The Full Court of the Federal Court of Australia Clarifies the Law Relating to Arbitration Agreements in Landmark Decision

(Comandate Marine Corp v Pan Australia Shipping Pty Limited, NSD 1613 of 2006, Finn, Finkelstin and Allsop JJ, 20 December 2006, Sydney, [2006] FCAFC 192

Malcolm Holmes QC[1]

When disputes arise between parties to an arbitration agreement, one party will often advance reasons why the arbitration agreement should be disregarded and the parties left to litigate their disputes before the courts. Common reasons advanced are; the other party has waived its rights to arbitrate, the arbitration agreement is not in writing as required by the New York Convention or the Model Law, the arbitration agreement does not cover all the disputes which have arisen and that the arbitrator appointed under the arbitration agreement cannot decide a claim that undermines the very contract which contains the arbitration agreement and gives the arbitrator power to arbitrate. This case provided the Full Court with an opportunity to deliver an authoritative analysis of each of these recurring issues.

The Facts

Pan Australia Shipping Pty Limited ('Pan') operated a coastal liner shipping service along the Australian coast and to and from foreign ports including ports in South Korea, Japan and Singapore. Pan had two ships, the Boomerang I and Boomerang II. The Boomerang II was time chartered from Comandate Marine Corp ('Comandate Marine') which was a Liberian company owned and managed by Greek interests.

The vessel Boomerang II was delivered by Comandate Marine to Pan under the time charter on 22 April 2006. Subsequently on 28 May 2006, the vessel was detained by the Australian Maritime authorities and disputes arose between Pan and Comandate Marine. It appears that the Australian

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Maritime authorities took the view that the vessel was unseaworthy and needed repairs before resuming service and accordingly detained the vessel in Perth, Western Australia. After the repairs had been completed, the vessel was then required by the authorities to leave Australian waters as the crew did not have the necessary visas to work in the Australian coastal trade.

The disputes which then arose between Pan and Comandate Marine gave rise to a veritable litigation war from June to December 2006, including the commencement of an arbitration in the UK and several actions in the courts of Australia and the US, and threats of litigation in the UK. So far as the particular decision with which this casenote is concerned, it was a contest between an arbitration commenced by Comandate Marine against Pan in London on 14 June 2006 claiming US$4,000,000 for unpaid charter fees, and the proceedings commenced by Pan against Comandate Marine in the Australian Federal Court which included claims for breach of the time charter and claims for misleading and deceptive conduct during the negotiations leading up to the charter, based on alleged representations that the vessel was seaworthy and that Comandate Marine would provide a crew capable of working on the vessel in the Australian coastal trade.

Comandate Marine sought a stay of the Australian court proceedings commenced by Pan to allow all the disputes to be referred to arbitration in London.

Should the Parties Arbitrate or Litigate?

The primary judge refused the application by Comandate Marine to stay the proceedings brought by Pan in the Federal Court of Australia. In a landmark decision on 20 December 2006, the Full Court reversed this decision and ordered that the Federal Court proceedings be stayed to allow all the disputes between the parties to be arbitrated in London. The case provided the Full Court with an opportunity to address a number of obstacles frequently placed in the path of arbitration. The Full Court considered and rejected arguments which included; the other party had waived its rights to arbitrate, the arbitration agreement was not in writing as required by the New York Convention or the Model Law, the arbitration agreement did not cover all the disputes which had arisen between the parties and that the arbitrator appointed under the arbitration agreement could not decide a claim that undermined the very contract which contained the arbitration agreement and the arbitrator's power to arbitrate. The Full Court's decision on these issues has since acquired added significance, in that the same reasoning was adopted by the English Court of Appeal in a decision delivered shortly after the Full Court's judgment.

Had Comandate Marine 'waived' or 'elected to abandon' the arbitration agreement?

