JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	**:**	PERTH
CITATION	**:**	WITHAM -v- RAMINEA PTY LTD [2012] WADC 1
CORAM	**:**	COMMISSIONER GETHING
HEARD	**:**	5 DECEMBER 2011
DELIVERED	**:**	18 JANUARY 2012
FILE NO/S	**:**	CIVO 2358 of 2011
BETWEEN	**:**	RODNEY THOMAS WITHAM Plaintiff AND RAMINEA PTY LTD Defendant

Catchwords:

Building and construction - Payment dispute - Determinations by adjudicator under the *Construction Contracts Act 2004* (WA) - Application for leave to enforce on a judgment of the District Court - Relevance of judicial review

Legislation:

Construction Contracts Act 2004 (WA) s 43

Result:

Leave to enforce granted

Representation:

Counsel:

Plaintiff	:	Mr T Carmady
Defendant	:	Mr D Ellis

Solicitors:

Plaintiff	:	Williams & Hughes
Defendant	:	HHG Legal Group

Case(s) referred to in judgment(s):

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2004] NSWCA 394; (2004) 61 NSWLR 421
O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2008] WASC 58; (2008) 36 WAR 479
O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2009] WASC 19
Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217
Police v Lymberopoulos [2007] SASC 247; (2007) 98 SASR 433
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Re Anstee-Brook; Ex Parte Mount Gibson Mining Ltd [2011] WASC 172
Re Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes Pty Ltd [2009] WASAT 133
Re Carey; Ex parte Exclude Holdings Pty Ltd [2006] WASCA 219; (2006) 32 WAR 501
Re Match Projects Pty Ltd and Arccon (WA) Pty Ltd [2009] WASAT 134
Re State Administrative Tribunal; Ex parte McCourt [2007] WASCA 125; (2007) 34 WAR 342
Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd [2011] WASC 80

1 **COMMISSIONER GETHING**: By application filed 14 October 2011 the plaintiff sought orders pursuant to *Construction Contracts Act 2004* (WA) (CCA) s 43 for leave to enforce a determination made under the CCA. The defendant opposed the grant of leave on the basis that there is an existing District Court action dealing with the merits of the issues between the parties and the adjudicator's decision was tainted by a lack of procedural fairness and jurisdictional error.

2 The plaintiff filed an affidavit in support of the application sworn 29 September 2011. In his affidavit, the plaintiff stated that he owns and conducts a tiling and general renovation business. In the course of his business he carried out tiling and general renovation works at the defendant's request at the Tom Price Hotel/Motel owned by the defendant. These works were the subject of a determination dated 26 July 2011 under the CCA by Alex Dunning, a registered adjudicator under the CCA (Determination). The affidavit annexed a copy of the Determination, signed by the adjudicator. At the hearing I was provided with the original Determination, certified by the Building Commissioner as having been made by a registered adjudicator.

3 The amount sought by the plaintiff to be the subject of the judgment is $150,004.44, together with GST and interest. This comprises the balance due by the defendant to the plaintiff, as determined by the adjudicator, of $147,504.55 together with the adjudicator's fee of $2,500.

4 This amount is within the jurisdiction of the District Court meaning that the District Court is a court of competent jurisdiction for the purposes of CCA s 43. Subject to one caveat which I will refer to below, I am satisfied that the District Court has the jurisdiction to make an order granting leave to enforce the judgment pursuant to CCA s 43.

5 On 30 November 2011 the defendant lodged an application under the *Civil Judgments Enforcement Act 2004* (WA) for an order to suspend all or part of the enforcement of 'the judgment'. This was filed to deal with the scenario in which the court granted leave to enforce the Determination. At the hearing on 5 December 2011 I adjourned this application to 18 January 2012 for mention, being the date which I had scheduled to deliver these reasons.

Scope of the power to grant leave to enforce

6 The power granted to the District Court to enforce determinations in CCA s 43 is in the following terms:

43. Determinations may be enforced as judgments

(1) In this section -

court of competent jurisdiction, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

(3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Building Commissioner as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.

7 The features of the statutory scheme in which CCA s 43 is placed were summarised by Beech J in ***O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*** [2008] WASC 58; (2008) 36 WAR 479 [39] - [41] as follows:

The following features of the statutory scheme seem to me to be of particular relevance:

(a) The procedure for determination by an adjudicator is intended to be quick, informal and inexpensive: s 30, s 31, s 32.

(b) A determination is binding on the parties even though other proceedings relating to the substantive dispute between the parties are on foot: s 38.

(c) A party liable to pay under a determination must do so: s 39.

(d) A determination is, with very limited exceptions, final: s 41, s 46.

(e) The substantive dispute (if any) will be determined by other means (such as arbitration or litigation) involving a comprehensive process, and payments made pursuant to a determination are to be taken into account and dealt with in the resolution of the substantive dispute: s 38, s 40, s 45.

The object of the scheme is, as described in the explanatory memorandum and Second Reading Speech, to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes'.

> The plaintiff submitted, and the defendants accepted, that the scheme of the *Construction Contracts Act* was such that on an application under s 43(2) for leave to enforce a determination, it was for a defendant to point to circumstances which justified a refusal to grant leave. Absent such circumstances, leave will be granted. I accept that submission. In my opinion, the statutory scheme gives rise to a predisposition in favour of a grant of leave. A determination is binding (s 38) and gives rise to a liability to pay (s 39).

8 As I have noted, with one caveat the plaintiff has satisfied me that it has enlivened the jurisdiction of CCA s 43 and is thus entitled to a predisposition in favour of the grant of leave. The caveat is that the nature of the defendant's challenge to the Determination is, in part, that, being made in breach of the requirement for procedural fairness or with a jurisdictional error, it is not a 'determination' for the purposes of s 43.

