# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Vis Constructions Ltd & Anor v Cockburn & Anor* [2006] QSC 416 |
| PARTIES: | **VIS CONSTRUCTIONS PTY LTD (ACN 105 871 654)**<br>**(**First applicant)<br>**LAMAN & CHARLENE HALFHYDE**<br>(Second applicant)<br>v<br>**JAMES LAWSON COCKBURN**<br>(First respondent)<br>**KILFOY CABINETS**<br>(Second respondent) |
| FILE NO/S: | 157 of 2006 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Cairns |
| DELIVERED ON: | 15 December 2006 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 6 September 2006 |
| JUDGE: | Jones J |
| ORDER: | **1. Declare that the adjudication decision of the first respondent, reference no. 1064504 26, purportedly made pursuant to s 26 of the *Building and Construction Industry Payments Act* 2004 is void.**<br>**2. Order that the second respondent be permanently restrained from further proceedings on the adjudication certificate issued under s 30 in respect of the said adjudication decision.**<br>**3. Leave to the parties to make written submissions on costs (including the costs of adjudication) on or before 14 February 2007.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – GENERALLY – application to review adjudication decision under *Building and Construction Industry Payments Act 2004* – whether decision is regulated by the rules of natural justice<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS |

– applicants seek to have set aside adjudication decision pursuant to the *Building and Construction Industry Payments Act 2004* – under the Act the adjudicator must have regard to the construction contract – adjudicator found that there was a construction contract between claimant and builder – builder under no obligation to perform work – whether a contract existed – whether adjudicator had jurisdiction to make decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – GENERALLY – application to review adjudication decision under *Building and Construction Industry Payments Act 2004* – adjudicator made a finding as to existence of a contract – finding on a basis not suggested by applicant or respondent – applicant denied the opportunity to be heard – whether a fair hearing denied to the applicant

COUNSEL: Mr D Morzone for the applicants
Mr M Jonsson for the respondents

SOLICITORS: Gadens Lawyers for the applicants
Williams Graham & Carman for the respondents

[1] By this application, the applicants seek to have set aside on various grounds an adjudication decision pursuant to the *Building and Construction Industry Payments Act* 2004 ("BCIPA") made by the first respondent on the application of the second respondent.

[2] The first applicant, Vis Constructions Pty Ltd (hereinafter "the builder") is a company duly incorporated and the holder of a licence issued pursuant to the *Queensland Building Services Authority Act* 1991. It carries on the business of a registered builder. The second applicants ("hereinafter referred to jointly as "the owner") are the registered owner of land on which they engaged the builder to erect a dwelling in which they intended to live. Mr Halfhyde is a holder of a QBSA licence but Mrs Halfhyde has no such licence. They contracted jointly with the builder. Whether they should be regarded as a joint **resident owner** for the purpose of s 3(2)(b) of BCIPA is one of the matters in dispute.

[3] The first respondent is a registered adjudicator who did not actively participate in the hearing of this application but will abide the order of the Court.

[4] The second respondent Shaun Kilfoy is a duly licensed cabinet maker trading as Kilfoy Cabinets (hereinafter "the claimant").

[5] The adjudicator found that the claimant was entitled to be paid by the builder the sum of $39,562 of which $25,583 had been paid by the time of the adjudication. Since that date a further $5,000 which had previously been acknowledged as owing has also been paid.[1] As a result, the amount in dispute is $8,979.

---

1 Affidavit of Laman Halfhyde – ex LH07 sworn 20 June 2006

**Background facts**

[6] On 26 May 2005, the owner contracted with the builder to erect a dwelling for a price of $265,000. The terms of the contract are in the standard form of a Residential Building Contract approved by the Master Builders Queensland Association.[2] The work of fitting out the kitchen and providing wardrobe shelving and storage was not included in the construction work required to be undertaken pursuant to the contract. At all times it was understood between the builder and the owner that such fitting out would be undertaken by the owner without reference to the builder and the payment of such work would be the separate responsibility of the owner. Provisional sums of $20,000 for the kitchen fittings and $1,500 for the wardrobe shelving were identified in the contract to facilitate the flow of funds borrowed in respect of the project.[3]

[7] A contract for the work of providing kitchen fittings and wardrobe shelving was entered into by the owner with the claimant following an exchange of requests and quotations between 21 June 2005 and November 2005. Variations to the work proposed were agreed between those two parties and the work was carried out by the claimant mainly in November 2005. The details of the work agreed to be carried out and the true price of that work is the matter of the continuing dispute. The decision to pursue payment of this disputed claim by a process of adjudication under BCIPA has generated costs for the parties far in excess of what the claim warrants. Further, the outcome of this application will not resolve essential issues in dispute leaving them to be dealt with in another forum.

