SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Bulk Water Supply Authority t/a Seqwater v McDonald Keen Group P/L (in liq) & Anor* [2010] QCA 7
PARTIES:	**QUEENSLAND BULK WATER SUPPLY AUTHORITY trading as SEQWATER** ABN 75 450 239 876 (plaintiff/applicant/appellant) **v** **MCDONALD KEEN GROUP PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 090 921 949 (first defendant/first respondent) **PHILLIP DAVENPORT** (second defendant/second respondent)
FILE NO/S:	Appeal No 8903 of 2009 SC No 9365 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2009
JUDGES:	Holmes and Fraser JJA, Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where adjudication of claim for recovery of a progress payment – where adjudicator allowed recovery – where judgment obtained by filing adjudicator's certificate – where legislation prohibited challenge to adjudicator's decision – whether application for declaration that adjudicator's decision void and for order setting aside judgment amounted to impermissible collateral attack on judgment. ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – POWERS, DUTIES AND DISCRETION OF ARBITRATOR – GENERALLY – where legislation specified matters an adjudicator must take into account in

making a determination – where adjudicator required to make a bona fide attempt to exercise powers under legislation – whether test for good faith broad or narrow

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where trial judge upheld the result of the adjudication – whether trial judge correct in finding that the adjudicator acted in good faith and accorded the respondent natural justice in determining the application.

Building and Construction Industry Payments Act 2004 (Qld), s 7, s 26(1), s 26(2), s 31(1), s 31(4), s 100
Building and Construction Industry Security of Payment Act 1999 (NSW), s 22(2), s 25(4)(a)

BMD Major Projects Pty Ltd v Victorian Urban Development Authority [2007] VSC 409, cited
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, applied
Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd [2007] NSWCA 32, cited
Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd [2005] NSWSC 1129, cited
Minister for Immigration and Multicultural and Indigenous Affairs v NAOS of 2002 [2003] FCAFC 142, cited
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431, cited
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749; [2002] FCAFC 361, cited

COUNSEL: R A Holt SC, with P D Tucker, for the appellant
J Bond SC, with M Ambrose, for the first respondent
No appearance for the second respondent

SOLICITORS: Minter Ellison for the appellant
Mullins Lawyers for the first respondent
No appearance for the second respondent

[1] **HOLMES JA**: The respondent, McDonald Keen Group Pty Ltd ("MKG"), was the successful tenderer for construction of a water pipeline. It made a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the *Payments Act*") in respect of excavation of rock which, it said, comprised a "latent condition" within clause 12.1 of the construction contract. The claim was adjudicated; the adjudicator determined an amount of $11 million as the amount of the progress payment to be made by the appellant, Queensland Bulk Water Supply Authority ("QBWSA"), to MKG.

[2] As it was entitled to do under s 31(1) of the *Payments Act*, MKG filed the adjudication certificate as a judgment. QBWSA sought a declaration that the

adjudication decision was void and an order for the setting aside of the judgment. It argued that the adjudicator had not acted in good faith, because rather than applying the construction contract, he had sought to produce an outcome which seemed fair; he had taken into account and treated as a contractual document a facsimile sent by QBWSA to MKG in such a way as, in effect, to construct a notional contract upon which he made his decision, rather than the construction contract; and he had failed to accord QBWSA natural justice, since it was given no notice that he would act on the document in that way.

[3] The learned judge at first instance found against QBWSA on each of those contentions and dismissed the application. QBWSA appeals that decision, arguing that the learned judge was wrong in the conclusions he reached.

Background

[4] In the course of the tender process, QBWSA's project manager provided tenderers with a geotechnical report in relation to the land where the pipeline was to be constructed. That report showed that 190 test pits had been excavated at various points, using an eight tonne excavator, and it set out in tabular form the results, including the depths to "test pit refusal". It suggested that excavations to greater depths could be achieved using a 20 tonne excavator, but went on to say:

> "In some areas however, where the rock is massive with few joints or defects, production rates will be very low and blasting may be required. It is not possible to identify such areas from the investigations undertaken."

[5] Relevant to that report, the job specification which formed part of the construction contract contained this clause:

> "14.1 The information in the Geotechnical Report represents the inference drawn by the operator from drilling and test pit excavation operations. Neither the Principal nor the Superintendent represents that information made available indicates completely the actual conditions nor warrants the correctness of the designation, delineation or position of naturally occurring materials shown or other information made available, and Tenderers are required to inform themselves fully in accordance with the General Conditions of Contract."

[6] Tenderers were required to quote against a Bill of Quantities provided by QBWSA. Against Item 11, for "Excavation in rock", MKG recorded an amount of $30,000 as a "provisional sum". The Bill of Quantities also included, as Item 47, a further "provisional item for excavation in rock", to be expressed per 100 cubic metres; against it, MKG quoted a rate of $250 (presumably per cubic metre), with a total of $25,000. By facsimile dated 13 April 2006 (the document which QBWSA says the adjudicator impermissibly treated as a contractual document), QBWSA, through its project manager, advised that the tender was non-conforming because of its inclusion of the provisional sum. It continued:

> "Adequate information has been provided in the documentation to allow this activity to be priced as a lump sum."

