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**Security of payments in New South Wales: the impact of *Kirk v Industrial Relations Commission of New South Wales*; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1
And
Chase Oyster Bar v Hamo Industries 2010 NSWCA 190**

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Outline and purpose of this paper; acknowledgments

The purpose of this paper is to examine the law as it was under *Brodyn*; & to consider the impact of *Kirk* and *Chase*. The approach I will adopt is to first set out what *Brodyn* stood for; then analyse *Kirk* and *Chase*; and then, having demonstrated on a conceptual level that *Brodyn* is no longer good law to the extent it excluded the remedy of certiorari for jurisdictional error, I will consider a number of limited practical categories of where certiorari might now issue in the context of the [Building and Construction Industry Security of Payment Act 1999](#).

The ultimate purpose of this lecture is to begin a dialogue on what constitutes a jurisdictional error of law, for which certiorari will now issue, post *Chase*.

The text is based largely on the latest update of Jacobs QC's work on Security of Payment, published by ThomsonReuters. I have interspersed that update with extracts from *Chase* and elsewhere.

Key words are in yellow.

When does the question of the Adjudicator's jurisdiction arise?

Notionally, the question of the jurisdiction of the Adjudicator may arise at various stages of the Adjudication procedure:

- (a) when there is an application to Court for a stay of the Adjudication;
- (b) when the Adjudicator's jurisdiction is challenged, once the Adjudication procedure is underway; and

- (c) when there is an application to Court to set aside the Adjudication Determination.

The questions above give rise to an important, but further subset of questions, viz:

- (a) Can there in New South Wales and in the other States and Territories be a curial review of an Adjudicator's Determination on the basis of a lack of or excess of Adjudicator's jurisdiction, at all?
- (b) If the answer to (a) above is in the affirmative, which jurisdictional challenges are still open?
- (c) At what stage can such challenges be made?

Consideration of Brodyn Pty Ltd (t/as Timecost & Quality) v Davenport (2004) 61 NSWLR 421

Until recently, the seminal statement of principle in *Brodyn Pty Ltd (t/as Timecost & Quality) v Davenport (2004) 61 NSWLR 421*; [2004] NSWCA 394 has held sway as to the limited circumstances in which an adjudication can be challenged. In that case, the Court of Appeal articulated the test of what constituted "basic and essential" matters required by the Act for the purposes of the validity for the appointment of an adjudicator and the validity of the adjudication. In summary, those matters were:

- The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8);
- The service of a payment claim by the claimant on the respondent (s 13);
- The making of an adjudication application by the claimant to an authorised nominating authority (s 17);
- The reference of the application to an eligible adjudicator (and the acceptance by the eligible adjudicator of the application) (ss 18 and 19); and
- The determination of the application by the adjudicator (ss 19(2) and 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 21(1)) and the issue of a determination in writing (s 22(3)(a)).

The above appears from paragraph [53] of *Brodyn* so it is apposite to refer to paragraphs [51] ff.

Brodyn held at [51] of the judgment in the Court of Appeal that an adjudicator's decision is not susceptible to relief in the nature of certiorari or prerogative relief in that the position of an adjudicator is not completely analogous to that of an administrative tribunal. At paras [52] ff it was held as follows:

[52] 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.

.....

[54] 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.”

[Speaker's note : I pause my citation from *Brodyn* at this point to point out that in *Chase* , considered more fully below, the central issue concerned non compliance with Sec 17 , which *Brodyn* categorised as a “more detailed requirement “, and hence within the power of the adjudicator to determine and hence in effect non reviewable by the court. *Chase* held that compliance with Sec 17 was necessary to confer jurisdiction on the adjudicator.]

[55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance

with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox* (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.”

In *Brodyn*, Hodgson JA considered whether an adjudication that was infected by a defect, but not void, could be made the subject of an order in the nature of **certiorari**. His Honour said that it could **not**. Hodgson JA stated as follows:

[58] The question then is whether there is available a remedy in the nature of certiorari, in circumstances where the determination is not void by reason of defects of the kind I have been discussing. In my opinion it is not, because the availability of certiorari in such circumstances would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies.

[59] For these reasons, I disagree with the view expressed in *Musico* and the cases which followed it, to the extent that they hold that relief in the nature of certiorari is available to quash a determination which is not void.

Brodyn held that the existence of a fact necessary for the validity of an adjudication is a matter within the competence of the adjudicator to determine. If an adjudicator erroneously finds a fact essential to jurisdiction and an adjudication certificate issues accordingly, it is always open to a party adversely affected to seek to set aside any judgment sought to be entered under s 25(1) of the Act on the ground that the adjudication was, in truth, a nullity because an essential ingredient of jurisdiction was absent: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, at 42 per Hodgson JA, with whom the other members of the court agreed.

What did *Brodyn* stand for?

Their Honours, in the Court of Appeal in *Brodyn* and *Transgrid*, clearly intended to lay down simplified and easily applied guidelines for permissible curial review of an adjudicator's adjudication. But there were however a number of problems that presented themselves as set out below.

The Court of Appeal, at [53], of *Brodyn* listed five basic and essential requirements for the validity of an adjudication, but made it clear that that list may not be exhaustive. Their Honours clarified this holding to the extent that it was not every non-compliance which amounted to jurisdictional error. The test was whether, on a proper construction of the relevant statutory provision, a particular legislative requirement is an essential pre-condition for the making of a valid adjudication determination, see, in particular, the extract of [55]–[57] of the *Brodyn* judgment above.

In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2010] QSC 95, the issue was whether s 26(2)(d) which requires the adjudicator to consider “all submissions” of the respondent, had been breached. Northbuild submitted that the adjudicator did not make a determination to the best of his ability on all of the material available, and thus did not make a bona fide attempt to determine the dispute.” Martin J said:

“[11] In summary, what is required of an adjudicator is that he or she make a genuine attempt to understand and apply the relevant contract and to exercise the power in accordance with the Act.”

The determination of what is or what is not an essential pre-condition for the existence of a valid adjudication is still an open question, and rather than the Court of Appeal's judgments in *Brodyn* and *Transgrid* answering this question, the judgments invited further litigation.

Brodyn and *Transgrid* did not exclude all judicial intervention. They held that such intervention by declaratory and injunctive relief, rather than by prerogative relief,

was the appropriate method of curial review.