[8] The builder claims it had no knowledge of the claimant's involvement in the kitchen and shelving project until 18 December 2005 when it received the first invoice claiming for part of the relevant work although it seems there may have been a discussions with the owner and perhaps the claimant about to where invoices would be sent. On behalf of the builder, Mr Keith Vis swore an affidavit in the following terms:-

> "6. I agreed with Laman and Charlene Halfhyde, the owner of the house at 13 Willie Ming Close, Redlynch Valley Estate, to pay, on their behalf, the cost to them of the construction of the kitchen cabinets and other cabinets to be installed at the house. Under this agreement I would be reimbursed by their financier.
>
> 7. The first time that I was aware that the Claimants were the party who carried out the kitchen cabinet work for the Halfhydes was when I received an invoice from the Claimant on our about the 18th December 2006.
>
> 8. I deny ever speaking or otherwise communicating with the Claimants on the 7th November 2005, the 19th of December 2005, the 20th of December 2005, or in early January of 2006, to the extent the Claimants allege telephone calls were made to me at those times.
>
> 9. I deny that I agreed with the Claimant on the 8th of February 2006 that I was responsible as the builder.

---

2 Affidavit of Keith Vis – ex KV4 – sworn 21 June 2006

3 Ibid at p 23

> …
> 13. I became involved in the payment dispute at the request of both the Halfhydes and the Claimants to assist them both in a mediation capacity. I recall advising the Claimants of this in my first correspondence to them on the 23rd of February 2006 (see item 4 in the documents accompanying the Adjudication Application)."

The builder's response was to forward the first invoice onto the owner. There was a challenge by the owner to the accuracy of that invoice and again to a second invoice dated 23 January 2006 which claimed the total price of $39,562, inclusive of the amount of the first invoice.

[9] The arrangement whereby the invoice was sent to the builder followed a discussion between Mrs Halfhyde and Mrs Kilfoy some time in November 2005. Mrs Halfhyde recalls telling Mrs Kilfoy that she "should contact Mr Keith Vis as he would be paying the invoices on our behalf". Mrs Kilfoy in a document tendered to the adjudicator asserted that there was an agreement "regarding payment was reached between ourselves and the builder through conversations via telephone on 7 November, 19 December, 20 December 2005 and 23 January 2006." She claimed that the terms of the agreement were that:-

> "(a) Invoices for work completed are to be sent directly to the builder;
> (b) The builder will present these invoices to Mr Halfhyde for approval;
> (c) Whether approved or not the builder will pay us directly via direct debit from his account."[4]

The terms of this arrangement were referred to again by Mrs Kilfoy in the following way:-

> **"7 November 2005**
> On Mrs Halfhyde's advice I contacted Keith Vis of the builder to advise who we are and what we will be doing for him. I also asked about invoicing: who do I make them out to and where do I send them; I was advised to send the invoices to him and that they would be paid within 2-3 weeks."[5]

These assertions were made in unsworn documents and have been challenged as to their terms and effect.

[10] Mr Vis claimed that the second communication between himself and Mrs Kilfoy was on 23 January 2006 when he received by fax the document purporting to be a payment claim. Again, he forwarded the payment claim to the owner.[6] The next step related to a visit to the claimant's workshop on 8 February 2006 to discuss the payment issues. As to this occasion, Mr Keith Vis said he was acting in the role of a mediator between the claimant and the owner, hoping to resolve the disputed issues.

---

4 See affidavit Emma Kilfoy – ex "EK-02" at p 03. The only relevant telephone conversation before the delivery of the invoice was that of 7 November 2005.

5 Ibid at p 6

6 Affidavit Keith Vis – sworn 20 June 2006, paras 13 and 14

[11] Neither party gave direct evidence of the terms of any telephone conversation and there was no contemporaneous writing to evidence the terms of any arrangement. One is bound to observe that the suggestion by Mrs Kilfoy that the builder would pay a subcontractor for works not approved either by the builder or the owner would be somewhat unusual.