MKG responded by letter in these terms:

> "The express condition of Item 11 being a Provisional Sum can be deleted. The allowance of $30,000.00 for rock in this Item remains as part of our Lump Sum."

QBWSA accepted the tender in that form.

[7] Clause 12.1 of the general conditions of the construction contract dealt with "latent conditions", defining them as:

> "(a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially and substantially from those physical conditions which should reasonably have been anticipated by an experienced and competent contractor at the time of tender if such contractor had -
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> (i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and
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> (ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries;
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> (iii) inspected the Site and its surroundings; and
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> (b) any other conditions which the Contract specifies to be Latent Conditions."

[8] MKG in fact encountered a good deal of hard rock in excavating for the pipeline and lodged payment claims under the latent condition clause, which were rejected, culminating in the adjudication application and decision. In its final payment claim, the subject of the adjudication application, it calculated the quantities of rock excavated by reference to pipeline trench volume over a distance of 14.2 kilometres, resulting in a claim in respect of 40,304 cubic metres. Its earlier claims related to a distance of only 5.115 kilometres.

The *Payments Act*

[9] The object of the *Payments Act* is expressed, in s 7, to be ensuring that persons carrying out construction work or supplying related goods and services under a construction contract are able to receive, and entitled to recover, progress payments. Section 8 provides for that object to be achieved by, *inter alia*, establishing a procedure for the making of payment claims, the referral of disputed claims to an adjudicator and the payment of the progress payment decided by the adjudicator.

[10] Part 3 of the Act sets up a procedure for recovering progress payments; Div 2 of that Part deals with adjudication of disputes. Section 26 of the *Payments Act* provides for what an adjudicator must decide and what he may consider in doing so:

> "(1) An adjudicator is to decide—
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> (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any amount became or becomes payable; and

(c) the rate of interest payable on any amount.

(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."

[11] Section 31 is the provision which enables filing of the adjudication certificate as a judgment for debt. It also provides, in s-s 4:

"(4) If the respondent commences proceedings to have the judgment set aside, the respondent—

(a) is not, in those proceedings, entitled—

(i) to bring any counterclaim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge the adjudicator's decision; and

…"

[12] Section 100 of the *Payments Act* preserves the rights of the parties to take civil proceedings under the construction contract. It requires the Court in any such proceedings to allow for any amount already paid under Pt 3 of the Act in its order, and to order restitution of any such amount; the Court may also make "any other orders it considers appropriate".

The adjudication decision

[13] The adjudicator began his decision with a consideration of the latent condition claim made under clause 12.1(a). He identified the questions that the claim raised, as to:

the physical conditions which should reasonably have been anticipated by an experienced and competent contractor; whether the conditions encountered were materially and substantially different; and whether clause 14 of the job specification presented any bar to the claim. As to the valuation of the claim, he noted that the issues were, whether MKG had proved its excavation of the rock the subject of the claim, and the rate at which the latent condition for excavation in rock should be valued. He had also to consider clause 12 in the further context of whether proper notice had been given under clause 12.2. His conclusions in that regard were not the subject of any ground of appeal.

[14] The adjudicator set out the history of the contract and of MKG's first and second tenders. In respect of the first tender, he observed that if the quantity of rock excavated over the item 11 allowance of $30,000 were accepted as the 40,304 cubic metres claimed in the payment claim, and working on the basis of the Item 47 provisional rate of $250 per cubic metre, MKG had effectively tendered for rock excavation at a price of $10,046,000, exclusive of GST. That tender would have been in line with the other tenders for the project. QBWSA had complained in its adjudication response that that claim was almost as much as the entire contract sum again, but it was no more than what MKG could have claimed as a provisional sum at the rate in item 47, had its first tender been accepted.

[15] After discussing the content and effect of the first tender, the adjudicator moved on to deal with the circumstances in which the second tender was made. He adverted to the effect of clause 14.1 of the job specification. The geotechnical report "left a lot to be desired", and QBWSA had, through the inclusion of clause 14.1, specifically disavowed any guarantee of the nature of the ground conditions. However, in the facsimile of 13 April 2006, QBWSA had asserted, inconsistently with clause 14.1, that adequate information had been provided in the documentation to allow the pricing of rock excavation as a lump sum. That amounted, the adjudicator said, to a request to MKG to make a new offer based on its assessment, from the information available, of a lump sum price for excavation. In fact, the report did not contain adequate information for the purpose; but to the extent that it was an assurance from QBWSA that the information was adequate, it was new information provided to MKG, which other tenderers did not have.

