiencies.

…

[128] Taking into account *all the submissions, statements and supporting documents*, I am satisfied that, *on account of variations, the value of the construction work carried out by the claimant is at least $4m more than allowed by the respondent* in the payment

> schedule. I am satisfied that the claimant is entitled to a progress payment of $4m plus GST of $400,000."

[20] Some of what is expressed in those paragraphs seems to be contradictory. For example, although he says repeatedly that he has examined only a selection of the separate claims, in paragraph [128] he refers to *all* the submissions statements and supporting documents as material he has considered, and assesses $4m in respect of "the value of construction work carried out by the claimant."

[21] Mr Davenport is not a lawyer and was working under pressure in a very tight schedule. I think it would be unfair to parse and analyse his reasons as if they were the reasons for judgment of a judge, or provisions of an Act of Parliament. But he is obviously a literate man who writes quite clearly. I consider that by reading his reasons fairly and as a whole one can confidently arrive at an interpretation of what he intended to say. To assist in that exercise I should make an examination of what he actually did.

[22] The total value of the variation claims in payment claim 17 was, according to Mr Davenport, $13,966,101 plus GST (see his reasons paragraph [19]).

[23] He considered in detail, and allowed these three claims:

Variation claim	**Amount claimed**	**Result**	**Amount allowed**
VQ60A	$123,357	Accepted	$123,357
VQ65A	$840,074	Accepted as a directed variation	$840,074
VQ68A	$3,383,018	Accepted as entitlement for additional scaffolding provided to carry out directed variations.	$3,383,018
Total			**$4,346,449**

[24] He also considered in detail and disallowed these six claims:

Variation claim	**Amount claimed**	**Result**	**Amount allowed**
VQ57A	$1,151,400	No basis for claims	Nil
VQ58A	$850,974	No basis for claim	Nil
VQ59A	$146,859	No basis for claim	Nil
VQ62A	$844,624	No basis for claim	Nil
VQ64A	$220,511	No basis for claim	Nil
VQ69A	$5,940,834	No basis for claim	Nil
Total	**$9,155,202**		

[25] He also considered and assessed three other claims:

Variation claim	**Amount claimed**	**Result**	**Amount allowed**
VQ02	$1,694	Allowed as a variation	$1,424
VQ61A	$43,011	No basis for variation but respondent allows $14,904 so that sum allowed	$14,904
VQ67A	$9,228	Accepted as additional work directed	$9,228
Total			**$25.556**

[26] Mr Wensley QC orally submitted to me that Mr Davenport, despite his examination of only those 12 separate claims, purported to assess the entirety of claim 17. He placed particular emphasis on Mr Davenport's paragraph [128]. I have referred to the contents of paragraph [128] as raising a difficulty in the interpretation of the reasons as a whole. If those words are intended to mean what they seem to say, then Mr Davenport assessed the whole of claim 17 at $4m.

[27] The contents of paragraph [13] may suggest the same conclusion. It says that a reasonable assessment of "the value of work executed" (which is a probable description of the value of work claimed in payment claim 17) can be arrived at, in a voluminous claim by assessing a lump sum without need to justify it by referring to valuation of "each and every variation claim." Does this suggest that he is setting out to put a value on the whole of payment claim 17?

[28] In paragraph [16] and [20] he says in terms that his endeavour is the assessment of a progress payment. He does not say he is specifically valuing variations except (in paragraph [20]) so far as is necessary to assess the progress payment. And in paragraph [20] he makes explicit reference to his conservative approach, an approach which is implicit throughout.

[29] In paragraph [21], he says that because of insufficient evidence (it seems of those claims listed in paragraph [24] and the claims he has not dealt with) he should not or could not value all the individual variations. But, he says, there is sufficient evidence to allow a lump sum assessment (of the progress payment).

[30] Finally it seems to me that the reference in paragraph [16] to the adjustment of any overpayment or underpayment in the next progress certificate is important. It is a clear reference to the availability, in his mind, of future possible claims for individual variation claims which he rejected as having no proven entitlement, or which he did not assess and place a value on. He would no doubt have been aware of the provisions of s 27 of the *Payments Act*, a provision to which I refer later.

[31] So on what I believe to be a reasonable and fair reading of the paragraphs of his reasons taken as a whole, aided by what he actually did, I think the methodology he explained and which he carried out could be summarised:

(a) Payment claim 17, with supporting material and material to the contrary, was too big to examine properly each separate claim;

(b) He took an appropriate selection of claims (12 in all), which included the largest claims, which he examined in detail. In six of these the material from ODG and/or Hitachi was unsatisfactory and did not establish entitlement, although it was apparent that if the task were correctly approached by ODG and/or Hitachi an assessment of value of those claims could be made;

(c) He was able to put a reasonably accurate figure on his assessment of three major items, and three relatively minor ones. He quantified, that is valued, each of those six. The total of the three major ones was $4,346,449; of the three minor ones $25,556.

(d) He was anxious to be conservative and so he took the value of the three major ones and reduced their assessed value to $4m. He was comfortable with this and he allowed that sum, that is, the discounted value of the major three, as a reasonable and conservative figure for the payment claim to constitute a progress payment. In reaching that

figure he was conscious not just of the reduction of $346,449 in respect of the major three, but also was conscious of the extra $25,556 he had assessed for the minor three. Furthermore he was confident that value lay in the other specified six as well as the unstudied and unassessed 101 claims which he said he had referred to.

(e) Importantly, while Mr Davenport reached an assessment of a reasonable progress payment sum, he did not state, nor did he intend that sum to be a valuation of all claims in payment clause 17.

[32] Thus the key to the understanding of Mr Davenport's reasons is to understand his conservatism. He valued only six claims and relied specifically on VQ60A, VQ65A and VQ68A but he satisfied himself that all of the other claims gave him enough padding to justify his resultant conservative progress payment.

Mr Davenport's methodology

[33] I now turn to Hitachi's submission that in adopting his methodology Mr Davenport:

(a) failed to make a *bona fide* attempt or an attempt in good faith to discharge his obligations under the *Payments Act;*

(b) failed to provide Hitachi the required measure of natural justice; and

(c) as a consequence his adjudication decision should be declared void and of no effect.

[34] I think the matter involves two considerations. *First*, was the methodology adopted by Mr Davenport a legitimate approach to his valuation of progress claim 17? *Second*, if it was, did he carry out that methodology fairly?