Summary of the defendant's argument

9 The defendant filed an affidavit of its director Ian Duncan, sworn 29 November 2011, in opposition to the grant of leave to enforce and in support of the application for suspension orders. Mr Duncan annexed to his affidavit a copy of the affidavit he had sworn in response to the adjudication under the CCA. Taking these two affidavits together, Mr Duncan relevantly deposes that:

(a) he received an invoice from the plaintiff on 10 May 2011 for the sum of $162,255;

(b) he received the adjudication application about 1 July 2011 at his office in Perth, it being forwarded to him by his accountant;

(c) he was in Tom Price (the location of the premises on which the work was carried out) on 1 July 2011 and returned to Perth on 7 July 2011;

(d) 'not long after', he reviewed the adjudication application and engaged and instructed solicitors;

(e) on 14 July 2011 he was advised by his solicitors that the adjudication was pursuant to the CCA and that there was a time limit in which to respond; and

(f) on behalf of the defendant, he instructed his solicitors to seek an extension of time within which to respond to the application, and annexes the facsimile sent on 20 July 2011 in this regard (page 131).

10 From the contents of the letter in par (f), it is apparent that a representative of the adjudicator had advised the defendant's solicitors that the adjudicator would not extend the time for filing the respondent's submission as he did not consider that he had the power to do so.

11 In the Determination, the adjudicator acknowledged receiving the respondent's submission on 21 July 2011. However, the adjudicator decided that: 'Due to its late timing of submission I have not considered the Response' (par 16). In a footnote, the adjudicator refers to CCA s 27(1) and s 32(1)(a).

12 The relevant parts of the Determination are as follows:

> 22. I am to dismiss the application without making a determination if I find that any one of the circumstances referred to in Section 31(2)(a)(i) to (iv) of the Act exist.
>
> 23. These matters must be decided by me before looking at the merits.
>
> 24. I find that all the requirements for a valid adjudication application exist as:
>
> a. The works performed constitutes a construction contract as defined in the Act.
>
> b. The Application has been prepared and served in accordance with Section 26 of the Act. Section 26 requires the Application to be served within 28 days of the payment dispute arising. The payment dispute arose on 8 June 2011. The application was served on 30 June 2011.
>
> c. There is no Arbitrator or other person or a court which has dealt with this matter.
>
> d. It is possible to fairly make a determination on this matter.
>
> 25. Whilst the Respondent has not issued any admissible response to the Application and thus no justification has been submitted to me by the Respondent to assert that I do not have any jurisdiction in respect of any part of the Application I consider that it is appropriate for me to explain why I have arrived at the conclusion that an unsigned invoice does not constitute a proper payment claim in the context of the Act.
>
> 26. Schedule 1 Division 4 5 (2) of the Act states '*A payment claim **must** be signed by the claimant*' [my emphasis].
>
> 27. By reason of the word 'must', I consider compliance with Schedule Division 4 5 (2) of the Act is mandatory for a document to properly

constitute a payment claim in the context of the Act. This conclusion is consistent with the findings in:

a. Match Projects Pty Ltd and Arccon (WA) Pty Ltd [2009] WASAT 134.

b. K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor [2011] NTCA 1.

28. For the above reasons I consider the unsigned invoices did not pass the threshold test to constitute a payment claim of the type envisaged by the Act and thus no payment dispute, in the context of the Act, arose when these invoices were unpaid.

29. Notwithstanding the foregoing, the evidence presented to me identifies that the Respondent received the Payment Claim and should have understood it to be a payment claim. Thus I find there to be uncertainty regarding this matter.

Analysis of the Merits of the Submissions

30. The Respondent did not provide a response to the Application within a time to allow me to consider that submission. Therefore no justification has been presented to me to rebut the Application.

31. Notwithstanding the previous paragraph, the implied terms in the Act regarding when and how to respond to a payment claim apply and the Respondent has omitted to issue a notice of dispute in response to the Payment Claim. The repercussions of an omission of this type was considered in Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd [2009] in which the State Administrative Tribunal advised that in the event of such circumstances arising the Respondent was obliged to pay the full amount of the payment claim.

32. For both of the above reasons I find that the amount claimed in the application is properly due.

13 Mr Duncan goes on to depose that on 2 August 2011 the defendant commenced an action in the District Court (CIV 2553 of 2011) in relation to the claims the subject of the Determination. The defendant (who is the plaintiff in the District Court action) claims that the plaintiff (as the defendant in the District Court action) is indebted to it in the amount of $25,237.42 being for damages for the plaintiff's breach of contract, reimbursement of improper charges incurred by the plaintiff and reimbursement of accommodation and bistro charges incurred at the Tom Price Hotel. The defendant admits in the District Court proceedings that it owes the plaintiff the amount of $11,644 pursuant to the contract entered

into between the parties in or about 29 June 2010, but that the amount be set off against the defendant's claim of $25,237.42. The affidavit does not state the amount claimed by the plaintiff against the defendant. The action was listed for a mediation conference on 21 December 2011, but did not settle.

14 The defendant's submissions can be summarised as follows:

(a) in exercising the discretion in CCA s 43, the court may have regard to whether there are grounds for a judicial review of the Determination, even though an application for judicial review has not been commenced;

(b) it is clear that a CCA determination may be the subject of judicial review on the ground of jurisdictional error;

(c) the Determination is tainted by jurisdictional errors of the kind identified by McLure P in ***Re: Carey; Ex parte Exclude Holdings Pty Ltd*** [2006] WASCA 219; (2006) 32 WAR 501 [109];

(d) at the core of the jurisdictional error is the interpretation adopted by the adjudicator that there is no discretion to the extend the time limits in CCA s 27(1);

(e) a CCA determination may also be the subject of a judicial review on the ground of a denial of procedural fairness; and

(f) the Determination is tainted by a denial of procedural fairness by reason of the failure to consider the defendant's submission.