[16] Under the latent condition clause, the adjudicator said, the principal bore the risk; it could not be said that a contractor should reasonably anticipate the total quantity and hardness of rock, where the information provided did not enable that to be done. Where the geotechnical report said that it was not possible to identify areas of massive rock which would require blasting, it was reasonable for MKG to proceed on the basis that the conditions in those areas constituted a latent condition: the quantity of rock which could not reasonably be assessed at the time of the second tender.

[17] Clause 14 of the job specification did not protect QBWSA; the issue was what should have reasonably been anticipated by an experienced and competent contractor having regard to the geotechnical report; and where it provided no specific information as to the rock below the depth of refusal, it left QBWSA exposed to latent condition claims. If QBWSA or its project manager thought that the apparent difference between MKG's tender and the other tenders was the result of a flawed estimate, they might have been guilty of unconscionable conduct; but the better view was that they had misconstrued the contract and did not appreciate

that quantities of rock in excess of the $30,000 estimate could be the subject of a latent condition claim.

[18] QBWSA had relied on a further report prepared by geotechnical engineers (the "Golder report") for the purpose of the adjudication. Its author had been asked to consider whether the physical conditions which MKG encountered were "materially and substantially different to those physical conditions which should have been expected". He responded with his opinion that "the physical conditions encountered were not different to those which could have been expected". The adjudicator identified a number of unsatisfactory features of that answer: there was a difference between "could" and "should"; the question should have asked, not simply whether the physical conditions were materially and substantially different, but whether the quantity of hard rock encountered was materially and substantially different from what an experienced and competent contractor should reasonably have anticipated, and, if so, by how much; and the writer had not taken into account QBWSA's representation that adequate information had been provided to allow pricing as a lump sum.

[19] A Mr Morley, who had supervised excavation and bore drilling for the purposes of the geotechnical report, provided a statement for the adjudication. The adjudicator noted that the geotechnical report had simply indicated that "test pit refusal" occurred using an eight tonne excavator at a level higher than the bottom of the excavation required for the pipeline purposes, and did not describe the material below the level of refusal. But Mr Morley in his statement observed that the material was hard rock in most holes, something not disclosed in the geotechnical report. (It was possible, the adjudicator observed, in light of Mr Morley's knowledge, that the statement in Clause 14 as to the geotechnical report representing the operator's inferences was misleading and deceptive, but that was not a matter he was called upon to decide.) None of the other tenderers had sought to test further or discuss the test pit digging with Mr Morley; it followed that MKG in not doing so had not failed to act as an experienced and competent contractor would have acted.

[20] The design manager for the project, Mr Betts, had also provided a statement. Since it was in discussing it that the adjudicator referred to fair recompense, it is worth setting out the relevant passage from the adjudication decision in full:

> "Mr. Betts says he thought the claimant's representatives were aware that they would encounter substantial quantities of rock. He must have been aware that $30,000 was an inadequate lump sum for excavation of substantial quantities of rock. *How did he think the claimant would be fairly recompensed if not by way of a latent condition claim?* He does not say that he was of the opinion that the allowance of $30,000 for rock excavation was inadequate. He does not say that he was of the opinion that in confirming a lump sum for rock excavation the claimant had made a miscalculation." (Italics added).

[21] The adjudicator observed that if the project manager had not invited MKG to make a second tender, or had not made representations about the adequacy of the information provided, or if it had disclosed in the geotechnical report what Mr Morley had deduced as to the existence of substantial quantities of hard rock, MKG would not have had to make the latent condition claim. He did not consider

the project manager had acted impartially, but, he said, that did not affect whether there was a latent condition.

[22] The adjudicator concluded that most of the rock excavation involved a latent condition. MKG had offered an estimate of the additional rock based on a "schematic long section" of the conditions it encountered, rather than actual field measurements. QBWSA had furnished an expert's report, pointing out that MKG's earlier claims were for lesser quantities of rock excavated, but it did not contend that those figures should be relied on; nor had it provided an alternative figure. The adjudicator rejected the criticisms of QBWSA's expert and accepted the estimated sum of 40,304 cubic metres provided by MKG as reasonable. He regarded the fact that the quantities claimed exceeded the previous claims as irrelevant; it was explained by the fact that MKG was now claiming for agreed, rather than actual, costs. QBWSA could have inspected and measured the actual quantities of rock as excavated; it had not done so.

QBWSA's contentions

[23] Because QBWSA's contentions at first instance were largely repeated here, and the grounds of appeal were, essentially, that the learned primary judge had failed to accept their correctness, it is convenient to set them out at this point.

[24] QBWSA said that the adjudicator was required to consider whether a latent condition existed by reference to the contract and the submissions made on the adjudication. Instead, he had been motivated by a desire to ensure that MKG was fairly recompensed; he had used that very term in addressing Mr Betts' evidence. His consideration of MKG's first tender was irrelevant, but it was indicative of that impermissible intent. He had disregarded clause 14 of the job specification and clause 12.1(a) of the general conditions, in order to ensure that MKG was fairly recompensed.