[12] On 23 February 2006 the builder wrote to the claimant commencing in these terms:-

> "Upon advice from Laman, Charlene Halfhyde and yourselves we have been asked to mediate and hopefully resolve the disputed costs to kitchen and cabinet works.
>
> We wish to make you aware that at no time was Vis Constructions involved with the kitchen and joinery under the contract with Lyman. We did not know who Lyman and Charlene were using for their cabinet works until an invoice arrived at our office. Lyman and Charlene always intended to look after their own kitchen and joinery."[7]

By this time it was clear that the relationship between the owner and the claimant had broken down.[8]

[13] This letter was accompanied by a document prepared by the owner and identified the amount the owner agreed to pay and the timelines for such payment. The builder had, by this time, paid the amount of the provisional sum available to him from the owner's loan facility.

[14] The builder did not respond to the payment claim but the owner, for their part, did. That identified the dispute in the following terms:-

> "The following is a summary of the differences between the amounts that were quoted and the amounts invoiced. As you can see, a considerable increase in cost has been made ($12,134) which is unsubstantiated. A quote cannot be alternated (sic) unless changes to the original quotation have been made. In this instance, written variations must be issued or a new quote must be drawn up. We have neither made significant changes to the original quotation nor received any written variations or a new quotation.
>
> Payment (as per original amount quoted) will occur when all works are completed."[9]

[15] The claimant however was not pursuing the owner but rather the builder. The adjudicator did not address this response to the payment claim. By Its terms it may well have qualified as a payment schedule. Rather, the adjudicator found that no payment schedule was delivered.

[16] On 6 March 2006 the claimant submitted an adjudication application. On 7 March 2006 the builder was notified of the referral of the application by RICS Dispute Resolution Service to the adjudicator and his acceptance of the referral.

---

7 Ex "EK-01" to affidavit of Emma Kilfoy sworn 28 April 2006 at p 12

8 Ibid at p 31

9 Ibid at p 17

[17] On 13 March 2006 the builder submitted to the adjudicator that at no time was there any construction contract in existence between it and the claimant and contended that the adjudicator had no power to make a decision under the terms of BCIPA.

[18] On 17 March 2004 the adjudicator sought further submissions but only on the topics of the scope and value of the claimant's work, details of an obscured part of a document and the scope of the work to be performed by the builder. Significantly the adjudicator did not then, nor at any later time, make a separate determination to the challenge to his jurisdiction.

[19] On 22 March 2006 the builder made further submissions in response to the adjudicator's request. The builder reiterated the facts known to it about the scope of the claimant's contract with the owner and the disputed areas of the claim were identified. As to the scope of the work of the builder, reference was made to the provisional sum and the responsibility "to pay for the work as a third party request of the owner and receive compensation for such payments from the owner' financier.

[20] The claimant responded to the adjudicator's request by giving details of the scope of his work for the owner and the circumstances upon which he contended there was an "arrangement" for the builder to make the payments as had been previously canvassed. The submission then went on to allege for the first time, that the owner was acting as an owner-builder.[10]

[21] On the next day the builder objected to the repetition of the allegations about the circumstances relied upon to suggest there was an "arrangement" as being outside the scope of the adjudicator's request. There was a further objection to the receipt of an allegation that the owner was acting as an owner-builder.

[22] On 27 March 2006 the adjudicator furnished his decision which included a finding that the builder's first submission objecting to jurisdiction was an "adjudication response" which under the BCIPA the builder was not entitled to lodge, and the existence of an arrangement "under the contract as demonstrated by their conduct".

[23] In the result, the builder was required to pay the adjudicated amount of $13,797 of which $5,000 has since been paid by the owner.

[24] On 10 April 2006 the claimant registered an adjudication certificate in the Magistrates Court for the sum of $22,978.23 (which sum included the adjudicator's fees of $8,428.75). On 12 May 2006 this Court ordered that any enforcement proceeding based on the adjudication certificate was suspended until further order.

[25] Before making his decision the adjudicator identified for himself two fundamental issues:-

(a) Was there a construction contract to which the Act applied; and
(b) Was there an arrangement for payment which involved the respondent (the builder)?[11]

[26] The applicants before me contend that the adjudicator's approach to answering these questions gives rise both to errors of law and breaches of the rules of natural justice.

