SUPREME COURT OF QUEENSLAND

CITATION:	*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors* [2007] QSC 333
PARTIES:	**MINIMAX FIRE FIGHTING SYSTEMS PTY LTD (ABN 8011 823 8681)** (applicant) **v** **BREMORE ENGINEERING (WA) PTY LTD (ABN 52 113 495 131)** (first respondent) and **PHILIP DAVENPORT** (second respondent) and **ADJUDICATE TODAY PTY LTD (ABN 32 109 605 021)** (third respondent)
FILE NO:	BS 1868 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2007
JUDGE:	Chesterman J
ORDER:	**Application Dismissed**
CATCHWORDS:	CONTRACTS – BUILDING ENGINEERING AND RELATED CONTRACTS – ADJUDICATION - where the first respondent sent the applicant an invoice for building work completed – where the applicant sent an email to the first respondent refusing to accept the invoice and suggesting the parties meet to discuss the claim and amount payable – where in response the first respondent applied under s21 of the *Building and Construction Industry Payments Act 2004* (Qld) for an adjudication of the dispute – where the second respondent was appointed as adjudicator – where the applicant argued that the appointment was precluded on the grounds that the applicant had issued a payment schedule to the first respondent as defined under the Act – whether the applicant's email constituted a payment schedule under s18 of the Act – whether the second respondent should have

granted the applicant an opportunity to make submissions regarding the nature of the email

ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – OTHER ORDERS – where the court's jurisdiction to hear the appeal was founded under Part 3 of the *Judicial Review Act* 1991 (Qld) – where under ss13 and 48 the court could dismiss an application for review if the applicant was afforded an opportunity for review by another court, tribunal, authority or person, or if the interests of justice made it appropriate to do so – whether the mechanisms available to the applicant under s100 of the *Building and Construction Industry Payments Act 2004* (Qld) enlivened the power granted under ss13 and 48

Building and Construction Industry Payments Act 2004 (Qld), s 12, s17, s18, s19, s21, s22, s23, s24, s25, s100, s226
Judicial Review Act 1991 (Qld), s13, s20, s41, s43, s45, s46, s48

Barclay Mowlem Construction Ltd v Tesrol Walsh Bay (2004) NSWSC 1232, applied
Brodyn Pty Ltd T/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421, applied
Co-ordinated Construction Pty Ltd v Climatech (Canberra) Pty Ltd & Ors [2005] NSWCA 229, applied
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor [2007] QSC 220, applied
Roadtek, Department of Main Roads v Davenport & Ors [2006] QSC 47, applied
State of Queensland v Epoca Constructions Pty Ltd & Anor [2006] QSC 324

COUNSEL: Mr M. Ambrose for the applicant
Mr D. Fraser QC, with him Mr A. Rich for the respondent

SOLICITORS: Holding Redlich for the applicant
Gleeson Lawyers for the respondent

[1] The applicant has brought these proceedings to challenge a decision of the second respondent by which it was ordered to pay $462,147.22 to the first respondent. The decision was made, or, as the applicant would have it, purportedly made, on 2 February 2007, pursuant to s 26 of the *Building and Construction Industry Payments Act 2004* (Qld) ('the Act'). The second respondent is an adjudicator as defined by the Act. He was appointed by the third respondent. Only the applicant and first respondent took part in the proceedings.

[2] The application was brought, as the applicant explains, 'pursuant to both Part 3 of the *Judicial Review Act 1991* (Qld) ('the *JR Act'*) and the inherent jurisdiction of the court to make declarations with respect to decisions made *ultra vires* the relevant

authorising legislation.' It will be necessary to say something later of the second basis.