[25] In that endeavour, the adjudicator had treated the facsimile of 13 April 2006 as making a new offer to MKG. It was not simply the provision of further information; it rewrote the obligations in the contract: MKG had only to make a lump sum tender for that excavation in rock which could be quantified from the geotechnical report and could recover for the balance as if it were a provisional item. He had referred to the figure of $30,000 as though it represented a separate lump sum in the contract for the quantifiable excavation, when, in fact, on the second tender, the provisional allowance in that amount had been merged into the overall lump sum.

[26] The adjudicator had redefined clause 12.1(a): the latent condition included any rock that might be encountered whose precise quantities could not be calculated, as opposed to physical conditions differing materially and substantially from those which should reasonably have been anticipated. In relation to clause 12.1(a)(iii), he had interpreted the facsimile in such a way as to render any inspection by MKG of the pipeline route irrelevant, because it would not permit a precise quantification of the rock requiring excavation. By noting that no other tenderer had sought to arrange further testing or discuss the test pit result with Mr Morley, the adjudicator had sought to justify his conclusion that MKG was not to be criticised for failing to make any investigations. He had failed to make any reference to an authority, *BMD*

Major Projects Pty Ltd v Victorian Urban Development Authority,[1] to which both parties had referred him. Had he done so, he could not have reached the conclusions he did about risk allocation.

[27] The adjudicator's criticism of the expert who had used the word "could" instead of "should" was capricious and further indicative of a desire to ensure that MKG was fairly recompensed; as was his statement that the project manager and QBWSA accepted or "should have accepted" any excavation over $30,000. His language, and in particular his references to a "misleading and deceptive" statement, unconscionable conduct and lack of impartiality on the part of QBWSA and its project manager, indicated a failure to make a *bona fide* attempt to reach his decision by reference to the submissions, the documents provided by the parties, and the relevant terms of the contract as to latent conditions.

[28] The onus lay on MKG to prove the actual quantities of rock that it claimed to have excavated, but the adjudicator had accepted a theoretical calculation. His disapproval of QBWSA's failure to provide an estimate of quantity did not entitle him to disregard the absence of evidence of the quantities of rock excavated. He had evidence, in the report of QBWSA's expert, of the amounts that MKG had previously claimed during the course of the work, but had ignored it and had failed to address the discrepancy between those claims and the final progress claim. The case was similar to *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*,[2] in which an adjudicator accepted a claim which was unsupported by any evidence.

[29] The arbitrator's failure to have regard to the parties' submissions, his "highly artificial" construction of the facsimile and his willingness to overlook the need for actual evidence to support the claim led inevitably to a conclusion that he had focused, not on the task required by the Act, but on how to overcome the terms of the contract in order to ensure that MKG was fairly recompensed. And in relying on the facsimile to overcome the effect of clause 14 of the job specification and clause 12.1(a) of the general conditions of the contract, notwithstanding that the parties had not submitted for any such result, and without opportunity given to make submissions on the point, the adjudicator had denied natural justice to QBWSA.

[30] In respect of the judgment appealed from, QBWSA complained that the learned primary judge had erred: in failing to observe that the whole of the adjudicator's reasons demonstrated the impermissible intent contended for; by forgiving individual elements of the reasons, including by an acceptance that reference to the relevant contract clauses satisfied the requirement that the adjudicator "have regard to" the contract; and in finding that the adjudicator's errors were excusable in light of the limited time available to deliver his determination.

The judgment

[31] The learned primary judge took as his starting point for considering QBWSA's attack on the adjudication the condition identified as essential for validity in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*:[3] a *bona fide* attempt by the adjudicator to exercise his power under the legislation. The parties were at odds as

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1 [2007] VSC 409.
2 [2005] NSWSC 1129.
3 (2004) 61 NSWLR 421 at 422.

to the test by which the good faith requirement was to be assessed. The learned judge rejected MKG's contention that he should act on the test for good faith formulated in a number of Federal Court decisions, which focused attention on the actual state of mind of the decision-maker, requiring personal fault and a conscious intent to be "recreant to his duty". Those cases, his Honour noted, involved review of decisions under the *Migration Act* 1958 (Cth), and could be regarded as a product of construction of that Act, which contained a privative clause requiring particular consideration of whether the decision in question was capable of challenge.

[32] The statutory context in which the minimum requirements for a valid decision under the *Payments Act* fell to be determined was different: the adjudicator's decision had an interim quality. His Honour preferred the broader approach advanced by QBWSA: what was required of the adjudicator was a genuine attempt to exercise his power in accordance with the *Payments Act* provisions, and in considering the construction contract, a genuine attempt to understand and apply it. But on either approach, the adjudicator's decision was not void on the ground that he had not acted in good faith.