The primary judge had placed considerable reliance on one of the shots fired by Comandate Marine in the litigation war. When the disputes concerning the Boomerang II arose, Pan failed to pay the fees due under the charter, whereupon Comandate Marine itself commenced a separate set of proceedings in the Australian Federal Court by way of a writ in rem claiming the arrest of Pan's other ship, the Boomerang I, as security for its claims in respect of the charter of Boomerang II.[2]

2 This single shot itself gave rise to several separate battles in the litigation war. On 23 June 2006 Comandate Marine commenced the action in Perth, WA, and obtained the arrest of the vessel. On 24 June 2006 Pan obtained a court order that the vessel could sail to Sydney. On 27 June 2006 the Full Federal Court on appeal held that in the circumstances the surrogate ship could not be arrested. On 29 June 2006 the High Court of Australia dismissed an application for a stay of the decision of the Full Federal Court. Finally on 4 August 2006 the High Court refused special leave to appeal from the decision of the Full Federal Court.

An action in rem is traditionally viewed as an action brought against the object or thing which is the subject of the proceedings and not against the owner of the object or thing. The primary judge had held that Comandate Marine's conduct in commencing these separate proceedings amounted to a binding election by Comandate Marine to pursue all the disputes with Pan, the owner of the vessel, in the courts rather than continuing with its earlier submission of the disputes to arbitration in London. This conduct, in the view of the primary judge, also amounted to an abandonment of the arbitration. In both respects, the Full Court held that the primary judge had erred.

The Full Court observed that this was not a case of two mutually inconsistent rights, where the exercise of one was inconsistent with the continued existence of the other, which would have established a binding election. The 'rights are inconsistent if neither may be enjoyed without the extinction of the other.' The Full Court held that the filing of the writ in rem was not the exercise of a right to litigate which was inconsistent with the continued existence of a right to arbitrate because the mere commencement of the proceedings seeking the arrest of the vessel did not cause or presuppose the extinction of the rights under the arbitration agreement. Nevertheless, the Full Court did note that the institution of some legal proceedings may amount to an election in some circumstances such as the commencement of an action to enforce a contract which could be rescinded for fraud is an election to affirm.

The court also distinguished the recent decision by Whelen J in *La Donna Pty Limited v Wolford AG*[4] where it had been held that the defendant's conduct in the litigation did amount to a waiver of any rights to arbitrate the dispute before the court and amounted to an election not to arbitrate. The conduct of the defendant in that case was its application for security of costs which was unsuccessful. That conduct amounted to a waiver of a right to arbitrate because such an application was 'based on the explicit premise' that the matter would proceed to a hearing and that the dispute 'would be determined by the court' and not in arbitration.

The leading judgment was delivered by Allsop J who first considered this issue on the assumption that the action in rem brought by Comandate was an action against the owner of the vessel, in this case Pan. This was in accordance with recently expressed but unconventional views of Lord Steyn in the '*Indian Grace*'[5] that an action in rem against a vessel was the full equivalent of an action against the vessel's owner rather than against the vessel. After a powerfully reasoned and comprehensive analysis of the competing arguments which will no doubt attract the attention of admiralty lawyers for some considerable time, Allsop J rejected the view expressed by Lord Steyn as contrary to authority and unsound. Accordingly there was a further reason why the trial judge had erred in finding that Comandate Marine elected not to pursue the arbitration proceedings. Allsop J held that the bringing of the action in rem against the Boomerang I did not amount to the exercise of any right to litigate against the owner, Pan, because it was not the commencement of legal proceedings against Pan but was an action in rem brought against the vessel itself.[6] Finklestein J agreed although Finn J reserved judgment on this issue.

3 Per Allsop J at [62]

4 (2005) 194 FLR 26.

5 *Republic of India v India Shipping Co Limited* (No 2) [1998] AC 878.

6 See paragraphs [99]-[130].

Was the Arbitration Agreement in Writing as Required by the International Arbitration Act, the New York Convention or the Model Law?