15 The defendant then submits that in the exercise of discretion in CCA s 43, given the existence of the grounds for judicial review and the existence of the District Court action, the court should decline to grant leave to enforce the Determination.

Summary of the plaintiff's argument

16 In relation to the judicial review arguments, the plaintiff's submitted that:

(a) following the decision in ***Perrinepod Pty Ltd v Georgiou Building Pty Ltd*** [2011] WASCA 217, a decision of an adjudicator pursuant to CCA s 31(2)(b) is not amenable to judicial review for non-jurisdictional error of law ([118]);

(b) a complaint as to the denial of procedural fairness is not an error of law going to jurisdiction;

(c) even if judicial review was available for a denial of procedural fairness, there was no such denial in the present case as the time limits for the filing of a response in CCA s 27 are mandatory;

(d) even if the time limits in CCA s 27 are not mandatory, as the adjudicator found, even had he considered the respondent's submissions of 21 July, he would have come to the same decision based on the decision in ***Re: Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes Pty Ltd*** [2009] WASAT 133; and

(e) in any event, as an exercise of discretion, the court should enforce the determination notwithstanding any denial of procedural fairness in order to give effect to the object and purpose of the legislation.

17 In relation to the District Court action, the plaintiff submitted that the existence of parallel proceedings under which the substantive issues in dispute between the parties are to be determined is contemplated as the normal position under the CCA, and is not sufficient grounds for the court to decline to enforce a determination. A determination has effect despite the existence of other proceedings. Specifically, the 'adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body': CCA s 38. The CCA does not prevent the parties from 'instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract': CCA s 45(1). In dealing with the dispute, the court or arbitrator must adjust the award made in light of the determination, including by making orders for the restitution of any money paid: CCA s 45(4). The jurisdiction of the adjudicator only comes to an end once 'an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application': CCA s 31(2)(a)(iii).

Scope of judicial review of CCA determinations

18 It is convenient to commence the analysis by considering the scope of judicial review available in relation to a determination by an

adjudicator under the CCA. The significance of the availability of judicial review is that the existence of a potentially successful challenge on the grounds of judicial review is a factor that the court should take into account in determining whether to grant leave to enforce the determination; indeed, it may call into question whether there is actually a 'determination' for the purposes of s 43.

19 The issue of the extent to which judicial review is open from a decision of an adjudicator under the CCA has been the subject of a number of recent Supreme Court decisions. It is convenient to start with the most authoritative, and recent, being the decision in ***Perrinepod***.

20 The issue in ***Perrinepod*** was whether the State Administrative Tribunal (SAT) could review a decision of an adjudicator *not* to dismiss an adjudication application pursuant to s 31(2)(a). The adjudicator had made a determination that the appellant was liable to pay the respondent a sum of just over $1.5 million. The appellant had applied to have the application for adjudication dismissed without the adjudicator making a determination on the merits on the basis that is was 'not possible to fairly make a determination because of the complexity of the matter' within CCA s 31(2)(a)(iv). The adjudicator declined to dismiss the application and proceeded to make the determination.

21 The appellant appealed to SAT. The SAT Tribunal determined that a decision of an adjudicator not to dismiss an application pursuant to CCA s 31(2)(a) is not open to review by it pursuant to CCA s 46. In doing so, the Tribunal followed an earlier Tribunal decision (***Re: Match Projects Pty Ltd and Arccon (WA) Pty Ltd*** [2009] WASAT 134) and declined to follow dicta from the Supreme Court to the contrary (***O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*** [2009] WASC 19 [126] (***O'Donnell (2)***) and ***Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd*** [2011] WASC 80 [44]). The Court of Appeal agreed with the Tribunal's decision. The key aspect of the Court of Appeal decision for present purposes is that the court confirmed that a decision of an adjudicator is amenable to judicial review and that the existence of a jurisdictional error may be a relevant consideration in the exercise of the court's discretion under CCA s 43 ([1], [20], [129]).

22 In order to analyse this decision for present purposes, it is necessary to set out CCA s 31 and s 46. CCA s 31 sets out the core functions of the adjudicator:

31. Adjudicator's functions

(1) In this section -

prescribed time means -

(a) if the appointed adjudicator is served with a response under section 27(1) - 14 days after the date of the service of the response;

(b) if the appointed adjudicator is not served with a response under section 27(1) - 14 days after the last date on which a response is required to be served under section 27(1).

(2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) -

(a) dismiss the application without making a determination of its merits if -

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine -

(i) the amount to be paid or returned and any interest payable on it under section 33; and

(ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.

(3) If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

23 CCA s 46 sets out the rights of a party aggrieved by a decision to have it reviewed by SAT:

46. Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

24 The ratio decidendi of the decision in ***Perrinepod*** is that a failure or omission to dismiss an adjudication under s 31(2)(a) is not a decision made under s 31(2)(a) and thus may not be the subject of review by SAT pursuant to CCA s 46(1) ([1], [17] - [20], [79]). The decision is also authority for the following propositions:

(a) there is no SAT review (nor any appeal) from a decision or determination of an adjudicator except as provided in CCA s 46(1) ([7]);

(b) there is no SAT review of a determination of an adjudication under CCA s 31(2)(b), that is, a decision on the merits of the claim under adjudication ([7]); and

(c) s 46(3) does not exclude judicial review of a decision or determination of an adjudicator made under CCA s 31(2)(a) or (b) ([1], [7], [119]-[129]).