[33] As to whether the adjudicator had genuinely attempted to understand and apply the contract, his Honour observed that the latter had clearly been conscious of the provisions of clause 12.1, which he had reproduced and referred to repeatedly, and by reference to which he had reached his conclusion. The passages relied on by QBWSA were taken out of context. Properly assessed, they could be seen to be part of a response to QBWSA's submissions in its adjudication response or were part of an evaluation of witnesses' evidence. They did not form the basis of the adjudicator's application of clause 12.1.

[34] When the adjudicator referred to the facsimile, he did so in order to shed light on the question of whether the extent of hard rock to be excavated was a latent condition, having regard to the test in clause 12.1. He did not determine that under some other contract than the construction contract. If he had made any error in relation to the terms of the construction contract, that would not have invalidated his decision; it would simply be a non-jurisdictional error of law. The failure to mention *BMD Major Projects* did not indicate a failure to consider the case, and even if it did, that was not a matter which would invalidate the decision. Since his Honour did not accept that the adjudicator had decided the payment claim on some other basis than on a consideration of the construction contract, he did not accept there had been any breach of the requirements of natural justice by failing to give notice of an intended approach. There was evidence on which the amount of the claim could be determined, in the form of MKG's estimate; so a "no evidence" ground for claiming that the decision was void could not succeed.

MKG's contentions

[35] Counsel for MKG characterised QBWSA's arguments as challenges to the merits of the adjudicator's decision, disguised as attacks on its validity. Not content with that argument, however, MKG raised, by notice of contention, further questions as to whether the application below was competent and whether the learned primary judge had applied the correct test in his consideration of whether the adjudicator had acted in good faith.

Impermissible collateral attack

[36] Counsel for MKG argued that in seeking a declaration that the adjudicator's decision was void, QBWSA had mounted an impermissible collateral attack on the

judgment obtained by filing the adjudicator's certificate. Indeed, there was also a question as to whether the application to set the judgment aside was properly made; although s 31(4) appeared to contemplate the bringing of such an application, there was no obvious source of power for a trial judge to set the judgment aside. (The latter submission lost what small attraction it might have had when, in the course of argument, counsel conceded that, following it to its logical conclusion, even a judgment based on an arbitration decision obtained by fraud would be unassailable.)

[37] Counsel acknowledged that his contentions ran contrary to what had been decided in *Brodyn*, but he argued that there was a basis for not following that decision, in that there was a different legislative background in Queensland. A series of single judge decisions had accepted that adjudicators' decisions under the *Payments Act* were amenable to review under the *Judicial Review Act* 1991 (Qld). However, by amendment in 2007,[4] adjudicators' decisions under the *Payments Act* were excluded from statutory review under the *Judicial Review Act*. No equivalent state of affairs, either as to the applicability of statutory review, or its removal, had existed in New South Wales; that was a basis for not following *Brodyn*. Counsel did not seek to argue that *Brodyn* was "plainly wrong", so as to justify departure from it.[5]

[38] *Brodyn* concerned the *Building and Construction Industry Security of Payment Act* 1999 (NSW), cognate legislation to the *Payments Act.* Apart from some minor and inconsequential difference in the nouns used, s 25(4)(a) of that Act was in identical terms to s 31(4)(a) of the *Payments Act*. Hodgson JA (with whose judgment the other members of the Court agreed) observed that a judgment made by the filing of an adjudication certificate could be set aside on appropriate grounds, either as authorised by rules of court allowing for the setting aside of judgments obtained *ex parte*, or as implied by s 25(4) itself, when it referred to commencing proceedings to have the judgment set aside[6]. If the Supreme Court were to quash the arbitrator's determination or declare it void, that order could support the setting aside of the judgment on the basis that there was no determination to support it; to do so would not be to challenge the adjudication within the meaning of s 25(4), which assumed an existing determination which was challenged.

[39] I am unconvinced by MKG's argument that the availability of review under the *Judicial Review Act* and its subsequent removal by amendment create a different statutory context which would justify not following *Brodyn*. If anything, it seems to me that the amendment to the *Judicial Review Act* brought the availability of challenge to judgments based on adjudicators' decisions squarely into line with the position as it exists in New South Wales, reinforcing the appropriateness of following *Brodyn* on this point. From that follows an acceptance that s 31(4) does not preclude a declaration that the adjudicator's determination is void, or the setting aside of a judgment obtained by the filing of the adjudication certificate, where there is no valid determination.

The good faith test

[40] In *Brodyn*, Hodgson JA went on to say that the scheme of the Act under consideration there indicated that judicial review was not available on the basis of

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4 *Justice and Other Legislation Amendment Act* 2007 (Qld), ss 90 and 91.

5 *Farah Constructions Pty Ltd and Ors v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152.