As pointed out by McDougall J, at [24] of his Singapore Construction Law Paper:

The practical effect of this is questionable, since (as the decisions indicate) the real question is not so much the head of power by which relief is granted, but the basis upon which (howsoever styled and formulated) it may be granted.

If jurisdictional error gives rise in most administrative law cases generally to the determination being void, it is difficult to see why that principle of law did not obtain with equal force in the context of seeking a curial remedy against an adjudicator's adjudication.

In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 (13 July 2005), the majority refused leave to re-argue *Brodyn*.

In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941, Hammerschlag J, at [30], provided a very useful summary of the relevant principles under what might be termed the "*Brodyn regime*".

- a. the Act seeks to facilitate speedy resolution of claims to progress payments without excessive formality or intervention by the court and the scope for invalidity for non-jurisdictional error is limited:.....
- b. an adjudicator's determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination:
- c. whether a failure by an adjudicator to meet a requirement imposed by the Act makes the determination void depends on whether that requirement was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination:
- d. the existence or otherwise of essential pre-conditions to a valid claim, as well as determination of the parameters of the payment claim, are matters for the adjudicator, not for objective determination by a court:
- e. an erroneous decision by an adjudicator that an essential pre-condition has been satisfied, when in truth it has not, can be a jurisdictional error making the determination reviewable. When there is present such jurisdictional error the determination is void and relief by way of declaration and injunction is available:

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- f. ss 13, 17, 18, 19, 21 and 22 of the Act contain certain basic requirements as well as more detailed requirements. The legislature did not intend exact compliance with all of the more detailed requirements to be essential to the existence of a determination. What was intended to be essential 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 that power, and no substantial denial of the measure of natural justice that the Act requires to be given: *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* at 442; *Transgrid v Siemens Ltd* at 540;
- g. if the basic requirements of the Act are not complied with, or if a purported determination lacks a bona fide attempt by the adjudicator to exercise the relevant power, or if there is a substantial denial of the measure of natural justice required, a purported determination will be void because then there will not be satisfaction of a requirement that the legislature has indicated to be essential to the existence of a determination.....
- h. the requirement of good faith is not a reference to dishonesty or its opposite but to the necessity for there to have been an effort to understand and deal with the issues in the discharge of the statutory function: *Timwin Construction Pty Ltd v Facade Innovations Pty Ltd* (2005) 21 BCL 383; [2005] NSWSC 548 at [38];
- i. an adjudicator is only required to consider submissions which are “duly made” under s 22(2)(d). A submission which is included in an adjudication response contrary to the requirements of s 20(2B) of the Act is not duly made within s 22(2)(d), although it could be duly made if made in response to a request under s 21(4)(a) or in a conference by an adjudicator under s 21(4)(c): *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [31] and [51];
- j. s 14(2) provides that the payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the respondent to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an

adjudication under the Act ensues: *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [45];

- k. both ss 22(2)(c) and (d) make reference to “submissions (including relevant documentation)”. The parenthesised words show that the legislature had in mind that the word submissions was not to be construed narrowly and that the submissions may include relevant documentation in support: *Austruc Constructions Ltd v ACA Developments Pty Ltd* [2004] NSWSC 131 at [68]-[69];
- l. under s 22(2) the adjudicator is required to consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission is not sufficient to invalidate the determination. This is either because an accidental or erroneous omission does not amount to a failure to comply with s 22(2) so long as the specified classes of consideration are addressed or because the intention of the legislature cannot have been to invalidate the determination for this kind of mistake: *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* at [55]; and
- m. the legislature entrusts to the adjudicator the role of determining whether submissions are or are not duly made and if the adjudicator addresses that question and comes to the conclusion that a submission was not duly made, a failure to take account of that submission is not a failure to afford the measure of natural justice contemplated by the Act: *JJohn Holland Pty Ltd v Roads & Traffic Authority of New South Wales* at [63] and [71]; *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229.

At [31] of the judgment, his Honour correctly, with respect, said that the application of these principles to the circumstances of any given case, involved matters of fact and degree and that **was not a simple exercise.**

The availability of certiorari to challenge an adjudicator's adjudication on the ground that it is void for an excess of jurisdiction in New South Wales post *Kirk v Industrial Relations Commission of New South Wales*; *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 and *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190

In essence, *Kirk* held at [96]-[100] that:

[96] In considering State legislation, it is necessary to take account of the requirement of Ch III of the [Constitution](#) that there be a body fitting the description "the Supreme Court of a State", and the constitutional corollary that "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description":

[97] At federation, each of the Supreme Courts referred to in s 73 of the [Constitution](#) had jurisdiction that included....."a general power to issue the writ [of certiorari] to any inferior Court" in the State: *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442, the Privy Council said of such provisions that:

"It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it." (emphasis added)

That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.

[98] The **supervisory jurisdiction of the Supreme Courts** was at federation, and remains, **the mechanism for the determination and the enforcement of the limits on the exercise of State executive** and

judicial power by persons and bodies other than the Supreme Court.

- [99] There is but one common law of Australia: *Lipohar* [1999] HCA 65; (1999) 200 CLR 485 at 505. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions": (1957) 70 *Harvard Law Review* 953 at 963. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.
- [100] This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

This theme was taken up in *Chase Oyster Bar*, in which it was held that even in an adjudication, a writ of certiorari was available to correct a decision which followed jurisdictional error.

***Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190**

(The case analysis below is structured around the headnote of the Court of Appeal judgment, as modified and expanded by me for this lecture)

The NSW Court of Appeal overturned the authority of *Brodyn Pty Ltd v Davenport (Brodyn)* , and held that where jurisdictional error has been made in an adjudication determination under the NSW Act, the court has the power to issue

the prerogative writ of certiorari (an order setting aside that decision).

The plaintiff contracted with the first defendant for the first defendant to carry out fitout work for the plaintiff. On 31 December 2009, the first defendant served on the plaintiff a payment claim. The due date for payment of the claimed amount was 13 January 2010. The plaintiff did not provide a payment schedule in response to the payment claim. The plaintiff became liable, pursuant to s 14(4) of the *Building and Construction Industry Security of Payment Act 1999* ('the Act'), to pay the claimed amount to the first defendant by the due date, but did not do so. The first defendant made an adjudication application.

Section 17 of the Act relevantly provides:

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:...