[35] Hitachi's written submissions made it clear that Hitachi's attack was on the methodology. Only in one particular, relating to an alleged set-off, did his actual endeavour fail the record point:

"(a) The adjudicator's deliberate decision to select a few only of the variation claims for consideration and therefore not to consider the majority of the variation claims and, by necessary implication, therefore not to consider the submissions and documents submitted by the parties in respect of those non-selected variation claims, was a clear breach of the requirements of s 26(2), subsections (c) and (d). Those subsections required proper consideration of *all* submissions and relevant documentation, with, of course, a primary obligation to consider the payment claim and the payment schedule. The obligation arose because of the opening words of subsection (2), requiring the adjudicator to consider *only* the matters enumerated in subsection (2), subparagraphs (a) to (e). In acting selectively he fell into jurisdictional error because he made a deliberate decision not to consider something that he was bound to consider by the requirements of the *Payments Act*.

(b) The mandatory requirements of s 26(2) plainly are essential requirements (as opposed to mere matters of detail) of the *Payments Act*, and therefore an essential precondition for the existence of the adjudicator's determination.

(c) No doubt, the adjudicator was not obliged and indeed, not able, to subject each of the variation claims to a determinative process as

might be provided by a curial proceeding. But he was, in the quick and interim manner provided by the Act, and doing the best that he could in the time available, obliged to consider each and every one of the claims and each and every one of the responses to the claims, in the time available. If, on his construction of the subcontract and consideration of the materials, he was not satisfied that a particular claim had been made out he could (and should have found against the claimant on that particular item).

(d) Further, in deliberately deciding not to consider a large number of the variation claims and, therefore, [Hitachi's] response to them, the adjudicator denied [Hitachi] natural justice because, as a matter of procedural fairness, [Hitachi] was entitled to have its responses considered – as was ODG entitled to have its claims considered – in the context of the whole of the payment claims and payment schedules.

(e) Further, because of the approach that the adjudicator took – to deliberately decide *not* to consider a significant number of the claims – the adjudicator did not act *bona fide*. A *bona fide* exercise of his power would have involved a consideration, to the extent reasonably possible, given the time constraints and the volume of material, of all of the material, rather than a selective sampling consideration of some of the material (presumably by reason of the selection, at a greater level of detail than would otherwise have been the case), with no consideration or, at best, fleeting and superficial consideration of the non-selected material.

(f) It is not to the point that a proper exercise of the power might have led to a different or perhaps greater adjudication sum. Once the jurisdictional error occurred – which plainly it did – the determination is void, as the authorities e.g. *Brodyn*, make clear. There is, it is submitted, no discretionary jurisdiction in the court to avoid declaring the determination void on the basis that had the adjudicator done his job properly, he might have determined a different or even higher amount for interim payment.

(g) A further error, going to jurisdiction, is the adjudicator's failure to include in the decision reasons for the rejection of [Hitachi's] set-off, including a claim for liquidated damages. The matters are dealt with in paragraphs [113] to [116] of the decision."

[36] At once it must be said that the submitted failure to consider all submissions etc. is not borne out in Mr Davenport's reasons, paragraph [128] where he expressly says he did consider them. In the absence of compelling evidence to the contrary I accept Mr Davenport's statement in paragraph [128] as expressing the truth in relation to his own acts and omissions. I accept that, as he says, he looked sufficiently at all relevant claims and their supporting documents in arriving at a reasonable total progress payment. In any event there can be no doubt that, of the specified and discussed claims, all relevant matters were considered.

[37] The broader question however, is whether the terms of s 26(2) oblige an adjudicator to deal with each separate claim (if he is satisfied that entitlement to the claim has been established), then to assess each separate claim making up the whole payment claim. Obviously Mr Davenport did not do that. Was he entitled to proceed selectively?

[38] There is no argument about Mr Davenport's understanding of his duties under the contract, his understanding of the necessity for ODG to prove entitlement to, as well as value of, each claim. Nor, apart from the question of Hitachi's set-off (to which I will return) is there any criticism of the way he went about his work on the matters he specified and dealt with. It seems to be accepted that in respect of them he followed sufficiently the provisions of s 26(2). For example it seems to be accepted that he was justified in excluding claims (not alleged variation claims) for direct field costs and overheads/profit, and that he made proper reference to ODG's own inefficiencies in reaching his final decision.

[39] Given the numerous statements made by the courts about the difficulties and pressures under which adjudications are carried out, I can see nothing about Mr Davenport's methodology which offends my sense of justice. He stated what he set out to do. He examined 12 claims in detail, rejecting some, but finding an entitlement to six which he then valued. He made no explicit use of the three lesser ones (although I think he probably set them aside as a sort of safety margin in reaching a conservative figure). He assessed three large claims and then reduced them by a considerable sum ($346,449) for safety's sake. In his conservatism I consider he kept in mind that the six very large claims (see my paragraph [24]) had value and he was also generally aware that some at least of the 101 unspecified ($880,000) claims would be valuable. These all provided a further safety measure. However while he assessed on current information the eligibility of the six large claims (paragraph [24] *supra*), he did not assess their value and he did not assess either the eligibility or value of any of the 101 unspecified claims.

[40] He did nothing underhand. His methodology was able to be understood after careful reading and what he actually did accorded with his methodology. The only questionable thing is the status in which he left many of the claims in payment claim 17, which directly led to the O'Sullivan application. On that point, however, it should immediately be noted that he did not cause them to be lost forever. The contractual rights between ODG and Hitachi would ultimately determine if they were valid and recoverable. All that may have happened to them is to make their recovery under a future progress claim debatable.

[41] If I can see nothing in principle illegitimate in his methodology, does the *Payments Act* or legal authority reveal illegality? Section s 26 says nothing specifically on the point. It does not in terms require the adjudicator to consider, assess and value each separate claim under pain of having the adjudication annulled. Given the time constraints and the size of many adjudications, that would be an unlikely intention of the legislature and, one would expect, would have been carefully spelled out if intended.

[42] One of the major intentions of the legislature in passing the *Payments Act* was the quick assessment of progress claims to keep up the vital cash flow to sub-contractors. Does s 26(2) require that every separate claim in a voluminous progress claim must be considered in full detail before the adjudicator's decision can be handed down? It does not say so in terms. Any number of possible factual situations can be advanced to argue against such an inflexible construction of s 26. Would failure to deal specifically with a handful of claims worth a few hundred dollars nullify a decision on a payment claim made up of many hundred claimed variations, worth many millions of dollars all of the other claims having been carefully considered and individually valued? I hardly think so.