6 In *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259, Handley JA also suggested that the Court's power under the equivalent of s 100(3)(b) to make "any other orders it considers appropriate" in a proceeding relating to a matter arising under a construction contract would allow it to set aside or vary a judgment entered by the filing of an adjudication certificate.

non-jurisdictional error of law. But an adjudicator's purported determination would be void if it did not meet the statutory conditions essential for a valid determination, which were, that there be: a construction contract between claimant and respondent to which the Act applied; service of the payment claim; the making of an adjudication application to an authorised nominating authority; reference of the application to an eligible adjudicator who accepted it; and the determination by the adjudicator of the application by determining the amount of the progress payment, the date on which it became due, and the rate of interest payable and the issue of a determination in writing.

[41] What the Act intended to be essential (on a *Project Blue Sky*[7] analysis) was:

> "compliance with the basic requirements … a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given."[8]

It was, Hodgson JA went on to say, sufficient to avoid invalidity if an adjudicator considered only the matters referred to in s 22(2) of the New South Wales Act (the equivalent of s 26(2) of the *Payments Act*) or *bona fide* addressed them as to what was to be considered.

[42] The reference in *Brodyn* to *Hickman* is to Dixon J's qualification as to the circumstances in which a privative clause would protect a decision:

> "provided always that [the decision-maker's] decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."[9]

[43] The requirement identified by Hodgson JA, of a *bona fide* attempt by the adjudicator to exercise the relevant power, in turn led to the controversy between the parties at first instance, and here, as to whether good faith should be considered against a broad or narrow test. MKG contended for the latter approach, in particular relying on a series of decisions of the Full Court of the Federal Court: *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs*;[10] *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN*[11] and *Minister for Immigration and Multicultural and Indigenous Affairs v NAOS*.[12]

[44] Counsel for MKG asserted that the nine propositions set out in *SBBS*, as modified by later decisions, should be applied. Those propositions are reproduced below from the judgment in that case, with references omitted:

> "First, an allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker. Second, the allegation is not to be lightly made and must be clearly alleged and

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7 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 – 391.
8 (2004) 61 NSWLR 421 at 442.
9 (1945) 70 CLR 598 at 615.
10 (2002) 194 ALR 749.
11 [2002] FCAFC 431.
12 [2003] FCAFC 142.

> proved. Third, there are many ways in which bad faith can occur and it is not possible to give a comprehensive definition. Fourth, the presence or absence of honesty will often be crucial...
>
> The fifth proposition is that the circumstances in which the court will find an administrative decision-maker had not acted in good faith are rare and extreme. This is especially so where all that the applicant relies upon is the written reasons for the decision under review.
>
> Sixth, mere error or irrationality does not of itself demonstrate lack of good faith. Bad faith is not to be found simply because of poor decision making. It is a large step to jump from a decision involving errors of fact and law to a finding that the decision-maker did not undertake its task in a way which involves personal criticism.
>
> Seventh, errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness.
>
> Eighth, the court must make a decision as to whether or not bad faith is shown by inference from what the tribunal has done or failed to do and from the extent to which the reasons disclose how the tribunal approached its task.
>
> Ninth, it is not necessary to demonstrate that the decision maker knew the decision was wrong. It is sufficient to demonstrate recklessness in the exercise of the power."[13]

[45] In *SBAN*,[14] the Full Court of the Federal Court added this qualification to the ninth proposition (again set out without references):

> "As with other areas of the law where wrongful intent is in issue, reckless indifference may be the equivalent of intent. But this is not to say that the test is objective. The inquiry is directed to the actual state of mind of the decision-maker. There is no such thing as deemed or constructive bad faith. It is the ultimate decision … which must be shown to have been taken in bad faith. Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith. Such defects can be equally explicable as the result of obtuseness, overwork, forgetfulness, irritability or other human failings not inconsistent with an honest attempt to discharge the decision-maker's duty.
>
> Questions of professional ethics arise. An allegation of bad faith, like an allegation of fraud, should not be advanced by an advocate unless there are proper grounds for doing so
>
> Bad faith may manifest itself in the form of actual bias. Actual bias in this context is a state of mind so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or argument may be presented. It is something more than a tendency of mind or predisposition. Apprehended bias, resting as it does on what

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13 At 756.

14 At [8] – [10].

> may be observed objectively, as distinct from the actual state of mind of the decision-maker, is quite different. While it has been suggested that actual bias may occur subconsciously, that would not establish bad faith in the relevant sense …"

[46] In *NAOS*, the Court expressed some doubt as to the usefulness of the seventh *SBBS* proposition, which suggested that capriciousness could support an allegation of bad faith; it was, they said, more relevant to questions of unreasonableness. At any rate, the qualification proposed in *SBAN* should be applied to the seventh proposition so as to

> "make it clear that want of bona fides will only be made out in such circumstances where whim or fancy has consciously been preferred to considered judgment."