The second group of issues considered was the nature of the time charter agreement which had been negotiated between the parties and whether this amounted to an agreement in writing. It was necessary to establish an agreement in writing as the application for a stay was based on the statutory jurisdiction to stay court proceedings found in s.7 of the International Arbitration Act 1974. This requires a finding that there was an enforceable arbitration agreement which relevantly was defined in terms of the New York Convention (i.e. Article II (2); 'The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams').

The negotiations for the time charter had taken place by an exchange of emails between 7 April 2006 and 20 April 2006 following which a bank guarantee from the charterer's bank was delivered to the owner late on 20 April 2006. The primary judge said that if the act or conduct which brought the contract into existence in terms of contract formation was not the exchange of emails but was the subsequent delivery of the guarantee then there was no agreement in writing for the purposes of Article II (2) of the New York Convention. Accordingly as the primary judge held that as the last and separate act of providing the guarantee amounted to the acceptance of the final offer by the charterer's broker then there was no agreement in writing.

Allsop J rejected the view of the primary judge and held that Article II of the New York Convention is 'clearly addressed to the agreement to arbitrate and not to the wider substantive relationship between the parties'. Accordingly, this had been satisfied in the circumstances as:

> *there was an exchange of letters or telegrams in which were contained the arbitration clause and the whole of the time charter. Even assuming that the contract did not spring into light with the act of despatch or receipt of the letter or telegram, but with some conduct of one of the parties, once the contract exists or once there is a binding arbitration agreement, the arbitral clause in the contract or the arbitration agreement can be said to be contained in the exchange of letters or telegrams.*[7]

Allsop J held that the requirement that the arbitral clause be contained in an exchange of letters is not a requirement that the contract be formed by the act of signing or the exchange of letters or telegrams.[8] In addition, the exchange of emails clearly evidenced that early in the negotiations the parties agreed to an arbitration clause in the New York Produce Exchange Form, 1993 Revision, clause 45(b) which stated that 'all disputes arising out of this contract shall be arbitrated at London ... any dispute arising hereunder shall be governed by English law'. Thus as the evidence was of clear and unambiguous exchanges of letters or telegrams setting out the arbitral clause and the whole of the agreement and the assent of the parties, the fact that the contract may have sprung into life upon the provision of the bank guarantee subsequently did not deny the proposition that the arbitral clause in the contract or the arbitration agreement itself was contained in the exchange of relevant documents.

The judgment of Allsop J that Article II requires bilateral recognition of an arbitration agreement

7 See paragraph [149].

8 See paragraph [150].

and that it does not require that the contract itself be formed by an exchange of letters and that what is required is that the terms of the agreement and assent to those terms are in exchanged documents has since been applied in the more recent case of *APC Logistics Pty Limited v CJ Nutracon Pty Limited* [2007] FCA 136.

Further, Allsop J held that the condition relating to the bank guarantee was at a stage when the parties were bound and unable to withdraw from the agreement. Properly construed, the condition as to the bank guarantee amounted to a 'condition precedent to performance, [and] not a condition precedent to the existence of any legal relations'.[9]

Further, the primary judge had failed to address an alternative submission for a stay which was based on the jurisdiction conferred on the court by Article 8(1) of the Model Law. Article 8(1) requires a court in respect of a matter which is the subject of an arbitration agreement, to refer the parties to arbitration. Significantly the definition of arbitration agreement in Article 7(2) of the Model Law is similar to but not the same as that contained in Article II of the New York Convention. For relevant purposes it critically adds the words 'which provide a record of the agreement" and as was stated by Allsop J "that plainly is the case here'.[10]

What was the Scope of the Arbitration Clause? Did the Words '*all disputes arising out of this contract*' Cover Claims for Damages Caused by Deceptive and Misleading Conduct in the Negotiations Prior to the Contract?