[43] What of judicial authority? Leaving aside cases dealing with breach of natural justice or bad faith, there is little of direct assistance. In my following references to New South Wales decisions I have substituted the equivalent sections of the *Payments Act* for any cited section of the New South Wales Act.

[44] I was referred to the judgment of Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd & Anor* [2005] NSWSC 1129. In that case, it was submitted that the adjudicator did not make a *bona fide* attempt to determine the matter entrusted to him, this in substance amounting to a complaint that the decision-making process of the adjudicator did not amount to an attempt in good faith to determine the matter remitted to him. In that case the payment schedule put in issue some important matters. The adjudicator's reasons revealed that he did not attempt to address, let alone resolve those matters, and he decided to prefer the claimant's claim on the main issue without examination either of its merits or of the defects in it which had been pointed out by the respondent. Those facts are quite unlike the facts here.

[45] Brereton J provided a comprehensive analysis of cases from Australia and the United Kingdom before concluding that the absence of a genuine or conscientious attempt to perform the adjudicator's function can amount to a want of good faith; that a "real attempt" to perform the function is required, a failure to address a question raised before an adjudicator could indicate that there was not a *bona fide* attempt to exercise the power; that determining the amount of a progress payment to be paid requires determination on the material available and to the best of the adjudicator's ability of the amount properly available, that there must be an effort to understand and deal with the issues in discharge of the statutory function which requires a conscientious effort to perform the obligation.

[46] Applying these principles to the case before him, Brereton J determined that the adjudicator did not meet them because he failed to evaluate the claim in the light of the payment schedule and instead simply accepted it on the basis that other unrelated submissions of the respondent were unmeritorious. Returning to the important issues, raised by the respondent and not referred to by the adjudicator in his reasons, his Honour concluded (at paragraph [122]) that the only explanation for the absence of any reference to these matters in the adjudicator's reasons was that he did not consider it. This amounted to a fundamental failure to consider the payment schedule "together with all submissions (including relevant documentation) that had been duly made by the respondent in support of the schedule", as required by s 26(2)(d) of the *Payments Act*. The adjudication determination was declared void.

[47] Then, I was referred to *Timwin Construction P/L v Façade Innovations P/L* [2005] NSWSC 548 per McDougall J. In that case, McDougall J found the adjudicator's determination void *inter alia* because he did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties, or to understand what, in relation to variations, the real dispute was.

[48] Both of those cases, *Holmwood* and *Timwin*, are a far cry from the facts of this case. The adjudicator in each case ignored or avoided dealing with arguments on the very issue he was deciding. Mr Davenport did not do that, or at least no such failure was submitted. Although his methodology was apparently novel, that does not make it unlawful. He dealt conscientiously with the issues (admittedly narrowed by him).

The question here is whether he was justified in narrowing the issues. To my mind that depends on whether he did so clearly and fairly. On that point it is important to note that there is no reason to suspect that there was any apparent lack of fairness in the narrowing, flowing simply from the failure to discuss and value the 101 small claims. They were large in number but small in money terms ($88,000 out of a total claim of almost $14m). In my view Mr Davenport did indeed look at them to derive extra comfort for his lump sum assessment. I was not told that there was anything in these small claims which would have contained material which might have influenced him particularly. Contrast *Halkat Electrical Contactors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32 (on appeal from *Holmwood* above). At paragraph [26] Giles JA sets out the quite unmeritorious reasons given by the adjudicator for his acceptance of the appellant's valuation and at paragraph [27] the adjudicator's spurious reason for his preference of the appellant's case.

[49] *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 at 539 sets out the limited basis on which an Adjudicator's determination is reviewable for jurisdictional error, following *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. A determination will be void if it does not satisfy the conditions laid down by the NSW Act as essential for there to be such a determination. The essential conditions identified were as follows:

(a) The existence of a construction contract between the claimant and the respondent, to which the Act applies (s 12 of the *Payments Act*);

(b) The service by the claimant on the respondent of a payment claim (s 17 of the *Payments Act*);

(c) The making of an adjudication application by the claimant to an authorised nominating authority (s 21 of the *Payments Act*);

(d) The reference of the application to an eligible adjudicator, who accepts the application (ss 22 and 23 of the *Payments Act*);

(e) The determination by the adjudicator of this application (ss 23(2) and 25(6) of the *Payments Act*), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 26(1) of the *Payments Act*) and the issue of a determination in writing (s 26(3)(a) of the *Payments Act*, giving reasons (s 26(3)(b)).

[50] In *Brodyn*, Hodgson JA said:

> "[56] I do not think that compliance with the requirements of s 26(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 26(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 21(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss 24(1), 26(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 26(2), or bona fide addresses the requirements of s 26(2) as to what is to be considered."

[51] Thus the effect of the reasoning in *Brodyn* is that non-compliance with s 26(2)(d) by an adjudicator acting in good faith is an error within jurisdiction, not leading to the consequence that the adjudicator's determination is void and amenable to declaratory and injunctive relief. That appears to be the case even if the adjudicator determines for legally wrong reasons not to give any consideration at all to the respondent's payment schedule and submissions: *Firedam Civil Engineering v KJP Construction P/L* [2007] NSWSC 1162 at [79] per Austin J.

[52] In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229, Hodgson JA said at [26]:

> "In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s 24(4) and s.26(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s 26(1)."

This approach was approved by Basten JA in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9. See at paragraph [71].

[53] In *John Holland Pty Limited v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19 Hodgson JA made the following very helpful statements:

> "[54] In my opinion, there may be a sense in which s 26(2) is breached if there is any relevant provision of the Act or provision of the contract which is not considered by the adjudicator, or indeed if there is any one of what may be numerous submissions duly made to the adjudicator which is not considered. However, in my opinion a mere failure through error to consider such a provision of the Act or of the contract, or such a submission, is not a matter which the legislature intended would invalidate the decision.
>
> [55] The relevant requirement of s 26(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s 26(2), so long as the specified classes of considerations are

addressed; or alternatively, if one takes the view that s 26(2) does require consideration of each and every relevant provision of the Act and the contract and each and every submission duly made, the intention of the legislature cannot have been that this kind of mistake should invalidate the determination. In a case where there were 1,000 submissions duly made, an accidental failure to consider one of them could not reasonably be considered as invalidating a whole determination; and there is no basis for partial invalidation of a determination, that is, invalidation only of that part affected by the omitted submission.