---

10 Ex EK-01 (supra) at p 72

11 Affidavit Christopher Taylor sworn 18 April 2006 ex CET-01 para 59

**Statutory scheme**

[27] It is well established that payment claims made pursuant to the BCIPA lead to a statutory remedy which is independent of, and unrelated, to any contractual obligations existing between the parties. See *Brodyn Pty Ltd v Davenport*[12]; *Lucas Sturt Pty Ltd v Council of the City of Sydney*[13]; *Jemstone Pty Ltd v Tritan Pty Ltd*[14]; *Beckhaus v Brewarraner Council*[15]. In *Beckhaus* Macready AJ summarised this position in the following terms:-

> "60. The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.
>
> 61. The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person who "is entitled to a progress payment under a construction contract."

[28] In *Brodyn* Hodgson JA said (at para [82]):-

> "In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the HBA."

[29] The starting point then is to consider to whom and to what does the statutory scheme relate. The answer is found in ss 12 and 17 of BCIPA which respectively provides:-

> "12. **Rights to progress payment**
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services under the contract.
> …
> 17. **Payment claims**

---

12 [2004] NSWCA 394 at para 82;
13 [2005] NSWSC 840 at para 21;
14 [2002] NSWSC 365
15 [2002] NSWSC 960 at para 60

> (1) A person mentioned in s 12 who is of claims to be entitled to a progress payment (the claimant) may serve a payment claim on a person who, under the construction contract concerned, is or may be liable to make the payment (the respondent)."

[30] Firstly, there must be a **contract for construction work** (as defined by s 10 of BCIPA) or for the supply of related goods. Secondly, the claimant must be entitled to a progress payment **under the contract**. Thirdly, the payment claim must be made on a person who is or may be liable to make payment under the **same construction contract**.

[31] A **construction contract** means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.[16]

[32] Thereafter, reliance upon this statutory remedy requires the claimant to have made a payment claim in accordance with s 17, an adjudication application in accordance with s 21, a reference of the application to an eligible adjudicator who accepts the application in accordance with s 23 and, finally, a decision by the adjudicator after compliance with s 26. There are five basic pre-conditions to the adjudicator's power to act referred to by Hodgson JA in *Brodyn*, though as he stated the list may not be exhaustive. In any event, behind those stated pre-conditions there are various procedural requirements to which reference need not be made at this point.

[33] When considering the cases decided in New South Wales, there is a point of distinction because there the legislature has excluded judicial review which yet remains available in Queensland. Commenting upon this exclusion, Hodgson JA said in *Brodyn* (at para [55]):-

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

---

16 See Schedule 2 of BCIPA

> determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance."

[34] There is a continuing debate as to whether only a "substantial" denial of natural justice" will trigger the Court's review or whether any breach of the rules of natural justice will suffice. Though the Court of Appeal in New South Wales has refused a formal re-examination of these propositions, concern has been expressed about the effect of any noncompliance with the decreed statutory requirements. In *Co-ordinated Construction Co Pty Ltd v J M Hargreaves (NSW)Pty Ltd*[17] Basten JA drew attention to this debate. He referred particularly to the remarks of McHugh J in *SAAP v Minister for Immigration*[18] as being apposite. His Honour said (at para [77]):-

> "77. …There can be no "partial compliance" with a statutory obligation to accord procedural fairness. **Either there has been compliance or there has not.** Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act. Any suggestion by the Full Federal Court in *NAHV* to the contrary should not be accepted." (my emphasis)

[35] What an adjudicator must have regard to, is found at s 26(2) of BCIPA as follows:-

> "(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."

[36] The preponderance of authority is that if the adjudicator has in a bona fide way considered each of those matters it does not matter that "whether or not the decision is actually made reflects a correct understanding of the legal principles derived from those sources".[19] *Brodyn* (supra); *Musico v Davenport* [2003] NSWSC 977 (McDougall J); *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (Palmer J).

---

17 [2005] NSWCA 228

18 [2005] HCA 24

19 *Co-ordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* per Basten JA at [78]

[37] A clear breach of the statutory requirements to accord natural justice undoubtedly results in invalidity of the decision. The builder here contends that there was also a breach of the general rules of natural justice by reason of the builder not being heard on some issues. The legislative scheme obviously limits the extent to which the rules of natural justice apply. But in the determination of the jurisdictional fact which may have financial and reputational consequences for the person affected there is nothing in the legislation which excludes resort to these principles. In *Re Refugee Review Tribunal; ex parte Aala*[20] the relevant Act laid down a particular framework for the conduct of that Tribunal in its review of a delegate's decision. The issue in that case was whether because of a general lack of procedural fairness a writ of prohibition would issue pursuant to s 75 of the *Constitution*. From the joint judgment of Gaudron and Gummow JJ (Gleeson CJ agreeing) the following appears (at para [59]):-

> "However, the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for "trivial" breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, there will have been jurisdictional error for the purposes of s 75(v)."