The third group of issues concerned the proper approach to ascertaining the scope of the arbitration clause. The scope of the clause is to be determined by 'what a reasonable person in the position of the parties would have understood it to mean, having regard to the text, surrounding circumstances, purpose and object of the transaction'.[11] Part of the surrounding circumstances was that the clause was from a standard form international contract, often used in the commercial time chartering of working ships. It was held that a court should construe such clauses liberally and that this approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes in their transaction being heard in two different places. There had been a series of decisions both in the UK and Australia which had construed the words 'arising under' as only covering those disputes which flowed from the contract itself and did not cover such matters as statutory claims which were based on misleading or deceptive conduct occurring during the precontract negotiations and did not include disputes about whether or not the contract should be rescinded or set aside for extraneous reasons. Allsop J applied the reasoning of Gleeson CJ in *Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Limited.*[12] In that case Gleeson CJ had said:

9 See also Perri v Coolangatta Investments Pty Limited (1982) 149 CLR 537 per Mason J at 552.

10 Paragraph [159].

11 Paragraph [162].

12 (1996) 39 NSWLR 160 at 165.

> *Where the parties to a commercial contract agree, at the time of making the contract, and before any disputes have arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of the individual issues, or by the ingenuity of lawyers in developing points of argument.*

This approach had been adopted at first instance by Hirst J in the English case of *Ethiopian Oil Seeds and Pulses Export Corporation v Rio del Mar Foods Inc.*[13] although a more recent Full Court decision in the Federal Court in *Hi-fert Pty Limited v Kiukiang Maritime Carriers Inc (No. 5)* (1998) 90 FCR 1 had preferred the more legalistic and narrower construction of the scope of arbitration clauses. Allsop J found this decision was distinguishable as it did not concern the construction of a clause in precisely the same terms as clause 45(b). However having analysed the reasoning in that case, his Honour expressed the view that the decision was 'wrong and inconsistent with the approach of modern authority'.[14] In this respect he was joined by Finklestein and Finn JJ.

The prescience of his judgment is seen in the subsequent decision of the English Court of Appeal on 24 January 2007 in the case of *Fiona Trust and Holding Corporation and Others v Yuri Privalov & Ors.* [2007] EWCA Civ 20, which also concerned a contest between an arbitration and court proceedings. In that case the primary judge had stayed the arbitration proceedings pending the action in the English courts where one of the parties was seeking that the contract be rescinded on the ground that it had been obtained by bribery. The primary judge held that the claim of bribery was not a claim '*arising under the contract*'. This decision was reversed on appeal where the approach of Allsop J was tacitly endorsed and Hirst J's judgment in the *Ethiopian Oil Seeds* case was approved. The Court of Appeal held that:

> *The time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. ... It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. ... Although in the past the words "arising under the contract" had sometimes been given a narrow meaning, that should no longer continue to be so ... One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration.*[15]

Do the Provisions of the Model Law Confer a Power to Stay Court Proceedings in Favour of an Arbitration?

The fourth group of issues considered on appeal related to the provisions of the Model Law which are given the force of law by s.16(1) of the *International Arbitration Act*. The primary judge had only considered the jurisdiction to grant a stay conferred by s.7 of the *International Arbitration Act* when deciding whether or not to stay the court proceedings and had failed to consider an alternative claim based on the jurisdiction conferred by the Model Law.

13 [1990] 1 Lloyds Reports 86

14 Para [184].

15 Per Longmore LJ

Allsop J noted that the Model Law has the effect of an act of the Commonwealth Parliament and it is not expressly subject to s.7(2)(b) of the *International Arbitration Act* which also gave the court the power to stay proceedings in favour of an arbitration in certain circumstances. The judgment analyses in detail the history of the Model Law and its adoption in Australia. Allsop J rejected the submission by Pan that Article 8 of the Model Law did not have an independent operation from s.7 and was subordinate to it.

Can an Arbitrator Decide a Claim that the Contract Containing the Arbitration Agreement which Confers Power on the Arbitrator to Arbitrate is Null and Void?