25 Murphy JA (with whom the Chief Justice agreed) made a number of observations about the scope of judicial review that are relevant for present purposes. The first is that it is incumbent on a court dealing with an application pursuant to CA s 43 to consider the issue of whether the determination exceeded the jurisdiction of the adjudicator and therefore was not a 'determination' at all ([92]).

> [I]f the adjudicator proceeds to make a determination, he or she must give reasons for the determination (s 36). That determination can then be challenged by judicial review on the ground of jurisdictional error, or at the point at which application is made to enforce the determination by a court of competent jurisdiction, under s 43, again on the basis that the determination exceeded the jurisdiction of the adjudicator and therefore was not a 'determination' at all. Given the legislative objective of 'keeping the money flowing', and to limit the means by which the validity of a determination can be challenged, it would be inconsistent with the legislative objective, and would detract from the coherence of the legislative scheme, to construe the Act as providing for merits review in the Tribunal whenever an adjudicator proceeds to make a determination. Such a construction of the Act would likely introduce significant delay, and provide for fragmented and somewhat incoherent avenues by which the exercise, or purported exercise, of jurisdiction to make a determination might be challenged.

26 His Honour goes on to observe ([129]):

> [A]lthough it might be thought to be more efficient or convenient for a 'decision' 'not to dismiss' to be equally amenable to Tribunal review under s 46(1) as a decision to dismiss under s 31(2)(a), rather than be amenable to judicial review, I am not persuaded that those considerations properly affect the proper construction of s 46(1). First, and fundamentally, for the reasons given earlier, the text of s 46(1) is inconsistent with such an approach. Secondly, insofar as the Tribunal would provide a quicker avenue for relief, a right of review to the Tribunal where an application is dismissed is conducive to the statutory purpose of 'keeping the money flowing'. On the other hand, no evident statutory purpose is served by expediting a review of a 'decision' 'not to dismiss', with a view to rendering inapplicable the adjudication process facilitated by the Act. The argument that the statute requires an early resolution by the Tribunal of the unavailability of adjudication under the Act in order to avoid the parties' resources being wasted on an unlawful adjudication is not compelling or adequately grounded in the Act. In this regard, the adjudication process is designed to be quick, informal and inexpensive. The Act does not envisage the application of substantial resources to the process. Further, even where the adjudication process is lawfully undertaken, the parties may commence and proceed with resolution of their substantive dispute in a court or by arbitration: s 45. Thus, it is difficult to glean from the Act that it is concerned to ensure that the parties' resources are not

> wasted in what might prove to be, ultimately, an ineffectual process for allocating rights and liabilities. That is not to say, however, that it might not be a relevant consideration in the exercise of the court's discretion under s 43, if a party first raised an allegation of jurisdictional error when seeking to resist an application under s 43 for leave to enforce a determination.

27 The issue then arises as to the scope of the judicial review permitted. In the present application, the defendant has raised issues in its submissions to the effect that the adjudicator's decision is amendable to judicial review on the ground of a denial of procedural fairness. In this regard, Murphy JA stated ([118]):

> Finally, although it is unnecessary to resolve in this appeal the scope of judicial review in respect of determinations under s 32(1)(b), I agree with Beech J in ***O'Donnell*** [102], with whom Corboy J has also expressed agreement in ***Thiess v MCC*** [59], that an appointed adjudicator's determination under s 31(2)(b) is not amenable to judicial review for non-jurisdictional error of law. I agree that the scheme and purpose of the Act, which, as the long title indicates, is 'to provide a means for adjudicating payment disputes arising under construction contracts', is more consistent with an appointed adjudicator being akin to an inferior court rather than an administrative tribunal for certiorari purposes, when exercising the power to make a determination under s 31(2)(b).

28 The decision of Beech J referred to is the decision in ***O'Donnell (2)***. In that case, the adjudicator made a determination that parties known as the 'RailLink Joint Venture' (RLJV) pay O'Donnell Griffin Pty Ltd (ODG) the sum of $7.3 million. ODG applied pursuant to CCA s 43 to enforce the determination. RLJV applied for a writ of certiorari to quash the determination in relation to about $4 million of the amount. Beech J granted an order nisi on RLJV's application, but dismissed the application, and granted ODG leave to enforce the determination.

29 The error raised by RLJV was that the adjudicator was obliged to dismiss the application as ODG had failed to comply with CCA s 26(1) which prescribes time limits for the preparation and service of adjudication applications. His Honour concluded on the facts that there had not been not failure to comply with CCA s 26(1).

30 Beech J went on to consider whether an error by an adjudicator in refusing to dismiss an application for non-compliance with CCA s 31(2)(a) was amendable to a writ of certiorari. His Honour concluded that:

(a) there will be a decision under s 31(2)(a) if the adjudicator dismisses an application without making a determination on the merits in reliance on s 31(2)(a) or rejects the submission of a respondent to that effect ([126]); and

(b) the decision in (a) is thus able to be reviewed pursuant to CCA s 46(1).

31 These two propositions have been overruled by the decision in ***Perrinepod***.

32 Beech J then observed that s 46(3) and the CCA as a whole reveal an intention to exclude the availability of certiorari in respect of an error of law regarding compliance with CCA s 26 ([128], though see also [131]).