…

[57] Accordingly, even if RTA's jurisdiction submissions were matters that should have been considered under s 26(2), the adjudicator's failure to do so did not invalidate his decision. At worst for Holland, they were submissions as to which there were strong reasons to hold they were not "duly made", the adjudicator made a reasonable if erroneous decision that they were not duly made, and the adjudicator took a reasonable if erroneous view that the matters raised were not of sufficient relevance to warrant express consideration under pars.(a) and (b) of s 26(2). Accordingly, if there was any breach of s 26(2), it was not of a kind that could invalidate the decision.

[58] Even more clearly in my view, an omission to consider the submissions could not conceivably justify a finding that the adjudicator did not make a bona fide attempt to exercise the relevant power.

[59] Whether or not in this context lack of bona fides can be demonstrated without demonstrating personal dishonesty, I do not see the slightest basis for concluding that the adjudicator did anything other than make a bona fide attempt to exercise his power.

…

[61] It would be surprising in the extreme if what the adjudicator did in this case was such as could disentitle him to the immunity provided by s 30; and I think it would be rare that a decision could be invalidated for lack of bona fides by conduct that would not also lose the immunity given by s 107. (*Payments Act* section substituted).

…

[63] Finally, on the question of natural justice, plainly there was no denial of natural justice if the submission in question was not "duly made". Even if the correct view was that the submission was duly made, I would still not find a denial of natural justice. The legislature plainly entrusts to the adjudicator the role of determining whether submissions are or are not duly made, and thus of determining whether a submission contained in an adjudication response is one that should not be there because of the effect of s 24(4). If an adjudicator addresses that question and comes to a

> conclusion that the submission was not duly made, I cannot see that the adjudicator has then failed to afford the measure of natural justice contemplated by the Act."

[54] In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1 Palmer J said:

> "[56] It is now established, I think, that an adjudication determination is void if the adjudicator fails to address in good faith the matters required by s 26(2): see *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at paras 31 and 49 per Brereton J and the authorities there discussed. Section 26(2) makes no distinction in this regard between, on the one hand, an adjudication in which the respondent has served timeously a payment schedule and has made submissions in support of the schedule and, on the other hand, an adjudication in which the respondent has been precluded from making submissions by s 24(3).
>
> [57] Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 26(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties." (*Payments Act* sections substituted).

[55] The overall thrust of those cases is to give a great deal of latitude to an adjudicator when he *bona fide* attempts to carry out his functions, even if, in his approach to his task he may not proceed strictly according to Hoyle. What he must do is act in good faith, that is, fairly to both parties and in compliance with those aspects of s 26 set out in paragraph [49] above. In this case there is no suggestion that he overlooked some submission of striking importance to the claims as a whole or that in the unspecified claims there resided the key to the whole adjudication to which he did not advert.

[56] Hitachi argued that Mr Davenport's methodology denied it procedural fairness. I adopt the statement of principle by Justice Wilson in *Abel Point Marina (Whitsundays) Pty Ltd v Uher & Anor* [2006] QSC 295. At paragraph [15] her Honour said:

> "Clearly the adjudicator was obliged to afford the parties procedural fairness. It is well established that the content of such an obligation varies according to the nature of the case. As Mason J explained in *Kioa v West*:
>
> > 'Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly

> depends to a large extent on the construction of the statute … *What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the enquiry, the subject matter, and rules under which the decision-maker is acting* …
>
> In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, ie, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations."

[57] In *Fifty Property Investments Pty Limited v Barry J O'Mara & Anor* [2006] NSWSC 428 Brereton J stated:

> "The result of a denial of natural justice is that the decision is void, even if the decision would not have been affected by any submissions which might have been made had an opportunity to make them been afforded. While, as a matter of discretion, relief might be declined if it can be shown that the denial of natural justice could not possibly have made a difference to the outcome, all that a plaintiff need establish is that the denial of natural justice deprived it of the possibility of a better outcome, and in order to negate that possibility it is necessary to conclude that a properly conducted adjudication could not possibly have produced a different result [*Stead v State Government Insurance Commission* (1986) 161 CLR 141, 147; *Kioa v West* (1985) 159 CLR 558, 633; *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224, 250-251; *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32, [111]-[121]; *Stanoevski v Council of the Law Society of New South Wales* [2005] NSWCA 429, [54]]."(*emphasis added*)

[58] Mr Davenport did not deny Hitachi anything. He simply narrowed the field, leaving the rest of the field for another day. That was done appropriately. To use the tests proposed by Wilson J, his methodology related appropriately to the circumstances, the nature of the enquiry, the subject matter and the strict time rules under which he was acting. On the *Fifty Property* principle I am satisfied that had Mr Davenport considered and valued more variation claims the only result could have been that Hitachi would have been ordered to pay a larger sum, certainly not a lesser sum. If that involves a gloss on *Fifty Property*, I consider it is a justifiable gloss.

[59] Finally I turn to the argument on behalf of Hitachi that Mr Davenport, "without analysis or reasons" dismissed Hitachi's claim for a substantial set-off ($1.406 million). This is the only particularised attack on the way Mr Davenport actually dealt with the components of the claims. Mr Davenport, at paragraph [113]-[114] said:

> "[113] In the payment schedule the respondent claims an entitlement under clause 42.9 of the Contract to set off 8 amounts totalling $1,406,159.33. The largest is $1,013,500 for liquidated damages. In the submissions accompanying the adjudication application the claimant does not expressly deal with these except for the claim for liquidated damages. See below. I note the claimant's general joinder of issue and Mr Zakos' comments at pp 136-137 of his November report. In the submissions in the adjudication response the respondent does not deal with the set off claims except for the claim for liquidated damages. The onus is on the respondent to satisfy me that these 'back charges and set offs' should be deducted by me when calculating the amount of the progress payment. The respondent has not satisfied me. Therefore I will not make the deductions.
>
> [114] Nevertheless, this remains one of the unresolved matters that I have taken into account when deciding upon a lump sum assessment rather than attempting to value every item separately."