[3] Section 12 of the Act gives a person who has carried out construction work under a contract an entitlement to progress payments. The Act then relevantly provides:

> '17. Payment claims
>
> (1) A person mentioned in s 12 … who is or who claims to be entitled to a progress payment (*the claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (*the respondent*).
>
> (2) The payment claimed –
>
> (a) must identify the construction work … to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (*the claimed amount*); and
>
> (c) must state that it is made under this Act.
>
> …
>
> 18. Payment schedules
>
> (1) A respondent served with the payment claim may reply to the claim by serving a payment schedule on the claimant.
>
> (2) A payment schedule –
>
> (a) must identify the payment claim to which it relates; and
>
> (b) must state the amount of the payment, if any, that the respondent proposes to make (*the scheduled amount*).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
>
> (4) Subsection (5) applies if –

(a) a claimant serves a payment of claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of –

(i) the time required by the … contract; or
(ii) 10 business days after the payment claim is served

(5) The respondent becomes liable to pay the claimed amount to the claimant …

19. Consequences of not paying claimant if no payment schedule

(1) This section applies if the respondent –

(a) becomes liable to pay the claimed amount … under s 18 because the respondent failed to serve a payment schedule …; and

(b) fails to pay … the claimed amount … on or before the due date …

(2) The claimant –

(a) may –

(i) …
(ii) make an adjudication application under s 21(1)(b) …

…

21. Adjudication application

(1) A claimant may apply for adjudication of a payment claim (*an adjudication application*) if –

(a) …

(b) the respondent fails to serve a payment schedule … and fails to pay … any part of the claimed amount by the due date …

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless –

(a) the claimant gives the respondent notice, within 20 business days immediately following the due

date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the notice states the respondent may serve a payment schedule on the claimant within five business days after receiving the … notice.

22. When a person may be an adjudicator

(1) A person may be an adjudicator … if registered as an adjudicator under this Act.

23. Appointment of adjudicator

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

24. Adjudication responses

(1) Subject to subsection (3) the respondent may give the adjudicator a response to the claimant's adjudication application (*the adjudication response*) at any time within the later of the following … -

(a) five business days after receiving … the application;

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

…

(3) The respondent may give the adjudication response … only if the respondent has served a payment schedule on the claimant within the time specified in s 18(4)(b) or 21(2)(b).

25. Adjudication procedures

(1) An adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator.

26. Adjudicator's decision

(1) An adjudicator is to decide –

(a) The amount of the progress payment, if any, to be paid by the respondent …'

[4] The applicant engaged the first respondent as a subcontractor to install fire fighting and fire protection equipment at a power station being built by the first respondent at Kogan Creek. The subcontract was partly oral and partly written.

[5] On 14 December 2006 the first respondent sent invoice 1282 to the applicant. An officer of the applicant's parent company in Germany responded to the invoice by email also on 14 December 2006. The applicant refused to accept the invoice but did not indicate what amount it proposed to pay the first respondent in respect to the invoice. Instead it proposed a meeting of relevant company employees to discuss the claim and the amount of any payment.

[6] The primary issue in the proceedings is whether the applicant's email of 14 December 2006 satisfies the description of a 'payment schedule' in s 18 of the Act. The first respondent thought it was not, and applied to the third respondent for the appointment of an adjudicator. The second respondent was duly appointed and proceeded with the adjudication on the basis, advanced by the first respondent, that the applicant had not delivered a payment schedule.

[7] Invoice 1282 was dated 13 December 2006. It was addressed to the applicant and identified the contract between applicant and first respondent. The body of the invoice read:

DESCRIPTION	**AMOUNT**
Claim No. – 17	
1. Additional Labour expended on original works, not included in variations paid to date 3819.3 hours @ $87.00 per hour (Refer attached breakdown	$332,279.10
2. Correct overtime rate charge (Refer attached breakdown)	4,045.50
3. Refund of 10.50% Discount for prompt Payment (Not achieved by Minimax) $798,183.23 x 10.5%	83,809.24
Please note: Find attached thorough breakdown of Variation hours, Overall Hours and Overtime Claim difference spreadsheet – Available in electronic format if requested Excludes for items previously notified (including additional supervision, engineering support and drawing changes, prolongation, equipment hire, labour rate incre	
SUBTOTAL	$420,133.84
TAX RATE	10.00%
GST	42,013.38
AU$ TOTAL VALUE OF INVOICE INCLUSIVE OF GST	$462,147.22

[8] The applicant concedes that the invoice 1282 was a payment claim under the Act.