33 However, relevantly for present purposes, Beech J makes some observations that remain relevant. First, his Honour concludes that 'the test for jurisdictional error (if certiorari does lie) is that applicable to an inferior court' ([102]). Second, the principles for jurisdictional error for an inferior court are as set out in ***Re: Carey***, followed in ***Re: State Administrative Tribunal; Ex parte McCourt*** [2007] WASCA 125; (2007) 34 WAR 342 [16] (***O'Donnell (2)*** [103]). Third, the conditions in CCA s 31(2)(a) set out the essential pre-conditions to the exercise of jurisdiction by the adjudicator. Specifically his Honour stated ([105] - [107]):

> RLJV submits that s 31(2)(a) unambiguously identifies essential pre-conditions to the exercise of jurisdiction by an adjudicator, namely that:
>
> (a) the contract is a construction contract;
>
> (b) the adjudication application has been prepared and served in accordance with s 26;
>
> (c) there is not already an order, judgment or other finding by an arbitrator or court or other similar body dealing with the matter the subject of the application.
>
> In addition, the submission continues, s 31(2)(a) stipulates the consequence of the non-existence of any of those conditions; the application *must* be dismissed without determining the merits. That is said to reveal an intention that there cannot be a valid adjudication determination if s 26 had not been complied with.
>
> But for s 46 of the Act, there would be considerable force in those submissions.

34 In the decision of Corboy J in ***Thiess*** referred to in the quote from ***Perrinepod*** at [27] above, his Honour considered an application pursuant to CCA s 43. The defendant (MCC) contended that the bundle of documents said by the plaintiff (Thiess) to constitute a payment claim within the meaning of CCA was not a valid payment claim within the CCA, and it if was, the application was made outside the time prescribed by the CCA. His Honour concluded that leave ought to be granted to the plaintiff to enforce the judgment.

35 His Honour went into detail to consider the test to be applied under CCA s 43 when the defendant raised a jurisdictional error ([20]):

> I have concluded that MCC has failed to establish a sufficiently arguable case to justify refusing to grant leave under s 43 that the adjudicator erred by making essentially factual findings in not dismissing Thiess' adjudication application under s 31(2)(a) CC Act It is tempting to deal with this application at that level. However, a test for determining whether Thiess ought to be granted leave under s 43 must be identified and explained, especially as MCC's arguments concern the jurisdiction of the adjudicator to have made the Determination and the effect of granting leave is to enable Thiess to enter a judgment which may then be enforced as an order of the court. That requires questions concerning the rights of a party who is dissatisfied with a decision of an adjudicator to be further considered.

36 Corboy J adopted the summary of general principles from ***O'Donnell*** set out in [7] above [25]. His Honour stated that 'it is not possible to further refine the approach to an application under s 43 by defining more precisely the kind of reason that would justify refusing to grant leave' [29]. His Honour went on to say [29]:

> There is a risk of distorting the intended application of s 43 CC Act if an unduly adjectival description of the quality of the reason required to refuse leave is adopted. I think that the most that can be said at a general level is that:
>
> (a) With a limited exception, the determination is final on the question of the liability of a party to immediately pay the amount that is the subject of the payment dispute. Section 39 CC Act requires a party to pay an amount determined by the adjudicator. A party will seek leave under s 43 where the party liable under the determination has failed to discharge the statutory obligation imposed by s 39. Consequently, the scheme of the CC Act [is] … that prima facie, a party who has the benefit of a determination is entitled to enforce it. That is particularly so under the CC Act, given its policy of maintaining cash flow to the parties during the performance of a construction contract.

(b) Nevertheless, the Act requires the court to oversee the entry of judgment by imposing the requirement for leave. The grant of leave gives the plaintiff access to the court's processes for enforcing its orders. Further, judgment may have significant effects on the commercial interests of the defendant within the construction industry and in many instances, the reason advanced by the defendant as to why leave should not be granted will be directed to the validity of the determination.

(c) Consequently, there must be a sufficient reason for declining to grant leave under s 43 having regard to the scheme and policy of the CC Act. What will be a sufficient reason will, of course, depend on a consideration of all of the relevant circumstances.

37 Significantly for present purposes, Corboy J drew a link between the grounds that might allow a court to refuse leave to enforce a determination in CCA s 43 and the scope of the rights of review of the application of CCA s 31(2)(a) ([30], also [17]). In response to a submission made by Thiess, his Honour noted in passing that the principles relevant to the grant of a stay (or suspension order) do not provide guidance on the application of CCA s 43 [34]:

> I do not consider that Thiess' analogy to a stay application assists in determining this application. The question of whether a stay should be granted might arise after a plaintiff has been given leave to enter judgment under s 43 CC Act. However, the factors relevant to that question do not, in my view, provide any guidance on whether the application for leave should be granted. The question of whether leave to enter judgment on a determination should be granted necessarily precedes any question of whether a stay of execution of the judgment should be allowed. The two issues should not be conflated.

38 Corboy J followed Beech J stating that 'there is much force in the proposition that a decision to refuse to dismiss an adjudication application is a decision made under s 31(2)(a) within the meaning of s 46(1)': [44].

39 His Honour agreed with the propositions from the judgment of Beech J set out at [33] above, namely:

(a) the test for jurisdictional error (if certiorari does lie) is that applicable to an inferior court' ([59]);

(b) the principles for jurisdictional error for an inferior court are as set out in ***Craig***, as summarised in ***Re: Carey*** ([57] - [59]);

(c) the conditions in CCA s31(2)(a) set out the essential pre conditions to the exercise of jurisdiction by the adjudicator ([70], [72]).

40 In relation to s 46, Corboy J concluded that 'there is a strongly arguable case that a determination by an adjudicator is susceptible to judicial review' [82].

41 In the end, His Honour considered that the view of Beech J and SAT (in ***Match Projects***) were each sufficiently arguable such that they should each be taken into account in determining the application [46]. Thus, his Honour refers to both approaches when considering the facts (see [106], [143], [155], [174]). Given the decision in ***Perrinepod***, the line of reasoning based on jurisdictional error is relevant for present purposes.

42 A third relevant decision is the decision of Kenneth Martin J in ***Re: Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*** [2011] WASC 172. The applicant (Mount Gibson) applied for prerogative relief by certiorari in relation to the adjudicator's decision to award the second respondent (Downer) a sum of just of $1.25 million. The case challenge was thus to the adjudicator's determination on the merits, contrasting the position in ***O'Donnell (2)*** and ***Thiess*** where the issue was the adjudicator's refusal to summarily dismiss the application, pursuant to s 31(2)(a) [35]. His Honour refused the order nisi.