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

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

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

The first defendant did not give notice until 11 February 2010: outside the 20 business day period for which s 17(2)(a) provides, but nonetheless made an adjudication application. The second defendant, the adjudicator, was appointed. The adjudicator made a determination that the first defendant was entitled to payment of the claimed amount, together with interest. Although there was no payment schedule, the adjudicator nonetheless considered whether the first defendant's notice pursuant to s 17(2)(a) had been given within the time required, and concluded that it had. The plaintiff raised before the trial judge, McDougall J, that compliance with s 17(2)(a) of the Act was essential if the adjudicator were to have jurisdiction, and that the adjudicator's finding amounted to jurisdictional error.

McDougall J at first instance held that the adjudicator, in good faith but by oversight, had concluded the notice had been served in time : [2010] NSWSC 332 para [20].

Chase argued that compliance with the NSW Act was essential if the adjudicator was to have jurisdiction, and that the adjudicator's finding amounted to

jurisdictional error. 21 .The thrust of Chase’s principal attack was that “the reasoning in *Brodyn* had been effectively undermined by the decision of the High Court of Australia in *Kirk v Industrial Relations Commission of New South Wales* [[2010\] HCA 1](#); ([2010](#)) 239 CLR 531. That is because the reasoning in *Brodyn*, which disagreed with the proposition that relief in the nature of certiorari was available for jurisdictional error of law, was based on the proposition that the scheme of the Act displayed an intention to displace the power of this Court to grant relief in the nature of certiorari.” Per McDougall J [2010] NSWSC 332.

The following questions were removed into the Court of Appeal, after McDougall J made the necessary finding of fact as to eg dates of service. McDougall J then sat on the Court of Appeal for the appeal.

1. Whether the determination of the Second Defendant (the Adjudicator) on 16 March 2010 that he could hear and determine the first defendant’s adjudication application pursuant to the *Building and Construction Industry Security of Payment Act* (the Act) should be set aside or quashed for jurisdictional error in circumstances where the adjudicator incorrectly concluded (on the facts found by him and on the facts subsequently found by the Court) that the notice required by s 17(2)(a) of the Act had been served on the Plaintiff in the time required by the Act.

2. Whether in light of the decision of the High Court in *Kirk v Industrial Relations Commission* [[2010\] HCA 1](#) the decision in *Brodyn Pty Ltd v Davenport* [[2004\] NSWCA 394](#); ([2004](#)) 61 NSWLR 421 should not be followed or was incorrectly decided so far as it held that:

(a) the Supreme Court of New South Wales was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the Act;

(b) an order in the nature of certiorari was not available to quash or set aside a decision of an adjudicator under the Act;

(c) the Act expressly or impliedly limited the Supreme Court of New South Wales’s power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the Act.

3. Whether the Act, so far as it expressly or impliedly limits the power of the Supreme Court of New South Wales to review an adjudicator’s determination for jurisdictional error, is inconsistent with the requirement of the [Constitution](#) that there be a State Supreme Court with jurisdiction to grant relief in the nature of certiorari.

The Court held:

In relation to Question 1:

1 Determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error.

Basten J emphasized that whilst an adjudicator is privately appointed and is not subject to governmental control, s/he is only subject to certiorari if exercising a statutory function which affects the rights of subjects ; the right involved being the right to immediate payment of the payment claim . Such a decision has “discernable or apparent legal effect upon rights , sufficient to found certiorari”, even although the legislative scheme is one of interim finality: paras [64] –[65]; [71]

(the quoted words being those of Vickery J in a recent Victorian decision, *Grocon Constructors Pty Ltd*, [2009] VSC 426 , apparently endorsed by Basten J).

Spigelman CJ said this :

“5 The process of adjudication is not in any sense a consensual arbitration of the character which has often been held not to be subject to the Court’s supervisory jurisdiction. Rather, it is a public, relevantly a statutory, dispute resolution process, and as a consequence is subject to the supervisory jurisdiction.”

2 The Supreme Court, in exercise of its supervisory jurisdiction:

(a) has power to determine that –

(i) an adjudication application has not been made in compliance with [s 17\(2\)\(a\)](#) of the [Building and Construction Industry Security of Payment Act 1999](#);

(ii) the determination of the adjudicator, made in the absence of a valid adjudication application, was invalid, and

(iii) there was non-compliance in the present case;

(b) has power to grant relief in the nature of certiorari and set the determination aside: per Spigelman CJ at [2]; Basten JA at [108]; and McDougall J at [267].

In relation to Question 2, and following Kirk :

3 To the extent that *Brodyn Pty Ltd v Davenport* held, in relation to an adjudication application which was not in compliance with s 17(2)(a) of the Act, the matters set out in the question at (a), (b) and (c), it was in error: per Spigelman CJ at [56]; Basten JA at [108]; and McDougall J at [287].

Spigelman CJ cited paras [54] and [55] of *Brodyn* and noted that what the Court in *Brodyn* said regarding Sec 17 of the Act (ie it was a “more detailed” provision) was not only obiter; but also that *Brodyn* left open for future development the development of the list of what was “basic and essential.” : para [26].

Further excerpts from the Chief Justice’s judgment follows :

“27 The third consideration is of particular significance. The impact of the judgment in *Kirk* on his Honour’s reasons arises from his rejection at [54] of the applicability of the distinction between “jurisdictional” and “non-jurisdictional” error, on the basis that it “cast the net too widely”. His Honour went on to apply a test as to what statutory requirements constituted “an essential pre-condition”. That statement could be understood as the equivalent of “jurisdictional error”, but it appears from the passage quoted at [22] above, that that may not be what his Honour had in mind. The concept of “an essential precondition” may have been intended to be encompassed within, but narrower than, the scope of “jurisdictional error”. “

“29 The centrality of the distinction between jurisdictional and non-jurisdictional error had been identified by the High Court in *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163. The significance of *Kirk* is that it has given this distinction a constitutional dimension in State law, to the same general effect as had earlier been established for Commonwealth law. That has placed this distinction at the centre of Australian administrative law jurisprudence, in a manner which is not consistent with the reasoning in *Brodyn*, on one view of that reasoning.

30 The distinction between jurisdictional and non-jurisdictional error is necessitated in Australian administrative law by the separation of powers established by Chapter III of the [Constitution](#), as interpreted by the High Court.
.....