Interconnected with this is, as he states, his discussion of liquidated damages in paras [115]-[117]:

> "[115] The respondent contends that in calculating the progress payment I should deduct $1,013,500 for liquidated damages. The respondent contends that the claimant failed to achieve plant readiness for initial firing on the due date which the respondent says was 14/12/06. The respondent claims that the claimant was 54 days late. At p 466 of the payment schedule the respondent contends that the amount which the respondent claims is calculated in accordance with Annexure G but the respondent has not shown me how the calculation has been made. It is not a straight forward calculation.
>
> [116] In the adjudication application at pp 125 to 135 the claimant provides many reasons why the claimant contends that the respondent is not entitled to liquidated damages. In the submissions accompanying the adjudication response, the respondent does not expressly deal with any of the reasons but simply says, 'The reasons why [the respondent] is entitled to liquidated damages are set out in the payment schedule and supporting evidence is included in the attached folders and the statement of Phil Williams'. The attachments are six folders of material. I don't think it is my function to trawl through the six folders in an endeavour to find reasons to support the respondent's claim and, perhaps, counter the arguments of the claimant. I have not found anything in Mr Williams' statement that I find useful in this regard. In the main, the claimant's arguments go unanswered.
>
> [117] The respondent has failed to satisfy me that, in calculating the amount of the progress payment, I should deduct any amount on account of liquidated damages."

[60] I fail to see that Mr Davenport did not deal with the set-off. In my opinion he did.

Conclusion – Mr Davenport's adjudication

[61] I see no basis on which to interfere with Mr Davenport's adjudication, and that application must fail.

ODG application – Mr O'Sullivan's adjudication

[62] On 21 January 2008 ODG submitted payment clause 18. On 5 February 2008 Hitachi served its payment schedule stating that it proposed to pay ODG $nil and alleging that ODG owed it $5,683,287.62.

[63] On 19 February 2008 ODG lodged with the third respondent its adjudication application. The application was accepted on 22 February, Mr O'Sullivan being appointed as adjudicator and on 26 February Hitachi lodged its application response.

[64] There followed some correspondence about a possible extension of the adjudication time. Ultimately by consent the time was extended to 19 March and the adjudicator's decision was given that day.

ODG's adjudication application for Payment Claim 18

[65] In its adjudication application in respect of payment claim 18, ODG claimed a total amount of $7,443,354.86 (including GST). This claim comprised in part a claim for variations (identified by reference to the Variation Register attached to the payment claim) in the amount of $6,266,947.07, a claim for direct costs in the amount of $487,284.10 and a claim for overhead/profit in the amount of $64,067.77.

[66] The variation claims, comprised of 75 variations which had previously been submitted as part of payment claim 17, but which, ODG contended, had not been valued in the adjudication by Mr Davenport. These claims incorporated additional information and/or a reformulation of the earlier claims that Mr Davenport had considered insufficient to establish an entitlement. They also comprised a further 20 variations which had not previously been submitted and therefore which had not been considered by Mr Davenport.

[67] As an alternative to the variation claims ODG made a claim to recover the costs of the works and materials the subject of the variation claims as an adjustment to the Bill of Quantity.

[68] In section 4 of the Adjudication Application, ODG dealt with the submission which had been made by Hitachi in its payment schedule that *"each of the claims that were included by ODG in its November Adjudication Application were valued in the adjudication"* and that *"there is no scope for further consideration of these claims by an adjudicator"*. ODG's submission was that the Davenport decision was not binding on any subsequent adjudicator under s 27 of the *Payments Act* for the purposes of payment claim 18.

Mr O'Sullivan's decision

[69] The decision reached by the Adjudicator is set out in summary form on page 20 of his decision in the following terms:

> "Based on the above reasons, I am satisfied that:

(a) I am bound by section 27 of the Act to adopt the valuation of Mr Davenport in relation to those items (including the variations) previously valued by Mr Davenport in his determination; and

(b) to the extent that the Claimant has included further claims in its payment claim, it has not satisfied me that it is entitled to an additional progress payment in relation to such claims.

On the basis of the above, and on the basis that the previous amount determined by Mr Davenport has been paid, I determine that the amount payable by the Respondent to the Claimant is $Nil."

[70] Mr O'Sullivan's reasons for his decision need not be examined minutely. It is sufficient to summarise his conclusions thus:

"a. That upon review of Mr Davenport's decision, he was satisfied that whilst Mr Davenport did not individually assess each of the variations, in valuing only a number of the variations, he used this as a '*technique*' for arriving at an overall valuation of the progress payment payable to ODG in respect of the total variation claims.

b. That in approaching the task as he did, Mr Davenport was in fact making a valuation of the VQ claims as claimed by ODG in their entirety, notwithstanding that Mr Davenport did not address all of the claims, and had doubts regarding entitlements of the claimant to some of the claims.

c. That on the basis of various statements made by Mr Davenport in his reasons, he was satisfied that *he did not value only some of the variations* in the manner contended for by ODG but, on the contrary, *he clearly valued all the variations* as stated in paragraph [128] of his determination."

[71] The relevant provision of the *Payments Act* is s 27 which is:

"**27 Valuation of work etc. in later adjudication application**

(1) Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14,17 decided –

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

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

(2) The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision."

[72] The question which immediately arises is to identify the variation claims which Mr Davenport valued. For the reasons I expressed in the Davenport application (supra) my conclusion is that he valued only six variation claims, those numbered VQ60A, VQ65A, VQ68A (totalling $4,346,449) and VQ02, VQ61A and VQ67A (totalling $25,556). None of these was included in payment claim 18. His reference

to any other claims making up payment claim 17 was only to satisfy himself that there was sufficient extra probable value to satisfy him that his assessment of $4 million for the progress payment was a conservative one. However in doing that he did not value any of them or purport to do so.

[73] For reasons given in the Davenport application I am of the opinion that Mr Davenport valued, within the meaning of 5.27 of the *Payments Act*, no other variation claim in payment claim 17.

[74] Mr Davenport's reasons included:

> "[123] … As will be seen from the variation claims that I have examined in detail, I am satisfied that Mr Zarkos has included a number of large variation claims that, in my opinion, are not justified as made. Nevertheless, if variations were properly assessed I am satisfied that the claimant would be entitled to some amounts in respect of the facts alleged but not of the amounts claimed. These amounts are:…" (and here he lists those I set out in paragraph [24] *supra*).