43 In relation to the statutory framework, Kenneth Martin J held that:

(a) a decision of an adjudicator under the CCA is more akin to that of a tribunal than the curial process of an inferior court [18], [22];

(b) following on from (a), the test for jurisdictional error is the wider of the two tests outlined in ***Craig*** (as to which, see [61] – [62] below) [19];

(c) following ***O'Donnell (2)***, CCA s 46(3) is a privative clause debarring the pursuit of certiorari by error of law in the face of the record (but not for jurisdictional error) [41];

(d) 'a failure to comply with the applicable requirements of procedural fairness has been recognised as an independent basis for the making of an order in the nature of certiorari, albeit the error made may not be characterised as a jurisdictional error' [43];

(e) it was open to the applicant to seek the grant of certiorari in relation to the decision of the adjudicator based upon the ground of asserted denial of procedural fairness [51]; and

(f) CCA s 46(3) was not sufficiently clear 'as to be assessed as an attempt to exclude challenges based on an asserted denial of procedural fairness … [t]he language would need to be far more explicit to advance that objective' [52].

Thus, his Honour concluded [53]:

> In the context of a challenge raising a denial of procedural fairness as a ground against a decision maker (that I assess to be more akin to a tribunal than a court), I do not read s 46(3) as wide enough or clear enough to exclude certiorari.

44 There were two substantive grounds of challenge pursued. Each essentially went to the merits of the decision, as distinct from whether CCA s 31(2)(a) had been complied with. They each related to a finding by the adjudicator that there had been an oral agreement for Mount Gibson to pay Downer a certain level of remuneration for rock blasting and removal work. The rate agreement had been reached between a representative of Downer and the representative of the superintendent appointed under the contract. The key issue raised by Mount Gibson was whether the superintendent's representative had the power to conclude such an agreement binding on Mount Gibson.

45 The first ground was that the adjudicator failed to give any, or any adequate, reasons for the decision that the supervisor's representative had the requisite authority. His Honour found that reasons were given, and that the real challenge was to their adequacy, and that the arguments sought to be raised by Mount Gibson on its order nisi were 'ultimately bound to fail' ([86], [96]).

46 The second ground was the denial of procedural fairness. This was raised on the basis that the alternate finding made, that the supervisor's representative had ostensible authority to bind Mount Gibson. Mount Gibson complained that it had not had the opportunity to address this issue in submissions. His Honour determined that the requirements of procedural fairness had to be assessed in the context of the CCA: [102]:

> The actual requirements of procedural fairness need to be assessed specifically, in their unique presenting contexts. Again of key significance is the consideration that the process for a contractor to seek a payment under the *Construction Contracts Act* is to proceed on an informal, speedy,

> but interim, basis before a body more akin to a tribunal than a court. This again, in my view, is the decisive consideration in assessing the metes and bounds of the requirement for procedural fairness in this particular context.

47 His Honour concluded that there was 'no arguable denial of procedural fairness within the context of an informal, interim process, requiring swift decision-making that this adjudicator completed' [105]. In relation to discretion, his Honour went on to say [107], [108]:

> I would, in any event, on the basis of an exercise of discretion, refuse an order nisi for certiorari, bearing in mind the future opportunities Mount Gibson clearly holds under the more traditional paths of arbitration or litigation to pursue any issue over this disputed payment of adjudicated funds to Downer. The importance of the *Construction Contracts Act* as a swift circuit-breaking mechanism in a construction contract dispute is the fundamental governing criteria in the analysis. The need to swiftly break a construction contract payment deadlock, to enable a contractor to receive payment on an interim basis to relieve that contractor from possibly suffering terminal economic harm in a situation of limited bargaining power, would be undermined if the scope for challenges by judicial review allowed a nit-picking dissection of mere aspects of an adjudicator's reasons. Arguments over minor alleged errors, on analysis, present as second order technical arguments, well capable of being ventilated elsewhere and later, pursuant to a preserved right to arbitrate or to litigate.
>
> A discretion not to allow prerogative relief looms large in such circumstances. I would decline relief here, on that basis alone.

48 The view that a decision of an adjudicator under the CCA is that of an administrative tribunal is contrary to the views set out in ***Perrinepod***, ***O'Donnell (2)*** and ***Thiess*** that the decision is more akin to that of an inferior court. This distinction is significant when it comes to jurisdictional error. Unlike an administrative tribunal, where the decision maker is an inferior court, the failure to accord procedural fairness does not have the effect of making the decision one that is made without jurisdiction, or in excess of jurisdiction: ***Police v Lymberopoulos*** [2007] SASC 247; (2007) 98 SASR 433 [33] - [40], ***Craig*** 177 - 178. In ***Lymberopoulos***, Doyle CJ stated [41]:

> The failure to accord procedural fairness did not cause the Magistrate to make a decision of a kind beyond his powers. He did not do something that he lacked authority to do. There is no indication that he misapprehended the nature of his function or power. He did not disregard any provision of the *Expiation Act*. No doubt Parliament assumed and expected that when the Magistrates Court exercised jurisdiction under the *Expiation Act* it would act in accordance with the requirements of procedural fairness. It does not follow that this expectation is a condition of the vesting or exercise of the jurisdiction. The requirement of

procedural fairness arises, by implication, from the fact that the jurisdiction under the *Expiation Act* is conferred on a court, and from the fact that there is nothing in the *Expiation Act* that displaces the requirement to accord procedural fairness.