[38] McHugh J said (at [101]):-

> "One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding."

[39] I should refer to the statement of the majority (Mason CJ, Deane and McHugh JJ) in *Annetts v McCain*[21] where the following appears:-

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment:"[22]

---

20 (2000) 204 CLR 82

21 (1990) 170 CLR 596

22 Ibid at p 598

[40] It seems to me that a breach of a fair hearing rule on the determination of the jurisdictional fact is apt to allow for the quashing of an adjudicator's decision under the *Judicial Review Act* ("JRA").

**Source of power to review**

[41] The builder argues that the adjudicator's decision is an administrative decision and falls to be reviewed within Part 3 of the JRA. The claimant contends that the decision is not of an administrative character. If a review is to be undertaken, it must satisfy the requirements for such review pursuant to Part 5.

[42] In my view the relief is appropriately sought under Part 5 of JRA. 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 ss 41 and 43 of JRA. It seems to me therefore that the Court has jurisdiction to quash an adjudication decision on the basis of an error law on the face of the record. See *Brodyn* (supra) at paras [49] and [50]). I shall adopt the approach suggested by Hodgson JA that for "a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not, in truth, be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable."[23]

[43] In such circumstances the relief available under JRA will include a prerogative order or injunction or declaration as provided by s 47.

**Adjudicator's findings**

[44] Against the background of facts referred to above the adjudicator made his decision proceeding on the following findings:-

> "67. The Owner has made arrangements with the Respondent (the builder) for the Respondent to receive Payment Claims from the Claimant and for it to make payments to the Claimant. The Respondent was to be reimbursed by the financial institution through which the Owner had arranged loan finance for the construction work.
>
> 68. This arrangement was made through the contract between the owner and the Respondent which contained a provisional sum of $21,500 for the supply and installation of joinery.
>
> 69. Under the arrangement made by the Owner, the Owner received the administrative benefit of making payments for the Claimant's work through an existing loan facility; the Respondent was in a no risk situation, with the protection of its own contract with the Owner and an assurance that it would be reimbursed for the amounts paid to the Claimant.

---

23 *Brodyn* (supra) at para [52]

70. Section 17(1) of the Act defines the Respondent as "a person who under the construction contract concerned, is or maybe liable to make the payment".

71. This definition is consistent with the role of Vis Constructions Pty Ltd.

72. The parties are in agreement with this arrangement under the contract as demonstrated by their conduct. The Claimant has submitted two payment claims addressed to the Respondent and the Respondent has made two separate payments to the Claimant.

73. The principles in *Okaroo Pty Limited v Vos Constructions and Joinery Pty Limited* establish that the parties can rely on arrangements established by conduct.

74. The Claimant is entitled to regard Vis Constructions Pty Limited as the Respondent."[24]

[45] The adjudicator then concluded:-

"75. There is a construction contract in place between the Owner and the Claimant to which the Act applies.

76. There was a separate construction contract in place between the Owner and the builder which included a provisional sum for $21,500 to be expended on kitchen and general joinery.

77. There was an arrangement put in place by the Owner for Vis Constructions Pty Ltd to make payments to the Claimant, through this separate contract.

78. The parties accepted this arrangement and the Claimant addressed and submitted its payment claims to Vis Constructions Pty Limited who made the subsequent payments.

79. Vis Constructions Pty Limited is, in terms of the Act, "a person who under the construction contract concerned is or may be liable to make the payment", the Respondent. The liability arises through the Respondent's agreement to process the Claimant's payment claims through its own accounts (even though it did not enter into a formal subcontract agreement with the Claimant). The Respondent was directly linked through its role under the building contract through to the Owner and the contract between the Owner and the Claimant.

80. The payment process has been agreed between the parties by conduct and performance on at least two occasions.

81. The Claimant is entitled to payment made up as follows:

---

[24] Affidavit of Christopher Taylor sworn 18 April 2006 ex CET 01

| | |
|---|---|
| Amount of Payment Claim | $39,562.00 |
| Less Paid | $25,583.00 |
| Outstanding Amount | $13,979.00"[25] |

**The issues**

[46] The applicants seek a review of the adjudicator's decision on the following grounds:-

> "(a) The adjudicator did not have jurisdiction to make the decision;
> (b) The adjudicator breached the rules of natural justice;
> (c) The adjudicator failed to observe procedures that were required by BCIPA;
> (d) The decision involved errors of law;
> (e) There was no, or insufficient, evidence or other material to justify the decision;
> (f) The decision was an improper exercise of power conferred by BCIPA."