[9] The applicant's reply was in these terms:

> 'Regarding your invoice 1282, we confirm that we received the invoice on 14 December 2006.
>
> For the indicated extension of the installation time, please note our statement for the main reasons which are influenced by the site-management from your site as follows:
>
> - The most pipefitter and installation personal are unskilled and they have no experience with installation of pipework and fire fighting systems (Some of them are hairdresser and barkeepers). For this reason you have lost a lot of time and money, because the installation progress and the quality of installation was not so effective as required
>
> - No suitable tools and not the required quantity of tools on site. For this reason the progress of installation and the quality could not be so effective as required
> Moreover you have spend too much money for rented tools, equipment and storage containers etc.
> It would be cheaper for you to buy the tools for this project
>
> - The conditions on site with storage of the material as on the laydown area and also at the installation areas was a big chaos (problem of housekeeping). Your people have lost a lot of time to search for the material what they need for installation.
>
> This are only a few short items to explain the reasons for extension of the installation time from our side
>
> For this reasons we accept not your invoice but we suggest to have a meeting on site next year to clarify the situation and to find a solution for both sides.'

[10] The date by which the applicant had to deliver its payment schedule in response to the payment claim was 3 January 2007, ten business days from service of the payment claim (s 18(4)(b) of the Act). Unless the applicant can made good its contention that its email of 14 December 2006 was a payment schedule it is accepted that it did not deliver one.

[11] On 8 January 2007 the first respondent sent to the applicant, by facsimile transmission, a letter which read:

> 'As per my previous email last year, in order to maintain our financial position I would like to inform you of our intention to apply for adjudication of our payment claim no. 17 dated December 13 2006. You may serve a payment schedule on (the first respondent) within five business days after receiving this notice.'

[12] This communication satisfied s 21(2) of the Act by giving the applicant notice within 20 business days following the due date for payment, (28 December 2006),

that it could serve a payment schedule within five business days of receipt of the letter of 8 January. A payment schedule in response to the letter of 8 January was due by 15 January 2007. It is common ground that the applicant did not serve a payment schedule in response to the notice.

[13] On 25 January 2007 the first respondent applied for the adjudication of its claim. The application was made within the time permitted by s 21(3)(c)(iii) of the Act. The third respondent appointed the second respondent on 30 January 2007 and gave the applicant notice of the appointment and served on it a copy of the adjudication application. The second respondent made his decision on 2 February 2007.

[14] The second respondent accepted the first respondent's submission that the applicant had not delivered a payment schedule. Accordingly he made his decision without waiting for the expiration of the time allowed by the Act for the delivery of an adjudication response. Presumably he did so because he took the view that there had been no payment schedule and, consequently, s 24(3) precluded the applicant from giving such a response.

[15] The applicant contends that the adjudication was erroneous and should be set aside. It complains that the second respondent did not have regard to its email of 14 December because he, wrongly, thought it was not a payment schedule. A subsidiary complaint is that the second respondent did not allow the applicant to address any argument on the point and proceeded with the adjudication on the false premise that no payment schedule had been delivered.

[16] Although many points are taken in the Originating Application and in the parties' written submissions, in the end four points were argued:

(i) Was the applicant's email of 14 December 2006 a payment schedule?

(ii) Is the question whether the communication was a payment schedule a 'jurisdictional fact' which the court must determine or was it a question for the second respondent adjudicator to determine?

(iii) Should the second respondent have given the applicant an opportunity to argue or make submissions about the answer to question (i)?

(iv) Was the second respondent obliged not to adjudicate until the period specified in s 24(1) had expired, whether or not the applicant had delivered a payment schedule and was entitled to deliver an adjudication response?

[17] Before considering the first question, I think, it necessary to remember the purpose of the Act because that purpose will influence the approach one takes to the construction of the 14 December email. As Hodgson JA said in *Brodyn Pty Ltd T/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at 440-1:

> 'The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that

> disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise … . The procedure contemplates a minimum of opportunity for court involvement … .'