31 In *Kirk*, after identifying the constitutional foundation of the supervisory jurisdiction of the Supreme Courts of the states, the High Court concluded:

“[100] ... [T]he observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context.”

32 This new dimension of the distinction between jurisdictional and non-jurisdictional error undermines the proposition in *Brodyn*, if that is the correct interpretation of the passage set out at [22] above, which suggests that, as a matter of statutory interpretation, a provision can constitute “jurisdictional error” but not constitute “an essential pre-condition”.

“33 There is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.

37 As Hodgson JA recognised in *Brodyn*, in the passage set out at [23] above,

the relevant question is that which was propounded in the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355. Section 17(2) of the Act is a procedural requirement of the kind to which the High Court referred in *Project Blue Sky* in the following way:

“[91] An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. *The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.* Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. *There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.*”

[92] Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.”

38 The joint judgment went on to approve the judgment in *Tasker v Fullwood* [1978] 1 NSWLR 20, particularly with respect to the doubt expressed by this Court about the utility of the distinction between “directory” and “mandatory” requirements. The High Court concluded:

“[93] ... A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to ‘the language of the relevant provision and the scope and object of the whole statute’.

In relation to Question 3:

4 The Act contains no such limitation: per Spigelman CJ at [60]; Basten JA at [108]; and McDougall J at [287].

5 In any event, *Kirk* has determined that it is not permissible for a State legislature to enact a privative clause which prevents the exercise by the Supreme Court of its supervisory jurisdiction with respect to jurisdictional error:

per Spigelman CJ at [58]; and McDougall J at [160].

It will be recalled that the ‘basic and essential requirements’ articulated in *Brodyn* were:

- there was a construction contract
- a payment claim has been served
- an adjudication application has been made
- there has been acceptance by an adjudicator; and
- a decision on the amount owing, due date and interest payable has been made.

On this basis the Court would have been unable to review the adjudicator’s determination in *Chase*.

Chase’s ratio decidendi

The ratio of *Chase* is that an adjudicator does not have jurisdiction to determine an ‘application’ that does not comply with the mandatory time limits specified under the NSW Act. The court also stated that *Brodyn* was incorrect insofar as the adjudicator is entitled to decide “jurisdictional facts” ie facts which lay the groundwork for the adjudicator having jurisdiction

In other words, contrary to *Brodyn*, the Court could consider and determine the existence of jurisdictional error by an adjudicator, and the could set aside or quash a decision of an adjudicator for jurisdictional error, **including a mistake made in deciding a jurisdictional fact** : cf McDougall J’s judgment [2010] NSWSC 332 para [20].

Further, *Chase* confirms that the NSW Act does not expressly or impliedly limit the power of the court to review an adjudicator’s determination for jurisdictional error.

Therefore, in addition to the grounds for review available under *Brodyn*, judicial review and common law relief in the nature of certiorari is now available to claimants to challenge an adjudicator’s decision. This is similar to the position adopted in Victoria in *Schiavello and Grocon*.

The source of the adjudicator's jurisdiction

The adjudicator derives his or her jurisdiction from his or her appointment. Once the appointment is made in accordance with the relevant provisions of the relevant Act, the adjudicator’s jurisdiction is then determined by the provisions of the Act.

In *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 (4 January 2000), it was held that in regard to the comparative English legislation, the HGCRA, that the appointment must relate to a pre-existing

dispute. The court held at [19]:

Thus, the notice of adjudication; the selection of a person to act as an adjudicator by an adjudicator nominating body; the indication from the selected adjudicator of his willingness to act; and the referral notice must all relate to that same pre-existing dispute. Any selection, acceptance of appointment or subsequent adjudication and decision which are not confined to that pre-existing dispute **would be undertaken without jurisdiction**. Of course, in such a case, it would have to be determined whether the whole adjudication process and purported decision or only that part relating to matters not covered or embraced by the pre-existing dispute were invalid and not authorised by the HGCRA and Scheme procedures. That determination would depend on the facts and relevant wording of the suggested dispute, notice of adjudication, appointment, acceptance and referral notice and on the application of the relevant adjudication or Scheme rules to those facts and that wording.

In the subparagraphs below, various aspects of the adjudicator's jurisdiction are discussed. Wherever the word "**jurisdiction**" is used, it may be that in certain circumstances, the more appropriate word would be "**power**". It is not necessary for the purpose of this discussion, at this point of time, to distinguish between the two concepts.

Can adjudicator determine his/her jurisdiction?

English Authority - on whether an adjudicator can determine his or her jurisdiction

The question whether or not an adjudicator has jurisdiction to determine his/her jurisdiction was raised before an adjudicator whose decision on the point was referred to by Judge Bowsher QC at [31] in his judgment in *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181; [2000] EWHC Technology 139 (24 February 2000). The adjudicator said:

An adjudicator does **not** have jurisdiction to decide his own **jurisdiction**:... A party who protests the jurisdiction of an adjudicator may invite him to inquire into his jurisdiction, but not to decide it:

In *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] All ER (D) 311 (Nov); [2004] 1 All ER 818; [2004] 1 WLR 2082, the Court of Appeal (Eng) at [10] said:

One troublesome area has concerned adjudicators' jurisdiction. There is first instance authority that the question whether the adjudicator has the necessary jurisdiction is not itself a dispute arising under a construction contract and that the adjudicator has no jurisdiction to decide his own jurisdiction, except perhaps in obvious cases – see *Homer Burgess Ltd v Chirex (Annan) Ltd* [1999] ScotCS 264; [2000] BLR 124.

The Court of Appeal said:

[11] Fears have been expressed that, if challenges to an adjudicator's jurisdiction are too readily entertained, the plain intention of Parliament will be frustrated. In *Project Consultancy Group v Trustees of the Gray Trust* [1999] BLR 377, the question was whether the construction contract had been entered into before or after 1 May 1998, the date when the 1996 Act took effect. Dyson J, sitting at first instance in the Technology and Construction Court, recorded counsel's suggestion that it would be easy enough for an imaginative defendant cynically to invent an argument that there was no contract, or that any contract was made before 1 May 1998. In his view these fears were exaggerated. It would only be in comparatively few cases that such argument would even be possible. Where they were advanced, the adjudicator and the court would be vigilant to examine the arguments critically. He concluded that it was open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decisions.