[75] Those six claims were contained within payment claim 18. They had been reformulated and contained further information in response to Mr Davenport's suggestion.

[76] I simply cannot understand how it could be said, logically, that Mr Davenport had valued those six claims when he expressly did not. All he did, at most, was to comfort himself that there was some value in them to enable him to set his conservative figure of $4m based substantially on claims VQ60A, VQ65A and VQ68A.

[77] Similarly it is my conclusion that Mr Davenport did not value any one of the remaining 101 variation claims in payment claim 17. As with the six referred to in paragraph [75] he formed a rough unspecified idea of likely value only in his endeavour to be conservative.

[78] Section 27 does not apply to Mr Davenport's treatment of those claims. What he did not do, according to ordinary English usage, was to value any of them. Furthermore to say that he did value them would render meaningless s 27(2) in respect of each of them. Should a change in value of one of them be alleged and claimed in a subsequent payment claim what would be the assessed value of that claim which is to be varied? It would be impossible to say, because there is no assessed value stated by Mr Davenport.

[79] So in my judgment Mr O'Sullivan's adjudication was completely erroneous so far as previously considered claims are concerned. In my reasons on the Davenport application I have set out excerpts from the leading cases on the question of jurisdictional error. My understanding of them results in the conclusion that, provided Mr O'Sullivan acted in good faith in reaching his decision and extended natural justice he did not fall into jurisdictional error. The submission of ODG is that conduct of Hitachi misled him from acting in good faith and further that he was led by the conduct of Hitachi into a failure to extend natural justice to ODG.

Consistency of Hitachi's approach

[80] ODG submits that the arguments put by Hitachi, first to Justice Lyons on the application for an injunction on 18 December 2007 and in the Davenport application heard by me on 29-30 May 2008 (the "early submissions") were quite inconsistent with the "later submissions" put by Hitachi to Mr O'Sullivan. It is submitted that the early submissions were, in short:

> "Mr Davenport fell into error because he valued only a handful of the variation claims to obtain a progress payment figure and he ignored the rest of the claims."

[81] I have been referred to excerpts of the transcript of the proceedings before Justice Lyons. I set out a selection of them to record submissions of Mr Wensley QC (emphasis added):

> "In effect he says, 'Look, there is a huge amount of material here. It's difficult for me in the time available to do the job properly by assessing each and every claim. *I don't think I do have to assess every claim*.' And I here already submitted that that's an error. 'So, what I'll do is I'll sample – I'll get a sense of, at least, the minimum amount that is likely to be due if there is one and certify for that. [I observe that this is the interpretation I have settled on].
>
> …
>
> But what he hasn't done is to assess what the progress payment should be and that's because *he hasn't looked at each and every variation as* – as we say he was required to do.
>
> …
>
> But even if we were to assume, for the purpose of this part of the argument, that he'd done the twelve perfectly well, we'd say, still there is the residual problem that *having failed to do the other 68 or whatever it is, he failed in his task*."

[82] In response to the statement by her Honour that on her reading of paragraph [124] Mr Davenport was only making a determination on three claims and that he "only says about those three claims this is what I determine and he really hasn't turned his mind to the others", Senior Counsel for Hitachi said (emphasis added):

> "That's our point if your Honour pleases. And what he's *failed to do is to assess the lot* and he is required to assess the lot.
>
> …
>
> That is something different from a decision that says, 'I'll look at part of the claim and if I am satisfied that there is some entitlement in relation to that part of the claim, then I can award that amount of money because I have reached the view that at least that amount is owed.' [Again I observe that this is my interpretation of what Mr Davenport did].
>
> …
>
> And as soon as the … adjudicator says, 'In effect, I have only considered some of them and I had not considered others' – and in that paragraph [123] he makes the express concession that he – he says, '*If all the variations were properly considered*' *– i.e. they haven't been*, but his view of the world is he doesn't have to do it in this particular case.
>
> …

> And our response to that, by way of submission, is that he is *obliged by the Act to do it and he failed to do it* then the whole decision is void.
>
> … what he *wasn't entitled* to do ... is to say, 'there is too much to do so *I will only do some of it and I will ignore the rest*.' As soon as he does that on the cases he has committed procedural unfairness because he has explicitly said, '*I will not consider parts of that which has been referred to me*.'
> …
> *So he is not required … to decide each and every variation claim* as if he were an arbitrator or a Judge. But what he must do is to go to each and every one and do the best you can with the materials he has got and in the time that is available."

[83] In his written submissions for the Davenport application counsel for Hitachi said:

> "32. Thus in respect of the claim for sum of approximately $14 million for a number of individual variation claims, the adjudicator's method of arriving at a lump sum interim progress payment amount was:
>
> (a) to decide that it was not necessary to examine each and every variation claim;
>
> (b) to proceed on the basis that the assessment of a reasonable value of work executed did not have to be justified by reference to the assessor's estimate of the value of each and every variation claim;
>
> (c) because the progress payment is a payment on account, all variation claims did not have to be decided and valued in order to assess the amount of the payment;...
>
> (d) to achieve this, the adjudicator decided to examine in detail a relatively small selection of the variation claims, it not being necessary to separately assess an amount for each and every variation. In fact, only twelve of the 81 (or 113) claims were examined;
>
> …
>
> 34. Importantly, and despite the broad-brush assertions in paragraph [20] that the adjudicator took into account all of the variation claims, and the statement in paragraph [128] to like effect that the adjudicator took into account 'all the submissions, statements and supporting documents', it is clear that, in respect of the variation claims, the *adjudicator deliberately chose to examine in detail a small number of variation claims* selected by him from the large number of claims made and *deliberately chose to ignore, and not to examine or value, the variation claims* (and implicitly [Hitachi's] responses to those claims) *which were not selected for examination.*
>
> …
>
> 56. The adjudicator's deliberate decision to select a few only of the variation claims for consideration and, therefore not to consider the majority of the variation claims and, by

necessary implication, therefore not to consider the submissions and documents submitted by the parties in respect of those non-selected variation claims, was a clear breach of the requirements of s 26(2), subsections (c) and (d).

…

58. But he was, in the quick and interim manner provided by the Act, and doing the best that he could in the time available, obliged to consider each and every one of the claims and each and every one of the responses to the claims, in the time available. If, on his construction of the subcontract and consideration of the materials, he was not satisfied that a particular claim had been made out he could (and, it is submitted, should) have found against the claimant on that particular item.