[18] Mackenzie J noted in *Roadtek, Department of Main Roads v Davenport & Ors* [2006] QSC 47 at para 16:

> '… the Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information … . Unless the parties extend time, the decision must be given within 10 days of receipt of the respondent's response or from the time one could have been received. Further, written submissions may be asked for by the adjudicator … . The adjudicator may call a conference of the parties … and make an inspection … . Any conference called must be held informally. Legal representation is excluded … . The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection.'

[19] In *Brodyn Pty Ltd t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors* [2003] NSWSC 1019 Einstein J referred to the legislation as:

> '… a fast track interim progress payment adjudication vehicle.'

[20] The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description. To constitute a payment schedule the applicant's email of 14 December had to:

(i) identify the payment claim to which it related, and

(ii) state any amount which the recipient of the payment claim proposed to make in response to it.

(iii) Importantly, if that amount is less than the amount claimed the payment schedule it must state why it is less.

[21] If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter.

[22] The important thing to note about invoice 1282 is that it claims three separate amounts. The first is for the cost of labour expended on the contract works, which was additional to amounts included in previous claims for payment. The second item was an adjustment of an overtime rate which had been wrongly charged in previous claims. The third item was of the same type. It was to recover the amount by which previous invoices have been reduced when the reason for the discount had not eventuated.

[23] The response on 14 December 2006 clearly identified the invoice and therefore the payment claim to which it related. The first criterion was satisfied. The email concluded:

> 'For this reasons we accept not your invoice but we suggest to have a meeting on site next year to clarify the situation and to find a solution for both sides.'

Although the grammar is incorrect the meaning is perfectly clear. Mr Knop, the author of the email, is German and any comment upon his choice of words is unnecessary, and would be rude. He made it quite clear that the applicant did not accept invoice 1282 which can only mean that it did not propose to make any payment pursuant to it. Any doubt there might be (and I think there is none) is removed by the suggestion that there be a site meeting, the purpose of which was to reach agreement on what might be payable pursuant to the invoice.

[24] The second criterion is satisfied. The email stated the amount, if any, that the applicant proposed to make. The amount was nil. There is no reason why a complete refusal to pay any money pursuant to an invoice is a statement of the amount if any that someone proposes to make. If one needs authority for such a proposition one may see it in *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay* (2004) NSWSC 1232 at para 15.

[25] The difficulty for the applicant comes with the third criterion, that the schedule must state why the applicant proposed to pay nothing. Some reasons were given. They were:

- The first respondent's pipefitters and installers were unskilled and inexperienced and the installation work was ineffective.

- The installers were not supplied with suitable tools and thereby experienced delay.

- The construction site was poorly organised with inefficiencies in finding and moving materials.

These contentions amount to sufficient reasons for the applicant's stated refusal to pay item 1 on invoice 1282. That claim was for the cost of labour over and above the labour charges that had been made in respect of the same work in earlier claims. The applicant made it sufficiently clear that it thought no additional labour charges were justified because the additional costs were occasioned by the first respondent's inefficiencies and ineptitudes.

[26] Significantly, the email does not deal at all with the claims for almost $88,000, seeking adjustments for overtime underpaid and a refund of discounts allowed for prompt payment which was not made. Mr Knop made it clear that the applicant would pay nothing in response to the invoice. He explained why it would pay nothing with respect to claim 1 but said nothing at all about claims 2 and 3. The reason may well be that Mr Knop was addressing the claim he considered contentious and was not, in his mind, compiling a payment schedule. His email is, however, the document on which the applicant is forced to rely and the only question is whether it satisfies the statutory definition.

[27] If the applicant had no objection to paying those amounts the Act required it to say so in its payment schedule. The whole purpose of such a document is to identify what amounts are in dispute and why. The delivery of a payment claim and a payment schedule is meant to identify, at an early stage, the parameters of a dispute about payment for the quick and informal adjudication process for which the Act provides. If a builder wishes to take advantage of the Act to dispute the claim it must comply with its provisions and must, relevantly, take the trouble to respond to a payment claim in the manner required by the Act. The process is not difficult. The applicant was required to identify those parts of the claim which it objected to paying and to say what the grounds of its objection were.