[47] In the light of the discussion about the statutory scheme the issues of lack of jurisdiction, breach of rules of natural justice, failure to observe procedures and the improper exercise of power come together in a consideration of whether the pre-conditions essential for a valid determination have been met. These pre-conditions concern compliance with the basic requirements, a bona fide attempt to exercise the statutory power and no denial (or no substantial denial) of the measure of natural justice required by the Act. The remaining issues refer to errors of law and sufficiency of evidence which are non-jurisdictional matters – I am satisfied these are not proper grounds upon which to base a review of this kind.

**The jurisdiction question**

[48] The builder and owner argue that the primary basic requirement – the existence of a construction contract between the claimant and the builder – cannot be established. This argument is put on two bases. Firstly, the so called arrangement identified by the adjudicator is not one applicable to finding a construction contract as defined and, secondly because the owner was a "resident owner", the provisions of BCIPA, by virtue of s 3(2)(b), do not apply.

[49] It is common ground that there was an agreement for the carrying out of construction work between the owner and the builder. Disregarding the owner's claim to be a resident owner, that agreement was one to which the BCIPA, prima facie, applies. It is common ground and consistent with the adjudicator's findings that there was no contract between the builder and the claimant. Rather, the adjudicator sought to identify "an arrangement" falling within the definition. He relied upon the decision of *Okaroo Pty Limited v Vos Constructions and Joinery Pty Limited*[26]. In that case Nicholls J identified the distinction between "agreement" and "arrangement". He said:-

> "41. With regard to the authorities, and to its context in the Act, in my opinion the term "arrangement" in the definition is a wide one, and encompasses transactions or relationships which are not legally

---

25 Affidavit Christopher Taylor ex CET-01

26 [2005] NSWSC 45

> enforceable agreements. The distinction in the definition between "a contract" and "other arrangement" is intended by the legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that "contract" is to be given its common law meaning and that "arrangement" means a transaction or relationship which is not enforceable at law as a contract would be. Accordingly I reject the submission for Okaroo that the term "arrangement" should be understood to mean an agreement which is tantamount to a contract enforceable at law.
>
> 42. In deciding whether a contract or other arrangement is within the definition of construction contract the only matter for consideration is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. There is no other requirement or qualification which is expressly or by implication included in the definition which must be satisfied. It may be safely assumed that had the legislature intended any additional requirement or qualification it would have included it in the definition. (Contrast, for example, s 22(2)(b) whereby the adjudicator is, in terms, directed to consider the provisions of the construction contract from which the application arose in determining an adjudication application)."

[50] The process of reasoning followed by the adjudicator to conclude that there was an arrangement within the definition, was to find that because the owner made an arrangement with the builder to receive an invoice from the claimant and make a payment from a provisional allowance, such action made the builder "a person who, under the construction contract concerned is or may be liable to make the payment".[27]

[51] The case *Okaroo* does not support any such proposition. Nor can it be said that an arrangement to make a payment from an owner loan facility is "construction work or the supply of related goods" by the claimant. The circumstances in *Okaroo* were quite different. There the arrangement was clearly identified and formed part of the inducement for the respondent contractor to become involved in the project. Until the arrangement concerning payment was entered into, the respondent, who was a nominated subcontractor, was not willing to accept engagement under the construction contract. In short the arrangement was an integral part of the relationship between the parties. That was not the situation here.

[52] Mr Jonsson of Counsel for the claimant argues that the definition of **construction contract** is a broad statutory construct. He sought to characterise it as a tri-partite arrangement whereby the claimant performed work in a direct sense for the builder and for the owner. By doing the work or supplying the goods the claimant has released the builder from the performance of the work he agreed to do under the contract.

---

[27] See paras 70 of Adjudicator's Reasons. Ex CET-01 (supra)

[53] I do not accept this submission because there was no obligation on the builder at any time to perform this work. In the construction contract between the builder and owner it was expressly excluded. The allowance of a provisional sum in the contract was, in my view, no more than a device to facilitate the flow of borrowed funds. It did not commit the builder to do any work or to be involved in any work.