His Honour then considered the wording of Article 8 which states that a court 'shall' refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Although the claim in the present proceedings was that the arbitration agreement should be set aside ab initio because of misrepresentations inducing it, the arbitration clause itself was not void. Accordingly whilst it appeared that if the claim succeeded then the arbitration agreement might be voidable but it was not null and void as required by Article 8 of the Model Law. However it was not necessary to decide the issue as his Honour held that this was a matter for the arbitrator to consider on the basis that the doctrine of separability was part of the law of Australia.

This doctrine regards the arbitration clause as an agreement independent from the main contract with the result that an arbitrator is able to decide whether the substantive contract was void or voidable or should be rescinded without destroying his or her own authority or jurisdiction to arbitrate. Thus the invalidity of the substantive contract does not necessarily entail the invalidity of the arbitration clause.

Allsop J followed the earlier decision of the New South Wales Court of Appeal in *Ferris v Plaister*[16] which endorsed the separability of the arbitration agreement. This was a further reason for granting a stay of the court proceedings. Again, the approach of Allsop J on this issue was tacitly endorsed shortly afterwards by the English Court of Appeal on 24 January 2007 in the case of *Fiona Trust and Holding Corporation and Others v Yuri Privalov & Ors* where the court held that a claim that the contract should be rescinded or set aside for alleged bribery may be determined by an arbitral tribunal pursuant to the arbitration agreement even if the whole contract in which it is contained is alleged to be invalid.

This landmark decision of 20 December 2006 has not only clarified and developed the law relating to arbitration in a number of significant respects, but it also brought to an end a six month 'curial traffic jam'[17] created by multiple court proceedings resulting in no less than eight Federal Court Judgments and two hearings in the High Court of Australia. Following the decision, the parties and their disputes then returned to the arbitration in London which had been commenced on 14 June 2006.

16 (1994) 34 NSWLR 474

17 per Rares J in a paper presented to the Third Biennial Conference of the NSW Branch of the Maritime Law Association of Australia and New Zealand on 24 February 2007 entitled "Some Lessons from Pan's Odyssey"

Review of Adjudication Decisions by Queensland Courts

Russell Thirgood[1]

During the period 1 June 2006 to 1 September 2007 Queensland Courts have reviewed the decisions of various adjudicators in a dozen or so cases. Since the landmark decision of the Queensland Supreme Court in *JJ McDonald & Sons Engineering Pty Ltd v Neil Gall & Ors*[2] the *Judicial Review Act 1991 Qld* (JRA) has been the primary vehicle for reviewing determinations made under the *Building and Construction Industry Payments Act 2004 Qld* (BCIPA). As at the date of preparing these casenotes, a bill is currently before Queensland Parliament which, if passed, will have the effect of excising BCIPA from the purview of the JRA, thereby preventing review of the determinations of adjudicators from under BCIPA. As to the future mechanisms that might be used to review adjudication determinations only time will tell what test the Queensland Courts will adopt. It may be the case that the Queensland Courts adopt a similar 'basic and essential requirements' test that New South Wales Courts have been using since the decision in *Brodyn*.

The following casenotes set out some of the issues that the Queensland Courts have had occasion to review over the last 12 months. These casenotes have been prepared in a summary format with the intention of setting out only some of the major issues that have been considered.

It should also be noted that the vast majority of adjudication determinations in Queensland are not being challenged in the Courts and that BCIPA generally is serving its purpose of ensuring that those parties who are higher in the construction contractual chain 'pay now and argue later'. In many respects, BCIPA has had a revolutionary impact upon Queensland's construction industry. Its impact may never be able to be fully measured. There are likely to be many instances of payment, now that BCIPA is in place, which otherwise would not have been made, and which are simply not recorded by any statistics.

CBQ v Welsh & Ian Hammett Electrical Pty Ltd[3] – Queensland Supreme Court, 19 June 2006

BCIPA section 3(1)

(a) CBQ ('Applicant') brought an action challenging the decision of Mr Welsh ('Adjudicator') on the grounds that the contract between CBQ and Ian Hammet Electrical Pty Ltd ('Second Respondent') to which the adjudication related was concluded prior to 1 October 2004. On this basis, the Applicant argued that the Adjudicator had no jurisdiction to make any order under the Act. In the circumstances negotiation and work had commenced prior to 1 October though the contract instrument was executed by the parties on 9 November 2004.