49 A failure to comply with the applicable requirements of procedural fairness has, however, been recognised 'as an independent basis for the making of an order in the nature of certiorari, albeit the error made may not be characterised as a jurisdictional error': ***Lymberopoulos*** [44]; ***Craig*** ((175) – (176)).

50 In summary terms, the balance of the authorities are to the effect that:

(a) an adjudicator's decision under the CCA is amendable to judicial review for an error of law going to jurisdiction;

(b) the test for jurisdictional error by an adjudicator under the CCA is that applicable to an inferior court;

(c) an adjudicator's decision under the CCA is not amendable to judicial review for a non-jurisdictional error or law;

(d) a denial of procedural fairness is a non-jurisdictional error of law, at least for the purposes of decisions of adjudication under the CCA; and

(e) the court should take into account whether the adjudicator's decision would be open to successful judicial review in exercising the discretion in CCA s 43.

Denial of procedural fairness

51 It follows from the discussion above, that the argument by the defendant that it was denied procedural fairness is not one I am able to take into account in the exercise of the discretion in CCA s 43, as it is a non-jurisdictional error of law.

52 Given conflicting authority on this point, it is appropriate that I proceed to consider whether there was such a denial of procedural fairness as to make it arguable that grounds exist for judicial review of the adjudication.

53 In order to apply the test in ***Craig*** in the present case, it is necessary to construe CCA s 27, which provides:

27. Responding to an application for adjudication

(1) Within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on —

(a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).

(2) The response —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations;

(b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

54 The defendant submits that in construing CCA s 27, the court should have regard to CCA s 30 which contains an obligation on the adjudicator to act fairly. Specifically, CCA s 30 provides:

30. Object of the adjudication process

The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

55 Other considerations advanced by the defendant in construing CCA s 27 are:

(a) there is no monetary limit on the amounts which may be claimed by a 'payment claim' under the CCA and which may be the subject of an adjudication – consequently, determinations may significantly effect parties to a construction contract;

(b) an applicant does not have the right of reply to materials provided by a respondent, meaning that the applicant is not prejudiced by late provision of the response; and

(c) adjudications under the CCA are intended to be binding, meaning for example that an applicant may suspend work under a construction contract if a determination is not paid.

56 The interpretation placed on CCA s 27 by the defendant is that it allows the adjudicator a discretion to extend the time for the defendant to file its response. The defendant conceded that if its response had been filed so late that it undermined the ability of the adjudicator to meet his or her timing deadline (CCA s 31), then it would be a proper exercise of discretion to refuse to accept the response. In the present case, the adjudicator received the response on 21 July 2011 and made the Determination on 26 July 2011.

57 The provisions of CCA s32 are instructive in considering whether or not there is a discretion in the adjudicator to consider a response filed late. CCA s 32(1) provides:

> (1) For the purposes of making a determination, an appointed adjudicator -
>
> (a) must act informally and if possible make the determination on the basis of -
>
> (i) the application and its attachments; and
>
> (ii) if a response has been prepared and served in accordance with section 27, the response and its attachments …

58 The language of this subsection, in particular par (1)(a)(ii) does not seem to contemplate the adjudicator considering a response prepared and served otherwise than in accordance with CCA s 27.

59 In my view, CCA s 27 does not allow the adjudicator a discretion to consider a response prepared and served otherwise than in accordance with CCA s 27. The CCA sets out a tight timeframe within which parties are to apply and respond. The intent of the legislature in using the word 'must' is to set mandatory timeframes. The legislative scheme does not contemplate a fluid flow of documents backwards and forwards in order to comprehensively define the issues; there is not even the right of an applicant to file a reply to a response. The adjudicator is to 'if possible'

determine the claim on the application and the response: CCA s 32(1)(a). The adjudicator may alleviate some of the strictness of the timeframe by inviting parties to file further materials (as was done in ***O'Donnell (2)*** [36]). The adjudication does not finally determine the rights of the parties. Rather, the objects of the CCA are to provide a 'rapid adjudication process that operates in parallel to any other legal or contractual remedy', so as to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes': CCA, Second Reading Speech (WA Hansard, 3 March 2004, 275). The imposition of mandatory time limits best gives effect to this object. The requirement to act 'fairly' in CCA s 30 is thus a requirement to do so is the context of the mandatory time limits in the CCA.

60 Consequently, I am of the view that even if judicial review for a denial of procedural fairness was a factor that I am able to take into account in the exercise of the discretion in CCA s 43, I would not have found judicial review on this ground as being arguable.

Jurisdictional error

61 As I have noted, the decisions in ***Perrinepod***, ***O'Donnell (2)*** and ***Thiess*** are authority for the proposition that the principles for jurisdictional error by an adjudicator under the CCA are those set out in ***Craig*** for an inferior court, as summarised by McLure JA in ***Re: Carey*** ([57] - [59]). That summary is as follows:

> The scope of jurisdictional error depends upon whether or not the decision-maker has authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law: ***Craig*** at 179. If it does not have authority to do either, there can be judicial review in the broad sense where the distinction between jurisdictional error and error within jurisdiction is of no practical significance. If the decision-maker has that authority, the Court's judicial review powers are confined to errors of jurisdiction in the narrow sense. The High Court in ***Craig*** identified five types or categories of such errors. … The five categories are as follows. First, if an inferior court or an anomalous tribunal mistakenly asserts or denies the existence of jurisdiction. Second, if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Third, if it is an essential condition of the exercise of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied (which I understand to be a reference to a jurisdictional 'fact') there will be jurisdictional error if the court or a tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the Court has jurisdiction to

> entertain. Fourth, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the existence of any authority to make an order or decision in the circumstances of the case. Fifth, it will exceed its authority and fall into jurisdictional error if it misconstrues the statute establishing it and conferring jurisdiction and thereby misconceives the nature or the function which it is performing or the extent of its powers in the circumstances of the case.