59. Further, in deliberately deciding not to consider a large number of the variation claims and, therefore, respond to them, the adjudicator denied natural justice because, as a matter of procedural fairness, was entitled to have its responses considered – as was ODG entitled to have its claims considered – in the context of the whole of the payment claims and payment schedules."

[84] Mr Wensley's oral submissions to me on 29-30 May included (emphasis added):

"…*he did not consider or value* – we don't shrink from that statement – *individual variations*. Nonetheless, having adopted this what we say is illegal technique, he then went the next step and purported to do what he has to do under section 26(1), namely to decide the amount of the progress claim,… [I observe that this is not inconsistent with what I decided]

…but he takes the further step of saying, 'Look, having done this exercise with respect to some of the variations a picture is emerging here which will allow me to assess the amount of the progress claim and, importantly, do so by making a global assessment of the value of the variations.'(T40)

…'Well, I come to this conclusion, it's at least 4 million so I will *value the construction work associated with variations in this claim as a whole* at 4 million.' That's what he's done."(T42)

And (T44):

"HIS HONOUR: They've been valued, admittedly not with a dollar value to each one but they are all wrapped up by Mr Davenport in his conclusion?

MR WENSLEY: Yes.

HIS HONOUR: Now, you're attacking Mr Davenport because you say, 'Well, that's not fair. *He should have valued them all separately*.'

MR WENSLEY: Yes."

[85] So far Hitachi's submissions are clearly that Mr Davenport did *not* value the individual claims other than those he identified. For the first time though, the concept of a global assessment of the value of the variations is mentioned.

[86] However in respect of payment claim 18, the submission changed substantially. In its payment schedule in response to payment claim 18 (served on 5 February 2008) the following submissions were made (emphasis added):

> "F.3 *Each of the claims* that were included by ODG *in its November Adjudication application were valued in the adjudication*…
>
> F.4 As *each of these claims were valued by the adjudicator* when the November Adjudication application was decided, and as [Hitachi] has paid the adjudicated amount to ODG, there is no scope for further consideration of these claims by an adjudicator. If ODG refers this January Payment Claim to a subsequent adjudicator, that subsequent adjudicator cannot allow any additional amount for each of these claims."

[87] In its adjudication response for Mr O'Sullivan's adjudication Hitachi said:

> "1.1 ODG's Adjudication Application fails to clear 2 fundamental hurdles:
>
> (a) ODG's claims *have already been valued by an earlier adjudicator* and any subsequent adjudicator is bound by that valuation.
>
> …
>
> 2.2 The submissions made by ODG in its Adjudication Application Section 4 (pages 67-76) misrepresent the November Adjudication Application. In particular, in paragraph 128 of the November Adjudication Application Decision, Mr Davenport said:
>
> > Taking into account all the submissions, statements and supporting documents I am satisfied that, on account of variations, the value of construction work carried out by the claimant is at least $4 million allowed by the respondent in the Payment Schedule. I am satisfied that the claimant is entitled to a progress payment of $4 million plus GST of $400,000.00.
>
> 2.3 That is Mr Davenport says that he took all of ODG's VQ Claims into account *and valued ODG's entitlement in respect of each and every VQ claim* when he assessed the total progress payment to be made to ODG had been in the order of $4 million.
>
> 2.4 The Schedule included in Tab D to the Payment Schedule emonstrates that each of the claims referred to Mr Davenport in the November Adjudication Application are (for all relevant purposes) identical to the variation claims included in this Adjudication Application."

[88] For the first time Hitachi submits that "each and every" variation claim has been assessed by Mr Davenport. That is quite contrary to what had been submitted to Justice Lyons and what would later be the written submissions to me and it is a

substantial step beyond what would be later orally submitted to me in the Davenport application.

Abuse of process

[89] That the Supreme Court of Queensland has an inherent jurisdiction to make orders protecting inferior courts and tribunals against any abuse of their processes cannot be doubted. See s 58 of the Constitution of Queensland 2001; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 363; *Walton v Gardiner* (1993) 177 CLR 378 at 391.

[90] *Williams v Spautz* (1992) 174 CLR 509 at the judgment of Mason CJ, Dawson, Toohey and McHugh JJ contains this:

> "It has been suggested that the criterion for abuse of process is whether the improper purpose is the sole purpose of the moving party. However, in more recent times it has been said, in our view correctly, that the predominant purpose is the criterion. That was the test applied by Lord Denning in *Goldsmith v Sperrings Ltd* and by the English Court of Appeal in *Metall & Rohstoff v Donaldson Inc.* In giving the judgment of the Court in the latter case, Slade L.J. observed (1990) 1 QB, at p 469.
>
> > '(A) person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed.'
>
> It is, of course, well established that the onus of satisfying the court that there is an abuse of process lies upon the party alleging it. The onus is 'a heavy one', to use the words of Scarman L.J. in *Goldsmith v Sperrings Ltd.* (55) (1977) 1 WLR, at p 498 and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances."

[91] Most of the cases seem to relate to the use of the principle to apply for a stay of proceedings (*Walton*) but I see no reason to limit the principle to that remedy. I see little advantage in time or cost between ODG raising it now to quash the decision of Mr O'Sullivan rather than apply to the court to stay his decision. ODG may well have considered it unlikely that Mr O'Sullivan would accept Hitachi's submissions, in which case no recourse at all to the court would have been needed. In *Nicholas v Bantick* (1993) 3 Tas R 49 Underwood J adopted the comments of IH Jacob in 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 that the court's inherent jurisdiction "may be exercised in an apparently inexhaustible variety of circumstances and may be exercised in different ways". In this case Hitachi had come to this Court on its Davenport's application. It was, I consider, convenient for ODG to apply in the related O'Sullivan's adjudication. In any event, I took Mr Wensley to accept the appropriateness of the proceeding.

[92] The variety of applications of the rule is great as Lord Diplock said in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536:

> "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before

> it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise the statutory power."

[93] I regretfully come to the conclusion that the substantial change in the Hitachi submissions from the early submissions to the later submissions carried great significance. It meant that at the same time as arguing before Justice Lyons and before me that Mr Davenport did not value any more than six of the variation claims, and that consequently the adjudication was void, Hitachi submitted to Mr O'Sullivan that Mr Davenport valued all of the variation claims before him in the payment claim 17 and therefore all of the variation claims before him in payment claim 18 had been valued. In my opinion, that was a classic case of approbation and reprobation, the impropriety of which was referred to by Fitzgerald JA in *VACC Insurance Co Ltd v BP Australia Ltd* (1999) 47 NSWLR 716 at 724.