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2 [2005] QSC 305

3 [2006] QSC 235

(b) The Court found that although works had begun prior to 1 October 2004, that a contract had not been formed until the document was signed as between parties on 9 November 2004. As such, the Adjudicator was found to possess the requisite jurisdiction under BCIPA and the Applicant's claim failed.

FK Gardner & Sons Pty Ltd v Dimin Pty Ltd[4] – Queensland Supreme Court, 1 September 2006

BCIPA sections 7, 8, 10, 12, 17, 18(3) and 19(2)(a)(i)

(a) FK Gardner & Sons Pty Ltd ('Applicant') a contractor, entered into a design and construct building contract with Dimin Pty Ltd ('Respondent') the principal. The Applicant issued payment claims numbered 1-15 on the 28th day of each month as was required by the contract, with payment claim 15 being lodged on the 28 April 2006.

(b) No payment claim was lodged in May 2006. On or about 20 June 2006 the Applicant issued claim number 16. The superintendent of the project received the claim on 22 June 2006 and faxed an 11 paged document titled "Payment Schedule for Claim No. 16" to the Applicant on 10 July 2006. The Applicant sought summary judgment under s 19(2) BCIPA on the basis that no Payment Schedule was received under s 18(5) BCIPA.

(c) The Respondent argued that the Applicant's payment claim was invalid as no entitlement to make a payment claim prior to the contractual reference date (28 June 2006) existed.[5] The Applicant agreed that claim number 16 was contractually due on 28 June 2006 but argued that it had the right to make a payment claim outside its contractual right because ss 12 and 17 BCIPA read together gave it a statutory right over and above any contractual right.

(d) The Court found for the Respondent saying that the legislature cannot have intended that s 17 BCIPA would override what is said in s 12 BCIPA about right to progress payments. The Court found that s 17 BCIPA confers a right to serve a payment claim only on a person mentioned in s 12. The Applicant was found not to have been entitled as at 20 June 2006 to the progress payment under s 12 BCIPA and therefore was not a person to whom s 17 applied.

Abel Point Marina (Whitsundays) Pty Ltd v Uher & Anor[6] – Queensland Supreme Court, 11 October 2006

BCIPA sections 7, 8, 17, 18, 21, 22, 24-26, 30, 31, 60 and 100

(a) Abel Point Marina (Whitsundays) Pty Ltd ('Applicant') a principal sought a review of the decision of Mr Uher ('Respondent'), an adjudicator which required that the Applicant pay an amount of $435,431.84 to Sea-Slip Marinas (Aust) Pty Ltd ('SSM') a contractor.

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4 [2006] QSC 243

5 *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 and *Beckhaus v Brewarrina Council* [2002 NSWSC 960 were cited in support of this position.

6 [2006] QSC 295

(b) SSM issued a payment claim to the Applicant under BCIPA which provided for certain amounts claimed as liquidated damages. The Applicant served a payment schedule, and upon SSM's application for adjudication also served an adjudication response. The Adjudicator made a decision in favour of SSM ordering the Applicant to pay the adjudicated amount with costs and interest. The Adjudicator's decision was held to be an administrative decision to which the JRA applied.

(c) In making his decision, the Adjudicator rejected the Applicant's deduction of liquidated damages on the basis that there was insufficient information available so as to allow for him to determine the date for and the date of practical completion. The Applicant argued in this respect that the Adjudicator was obliged to seek further submissions and that his failure to do so, amounted to a breach of natural justice and procedural fairness. On these grounds it was argued that the Adjudicator's decision was invalid.

(d) The Court found that the Adjudicator was not obliged to seek further submissions to avoid a breach of procedural fairness. The Court stated that in reaching his decision, the Adjudicator had to follow the procedures in s 25 BCIPA and consider only those matters set out in s 26 BCIPA. The Court deemed those provisions as setting the bounds of the Adjudicator's obligation to afford parties procedural fairness. The appeal for review was dismissed.