[12] Simon Brown LJ said in *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2003] EWCA Civ 1494, 21 October 2003, that it did not follow that, because the policy of the Act was “pay now, argue later”, even in the short term the adjudicator's decision binds the parties if a respectable case has been made out for disputing the **adjudicator's jurisdiction** ([20] of the judgment). One issue in that appeal was whether the appellant had submitted to the jurisdiction of the adjudicator. Simon Brown LJ said that to his mind it was impossible to conclude from the facts and documents that the appellant had done so. He summarised the position at [33] of his judgment in two propositions:

- (1) If a defendant to a Pt 24(2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue.

- (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Pt 24(2) summary judgment upon the award if the arbitrator's ruling on the **jurisdictional issue** was plainly right.

Judge LJ and Jonathan Parker LJJ agreed with Simon Brown LJ, Judge LJ specifically endorsing the two essential principles at the end of the judgment.

Lady Justice Hale, in a separate judgment, at [35] said:

I am most grateful to my Lord for the history lesson and also for his analysis of the present legal position. I agree that the court should take care not to circumvent the policy of the Act. I would also emphasise the words of Mr Justice Dyson, as he then was, in *Project Consultancy Group*

It is only if a defendant had advanced a **properly arguable jurisdictional objection** with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him.

But this is clearly such a case.

The point may, for example, be taken that a party cited as a respondent is not a party to the construction contract, alternatively, a construction contract which reflects that party as a party to it, falls to be rectified so as to reflect a company of which that party was a shareholder and/or director as the true and correct party to the construction contract.

Jacobs QC, in his text has long submitted that the principles set out in the English cases above, should be held to apply in all the Australian jurisdictions in which there is legislation with the same aims, objects and substantially similar provisions to that of the New South Wales Act.

One of the fundamental issues in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 was whether the adjudicator had jurisdiction to determine whether an "Application" for a matter to go to adjudication failed to comply with s 17(2) of the NSW Act, and was therefore void. At [36] of *Chase Oyster Bar*, Spigelman CJ, with Basten JA and McDougall J concurring, said:

The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of [s 17\(2\)](#). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that [s 17\(2\)\(a\)](#) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act"

within s 22(2)(a). However, that section confers no power to determine the issue.

New South Wales authority - on whether an adjudicator can determine his or her jurisdiction

(a) Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

In *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 (14 April 2005) there were serious attacks on the adjudication process, in that there was a strong case that none of the claims in the payment claim fell under s 5 or 6 of the Act and there was evidence that one claim had been compromised and therefore the adjudicator who would be appointed **would have had no jurisdiction.**

McDougall J was urged to grant a declaration that the adjudicator **had no jurisdiction** and to grant an injunction restraining the adjudication process. His Honour's attention was drawn to *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; 21 BCL 437; [2005] NSWCA 49 at [24], in support of the principle that a court could grant an "anti-suit" injunction restraining an adjudication. At [10] of *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 McDougall J was unnecessarily dismissive of the English authorities referred to above. He relied on *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 in support of his finding that **an adjudicator had power to decide his/her own jurisdiction** and that the pay now, argue later principle was the overriding one. It is respectfully submitted that his Honour's judgment was wrong and should not be followed. *Brodyn* does not go to the extent that his Honour said it did.

In fact, McDougall J, sitting as one of the judges in the Court of Appeal in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, was constrained to depart from the *ratio* in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394.

It will be recalled that *Brodyn* held at [51] of the judgment in the Court of Appeal that an adjudicator's decision is not susceptible to relief in the nature of certiorari or prerogative relief in that the position of an adjudicator is not completely analogous to that of an administrative tribunal. If the adjudicator's decision cannot be challenged for jurisdictional error after it has been made, it surely must follow that in an appropriate case and extracting the principles from the English authority above, an "anti-suit" injunction should be made.

Jacobs QC says that is difficult to understand the logic behind holding that an

adjudicator can determine his/her own jurisdiction, and why the adjudication process cannot be brought to an end, only to have the jurisdictional issue litigated at the last minute.

By that stage the parties would have been put to a substantial amount of legal costs, very little of which, if any at all, can be recovered. The s 25(1) challenge is last minute and last ditch. Why should the employer be put to that financial and emotional strain?

Jacobs QC submits that The New South Wales courts have sacrificed basic and logical principles on the so called altar of non curial intervention in the adjudication process, and asks : what was the consequence and what did they achieve?

There is no provision in the Act for a court to be approached to determine a point of law. In the light of all those circumstances, there can be absolutely no warrant, even on a provisional basis, for holding that adjudicators have power to determine their own jurisdiction.

No provision was made for the recovery of the costs payable to an adjudicator where ultimately it is found that he has no jurisdiction. This merely adds a further element of unfairness.

Where this question remains undecided in the other States and Territories, whose legislation contains similar provisions, it is respectfully submitted that this line of authority in New South Wales should not be followed. Alternatively, the harshness of the consequences of this line of authority should be ameliorated by legislative amendment.

Further authority on the point discussed in this paragraph is set out below, in case *Brodyn* and its principles may still be followed in other States and/or Territories, after the *Chase Oyster Bar* decision referred to in subparagraph (b) below.

In *Boutique Developments Ltd v Construction & Contract Services Pty Ltd* [2007] NSWSC 1042, Construction & Contract Services provided, as experts, provided engineering reports to Boutique Developments in aid of its litigation with CGU Insurance Pty Ltd.. The question arose as to whether or not the provision of those reports fell within the definition of “construction work” or work undertaken to supply “related goods and services” in respect of both of which services a person became entitled to a progress payment under s 8(1) of the Act. In an application for an injunction restraining Construction & Contract Services from taking any steps to obtain or enforce any adjudication determination, Gzell J held at [7] and [8] that **the work claimed for was not construction work under the Act**, and that to qualify as such the services had to relate to the actual construction work itself. His Honour **held that the adjudicator would act outside the scope of his jurisdiction if he proceeded with the matter.**

However, although the facts of the matter before him were distinguishable, Gzell J followed *Australian Remediation Services Pty Ltd* above and *Lifestyle*

Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd [2005] NSWSC 411 in holding that the question of the adjudicator's jurisdiction was a matter for the adjudicator. In the premises, the application for an injunction was rejected.

Jacobs QC respectfully submits in his text that this decision on this point, in keeping with the decisions in *Australian Remediation Services* and *Lifestyle Retirement Products No 2* on the same issue, is wrong and should in due course attract the attention of the Court of Appeal.