[47] MKG submitted that the primary judge was wrong to distinguish the line of Federal Court authority which derived, as did the test in *Brodyn*, from the *Hickman* requirement of good faith. That error had led him to reject the need to show personal misconduct or fault on the part of the decision-maker in order to demonstrate lack of good faith. Section 107 of the *Payments Act*, consistently with the narrower approach, protected an adjudicator from personal liability for anything done or omitted to be done in good faith in performing his functions or what he reasonably believed was the performance of his functions.

[48] QBWSA argued for the approach taken at first instance in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*[15] in the Supreme Court of New South Wales. Brereton J conducted an extensive review of cases considering the "good faith" formula, including the *Migration Act* cases. Of them, he said that there were two schools of thought; while both schools supported the first six propositions advanced in *SBBS*, they diverged on whether there was a dichotomy between good faith and bad faith, or some middle ground, and on whether want of good faith could be established by recklessness or capriciousness short of deliberate and wilful conduct. He preferred the broader view, concluding that recklessness or capriciousness such as to show the absence of a genuine or conscientious attempt by the adjudicator to perform his or her function, while falling short of a wilful and deliberate failure, could amount to a want of good faith. He summarised:

> "[G]ood faith as a condition of validity of the exercise of an adjudicator's power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness."

[49] On appeal,[16] however, Brereton J's approach was not endorsed. Giles JA gave the leading judgment; he identified the vice in the adjudicator's determination as his arrival at an adjudicated amount by a process unrelated to a consideration of the matters in the equivalent of s 26(2), a conclusion which, he observed somewhat tersely, could be reached:

> "without embarking on an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a bona fide attempt to exercise the statutory power."[17]

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15 (2005) NSWSC 1129.

16 *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32.

17 At [26].

[50] The difference between the two tests would only be relevant for present purposes if one took the view that the arbitrator had, without any deliberate, wilful or conscious intent, constructed a contract so different from the one which he was required to consider as to fall short of a genuine attempt at his task. If, instead, one concluded, as QBWSA posited, that the adjudicator had approached the adjudication intent on determining the claim by ensuring that MKG was fairly recompensed, rather than by reference to MKG's entitlements under the contract, one would inevitably conclude that there was personal fault on his part, and, at best, a conscious preference of "whim or fancy … to considered judgment".

[51] I incline to the view that the absence of good faith may not be the exact converse of bad faith, and I agree with the learned primary judge that the content of what is required may vary according to context. But I am not entirely convinced of the significance his Honour attributed to the context here, and, more particularly, to the interim character of the arbitrator's decision. In that context, of the *Payments Act* which is designed to provide an expeditious mechanism for payment, and which allows of further proceedings, unaffected by the arbitrator's decision, to determine the parties' contractual rights, I think there is a good deal to be said for a narrow approach to questions of good faith. However, as will emerge from what follows, I agree with the learned primary judge that on either test, QBWSA has not demonstrated a want of good faith on the adjudicator's part.

The adjudicator's performance of his function and the judgment below

[52] The learned judge considered that the adjudicator had referred to the facsimile as a matter relevant to the application of the latent condition test for the purposes of clause 12.1. That was, in my respectful view, an appropriate characterisation of the adjudicator's use of the document. He did not characterise the facsimile as resulting in a new contract on different terms from those of the construction contract, but as an invitation to re-tender containing a relevant representation. His conclusion in relation to it was not some frolic of his own. MKG had suggested in its material that it constituted a warranty, a suggestion which QWBSA resisted; in its submissions, MKG pointed to it as the "strongest evidence of site conditions reasonably available to the Contractor".

[53] That the adjudicator accepted the last approach can be seen from his references to MKG's possession of the facsimile as information which other tenderers did not have and to the failure of the writer of the Golder report to allow for the representation in the facsimile in advancing an opinion as to what an experienced and competent contractor should reasonably have anticipated. Those references indicate that he regarded the facsimile, and its representation to the adequacy of the geotechnical report as a basis for pricing, as relevant to what a reasonable and competent contractor should have anticipated, and thus relevant to the application of clause 12.1(a).

[54] If the adjudicator was wrong in the weight he accorded the facsimile, or in his rejection of the Golder report on the basis he gave, or in his interpretation of risk allocation under clause 12.1(a), these were errors which had no implications for the validity of his decision, unless QBWSA can make good its argument that they were all indicative of an improper aim to compensate MKG, regardless of its contractual entitlements. In that regard, QBWSA attributed to the adjudicator an expressly stated concern that MKG be "fairly recompensed". That is to misquote him. All

that the adjudicator did in the relevant passage (set out at [20] above) was to question the evidence of Mr Betts when he attributed to MKG's representatives an awareness that they would encounter substantial quantities of rock, but a willingness nonetheless to adopt the figure of $30,000 for its excavation. QBWSA's suggested reading of the adjudicator's reasons in this respect is, in my view, fundamentally misconceived.