[54] The main criterion for the adjudicator's jurisdiction is the existence of a "contract, agreement or arrangement" which falls within the definition. It must be established that there was an undertaking by one party (the claimant) to carry out construction work or supply related goods to another party" (the builder). I do not consider it necessary or helpful to descend into the factual debate on whether the builder assumed a liability (without apparent consideration) to pay for the work. The adjudicator's reliance upon the "combined actions" of the parties does not in the circumstances of this case establish the existence of any agreement or arrangements such as to comply with the definition of construction contract.

[55] This was the substance of the preliminary objection taken by the builder – that there was no construction contract which linked it to the work done by the claimant. This point goes to whether the adjudicator could undertake the adjudication at all. It was a point which was not dealt with specifically by the adjudicator. Rather, he concluded that the objection was an adjudication response which, by reason of the fact that the builder had not given a payment schedule, it was not something to which he could have regard.[28]

[56] Notwithstanding this, the adjudicator determined that there was such an arrangement based on the fact that the owner "received the administrative benefit of making payment for claimant's work through an existing loan facility". He went on to observe that the builder was "in a no-risk situation with the protection of his own contract with the owner".[29]

[57] There was an obvious risk which in fact came to pass. The builder was ordered to pay the claimant's account for work about which it had no knowledge and over which it had no control. The funds of the builder would be committed until such time as the owner and the claimant resolved their dispute, a matter over which the builder has no control. In my view there was a risk and it was of a kind which was not contemplated by the terms of the contract entered into by the builder nor by the terms of any conversation that has been offered in evidence.

[58] The claimant's assertion that the arrangement arose from Mrs Kilfoy's conversation with Keith Vis, from conversations with the owner and by the builder's conduct in paying two accounts[30] cannot be maintained. Firstly, the words of any conversation are not deposed to and the statement of Mrs Halfhyde does not bind the builder. Further, whilst the remarks are consistent with an arrangement for payment of an account, this does not equate to an arrangement under which the claimant undertook construction work as defined on behalf of the builder. In my view, the adjudicator's reliance upon *Okaroo* in the circumstances was misconceived. There the arrangement was made between the relevant parties and "it commenced before the

---

28 Affidavit of Christopher Taylor sworn 18 April 2006 ex CET-01 paras 56 and 57.

29 Ibid at para [69]

30 Ex EK 51 to Affidavit of Emma Kilfoy sworn 28 April 2006 at p 71

subcontract between Vos and Consolidated was made".[31] In that sense the present facts are clearly distinguishable from those attaining in *Okaroo*.

[59] Accordingly, it is my view that the adjudicator embarked upon the adjudication without there being a construction contract upon which his statutory power to do so depended. This is a jurisdictional error resulting in non-compliance with the pre-conditions upon which the adjudicator's authority depends. For this reason his decision is void and ought to be set aside.

[60] I turn now to the contention that the contract between the owner and the claimant is not one to which BCIPA applies. The owners argue that this was a contract entered into by them as a resident owner intending to live in the dwelling. As such it falls within the purview of the *Domestic Building Contract Act* 2000. The building work, prima facie, falls within the definition of **domestic building work** in s 8 of that Act. The adjudicator however at paragraph 25 of his decision found it was **construction work** without reference to the point of distinction which had been drawn to his attention. The distinction between **domestic work** and **construction work** if it applied, would result in the kitchen cabinet contract being excluded from the provisions of BCIPA. See s 3(2)(b) which provides:-

> "3(2) The Act does not apply to -
>
> (b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or…"

This exclusion is negated where the resident owner "is a building contractor within the meaning of the QBSA: Section 3(5)(b). As mentioned above Mr Halfhyde is a plastering contractor and the holder of a relevant licence. Were he alone the resident owner, he would not be entitled to the exclusion provided by s 3(2)(b).

[61] It would appear that the adjudicator assessed that Mr and Mrs Halfhyde jointly came within that exception, though he gave no reasons for doing so. He stated at paras [63] and [64] as follows:-

> "63. The Owner is a building contractor as defined in the Queensland Building Services Authority Act 1991 and has a QBSA Licence No. 1064969.
>
> 64. Accordingly, the Owner is not included as a resident owner under the Act, and there is therefore a valid construction contract, between the Owner and the Claimant, under the Act."[32]

[62] The question whether the exception could apply to Mrs Halfhyde or, more relevantly, to the joint entity may have posed some difficulty for the adjudicator. He has come to a decision which might well be wrong in law. He has not given any, or any adequate, reason for his decision or this contested issue. This may result in non-compliance with the requirement of s 26(3)(b). But if he has otherwise considered the provisions of the Act as he was required to do, an error of law of this kind is a non-jurisdictional error and is not reviewable in these proceedings.