Where clearly the work was neither construction work nor qualified as "related goods and services", the Court should have intervened at an interlocutory stage, and prevented the matter from proceeding further.

McDougall J's judgment in *Earth Tech* has been cited with approval by Palmer J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 (22 April 2005) where his Honour, at [4] of his judgment said:

I think that the plaintiff's application should be declined. It has been made clear by McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 and in the authorities to which his Honour there refers that the existence of a fact necessary for the validity of an adjudication is a matter within the competence of the adjudicator to determine. If an adjudicator erroneously finds a fact essential to jurisdiction and an adjudication certificate issues accordingly, it is always open to a party adversely affected to seek to set aside any judgment sought to be entered under s 25(1) of the Act on the ground that the adjudication was, in truth, a nullity because an essential ingredient of jurisdiction was absent: *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, at 42 per Hodgson JA, with whom the other members of the court agreed.

But, see the judgments in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 (23 November 2005) and *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (30 January 2006) discussed at [95.800] and the impact that may ultimately have on this issue.

In *Wooding v Eastoe* [2006] NSWSC 277 (12 April 2006) in New South Wales, it was decided by Young J, prior to *Chase Oyster Bar*, as follows:

[12] First, as acknowledged in *Brodyn*, the purpose of the Act is to minimise the number of situations in which a court can interfere with the obvious purpose of the Act and that is to make sure that pending the resolution of building disputes the sub-contractor or similar will actually receive money so that it can remain liquid, whereas before the Act it would be starved of funds until the dispute was determined or settled.

[13] Secondly, there are a whole series of decisions which distinguish between situations where an adjudicator or the like is given power to determine whether he or she has jurisdiction as well as jurisdiction to determine the dispute and those situations where an adjudicator or the like must objectively and in truth only determine a question if jurisdictional matters are absolutely established.

[14] The leading case in this area is *Parisiennes Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369. At 389 Dixon J said:

The clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is *coram non iudice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable.

[15] In *Ex parte Hulin; Re Gillespie* (1965) 65 SR (NSW) 31; [1965] NSW 313; (1965) 82 WN (Pt 2), a decision of the Full Court of this court constituted by Sugerman, Maguire and Nagle JJ, Sugerman J said at 33 that there was a very real distinction between the absence of some essential preliminary, and an objection “that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try”. Nagle J, in a separate judgment, came to the same view.

[16] In the instant case a matter for the adjudicator to decide was who were the parties to the contract under which the second defendant did its work. The adjudicator made a bona fide attempt to deal with those issues. He made a decision and I do not consider that there is anything in *Brodyn* which would make me say that if an adjudicator decides a question of fact which is one of the essential matters to his jurisdiction, after a bona fide inquiry into the fact, there is anything more than a mistake of fact and no error which would vitiate his judgment.

In *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, the primary question was whether the agreement before the Court was for “related goods and services”.

The issues before the court were referred to at [2] of McDougall J’s judgment in *Smith*, viz:

- (1) Whether under the deed Coastivity undertook to supply related goods and

services for another party;

- (2) Whether under the deed the consideration for such related goods and services as Coastivity might have undertaken to supply was to be calculated other than by reference to the value of those goods and services; and
- (3) Whether, if the first issue were to be answered “no” or the second issue were to be answered “yes”, there were any available discretionary grounds for the refusal of relief to the Owners.

McDougall J went on to point out that it was common ground that the first and second issues raised questions as to the “basic and essential requirements” for the existence of a valid adjudication determination (see *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at 441 [53] (NSWLR).)

After a detailed analysis of the various facts and circumstances relating to questions (1) and (2), McDougall J held that the owners had made good their claims to declaratory and injunctive relief which he accordingly granted. What seems, with respect, to have been overlooked is the line of authority above to the effect that the jurisdiction of the adjudicator is a matter for the adjudicator and not for the court and that the two questions before the court were matters clearly going to questions of jurisdiction.

Payment claim served in accordance with the Act ?

The judgment in *Smith* [2008] NSWSC 313 is to be contrasted with the judgment of Hammerschlag J in *Bucklands Convalescent Hospital v Taylor Projects Group* [2007] NSWSC 1514, where his Honour examined the question as to whether or not the allegation that a payment claim had not been served in accordance with the provisions of the Act was a matter for the court or the adjudicator.

Hammerschlag J said:

[22] In *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* Palmer J considered that disputes whether a payment claim had been served within the time prescribed under the Act and whether a payment schedule had been served within the time prescribed by the Act were matters properly for the determination of an adjudicator. The present situation is to my mind analogous to that being considered there by his Honour.

[23] The existence of a payment claim under the Act is clearly a jurisdictional requirement for an adjudicator to validly exercise the jurisdiction conferred under the Act. Palmer J, following McDougall J in *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*, held that whether such a fact existed was a matter within the competence of the adjudicator to determine.

It seems to be quite clear now that all of the decisions above which followed the *Brodyn* principle, can no longer be regarded as the law in New South Wales following the *Chase Oyster Bar* decision in subparagraph (b) below.

Again, it is respectfully submitted that this is quite a draconian result, where a lay adjudicator (in the sense of not having any or adequate legal knowledge) can make a determination of this nature, with a result that vast sums of money have to change hands, with the potential of bankrupting the unfortunate company required to make payment.

(b) Post *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190

It is clear from *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 that *Brodyn* can no longer be referred to as authority for the proposition that the remedy of certiorari is excluded.

At [102] of *Chase Oyster Bar*, Spigelman CJ, with Basten JA and McDougall J concurring, said:

If the last conclusion be wrong, and the practical considerations should be considered determinative, the decision of the adjudicator in respect of the validity of an adjudication application would not be beyond review. The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred: *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42; [69 CLR 407](#) at 430 and 432 (Latham CJ); *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118-119 (Gibbs J); *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [\[133\]](#)-[\[135\]](#) (Gummow J); *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; [78 ALJR 992](#) at [\[37\]](#)-[\[38\]](#) (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 84 ALJR 369 at [\[23\]](#)-[\[24\]](#) (Gummow ACJ and Kiefel J, dissenting as to the result) and at [\[102\]](#)-[\[103\]](#) (Crennan and Bell JJ). Although, as noted by Gibbs J in *Buck v Bavone*, the Court may be slow to intervene where authority depends upon a matter of “opinion or policy or taste”, that will not be so where authority depends upon a straightforward calculation of time, as in the present case.