State of Queensland v Epoca Constructions Pty Ltd[7] – Queensland Supreme Court, 31 October 2006

BCIPA sections 7, 12-15, 17-21, 24-26, 29- 31 and 100

(a) In this case, the Court considered whether adjudicator's decisions under BCIPA were subject to judicial review under the JR Act.

(b) The State of Queensland ('Applicant') was a principal in a construction contract with Epoca Constructions Pty Ltd ('Respondent') as contractor. Following BCIPA procedures the adjudicator handed down a decision under which the Applicant was liable to the Respondent in the amount of $738,29339 plus costs and interest.

(c) The Applicant did not pay this amount as required by s 29 BCIPA but instead filed an originating application and successfully sought interlocutory injunctive relief restraining the Respondent from taking any step (including action under s 30 and 31 BCIPA) to recover monies owing pursuant to the adjudicator's decision pending final hearing of the originating application.

(d) The Applicant sought orders pursuant to the JR Act quashing the decision of the adjudicator. The Respondent argued that there was no jurisdiction to grant relief sought under the JR Act, believing that BCIPA by necessary implication excluded the availability of relief under the JR Act (whether by way or statutory order of review or relief by way of prerogative order). The Respondent argued that Part 3 of the JR did not apply to an adjudicator's decision as was posited by the Applicant. In

7 [2006] QSC 324

response to this, the Applicant amended its application so as to advance 3 alternate claims for relief as follows:

(i) order for review under Part 3 of JR Act;

(ii) order for review unde Part 5 of JR Act; and

(iii) declaration that the decision of the Adjudicator is void.

(e) The Court found that BCIPA is not excluded from judicial review under the JR Act by express provision under BCIPA nor is it excluded by necessary implication of ss 31(4), 99 and 100 of BCIPA. The Court further found that BCIPA is not included in Part 2 of Schedule 1 of the JR Act as an enactment to which the JR Act does not apply.

(f) As an adjudicator's decision is a decision and is made under enactment, it follows that the same is subject to judicial review under the JR Act. The Court in this instance upon review, found certain parts of the adjudicator's decision to be void.

(g) The Court found that the adjudicator had failed to consider key clauses of the contract, and that by doing so the adjudicator had erred in relation to those parts of his determination – those matters were referred by the Court back to the adjudicator for further consideration.

(h) This case which is in line with the earlier decision in *JJ McDonald* has opened the door to appeals in Queensland on merits of an adjudicator's determination within the purview of the JR Act in a manner that such appeal is currently unavailable in New South Wales and other States. On many points the Applicant was unsuccessful due to its failure to properly enunciate grounds of later argument in its payment schedule, preventing them from being validly argued at a later date. This decision also highlights the importance of issuing appropriately detailed payment schedules.

Cant Contracting Pty Ltd v Casella[8] – Queensland Court of Appeal, 15 December 2006

BCIPA sections 3, 7, 8, 12- 14, 17- 19 and 26,

(a) In this case, summary judgment was obtained by Casella ('Respondent') pursuant to BCIPA on the basis that Cant Contracting Pty Ltd ('Applicant') had failed to issue a payment schedule in accordance with BCIPA. At this time, the Applicant sought to rely on the following by way of defence:

(i) that Respondent was unlicensed under the Queensland Building Services Authority Act 1991 Qld) ('QBSA Act') at the time it completed the construction work;

(ii) that as such the Respondent was in breach of s 42(1) of the QBSA Act; and

(iii) the Respondent being unlicensed could not have recourse under BCIPA as by operation the QBSA Act, it was only able to recover amounts under the contract in accordance with ss 42(3) and (4) of the QBSA Act.

(b) The Court at first instance found for the Respondent, entering summary judgment on the basis that due to the Applicant's failure to issue a payment schedule the Applicant was unable to raise a defence.

8 [2006] QCA 538