**Denial of fair hearing**

---

31 [2005] NSWSC 45 at para [43]

32 Affidavit Christopher Taylor sworn ...ex CET-01

[63] Both the builder and the owner argue that they were not given a proper opportunity to be heard. I shall confine my consideration to the position of the builder who alone is affected by the adjudication decision though noting that the affidavit evidence of Mr and Mrs Halfhyde supports the factual position contended for by the builder.

[64] The first concern raised is that the submissions from the builder's solicitors that the adjudicator lacked jurisdiction to determine the adjudication application was not properly considered. As to this, the adjudicator claimed to have considered the submissions though he was not required to do so as it was an adjudication response which the builder was not entitled to make.[33] One consequence of this is that the adjudicator did not address in a direct way the builder's objection to the application that there was no construction contract, finding instead an arrangement referred to above.

[65] The second concern was that the adjudicator reached a conclusion about the existence of an arrangement on a basis, not suggested by either the builder or the claimant, without the builder being given the opportunity to be heard. As to this point, the claimant contends that the adjudicator was doing no more than relying on the facts before him which allowed him to infer from the conduct of the parties that there was an arrangement within the definition.

[66] Mr Jonsson on behalf of the claimant submits that where, as here, the statutory scheme stipulates in detail the extent of the entitlement to be heard there is little scope for the implication of rights to procedural fairness going beyond what the statute specifically provides. He relied particularly on the remarks of Brennan J in *Kioa v West*[34] at p 614 but these had been overtaken by the majority decision in *Annetts* referred to in paragraph 39 hereof. Brennan J in *Annetts* remained in respectful dissent.[35]

[67] This question was also considered by Hodgson JA in *Brodyn*. His Honour there came to the view that "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".[36] Nonetheless the exercise of that power requiring those considerations is regulated by the rules of natural justice: *Annetts v McCann* at p 598. See also *Ainsworth v Criminal Justice System*[37].

[68] It is clear that the adjudicator has confused the nature of the submissions made on behalf of the builder going to the existence of a construction contract upon which his power to adjudicate depended. The question of whether or not to embark upon the adjudication is not constrained merely by the procedural requirements of the BCIPA. The determination on whether to proceed at all depended on such questions as to whether the claimant was entitled to make a payment claim and only then was an adjudication response relevant. The builder was entitled to have the challenge to the adjudicator's jurisdiction determined as a separate issue and upon the evidence placed before the adjudicator. The adjudicator found the parties "are in

---

33 Adjudicator's reasons paras 56-58
34 (1985) 159 CLR 550
35 Ibid at p 606
36 *Brodyn* (supra) at para 56
37 (1991) 175 CLR 564

agreement with the arrangement as demonstrated by their conduct. The parties were not agreed as to what the actions were nor has the adjudicator revealed what actions he had in mind. Given that neither party contended for an arrangement of the kind the adjudicator inferred, they ought at least to have had the opportunity to be heard on what competing inferences were open based upon such conduct. In all the circumstances it seems to me that the adjudicator has not bona fide addressed the requirements of s 26(2) of BCIPA. For this reason also the decision in my view is void.

[69] The applicants have raised other matters identifying what they contend were errors of law and errors of fact and submitting these might properly be taking into account in the review of an administrative decision. I do not propose to deal with those matters having regard to the opinion I have expressed the nature of the review and its limitations under BCIPA.

**Conclusion**

[70] For the reasons which I have mentioned I am satisfied that the adjudicator acted without any jurisdictional basis and as well failed to accord to the builder a fair hearing. The adjudication decision should therefore be quashed. I will hear further argument on the question of costs and whether it is necessary for this Court to make further orders as to the resolution of the dispute between the claimant and the owner.

**Orders**

[71] 1. Declare that the adjudication decision of the first respondent, reference no. 1064504 26, purportedly made pursuant to s 26 of the *Building and Construction Industry Payments Act* 2004 is void.

2. Order that the second respondent be permanently restrained from further proceedings on the adjudication certificate issued under s 30 in respect of the said adjudication decision.

3. Leave to the parties to make written submissions on costs (including the costs of adjudication) within 28 days from the date hereof.