The judgment in *Chase Oyster Bar* above was explained further by McDougall J in *Cardinal Project Services v Hanave* [2010] NSWSC 1367.

If an adjudicator’s determination can be challenged by way of certiorari for jurisdictional error, it follows that a similar challenge could have been made to the adjudicator’s jurisdiction in advance of the adjudication determination, with the result that the heavy costs of the adjudication proceedings could have been avoided.

Jacobs QC's text consider the case law from the other states and territories on whether *an adjudicator can determine his or her jurisdiction*.

The adjudicator's jurisdiction to determine the issue of related goods and services

In s 6 of the NSW Act (and its similar sections in the Acts of the other States and Territories), the phrase "in relation to", when dealing with related goods and services, probably bears the broad meaning ascribed to it by Sundberg J in *Timic v Hammock* [2001] FCA 74 at [9], and by Barrett J in *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587; [2001] NSWSC 596. Davenport at p 31 queries what aspect the phrase "advisory services" qualifies in this subsection. It is submitted that it merely qualifies "landscape".

In *Boutique Developments Ltd v Construction & Contract Services Pty Ltd* [2007] NSWSC 1042, Construction & Contract Services provided expert engineering reports to Boutique Developments in aid of its litigation with CGU Insurance Pty Ltd.

The question arose as to whether or not the provision of those reports fell within the definition of "construction work" or work undertaken to supply "related goods and services" in respect of both of which services a person became entitled to a progress payment under s 8(1) of the Act. In an application for an injunction restraining Construction & Contract Services from taking any steps to obtain or enforce any adjudication determination, Gzell J held at [7] and [8] that the work claimed for was not construction work under the Act, and that to qualify as such the services had to relate to the actual construction work itself. His Honour held that the adjudicator would act outside the scope of his jurisdiction if he proceeded with the matter.

However, although the facts of the matter before him were distinguishable, Gzell J followed *Australian Remediation Services Pty Ltd* above and *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 411 in holding that the question of the adjudicator's jurisdiction was a matter for the adjudicator. In the premises, the application for an injunction was rejected.

Where clearly the work was neither construction work nor qualified as "related goods and services", the Court should have intervened at an interlocutory stage, and prevented the matter from proceeding further: cf *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.

In *Smith v Coastivity Pty Ltd* [2008] NSWSC 313, McDougall J at [34] held that the work done under the contract was of limited relevance in determining whether or not that work constituted related goods and services as defined, in that:

[T]o the extent that it goes further than the contract, it is presumably to be regarded as having been undertaken under some sort of variation or ad hoc agreement. In this case, as I have said, the only candidate for the role of “construction contract” was the deed.

A valid payment claim is the foundation for a valid adjudication, and following *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, it seems to be quite clear that it is not the function of the adjudicator to determine its validity.

Spigelman CJ, with whom Basten JA and McDougall J concurred, at [36] of *Chase Oyster Bar* determined that an adjudicator had no jurisdiction to determine an “application” which had been made without compliance with the provisions of s 17(2) of the New South Wales Act, and added:

That section is not addressed to the adjudicator and is not a matter which he is directed to “determine” within s 22(1) of the Act.

His Honour continued:

It may be that it is a matter which he must “consider” as one of the “provisions of the Act” within s 22(2)(a). However, that section confers no power to determine the issue.

The adjudicator’s jurisdiction to determine whether or not there was a construction contract

It is submitted that following *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, it is certainly not the function of the adjudicator to determine whether or not there was a construction contract: see Spigelman CJ’s comments from [36] of the *Chase Oyster Bar* above.

Adjudicator’s jurisdiction to determine the meaning and import of contractual terms

In order to enable the adjudicator to determine quantum, it appears to be obvious that he or she may have to determine the meaning and import of the contractual terms. Accordingly, it is submitted that the adjudicator would have jurisdiction to fulfill that function: cf Spigelman CJ at [36] of *Chase Oyster Bar*. Following that decision, however, this does not appear to be an issue for the adjudicator to determine.

Adjudicator's jurisdiction where contract works have been completed or whether contract has been repudiated

It seems to be part of the adjudicator's function to determine whether the contract works have been completed or whether the contract has been repudiated. Accordingly, it seems to be the better view that the adjudicator has jurisdiction to determine whether the contract works have been completed or whether the contract has been repudiated: cf Spigelman CJ at [36] of *Chase Oyster Bar*. Following that decision, however, this does not appear to be an issue for the adjudicator to determine.

Adjudicator's jurisdiction to determine sufficiency of payment claim

(a) *Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190*

The adjudicator's jurisdiction to decide the validity of a payment claim

There is Queensland authority to the effect that a court can determine whether an adjudicator has jurisdiction to decide the validity of a payment claim where the validity thereof goes to the jurisdiction of the adjudicator: see the decisions of Fryberg J in *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117; and the decision of Martin J in *Northside Projects Pty Ltd v Trad* [2009] QSC 264. Neither case decided whether or not such jurisdiction could be determined by the adjudicator and whether or not the adjudicator's determination of jurisdiction is subject to curial review.

There seems to have been doubt that whatever the jurisdiction of the adjudicator may be in regard to deciding the validity of a payment claim, whether a court has that power when there is a motion for the curial review of an adjudicator's determination : inter alia *Fernandes Constructions v Tahmoor Coal (trading as Centennial Coal)* [2007] NSWSC 381 at [17]-[19].

(b) *Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190*

In the light of the decision in *Chase Oyster Bar*, Jacobs QC submits that the better view is that an adjudicator does not have jurisdiction to determine the sufficiency of a payment claim. Very simply, if a payment claim does not comply with the relevant section of the Act, a jurisdictional fact is not complied with, and any resultant determination would be void. The major issue is whether a court at the preliminary stage, where the point is taken for the first time that the payment claim fails to comply with the provisions of its enabling section, will then intervene or wait until the determination has been made.

The *Chase Oyster Bar* decision was explained by McDougall J in *Cardinal Project Services v Hanave* [2010] NSWSC 1367.

It is submitted that a more practical solution would be that the issue as to the adequacy of the payment claim should be raised by the respondent as a preliminary point, and be determined by a court at that stage.