[28] There are two possible constructions of the 14 December email. The first is that the applicant did, in fact, object to paying anything for items 2 and 3, and proposed to pay nothing in respect of them. In that case for the document to be a payment schedule the applicant had to give reasons for its objection. The email is silent on this point. The second, more likely, construction is that the email does not address that part of the payment claim at all. It did not state the amount of the payment which the applicant proposed to make. If this be the true construction the email did not satisfy the second criterion in s 18 of the Act. On either view the 14 December email did not comply with the definition. The email is incomplete if it is intended to be a payment schedule. It had to address the claim made and not only a part of it. I think this is clear.

[29] A payment schedule which complies with the Act will set out the amount it proposes to pay in response to a claim. By s 20 a respondent who does not pay the amount its payment schedule proposes to pay can suffer summary judgment in a court of competent jurisdiction and enforce the amount as a judgment debt. The machinery for prompt payment and enforcement of payment would break down if a document, said to be a payment schedule, took issue with part only of a claim but was silent as to what it proposed to pay in respect of the balance. The contractor could not enter judgment. The respondent's reticence could frustrate the operation of the Act.

[30] This conclusion has the consequence that the second respondent was correct in his approach to the adjudication. It becomes unnecessary to answer the second question. There is another reason why the question is irrelevant. I will mention it later.

[31] The answer to question 1 also makes it unnecessary to determine whether the third respondent should have afforded the applicant an opportunity to be heard on the status of the 14 December email. There is no point in setting aside the adjudication when a further hearing would necessarily come to the same conclusion because the court has determined that there was no payment schedule.

[32] But in any event the applicant did have an opportunity, which the Act regards as adequate, to argue that it had delivered a payment schedule. The first respondent's notice of 8 January told the applicant that it was applying for an adjudication and that the applicant could serve a payment schedule. By that schedule the applicant could have given the reasons required by s 18(3) and gained the right to deliver an adjudication response in opposition to the claim. It is true that the applicant's attention was not drawn specifically to the first respondent's contention that it had not delivered a payment schedule and was not specifically invited to argue that it

had. Nevertheless its position was sufficiently protected. It could have delivered a second schedule which cured any defect in the first.

[33] As Baston JA pointed out in *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229 at 48:

> '… the relevant content of procedural fairness must be ascertained by reference to the specific statutory scheme. Where that scheme is inconsistent with some element which might otherwise have been implied under the general law, it is the general law which must give way.'

[34] The opportunity the Act gives to a respondent to deliver a second, fresh or supplementary, payment schedule, is a statutory indication that that and the subsequent right to expand upon the points taken in the schedule in the adjudication response are all that the Act requires to afford procedural fairness. It is easy enough to avoid the consequence of not delivering a payment schedule in response to a payment claim. It is to deliver one on the second opportunity. The Act's insistence upon speed, informality, the lack of oral evidence, and reliance on documents, is a sufficient indication that the first respondent did not have to give specific notice to the applicant that it would contend there had been no payment schedule. Nor was the second respondent required to request specific argument on that point.

[35] The last point is whether the second respondent acted prematurely in giving his decision before the expiration of five business days after receipt of the application, on 30 January. A respondent may give its adjudication response at any time within those five days: see s 24(1). By s 25(1) an adjudicator must not decide the application until the expiration of the period within which the respondent may give an adjudication response. However, s 24(3) provides that the respondent may not give an adjudication response if it has not earlier given a payment schedule.

[36] The applicant therefore could not give an adjudication response. Was the second respondent nevertheless obliged to wait for the expiration of the five days? The answer must be negative. Such a construction of the Act would achieve no purpose. There was no period within which the applicant could give an adjudication response because of s 24(3). Section 25(1) is not dealing with abstractions. It provides the procedure that an adjudicator must follow in particular cases. The time within which an adjudicator may or may not decide an application will depend upon the particular facts on which the Act operates. Where a respondent may not deliver an adjudication response the adjudicator does not have to pretend that he can, and wait for a period during which nothing can happen. The adjudication was not premature.