[55] The complaint that the learned primary judge failed to assess the adjudicator's lack of good faith against the whole of the reasons must be rejected, given his Honour's detailed consideration of the entirety of the adjudication decision.[18] Indeed, one might observe that it was QBWSA's submissions which invited a piecemeal approach to the adjudicator's reasons. An example was the complaint that the adjudicator's reference to the first tender was irrelevant, and served as evidence of his desire to achieve a favourable outcome for MKG regardless of the contract's terms. But the comments were plainly made in response to what QBWSA had said in its adjudication response to the effect that the amount now claimed was almost the entire contract sum again. They were perhaps, peripheral, but they were certainly not indicative of some illicit intent. Similarly, criticisms of QBWSA and its project manager were, in context, unsurprising; they were hardly revelatory of some larger design.

[56] The assertion that the learned judge had accepted mere reference to relevant clauses as satisfying the requirement that the adjudicator have regard to the contract is equally unfounded. His Honour properly identified the many references to clause 12.1 in the adjudication decision, but also explained that the reading of the identified parts established that the adjudicator not only was "very conscious" of what the clause contained, but reached his conclusion by reference to its provisions as he understood them. As his Honour observed, on occasions the adjudicator expressed views which he then put to one side, acknowledging that they were not relevant to his conclusion on whether a latent condition existed by reference to clause 12.1.

[57] The adjudicator specifically considered clause 14.1 of the job specification, which, he said, correctly, did not affect QBWSA's liability to pay for latent conditions under clause 12.1. Insofar as he described what was said in the facsimile as inconsistent with clause 14.1, I am inclined to think that was not really so. The clause required tenderers to fully inform themselves in accordance with the general conditions of the contract, but no such requirement in the general conditions was identified; clause 12.1 did not impose one. Clause 14.1's disclaimer of any representation that the information in the geotechnical report completely indicated the actual conditions along the route, or any warranty as to the correctness of its description of the naturally occurring materials did not necessarily conflict with the facsimile's assertion, that the report provided "adequate information" to allow the pricing of rock excavation as a lump sum. At any rate, I do not think there is any force in the suggestion that the adjudicator applied the facsimile so as to overcome the effect of clause 14.1.

[58] The submission that the learned primary judge wrongly excused error in the light of the limited time available to deliver the adjudication determination appears to refer to his Honour's observation that the adjudicator's omission to mention *BMD Major*

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[18] *Queensland Bulk Water Supply Authority v McDonald Keen Group P/L & Anor* [2009] QSC 165 at [39]-[54].

Projects firstly, did not establish that he had failed to consider the case and secondly, was unsurprising, given the constraints imposed by the time limits for completion of his task. The latter comment was a proper one; as has been recognised elsewhere, the very short timeframes allowed for adjudicator's decisions make the "precision aimed for in litigation … not practically achievable".[19]

[59] In the same connection, it was submitted that the adjudicator could not have turned his mind to *BMD Major Projects*, because, had he done so, he would not have arrived at the reasoning he did in relation to risk allocation under clause 12.1(a); hence the learned judge erred in finding that his failure to mention the case did not carry the implication that he had not considered it. But the submission is simply untenable; *BMD Major Projects* was relied on by MKG for another purpose altogether, and QWBSA sought to distinguish it on its facts. There was no reason for the adjudicator to consider what it said about risk allocation.

[60] As to the valuation of MKG's claim, the adjudicator patently did not treat the absence of any offer by QBWSA of an alternative means of calculation, or product of calculation, as in itself warranting allowance of what MKG sought. He accepted MKG's estimate, having considered and rejected QBWSA's criticisms of it. His approach may be contrasted with that of the adjudicator in *Halkat v Holmwood Holdings*, who was said to have decided to prefer the contractor's assessment of the work done, without examination of its merits or defects, because he took a dim view of the principal's submissions on unrelated issues.

[61] As the learned primary judge, correctly, with respect, observed, it was not to the point to ask whether a court would have come to the same conclusion as the adjudicator; the question was whether he had arrived at his conclusion by a process which failed to consider the matters set out in s 26(2). The evidence which he had relied on, including the estimate, was within the range of the considerations identified in that section. A contention that the decision was void on the basis that there was no evidence on which the adjudicator could determine the amount of the claim was rejected. That reasoning was, in my respectful view, entirely correct.

[62] The argument that there was a failure to accord natural justice must fail, absent a conclusion that the facsimile was used by the adjudicator as the basis for constructing an alternative contract.

[63] I would dismiss the appeal with costs.

[64] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the order proposed by her Honour.

[65] **FRYBERG J:** The appeal should be dismissed with costs. I agree generally with the reasons of Holmes JA for that order, but I prefer to express no view regarding the narrow or wide approaches to questions of good faith under the *Payments Act*.

[66] Whether the facsimile of 13 April 2006 was a contractual document and whether it gave rise to any form of estoppel were matters not argued in this appeal. They remain open questions.

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19 *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495 at 514.