Adjudicator's jurisdiction to determine sufficiency of payment schedule

(a) *Pre Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190

Similarly, in New South Wales, prior to the decision in *Chase Oyster Bar*, it was held that an adjudicator has jurisdiction to determine the validity of a payment schedule: see *Perform (NSW) Pty Ltd v Mev-Aust Pty Ltd t/as Novatec Construction Systems* [2008] NSWSC 858 at [44] where Einstein J said:

[44] Even if the Adjudicator had in fact erred in relation to the proper construction of the requirements of section 14(3), such error did not render the present determination a nullity. In short:

- i. Where the basic and essential requirements of the Act have been complied with, an error of law by the Adjudicator, even in interpreting the Act itself, does not invalidate the adjudication [*Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at 398 [46] per Hodgson JA.
- ii. Whether Perform complied with the requirement in section 14(3) that the Payment Schedule "must indicate ... the respondent's reasons for withholding payment" is a matter that the Adjudicator has power to determine.
- iii. The requirement in section 14(3) is relevantly analogous and complementary to the requirement in section 13(2)(a) that a payment claim "identify" the construction work or related goods and servicesThat requirement has been found to be a matter for the Adjudicator to determine
- iv. In this case the factors militating in favour of the Adjudicator having power to determine the question are [by analogy with the reasoning of Basten JA in relation to section 13(2) in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [44]]:
 - a) what is or may be a sufficient indication of reasons falls within the special experience of a qualified adjudicator;

b) that decision requires a process of evaluation by the Adjudicator dependent on that experience and professional judgment;

c) the requirement relates to a procedural step in the claim process, rather than some external criterion;

d) the overall purpose of the Act is to provide a speedy and effective means to ensure progress payments are made without undue formality or resort to the law.

- v. Relevant to the first two factors are the observations of Palmer J in *Luikens* that a payment claim and payment schedule are

.....

... given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim.

- vi. The need for the Adjudicator in evaluating both payment claims and payment schedules necessarily to have regard to the contextual background of the building industry reinforces the view that this is a matter requiring the application of the Adjudicator's special expertise and therefore an issue within his jurisdiction.

- vii. That section 14(3) was not one of the essential requirements cited by the Court of Appeal in *Brodyn* reinforces this reasoning. Indeed the position of section 14(3) appears to sit in the matters described by Hodgson JA in *Brodyn* as "more detailed requirements" not requiring exact compliance

.....

(confirmed on appeal in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157 (23 June 2009) per Giles JA, McColl JA and Young JA at [45] et seq).

In the light of the decision in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, particularly [36] of Spigelman CJ's judgment, and in which Basten JA and McDougall J concurred, it is doubtful whether this judgment is still good law.

(b) *Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190*

The same considerations in regard to the adjudicator's jurisdiction to determine the sufficiency of the payment claim above apply here as well.

Adjudicator's jurisdiction to determine the ambit of the dispute**(a) *Pre Chase Oyster Bar v Hamo Industries [2010] NSWCA 190***

At [26] of *J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd* (2008) 24 BCL 401; [2008] NSWSC 838 McDougall J accepted that it was open to the adjudicator to determine the scope of the payment schedule and the identification of submissions to be made in support of it and endorsed the view that if the adjudicator does consider the matters that he thinks are relevant and the submissions made in support of them, then an accidental or erroneous failure to consider something would not wholly or in part invalidate a determination. In the scope of the dispute was not a matter for the court to determine objectively, but for the adjudicator.

(b) *Post Chase Oyster Bar v Hamo Industries [2010] NSWCA 190*

It is submitted that the same considerations as set out above apply here, and that **the adjudicator does not have jurisdiction to determine the ambit of the dispute.**

“reasons”

The adequacy of reasons is addressed in [28.20] of Jacob's QC's text. When the Act was drafted, it would have been a simple matter to spell out the consequences of a failure on the part of the adjudicator to provide any or adequate reasons for a determination including a determination of interest. But the Act is silent on these issues, and has left the matter for the courts to decide.

There is authority, in the context of arbitrations and court references, for the principle that a failure to give reasons or adequate reasons does give rise to an argument that there has been a failure of natural justice. Cole J, as he then was held so in *Xuereb v Viola* (1989) 18 NSWLR 453.

Xuereb has been followed in various cases, eg in *Hughes Bros Pty Ltd v Minister for Public Works* (unreported, NSWSC, Rolfe J, 17 August 1994), Rolfe J said (adopting the BC pagination) at 13–14:

In my opinion the court must be able to see and follow a reasoning process ...

McDougall J also referred to the above extract from *Xuereb*, with apparent approval in *A & P Parkes Constructions Pty Ltd v Como Hotel Holdings Pty Ltd*

[2004] NSWSC 588; (2004) 22 BCL 45, at [13].

However, there is a line of cases that have doubted that the rules of natural justice require the giving of reasons. Simpson J appears to have led the charge in this regard, in *Archcom Pty Ltd v Consumer Claims Tribunal* (unreported, NSWSC, Simpson J, 29 September 1995)

Consequently, it is distinctly arguable that a failure by an adjudicator to address serious issues that have been raised in the documents before him/her in his/her reasons, may lead to the adjudication being quashed on the ground that there has been a failure of natural justice. But at the end of the day it is a matter of fact and degree.

The Court of Appeal's decision in *Brodyn* turned on the question that the giving of reasons was not one of the essentialia in an adjudication process. The question that arises is whether this could ever have been a correct analysis?

The functions to be served by the provision of reasons by an adjudicator include, at least:

- (a) to see whether there has been that degree of natural justice that the Act requires; which in turn means
- (b) to see whether the adjudicator has made a bona fide attempt to exercise the power in the Act (one of the essential requirements of a valid adjudication, identified at [55] of *Brodyn*).

In *Tolfab Engineering Pty Ltd v Tie Fabrications Pty Ltd* [2005] NSWSC 326 at [43], Macready AJ appeared to hold that the requirement for an adjudicator to give reasons was not a basic and essential requirement for the validity of an adjudicator's determination.

In *Integral Energy Australia v Kinsley & Associates Pty Ltd* [2009] NSWSC 64 at [47]-[48], Hammerschlag J correctly, with respect, expressed doubts as to the correctness of that statement.

In the light of the decision in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, it is now clear, certainly in New South Wales, that a failure to provide reasons under the provisions of the Act, strikes at the very heart of the adjudication process, and will probably result in any adjudication determination in which such reasons do not appear being declared void.