[37] This sufficiently disposes of the application. It must be dismissed. There is, however, another basis for that conclusion and it is the one on which I prefer to base my judgment. In my opinion the court's jurisdiction to determine the application is that conferred on the court by the *JR Act*. Any inherent power of the court to make orders of the kind sought has been circumscribed by the provisions of the *JR Act*. The power of the court to control and review the proceedings of administrative decision-makers is controlled by Part 3 of the *JR Act*. Part 5 of the Act regulates the jurisdiction the court formerly had to control proceedings of inferior courts and domestic tribunals.

[38] Section 41 of the *JR Act* has abolished the prerogative writs and replaced them with a new form of relief, the prerogative order by which the court is now to regulate the entities which were subject to curial supervision by the abolished writs. By s 43(2) the court may make declarations or grant injunctions instead of, or as well as, making a prerogative order. Section 43(1) prescribes the only manner by which an applicant may seek a prerogative order, s 45 and s 46 describe the procedures for making an application for review. The result of these sections is that the inherent supervisory jurisdiction of the court has been regulated by the particular statutory jurisdiction and the inherent powers while not abolished, are to be exercised in conformity with the *JR Act*.

[39] Part 3 of the *JR Act* applies to decisions of an administrative character made under an enactment. There is no doubt that the decisions of an adjudicator under the Act are decisions made under an enactment. In *The State of Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324 Philippides J considered whether a statutory order for review, pursuant to the *JR Act*, was available to a person aggrieved by an adjudication made under the Act. Her Honour examined the question at length, and by careful reference to authority, and concluded that such adjudication was administrative in character so that any adjudication under the Act was a decision to which the *JR Act* applied. Her Honour's reasons appear at paras 16-35 and, with respect, are plausible.

[40] Mullins J accepted the correctness of the judgment in *Epoca* in *ACN 060 559 971 v O'Brien & Anor* [2007] QSC 91. Earlier Dutney J had come to the same conclusion in *JJ McDonald & Sons Engineering v Gall* [2005] QSC 305. His Honour concluded that the *JR Act* allowed judicial review of an adjudicator's decision which was, applying *Griffith University v Tang* (2005) 213 ALR 724, a decision made under an enactment. His Honour did not expressly advert to the requirement that the decision must be of an administrative character, but must have been of that opinion.

[41] Jones J took a slightly different view in *Vis Constructions Pty Ltd & Anor v Cockburn & Anor* [2006] QSC 416 at para 42. His Honour thought that the right to review was conferred by Part 5 of the *JR Act* because:

> 'In New South Wales the right to relief when challenging an adjudication of this kind, is determined in the context of s 69 *Supreme Court Act* 1970 (NSW). That section is in terms equivalent to s 41 and s 43 of the *JRA*. It seems to me therefore that the court has jurisdiction to quash an adjudication decision on the basis of an error of law on the face of the record. See *Brodyn* …'

[42] It must be remembered that there is no equivalent to the *JR Act* in New South Wales and jurisdiction to review adjudications under the equivalent legislation had to be found in some other source. It was found in the *Supreme Court Act* in provisions similar to s 41 of the *JR Act*. The legislative difference is important. There is no reason to think that the New South Wales courts would have taken the course they did but for the absence of a statutory equivalent to Part 3 of the *JR Act*.

[43] I would accordingly hold that the jurisdiction to grant a review of an adjudicator's decision is reviewable pursuant to the provisions of Part 3, and not Part 5.

[44] The legislative difference has another significance. It means that the New South Wales authorities are of no, or very little, use in determining applications brought pursuant to the *JR Act*. That Act determines the grounds on which the review may be granted and whether relief may be given.

[45] The point may be illustrated by reference to the second question argued on the hearing of the application, whether or not the status of the 14 December email was a jurisdictional fact. I remarked earlier that the question was irrelevant. The distinction might have been relevant had the application been argued in New South Wales where the availability of judicial review depends upon it being established that the adjudicator's error was with respect to a jurisdictional fact. But in Queensland it is a ground for judicial review under Part 3 of the *JR Act* that a decision involved an error of law whether or not appearing on the record of the decision (s 20(2)(f)), and the question whether the 14 December email was or was not a payment schedule is a question of law. The question involved the construction of the document (which is a question of law) and a consideration of whether the document complied with the terms of the statute (which is also a question of law). No doubt the existence of a 'jurisdictional error' by the adjudicator would have been important had the review come within the purview of Part 5 of the *JR Act* but it fell rather within Part 3. Judicial reviews under that Part do not require, as a condition precedent, a 'jurisdictional error' made by the decision-maker.