[94] Were the later submissions material to Mr O'Sullivan's decision? It goes without saying that they were, because he obviously adopted them in reaching his decision to value at nil the variation claims in progress claim 18. His reasons make that clear.

[95] Was the predominant purpose of Hitachi in adopting the new submission to obtain a favourable decision from Mr O'Sullivan? It must have been. Had Hitachi put the early submissions to him he would have had no argument before him at all that the variation claims had all been valued. The early submissions were that on Davenport's error lay in his not valuing more than a handful of claims. The later submission, constituting the abuse of process must have been put forward to sway him to a result favourable to Hitachi.

[96] I am satisfied that Hitachi has committed a material abuse of process in the O'Sullivan adjudication which led to a denial of natural justice to ODG. The adjudication decision cannot stand.

Denial of natural justice

[97] ODG submitted that in other respects Hitachi denied to it natural justice. The first point was that in the adjudication response Hitachi went further than it had gone in its payment schedule, at a time when ODG had no right of reply. The second point is that Hitachi sent a communication to Mr O'Sullivan the contents of which give rise to a reasonable apprehension of bias.

[98] The first point is a very nice one, too nice to lead me to a finding of the withholding of natural justice. Essentially the complaint is that in the adjudication response Hitachi set out its construction and interpretation of what Mr O'Sullivan said in his paragraph [128] which was not what Hitachi had explicitly stated in its payment schedule where no reliance on paragraph [128] had been put. Mr O'Sullivan's reasons refer to paragraph [128]. There is something in the argument, but not enough to establish denial of natural justice. It went no further than a slight re-statement of Hitachi's submissions which had been put clearly enough in the payment schedule. The meaning of paragraph [128] of Mr Davenport's reasons was

an integral part of the debate. In its adjudication application ODG might well have dealt with the apparent difficulties of interpretation raised by paragraph [128], but did not. There is also criticism by ODG of Mr O'Sullivan's use of the word "technique' when referring to Mr Davenport's "methodology" (as the parties seemed to prefer). I see nothing sinister in that – "methodology", "method", "system", "technique", "approach" could all equally be used without mis-describing what Mr Davenport did.

[99] The second complaint concerns a faxed response from Hitachi to Mr O'Sullivan in response to his request to extend time for delivery of his decision. The fax, signed by Hitachi's Deputy General Manager read:

> "Although the volume of material in this adjudication may appear significant, Hitachi pointed out by both its Payment Schedule and Adjudication Response that most of the material ODG seeks to rely upon in this adjudication is otiose, in that it relates to claims which have been valued by an earlier adjudication (see Adjudication Application 1057877-496, which was decided by Phillip Davenport on 10 December 2007). The effect of BCIPA section 27 is that Mr O'Sullivan is bound by Mr Davenport's valuation of those claims, and the material that relates to those claims need not be reconsidered by Mr O'Sullivan.
>
> In these circumstances, it seems unlikely Mr O'Sullivan will require the extension time he has requested.
>
> However, Hitachi has no objection to the time within which the adjudicator is required to decide this matter being extended to 19 March 2008."

[100] It is a most disturbing document. It set out, in a conversational tone, the nub of Hitachi's "later submission", which related to the central issue in the O'Sullivan adjudication. Then it told him that he probably would not have to go through all that voluminous material and so was unlikely to need the extension. Then, in what could be seen to be an act of generosity, it agreed to extend the time in any event.

[101] Read in any fair way, the fax was a statement that there was a quick answer to the adjudication debate namely the adoption of Hitachi's argument. No doubt every judge has had occasions of hearing at the beginning of a court proceeding, suggestions to that effect from one side or the other, and knows the temptation that it arouses. But there are, I think, three important distinctions which apply in such a case. First, it is said in open court so that the opponent can reply. Second, it is very much part of a judge's instinct, built on learning, tradition, experience and belief in the judicial oath of office to be able to ignore the bait. Third, the judge's reasons for judgment would be expected to reveal that the bait was ignored.

[102] It seems that ODG did not take any step, by making its own response or by calling for appearances before Mr O'Sullivan. There may have been all sorts of reasons for that, for example failure to realise the importance of the matter, but in any event a failure to act by the innocent party hardly excuses the guilty party.

[103] It is regrettable that Mr O'Sullivan did not himself call the parties before him to discuss the contents of the fax or at the very least quote it fully in the introduction to

his reasons with a disclaimer of its influence. In fact all he did was to state that he had "received correspondence from the respondent consenting to the requested extension of time."

[104] In the circumstances it is impossible to know whether Mr O'Sullivan was influenced by the "message within the message", even if only subliminally. In my opinion it remains as a serious question mark over the decision, the presence of apprehended bias. I consider it is serious enough to amount to a denial of natural justice.

General

[105] I would like to record that although I have decided that the change from the early submissions to the later submissions was such a shift in stance as to lead to an abuse of process, I do not find that legal advisors of Hitachi were intending to be devious, misleading or unfair whether to the adjudicator or the Court. Senior counsel for ODG expressly disavowed any suggestion of improper motive on their part. In my opinion, in trying to mount a challenge to payment claim 18 in the teeth of the decision on payment claim 17 they came up with an argument which they believed to be a valid one. However it was not and its promulgation was in fact an abuse of process.

Conclusions – Mr O'Sullivan's adjudication

[106] I accept that a finding of just what variation clauses were valued by Mr Davenport is not just of theoretical importance in that it can all be sorted out later, if necessary by ordinary litigation. While an adjudicator's decision is not binding on a later adjudicator who is adjudicating future claims, the earlier decision is likely to be highly persuasive.

[107] It is appropriate therefore to declare that in his adjudication decision on payment claim 17, Mr Davenport valued only VQ02, VQ60A, VQ61A, VQ65A, VQ67A and VQ68A.

[108] It is therefore appropriate to declare that the adjudication decision of Mr S O'Sullivan dated 19 March 2008 on payment claim 18 is void and of no effect, and is set aside.

Orders

[109] I will hear submissions on the form of the order in each application and on costs.