62 By way of contrast, an administrative tribunal will commit a jurisdictional error in a wider set of circumstances, as summarised by the High Court in ***Craig*** (179):

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding, or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

63 The first ground in ***Re: Carey*** is not pressed by the defendant.

64 The second ground in ***Re: Carey*** arises if it can be shown that the adjudicator 'misapprehends or disregards the nature or limits of its functions or powers in a case where [he] correctly recognises that jurisdiction does exist'. In relation to this ground, the defendant reiterates the point that the adjudicator has the obligation to act fairly: CCA s 30.

65 Given the interpretation I have placed on CCA s 27, this ground is not made out. In so far as the decision has to be 'fair' within CCA s 30, a decision that is in compliance with the mandatory timetable set out in the CCA must be taken to be fair.

66 To fall within the third ***Re: Carey*** ground, the failure to identify the existence of a discretion in s 27 must be characterised as 'an essential condition of the exercise of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied'. Given the interpretation I have placed on s 27, this ground is not made out.

67 Even if I had found that the adjudicator erred in finding that s 27 did not contain a discretion to consider material filed late, that would not be sufficient to invalidate the decision. To invalidate the decision, the

existence of the discretion must be construed to be an 'essential condition of the exercise of power'. This requires a consideration of the legislative purposes of s 27 in the context of the CCA, which may be ascertained by reference to the language of the CCA, its subject matter and objects, and the consequences to the parties of holding the provision to be essential: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355, 389. As I have noted, the objects of the CCA are to provide a 'rapid adjudication process that operates in parallel to any other legal or contractual remedy', so as to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes': CCA, Second Reading Speech (WA Hansard, 3 March 2004, 275).

68 In my view, the issue of discretion in CCA s 27 cannot be so characterised. As I have noted above, the decisions in ***Perrinepod***, ***O'Donnell (2)*** and ***Thiess*** each contain observations that it is the conditions in CCA s 31(2)(a) which set out the essential pre-conditions to the exercise of jurisdiction by the adjudicator. Limiting the essential pre-conditions to those in s 31(2)(a) promotes the objects of the CCA by limiting the range of errors that can be the subject of judicial review. This is in a context in which the parties have the ability to commence separate proceedings to determine the merits of the underlying claims.

69 In the context of the CCA, the comments of Hodgson JA in ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*** [2004] NSWCA 394; (2004) 61 NSWLR 421, on the equivalent New South Wales legislation are apposite ([51] - [55]):

> [T]he scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) and s 25(4). The remedy provided by s 27 can only work if a claimant can be confident of the protection given by s 27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap.
>
> However, it is plain in my opinion 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. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8).

2. The service by the claimant on the respondent of a payment claim (s 13).

3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).

4. The reference of the application to an eligible adjudicator, who accepts the application (s 18 and s 19).

5. The determination by the adjudicator of this application (s 19(2) and s 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

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***

> ***BlueSky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 390 - 391. 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 (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. 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 will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of 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 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.

70 These comments are referred to by Beech J in ***O'Donnell (2)***, who goes on to review a number of subsequent decisions in which leave to reargue the decision in ***Brodyn*** was refused (***O'Donnell (2)***, [89] - [94]).

71 In this context, to borrow a phrase from the decision in ***Brodyn*** 'the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination' [55]. Again using the terminology of that decision, I consider that the adjudicator made a 'bona fide attempt' to exercise the power to adjudicate vested in him [55].

72 To fall within the fourth ***Re: Carey*** ground, the defendant must show that the adjudicator's decision 'disregards or takes account of some matter in circumstances where the statute establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the existence of any authority to make an order or decision in the circumstances of the case'. Even if the adjudicator erred in finding no discretion to extend time, I do not consider that this ground would be made out. The failure to exercise the discretion so as to take into account a late response cannot be characterised as a pre-condition to the exercise of the adjudicator's authority.

73 To fall within the fifth ***Re: Carey*** ground, the defendant must establish that the adjudicator misconstrued the CCA and thereby misconceived the nature or the function which he was performing or the extent of his powers in the circumstances of the case. For the reasons set

out in relation to the second ***Re: Carey*** ground, I do not consider that this ground is arguable.

Exercise of discretion

74 For the reasons set out above, I do not consider that the defendant has established a sufficiently arguable case that the Determination is liable to be set aside for jurisdictional error (using the terminology of Corboy J in ***Thiess*** [106]) for me to decline to grant leave to enforce it.

75 Even if I had formed the view that judicial review for either a denial of natural justice or jurisdictional error was arguable based on a misconstruction of CCA s 27, there is a further factor which would have weighed strongly against the exercise of discretion in favour of the defendant. This is that the adjudicator found that even if he had considered the defendant's submissions, he would have still found in favour of the plaintiff. The adjudicator did so on the basis that the defendant omitted to issue a notice of dispute in response to the payment claim (Determination, par 31). The implied terms in CCA Sch 1 Div 5 cl 7(1) requires the recipient of a payment claim to serve a written notice of dispute within 14 days. This did not occur in the present case. The failure to do so results in an obligation to pay the claim in full: CCA Sch 1 Div 5 cl 7(3), ***Blackadder*** [54] - [59].

76 This leaves the existence of the District Court action as the sole basis for opposing the grant of leave. As set out in par [17] above, the statutory framework clearly contemplates it as being normal that civil proceedings will proceed in parallel to the making of a determination. The existence of the District Court action of itself is not a sufficient ground for declining the grant of leave to enforce. It follows that the defendant has not displaced the predisposition in favour of the grant of leave and that leave ought to be granted.

77 I will hear from counsel as to the final orders to be made and costs.