[46] Another consequence of the availability of judicial review is that an adjudicator's decision will be reviewable on any of the grounds set out in s 20 and s 23 of the *JR Act*. The scope for setting aside an adjudication is substantial. This has serious implications for the effectiveness of the Act. Dutney J made the point in *JJ McDonald* at line 40 page 8:

> '… Unless decisions under this legislation are excluded from the operation of the *Judicial Review Act* the benefit of prompt periodic payments to contractors, which is the stated purpose of the Act, is likely to be defeated by applications for review which serve the purpose of preventing the [contractor] taking early advantage of a favourable determination.'

[47] The same point was made by Hodgson JA in *Brodyn* and by Einstein J in *Brodyn v Davenport*, who said at para 14:

> '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. This is because the adjudicator … cannot possibly, in the time available … give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator … by … denying the parties any legal representation … . But primarily it is because the nature and range of issues legitimate to be raised … 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 … . Those rights may be determined by

> … the court … including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures.'

[48] It is s 100 of the Act which makes an adjudication provisional and preserves the rights of parties to a building contract to recover moneys payable pursuant to the contract or as a consequence of its breach and to recover any moneys paid pursuant to an adjudication which legal proceedings may demonstrate were wrongly ordered.

[49] The effect of this section brings into play s 13 and s 48 of the *JR Act*. Section 13, in Part 3, provides that the court must dismiss an application for review if another law entitles the applicant to seek a review of the decision by 'another court or a tribunal, authority or person', at least where the court is satisfied the interests of justice require this course. Section 48, which applies to Parts 3 and 5, provides that the court may dismiss an application for review if it considers that it would be inappropriate for the proceedings to continue. One circumstance which makes the continuation of an application for judicial review inappropriate is that a decision sought to be reviewed is provisional and has no permanent effect on the rights of the parties.

[50] The point identified by Dutney J adds force to this opinion. The salutary protection afforded to subcontractors by the Act will be sadly reduced if adjudications are routinely reviewed on any of the grounds appearing in s 20 of the *JR Act*. As Einstein J pointed out it is inevitable that mistakes will be made given the expedition with which the Act requires decisions to be brought down.

[51] The Chief Justice thought the same in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor* [2007] QSC 220. His Honour there applied s 13, having concluded that s 100 was a provision made by a law other than the *JR Act*, under which the applicant could seek a review of the adjudication. His Honour pointed out that a 'very substantial limitation' upon the effectiveness of a judicial review was that it will not produce a definitive determination of the parties' rights. The Chief Justice said at para 10:

> '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 … later.'

[52] I respectfully agree with this approach.

[53] Cases may arise in which it will not be in the interests of justice to dismiss an application for review because of the existence of s 100 of the Act. There may be cases where the adjudication is tainted by fraud, or where the proprietor was given no notice of the claim for payment, or where the adjudicator was not properly appointed, so that it will not be in the interests of justice to dismiss an application, and it will not be inappropriate for one to continue. But such obvious cases of impropriety apart the court, in my opinion, ought to exercise the powers given by s 13 and s 48 of the *JR Act* to dismiss an attempt to review an adjudicator's decision.

[54] This application is of the ‘ordinary’ kind. When the subcontract works are complete the applicant may commence proceedings and recover any amounts which it can prove the first respondent should pay it by reason of the contract or its breach. Interest can be awarded. It will suffer no injustice by making the provisional payment required by the Act under the adjudication. That payment was made on account of liabilities to be determined and might be recovered. Section 100 provides another remedy alternative to judicial review and it is the one which the Act contemplates should regulate the obligations of parties to a contract to pay money one to the other. The efficacy of the Act will be diminished, if not destroyed, if judicial review of adjudications is not restricted.

[55] The application should be dismissed.